

## **Abrupt Attempts to Prohibit Police Torture: A Critical Analysis of the Torture Bill 2010 in the Light of 273<sup>rd</sup> Law Commission of India Report, 2017- Pertinent Suggestions and Trajectory for Future Bill**

**Praveen Patil**

Assistant Professor, Shahaji Law College, Kolhapur, Maharashtra, India

### **Abstract**

Not only the states in their domestic jurisdictions have denounced torture but also nearly universal attempts have been made by the international community at international platform to prohibit torture, inhuman and degrading treatment. Of the several conventions, The Convention against Torture and other Cruel, Inhuman and Degrading Treatment 1984, to which India is a party to, has mandated the signatory states to prohibit and punish all acts of Cruel, Inhuman and Degrading Treatment through their domestic penal legislations. India being a signatory, tested the water for long time and, came with the Prohibition of Torture Bill 2010. The Bill fortunately did not pass the muster (not for good enough reasons on rationality but on technical ground of dissolution of Lok Sabha), but gave an impetus to debates and deliberations on the model law on prohibition of torture and other degrading and inhuman treatments. The present paper deals with flaws of 2010 Bill, the subsequent suggestions made by multiple institutions and tentative suggestions that may be included in the new Bill.

**KEY WORDS:** Convention on Cruel, Inhuman and Degrading Treatment 1984, custodial torture, Prohibition of Torture Bill 2010, Law Commission of India, Human Rights, NHRC,

### **PART I: INTRODUCTION**

Police resort to torture as a means of investigation. Legal systems have prohibited torture and yet the practice is strengthening with passing years and crimes. The remote justification for torture is security of the state. The protection of fundamental rights of an individual on the one hand and duties of the police to protect the society and suppress the crimes on the other, is a delicate balance the State must strike. It cannot be gainsaid that freedom of an individual must yield to the security of the State. Latin maxim *saluspopuli est suprema lex* - the safety of the people is supreme law; and *salusreipublicae suprema lex* - safety of the State is supreme law, co-exist. However, the doctrine of the welfare of an individual must yield to that of the community.<sup>1</sup>

Though the Supreme Court has read prohibition of torture as a fundamental right in several cases<sup>2</sup> and consequentially issued several guidelines to prohibit and

<sup>1</sup>Prithipal Singh v. State of Punjab (2012)1SCC10 MANU/SC/1292/2011

<sup>2</sup>See the following cases where the Supreme Court of India has strongly condemned the practice of torture and other inhuman and degrading treatment by police during the custody or otherwise.

*Raghbir Singh v. State of Haryana* (1974) 4 SCC 560., *Niranjan Singh v. Prabhakar Rajaram Kharote* AIR 1980 SC 785., *Kishore Singh v. State of Rajasthan* AIR 1981 SC 625., *Gauri Shanker Sharma v. State of UP* AIR 1990 SC 709., *Citizen for Democracy v. State of Assam* (1995) 3 SCC 743., *Prem Shankar Shukla v. Delhi Administration* AIR 1980 SC 1535., *Kishore Singh v. State of Rajasthan* 1981 AIR 625., *Prakash Kadam v. Ramprasad Vishwanath Gupta and another* (2011) 6 SCC 189., *PUCL v. State of Maharashtra* (2014) 10 SCC 635., *Tuka Ram And Anr v. State of Maharashtra*, AIR 1979 SC 185, *State of Maharashtra v. Madhukar Narayan Mardikar*, AIR 1991 SC 207., *Arvinder Singh Bagga v. State of U.P* 1994SCC (6) 565., *Francis Corallie Mullin v. Union Territory of Delhi* AIR 1981 SC

punish police torture,<sup>3</sup> the position seems to have still more worsened which is evident by the statistics of crimes by the police. In the following revise, the evidence of practice of police torture in India with data and the attempt to prohibit it has been discussed.

## PART II: POLICE TORTURE- INDIAN CONTEXT

Police atrocities in India had always been a subject matter of controversy and debate.<sup>4</sup> However, in the constitutionally promised egalitarian society<sup>5</sup> in general, and the prohibitive readings under Article 21 of the Constitution in particular,<sup>6</sup> any form of torture or cruel, inhuman or degrading treatment is prohibited. Torture is not permissible whether it occurs during investigation, interrogation or otherwise.<sup>7</sup>

Except for few, “custodial torture has become so common these days that not only the police and bureaucracy but even the people take it for granted as a routine police practice of interrogation.”<sup>8</sup> the Indian scenario in respect of torture is still more worse. Every now and then, the newspapers report that police excessives have been committed on the civilians, the range of which includes simple beating to extreme torture of custodial death. The custodial torture is even justified as a "necessary evil" to curb the growing crime rate in the society.<sup>9</sup> The following glaring remarks by the Allahabad High Court, way back in 1961 (which were subsequently expunged by the Court on the request of the state<sup>10</sup>) are sufficient to narrate the reality

*“That there is not a single lawless group in the whole of the country whose record of crime comes anywhere near the record of that organised unit which is known as the Indian Police Force.”*

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<sup>3</sup>746., *SheelaBarse v. State of Maharashtra*, AIR 1983 SC 378., *Charles Sobraj v. Superintendent, Central Jail, Tihar* 1978 (4) SCC 104.

