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TORTURE AND INDIAN LEGISLATION: WHERE DO WE DRAW THE LINE

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ABSTRACT

“The opposite of love is not hate but indifference. Indifference creates evil. Hatred is evil itself. Indifference is what allows evil to be strong, what gives it power.” - Elie Wiesel

The accomplishment of social development for all citizens of the world depends upon an acknowledgment of the intrinsic morale and worth of each human being and a resolute observance of human rights. The use of torture is burdened with practical problems that seriously affect its effectiveness and its morally and legally challenging problems. The prohibition of torture has been treated as one of the most emblematic benchmarks of the modern human rights movement. Its prevalence has increased rapidly in the past decades in the National Constitutions. However, there is little evidence about whether constitutional torture prohibitions actually reduce torture or just suppress the accountability of law enforcement officials. Most of these law enforcement officials engage in ‘police brutality,’ which refers to various human rights violations by police that manifest themselves both on and off the street. Methods and tools desperately require an urgent change of investigation. The first step towards this goal for India would be for it to sanction the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984. At the same time, the United Nations, human rights NGOs, intergovernmental bodies,

religious organisations, and other institutions are continuing their efforts to eradicate torture worldwide.

INTRODUCTION

Torture is the infliction of severe mental or physical pain or just painful suffering for a purpose, such as the extraction of information or the coercion of a confession. It is an intentionally brutal act and is generally created in a way to provoke an emotional response from its receiver, which means that the perpetrator does not only acknowledge but also endeavours to exploit the humanity of the sufferer. The justification for torture, which was subservient to rational challenge throughout the centuries, was that it was a vital means required to thwart critical miscarriages of justice, which could bring about notable damage and the repercussions of which would be irremediable. It will continuously indicate or in some particular instances, even express in words, a distinct mode of viciousness. Torture is, in fact, an ascertainable reality, and it makes no distinction; however, much one strives to make it seem obscure.^[1] There is no precise use of a physical means for its premeditated purpose; however, in the present-day circumstances, more often than not, it is intimated that this is accurate. Suppose the old-fashioned means of torture were to be observed, and even after the addition of some modern means, it becomes evident that torture being perceived as solely just a corporeal practice is illogical. Yes, physicality is imperative, necessitates to be acknowledged, and will forever be assumed. Nevertheless, it is crucial to know that verbal menaces and mental harm most certainly cause harm to the body too. However, it cannot be uniquely defined.

¹Max Dorfman, *The Psychology of the Torturer* (2014), (August, 2020) https://www.huffpost.com/entry/the-psychology-of-the-tor_b_6327980 .

Even though the acts of torture are not required to function at the physical level, they penetrate the person in a way that is undoubtedly and arguably corporal but, more importantly, obscure and extreme in its ramifications on a victim's psychology. Torture is tragically considered to be necessary for some instances to save innocent lives that might be at stake. However, it is a terrible thing for a government to engage in and also encourage. It needs to be subject to strict safeguards, and it must be used when the information required is vital to avert a disaster or when time is of the essence, or the rest of the methods have been exhausted. It should be the absolute last resort that a person needs to turn towards.

Victims are treated as a means to an end and not as an end in themselves. Torturers frequently dehumanise their victims to make it easier to torture them, and the purpose of the torturers are considered to be of utmost importance, and the physical bodies of the victims are used to achieve those ends. In a way, this results in the victim losing autonomy over themselves, which in turn results in the suppression of individual thought. Human dignity and rights are violated, which includes the right to remain silent while being questioned. Committing these atrocious acts also ends in the torturers losing their humanity. They usually become increasingly desensitised to suffering, which could lead to them deciding that life is not worth anything. Committing acts of torture and being caught in the act could damage the moral authority and the reputation of the institution. This could cause internal dissent and cause harm to the agency or institution's goodwill and reputation.^[2]

² *Why is torture wrong?* (2019), http://www.bbc.co.uk/ethics/torture/ethics/wrong_1.shtml.

THE COMMUNAL ASPECTS OF TORTURE, ALONG WITH ITS EFFECTS ON INTERSECTIONALITY:

Traumatic events relating to torture give rise to friction and ambivalence within ethnic groups and community support structures. As faith is lost among family members, neighbours, and friends, entire communities can become polarised and disintegrate. Under steady governmental oppression, feelings of community despair and passiveness surface, leaving members with an overpowering sense of hopelessness because of the unimaginable barbarities they faced in their homelands.

