



## ANTI-TORTURE LAW- A COMPELLING NEED FOR STANDALONE LEGISLATION IN INDIA

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### **ABSTRACT:**

Torture has been practiced as a potent means of criminal investigation in India. Though there are honourable exceptions, the police and the paramilitary forces resort to this barbaric practice, thwarting the criminal justice system and undermining the rule of law. The authors have provided a brief history of custodial torture and its existence in India. The authors have analysed the significant attempt that the Supreme Court of India has made to curb this barbaric practice. A brief study of the International conventions relating to torture has been made. The recommendations made by the Law Commission and the Parliament's attempt to enact an Anti-Torture law have been discussed. The authors have concluded that the enacting of Anti-torture law can make a worthwhile difference in tackling one of the major issues of policing in India.

### **INTRODUCTION:**

The paradigm of Criminal Justice Administration is dynamically altering its facets which ultimately resulted in the evolution of three essential principles that forms the pillars of the modern criminal justice administration. The foremost principle is the essence of legality wherein the criminals are treated equally irrespective

of their wealth or repute. The next principle is that the stakeholders involved in the process must be treated with due respect, be it the accused or the victim or the witness at both procedural and substantive levels. The third principle is the quintessence of quality in the criminal justice which mandates the presence of certain minimum standards that should be followed in various criminal processes such as independence and impartiality of judiciary, an open court trial, unconstrained access to legal counsel, right to be released on bail and speedy trial.<sup>1</sup> In spite of incorporating such core principles, the criminal justice administration yet delivers injustice, the reason for which is identified to be the cruel act of torture inflicted by one of its agencies upon the persons who are detained in prisons. Out of the all human rights violations, custodial torture forms a serious form of human rights violation and the same is performed by the State machinery, which is constituted for the purpose of guarding the human rights. The present-day irony is that, the custodial torture is being seen as a common practice by police during investigation rather than a human rights violation which it actually is. This paper focuses upon the immoral illegality of custodial torture and discusses about the pressing demand for an Anti-Torture Law in India.

### **CUSTODIAL TORTURE-AN AGE-OLD PHENOMENON:**

India is boasting as an effective upholder of the fundamental rights of its citizens, but the evil of custodial torture has been in practice for decades now, to which there is no effective legislation to curb. The

<sup>1</sup> Pandey BB. India-Pre-trial Detention Law and Practice, in Frieder Dunkel and Jon Vagg (eds.), Waiting for Trial, 1994, 303-333



malevolence of custodial torture intensified and was noted widely during the period of emergency in India. The country witnessed various violations in the custody, yet remained silent as its hands were tied down by the strings of emergency. The death of P.Rajan a student of Engineering, who was arrested by the police alleging naxal association and was later, killed due to torture inflicted by the police upon him hinted the atrocities of the State machinery. What instigated more shock waves was when the police denied arresting him. But after years of struggle, the victim's father brought out the truth that Rajan was brutally murdered in the custody and his body was disposed off by the police which couldn't be found till date. While the nation perceived that the police tortured only men in custody, the Mathura rape case<sup>2</sup>, wherein a young tribal girl was raped in custody by two police man proved the perception otherwise and revealed that the police are not having any moralities within themselves as they voluntarily plunder the human rights of the victims. The factum that the police are acting without any conscience was proved when *Bhagalpur Blinding Case*<sup>3</sup> was reported, in which the police had poured acid into the eyes of the hardened criminals with an intention to discipline them. Even after four decades of such cruelty, when the justice system is bragging that every victim is delivered justice, the custodial torture has proven itself to be a never ending saga. The statistics that 1,727 persons died in police custody between 2001 and 2018, out of which only 26 policemen were convicted imbibe shock waves in the minds of the citizens. More recently in the times of this pandemic, the

southern part of the country witnessed a ravishing incident where a father and son were beaten to death in the police custody for a sole of reason of them opening their shop beyond the curfew hours. The arrest was made on June 19, and the next day the father and son duo were admitted in the hospital with severe wounds wherein it was found out that the father's dhoti and the son's pant were fully soaked with blood. After two days of agony the son passed away, and his father passed away the very next day. The chronology of these events articulates the change in attitude of the state machinery wherein in the initial phase atrocities were committed upon individuals who were criminals, but in the subsequent phase the victims were tortured due to political pressure and the recent phase is that torture is inflicted upon the victim irrespective of the fact that whether the person committed the crime or not.

