

TORTURE IN INDIA: A HUMAN RIGHTS PERSPECTIVE VIS-À-VIS UNCAT

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Abstract

India has signed the UNCAT on October 14, 1997, but yet to ratify the global human rights convention, which is ratified over 160 countries including Pakistan and Afghanistan. Although, Supreme Court of India on numerous times including in *Francis Coralie Mullin v. Union Territory of Delhi 1981* had condemned torture and cruelty as being violative of Article 21 of the Constitution, however, even after a proposed bill in 2017 steps are yet to taken by the legislature. Furthermore, any form of torture or cruel, inhuman or degrading treatment would be offensive to human dignity and constitute a violation of the right to life protected under Article 21 of the Indian Constitution. Despite troves of apex court's judgments on any form of torture as a violation of Right to life, there is a paradoxical sharp increase of custodial torture deaths, police torture, cruel prison treatment is being inflicted and normalized in India.

The torture is de-facto legitimized and employed by the police authorities and military authorities in India. The lethal torture methods practised by the authorities lead to death as mere instances of grievous hurt is to grant authorities a special privilege against that would fall foul of the basic human right to life and equal protection. Furthermore, there is absolute culture de-jure and de-facto impunity granted to the State agents for perpetrating torture and other cruel treatment with absolute impunity. The real practice of State agents commission of torture as legitimizes the use of force cannot be changed without ratifying the UNCAT.

The paper, therefore, emphasizes the issues and challenges concerning the implementation and ratification of UNCAT and other legal instruments prohibiting torture. Also, it will argue on how there is a dire need of an anti-torture law considering the current scenario across the country where a certain section of the society still is under the draconian law of AFSPA. Lastly, the paper will analyse the role of the Judiciary in protecting the basic rights of the people.

Keywords: - Torture, Right to life, UNCAT, Judiciary etc.

INTRODUCTION

The concept of human rights is very wide in its ambit and it can be simply said that the respect towards the human personality and its absolute worth, regardless of caste, creed, religion, sex etc. The basic human right is an intrinsic part of an individual, merely by been born as a human, which is inalienable in nature regardless of any event. However, in the recent times there has been increasing concerns related to torture globally against the individuals, especially against the prisoners and detainees which violates the concept of human dignity first and foremost be found in the Universal Declaration of Human Rights (UDHR) states "*all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood*".¹ Torture is a well-established tool of investigation of the investigating agencies around the world. If we analyse the recent history it was after the end of the Second World War, the

¹ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art. 1

world witnessed massive human rights abuses by the State against its individuals. However, the same has evolved over the time and the international community started to develop international standards for the protection of human rights and the States started to sign and ratify the treaty to recognize, protect and promote the human rights of every individual within its territories. The adoption of the Universal Declaration of Human Rights² by the General Assembly Resolution had a profound impact on recognizing human rights as universal, inalienable and indivisible. This document is a milestone and evolutionary in setting the agenda for prevention, protection and promotion of human rights to every individual without distinction of any kind such as race, colour, sex, language, religion, political or another opinion, national or social origin, property, birth or another status.

The prohibition against torture is compatible with a set of established norms of international human rights law such as the right to physical integrity and inherent dignity (Article 1 of the UDHR and Article 10 of ICCPR). The UDHR and ICCPR explicitly prohibit the torture, cruel or inhuman and degrading treatment or punishment (Article 5 of UDHR & Article 7 of ICCPR). The State responsibility and obligation to prevent and protect the individual from torture itself codified and interpreted in the international human rights treaties and bodies. However, there was a growing need for separate treaty and institutional mechanism to prohibit the torture in any kinds. Consequently, the United National Convention Against Torture³ (UNCAT) was promulgated with the global mandate to prohibit on torture and other acts of cruel, inhumane treatment and punishment, defined and criminalized the conduct of torture by the agents of the state and also created an institutional structure of United National Committee against torture for monitoring the compliance and the State's responsibility for violating the UNCAT obligations. Despite the overwhelming ratification to the UNCAT, it is very unfortunate that many countries around the world are not part of this Convention and there are a few who is a party, however, have not ratified to it and in the latter case, the one such prominent name is India. India though signed the document on 14th October 1997 is yet to ratify the Convention and further, it is still lacking strong legal and policy framework to prevent and abolish the torture in the domestic legal sphere.