This act of torture can also be found to be widespread among specific classes of people and can closely be correlated with intersectionality. Arriving at a comprehensive framework for the reconceptualization of torture, and progressively broadening the precise scope of intersectionality and torture, are priorities. The analysis of torture needs to incorporate a more extensive range of phenomena, from rape and attacks on sexual integrity to any suffering inflicted on human beings that is intricately intertwined with intersectionality. Intersectionality-based torture can be fully surmised only in relation to the socio-cultural systems and contexts that give it meaning. These acts may be an attack on a woman, man, or non-binary person, possibly based on their sexual orientation and identity (gender-based torture); and, a particular aim to devastate the human being by using multilevel linked elements that make the person more vulnerable. The methods used to torture victims vary by the class, caste, and gender that they identify with, among others. An intersectional outlook goes beyond this fact. Given that torture targets basic physical and psychological human needs in order to break the will, an intersectional perspective makes way

for an exploration of the logic behind the difference in the treatment of torture victims. Governmental and non-governmental organisations have been reprimanded for using prejudiced juridical definitions of torture that do not necessarily apply the same nuanced perceptions of intersectional violence to the forms of torture that women and men are often subjected to. This may result in a social silencing of the act of torture.

PREVENTION OF TORTURE BILL, 2010:

The Lok Sabha introduced the Prevention of Torture Bill in 2010 to give effect to the provisions of the United Nations Convention Against Torture. The Lok Sabha also passed the Bill on 6th May 2010. The Rajya Sabha then transferred the Bill to a Select Committee, which in turn had recommended modifications to the said Bill to make it slightly more amenable and to avoid any contrarities with the Torture Convention. However, the Bill clocked out and ceased with the adjournment of the 15th Lok Sabha and hence did not get turned into an Act.

The Minister for Home Affairs introduced the Prevention of Torture Bill, which makes torture a punishable offence. The Bill was introduced, originally to ratify the UN Convention against Torture of 1975, and the Statement of Objects and Reasons of the Bill states this quite clearly. The member countries of the Convention against Torture are required to confirm their domestic legislation with the provisions of the Convention, and even though India is a signatory of the Convention, there's still no law that has been enacted for the Convention to be ratified. Torture has been defined under this Bill, and the conditions are also prescribed under which torture can be punishable.

The Prevention of Torture Bill has three main elements, the first of which states the definition of 'torture' under Section 3 of the Bill. Section 3 states that a public

servant or any person with the consent of a public servant has committed the act of torture if he causes grievous hurt to any person or imposes a danger to life, limb, or health (mental or physical) of any person. The act of torture should also be intentional and must be committed with the intention of gaining a confession or new information.

The second element of this Bill is stated under Section 4 of this Bill, which states the punishment for the act of torture to be ten years. It also states the conditions under which torture is punishable. It has to be committed to gaining a confession or other information for detecting the commission of an offence. The torture also has to be committed on specific grounds such as religion, race, language, caste, or 'any other ground,' intersectional or otherwise.

The third and final element states the complaints and conditions under which courts can admit complaints. It mentions that the complaint needs to be made within six months of the act of torture having been committed. Also, the permission of the central or state authority accountable for the appointment of the implicated public servant has been taken.

There are many impediments to the Bill which might do more harm more than good. Some of them can be scrutinised in the following points. The definition of 'torture' in the Bill is contradictory to the definition of 'torture' in the Convention against Torture which India seeks to sanction; it leaves out various acts amounting to torture which are condemned under the Indian Penal Code; it also adds a requirement of proving the intention of the accused person to commit torture. It should be known that the current provisions in the Indian Penal Code do not have this requirement, and last, of all, the definition of 'Grievous Hurt'

given in the Indian Penal Code, which is what the Bill refers to, does not include mental suffering or pain. The second drawback is that the Bill is contradictory to the UN Convention on Torture. The Statement of Objects and Reasons states that one of the significant reasons for introducing the Bill is to ratify the UN Convention against Torture. It is also given by Article 4 of the Convention that all acts of torture (as defined in the Convention) have to be made punishable, and any attempts to commit the act of torture and participation in said act shall also be made punishable. The Bill does not contain a number of provisions contained within the definition of torture in the Convention.

This requirement is additional to the provisions in the Indian Penal Code, 1860. The Indian Penal Code does not require the intention of the accused to cause “grievous hurt” to be proved.

Torture is defined as the causing of grievous hurt or endangering the life, limb, or health of a person under the Bill. It also states that the meaning of grievous hurt in the Bill is the same as that given in the Indian Penal Code. Grievous hurt, as defined in the Indian Penal Code, does not include mental agony. The definition of torture in the Bill covers danger to mental health but does not cover any damage caused to mental health or any other form of mental suffering.

This Bill dilutes the existing laws through the imposition of a time limit of six months and the requirement of prior government sanction for the trial of those accused of torture. Existing laws do not have such requirements. In turn, it is made difficult for those accused of torture to be tried. This is because the sanction of the appropriate government has to be sought before a court can entertain a complaint and the complaints against acts of torture have to be made within six

months. The Criminal Procedure Code (CrPC) requires government sanction only when public servants cannot be removed without government sanction, and also does not specify a time limit for offences whose punishment exceeds imprisonment for three years.

