

ISSN: 2582-6433



# INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary  
Peer Reviewed 6th Edition

VOLUME 2 ISSUE 7

[www.ijlra.com](http://www.ijlra.com)

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# **LEGISLATIVE FRAMEWORK ON CUSTODIAL TORTURE IN INDIA**

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## **ABSTRACT**

Custodial torture is universally held as one of the cruellest forms of human rights abuse. The Constitution of India, the Supreme Court, the National Human Rights Commission (NHRC), and the United Nations strongly condemn it. However, the law enforcement authorities across the country defy these institutions in utter disregard to the basic fundamental rights of an individual embodied in the Constitution of India. It is one of the heinous crimes for the entire human kind, where people believing that police are meant for their protection and police itself taking disadvantage of their authority. Therefore, there is an urgent need to strike a balance between individual human rights and societal interests in combating crime by using a realistic approach.

## **Introduction**

The rule of law means that no one shall be deprived of his liberty except with the authority of a law and all persons shall be equal before the law. It means that even the Government and its agents have to act according to and within the limits of the law. State or region and the wings of the State, the law and order machinery, i.e., the police. Custodial torture, inhuman treatment, handcuffing prisoners, third degree methods which are often used and practiced by police officials during the course of their official duties are against the norms of the civilised nations and are barbarous activities violative of the principles of rule of law and human dignity. The main objective of the police is to apprehend criminals, to protect law abiding citizens, to prevent commission of crimes and to maintain law and order. In India, torture is not expressly prohibited by the Constitution but the Ministry of Home

Affairs has claimed that Indian law contains adequate provisions for safeguarding human rights and sufficient safeguards against police brutality and torture also exist. Although, the prohibition of torture in specific terms lacks Constitutional authority, Indian courts have held that Article 21 of the Constitution implies protection against torture.

## **Provisions under the Indian Legal System: To Protect a Person from Custodial Torture**

- **Protection against Conviction or Enhanced Punishment under Ex-Post Facto Law**

Article 20(1) of the Constitution of India provides that, no person shall be convicted of any offence except for violation of law in force at the time of commission of the act charged as an offence, nor be subjected to any greater penalty than that which might have been inflicted under the law in force at the time of the commission of an offence. The concept of ex-post facto law has its roots in the maxim *nulla poena sine lege*, which profounds the idea that no man shall be made to suffer except for a distinct breach of the criminal law.

- **Protection against Double Jeopardy**

Article 20(2) of the Constitution of India provides that,

No person shall be prosecuted and punished for the same offence more than once.

Article 20(2) is based on the maxims *nemo debet bis vexari, si constat curiae quod sid pro una et eadem causa*, which means that no one must be vexed twice if it appears to the court that it is for one and the same cause.

- **Right not to be Witness against Himself**

Article 20(3) of the Constitution of India provides that, No person accused of any offence shall be compelled to be a witness against himself.

The Constitutional protection against testimonial compulsion on the premise that such compulsion may act as subtle form of coercion on the accused and it is also the underlying theme of several statutory provisions – particularly Sections 24-26 of the Indian Evidence Act. Article 20(3) of the

Constitution comes into operation as soon as a formal accusation is made whether before the commencement of a prosecution or during its currency. The legal perils following upon refusal to answer or answer truthfully cannot be regarded as compulsion within the meaning of Article 20(3). On the other hand, if there is any mode of pressure, subtle or crude, mental or physical, direct or indirect but sufficiently substantial, applied by the policeman for obtaining information from an accused strongly suggestive of guilt, it becomes 'compelled testimony', violative of Article 20(3).

*Section 163(1) of the Code of Criminal Procedure, 1973 provides that,*

(1) No police officer or other person in authority shall offer or make, or cause to be offered or made, any such inducement, threat or promise as is mentioned in Section 24 of the Indian Evidence Act, 1872 (1 of 1872).

*Section 348 of Indian Penal Code, 1860 provides that,*

Whoever wrongfully confines any person for the purpose of extorting from the person confined or any person interested in the person any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the person confined or any person interested in the person confined to restore or to cause the restoration of any property or valuable security or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

*Section 24 of the Indian Evidence Act, 1872 provides that,*

A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

*Section 25 the Indian Evidence Act, 1872 provides that,*

No confession made to a police-officer shall be proved as against to a person accused of any offence.

