The Tortured Bill – An Analysis of The Prevention Of Torture Bill, 2010

Jitendra Soni and Kanad Bagchi[*]

A special legislation aimed at ratifying the Convention against Torture and criminalizing act of torture in domestic law, eventually fails to meet even the minimum standards laid down in international law. This is the saga of Prevention of Torture Bill, 2010 which was passed by Lok Sabha off lately. The present note attempts to summarize and critically evaluate the three most important aspects of the Bill which requires proper debate, i.e. first the definition of torture, secondly the punishment for torture and lastly cognizance of torture. It is argued by the authors that though the intention of legislature is to define torture and to provide for its punishment, the bill in the present form fails to establish a strong and credible legal framework for the prevention of torture.

I. Introduction

The Prevention of Torture Bill, 2010[1] was introduced in the Lok Sabha on 26th April, 2010. While it was passed by the Lok Sabha on 6th May, 2010, the Rajya Sabha passed a motion for reference of the bill to the select committee on 31st August, 2010.[2] The Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (UNCAT) was adopted by the United Nations General Assembly on 9th December, 1975 [Resolution 3452 (XXX)]. India signed the Convention on 14th October, 1997. Insufficiency of prevalent domestic laws in defining and criminalizing torture necessitated *"either amendment of the existing laws such as Indian Penal Code or bringing in a new legislation."*[3] In this regard discussions were held with the Law Commission as well as

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[*] 4th year students, B.B.A.LL.B (Hons.), KIIT Law School, Bhubaneswar India

[1] Bill No. 58 of 2010.

[2] Rajya Sabha Debates, VKK-MCM/1a/11.00, 220th Session, (31st August 2010) Available online at <http://164.100.47.5/newdebate/220/31082010/Fullday.pdf> (Last visited March 21, 2011)

[3] *Ibid,* Statement of Objects and Reasons, ¶ 1

Attorney General of India wherein it was decided to enact a separate piece of legislation for the purpose of ratification and implementation of the CAT.[4] It seeks to define *"torture"* and "*to provide punishment for torture inflicted by public servants or any person inflicting torture with the consent or acquiescence of any public servant and for matters connected therewith or incidental thereto*."[5]

The National Human Rights Commission (NHRC) in its Annual Reports recorded the custodial deaths of 16,836 persons or an average of 1203 persons per year during 1994-2008.[6] These included 2,207 deaths in police custody and14,629 deaths in judicial custody.[7] The Law Commission of India in its 152nd report on custodial crimes states the situation thus "*if power tends to corrupt in the political arena, it is equally true to say that a situation of authority tends to abuse of authority. Such abuse may take a variety of forms. It may lead to physical torture, mental cruelty, silent psychic domination or any other form of abuse. The varieties of custodial torture and crime can be as infinite as are the varieties of human perversity*."[8]

The Bill no doubt is an initiative in the right direction; however, the scope of the Bill remains far from being satisfactory. If the end goal of the Bill, as it is stated, is to comply with the UNCAT then it needs to be emphasized that it has failed miserably. The issue of torture is complex and prevention of torture and protection from torture require numerous legal mechanisms. The Bill as we shall see, does not even take into account

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4 *Ibid,* Statement of Objects and Reasons, ¶ 2

5 *Ibid,* Preamble

6 *Prevention and Punishment of Torture Bill, Report of the National Conference on the Prevention of Torture Bill, 2008* as drafted by Government of India, Asian Centre for Human Rights, July 2009. Available online at <http://www.achrweb.org/reports/india/India-Anti-Torture-Bill-2009.pdf> (Last visited May 26, 2010)

7 *Ibid.*

8 Law Commission of India, *One Hundred and Fifty Second Report on Custodial Crimes*, 1994, available online at <http://lawcommissionofindia.nic.in/101-169/Report152.pdf> (Last visited May 26, 2010)

some of the minimum standards of protection that needs to be afforded for the proper implementation of the UNCAT.

The Bill contains three operative paragraphs relating to (1) definition of torture, (2) punishment for torture and (3) limitations or cognizance of offences.

II. Definitional Challenge

Clause 3 of the Bill defines torture to be an "intentional" act committed by anyone who is a "public servant" or being"abetted" by a public servant or with the "consent" or "acquiescence" of a public servant, 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.

