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# **“A CRITICALLY ANALYSIS OF TORTURE WITH SPECIAL REFERENCE TO INDIA”**

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## **ABSTRACT**

This article tends to have A critically analysis of torture with special reference to india The term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person 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 intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. In this situation in countries like India with a large population, there is a lot of torture and human right violations are happening every day, the constitution of India does not define torture. Torture is infliction of mental or physical suffering by or with the consent of state authorities inflicted for a specific purpose such as gaining information, punishment or intimidation. There are several laws and international conventions which consider torture to have taken place only when a public official is involved. Torture includes a variety of methods like beating, electric shock, sexual abuse, and prolonged solitary confinement, deprivation of sleep, food and water among others. Further, torture is not only limited to the physical suffering but also the mental suffering. As for India Prohibition of torture and India, Laws pertaining to prevention of Torture, International pressure on India, Law Commission's 273rd report, The Law Commission Report on Torture, Supreme Court of India and Torture, Prevention Of Torture Bill, 2017, and Features Of Draft Prevention Of Torture Bill, 2017.so this article elaborates on such titles.

## **1. INTRODUCTION:-**

The definition of torture, systematic or widespread torture belongs to a special group of crimes recognized by international law as crimes against humanity. The category further includes the practice of systematic or widespread murder, forced disappearances, deportation and forcible transfers, arbitrary detention, custodial torture and persecutions on political or other grounds. A number of international conventions or instruments recognize these crimes as crimes against humanity. The effort to eradicate torture works at many levels of international, regional, and national decision-making and often involves both public and civil society initiatives, working in complementary roles. In addition to the prohibition of torture in contemporary international law and practice, the capacity to provide a sanctioning response to torture has also been extended to the institutions of private law. Moreover one human being by another is a global human rights issue. Many types of torture are listed in this article. What are the types of torture in a large country like India? Are remedies for these provided in the Constitution of India and other laws? What are the possible punishments for the perpetrators of torture? What are the compensations available to victims? What are the current measures taken by the government against torture in India? Here is an article to answer such questions and create awareness against torture.

## **2. LAWS PERTAINING TO PREVENTION OF TORTURE IN INDIA:-**

Torture is not criminalised in law as a separate or special offense. Provisions in the Indian Penal Code, 1860 (sections 330 & 348) penalises acts that can also be considered as torture, with seven and three years of imprisonment respectively if proven guilty. But the offense attracts no particular relevance if the crime is committed by a police officer. The temporal treatment of the law is to deal with a regular offense. The 2 provisions also falls short of covering all aspects of torture, as defined in the Convention against Torture. In addition, the reduced possibility of a proper forensic medical examination of a victim and the complete absence of a witness protection mechanism facilitates easy acquittal of the criminal. The Indian Evidence Act, 1872 also does not have any provisions in dealing with the aspect of torture. The only record that is indicative of torture is the number of custodial deaths released every year in Crimes in India report released by the National Crime Records Bureau (NCRB) annually<sup>1</sup>. However, death in judicial or state's custody is an

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<sup>1</sup> . National Crime Records Bureau records also available at <http://ncrb.gov.in/statpublications/psi/Prison2015/Full/PSI-2015-%2018-11-2016.pdf>

extremely poor measure of torture even if custodial deaths are always met with impunity of the officials. Naturally, this is because there is no law in place to enforce criminal cases against agents of the government.

The UNCAT defines torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person 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 intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”

While there are some safeguards against torture in Indian law, they are seldom taken seriously and enforced. For instance, section 54 of Code of Criminal Procedure (Crpc) extends safeguard against any infliction of custodial torture and violence by providing for examination of arrested person by medical officer and section 176 of the Code provides for compulsory magisterial inquiry on the death of the accused in police custody. It can be unequivocally said that a democratic country ought to safeguard human rights and thus cannot be tolerant of any form of torture to human life. It takes an accountable and responsible government to recognize the iniquities within its system with the clear intent of upholding basic human rights as well as the right to life enshrined under Article 21 of the Indian Constitution. Law Commissions have over the years pushed for a legislation penalizing torture by public officials but the discourse around it has died down and needs to be reinvigorated as a fight for human rights.

India's stand so far, India signed the UN convention on October 14, 1997 but has not yet ratified it. The reason the government gives is that it has already criminalized torture under penal law. However, sections 330 and 348 of the Indian Penal Code, 1860 do not particularly criminalize torture instead it penalizes certain acts that involve torture. In addition, the provisions grant immunity to the police officers, armed forces personnel and public servants unless the government approves their prosecution.