There is no independent authority that is present to investigate any complaints of torture. Not only is the investigating agency in cases of torture be the same department whose official has committed torture (police officials) sometimes, prior sanction is also required from the government (whose officials are alleged to have committed torture). This may negatively affect the effectiveness of investigations in incidents of torture. Independent authorities in many other countries are given powers to investigate any incidents of torture.

There are no provisions in this Bill that allow victims of torture to claim compensation. Article 14 of the Convention against Torture requires member countries to ensure that victims of torture have a right to compensation. The Supreme Court has thus held torture to be a violation of the fundamental right to life under Article 21 and has also firmly stated that compensation might be granted to victims of torture.^[3]

THE 273RD LAW COMMISSION REPORT:

Throughout the ages, the history of torture reveals that torture has been employed by various communities, either in its code of punishment or their religious rites. Though India turned signatory to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 14th

³ Anirudh Burman, *The Prevention of Torture Bill, 2010* (2010), [(last visited August, 2020)]
<https://www.prsindia.org/uploads/media/Torture>

October 1997, it has been very reluctant to ratify it. The Law Commission, which was headed by Justice (retired) B. S. Chauhan, recommended the ratification of the UN Torture Convention through a new Bill, aptly named “The Prevention of Torture Bill, 2017”.

There were some recommendations made by the commission after looking at all the discrepancies in the legal justice system. This included the following: For the purpose of tiding over the problems encountered by the country in getting perpetrators extradited, mostly due to the lack of an anti-torture law; and to secure an individual’s right to life and liberty, the Commission recommended the consideration of the Convention Against Torture for ratification, and in the event, the Central Government decides to ratify the Convention, then the Bill should be considered.

The Law Commission also concluded that the Criminal Procedure Code, 1973 and the Indian Evidence Act, 1872 required certain amendments to accommodate the provisions concerning compensation and burden of proof, respectively. Hence, for the Indian Evidence Act, 1872, the insertion of section 114B is needed, which will then ensure that in a situation where a person in police custody sustains any injuries, it will be presumed that the police have inflicted those injuries, and the burden of proof shall lie on the concerned authority to explain such injuries. As for the Criminal Procedure Code, 1973, an amendment to section 357B to include payment of compensation was recommended, in addition to payment of fine.

In order to curb the menace of torture and to have a deterrent effect on acts of torture, the Commission recommended stringent and tough punishments to the

perpetrators of such acts. The Prevention of Torture Bill, 2017 provides for punishment extending up to life imprisonment and a fine.

The commission also recommended that the Courts should decide upon a justiciable compensation after taking into account various facets of a case, such as manner of injury, nature, extent, and purpose with the inclusion of mental agony caused to the victim. The Courts should also bear in mind the socio-economic background of the victim and ensure that the compensation so decided will suffice the victim to bear the expenses of medical treatment and rehabilitation.

There needs to be present an effective mechanism which must be put in place in order to protect the complainants, victims of torture, and the witnesses against possible threats, violence, or ill-treatment.

Going by the law of torts, which states ‘liability follows negligence’, the Commission believed that the state should take the responsibility and be held accountable for the injuries caused by its agents on citizens and that the principle of sovereign immunity should not override the rights assured by the Constitution. While dealing with the plea of sovereign immunity, the Courts should bear in mind that it is the citizens who are entitled to fundamental rights and not the agents of the state. ^[4]

PREVENTION OF TORTURE BILL, 2017:

The Prevention of Torture Bill, 2017 was recommended by the Law Commission in its 273rd report. This autonomous anti-torture law directly holds the state

⁴Law Commission Of India, *273rd Law Commission Report (2017)*, <https://cjp.org.in/wp-content/uploads/2017/11/Report273.pdf>

responsible for any injury inflicted by its agents on citizens. Torture has a comprehensive definition under this Bill, including inflicting mental, physical, or psychological injury. Recommendations for the punishment for torture, ranging from fines to life imprisonment, have also been provided. The Bill provides for a presumption that injuries on any person in police custody are inflicted by the police unless proven otherwise. Courts have also been envisioned to provide a justiciable and fair compensation for victims of torture.

Human rights advocates are now mostly better equipped to turn the pressure onto the government to recognise and declare torture as a separate crime. So far, neither the ‘Code of Criminal Procedure’ nor the ‘Indian Penal Code addresses custodial torture. The Law Commission had also specially recommended the ratification of the UN Convention Against Torture. While India had been a signatory to the Convention, it has not been ratified yet. Ratification would help to overcome the difficulties and make it easier to extradite criminals from abroad.