It is pertinent to note that torture is not something new in India, it has been prevalent for centuries and it is still in practice even after 74 years of Independence. As we all know that the Art. 21 which provide a constitution guarantee to live with dignity which includes life without trauma or torture is being violated by many across the state of India. Moreover, the only provisions available to safeguard the interest of people are Section 330 and 331 which lacks in many aspects and the absence of specific legislation and institutional framework, the torture has been widespread and normalized for custody, interrogation and conflict-affected areas. The successive governments of India have shown extremely low commitment to the prevention, the abolishment of torture and the need for a legal framework to punish the perpetrators engaging in the torture. In India, torture and other cruel, inhuman and degrading treatment in state detention is common, and involves a range of practices including shackling, beatings and the administration of electric shocks, especially marginalized groups including women, dalits, adivasis and suspected members of armed opposition groups are those most commonly abused.⁴ Moreover, it is important to analyse the patterns of torture often used by various authorities in India. Here the observations of the report about the Torture of Political Prisoners in India submitted before the subcommittee on International Relations; U.S. House of Representatives in March 1976 is worth mentioning.⁵ The report pointed out the following kinds of physical torture:

- Stamping on the bare body with heeled boots.
- Beating with canes on the bare soles of feet.
- Rolling a heavy stick on the shins, with a policeman sitting on it.
- Making the victim crouch for hours in a 'Z' position.
- Beating on the spine.
- Beating with a rifle butt.
- Slapping with cupped hands on both ears until the victim bleeds and loses consciousness.
- Inserting live electric wires into body crevices.

² Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR)

³ Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984 UNGA Res 39/46 (UNCAT)

⁴ Editorial, "Indian government should ensure torture law meets international standards" (Amnesty International, Oct. 14, 2010) < <https://www.amnesty.org/en/latest/news/2010/10/la-legislac3b3n-de-la-india-contra-la-tortura-debe-cumplir-las-normas-internacionale/> > accessed 29 October 2019

⁵ Nirman Arora, "CUSTODIAL TORTURE IN POLICE STATIONS IN INDIA: A RADICAL ASSESSMENT" [1999] 513 JLI 513.

- Forcibly laying nude on ice slabs.
- Burning with lighted cigarettes and candle flame.
- Denying food, water and sleep and then forcing the victim to drink his excreta.
- Stripping the victim, blackening his face and para
- Suspending the victim by his wrists.
- Hauling him on 'aeroplane'- victim's hands tied be long rope, the end hauled over a pully, leaving the mid-air swinging.

Besides these methods of torture, there are certainly other forms of brutalities and atrocities committed by our police. Some of them are inhuman and barbaric, eg: - the Saturday Statesman June 4, 1988, reported that "*in most of the cases crushing the testicles of the prisoners has been the modus operandi of Tamil Nadu police*".⁶ Likewise, the numerous agencies have reported the atrocities on the civilians by the various investigating agencies in India and one of such report is of the state of Jammu Kashmir by the Jammu Kashmir Coalition of Civil Society (JKCCS) which reported 432 cases out of which 70% of victims in search operations were civilians between 1990 to 2017.⁷ Consequently drawing the attention of the United Nations and other agencies working for the protection of human rights. Though all the aforementioned discussion it is very clear that there is a dire need to implement strong anti-torture laws in the country to eradicate these heinous acts. However, it is pertinent to note that some attempts have been made in the past to bring in some legislation to keep a check with the recent one is the Prevention of Torture Bill which was presented in the year 2010 but the bill lapsed with the dissolution of 15th Lok Sabha in 2014. Later, in the year 2017, the Prevention of Torture Bill 2017 was presented, however, in the ground reality, this bill is yet to see the daylight even after judicial intervention in early 2019. Therefore, the author in this paper will paper that there is a dire need to bring an anti-torture law in existence and implement it thoroughly.

UNVEILING THE CONUNDRUM IN THE DEFINITION OF TORTURE

It is imperative to probe into the scope of statutory as well as the general definition of the term 'torture'. The issue arising for the definition of 'torture' is closely tied with the uncountable acts of torture that can be inflicted against any person. The acts like beating, causing sleeplessness, threatening, or causing any physical or mental injury on a person, etc. either by a person or person himself who was caused to inflict such injury on him shall invariably amount to torture. This list, unfortunately, remains uncannily endless imbibing sheer subjectivity and gravity with each act of torture. There may be acts of torture done merely to satisfy one's anger or dominance over the other person with no other purpose whatsoever. No statutory definition of torture has been adopted by India till date. However, the Prevention of Torture Bill, 2017 was introduced in the Parliament in 2017 which includes the definition of Torture.⁸ This Bill was brought in response to the Law Commission's Report on Torture⁹. The Report does have shortcomings but vociferates that torture is prohibited under the Constitution of India and other customary law without any exception.¹⁰

The Supreme Court in *D.K. Basu v. State of West Bengal*¹¹ observed that "*Torture has not been defined in the Constitution or other penal laws. 'Torture' of a human being by another human being is essentially an instrument to impose the will of the 'strong' over the 'weak' by suffering. The word torture today has become synonymous with the darker side of human civilization.*" In this regard, an attempt to peruse and analyze a clutch of definitions propounded in various international instruments, literature and national legislations has endeavoured.

