

## **Conference Report**

### **Strengthening Legal Protection Against Torture In India**

Torture in India is still very much alive. It continues to enjoy impunity for several reasons, chief among which are a lack of knowledge and sensitisation among people in power, gaps in an overburdened judiciary and the near-complete absence of sturdy inhibitory mechanisms. Despite having signed the [UN Convention Against Torture \(CAT\)](#) 21 years ago in 1997, India has still not ratified it or passed a national law on the subject. As a result, the practice continues unabated across the country — frequently within state institutions — even though it only intermittently enters public and media consciousness.

In light of this, Commonwealth Human Rights Initiative (CHRI) conducted a two-day academic conference on *“Strengthening Legal Protection Against Torture in India”* on 26 and 27 October, 2018, in New Delhi, in collaboration with National Law University Delhi (NLU Delhi), World Organisation against Torture (OMCT), Working Group on Human Rights (WGHR), People’s Watch, Quill Foundation and the International Commission of Jurists. Its objective was primarily to call for India to ratify the UNCAT, to take stock of the current scope of the problem and to seek recommendations from various actors for establishing preventive systems for ending torture in the country.

Spread over two days, the conference witnessed discussions on issues such as:

- The global significance of a domestic bill against torture and the need to ratify the UNCAT
- The need for a comprehensive and integrative anti-torture legislation in India
- The nature of the Prevention of Torture Bill and its trajectory
- Steps to be taken towards the ratification of UNCAT

#### **1. Setting the context**

The conference began with video testimonies by Indian victims of custodial torture. Their accounts underscored the real, visceral, and urgent need for reforms that the conference needed to address. The survivors narrated their ordeal, and discussed the police’s preferred methods of torture for extracting false confessions -- stripping, waterboarding, giving electric shocks (often to genitals), injecting chemicals into orifices (often the rectum), and forcing Muslim detainees to walk on torn bits of the Qurans. They spoke about being left ‘damaged’ for life, unable to find closure, justice or even the treatment they needed to function normally.

There are several international human rights standards currently in action, pointed out Ambassador Claude Heller Rouassant, vice-chairperson of the UNCAT. These include Articles 5 and 7 of the International Covenant on Civil and Political Rights, 1966, the Universal Declaration of Human Rights, 1948 (which served as the basis of the UNCAT), the four Geneva Conventions and the jurisprudence of the International Court of Justice. However, due to glaring gaps in their implementation, several countries tolerate (and even promote) excessive use of force by law enforcement agencies: arbitrary detentions, the abuse of illegal migrants and refugees, custodial torture and a host of other examples of non-compliance with fundamental citizen safeguards.

In India too, torture was endemic, said Justice (Retd.) A.P. Shah, former chairman of the 20th Law Commission of India. Unsurprisingly, several domestic terror laws -- the Terrorist and Disruptive Activities (Prevention) Act, Prevention of Terrorism Act and the Maharashtra Control of Organised Crime Act -- either covertly or overtly accept torture as a necessary evil in extracting confessions and obtaining evidence. This belief is not just prevalent among state functionaries, but also among high-ranking members of the judiciary have consider torture a necessary tool for investigation and successful prosecution.

## **2. The legal framework against torture in India**

Moving on, the second session focused on existing gaps in the Indian legal framework on torture. Vrinda Grover, an advocate at the Supreme Court of India, expressed concern over the culture of impunity around torture ingrained in legal and statutory systems in India. In the absence of a comprehensive law on the prevention of torture, only a few sections of the Code of Criminal Procedure (CrPC) and the Indian Penal Code (IPC) criminalise torture and custodial deaths (Section 176 of the IPC, for instance, provides for judicial enquiry into alleged custodial deaths). However, there have been attempts to pass an anti-torture legislation in the country, said advocate Grover.

The Prevention of Torture bill (2010) was passed in the Lok Sabha that year. However, widely criticised by the civil society for lacking teeth and not meeting international standards, it was eventually passed to the Rajya Sabha. A Parliamentary Select Committee was then set up under former Law Minister Ashwani Kumar to review the Bill. These were presented in the Rajya Sabha,<sup>1</sup> but presentation the bill has since lapsed due to inaction and the subsequent change in governments in 2014.