<sup>4</sup>In the following cases, various guidelines have been issued by the court to prevent arbitrary and unnecessary arrest which will help reduce cases of police torture. See *Arnesh Kumar v. State of Bihar*, (2014) 8 SCC 273., *Bhim Singh v. State of Jammu and Kashmir* AIR 1986 SC 494. *D. K. Basu v. State of West Bengal*(1997)1 SCC 416., *KedraPahadiya and others v. state of Bihar* (1981) 3 SCC 671., *Khatri (I) v. State of Bihar* AIR 1981 SC 928., *Lalita Kumari v. Govt. of U.P* (2014) 2 SCC 1., *M. H. Hosket v. State of Maharashtra* AIR 1978 SC 1548 AIR 1978 SC 154854., *Sheela Barse v. State of Maharashtra*, (1983) 2 SCC 96., *Sunil Batra v. Delhi administration (II)* AIR 1980 SC 1579.

<sup>5</sup>*Prithipal Singh v. State of Punjab*(2012)1SCC10 MANU/SC/1292/2011

<sup>6</sup>In *Sunil Batra v. Delhi Administration*, (AIR 1978 SC 1675) the Supreme Court in held that “fundamental rights do not flee the person as he enters the prison although they may suffer shrinkage necessitated by incarceration.” Thus, no constitution would generally denude the person of his basic rights and dignity just because he happens to tread a path prohibited by law.

<sup>7</sup>The National Commission to Review the Working of the Constitution (2002) recommended for ‘prohibition of torture and cruel, inhuman or degrading treatment or punishment’ as one of the additions to the fundamental rights chapter as Article 21(2) based on the dicta laid down in various Supreme Court judgments in recognition of torture in our constitutional jurisprudence. The said recommendation has however not been incorporated yet, though judicial readings have underscored it in number of judgments.

<sup>8</sup>See 273<sup>rd</sup> Law Commission of India (2017) on “Implementation of ‘United Nations Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment’ through Legislation” at p 31 available at <http://lawcommissionofindia.nic.in/reports/Report273.pdf>

<sup>9</sup>*Prithipal Singh v. State of Punjab*(2012)1SCC10 MANU/SC/1292/2011

<sup>10</sup>R.S. Saini “Custodial Torture in Law and Practice with reference to India” *Journal of the Indian Law Institute*, 1994 Vol. 36: 2, p.166

<sup>10</sup>*Ibid* p.168

<sup>10</sup>*State of U.P. v. Mohd. Naim*, AIR 1964 SC 703

*...Where every fish, barring perhaps a few stinks, it is idle to pick out one or two and say that it stinks."*

The forms of tortures include physical, mental and psychological tortures. The observations of the report about the Torture of Political Prisoners in India submitted before the sub-committee on International Relations U.S. House of Representatives in March 1976 is worth mentioning. The report pointed out the following kinds of physical torture:<sup>11</sup>

- (a) Stamping on the bare body with heeled boots.
- (b) Beating with canes on the bare soles of feet.
- (c) Rolling a heavy stick on the shins, with a policeman sitting on it.
- (d) Making the victim crouch for hours in a 'Z' position.
- (e) Beating on the spine.
- (f) Beating with rifle butt.
- (g) Slapping with cupped hands on both ears until the victim bleeds and loses consciousness.
- (h) Inserting live electric wires into body crevices.
- (i) Forcibly laying nude on ice slabs.
- (j) Burning with lighted cigarettes and candle flame.
- (k) Denying food, water and sleep and then forcing the victim to drink his own excreta.
- (l) Stripping the victim, blackening his face and parading him in public.
- (m) Suspending the victim by his wrists.
- (n) Hauling him on 'aeroplane'- victim's hands tied behind the back with a long rope, the end hauled over a pulley, leaving the victim dangling in mid-air swinging.

In 2016 alone as many as 209 cases were filed against police in respect of Human Rights violation. Of the 209 cases, 50 police were charged sheeted for the human rights violations. It is surprising to note that as many as 13 fake encounter cases were registered against police of which 4 were found to be genuine. Custodial torture is a common phenomenon. In 2016 alone 52 cases of hurt and injury by the police against the inmates were registered.