#### **APEX COURT ON TORTURE:**

The Hon'ble Supreme Court has condemned the brutality of the police in custody in various circumstances and has laid down that the police is not a judicial body to decide whether an accused is guilty or not and it has absolutely no right to inflict pain upon the persons in custody under the guise of delivering justice. The Apex Court in the case of *Kishore Singh v. State of Rajasthan*<sup>4</sup> has held that the use of third degree methods is violative of Article 21 of the Constitution and that the State must Re-educate the police force out of their sadistic arts and inculcate respect for humans. While expressing the fervour for the betterment for the persons suffering from police brutality the Apex court

<sup>2</sup> Tukaram and Others v State of Maharashtra, AIR 1979 SC 185

<sup>3</sup> Khatri (IV) v State of Bihar, AIR 1981 SC 1068.

<sup>4</sup> Kishore Singh v. State of Rajasthan AIR 1981 SC 625



in the case of *State of Uttar Pradesh v. Ram Sagar Yadav*<sup>5</sup> recommended for an amendment to the Law of Evidence to place the burden of proof on police in cases of police brutality and custodial violence. In the historic case of *Shri D.K. Basu vs State Of West Bengal*<sup>6</sup>, the Apex Court observed that custodial violence, including torture and death in the lock ups, stroke a blow at the Rule of Law, which demanded that the powers of the executive should not only be derived from law but also that the same should be limited by law. The Bench further expressed its astonishment that the cruelty is committed by persons who are supposed to be the protectors of the citizen under the shield of uniform and authority in the four walls of a police station or lock-up and the victim being totally helpless in that situation. In addition to which the Apex Court also issued guidelines which have to be followed while arresting a person. The guidelines mandated medical examination of the arrestee ever 48 hours during detention by an approved doctor and the presence of a very minute injury was to be recorded. Though the guidelines were ordered to be displayed in every police station and were required to be followed by the State machinery, yet the custodial atrocities have not been destroyed, perhaps practiced more intensely than before. This cast light upon the fact that, this ruthless

practice cannot be destroyed by mere guidelines as the same has fallen in deaf ears; all it needs is an enactment to terminate the same.

### UN CONVENTION AGAINST TORTURE:

Article 2 of The United Nations Convention against Torture, 1984 (UNCAT) imposes a duty on the states to take effective administrative, legislative, judicial and other necessary measures to prevent acts of torture in any territory under its Jurisdiction.<sup>7</sup> The Article also emphasizes the fact that an order from a superior officer or public authority cannot be invoked as a justification of torture.<sup>8</sup> The Convention also calls upon the State to ensure that all acts of tortures are offences under its criminal law. Article 5 of the UDHR<sup>9</sup> and Article 7 of the ICCPR<sup>10</sup> states that no one shall be subjected to torture, cruel inhuman or degrading treatment or punishment. **India is a part of unique list of 9 countries which has the inglorious distinction for not having ratified the UN Convention against torture. The murderous police assault and brutal torture which caused the death of two innocent traders in the city of Tuticorin in Tamil Nadu underlines the urgent need to ratify the UN Convention against Torture (UNCAT) in fulfilment of its legal**

<sup>5</sup>State of Uttar Pradesh v. Ram Sagar Yadav 1985 SCR (2) 621

<sup>6</sup>D.K Basu v. State of West Bengal 1997 (1) SCC 416

<sup>7</sup>UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx> [accessed 16 July 2020]

<sup>8</sup> UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at:

<https://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx> [accessed 16 July 2020]

<sup>9</sup>UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: <https://www.un.org/en/universal-declaration-human-rights/index.html> [accessed 16 July 2020]

<sup>10</sup>UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx> [accessed 16 July 2020]



**obligations both National and International.** The Executive Committee of the Common Wealth Human rights initiative (CHRI) chaired by former Chief Information Commissioner Wajahat Habibullah issued a statement<sup>11</sup> on the recent torture and deaths of 2 innocent traders in Tamil Nadu wherein he urged the Government of India to announce its commitment to UN Convention against Torture (UNCAT). The report<sup>12</sup> published by the UN High Commissioner for Human Rights (OHCHR) stated that no security forces accused of torture were prosecuted in a civilian court despite such allegations emerging since early 1990's. The report also reiterated its recommendation on Human Rights Situation in Kashmir calling upon India to ratify the UN Convention against Torture, and other cruel, inhuman or Degrading Treatment or Punishment (UNCAT) and its Operational Protocol and despite repeated calls India has not yet ratified UNCAT.