⁶ S. K. GHOSH, *Torture and Rape in Police Custody: An Analysis* (first published 1993, Ashish Publishing House 1993) 45

⁷ Id.

⁸ Bill on The Prevention of Torture Bill 2017

⁹ Law Commission of India, *Implementation of 'United Nations Conventions against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment' through Legislation* (Law Com No 273, 2017)

¹⁰ Jinee Lokaneeta, "Law Commission Report on Torture is a Step in the Right Direction, Just a Bill is Still Some way off" (The Wire 15 November 2017) <<https://thewire.in/external-affairs/prevention-of-torture-bill-india-law-commission>> accessed 30 October 2019

¹¹ *D.K. Basu v. State of West Bengal*, AIR 1997 SC 610.

• **BILL OF 2017 LEGITIMIZES CERTAIN ACTS OF TORTURE**

A bare perusal of the definition of torture under Section 3¹² entails that it makes certain acts of grievous hurt to any person; or danger to life, limb or health, whether mental or physical, indirectly legal. The proviso to Section 3 insinuates towards an uncanny, callous and uncontrollable acts of torture to be committed in the garb of '*pain inflicted in accordance with the procedure established by law*'. The standalone law on Torture frustrates the very object that the legislation sought to achieve in the first place. Contemporary issues like custodial death, beatings by state officials without any motive, atrocities committed during AFSPA or PSA, indefinite communication blackouts, etc. do not find a place in the proposed standalone legislation on Torture, i.e. The Prevention of Torture Bill, 2017. While it is believed that such standalone legislation should be comprehensive enough to tackle with the highest possible situations of torture, the Bill of 2017 has unfortunately failed to meet the standards set out in the UN Convention Against Torture.

• **IMPLICIT DEFINITION UNDER IPC IS HIGHLY NARROWED**

When spoken of the Indian Penal Code, 1860 and Torture, Section 330 and Section 331 are often invoked. It is, however, pertinent to note that these provisions have very specific and limited applicability concerning torture. To bring clarity, Section 330 simply applies over two situations, first being, where a person voluntarily causes hurt to extort a confession from the other person and second being, where a person causes hurt to compel the restoration of property from the other person. Further, Section 331 is merely an aggravated version of Section 330, making grievous hurt in furtherance of the commission of acts under Section 330 as punishable.

It can be rightly said that these provisions deal with a certain aspect of torture, but these provisions do not apply to all acts of torture. These provisions can only be invoked only in situations mentioned therein. But as mentioned above, situations like custodial death, beatings by state officials without any motive, atrocities committed during AFSPA or PSA, indefinite communication blackouts, etc. do not fall within the four walls of the Indian Penal Code, either implicitly or explicitly.

• **TORTURE AS OUTLINED UNDER UNCAT**

The United Nations in 1987 brought in force the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment¹³ (UNCAT). It is pertinent to note that the title in itself uses certain phrases like 'Other Cruel', 'Inhuman', 'Degrading Treatment' and 'Punishment'. These phrases have been separated by the conjunction 'or' which therefore makes the convention more inclusive and broader. Article 1 of UNCAT¹⁴ outlines the definition of 'torture'. The commendable part of the definition as encapsulated under UNCAT is that the UN General Assembly has walked an extra mile to make the definition more inclusive and non-exhaustive. The definition under Article 1 shall be without prejudice to any international instrument or national legislation which may contain the definition of torture.¹⁵ Another peculiar feature of the definition under Article 1, paragraph 1 is that the acts of torture shall merely be restricted to the pain or suffering arising only out of lawful sanctions.

The 29th World Medical Assembly (WMA) adopted 'Guidelines for Physicians Concerning Torture and Other Cruel, Inhuman or Degrading Treatment or punishment in relation to detention and imprisonment¹⁶'. The WMA also adopted the definition of 'Torture' through these guidelines.

¹² Bill on The Prevention of Torture Bill 2017, s 3

¹³ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85

¹⁴ Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984 UNGA Res 39/46 (UNCAT) art 1

¹⁵ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 art 1]

¹⁶ WMA, "Guidelines for Physicians Concerning Torture and Other Cruel, Inhuman or Degrading Treatment or punishment in relation to detention and imprisonment" (WMA, 31 October 1975),

<<https://www.wma.net/policies-post/wma-declaration-of-tokyo-guidelines-for-physicians-concerning-torture-and-other-cruel-inhuman-or-degrading-treatment-or-punishment-in-relation-to-detention-and-imprisonment/>> accessed 30 October 2019

• JUDICIAL CONSTRUCTION OF THE TERM 'TORTURE'

In a slew of judgements, the Courts in India have, umpteen number of times, defined torture considering the lack of an accepted and a statutory definition. Ranging from voluntary and involuntary acts of torture and injuries inflicted by the police or any person from the forces, the nature of torture differs. The Supreme Court in *D.K. Basu*¹⁷ held that the term torture has neither been defined in the Constitution nor any statute. It referred to a slightly metaphoric definition propounded by Adriana P. Bartow which is "Torture is a wound in the soul so painful that sometimes you can almost touch it, but it is also such intangible that there is no way to heal it. Torture is anguish squeezing in your chest, cold as ice and heavy as a stone paralyzing as sleep and dark as the abyss. Torture is despair and fear and rage and hate. It is a desire to kill and destroy including yourself."