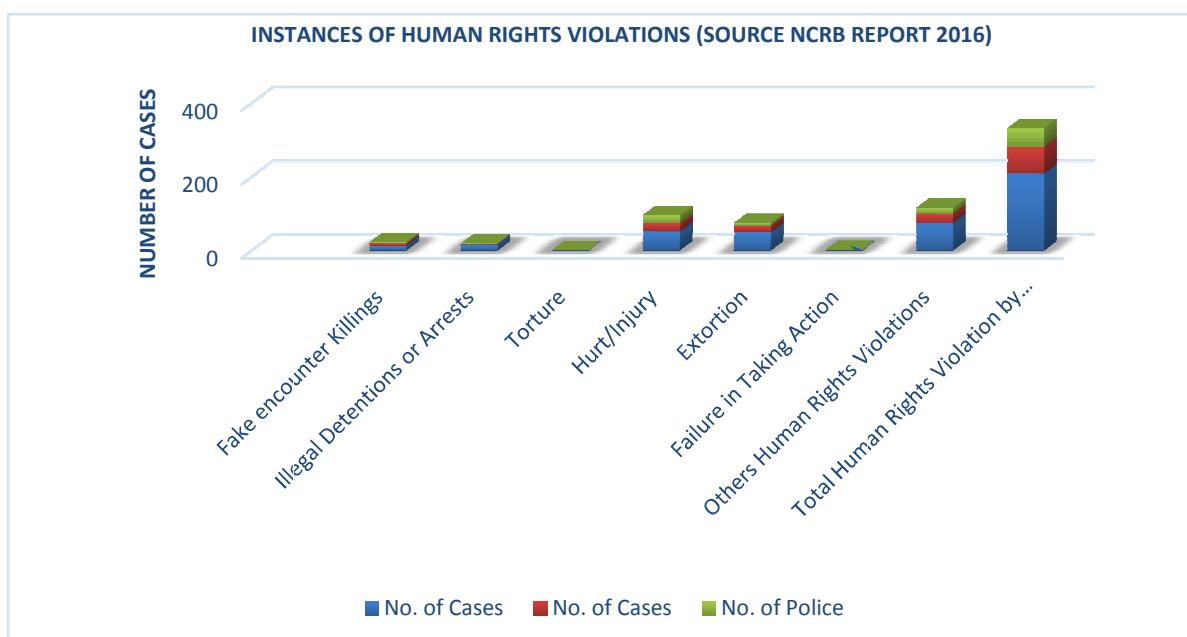
Illegal arrest and detention is not a new thing for police. for every trivial offence the police resort to arrest and detention despite there being speaking guidelines by the Supreme Court to not to resort to arrest unless there are pressing cases and circumstances so warranting.<sup>12</sup>It seems, however, that judicial guidelines have fallen on the deaf ears of the police which fact is evident by the data that there are 16 cases in 2016 where illegal detention or arrests were reported with the NCRB against police.

<sup>11</sup> See Nirman Arora "Custodial torture in police stations in India: a radical assessment" *Journal of the Indian Law Institute*, Vol. 41: 3&4 1999, pp 515-516

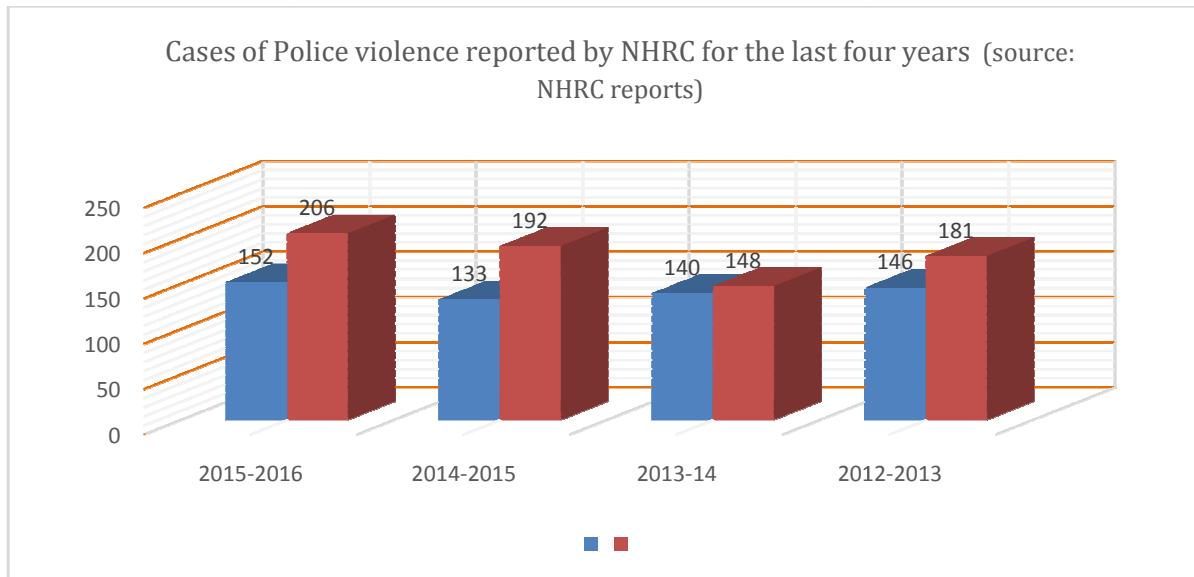
<sup>12</sup> See *Supra* note 2

The following chart shows the violation of human rights by the police for the sample year of 2016

Incidences of	No of cases		
	Registered	Found to be false	Personnel charge sheeted
Fake encounter Killings	13	6	4
Illegal Detentions or Arrests	16	2	1
Torture	1	0	0
Hurt/Injury	52	22	22
Extortion	50	18	7
Failure in taking action	2	0	0
Others Human Rights Violations	75	25	16
Total Human Rights Violation by Police	209	73	50