### 3. INTERNATIONAL PRESSURE ON INDIA:-

The International Commission of Jurists had earlier criticized India's failure to tackle issues of torture and unaccountability of armed forces. It asked India to adopt the reforms suggested by the United Nations Human Rights Council and ratify convention against torture. Out of the 80 countries which participated in the second Universal Periodic Review of human rights record, 22 States urged India to immediately ratify the torture convention. The Universal Periodic Review is an interactive process carried out every four years. Under this framework, UN member states are reviewed for their human rights record. According to the Report of the Working Group on Human Rights in India, torture and ill-treatment are widespread in India. The report has also called for immediate intervention by the government against torture <sup>2</sup>.

### 4. LAW COMMISSION'S 273<sup>rd</sup> REPORT <sup>3</sup>:-

Although India signed the UNCAT in 1997, it is yet to ratify it <sup>4</sup>. In 2010, a weak Prevention of Torture Bill was passed by the Lok Sabha, and the Rajya Sabha later sent it to a Select Committee for review in alignment with the UNCAT. By 2017, the Law Commission had submitted its 273rd report and an accompanying draft torture law. But the Supreme Court dismissed the petition on grounds that the government cannot be compelled to make a law by mandamus; treaty ratification was a political decision; and that it was a policy matter.

Even with failings, the Commission's draft Bill is better than not having one at all. A version based on this draft was circulated to State governments for views, but nothing has come of it, and nothing is likely to, either. This reluctance is arguably because all governments appear to collectively agree that police brutality is a necessary evil to maintain law and order.<sup>5</sup>

#### **4.1. The Law Commission Report on Torture <sup>6</sup>-Key Recommendations:-**

The Law Commission of India released its last year recommending the implementation of United Nations Convention against Torture through a legislation. The key recommendations of law commission's 273rd report are as follows:

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<sup>2</sup>.Torture Update: India Asian Centre of Human Rights also available at <http://www.achrweb.org/wp-content/uploads/2018/06/TortureUpdateIndia.pdf>

<sup>3</sup>. <https://indianlawwatch.com/law-commission-report-no-273-implementation-of-united-nations-convention-against-torture-through-legislation>

<sup>4</sup> .India should ratify UN Convention against Torture, THE HINDU, February 17, 2013

<sup>5</sup> .<https://www.thehindu.com/opinion/lead/indias-torture-culture-needs-to-end-now/article31973431.ece>

<sup>6</sup> .273rd law commission report also available at <https://www.sconline.com/blog/post/2017/11/03/273rd-law-commission-report-implementation-un-convention-torture-cruel-inhuman-degrading-treatment-punishment-legislation/>

- As the law commission recommended, the government may take steps to ratify the convention against torture by enacting a revised prevention of torture bill in the parliament <sup>7</sup>.
- Amendments to the Criminal Procedure Code, 1973, and the Indian Evidence Act, 1872, to accommodate provisions regarding compensation and vesting the burden of proof on the accused officers.
- Provisioning compensation to the victims with the Courts to decide on compensation after taking into account various facets of each case, such as the nature, purpose, extent and manner of injury along with socio- economic backgrounds.
- Effective mechanism to protect the victims of torture, the complainants and the witnesses against possible threats, violence or ill treatment.
- Strong punitive punishments for those who indulge in torturing which could range up to life imprisonment.
- The State to bear the responsibility for the injuries caused by its agents on citizens, and that the principle of sovereign immunity cannot override the rights assured by the Constitution.
- The courts will bear in mind the socio-economic background of the victim and ensure that the compensation helps the victim to bear the expenses on medical treatment and rehabilitation.
- Ratifying UNCAT would mean that India would have had to pass the Prevention of Torture Bill that was first introduced by the UPA II government in 2010. The bill defined torture as: an act by a public servant or by a persons with acquiescence of a public servant, causes grievous hurt or danger to life, limb or health (whether mental or physical). It proposed punishment of minimum 3 years which may be extended to 10 years and fine, for torture inflicted for purpose of extorting confession, or for punishing or on the ground of religion, race, place of birth, residence, language, caste or community or any other ground.
- The 273rd Law Commission report released in 2017 suggested, among other things, payment of compensation to victims of torture keeping in mind socio-economic background of the victim, nature, purpose, extent and manner of injury, including mental agony caused to the victim such as the amount suffices the victim to bear the expenses on medical treatment and rehabilitation. The Commission had also observed that tolerance of

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<sup>7</sup> . <https://www.gktoday.in/topic/law-commission-273rd-report-and-prevention-of-torture-bill-2017/>

police atrocities, amounts to acceptance of systematic subversion and erosion of the rule of law and that it is not permissible whether it occurs during investigation, interrogation or otherwise.