Further, in *Re: Ramlila Maidan Incidence*, the that Depriving a person of sleep impairs the normal functioning and performance of individual which amounts to mental and physical torture as it has a very wide range of negative effects.¹⁸ In *Shatrughan Chauhan v. Union of India*¹⁹ the Supreme Court emphasized on the scope of torture in execution of a death sentence wherein it was held that an undue, inordinate and unreasonable delay in execution of a death sentence shall amount to torture, which shall further be a violation of Article 21 of the Constitution of India thereby emerges as a ground for commutation of the death sentence. Judicial Construction of the word 'torture' can also be perused from foreign judgements such as in *Ireland v. the United Kingdom*²⁰, wherein the European Court of Human Rights (ECHR) laid down factors to be taken into account in determining the severity of treatment like the age, sex, and state of health of the victim. Physical health of a person shall be taken into account while determining the level of injury inflicted upon a person. However, ECHR held that subjecting prisoners to noise and depriving them of food, water and sleep amounted to ill-treatment but refused to hold that the treatment amounted to torture. A perusal of this judgment shall put the threshold of torture on slightly a more rigid side. In other foreign cases like *Labita v. Italy*²¹, *Selmouni v. France*²², 'torture' has been defined on similar lines. However, the definition of torture remains highly subjective and no hard and fast rule can be used to define torture and acts of torture.

TORTURE IN DEROGATION WITH HUMAN DIGNITY AND OTHER HUMAN RIGHTS

The right to freedom from torture is enshrined in several human rights instruments. The protection significantly ranges from physical to mental torture including all forms intentional and psychological distress by government officials as well as persons acting outside their official capacities. The prohibition of torture and other cruel, inhuman or degrading treatment is enshrined in the following regional and universal human rights instruments:²³

- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), 1984
- UN Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power 1985
- Universal Declaration of Human Rights, 1948 (Art. 5)
- United Nations Standard Minimum Rules for the Treatment of Prisoners, 1955 (Art. 31)
- Draft Principles on Freedom from Arbitrary Arrest, Detention and Exile (1963).
- International Convention on the Elimination of All Forms of Racial Discrimination, 1965 (ICERD)
- International Covenant on Civil and Political Rights, 1966 (Arts. 4, 7 and 10)
- American Convention on Human Rights, 1969 (Art. 5)

¹⁷ D.K. Basu v. State of West Bengal, AIR 1997 SC 610.

¹⁸ In Re: Ramlila Maidan Incident, 2012 (5) SCC 1.

¹⁹ Shatrughan Chauhan v. Union of India, (2014) 3 SCC 1.

²⁰ Ireland v. the United Kingdom, (1978) 2 EHRR 25.

²¹ Labita v. Italy, Application No. 26772/95 § 119, ECHR 2000 IV (2000).

²² Selmouni v. France, (1999) SHRR 403

²³ Law Commission of India, Implementation of 'United Nations Conventions against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment' through Legislation (Law Com No 273, 2017)

- Declaration on the Protection of All Persons from being Subjected to Torture and other Cruel Inhuman or Degrading Treatment or Punishment (1975).
- Optional Protocol to the International Covenant on Civil and Political Rights (1976)
- Convention on the Elimination of All Forms of Discrimination against Women 1979 (CEDAW)

India hasn't ratified the United Nations Convention Against Torture²⁴ till date. The Special Rapporteur on Torture for the Commission on Human Rights (2001) states the following concerning India: -

"By letter dated 19 November 1999, the Special Rapporteur advised the Government that he had received information alleging routine torture in detention facilities throughout the country. The police and jailers allegedly torture or ill-treat new prisoners to obtain money and personal articles. Police are reported to torture detainees frequently during custodial detention."