### **THE LAW COMMISSION'S REPORT ON TORTURE:**

The 273<sup>rd</sup> Law Commission report<sup>13</sup> on Torture recommended the implementation of United Nations Convention against Torture through a legislation. The report stated that **the most significant reminders in the report are twofold: recognition above all**

**the jus cogens nature of torture, that it is prohibited without any exceptions as a part of customary law;** the constitutional protection under Article 21 and Article 20 (3) of the Indian Constitution. The report also acknowledges the Court's inability to ensure prohibition of torture in everyday policing despite the attention given by it in number of cases. The report further recommended strong punitive punishments for those who indulge in torturing. A draft Prevention of Torture Bill, 2017 was also annexed to the report which provides for **punishment extending up to life imprisonment and fine.** The Commission also suggested a definition of Torture wide enough to include inflicting injury either intentionally or involuntarily, or even an attempt to cause such injury which will include which will include physical, psychological or mental injury. The Commission also was of the opinion that the state should own responsibility and the principle of sovereign immunity cannot override the rights assured by the Constitution. The Commission also recommended amendments to Criminal Procedure Code, 1973 and Indian Evidence Act, 1872 to accommodate provisions regarding compensation and burden of proof respectively. The 113<sup>rd</sup> Law Commission report,<sup>14</sup> on injuries in police custody also stressed on the necessity to shift the burden

<sup>11</sup>Humanrightsinitiative.org. 2020. *Custodial Killings Show India Needs To Go Beyond Police Reforms, Must Ratify Anti- Torture Convention: CHRI*. [online] Available at: <<https://www.humanrightsinitiative.org/press-releases/custodial-killings-show-india-needs-to-go-beyond-police-reforms-must-ratify-anti-torture-convention-chri>> [Accessed 13 July 2020].

<sup>12</sup>2019. *Update Of The Situation Of Human Rights In Indian-Administered Kashmir And Pakistan-Administered Kashmir From May 2018 To April 2019*. 1st ed. [ebook] Venezula: Office of the United Nations High Commissioner for Human Rights, pp.5,28.

Available at: <[https://www.ohchr.org/Documents/Countries/IN/KashmirUpdateReport\\_8July2019.pdf](https://www.ohchr.org/Documents/Countries/IN/KashmirUpdateReport_8July2019.pdf)> [Accessed 13 July 2020].

<sup>13</sup>Law Commission of India, 2017. *273Rd Law Commission Report On Implementation Of UN Convention Against Torture And Other Cruel, Inhuman And Degrading Treatment Or Punishment Through Legislation*. New Delhi: Government of India.

<sup>14</sup>Law Commission of India, 1985. *113<sup>th</sup> Law Commission Report On Implementation Of UN Convention Against Torture And Other Cruel,*



of proof upon the police in case of custodial deaths. The Law commission also had recommended special measures in its 135<sup>th</sup> report on custody of women in custody. Time and again the Law Commission has urged the Government of India to consider the enactment of an Anti-torture legislation in the lights of increasing custodial torture, deaths and abuse of power.

### **THE INADEQUACY OF THE EXISTING LEGISLATIVE PROVISIONS:**

Section 26 of the Indian Evidence Act, 1872 is categorised as the mainstay principle which is said to prevent the menace of custodial violence, as there was a common perception that police used third degree methods or inflicted pain upon the body of the detained persons for recording their confession as to the commission of the crime. But this perception does not hold any good in the present day scenario wherein the state machinery is practicing custodial torture not only for the purpose of obtaining confession from the accused but also for an array of reasons including psychological factors, political pressure, work pressure, punitive violence and other such related factors. The only penal provisions castigating custodial violence that are in existence are Sections 330 and 331 of the Indian Penal Code, 1860 which again is directed towards the path of confession. Section 49 of the Code of Criminal Procedure, 1973 is the only

provision which is not concerned about confession as it restrains the policemen from using more power than required to detain the accused in custody. The existing legal proscription of the use of violence in custody is proving itself derisory as it does not efficiently meet up the complex facets of the injustice imposed in the hands of the victims in the form of custodial violence, thereby compelling a separate legislation to inhibit the evil practice.