- India's refusals to ratify UNCAT and its unwillingness to have any law that condemns torture only makes its fealty to the doctrine of sovereign immunity apparent. The doctrine of sovereign immunity is a concept of common law principle consistently followed in British jurisprudence in last several centuries that 'King commits no wrong' and has evolved on the principle of sovereignty that a State cannot be sued in its own court <sup>8</sup>.

## 5. SUPREME COURT OF INDIA AND TORTURE:-

Until three decades after independence, the courts in India continued to give primacy to the doctrine of "sovereign functions" and rarely granted relief in petitions filed against Torture. For years now, the Court has raised the issues of increasing custodial torture and has preserved the basic fundamental rights of the citizens in various cases before it. In *Sunil Batra v. Delhi Administration*,<sup>9</sup> the Court considered solitary confinement of prisoners as a human perversity that should be avoided and issued suitable guidelines. In *Khatri v. State of Bihar*<sup>10</sup>, the Bhagalpur blinding case, the Court introduced the principle of giving compensation to the victims for the first time. The principle for calculating quantum of compensation was laid down in *People's Union for Democratic Rights state of Bihar*<sup>11</sup>, In 1994, the Court in *Arvind Singh Bagga v. State of UP*<sup>12</sup>, introduced the principle of personal liability wherein the State could recover the compensation paid to the victim or his family from the concerned officials involved in the matter.

In *D.K. Basu v. State of West Bengal*<sup>13</sup> the Supreme Court had observed, "Torture has not been defined in the Constitution or in 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 the human civilisation".

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<sup>8</sup>. India among 9 nations that have not ratified UN Convention against Torture , OUTLOOK, May 4, 2017

9. 1980 AIR 1579

10. AIR 1981 SC 928

11. AIR 1987 SC 355

12. 1994 6 SCC 565

13. 1997 1 SCC 416

14. 1980 AIR 1087

In *Raghubir Singh v. State of Haryana*<sup>14</sup>, a case where the violence employed by the police to extract a confession resulted in death of a person suspected of theft, the court had passed severe remarks “We are deeply disturbed by the diabolical recurrence of police torture resulting in terrible scare in the minds of common citizens that their lives and liberty are under a new peril when the guardians of law gore human rights to death.”

In another case, *State of U.P. v. Ram Sagar Yadav*<sup>15</sup>, the Supreme Court dealt with a case where the policemen murdered one Brijlal who not only refused to pay a bribe of Rs.100 in a trivial matter of cattle trespass but also complained about demand of bribe to senior police officers. The Court observed that “Police officers alone and none else can give evidence as regards the circumstances in which a person in their custody comes to receive injuries while in their custody... The result is that persons on whom atrocities are perpetrated by the police in the sanctum sanctorum of the police station are left without any evidence to prove who the offenders are.” The Court recommended that the “law as to the burden of proof in such cases may be re-examined by the legislature so that handmaids of law and order do not use their authority and opportunities for oppressing the innocent citizens who look to them for protection.

## 6. PREVENTION OF TORTURE BILL, 2017<sup>16</sup>:-

### 6.1. Progress in Passing the Bill :-

Although India signed the UNCAT in 1997, it is yet to ratify it. In 2010, a weak Prevention of Torture Bill was passed by the Lok Sabha, and the Rajya Sabha later sent it to a Select Committee for review in alignment with the UNCAT. But the Committee’s recommended law, submitted in 2012, never fructified, as the Bill was allowed to lapse. In 2016, Ashwani Kumar, a senior advocate and former Union Minister of Law, sought the enactment of a torture law via a Supreme Court petition<sup>17</sup>. By 2017, the Law Commission had submitted its 273rd report and an accompanying draft torture law. But the Supreme Court dismissed the petition on grounds that the government cannot be compelled to make a law by mandamus; treaty ratification was a political decision; and that it was a policy matter.