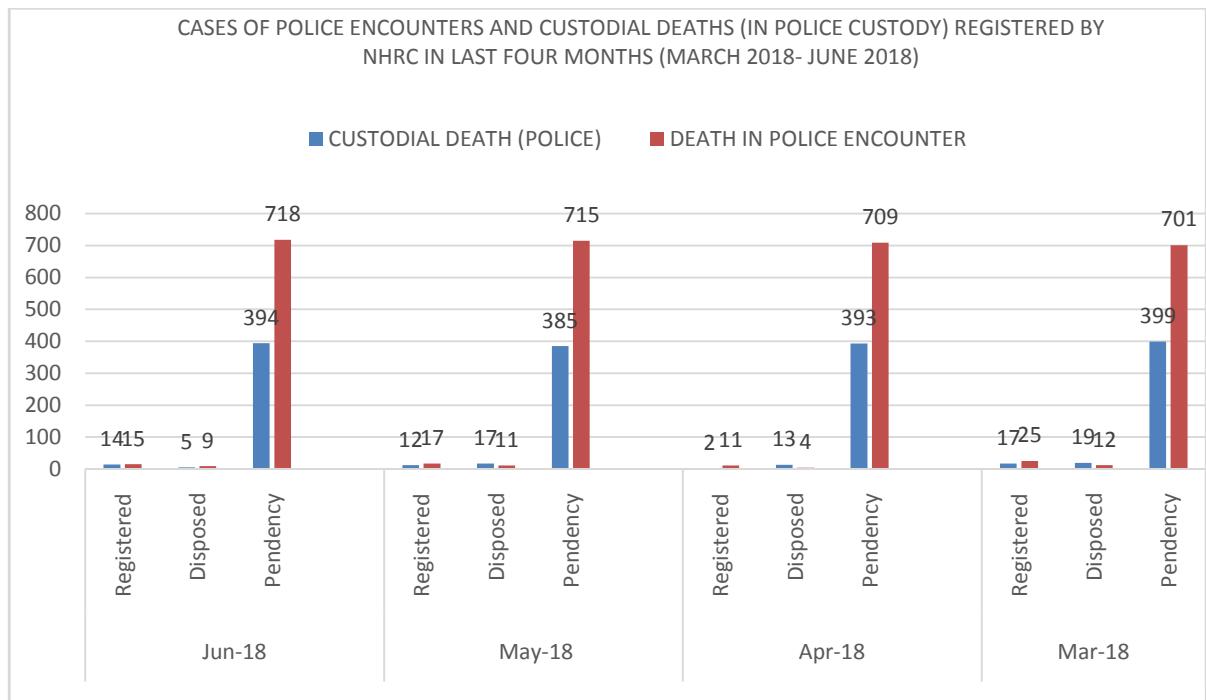


National Human Rights Commission of India has also kept track of custodial violence by police in its yearly reports (and now monthly reports started from January 2018). The following data is self-speaking of police atrocity in terms of data provided therein.



The NHRC is publishing monthly data of human rights violation since 2018 as is available on its website. The human rights violation by police in terms of custodial death and police encounter is as follows.

<b>CASES OF POLICE ENCOUNTERS AND CUSTODIAL DEATHS (IN POLICE CUSTODY) REGISTERED BY NHRC IN LAST FOUR MONTHS (MARCH 2018- JUNE 2018)</b>				
As on date	No of cases (as on date)	CUSTODIAL DEATH (POLICE)	DEATH IN POLICE ENCOUNTER	
06.06.2018	Registered	14	15	
	Disposed	5	9	
	Pendency	394	718	
05.05.2018	Registered	12	17	
	Disposed	17	11	
	Pendency	385	715	
04.04.2018	Registered	2	11	
	Disposed	13	4	
	Pendency	393	709	
14.03.2018	Registered	17	25	
	Disposed	19	12	
	Pendency	399	701	



### PART III: ABRUPT ATTEMPT TO PROHIBIT POLICE TORTURE

The Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment was adopted by the United Nations General Assembly on 9th December, 1975, which was signed by India on 14th October, 1997, obligated India to bring a standalone law or amend the existing laws to ratify the treaty. Instead of amending Indian Penal Code, 1860 and other allied laws, India chose to enact The Torture Bill 2010. Though the statement of object and reasons of the said Bill speaks of bringing a standalone legislation, the Bill did not appear to be comprehensive enough, to be called a standalone Bill in its propriety. The Bill suffers from obvious defects.

The definition of torture<sup>13</sup> which is the linchpin of the Bill itself suffers for being a restrictive, narrow, selected and purpose-oriented definitions. Many acts of torture, which fall in the category of degrading treatment are not included in it. Further, the definition was restricted to being invoked only when the torture was in relation to extracting confession. Acts of police done for any other purposes (sometimes done out of sheer entertainment!) are not included.