Although the Courts have played a major role in directing and laying down guidelines related to detentions carried out the police,²⁵ however, in reality, the author has analysed that the courts demand action against the police, but in most cases, torture invokes only a verbal outrage on the part of the judiciary', it is not much effective in prosecuting the perpetrators of law.²⁶ Torture is not an alien concept in a democracy, it is the tendency of the people holding the positions of the law enforcing agencies to misuse it in various forms such as Torture. Unfortunately, India being the world's largest democracy, it still lacks a legal framework in which committing torture is criminalised. As a result, a framework of torture no doubt dominates India's law enforcement, while much of the judiciary turns a blind eye. According to Vrinda Grover, a Supreme Court lawyer and a long-time campaigner against torture, 'we have seen the courts demand action against the police, but in most cases, torture invokes only a verbal outrage on the part of the judiciary'. Grover further stated, '[i]t does not necessarily lead to the effective prosecution of the perpetrators of torture'.²⁷

In the present scenario is very difficult to fight against the wrongs which have been done to them, especially when the question is of torture. The opportunity for a victim of torture to complain is very limited in India as there is no specific legislation or provisions related to it. The absence of witness protection laws, proper investigative mechanisms including medico-legal facilities and prosecutorial mechanisms makes it difficult for a victim to complain because of fears that there will be deadly consequences. This allows torture to be used for blackmail, as a form of revenge and for monetary gain, instead of providing an impartial prosecution that can render reasonable sentences as punishments for perpetrators. There must also be a procedure through which a victim of torture can access and receive redress and adequate rehabilitation to regain the balance in life every victim of torture is certain to lose, irrespective of gender, social status, race and nationality.

²⁴ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted on 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85

²⁵ D.K Basu v. State of West Bengal, (1997) 1 SCC 416

²⁶ Dhaka Tribune, 'No End to Torture, Custodial Deaths in India' (June 8 2013) <<http://www.dhakatribune.com/world/2013/jun/08/no-end-torture-custodial-deaths-india>> accessed 21 June 2014.

²⁷ Id.

• **INDIA'S OBLIGATION UNDER ICCPR**

India, however, is a party to the International Covenant on Civil and Political Rights²⁸ wherein Article 7 of which forbids torture.²⁹ India has not been forthcoming when it comes to accepting any non-treaty international legal obligation to prevent torture.³⁰ While the ICCPR was drafted back then, India recused itself to accept and acknowledge the protection of human rights under international law. The same can be corroborated and perused from the debates in the Third Committee of the United Nations General Assembly on a draft of the ICCPR produced by the Commission on Human Rights. The draft so prepared enshrined for a complaint mechanism wherein all parties to ICCPR shall be under an obligation to submit an intervention by the Human Rights Committee if the complaining state has exercised its right to refer the matter.³¹ Scanty amendments were made, *inter alia*, the procedure to make submissions were made voluntary. In simple words, the states could become parties to ICCPR while having a reservation on complaints brought against them by other parties. The reservation shall also extend to the exclusion of intervention Human Rights Committee's authority in matters brought by a state party against the other.

Speaking in 1966 in support of this amendment, India's representative explained that his state's position was motivated in part *"by the feeling that time had not yet come to set up an international legal system for the enforcement of human rights throughout the world."*³² Similarly, India's refusal to adhere to the Optional Protocol to the ICCPR³³-which permits an individual to bring to the Human Rights Committee complaints that a state has violated the individual's rights under the Covenant-was justified by the Joint Secretary of Home Ministry in 1980 on the ground that the Indian government believed that *"complaints by individuals against any executive action should be dealt with only by national courts and nor by an International Organisation."*³⁴

• **INTERNATIONAL REACTION TO INDIA'S STAND ON TORTURE**

The Special Rapporteurs of the UNHRC wrote to India on 18th March 2019 asking for the details of measures and steps taken to bring justice to victims in 76 cases of torture and arbitrary killings in the Jammu and Kashmir since 1990.³⁵ However, the Indian government rejected all the apprehensions included in the letter and stated that it was a "false and motivated" step and this "chapter is closed".³⁶ A very recent report³⁷ of the United Nations was published on 8th July 2019 wherein the Office of the United Nations High Commissioner for Human Rights (OHCHR) records a history of torture in Kashmir³⁸. This Report of 2019 came after a Report of UNHRC dated 14th June 2018³⁹ which also recorded a wide range of serious human rights violation because the Indian government failed to comply with the recommendations given under the previous report.

²⁸ "Focus 2003 Multilateral Treaty Framework: An Invitation to Universal Participation" UN Millennium Summit (23 September 2003) UN Doc DPI/2130 (2000)

²⁹ International Covenant on Civil and Political Rights Art 7, 999 UNTS 171, 6 ILM 368, 370 (1967).

³⁰ A. Mark Weisburd "Customary International Law and Torture: The Case of India" [2005] 2 Chi.

J. Int'l L., 81

³¹ Id.

³² UN GAOR, 3d Comm, 21st Sess, UN Doc A/C3/SR1416, para 2 (1966).

³³ Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976 6 ILM 383

³⁴ Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976 6 ILM 383 art (Protocol) 2

³⁵ Editorial, "As UN Demands Details on Civilian Killings in Kashmir, India Stops Engagement on Topic" (The Wire 20 May 2019) <<https://thewire.in/security/unhrc-civilian-killings-kashmir>> accessed 28 October 2019

³⁶ Id.