When the Supreme Court brought up the questions about the implementation of the law commission’s recommendations, it was told by the Attorney General representing the Central Government on 22nd January 2019 that the draft for the Prevention of Torture Bill, 2017 had been sent to all the states so that their input could be considered. Only eight states/ union territories had responded by that date. Even though an astonishing amount of time has passed since the law commission report, the Prevention of Torture Bill, 2017 has not even been introduced to the Houses of Parliament, let alone start the process of implementation. Sadly, it has to be admitted that India's anti-torture bill debate has been stagnant for almost ten years.^[5]

⁵ Mukund. P Unny, *Custodial Deaths: Revisiting Debate On Anti-Torture Law* (2020),

THE UNITED NATIONS CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, 1987:

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) was an apotheosis of endeavours put into motion by the 1975 declaration. The Torture Convention was adopted by the overall Assembly of the United Nations on 10th December 1984 (resolution 39/46). The Convention entered into force on 26th June 1987 after 20 States had ratified it. The Torture Convention was the result of years of work, commencing shortly after the endorsement of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by the Assembly on 9th December 1975. The signatory states of the United Nations acknowledged and pledged themselves to the advancement and promotion of human rights when they validated the Charter of the United Nations. The Convention specifies a definition of torture and demands all states to take all essential constitutional, executive, and other relevant measures to deter acts of torture and cruelty.

This Convention alludes to Article 7 of the Universal Declaration of Human Rights and Article 5 of the International Covenant on Civil and Political Rights, which asserts that no one shall be submitted to harsh, ruthless, or demeaning treatment or suffering, or torture. The Convention is organised into three components and contains 33 Articles. It looks into suggestions to States on the

<https://www.livelaw.in/columns/custodial-deaths-revisiting-debate-on-anti-torture-law-159054?infinitemscroll=1>

ban of torture and other inhuman or demeaning conduct or mistreatment. It also recommends authorising a Committee against Torture comprised of nationals of the Parties to the Convention and guides how the State shall communicate the means they have approved to acknowledge the rights sanctioned by the Convention. Additionally, it explains the manner by which the Convention is to be endorsed and revised.^[67]

Its principal hallmarks can be observed in the subsequent points, where it is asserted that on no account can torture be excused, even in extraordinary circumstances. Torture is required to be incorporated as a specific crime in every country's national criminal law. Universal jurisdiction must be established over any individual discovered in its region who has supposedly perpetrated the crime of torture – irrespective of where the malfeasance was committed or their nationality. There must be a methodical analysis of examination rules, methods, and custody procedures. Each state should practice unbiased and timely inquiries whenever there are rational premises to suspect that an act of torture has been executed in the territory under its jurisdiction. Victims of torture will now have the liberty to lodge a complaint and to have their case reviewed immediately, as well as obtain restitution and damages. ^[87]

While the death penalty in itself is not violative of the repudiation of torture and inhuman treatment, certain features associated with it, such as modes of execution supported by some countries and the experience of being on death row, may be

⁶ Shruti Bhosale, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984), <https://ruralindiaonline.org/library/resource/convention-against-torture-and-other-cruel-inhuman-or-degrading-treatment-or-punishment/>

⁷ Directorate of Scotland, *UN convention against torture: our position statement* (2019), <https://www.gov.scot/publications/un-convention-against-torture-cruel-inhuman-degrading-treatment-punishment-position-statement/>

covered under this Convention. However, it must be taken into consideration that such a view on torture and the death penalty applies to only those countries where barbaric executions that have traits of torture carried out under the guise of lawful sanctions. The states which are party to this Convention are required to take preventive actions against torture like criminalising acts of torture and enacting domestic laws and regulations to respect the rights of the victim and even the accused. They also need to outlaw torture and refrain from using ‘higher orders’ or ‘exceptional circumstances’ as excuses for committing acts of torture.

Concerns about human rights for torture and the death penalty have often been cited as grounds for refusal of extradition requests. Diplomatic assurances are often needed for countries that have abolished the death penalty that the rights of the person to be extradited shall not be breached. If it appears that there are grounds for believing that if the person is extradited, he may be tortured or subjected to inhuman, cruel, and degrading treatment or that the death penalty may be given or that they may be denied any of the rights guaranteed to them by various international law instruments such as ICCPR and UNDHR.

The Convention strives to ensure that countries have put in place various institutional mechanisms to prevent the act of torture from being committed.

Each country that is a party to the Convention is required to carry out specific steps such as legislative, administrative, judicial, or other measures to prevent torture and also ensure that torture is a criminal offence, among others.

India became a signatory to the UN Convention against Torture in October 1997 and has since expressed its commitment to ratifying it regularly, in particular during its Universal Periodic Review in May 2017 and its voluntary pledges for the elections to the Human Rights Council in October 2018. It was highlighted

that given the practical nature of the UN Convention Against Torture, implementing its provisions helps countries bridge the gap between the existing legal prohibition of torture, recognised under both international and domestic law, and its application on the ground. The International Commission of Jurists has criticised India for its failure to tackle issues of unaccountability and torture of armed forces. India has been asked to adopt the reforms suggested by the Convention. In the Second Universal Periodic Review of human rights record, out of the 80 countries which participated, 22 States urged India to ratify the torture convention immediately. The Universal Periodic Review is an interactive process that is carried out every four years. Under this structure, UN member states are reviewed thoroughly for their human rights record. India is one of only five countries that have yet to ratify the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), 1987. The others include countries like Sudan, Brunei, and Haiti.