This definition completely fails to take into account the width and ambit of the definition as provided in UNCAT. While the bill covers only acts causing grievous hurt or acts which endangers life, limb or hearth, definition of torture in the convention is also extended to acts which cause *"severe pain and suffering"*.[9] As per Clause 2 of the proposed law, *"words and expressions used...have the same meanings respectively assigned to them in the Indian Penal Code"*.[10]

Grievous hurt is defined in section 320 of the IPC, 1860 which contains only eight categories of hurt which are considered as grievous.[11]

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[9] *See* 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,Art. 1, available online at: http://www.unhcr.org/refworld/docid/3ae6b3a94.html [Last visited March 20, 2011].

[10] *Supra* note 1, § 2(a)

[11] *See* Indian Penal Code, 1860, § 320. (These are Emasculation, Permanent privation of the sight of either eye, permanent privation of the hearing of either ear, privation of any member or joint, destruction or permanent impairing of the powers of any member or joint, permanent disfiguration of the head or face, fracture or dislocation of a bone or tooth and any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits).

Therefore for an act to be falling within the definition of torture, it needs to be of a very high threshold and magnitude. It has been seen that some of the common methods of 3rd degree interrogation include that of severe beatings, electric shocks, head banging, punching, cigarette burning, rubbing of pepper or other substances on mucus membranes and other forms of aggravated deliberate subjection of a person's body to pain.[12] In the light of the above argumentation, it is submitted that none of the aforesaid mistreatment would amount to torture if the victim's condition does not fall into any of the categories mentioned in section 320 of IPC. Further if the person is subjected to food deprivation or forcible feeding with spoiled food, animal or human excreta or other food not normally eatenby the victim, would not amount to torture. The disgraceful condition of sex workers and hijras in police custody is not unheard of; they are subjected to verbal abuse, beatings, and other such disgraceful acts including the insertion of foreignbodies into the sex organs or rectum or electrical tortureof the genitals.[13] The bill, does not take into account the element of coercion or intimidation either. Torture as defined under the bill completely overlooks the present position and would allow the perpetrators of crime to escape with impunity and would completely obliterate the objective of the Bill which is to provide for more effective implementation of the Convention Against Torture. The clause when read as a whole point to another major infirmity, that being, any act which causes grievous hurt would still not amount to torture if it was not inflicted for the purposes of obtaining "information" or "confession". Therefore if a person is "simply" beaten up without any reason, it would not amount to torture under the definition.

III. Punishment For Torture

Clause 4 reads "*Where the public servant referred to in clause 3 or any person abetted by or with the consent or acquiescence of such public servant, tortures any person—*

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[12] *Human Rights Violations against the transgender community*, Report by Peoples' Union for Civil Liberties, Karnataka, September 2003. Available at <http://sangama.org/files/PUCL%20Report.pdf> (Last visited May 26, 2010)

[13] *Ibid.*

(a) for the purpose of extorting from him or from any other person interested in him, any confession or any information which may lead to the detection of an offence or misconduct;

AND

(b) on the ground of his religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, shall be punishable with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine."

The most amazing aspect of this clause is that it provides for punishment for acts of torture only if both the requirements as envisaged in sub-clauses (a) and (b) of clause 4 are fulfilled. Hence, even if an act amounts to "torture" under clause 3 of the bill, it will be punishable only if it was committed "*(a) for the purpose of extorting from him or from any other person interested in him, any confession or any information which may lead to the detection of an offence or misconduct;* ***AND*** *(b) on the ground of his religion, race, place of birth, residence, language, caste or community or any other ground whatsoever"*. If a person was subjected to torture for some reason, other than those mentioned under clauses (a) and (b), such as threatening witness and committing gross acts of cruelty against them which can be for political motives, extortion or personal conflicts, witnesses of police encounters or for no reason at all, it would not be punishable under this clause. Further, for an act of torture to be punishable both clauses (a) and (b) have to be fulfilled concurrently and simultaneously. Inclusion of the conjunction "AND" requires that infliction of torture should be for the purposes of extortion of information and at the same time should be discriminatory on grounds of either religion, race, place of birth, residence, language, caste or community or any other ground. Therefore for an act to be punishable under this clause it has to be directed towards a particular class of people on account of some attributable identity. For a victim it might still be possible to prove that he was subjected to torture for the purposes extorting information and confession, however, it may not be possible for him to prove that he was treated in a discriminatory

manner. The protection which the bill claims too afford is totally nullified by this provision.