³⁷ United Nations High Commissioner for Human Rights, "Update of the Situation of Human Rights in Indian-Administered Kashmir and Pakistan-Administered Kashmir from May 2018 to April 2019" (reliefweb 8 June 2019) <<https://reliefweb.int/report/pakistan/update-situation-human-rights-indian-administered-kashmir-and-pakistan-administered>> accessed 1 November 2019

³⁸ Sreya Roychowdhury, "Bodies in a Broken State: New Report Records a History of Torture in Kashmir" (The Wire 22 May 2019) <<https://thewire.in/rights/jammu-kashmir-torture-report-armed-forces-jkccs>> accessed 31 October 2019

³⁹ UNHCHR, "Update of the Situation of Human Rights in Indian-Administered Kashmir and Pakistan-Administered Kashmir from May 2018 to April 2019" (reliefweb 8 June 2019)

OHCHR in its 2019 report recommended India to adhere to the provisions of ICCPR and other international treaties in good faith⁴⁰, repeal Armed Forces (Jammu and Kashmir) Special Powers Act, 1990, investigate the missing, deaths, and all other acts of torture committed by the government officers/forces, provide reparations and rehabilitation to all victims, etc. OHCHR made similar recommendations in its 2018 report. India, however, rejected the 2019 report by calling it “fallacious and politically motivated” similar to its rejection in 2018.

TORTURE AND CONSTITUTION OF INDIA

Article 21 of the Constitution of India, though not explicitly, but implicitly, provides for protection from torture as a part of the right to life. In a plethora of cases, the Supreme Court has upheld this proposition. In *Khatri & Ors v. State of Bihar*⁴¹ which is popularly known as the Bhagalpur Blinding case, is an excruciating example of cruel, inhumane and barbaric treatment of the prisoners. The issue in hand pertained to the blinding of prisoners by police officers by piercing their eyeballs with needle and pouring acid in them. This case shows the pattern of torture and its implicit endorsement by the State. Torture also has its roots in arbitrary arrest and detention as well. Arbitrary arrest and detention have unabatedly persisted in India over the years. Such arrest and detention are further followed by custodial violence and torture, and in a few cases results in death. However, there are a plethora of judgements and guidelines of the Supreme Court on this issue. In *Sunil Batra v. Delhi Administration*⁴², the Supreme Court in vehement words held that

“fundamental rights do not flee the person as he enters the prison although they may suffer shrinkage necessitated by incarceration.”

The Supreme Court, after perusing several reports on custodial violence and torture, in *D.K Basu v. State of W.B*⁴³ it held that “Custodial violence including torture and death in lock-ups strikes a blow at the rule of law which demands that the powers of executive should not only be derived from law but also that the same should be limited by law.” The Court, furthermore, issued comprehensive and detailed guidelines for arrest and detention of a person, wherein a person must be informed about the grounds of his arrest, and the police personnel must be carrying his visible identity card showing his designation. On a similar issue, the Supreme Court in *Rama Murthy v. State of Karnataka*⁴⁴, reiterated and upheld the guidelines laid down in *DK Basu*⁴⁵. Further, In *Sube Singh v. State of Haryana*⁴⁶, the issue pertained to custodial deaths and third-degree torture inflicted by the police during interrogation. The Court also went on to probe into the reasons behind such practice and came up with suggestions on the preventive measure to tackle such violence.

There have been a plethora of judgments on this issue, however, Section 197 of the Code of Criminal Procedure, 1973 provides to forbid the prosecution of public servants employed by the states, except by the sanction of the Central Government or the State Government. While police forces are appointed by State Governments of their respective states, they fall within the definition of ‘public servants’ and are thus, protected from prosecution normally. Thus, Section 197 of the Code of Criminal Procedure, 1973 creates an inevitable hurdle to provide justice to the victims of torture. It further diminishes the efficacy of Article 21 of the Constitution. In principle as well as in practicality, the issue of torture is swept under the carpet.

PRESENT SCENARIO WITH SPECIAL EMPHASIS ON ANTI-TORTURE BILLS

Torture is a concept which is forbidden in a democratic setup, however, is not an alien concept when it comes in reality. There have been many instances when this concept has come under scrutiny and has been tried by many to dismantle it, however, in reality, it is highly improbable. As in the previous section of the paper, the

<<https://reliefweb.int/report/pakistan/update-situation-human-rights-indian-administered-kashmir-and-pakistan-administered>> accessed 1 November 2019

⁴⁰ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force on 27 January 1970) 1155 UNTS 331 art 26

⁴¹ *Khatri & Ors v. State of Bihar*, AIR 1981 SC 928.

⁴² *Sunil Batra v. Delhi Administration*, AIR 1978 SC 1675.