THE INDIAN CONSTITUTION AND OTHER STATUTORY

A Reservoir of Socio-Legal Discourse

There are a lot of different Indian laws that help in safeguarding people and their Rights, like the Constitution of India, Indian Penal Code (IPC), Criminal Procedural Code (CrPC), Indian Evidence Act, and some others.

■ The Constitution -

Article 20(3): an accused person (committed any offence) cannot become a witness against himself and has the right to be silent and not disclose his defence before the trial.

Article 21 protects a person's right to life and liberty, and nobody can take that right without following the procedure prescribed by law. The Supreme Court has consistently held that custodial torture violation of the right to life.

Article 22(1) & (2) prohibits detention of any person in custody without being informed of the grounds for his arrest, nor shall he be denied the right to consult and to be defended by any legal practitioner of his/her choice. Moreover, it provides protection against arrest and detention in some instances.

■ The Indian Penal Code (IPC) -

The crime of custodial violence or torture against prisoners can be brought under Section 302, 304, 304A, and 306.

Section 330 provides for punishment for causing a superficial injury.

Section 331 provides for punishment for causing grievous injury or harm to any person.

■ Criminal Procedural Code (CrPC) -

Sections 46(3) and 49 protect the person held in custody who is not accused of an offence punishable with death or imprisonment for life by not restraining the person to more than necessary.

Section 54 safeguards the arrested person against any infliction of custodial torture and violence by providing for examination by a medical officer.

Section 176 provides for compulsory magisterial inquiry on the death of the accused in police custody.

Section 358 provides for compensation to a person who is arrested without any legal ground.

■ The Indian Evidence Act -

Section 24 provides that any confession obtained by threat, promise, or inducement from an accused would not be relevant in criminal proceedings.

Section 25, a confession of an accused to a police officer is not admissible in evidence and cannot be used by the prosecution to obtain a conviction.

Section 26 a confession by an accused while in police custody could not be proved against him unless it is subjected to cross-examination or judicial scrutiny.

Section 27 provides that recoveries are not permitted to be procured through torture.

■ Indian Police Act -

Sections 7 and 29 provide for penalty, dismissal, or suspension of a police officer who is negligent in discharging his/her duties or unfit to perform the same.

Although these Articles and Sections are made for people to safeguard their rights and protect them from harm, this is not enough as still many cases of torture and custodial deaths occur, and no punishment is seen to be given. Like in the case of Deepak Bundele, who was beaten by the police when he was going to a government hospital for treatment during Covid-19 lockdown, as he was explaining to police personnel that he had to get his medicines, but one of them

slapped him without trying to listen to what he was saying and when he tried to talk to them, they started beating him up. Only after he said that he is a lawyer they stopped beating him. Afterward, police gave the reason that they had wrongly identified him as a Muslim man, and till now, no action has been taken against them, and instead, Deepak has been pressured to take back the complaint.⁸ And also, in the case of extra-judicial killing where the four alleged rapists, who allegedly raped and killed a 27-year-old veterinary doctor in Hyderabad, were shot dead in custody, and people praising the police officer who shot the four, claiming the deliverance of ‘true justice’ is a different way of police brutality and police claiming extra-judicial power. This motivates them to do as they please, and that clearly shows how current laws are not enough to keep a check on the police.

And not ignoring the fact that torture is not always physical, it could be mental torture also, and the given laws do not take into account the mental and psychological impact torture has on a person. The Prevention of Torture Bill, with the support of the given laws, can make a lot of positive changes in safeguarding the rights of the people against torture as given in the Constitution. So, there is a need for the prevention of torture bill to come.

STATISTICS:

Torture and custodial deaths are not new to society. According to the government data, there were 1,307 reported deaths in 2002 in police and judicial custody in

⁸ Ajoy Ashirwad Mahaprashasta, *Madhya Pradesh Police Apologise for Beating Lawyer, 'We Thought You Were Muslim,' They Say*, THE WIRE <https://thewire.in/communalism/madhya-pradesh-lawyer-police-betul>.

India. “India has the highest number of cases of police torture and custodial deaths among the world’s democracies and the weakest law against torture,” said Ravi Nair, who headed the South Asia Human Rights Documentation Center. Furthermore, the severity of the torture problem is probably worse than statistics indicate because victims, fearing reprisals, rarely report cases against the police; human rights advocates said that about 40% of custodial torture cases are not even reported to the authorities.⁹

According to official reports, during 2008-2009, 127 persons died in police custody in India, 188 during 2007-2008, and 119 during 2006-2007. Moreover, the actual number of deaths in police custody during these years could be even higher as many states failed to report such deaths. Although police cited “suicide” as a cause of death in custody, they are widely believed to be a result of torture.