*Section 26 the Indian Evidence Act, 1872 provides that,*

No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such persons.

*Section 27 the Indian Evidence Act, 1872 provides that,*

When any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

- **Right to Life and Personal Liberty**

*Article 21 of the Constitution of India provides that,*

No person shall be deprived of life or personal liberty except according to procedure established by law.

Article 21 does not contain any express provision against torture or custodial crimes. The expression 'Life or personal liberty' occurring in the Article has been interpreted to include constitutional guarantee against torture, assault or injury against a person.

- **Right to be Informed of the Ground of Arrest**

*Article 22 (1) of the Constitution of India provides that,*

No person who is arrested shall be detained in custody without being informed as soon as may be, of the grounds for such arrest, nor shall he be denied the right to consult and to be defended by a legal practitioner of his choice.

*Section 49 of the Code of Criminal Procedure, 1973 provides that,*

The person arrested shall not be subjected to more restraint than is necessary to prevent his escape.

*Section 50 of the Code of Criminal Procedure, 1973 provides that,*

Person arrested to be informed of grounds of arrest and of right to bail.

*Section 55A of the Code of Criminal Procedure, 1973 provides that,*

It shall be the duty of the person having the custody of an accused to take reasonable care of the health and safety of the accused

*Section 75 of the Code of Criminal Procedure, 1973 provides that,*

The police officer or other person executing a warrant of arrest shall notify the substance thereof to the person to be arrested, and, if so required, shall show him the warrant.

- **Right of an Accused Person to Counsel**

Right to Counsel is a fundamental right under the Constitution of India by virtue of Article 22 (1).

*Section 41D of the Code of Criminal Procedure, 1973 provides that,*

When any person is arrested and interrogated by the police, he shall be entitled to meet an advocate of his choice during interrogation, through not throughout interrogation.

- **Protection against Illegal Arrest**

*Article 253 of the Constitution of India provides that,*

Notwithstanding anything in the foregoing provisions of this chapter, Parliament has power to make any law for the whole or any part of the territory of India implementing any treaty or, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.

- **Provisions under Navy Act, 1957**

*Section 85 of the Navy Act, 1957 provides that,*

No person subject to naval law who is arrested under this Act shall be detained in naval custody without being informed, as soon as may be, of the grounds for such arrest.

*Section 86 of the Navy Act, 1957 provides that,*

The charge made against any person subject to naval law taken into custody shall without any unnecessary delay be investigated by the proper authority and as soon as may be either proceedings

shall be taken for the trial or such person shall be discharged from custody.

*Section 87 of the Navy Act, 1957 provides that,*

The commanding officer shall be responsible for the safe custody of every person who is in naval custody on board his ship or in his establishment. The officer or sailor in charge of guard, or a provost-marshal shall receive and keep any person who is duly committed to his custody.

## **Prevention of Torture Bill, 2010**

The Prevention of Torture Bill, 2010 was introduced in the Lok Sabha on 26 April 2010 to allow India to ratify the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. It was passed by the Lok Sabha on the 6 May 2010. However, in the Rajya Sabha, the Government was forced to refer the Bill to a Parliamentary Selection Committee. The Government of India stated that the law is being enacted to provide punishment for torture inflicted by public servants or any person inflicting torture with the consent or acquiescence of any public servant and matters connected therewith or incidental thereto.

The Bill contains only three operative paragraphs relating to (1) definition of torture (2) punishment for torture and (3) limitations for cognizance of offences. It lacks many of the key provisions of the United Nations Convention against Torture. The three paragraphs outlined in the Bill also fall short of obligations that the ratifying parties to the United Nations Convention against Torture must undertake.

- **Definition of Torture**

Section 3 of the Bill 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 purpose to obtain from him or a third person such information or 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.

Article 1(1) of the UNCAT defines torture as any act by which severe pain or suffering whether physically or mentally, is 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.

The degree of harm required to constitute torture is more severe in the Bill, whereas the Convention's threshold starts from 'pain or suffering'. The Bill states that only actions that cause actual damage or danger constitute torture. The Bill relies on the definition of 'grievous hurt' found in the Indian Penal Code. Certain acts, which are already considered as torture under Section 330 of the Indian Penal Code, have been consciously evaded in the definition. Here, simple 'hurt' by a public servant would call for a punishment of a seven year term and fine.