⁴³ *D.K Basu v. State of W.B*, AIR1997 SC 3017

⁴⁴ *Rama Murthy v. State of Karnataka*, AIR 1997 SC 1739.

⁴⁵ *D.K Basu v. State of W.B*, AIR1997 SC 3017

⁴⁶ *Sube Singh v. State of Haryana*, AIR 2006 SC 1117

authors' tried to discuss how the judiciary played a major role in protecting the rights of the people vis-à-vis, one must also not forget the contribution of the Law Commission in advocating for the anti-torture legislation through their reports. It is pertinent to note that since 1997 India has been a signatory to the UNCAT⁴⁷, however, it is yet to ratify the same. Nonetheless, there have been many instances where the respective Governments' have tried to bring in specific legislation and the Law Commission has presented various reports on the bringing of an anti-torture law. Let us now comparatively analyse both the bills and have a concluding remark on it.

The Bill was an attempt on the part of the Indian legislature to bring its laws into conformity with international standards. The Bill defines torture and prescribes the conditions under which torture is punishable. The Bill seeks to provide punishment for torture committed by government officials. It states that if a public servant acts in a way that causes grievous hurt to a person or endangers the life, limb and health of a person to obtain information or a confession, the act shall be termed as torture. However, it exempts any hurt caused due to an act that falls within the purview of any procedure established by law.⁴⁸ Moreover, the Bill proposed to put sanctions on the public servants if they are being found guilty of any torture. The author found that the Bill of 2010 contained a broad definition of torture which included physical and mental pain, stress and trauma. It also emphasized on torture in the context of discrimination based on sex, race, religion, which are excluded in the 2017 Bill. The Implementation of '*United Nations Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment*' through Legislation presented in 2017 is twofold: -

- (i) recognition all of the *jus cogens* nature of torture, that it is prohibited as a part of customary law without any exceptions; and
- (ii) the condemnation within Indian case law of the use of torture based on constitutional protections under Article 21 and Article 20 (3) of the Constitution of India i.e., right against self-incrimination.

Further, the report states that the Courts are unable to ensure the prohibition of torture in everyday policing despite such attention even after laying down the guidelines in the case of *D.K Basu*⁴⁹. In a way, the Bill of 2017 is a unique opportunity for the current government to put sanction of the perpetrators of law and misusing their position. Though the text follows the same recommendation as of in 2010, however, there is a major difference which could be drawn out. Firstly, as discussed, the definition in the Bill of 2010 was wider in a sense because it includes the torture beyond physical pain and agony, which are excluded in the Bill of 2017. Furthermore, in the Bill of 2010, it had an explanation that recounted forms of various types of torture based on years of documentation. Also, the reporting time as proposed in the 2010 Bill was 2 years which can be said adequate as compared to 6 months because the victims have to undergo a lot of trauma and pain while the barbaric act. In a way, it can be said that the previous Bill was more accountable and transparent.

Further, it has been observed that the term "torture" can be defined in different contexts such as – *firstly*, in criminal cases where involves various criminal activities such as custodial deaths even in petty offences, *secondly*, in a conflict of terrorism and organized crimes and *lastly*, in conflict-related to the environment.⁵⁰ It is pertinent to note that all the aforementioned are quite prevalent in the conflict zones of India. The current Bill majorly hits the criminal cases and misses to make an impact on the rest of the two. Especially, we discuss the conflict zones the trial on the forces not transparent and they are always protected by the anti-terror laws which safeguard every act of them. Through this we can conclude that both the Bills are not complete as they missed several major issues to cover, especially, related to that of the armed forces in

⁴⁷ Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984 UNGA Res 39/46 (UNCAT))

⁴⁸ Bill on the Prevention of Torture Bill 2010, s 3

⁴⁹ D.K Basu v. State of West Bengal, (1997) 1 SCC 416

⁵⁰ Jinee Lokaneeta, "Law Commission Report on Torture is a Step in the Right Direction, but a Just Vill is still some way off" (The Wire, 15 November 2017) <<https://thewire.in/external-affairs/prevention-of-torture-bill-india-law-commission>> accessed 1 November 2019

the conflict zones in India, however, by comparatively analyzing as mentioned before, the Bill of 2010 deems more complete and wider in nature.

CONCLUSION

Torture is an act which violates the basic principles of the human rights and especially when this is practised by the very people who are the protector of law it is gross and unjust, therefore, there is a dire need with regard to the current scenario that India ratifies the UNCAT and bring in a specific legislation which will protect the interest of the people. Justice requires us to uphold the human rights of all persons, regardless of any caste, creed, religion, sex, simply because they are human beings who are capable of reason and therefore, are worthy of respect. According to his theory, torture can be seen to be unacceptable, whatever the circumstances and consequences. It can be argued well that no one has the right to undertake such immoral acts like torture, even if the outcome is morally preferable. Further, torture has been used as a method of police interrogation or the armed forces in the conflict zones to extract statements, confessions and any information, which are considered necessary in safeguarding the country, however, the question here arises at what cost? Especially, where the human is safeguarded by the customary laws and the law of the land, any reasonable government must act upon it and stop the practice of this barbaric act by the law enforcing agencies and bring specific legislation to put sanction on them.