In 2016, Ashwani Kumar filed a petition in the Supreme Court enquiring about the bill.<sup>2</sup> The next year, in response to Supreme Court directions, the Law Commission of India released its 273rd report in which it recommended that India ratify the UNCAT. It also released a draft legislation on the prevention of torture in India<sup>3</sup>, which, Ms. Grover said, introduced further reduced the comprehensiveness of the 2010 draft, rather than improving it.

For instance, unlike the 2010 Parliamentary Select Committee Bill, the 2017 draft bill made no reference to gender-based torture and inhuman treatment, in addition to facing several other shortcomings (discussed a little later). Even High Court judges were opposed to the bill, said advocate Grover. However, they were more concerned with internal and external enemies of the Indian state, who they believe cannot be dealt with unless the police was allowed to use torture.

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<sup>1</sup> Select Committee Report. Available at [http://www.prsindia.org/sites/default/files/bill\\_files/Select\\_Committee\\_Report\\_Prevention\\_of\\_Torture\\_Bill\\_2010.pdf](http://www.prsindia.org/sites/default/files/bill_files/Select_Committee_Report_Prevention_of_Torture_Bill_2010.pdf)

<sup>2</sup> <https://www.telegraphindia.com/india/ex-minister-plea-for-anti-torture-law/cid/1340294>

<sup>3</sup> Law Commission of India's 273<sup>rd</sup> Report. Available at <http://lawcommissionofindia.nic.in/reports/Report273.pdf>

A truly comprehensive anti-torture legislation should mandatorily contain certain essential elements, said Gerald Staberock, OMCT Secretary General. These include:

- ***Having a clear chain of command for responsibility.*** The law should hold superior officials responsible for the activities conducted under their supervision;
- ***Honouring the principle of non-refoulement*** by ensuring, in addition to protecting individuals in the country's territory, that individuals can gain asylum and avoid deportation if they face torture in their native country;
- ***Acknowledging gender-based violence,*** since sexual violence is often an aggravating factor in cases of custodial torture;
- ***Ensuring comprehensiveness.*** In addition to providing for criminalisation, prevention and detection of torture, and offering accountability, compensation and rehabilitation to victims, the law should also empower activists, civil society groups, lawyers, and public officials.

Mr. Staberock also emphasised on the need for independent and unbiased investigators into allegations of torture. The imposition of statutory limitations of six months in the 2017 bill – under which a victim must file a complaint within six months of the alleged commission of the crime for it to be acted upon – would also turn out to be disastrous in reality, he added.

Taking forward the discussion on custodial torture, an audience participant, Kirity Roy, pointed out that medical officers (who are usually government officials) could play a significant role in proving torture cases if they conscientiously document all injuries and physical evidence of torture they find while examining prisoners. He said that he had discovered frequent instances of torture of undertrial prisoners being overlooked because of deliberate oversight of medical officers and apathy of magistrates in launching investigations.

The second session saw panelists highlighting some of the most damaging drawbacks of the 2017 Law Commission bill, by pointing out that it was:

- ***Vague:*** By staying vague, the bill risks setting a very high threshold for physical violence. ***“Grievous hurt”*** has been kept ambiguous and open to interpretation under section 320 of the IPC, which has a high threshold of physical hurt and excludes non-physical injuries. The terms mentioned in the definition -- ***“danger to life, limb or health”*** – are overtly broad and vague, and thus, do not have a place in a comprehensive law;
- ***Subjective and exclusionary:*** In the phrase ***“severe or prolonged pain or suffering, whether physical or mental, caused to such person by cruel, inhuman and degrading treatment”***, the words ‘severe’ and ‘prolonged’ can be interpreted subjectively, because of which, certain testimonies can be invalidated. Further, despite mentioning ‘cruel, inhuman and degrading treatment’, there is no definition of what it specifies. It is inconsistent about non-physical injuries, and also contains a problematic explanation of mental torture, which can span wider than mere “mental agony or tension arising due to coercion”;
- ***Discriminatory:*** The bill fails to account for class discrimination of any kind among victims, which is a regression from the 2010 bill. It also fails to criminalise the instigation of the act by a public servant;