Section 4 of the Bill infuses an additional and restrictive element into the definition of torture. Section 4 provides that 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 any person:

- 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 .

On the question of quantum of punishment there is no advancement in the existing provisions under Section 331 IPC, which punishes grievous hurt with imprisonment up to 10 years and fine. But, for an act causing 'danger to life', which would be prosecutable under Section 307 IPC and attract punishment for life, the proposed Bill, in fact, seeks to reduce the punishment as Section 4 of the Bill provides imprisonment for a term which may extend to ten years. Section 4 of the proposed Bill does not lay down any minimum sentence for a person found guilty of torture. The Select Committee

suggested that a minimum punishment of three years be given to make the law more of a deterrent. Also, the torturer should be fined a minimum of 1 lakh.

- **Limitation Period**

Section 5 of the Bill requires that a court can entertain a complaint only if it is made within six months of the date of the offence. Victims of torture need longer to be able to gather courage and resources to make the complaint. Under Section 468 of the Code of Criminal Procedure, the limitation of six months for taking cognizance is applicable only to offences punishable by a fine. Torture would definitely not fall within this category.

- **Penal Offences**

In a serious omission, the Bill does not incorporate the offences in the Indian Penal Code which constitute acts of torture – even those which specifically set out custodial crimes by public servants. The Law Commission in 1994 described the types of custodial crimes being perpetrated in ‘alarming dimensions’ – torture, assault, injury, extortion, sexual exploitation and death in custody.

The Bill also makes no reference to gender-based violence perpetrated by public servants, particularly violence affecting women in custody given the wide ambit for States to codify a broad definition of torture. As advised by the UN Committee against Torture, borrowing from Domestic definitions, the relevant Indian Penal Code offences need to be incorporated into the definition of torture in Sections 3 and 4 of the Bill.

- **Death in Custody**

In spite of high number of custodial deaths in India, many of them obviously resulting from torture, the Bill is totally silent on deaths in custody. Commonwealth Human Rights Initiative strongly recommends that Sections 3 and 4 be amended to include a provision that establishes death in custody, or death occurring as a result of injuries sustained while in custody, as a part of the definition of torture. Any death in custody, or as result of injuries sustained while in custody, should be made punishable with the offence of murder or culpable homicide not amounting to murder, depending on

the specific circumstances of each case.

- **Presumption**

The Law Commission in its 113th report on custodial violence recommended the insertion of a new Section in the Evidence Act, 1872, to give courts the power to draw a presumption that injuries caused to a person while in police custody were caused by the police officer with custody over that person. Commonwealth Human Rights Initiative objects to the proviso following Section 3 of the Bill, which states, provided that nothing contained in this Section shall apply to any pain, hurt or danger as aforementioned caused by law or justified by law.

- **Review Mechanisms**

The Bill also fails to provide for the establishment of appropriate review mechanism of interrogation practices and custodial treatment. Similarly, it does not provide any mechanism to ensure proper education and training of law enforcement officers, medical personnel, public officials and others interacting with those arrested or detained. The absence of such provisions dilutes its capacity to prevent torture in practice.

- **Power to Make Rules**

Anti torture Bill is silent about the powers of the Government to make rules for implementation of the Bill. Select Committee stated that the appropriate government would need to frame rules for implementation of Bill. Such a provision should be included in the Bill.

- **Expulsion and Extradition Provisions**

The Bill is silent on the requirements of Article 3 of the Convention that no State party shall expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. These prohibitions are particularly pertinent given that India has not ratified the 1951 Refugee Convention and does not have any national legislation for the protection of refugees.

## Conclusion

No doubt, there exists a need for a special and effective anti-torture programme. Historically, torture has been institutionalized in India during the British Rule, when it had been used as a weapon to keep the 'natives in submission' and suppress national liberation movement. The present ruling classes continue using this inherited institution to counter people's movements. Here torture is not an exception perpetuated by some 'evil subordinates', but rather a deliberate practice sanctioned by top ranking officials and policymakers. Special draconian laws have further institutionalized torture.