### **DESPERATE STIPULATION FOR ANTI-TORTURE LAW IN INDIA:**

The cruel and barbaric attitude of the Indian police is not something that has suddenly come out of the blue but has been in existence since the Vedic period of Indian History. Sexually harassing women to the extent of rape has become a common and prevalent form of torture. In most of the cases crushing the testicles of the prisoners has been the approach of police towards the prisoners.<sup>15</sup> The dreadful Mathura rape case<sup>16</sup>, Bhagalpur blinding case<sup>17</sup>, Maya Tyagi case in Baghpat and the recent murder of Jeyraj and Phenix in Tamil Nadu are shameful incidents of police atrocities which have caused a nation-wide outcry. This lingering barbaric exercise of power, despite being controlled is showing an alarming increase every year. As per the report by the National Campaign Against Torture (NCAT) the number of custodial deaths during the year 2019 remained 5 persons per day.<sup>18</sup> The

*Inhuman And Degrading Treatment Or Punishment Through Legislation.* New Delhi: Government of India  
<sup>15</sup>Arora, Nirman. "CUSTODIAL TORTURE IN POLICE STATIONS IN INDIA: A RADICAL ASSESSMENT." *Journal of the Indian Law Institute*, vol. 41, no. 3/4, 1999, pp. 513–529. *JSTOR*, www.jstor.org/stable/43953348 [Accessed 15 July 2020.]

<sup>16</sup>Tuka Ram And Anr vs State Of Maharashtra 1979 SCR (1) 810

<sup>17</sup>Khatri And Others vs State Of Bihar & Ors, 1981 SCC (1) 627

<sup>18</sup>National Campaign Against Torture, 2020. *INDIA: ANNUAL REPORT ON TORTURE 2019*. [online] New Delhi: National Campaign Against Torture, p.6. Available at: <<http://www.uncat.org/wp->



National Human Rights Commission recorded<sup>19</sup> a total of 1,723 deaths out of which 1,606 were in judicial custody and 117 deaths were in police custody.

Apart from torturing for the purpose of extracting confession, **torture is routinely done to obtain bribe from the detainees or their relatives.** The NCAT report also highlighted the methods of torture practiced by the police which **included hammering nails in the body, electric shock, pouring petrol in private parts, applying chilli powder in private parts, urinating in mouth, pricking needle into body, branding with hot iron rod. Moreover, the police officials in a gruesome act of barbarism kicked a pregnant woman in her belly.**<sup>20</sup> **If there isn't a proper law and if the police officers aren't charged or convicted for police brutality they would continue to act in a demonic fashion.** Policemen must know that they will go to jail and pay the ultimate price if they continue to operate in an inhumane way. When a policeman indulges in such heinous acts, he also degrades himself to the level of a criminal. He cannot furnish an argument in favour of such heinous action that it was done for the protection of society or the necessity to bring the wrongdoer to justice.

The report also stated that the Central Armed forces deployed in insurgency affected areas also involve in torture. The report further blamed the armed opposition group for brutal killings including torture and Maoists also

have tortured and killed villagers suspecting them to be police informers.<sup>21</sup> The duty of law enforcement officers is to serve mankind, safeguard lives and property, and to respect constitutional rights of all men to liberty, equality and justice however the statistics above stated clearly shows there has been a clear violation of the constitutional rights guaranteed and under Article 21 and with such violations showing an alarming increase every year it becomes absolutely necessary to enact a Legislation to combat such gross violation of human rights and abuse of power by the officials in power. Irrespective of existing laws governing the police accountability, the increase in police brutality highlights the need for the enactment of a specific law serving to the prevention of the custodial violence.

#### **PARLIAMENT'S FAILED ATTEMPT:**

The absence of an anti-torture law doesn't mean that the practice is approved by the law-making body. The malice of custodial torture has been identified as a practice which demands immediate termination by the Parliament, owing to which the Bill of prevention of torture was passed in the Parliament for the first time in 2008. However, the same got stuck in the upper House since 2010. It was then in 2016, the Bill was again called for enactment in the Apex Court. The 273<sup>rd</sup> Law Commission in the course of the proceedings proposed the "Prevention of Torture Bill, 2017" which

content/uploads/2020/06/INDIATORTURE2019.pdf, > [Accessed 12 July 2020].