<sup>13</sup>Sec 3 of Prevention of Torture Bill, 2010 defines torture as

“Whoever, being a public servant or being abetted by a public servant or with the consent or acquiescence of a public servant, intentionally does any act for the purposes to obtain from him or a third person such information or a confession which causes

- i. grievous hurt to any person; or
- ii. danger to life, limb or health (whether mental or physical) of any person, is said to inflict torture

Provided that nothing contained in this section shall apply to any pain, hurt or danger as aforementioned caused by any act, which is inflicted in accordance with any procedure established by law or justified by law.”

There was no separate mechanism provided for investigation of such crimes. The punishment provided was just an extension of provisions of Indian Penal code, 1860. The Torture Bill 2010 disappointingly put a bar on cognizance unless the complaint is made within six months from the date on which the offence is alleged to have been committed. The Torture Bill 2010 mandated with previous sanction by the appropriate government to prosecute the public officials. It neither mandates the sanction or the decision thereof in stipulated time, nor does it provide appeal from such decisions.

The overall reading of the Bill gives an impression that the Bill was, (out of international concern rather than being a product of sensitivity) just a lip service to the international commitment. So is the reading when we contrast the Bill with The Select Committee Report of Rajya Sabha on Torture Bill 2010 and the Report of 273<sup>rd</sup> Law Commission of India.

Fortunately, the Bill lapsed avoiding the greatest embarrassment. The suggestions of The Select Committee Report of Rajya Sabha on Torture Bill 2010<sup>14</sup> and the report of 273<sup>rd</sup> Law Commission of India, if read and selectively enacted, can produce a meaningful and purpose-oriented legislation.

#### PART IV: PERTINENT SUGGESTIONS AND TRAJECTORY FOR FUTURE BILL

Based on 273<sup>rd</sup> Report of Law Commission of India, the Select Committee Report of Rajya Sabha on Torture Bill 2010, and the Torture Bill 2010 (lapsed with dissolution of 15<sup>th</sup> Lok Sabha as per provision of Article 107 of the constitution) following suggestions should be included in the new Bill to be proposed in the parliament. **The suggestions are provided in bold lines.** The discussion and base material for the suggestions follow in the neutral lines. **The exact words to be included are provided in italics.**

##### 1. REFERENCE TO CONSTITUTION AND INTERNATIONAL COMMITMENT IN LONG TITLE

**There shall be reference to the constitution of India in preamble of the Bill to reaffirm faith in Article 21 which prohibits torture in all its form.**

The Torture Bill 2010 refers to the international commitment of India, in the form of Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, as a basis for legislative enactment. The Supreme Court of India, has also in no uncertain words, denounced the acts of ill treatment reading the protection under article 21 of the Constitution. It is, therefore suggested that, the new bill should also refer to the constitution of India as *grundnorm* in its preamble so that the faith in the constitution, which prohibits all ill-treatment in the form of article 21, 14, 20 and 22, is reaffirmed.

<sup>14</sup> Select Committee Report, 6 December 2010, submitted to Rajya Sabha. Available at <http://www.prsindia.org/uploads/media/Division%20High%20Courts>Select%20Committee%20Report.pdf> visited on 23 May 2018

## 2. WHAT AMOUNTS TO TORTURE

**The definition of torture should be comprehensive to include all acts of ill-treatment, including torture, inhuman and degrading treatment.**

The Torture Bill 2010 defined the torture to include only grievous hurt and acts of such severity excluding the much lesser acts which, if inflicted in systemic way, or for longer duration, can result into graver than grievous hurt. The definition provided by the Bill, therefore, was neither in compliance with convention of 1984, nor was with suggestion of select committee of Rajy Sabha. The definition of torture, as provided by the Law Commission of India, in its 273 Report seems to be eye catchy,<sup>15</sup> yet suffers from defects.<sup>16</sup> The Select Committee of Rajya Sabha has given a comprehensive definition of torture which needs implementation in toto

*"3. Whoever, being a public servant or being abetted by a public servant including a superior officer or with the consent or acquiescence of such public servant, including the superior officer intentionally commits or is suspected to have committed any act for the purpose of obtaining information or confession from any person or punishing such person for any act, committed or is suspected to have been committed by him or intimidating or coercing such person which may lead to the detection of an offence or misconduct or discriminates on the ground of religion, race, sex, place of residence, birth, language, caste, sect, colour, community or commits any other act for any other purpose, and such act causes –*

- I. Grievous hurt to any person; or*
  - II. Danger to life, limb or health of any person; or*
  - III. Severe mental pain, agony, trauma or suffering caused to any person by cruel, inhuman and degrading treatment,*
- Is said to inflict torture:*

<sup>15</sup> Clause 3, What amounts to torture

"Whoever, being a public servant or being abetted by such servant or with the consent or acquiescence of the public servant, -

- (a) intentionally inflicts on a person, or
- (b) voluntarily causes to inflict on a person, -
  - (i) grievous hurt; or
  - (ii) danger to life, limb or health; or
  - (iii) severe or prolonged pain or suffering, whether physical or mental, caused to such person by cruel, inhuman and degrading treatment; or
  - (iv) death,

for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidates or coerces him or a third person, commits the offence of torture:

Provided that nothing contained in this section shall apply to any pain or suffering arising from or caused by, inherent in or incidental to any act committed in accordance with the procedure established by law:

Provided further that where torture in custody of a public servant is proved, the burden of proving that the torture was not intentionally caused or, abetted by or was not with the consent or acquiescence of such public servant, shall shift to the public servant."