The Art. 21 of the Constitution of India which is considered the heart and soul of the Indian Constitution itself provide a constitutional guarantee to the people to live with dignity which includes life without trauma or torture. However, with a certain amount of success, the judiciary is also failing to safeguard the interest of the people and it can be argued that there were no checks and balances against the personnel who commit custodial torture and thus “an intervention from this Hon’ble Court has become imperative.”⁵¹ Furthermore, owing to the analysis of Indian laws dealing with torture and its obligation towards international law, there have been ample recommendations made by the United Nations, International Community and various other writers and scholars. The authors, therefore, make the following recommendations: -

1. India should ratify UNCAT without making reservations on Complaints and accountability mechanism as provided under UNCAT. It is necessary to make the justice system efficacious for the victims.
2. The Bill on Prevention from Torture, a standalone law on this issue must also include a mechanism to prosecute officials who fall within the definition of a public servant as they can be prosecuted only by a sanction of the state government or the central government.
3. India must take effective measures to comply with the recommendations made by the OCHCR in 2018 and 2019 in their Report on Torture.
4. Investigate all deaths that have occurred in the context of security operations in Jammu and Kashmir following the guidelines laid down by the Supreme Court of India
5. Bring into compliance with international human rights standards all Indian laws and standard operating procedures relating to the use of force by law enforcement and security entities, particularly the use of firearms: immediately order the end of the use of pellet-firing shotguns in Jammu and Kashmir for crowd control.⁵²
6. Even after comprehensive guidelines of the Supreme Court in *D.K Basu* and *Sheela Barse’s case*, there have been a flagrant violation of the law as well as the guidelines. Thus, the Government must ensure that these guidelines be implemented and followed.
7. Rehabilitative measures must be adopted to bring the victims of torture to the fore of mainstream of life.

Lastly, it is pertinent to note that although many around the world argue the wrongs which are being done by torture as a tool, however, it is a contentious topic throughout the world and has resulted in many scholarly pre-legal debates. Many around the world with the evolving time has come out to forbid cruel and bizarre

⁵¹ Gaurav Vivek Bhatnagar, “SC Direct all States, UTs to send replies on Torture Bill within Three Weeks (The Wire, 22 January 2019) <<https://thewire.in/law/sc-directs-all-states-uts-to-send-replies-on-torture-bill-within-three-weeks>> accessed 31 October 2019

⁵² United Nations High Commissioner for Human Rights, “Update of the Situation of Human Rights in Indian-Administered Kashmir and Pakistan-Administered Kashmir from May 2018 to April 2019” (reliefweb 8 June 2019) <<https://reliefweb.int/report/pakistan/update-situation-human-rights-indian-administered-kashmir-and-pakistan-administered>> accessed 1 November 2019

penalties and have declared that deliberate torture committed by a person invested with official authority is a violation of internationally accepted human rights norms. But, at the same time, many have tried to give a reasonable explanation for torture and have supported cruel punishments.⁵³ The basic ethical debate is often presented by contrasting a deontological versus a utilitarian viewpoint. A utilitarian thinker may believe that if torture results in an overall positive outcome resulting in lives being saved, torture can be justified.⁵⁴ However, the aforementioned argument is not acceptable in the present time as it violates the *jus in bello* principle of non-combatant immunity, which is a right that can never be suspended, even during emergencies.⁵⁵ The whole concept of torture cannot be justified, not even to extract the military information as it takes away the basic human right of that person and will set a precedent for the others. Although in reality it can never be stopped being practised, however, should remain anathema to liberal democracy and should never be regulated, countenanced, or covertly accepted in a war on terror.⁵⁶

⁵³ Nehaluddin Ahmad and Gary Lilienthal, "Proscribing torture: an analysis in Indian and ethical contexts" [2016] 42 (1) CLB 38, 46

⁵⁴ Anthony Lewis, 'Making torture legal' (The New York Review of Books 15 June 2004) <<https://www.nybooks.com/articles/2004/07/15/making-torture-legal/>> accessed 28 October 2019

⁵⁵ AJ Bellamy, "No Pain, No Gain? Torture and Ethics in the War on Terror" (2006) 82(1) IA(RIIA) 121, 124

⁵⁶ Nehaluddin Ahmad and Gary Lilienthal, "Proscribing torture: an analysis in Indian and ethical contexts" [2016] 42 (1) CLB 38, 46