

# INDIA: Public debates required for a better law against torture

April 7, 2010

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The Union Cabinet of the government of India will today discuss about introducing a domestic law criminalising torture in the country. The Asian Human Rights Commission (AHRC) welcomes the move and finds it as an encouraging opportunity for the law enforcement agencies, civil society organisations and for the general public to participate in local and national discussions about how the law against torture should be and what it must address. A draft Bill prepared by the government in 2008 is available here.



## Why a separate law against torture is required?

Torture is practiced by law enforcement agencies in India as a crude shortcut for crime investigation. Investigating agencies justify the use of torture arguing that they often lack advanced training and equipments for crime investigation. The concept of modern policing is still a mirage in India, where the police is expected to function as a tool for social control than to serve the citizens.

It can be argued that a large number of law enforcement officers in the country believe that the deterrence quotient against a crime is the possibility of being tortured, rather than the crime being detected, prosecuted and punished in the legal process. Extensive delays in court proceedings and the repeatedly demonstrated professional and intellectual paucity of the country's prosecutors appear to offer a layperson's excuse for the widespread belief among law enforcement officers that the only punishment a criminal might get in India is the torture at the hands of the investigator.

This has led into a situation where torture is widely practiced, particularly in the police stations, throughout the country. Police officers and other law enforcement officers generally consider torture as an essential investigative tool for investigation. Policy makers and bureaucrats believe that there is nothing wrong in punishing a criminal in custody, not realising the fact that a person under investigation is only an accused, not a convict and further, that even a convict must not be tortured. This is due to the lack of awareness about the crime, its nature and seriousness.

As early as in 1981 the Supreme Court of India has said "...[n]othing is more cowardly and unconscionable than a person in police custody being beaten up and nothing inflicts deeper wound on our constitutional culture than a state official running berserk regardless of human rights" Kishore Singh V. State of Rajasthan (AIR 1981 SC 625). Internationally, torture is considered as one among the most heinous crimes like slavery, genocide and maritime piracy against which there is an absolute prohibition and the principle of *ius cogens* applies. When torture is committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, torture can also be treated as a crime against humanity under the Rome Statute.

The National Human Rights Commission of India has repeatedly recommended the government to criminalise torture. The Commission once said "[d]aily the Commission receives petitions alleging the use of torture, and even of deaths in custody as a result of the acts of those who are sworn to uphold the laws and the Constitution and to ensure the security of its citizens. Such a situation must end, through the united efforts of the Government..."

The UN Human Rights Committee as early as 1997 has expressed its concern about the widespread use of torture by the law enforcement agencies in India. (*CCPR/C/79/Add.81*). Similar concerns were expressed by the Committee on Elimination of Racial Discrimination (*CERD/C/IND/CO/19*) in 2007 and the Committee on Economic Social and Cultural Rights (*E/C.12/IND/CO/5*) in 2008.

In a democratic framework, torture undermines democracy and the rule of law. Its open or clandestine use undermines the fundamentals of democratic governance. Law enforcement agencies, particularly the police, practicing torture reduce itself into an instrument of fear. This image and torture often diminish criminal investigation into a mere charge based on confessions. Fair trial, an important part of the rule of law framework, has no place in such an environment.

The practice of torture is not limited to policing. Paramilitary and military units also resort to torture, often brutal. Whether torture is practised by a military detachment or by the local police, the possibility for a victim of torture to complain is very limited in India. The absence of witness protection laws, proper investigation mechanisms including medico-legal facilities, and prosecution mechanisms, render complaint making suicidal for a victim. This allows torture to also be used for blackmailing, as a form of revenge and for monetary gain.

A domestic law against torture is thus required to deal with the central deficit in India's policing.

Torture is not criminalised in law as a separate or special offense in India. 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 treatment by the law as of now is to deal torture as a regular offense. The two provisions in the Penal Code also falls short of covering all aspects of torture, as defined in the International Convention against Torture, a document India has signed 11 years before and failed to ratify till today.

### **About the pending Bill:**

The International Convention against Torture 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.*"

The proposed Bill in Section 3 however reduces 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 which causes:- (i) grievous hurt to any person; or (ii) danger to life or health (whether mental or physical) of any person, is said to inflict torture.*

'Grievous hurt' is defined in Section 320 of the Penal Code as "*[f]irst - Emasculation; Secondly - Permanent privation of the sight of either eye; Thirdly - Permanent privation of the hearing of either ear; Fourthly - Privation of any member or joint; Fifthly - Destruction or permanent impairing of the powers of any member or joint; Sixthly - Permanent disfiguration of the head or face; Seventhly - Fracture or dislocation of a bone or tooth; Eighthly - Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits.*" Therefore, other injuries that could be considered as torture in international law will be excluded if the current Bill is legislated.

The law is also not gender sensitive. While emasculation could be torture, rape or other forms of sexual violence often committed against women in custody will not be torture in the proposed Bill.

There is also a limitation clause in the Bill that requires a complaint of torture to be made within six months from the incident. In the Indian context often victims are not in a position to lodge a complaint soon after the complaint. The Supreme Court of India has held in numerous occasions that in crimes like rape, often the complaint is made after the elapsing of months and sometimes years. When a complaint of rape can be made by a woman even after six months of the incident, there is no reason why in the case of rape committed by a public

servant, it must be made within six months.

The Bill also falls short of specifying a mechanism to investigate torture, or of any witness protection arrangements. Given the nature of the crime it is imperative that torture must be investigated by an investigating agency independent of the police and having no officers on deputation from any other law enforcement agencies. One of the reasons for the failure of successful prosecution of complaints against police in the country is that the investigation is conducted either by police officers directly or indirectly involved in the crime or their superiors. There is no need to enumerate why a victim or witness having a complaint against a government servant like a police officer in India requires protection. In countries where the practice of torture has been reasonably contained, both these requirements are met. In jurisdictions where these basic requirements are not followed, like in Sri Lanka, the law has become useless.

### **What could be done?**

A good law penalising torture and its effective implementation can be the beginning of real change towards good governance in India. An effective law against torture can change the negative public perception against law enforcement agencies. Peoples friendly policing will reduce all forms of crimes, in particular corruption, thereby indirectly addressing issues like corruption induced maladministration, poverty and malnutrition.

The Bill against torture, therefore before being formalised into a law has to be publicly discussed and debated. Given the importance of the law, the government has a responsibility to make available enough opportunities for the public to engage in the discussion. It is equally the responsibility of the civil society organisations in the country, particularly the media to generate public opinion about what is required to be addressed in the law.

Law enforcement agencies, in particular the state police, must make use of the opportunity to encourage the government to revisit its policing policy. India after 62 years of independence has no excuse to follow a policing policy based on punishment, fear and control that was required and thus practiced by the colonial administration. Entities like the Bar Councils and Bar Associations, who are more privileged to understand and interpret legislations must organise debates and encourage their members to participate in public discussions on the subject.

Democracy implies open and transparent public participation. A law criminalising torture, if drafted and implemented properly, has the potential to radically enrich the future of the country and that of its citizens. Indians have a right to participate in the legislative process that will decide their future.