<sup>16</sup> The otherwise good definition, however, has been eroded with an explanation appended as "Explanation III.- A mere mental agony or tension arising due to coercion shall not constitute the offence of torture."

It is difficult to distinguish acts of 'a mere mental agony or tension arising due to coercion' with the acts of torture or inhuman and degrading treatment.

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*Explanation II – For the purposes of this section, “torture” includes, but is not limited to the following, namely:*

- a. Causing disability or dysfunction of one or more part of the body, by acts, such as –*
  - i. Systematic beating, head banging, punching, kicking, striking with truncheon or rifle butt or other similar objects, and jumping on the stomach;*
  - ii. Food deprivation or forcible feeding with spoiled food, animal or human excreta and other stuff substances not normally eaten;*
  - iii. Electric shock;*
  - iv. Cigarette burning, burning by heated rods, hot oil or acid; by the rubbing of pepper or other chemical substances including spices or acid; by the rubbing of pepper or other chemical substances including spices or acids on mucous membranes, or on the wounds;*
  - v. Submersion of the head in water or water polluted with excrement, urine, vomit or blood;*
  - vi. Rape or threat thereof and sexual abuse of any kind, including sodomy, insertion of foreign objects into the sex organ or rectum, or electric shock to the genitals;*
  - vii. Mutilation or amputation of any part of the body such as the genitalia, ear or tongue;*
  - viii. The use of plastic bag and other materials placed over the head to the point of asphyxiation;*
  - ix. The use of psychoactive drugs to change the perception, memory, alertness or will of a person, including the administration of drugs to induce confession or reduce mental competency and the use of drugs to induce extreme pain or symptoms of a disease;*
- b. maltreating members of the family of a person and inflicting shame upon the victim or any one by such act as stripping the person naked, parading him in public places, shaving the victims head or putting marks on his body against his will;*
- c. other analogous acts of mental or psychological torture;*
- d. torture of children in any form.”*

### 3. PUNISHMENT

**The acts of torture must be punished with minimum of three years imprisonment commensurate with the gravity of the offence. There shall be provision for mandatory and adequate fine and compensation.**

The Torture Bill 2010 did not provide for minimum mandatory punishment, though it provides the maximum punishment of 10 years imprisonment. The said bill is less effective when compared to the existing provisions of Indian penal code, 1860.

The Law Commission of India, in its 273 Report, suggested for 10 years imprisonment highest imprisonment (with no minimum imprisonment, leaving discretion to judges to decide proportionality), in line with The Torture Bill 2010. However, it suggested for fine and compensation to be paid to the victims, and accordingly also suggested for amendment of section 357B of Cr.PC.<sup>17</sup>

<sup>17</sup> The proposed amendment reads

The Select Committee of Rajya Sabha, has, however, suggested an effective punishment with gradation and fine. The following punishment clause suggested by the Select Committee of Rajya Sabha, needs to be incorporated in the Bill

*“ 4(1) Where the public servant referred to in section 3 or any person abetted by or with the consent or acquiescence of such public servant, tortures or attempts to torture any person, such public servant or person shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to ten years and shall also be liable to fine which shall not be less than one lakh rupees.*

*(2) Where death of any person is caused due to torture, the person committing the offence shall be punishable with death or imprisonment for life and shall also be liable to fine.*

*(3) Any public servant or other person committing torture or attempting to commit torture shall also be liable to fine, which shall be payable to the effected person.*

*(4) Notwithstanding the fine imposed under this section, the State may award such compensation including interim compensation to the victim of torture as may be considered necessary for rehabilitation of the victim.*

*(5) Compensation by the State to the victim of torture for the purpose of his rehabilitation shall be awarded taking into consideration amongst others, the following factors, namely:-*

*(a) the gravity of the physical and mental harm and suffering inflicted, including death if caused as a result of torture;*

*(b) lost opportunities, including employment, education and social benefits;*

*(c) material damages and loss of earnings including loss of earning potential;*

*(d) cost required for legal or expert assistance, medicine and medical services, and psychological and social services;*

*(d) the age, family responsibilities and material condition of the dependents of the victim.*

*(6) In case of death due to torture, the dependents of the deceased person shall be entitled to compensation including interim compensation under this Act.”*

#### 4. COGNIZANCE OF OFFENCES- TIME LIMIT

**The time limit to bar the judicial cognizance of torture shall be not less than two years with necessary extension in exceptional circumstances.**

The Torture Bill 2010 disappointingly put a bar on cognizance unless the complaint is made within six months from the date on which the offence is alleged to have been committed.

