



## ASIAN CENTRE FOR HUMAN RIGHTS

Dedicated to promotion and protection of human rights in Asia

*ACHR has Special Consultative Status with the United Nations Economic and Social Council*

Address: C-3/441-C, Janakpuri, New Delhi-110058, India

Phone/Fax: +91-11-25620583, 25503624;

Email: [suhaschakma@achrweb.org](mailto:suhaschakma@achrweb.org); Website: [www.achrweb.org](http://www.achrweb.org)

30 June 2010

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

A case for intervention with the Government of India

#### **1. Introduction**

Torture is rampant and institutionalised in India. The National Human Rights Commission (NHRC) has recorded 16,836 custodial deaths, or an average of 1,203 per year during the period 1994 to 2008; these included 2,207 deaths in police custody and 14,629 deaths in judicial custody.<sup>1</sup> Given well-established practices and consistent documentation of persons being tortured to death in police and prison custody, it is not unreasonable to conclude that a large number of those who died in custody were subjected to torture. The cases of torture not resulting in death are not recorded by the NHRC. Further, the Central para-military forces and the Indian army remain outside the purview of the NHRC under Section 19 of the Human Rights Protection Act, 1993. The actual cases of torture are in reality run into thousands.

In order to ratify the UN Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, on 6 May 2010 the Lok Sabha (Lower House of Indian Parliament) passed the Prevention of Torture Bill, 2010 (Bill No. 58 of 2010).

---

<sup>1</sup> . See Suhas Chakma (ed.), *Prevention and Punishment of Torture Bill 2009 - Report of the National Conference on the Prevention of Torture Bill, 2008 as drafted by the Government of India*, New Delhi, July 2009

## **2. Shortcomings of the Prevention of Torture Bill, 2010**

The Prevention of Torture Bill, 2010 (PTB, 2010) falls far short of national and international standards. It is an attempt to subvert/undermine existing legal safeguards against torture.

### ***i. Restrictive definition of torture***

*“Section 3. 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 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:*

*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.*

*Explanation.—For the purposes of this section, 'public servant' shall, without prejudice to section 21 of the Indian Penal Code, also include any person acting in his official capacity under the Central Government or the State Government.”*

The above definition of torture under Section 3 of the PTB, 2010 is narrow and restrictive. It does not capture the spirit and essence of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT).

Despite the prevalence of custodial deaths as a result of torture, it makes no reference to death as a result of torture. This means acts of torture that result in death are likely to be prosecuted as a murder and, thus, sentences may not incorporate the gravity of the crime of torture as the cause of death. Similarly, there is no reference to ‘other cruel, inhuman or degrading treatment or punishment’ anywhere in the Bill.

Further, the above definition is not consistent with the Indian Penal Code which also provides sentences for voluntarily causing hurt (Section 323), voluntarily

causing hurt by dangerous weapons or means (Section 325), voluntarily causing hurt to extort property, or to constrain to an illegal act (Section 327), causing hurt by means of poison etc with an intent to commit an offence (328). However, by restricting definition of torture strictly to “*grievous hurt*”, the Prevention of Torture Bill, 2010 has excluded other forms of torture recognized under the Indian Penal Code.

***ii. Lenient punishment for torture***

*“Section 4. 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”.*

Section 4 of the PTB, 2010 provides for a maximum of 10 years imprisonment for those who are convicted of torture.

The Bill once again does not take into account Indian realities of custodial deaths as a result of torture. For India to comply with the UNCAT, punishments for torturers should reflect the gravity of the crimes committed, as stated in UNCAT Article 4(2). If torture leads to death, will the law enforcement personnel be still awarded 10 years imprisonment?

The Bill equates crimes by law enforcement personnel, including torture, with normal crimes. This is a serious omission considering that law enforcement personnel exercise the sovereign power of the state. Through being entrusted with carrying out duties by the state, they are afforded special powers and, thus, have a higher level of responsibility. Hence, the crimes committed by law enforcement personnel should receive harsher punishment than is provided under the Indian Penal Code.

*iii. Limitation for cognisance of offences falls far below national law*

*“Section 5. 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”.*

The limitation of six months for taking cognizance is less than that for other comparable crimes under the Criminal Procedure Code (CrPC) of India. In its definition, the Prevention of Torture Bill, 2010 includes ‘grievous hurt’ as part of infliction of torture. However, for normal crimes of grievous hurt there are no limitations under Section 468 of the CrPC as provided below:

**“468. Bar to taking cognizance after lapse of the period of limitation.**

(1) Except as otherwise provided elsewhere in this Code, no court, shall take cognizance of an offence of the category specified in sub-section (2), after the expiry of the period of limitation.

(2) The period of limitation shall be-

(a) Six months, if the offence is punishable with fine only;

(b) One year, if the offence is punishable with imprisonment for a term not exceeding one year;

(c) Three years, if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years.

[(3) For the purposes of this section, the period of limitation, in relation to offences which may be tried together, shall be determined with reference to the offence which is punishable with the more severe punishment or, as the case may be, the most severe punishment.]”

Since the punishment given under the Prevention of Torture Bill, 2010 is maximum of 10 years, the limitation of six month for taking cognizance is contrary to the CrPC and therefore, illegal.

***iv. Justification of torture***

*“Section 6. 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,—*

*(a) in the case of a person, who is employed in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the Central Government, of that Government;*

*(b) in the case of a person, who is employed in connection with the affairs of a State and is not removable from his office save by or with the sanction of the State Government, of that Government;*

*(c) in the case of any other person, of the authority competent to remove him from his office”.*

The regime of prior sanction exists in many laws including Section 197 of the CrPC and has been consistently used in India to provide impunity by denying permission. This provision does not comply with the requirement of Article 2 of the UNCAT that ‘no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture’.

***v. Issues excluded in the Bill***

The Prevention of Torture Bill, 2010 also does not include any text pertaining to the following provisions of the UNCAT: the need to

- (1) ensure that an order from a superior officer or a public authority may not be invoked as a justification of torture (Article 2)
- (2) bar deportation, extradition or *refoulement* of any person when there are substantial grounds for believing he/she will be subjected to torture (Article 3)
- (3) establish jurisdiction over acts of torture committed by or against a party’s citizens (Article 4)
- (4) ensure that torture is an extraditable offence (Article 8)

**A case for intervention with the Government of India**

- (5) establish universal jurisdiction to try cases of torture where an alleged torturer cannot be extradited (Article 5)
- (6) provide a mechanism to promptly investigate any allegation of torture (Articles 12 and 13)
- (7) provide an enforceable right to compensation to the victims of torture (Article 14) and
- (8) ban the use of evidence obtained via torture in the courts (Article 15)

**3. The case for interventions with the Government of India**

The PTB, 2010 is likely to be introduced in the Rajya Sabha during the forthcoming monsoon session of the parliament in July-August 2010.

Considering that the Bill fails to comply even with the existing Indian Penal Code and the Criminal Procedure Code, necessary interventions should be made with the Government of India to ensure that the PTB complies with the national laws as well as the UNCAT. [Ends]