Article 1 of the UNCAT which defines the term "torture" also provides for a provision for discriminatory treatment in the following words "…punishing him for an act he or a third person has committedor is suspected of having committed, or intimidating or coercing him or a third person, *or for any reason based on discrimination of any kind*…". Here the disjunction used is "or" thereby connotes the meaning that discrimination can be an independent ground for the purposes of torture. It exists independently of the other requirements such as intimidation or coercion and can alone bring an act of a public official under the definition of torture.

IV. Quantum Of Punishment

The quantum of punishment as stated in clause 4 of the Bill provides for imprisonment for a term which may extend to a maximum of 10 years. This according to the gravity of the crime is very disproportionate. An undesirable act, more so an act of torture by them can be attributable directly to the state. The law enforcement agencies are nothing but agencies or instrumentalities of the state. The law enforcement agencies are entrusted with the responsibility to ensure that there are no violations of the law, and hence when they are themselves involved in an act of such nature, the punishment awarded to them should be much higher. An instance of this can be found in the provisions of rape by public officers or a public servant under section 376 of IPC which provides for imprisonment of not less than 10 years and which may even extend for life. Public power wielded by public authorities is held in trust and hence they are liable for higher quantum of punishment proportional to nature and gravity of the crime.

V. Limitations Or Cognizance Of Offences

Clause 5 of the Prevention of Torture Bill provides that:

> "*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 six months from the date*

on which the offence is alleged to have been committed".

A limitation providing for a maximum period of six months from the date on which the offence is alleged to have been committed and the date on which the complaint is registered is absolutely unreasonable. There are certain crimes which are committed in judicial custody[14] which makes the victims very vulnerable, they completely lose their self confidence and it takes them considerable amount of time to recover. A victim of such atrocity is not expected to stand up and fight back immediately.

The "Notwithstanding" is absolutely unjustified. There is no limitation prescribed in the CrPC, 1973 for offences punishable with more than three year of imprisonment.[15] Further there is no reason for a limitation clause for an act purported to have been done by a public official, considering the fact that they are agents of the state. As argued earlier, they should be subjected to harsher punishment.

Clause 6 of the Prevention of Torture Bill provides that:

"*No court shall take cognizance of an offence punishable under this Act, alleged to have been committed by a public servant during the course of his employment, except with the previous sanction…*"

This clause makes it mandatory for prior sanction from the appropriate government before the court can take cognizance of an offence punishable under the Bill. Section 197 of the CrPC provides for prior sanction from the appropriate government for prosecution of the alleged public servants. It is an accepted fact that sanction is rarely given in such circumstances.[16] The Select Committee of the Parliament did not

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[14] *Supra* note 12.

[15] *See* Code of Criminal Procedure, 1973, § 468.

[16] *India: Briefing On The Prevention Of Torture Bill,* Amnesty International (October 2010), Available at <http://www.amnesty.org/en/library/asset/ASA20/030/2010/en/d0dd2c3f-5f32-464e-b97d-50e5e6456f96/asa200302010en.html#sdfootnote13sym> (Last visited March 21, 2011).

recommend dilution of this provision in the interest of the honest public servants, however taking note of the procedural delays inherent in the working of criminal justice system it recommended an inclusion of deemed provision in the bill under which if the requested sanction is not granted within a period within a period of three months from the date of application, it would be deemed to have been granted.[17]

VI. Conclusion

The Supreme Court rightly noted in the case of D.K. Basu vs. State of West Bengal[18] that "Custodial torture is a naked violation of human dignity and degradation, which destroys, to a very large extent, the individual personality. It is a calculated assault on human dignity and whenever human dignity is wounded, civilization takes a step backward." The Bill in present form suffers from some glaring loopholes like – Clause 3 of the Bill which defines 'torture' is inconsistent with the definition in 'Convention Against Torture'. Also, 'torture' under the bill requires high threshold to be proved and so, it should be lowered down. The conjunction 'And' should be substituted with Disjunction 'Or' so that Clause 4 of the Bill which accords punishment for torture is brought in consonance with Article 1 of UNCAT. Clause 5 and 6 in present form further weakens the Bill as there is a limitation period of just six months and also, there is need for prior government approval for trying those accused of torture. The present bill, though has a very commendable objective, will remain a paper tiger, if the glaring loopholes are not addressed.

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[17] *Report of the Select Committee on the Prevention of Torture Bill, 2010,* Rajya Sabha, Parliament of India (6th December 2010), Available at <http://www.prsindia.org/uploads/media/Torture/Select%20Committee%20Report%20Prevention %20of%20Torture%20Bill%202010.pdf> (Last visited March 21, 2011)

[18] 1997 CrLJ 743 (SC)