Under the guidelines issued by the National Human Rights Commission, only those cases where death occurs in police custody need to be reported to India’s National or State-level human rights commissions, which means there is no mandatory need to record or report instances of torture that do not result in death. The National Human Rights Commission recorded 1,596 complaints of torture of prisoners in 2008-2009, 2,481 complaints in 2007-2008, and 1,996 complaints in 2006-2007, and the practice of torture is also believed to be widespread in prisons. The number of deaths due to torture in judicial custody is not available even though prison authorities often record deaths due to “unnatural” causes.¹⁰

⁹ Sarla Gautam & Aaju Gautam, *Victim of Torture in Police Custody: A Case Study*, 5 IJHER, 5 (2014), https://www.researchgate.net/publication/308952960_Victim_of_Torture_in_Police_Custody_A_Case_Study.

¹⁰ Amnesty International, *India: Briefing on the Prevention of Torture Bill*, AI, 3 (2010), <https://www.amnesty.org/download/Documents/36000/asa200302010en.pdf>.

The NCRB's (National Crime Record Bureau) crime in India Report 2008 showed that during 2008, 253 cases were reported throughout the country of Human Rights violations by police. Even after these vast numbers of incidents were reported against the policemen, no inquiry was made against them, and they were not charged with it. The violations included torture, illegal detention, fake encounters, etc. It was also reported that only 14 policemen were charge-sheeted out of 253 cases, and only eight policemen were convicted.¹¹

Between 2011 and 2013, 308 people died in custody, and only 40% of these cases were being registered against them. The year 2017 alone saw 100 custodial deaths, and of these, 58 people had not been arrested and not yet produced before a court.¹²

In 2019, a total of 1,731 people died in custody in India. This means there were almost five such deaths daily. 'India: Annual Report on Torture 2019' said 125 of the deaths happened in police custody and 1,606 in judicial custody. Out of 125 cases in police custody, 93 persons died due to foul play or alleged torture, while 24 died under suspicious circumstances in which the police cited suicide, illness, and injuries. Furthermore, the reasons for the custodial death of the other 4% were unknown. It also revealed that 60% of these 125 belonged to the poor and marginalised communities. They included 15 Muslims, 13 from Dalit and tribal communities, and 35 were picked up for petty crimes.¹³

¹¹ Shivam Jasra, *Rights of Prisoners against Custodial Torture in India* By: Shivam Jasra, LATEST LAW (Apr. 20, 2020), <https://www.latestlaws.com/articles/rights-of-prisoners-against-custodial-torture-in-india-by-shivam-jasra/>.

¹² SABRANG, <https://sabrangindia.in/article/prevention-torture-bill-forgotten-law>.

¹³ Special Correspondent, *Five custodial deaths in India daily, says report*, THE HINDU (JUNE 27, 2020 01:12 IST), <https://www.thehindu.com/news/national/five-custodial-deaths-in-india-daily-says-report/article31928611.ece>.

Caste-based discrimination, which is widely prevalent in Indian society, is the basis on which Dalits, in particular peasants, farm labourers, and urban workers, often suffer brutal violence at the hands of non-Dalit upper castes. Adivasis (Indigenous communities), particular members of communities whose traditional lands and habitats fall in protected forests, undergo violence at the hands of the forest department and police personnel. Women – particularly poor, Dalit or Adivasi – are frequently targeted for rape and other forms of sexual assault.

In addition to torture in police custody, instances of torture are commonly reported from Jammu and Kashmir and parts of north-eastern India, where suspects are often illegally detained and interrogated at ‘Joint Interrogation Centers’ and other similar secret detention facilities. In “disturbed areas” in Jammu and Kashmir and the north-eastern states where the Armed Forces Special Powers Act (AFSPA) is in operation, Armed Forces personnel enjoy further immunity under Section 6 of the Act, which prohibits prosecutions of the security forces unless approved by the Union Government. There is virtually no accountability for violations in such areas as the National and State-level Human Rights Commissions have a limited mandate concerning complaints against members of the Armed Forces and State authorities are reported not to take complaints of torture seriously.¹⁴

These statistics are not only disturbing, but also the fact that the authorities have taken no proper action is saddening. Year by year, the cases are worsening and not taking into account that some of these cases are not registered or cited as

¹⁴ Sarla Gautam & Aaju Gautam, *Supra* note 10.

suicide, died by some illness, or died under suspicious circumstances, among others. The reports also show that torture is very high with lower caste and indigenous people, where lower caste women suffer the most, which highlights caste discrimination, and its consequences in society. However, the list does not end here; torture on the people is prevalent in disturbed areas in Jammu and Kashmir and the north-eastern states where the AFSPA is under operation. In these areas, there is no chance of even a complaint to be registered against the officers, and people have to live without any protection. It is evident how the Human Rights of the people in India are in danger.

PROMINENT CASES:

As appalling as the numbers are, the stories of torture are more outrageous. The case of Jayaraj and his son, Benicks' custodian death that shocked everyone was so heinous that there is no doubt about why there is a dire need for this Bill to be passed in our country.