The Law Commission of India, in its 273 report, subscribed to the six months limitation clause as above for cognizance of the case. It however put a relaxing proviso indicating that “*Provided that the court may on sufficient grounds being*

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*“357B. - The compensation payable by the State Government under section 357A and subsection (5) of section 4 of the Prevention of Torture Act, 2017, shall be in addition to the payment of fine to the victim under section 326A or section 376D of the Indian Penal Code or under sub-section (4) of section 4 of the said Act.”*

*shown, condone the delay in filing the complaint beyond the said period of six months.”*

Report and The Select Committee of Rajya Sabha, has, however, provided for a satisfactory time limit of two years, with further extensions. The said provision needs to be incorporated which reads as under

*“6(1). Notwithstanding anything contained in the Code of Criminal Procedure, 1973, no court shall take cognizance of an offence under this Act unless the complaint is made within a period of two years from the date on which the offence is alleged to have been committed.*

*Provided that the court may on sufficient grounds being shown, condone the delay in filing the complaint beyond the said period.*

*(2) Where the victim of torture is disabled for reasons of health, financial incapacity or otherwise, he may cause a complaint to be filed by a duly authorized representative.”*

## 5. SANCTION FOR PROSECUTION

**Every decision in respect of granting or non-granting of the previous sanction shall be made within three months from the date of application. Every such decision shall be with reasons from which appeal shall lie to high court.**

The Torture Bill 2010 has mandated with previous sanction by the appropriate government to prosecute the public officials. It neither mandates the sanction or the decision thereof in stipulated time, nor does it provide appeal from such decisions.

The Select Committee of Rajya Sabha and The Law Commission of India, in its 273 Report have unanimously agreed in their respective reports to have the decision of sanction in three months with provision to appeal to high court. The provision as suggested by The Law Commission of India, in its 273 Report, needs to be incorporated

*“ Clause 7*

*(1)...*

*Provided that the decision regarding the grant of sanction to prosecute the offending public servant shall be taken not later than three months from the date of application therefore, failing which the sanction to prosecute shall be deemed to have been granted:*

*Provided further that the sanction for prosecution shall not be refused by the Government or the competent authority, as the case may be, except for reasons to be recorded in writing.*

*(2) Any person aggrieved by the decision of the Government or the competent authority, as the case may be, under this section may prefer an appeal to the High Court within ninety days from the date of the decision in such form and manner and accompanied by such fees as may be prescribed.*

*(3) The High Court shall endeavour to dispose of the appeal as early as possible, preferably within a period of one year<sup>18</sup> from the date of its filing.”*

<sup>18</sup> The Select Committee of Rajya Sabha suggested it to be six months.

## 6. PRESUMPTION AS TO NON-EXCLUSION OF PROVISION OF LIABILITY

**The liability of public officials, in no case and on whatsoever ground, be excluded.**

The International Convention on Prohibition of Torture, 1984 has prohibited the derogation of the liability or exemptions from it in no circumstances. The Torture Bill 2010, however, did not make any reference to it. The Select Committee of Rajya Sabha and The Law Commission of India, in its 273 Report, on the other hand have specifically incorporated this in their respective reports verbose verbatim. Clause 8 273<sup>rd</sup> of the Law Commission of India report reads as under which needs to be incorporated

*"8. For the avoidance of doubts, it is hereby declared that the fact that any act constituting an offence under this Act was committed –*

*(a) at a time when there was a State of war, threat of war or where a proclamation of emergency was in operation; or (b) on an order of a superior officer or public authority, shall not be a defence to such offence."*

## 7. INDEPENDENT AUTHORITY TO INVESTIGATE COMPLAINTS

The International Convention on Prohibition of Torture, 1984 expects the member countries<sup>19</sup> to have independent authority to investigate the case and report, apart from the commission established under the convention to investigate the matter of violation periodically.

The Torture Bill 2010 remained silent on this issue. The establishment of independent mechanism may not be viable in the given circumstances. However, the investigation can be carried out by the superior police officer or judicial magistrates. The Law Commission of India, in its 273 Report, suggested having the case investigated by Deputy Superintendent of Police. The Select Committee of Rajya Sabha, however, suggested the case to be investigated by such officer not below the rank of superintendent of police. The Law Commission of India in the above reports mandates the conclusion of investigation within a period of three months from the date of making of the complaint, whereas The Select Committee of Rajya Sabha extends it to six months. The suggestion of Select Committee of Rajya Sabha appears to more appropriate which is as under

*"Clause 6*

*(1)...*

*...*

*(4) A complaint against torture shall be investigated by such officer not below the rank of superintendent of police or the corresponding rank in any*

<sup>19</sup> France has “Comptroller General of the places of deprivation of liberty”, New Zealand has “Human Rights Commission, Police Complaints Authority, Children’s Commissioner”, United Kingdom has “18 different organisations, including Independent Monitoring Board, Independent Custody Visiting Associations.” Germany “The Federal Agency for the Prevention of Torture”

See Subcommittee on Prevention of Torture,  
<http://www2.ohchr.org/english/bodies/cat/opcat/mechanisms.htm>

*other organization or investigative agency as would ensure independent investigation.*

*(5) The investigation shall be completed within a period of six months from the date of making of the complaint.”*