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15. 1985 1 Scc 552

16. <http://164.100.47.4/billtexts/rsbilltexts/AsIntroduced/torture-E-151217.pdf>

17. Ashwini Kumar vs Union Of India, writ petition (civil) no. 738 OF 2016

India had earlier introduced the Prevention of Torture Bill, 2010 in the Lok Sabha on April 26, 2010. While Lok Sabha passed the bill, Rajya Sabha referred it to a Select Committee. The Select committee had proposed to amend the bill to make it more compliant with the torture convention. The bill then lapsed and government also did not show any urgency to enact a revised torture bill<sup>18</sup>. In addition, India has also refused to repeal the Armed Forces Special Powers Act (AFSPA), which enables Armed Forces to perpetrate human rights abuses in the North East eastern states and Kashmir. The Prevention of Torture Bill, 2010 sought to punish any public official who inflicts harm to a person in custody. The Act lays down specific instances wherein a public official shall be held liable, namely:

1) When the act is committed in order to obtain a confession from the victim or any other information that implicates the person in custody.

2) When the Act is committed on the grounds such as religion, race, sex, language, caste or any other ground.

The Bill also lays down the due procedure that is to be followed in cases which are in relation to custodial torture<sup>19</sup>. The bill clearly demarcates the manner in which nature of the crime is to be ascertained and due procedure that a victim is follow in order file a complaint with regards to the same. It also lays emphasis on types of torture and the remedies that are available to the victim in relation to the crime.

### **6.2 Features Of Draft Prevention Of Torture Bill, 2017**<sup>20</sup>:-

- Any public servant or an individual authorised by him indulges in an act of torture if they inflict on another person: (i) grievous hurt, (ii) danger to life, limb, or health, (iii) severe physical or mental pain, or (iv) death for the purpose of acquiring information or punishment.
- Punishment for torture includes imprisonment up to 10 years and fine. In case torture leads to death, the punishment includes death or life imprisonment in addition to fine.
- The bill makes state governments responsible for protecting victims of torture, complainants, and witnesses against possible violence and ill- treatment. The state government will provide such protection from the time of submission of complaint till conclusion of trial for the offence.

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<sup>18</sup> .Dr. Shashi Tharoor urges Govt to bring law against torture, LIVE LAW, December 13, 2018

<sup>19</sup> . Ex-minister plea for anti-torture law, TELEGRAPH INDIA, March 31, 2017

<sup>20</sup> . Supra 43

- The Law Commission recommended amendments to the Code of Criminal Procedure, 1973 to allow for payment of compensation in case of torture. It made this recommendation citing that courts have previously awarded compensation for various forms of torture including illegal detention, and custodial torture.
- The Law Commission recommended amendments to the Indian Evidence Act, 1872 to ensure that in case a person sustains injuries in police custody, it will be presumed that these have been inflicted by the police. The burden of proof shall lie on the police authorities to explain such injuries.

## **7. CONCLUSION AND SUGGESTIONS: -**

The Prevention of Torture Bill, 2017, drafted by the Law Commission, is a unique opportunity for the government to create a comprehensive law to counter the menace of torture and address the roadblocks to the prevention of torture in India. One of the reasons for custodial torture is the police sub-culture and lack of proper training. For a long time now, the culture of custodial torture is prevalent in Indian prisons. A strong legislation would act as the mode of deterrence and will make the prisons safer for the accused. The custodial torture is a violation of human dignity involving various fundamental rights. An arrested person has the right to life and liberty and it could only be taken away by the procedure established by law. Thus, the torture inflicted on a person is a violation of Article 21 of the Constitution. It is noteworthy that even after 71 years of independence and 21 years after signing UNCAT, no substantial steps have been taken to effectuate it. It is high time that the Government ratify UNCAT and bring a legislation with strong penal provisions ensuring that anyone indulged in the act of torture should not get away from the hands of justice.

### **SUGGESTIONS:-**

- A country like India should domesticate the UNCAT definition of torture into their law as it. Moreover must acknowledge the universal jurisdiction applicable to torture such that torture perpetrators are left no room to escape liability.
- Out of 170 signatories to the United Nations Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, India remains one of the only eight countries yet to ratify the Convention.

- In India, as the law commission recommended, the government may take steps to ratify the convention against torture by enacting a revised prevention of torture bill in the parliament.
- There is no independent authority to investigate complaints of torture, and no provision for granting compensation to torture victims has been made

Therefore finally in this article by stating that no human being should inflict physical or mental torture and other degrading acts on another human being and if it is done, the government should punish the perpetrators and at the same time provide adequate compensation to the victim.