P. Jayaraj was in his woodworks shop; on 19th June 2020, a police constable picked him up from the shop and took him to the local police station where he was allegedly tortured. The same night, Benicks' friends informed him about Jayaraj's arrest and he, along with his friends, rushed to the police station. The police made him wait for several hours, and as he inquired about the issue, the police attacked him and put him in the chamber. It has been told that the duo was tortured so gravely that their screams were heard for more than three hours, and the people residing as far as 500 meters away from the station could hear their cries. The reason given by the police for the arrest was that Jayaraj and Benicks exceeded the lockdown limit by 15 minutes, and despite asking them to close their store, Jayaraj and Benicks sat on the ground and abused them badly. It

further added that the duo threatened to beat and kill the police officers on duty if they compelled them to shut the store. Benicks' lawyer, Advocate S. Manimaran, who saw the gruesome torture, told that the victim's rectum was bleeding and even claimed the victims to be sexually assaulted. In fact, he also added, there was so much blood oozing from all over the body that their blood-soaked clothes were changed four times. Also, the eyewitnesses from the hospital described the same hounding physical state. Two days later, on 22nd June 2020, Benicks died at the hospital, and Jayaraj passed away the next morning on 23rd June 2020. The reasons for their deaths have been stated to be heart failure and fever.¹⁵

The case of Jayaraj and Benicks is one of the thousands of torture cases by police; the 2019 report by NHRC highlighted how while probing non-heinous crimes, police personnel in several states went to the extent of torturing the suspects to death. From a 17-year-old boy in Tamil Nadu to Hira Bajania of Gujarat, Karan Kumar of Punjab, Nesar Ansari of Bihar, and Ashok Bansal of Madhya Pradesh, the cases where people were allegedly tortured to death only because they were suspected of having committed thefts. This apart, it pointed out how some, like Rajesh of Kerala, died by suicide as they are unable to bear such torture. In some cases, groups of people are also subjected to torture as the cops want to extract confessions like in the case of two Dalit brothers – Deepak and Dashrath – and 12 labourers, including women, of Gujarat who were tortured to extract confessions in connection with a case of murder. Often, it said, people are also tortured by cops or jail staff to extort money from them or their relatives. As part

¹⁵ Nikhil Sharma, *The Custodial Death Of Jayaraj & Fenix : What Happened With Them Is Nothing But Barbaric*, DU EXPRESS (Jun. 29, 2020), <https://duexpress.in/custodial-death-of-jayaraj-fenix-what-happened-with-them-is-nothing-but-barbaric/>.

of the torture, the report pointed to cases where the victims were forced to perform oral sex (as in the case of Hira Bajania and 12 others of Gujarat). Also, it said women continue to be tortured or targeted for sexual violence in custody. A 35-year-old Dalit woman was allegedly illegally detained, subjected to torture, and raped in police custody by nine police personnel at Sardarshahar police station in the Churu district of Rajasthan. Her nails were also plucked by the cops who tortured her. The torture included beating, pulling nails, burning, and even rape, and also most of the victims were from poor, marginalised sections.¹⁶

The Supreme Court, in the case of *Dagdu & Ors. v. State of Maharashtra*¹⁷ observed that “If the custodians of law themselves indulge in committing crimes, then no member of the society is safe and secure.”

In *D K Basu v. State of West Bengal*¹⁸, the Supreme Court gave specific guidelines to the authorities safeguarding detainees’ rights in all cases of arrest or detention; the safeguards listed in this judgment stipulate that a person taken into custody should have his/her detention recorded, have prompt access to a lawyer or impartial medical examination upon arrival at the place of detention or at the time of release, and should be produced before a court of law within 24 hours of his/her arrest or detention. Although some of the guidelines were subsequently incorporated in the Code of Criminal Procedure, 1973 (CrPC), they are seldom implemented in practice.

¹⁶ The Wire Staff, *Custodial Torture Continues Unabated in India Amidst Culture of Impunity: Report*, THE WIRE (Jul. 8, 2020), <https://thewire.in/rights/custodial-torture-continues-unabated-in-india-amidst-culture-of-impunity-report>.

¹⁷ *Dagdu & Ors. v. State of Maharashtra*, (1997) 3 SCC 68.

¹⁸ *D.K Basu v. State of West Bengal*, (1997) 1 SCC 416.

Choudhury Parveen Sultana v. State of West Bengal¹⁹, in this judgment, Justice A. Kabir and M. Katju of the Supreme Court set aside the Kolkata High Court order denying permission to prosecute a Deputy Police Superintendent on charges of threatening a resident of Berhampore town to withdraw his complaint against five police who had attacked him, and the police officer was supposed to investigate the attack. The Supreme Court held that no prior permission is required to prosecute the accused public servants stating that “All acts done by a public servant in purported discharge of his official duties cannot as a matter, of course, be brought under the protective umbrella of Section 197 of Criminal Procedure Code..”