<sup>19</sup>Nhrc.nic.in. 2020. *Human Rights Cases Statistics / National Human Rights Commission India*. [online] Available at: <<https://nhrc.nic.in/complaints/human-right-case-statistics>> [Accessed 12 July 2020].

<sup>20</sup>MSN. 2020. *Police Strip, Torture 3 Assam Sisters, Pregnant Woman Loses Baby After Beating*. [online] Available at: <[\[in/news/other/police-strip-torture-3-assam-sisters-pregnant-woman-loses-baby-after-beating/ar-AAHs3M3\]\(http://www.msn.com/en-news/other/police-strip-torture-3-assam-sisters-pregnant-woman-loses-baby-after-beating/ar-AAHs3M3\)> \[Accessed 15 July 2020\].](https://www.msn.com/en-</a></p>
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<sup>21</sup>National Campaign Against Torture, 2020. *INDIA: ANNUAL REPORT ON TORTURE 2019*. [online] New Delhi: National Campaign Against Torture, p.6. Available at: <<http://www.uncat.org/wp-content/uploads/2020/06/INDIATORTURE2019.pdf>, > [Accessed 15 July 2020].



again felt prey to the political games. The Bill missed out certain recommendations of the Commission such as the prescription of life imprisonment for public servants who caused the death of persons in the custody, the burden of proof on the public servants and the compensation for the victims which rather formed the core principles of the Bill. The act of making the Bill as a mere political agenda rather than enacting the same is posing a greater threat to the prevention of human rights rather the actual act itself.

### **THE PLAUSIBLE INCLUSIONS IN THE ANTI-TORTURE LAW:**

The alarming rise in the number of custodial violations necessitates the immediate enactment of the Anti Torture law, which is merely a step away from the Prevention of Torture Bill, 2017. The Anti-Torture Law whilst consisting of punitive provisions to punish the wrong-doers and containing remedial measures as to providing compensation to the victims, it should also contemplate eclectic measures to prevent the commission of the offence. The very fact that most of the cases involving custodial torture and even custodial death are not reported and even if reported in certain circumstances the policemen are never convicted compels the need for preventive measures in the legislation more extensively than the penal provisions. The enactment must mandate the presence of a person appointed by the National Human Rights Commission or other incidental body during the course of arrest and investigation. In line with the Convention against Torture Initiative, the Anti Torture law must encompass the victim with the right to complain against the use of force or any form of torture in custody. The allegation must be investigated by an independent and impartial body, as the present scenario of the

police investigating the complaint against police is further deteriorating the ravished self of the victims. As recommended in the Law Committee report, the statute must incorporate the provisions of imprisonment which may extend up to life imprisonment depending upon the crime and nature of the injury inflicted upon the victim. The legislation must also address the extradition provisions as extraditing criminals from foreign countries still remains a greater problem to the nation.

### **RECCOMENDATIONS:**

- To repeal all laws promoting impunity to the police force including Section 45 and Section 197 of the Criminal Procedure Code and to amend the Human rights Protection Act, 1993 in order to bring the Armed Forces under the purview of NHRC.
- Enact a Legislation which does not provide any kind of defence to those indulging in such inhumane act.
- Recognise torture as a crime distinct from custodial death and provide a separate punishment for torture under the Law that is to be enacted.
- Surprise visits to police stations and similar units by senior officers which would help in early detection of persons who are held in unauthorised custody and subjected to ill-treatment.
- The police officials should be trained in such a way that they implant the spirit of service in accordance with the rule of law.
- The behaviour and the personality traits of the candidates have to be assessed during the process of recruitment.

### **CONCLUSION:**

The upswing in the incidents of custodial torture and subsequent deaths emphasizes the need for the enactment of Anti-Torture Law



in India. Constitutionality should not be replaced with muscularity in a democratic country like India. The existing legal provisions are certainly not enough to meet the tests of UN Convention and that is why we have failed to live up to the expectations of the international community which emphasizes on the safeguarding of fundamental human freedom. Security concerns are often being cited to defeat humanitarian morality which is impermissible in a country that is committed to the advancement of fundamental human freedoms. Human dignity being the core constitutional value, the increase in torture and custodial deaths stresses on the compelling need for a standalone anti-torture legislation in India.

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