## **8. TRIAL TO CONCLUDE WITHIN ONE YEAR**

**Every trial under the Act of prevention of Torture shall conclude in one year. The case shall be heard by competent authority on day to day basis.**

The Torture Bill 2010 neither provided a separate mechanism nor spoke of the conclusion of the trial in time bound period. 273<sup>rd</sup> The Law Commission of India Report is also silent on this issue. However, the Select Committee of Rajya Sabha provides as under

*“5. Every offence under this Act shall be tried as expeditiously as possible on a day to day basis and endeavor shall be made to conclude the trial within a period of one year from the date of cognizance of the offence by the Court of Session.”*

## **9. BURDEN OF PROOF IN CASES OF ACCUSATION**

**The burden of proof in cases of accusation shall always be on the accused public officials which he shall refute beyond all reasonable doubts. There shall be necessary amendment in the Indian evidence Act to this effect.**

The Torture Bill 2010 remained silent on this issue. The Select Committee of Rajya Sabha made a reference to this in the proviso to clause 3 of the proposed bill which provided for the definition of torture.<sup>20</sup> The Law Commission of India, however, in its 273 Report proposed an amendment to the Indian evidence Act, to incorporate the burden of proof in section 114B. The said amendment serves the purpose and therefore should be included in the new bill as it is. The proposed amendment reads,

*“114-B. (1) In a prosecution of a police officer for an offence constituted by an act alleged to have caused death or bodily injury to a person, if there is evidence that the death or injury was caused during a period when that person was in the custody of the police, the court may presume that the death or injury was caused by the police officer having custody of that person during that period.*

*(2) The court, in deciding whether or not it should draw a presumption under sub-section (1), shall have regard to all the relevant circumstances including, in particular,*

*(a) the period of custody,*

*(b) any statement made by the victim as to how the injuries were received, being a statement admissible in evidence,*

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<sup>20</sup> Clause 3...

...

*“Provided further that where torture in custody of a public servant is proved, the burden of proving that the torture was not intentionally caused or abetted by, or was not with the consent or acquiescence of, such public servant, shall shift to the public servant.”*

(c) the evidence of any medical practitioner who might have examined the victim, and (d) evidence of any magistrate who might have recorded the victim's statement or attempted to record it."

## 10. PROTECTION OF VICTIMS, COMPLAINANTS AND WITNESSES

**Provision to protect victims, complainants and witnesses from the time of submission of the complaint to the conclusion of the trial and thereafter till such time as the State Government is reasonable satisfied that such protection is no longer required, be made and provided.**

The essence of the prevention of torture lies in the protection of victims, complainants and witnesses from the time of submission of the complaint to the conclusion of the trial and thereafter till such time as the State Government is reasonable satisfied that such protection is no longer required. The Torture Bill 2010 did not make any provision in this regard. The Select Committee of Rajya Sabha and The Law Commission of India have, however, included a full section wherein protection as aforesaid is provided. The sections dedicated by both reports for the protection are verbatim same. The Law Commission of India, report reads as

" 9. (1) It shall be the duty and responsibility of the State Government to make arrangements for the protection of victims of torture, complainants and witnesses against all kinds of ill-treatment, violence, threats of violence, or physical harm or mental trauma or the recurrence of torture.

(2) The protection under sub-section (1) shall be provided from the time of submission of the complaint to the conclusion of the trial and thereafter till such time as the State Government is reasonably satisfied that such protection is no longer required.

(3) The protection under sub-section (1) shall include necessary provision for providing physical security to the victims, complainants and witnesses.

(4) The State Government shall inform the concerned Court about the protection provided to any victim, complainant or witness under this section and the court shall periodically review the need of protection being offered to the complainants, victims and witnesses under this section and pass appropriate orders in this behalf.

(5) The State shall ensure proper medical examination of every person remanded to custody in jail and the report of such medical examination shall be transmitted to the concerned trial court."

## 11. PREVENTION OF TORTURE ACT HAS TO BE IN ADDITION TO EXISTING LAWS AND NOT IN DEROGATION OF.

**Provisions of the torture law shall be in addition to and not in derogation of the provisions of any other law. It should have overriding effect in case of inconsistency**

The Torture Bill 2010 and the Select Committee of Rajya Sabha did not speak of overriding effect of torture law over other laws. The Law Commission of India, however, in its 273<sup>rd</sup> report specially provided for the non-derogation clause form other Acts and overriding effect as under which need to be included in new law.

*"11. The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency."*

## I. CONCLUSION

The statistics provided by NCRB and NHRC go to indicate that police torture is very much prevalent and is persistently increasing day by day. The 2010 bill did make certain attempts to prohibit and punish the torture but fell to ground for obvious reasons. It is heard from the Home Ministry that the new Bill will be tabled soon for passage. The wisdom of the Parliament is, this time, further supplemented by the report of Law Commission of India submitted in 2017. The suggestions made above are in consonance with the said report with necessary modification according to international standards. It is expected of the Parliament that, the new Bill will not fail the spirit of the International Convention of 1984 which prohibits all forms of torture, cruel and inhuman treatment and punishments.