The long list of judicial pronouncements against torture does not end here. Prakash Kadam v. Ramprasad Vishwanath Gupta²⁰ expressed his displeasure on fake encounters, where the police officers and the staff were engaged by persons to kill their opponent. If the police personnel act as contract killers, there could be very strong apprehension in the mind of the witnesses about their own safety that the police may kill the important witnesses or their relatives or give threats to them at the time of the trial of the case to save them. The protectors have become the predator. The Court observed that in cases where a fake encounter is proved against police officers in a trial, they must be given the death sentence and treated it as the rarest of rare cases. The policemen were warned that they would not be excused for murdering people in the name of ‘encounter’ on the pretext that they were carrying out the orders of their superior officers or politicians,

¹⁹ Choudhury Parveen Sultana v. State of West Bengal, (2009) 1 SCALE 374.

²⁰ Prakash Kadam v. Ramprasad Vishwanath Gupta, (2011) 6 SCC 189.

however high. If a policeman is given an illegal order to carry out a fake ‘encounter’ by any superior, it is his/her duty to refuse to carry out such illegal order; otherwise, he/she will be charged for murder, and if found guilty will be given the death sentence.

During the Covid-19 lockdown, there was an ample number of police brutality cases, especially involving the migrant workers who were trying to go back to their homes. Thousands of migrants in Delhi, including whole families, had planned to walk hundreds of miles to reach home, but as they reached the Delhi Highway border, many of them were beaten and sent back by the police. A few migrant workers were beaten and kicked by Bengaluru Police personnel at the KG Halli Police Station, who (Karnataka State) requested the police to make arrangements for their return to home at Uttar Pradesh State.²¹ These are the chosen few from hundreds and thousands of cases of police brutality during the lockdown.

One of the significant losses because of the lack of anti-torture regulation is the bar on extradition from other countries. Denmark denied the extradition of Kim Davy (a Danish citizen), prime accused in the Purulia arms drop case of 1995. On 17th December 1995, an aircraft dropped a massive cache of sophisticated arms over villages of Purulia district in West Bengal. The aircraft was identified and forced to land at Mumbai’s Sahar airport. The five Latvian crew members and the arms dealer Peter Bleach were arrested in connection with the case, but key conspirator Kim Davy managed to disappear from the airport. However, Kim Davy has confessed to his crime orchestrating the dropping of the arms and

²¹ Chitranjali Negi, *Human Rights Violations of Migrants Workers in India During COVID-19 Pandemic*, SSRN, 4 (2020),

ammunitions — including over 300 AK 47s — to fight the then communist government in West Bengal]²² The Danish Court had rejected the plea on the ground that he would risk “torture or other inhuman treatment” in India.

The gruesome case of Jayaraj and Benicks, all the other atrocities committed by the police, and even after all the judgments that talked about police brutality, there is no significant change in the system and the behaviour of the police. In addition to that, people who are most affected by it are the lower caste people, migrants, women, etc., i.e., people who have the least chance to get access to justice. Moreover, in cases like Kim Davy, where the accused even confessed his crime in Danish Court but has been denied the extradition because India lacks anti-torture legislation is a significant setback for the Indian justice system, which makes the Prevention of Torture bill more essential and adds to the list of reasons why it should be a law.

CONCLUSION

Therefore, we can conclude by stating that the government needs to take action against the atrocious action of torture and acknowledge the roadblocks to the prevention of torture in India by making the Prevention of Torture Bill, 2017, as recommended and drafted by the Law Commission, into legislation. And it should be noted that human rights, which are also fundamental rights of the people, are at stake, and the Indian government is a signatory to the “United Nations Convention against Torture” has failed to perform its obligation to protect individuals and their rights.

²² Abhishek Sharan, *Purulia case: Kim Davy confesses*, HINDUSTAN TIMES (May 27, 2011, 01:27 IST), <https://www.hindustantimes.com/delhi/purulia-case-kim-davy-confesses/story-KgnUeJs5nv74VmKRUPiX2N.html>.

The statistics for cases of torture in India show an alarming increase, which is a matter of grave concern since a lot of these cases report the death of the accused. The Indian government currently has not ratified the “United Nations Convention Against Torture,” which seems astonishing since 73 years have passed since India gained independence and it is also known that India signed the UNCAT almost 21 years ago and it should also be noted that the government has not revealed any plans to ratify the Convention and legitimise the Bill. It is also seen that the marginalised sections of the society are the most vulnerable to the act of torture committed by the authorities, and this alone is reason enough to acknowledge that the government has a responsibility towards its citizens to be held accountable and ratify the UNCAT. They also need to ensure that the legislation needs to have strong punishments to be awarded to offenders indulging in the act of torture, which would, in turn, result in fewer offenders and fewer cases of torture. Thus, concluding this paper, it can be seen that India needs to take the first step, which is ratifying the UNCAT, which would pave the way for the legislation to follow.

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