- **Non-committal about victim welfare:** Not only does the bill fall short in providing for rehabilitation measures for victims, it also does not include any gradation of offences, and offers punishments that are less strict than those in the previous bill. In addition, unlike the 2010 select committee bill, the 2017 bill does not offer a comprehensive formula for calculating compensation for torture victims;
- **Unempowering:** The bill includes a clause for previous sanction to prosecute (as under section 197 of the IPC) – where one needs to seek permission from a high-ranking government official to prosecute an accused police official — and this can be extremely problematic. The bill needs a comprehensively lay out the provision for independent investigations;
- **Limited in scope:** This bill does not illustrate acts of torture (as the 2010 bill does) with case studies and examples. It also does not talk about preventive measures. Additionally, the principle of regular review, as included in the UNCAT, is not reflected in the bill.

### 3. The Indian scenario

The third session canvassed past legal efforts in the country towards protection from torture, including the Prevention of Torture Bill, 2017, submitted by the Law Commission of India in its 273rd report, as well as role of the National Human Rights Commission (NHRC).

Current laws in India remain silent on torture, said NHRC registrar Surajit Dey, who represented NHRC in the conference. He then detailed the organisation’s functioning and highlighted its mechanism to deal with complaints of torture and rape in police or judicial custody. NHRC guidelines mandate District Magistrates and Superintendents of Police in every district to report all complaints of custodial deaths and rapes to the NHRC within 24 hours of occurrence. The guidelines further provide mechanisms to reprimand authorities in the case of non-reporting.

Once NHRC receives a custodial torture complaint, it sends over an independent investigation team to the spot. In cases of custodial death, a two-member division bench considers the reports of the magisterial enquiry, as well as forensic and post-mortem reports. Pursuant to the Evidence Act (Section 114 b), there is a presumption of torture in cases of custodial death; it is then the duty of the accused or the state authorities to prove that the death was natural and not a result of torture.

After Mr. Dey echoed concerns over shortcomings in the draft torture bill, Mr. Staberock, went on to reiterate the importance of introducing a comprehensive law on torture in India that would be in force during peace time as well as during times of conflict.

### 4. Torture prevention and accountability: Policies, guidelines and suggestions

The fourth session explored best practices as well as policy changes that should be introduced in India’s legislative framework to provide adequate protection from torture. The panelists began the discussion by reiterating NHRC’s mandate to enquire into all human rights violations, as discussed in the last session. As mentioned before, NHRC mandates that complaints of torture or rape in police or judicial custody must be made to it within 24 hours of the commission of the crime.<sup>4</sup> Failure to report on time can be seen as a deliberate attempt to suppress the incident, hence making the authorities party to the crime.<sup>5</sup> The NHRC

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<sup>4</sup> NHRC: On Custodial Deaths/Rapes. Available at: <http://nhrc.nic.in/sites/default/files/sec-1.pdf>

<sup>5</sup> Ibid.

also conducts workshops, training programs, awareness and sensitisation programmes with paramilitary and police forces. NHRC data has shown that 95-97% of all Indian states comply with its recommendations for providing compensation to torture victims, but not with its recommendations on prosecuting the accused.

Several criticisms of the NHRC were raised during this session. Despite provisions to video-record post-mortems, this documentation was often of poor quality due to a lack of trained videographers – in some cases, injuries on certain parts of the body were ignored, and in others, the victims’ confidentiality was not preserved. Furthermore, NHRC guidelines<sup>6</sup> for custodial deaths do not contain an exhaustive checklist of the signs of torture, and other relevant information that should be collected during examination. There is also no comprehensive guidance on autopsies on victims who had also been raped. A working group has been attempting to frame these guidelines and push NHRC to accept these. In the conference, the panelists suggested that the NHRC:

- Have the District Legal Service Authorities (DLSA) respond to the incidents of torture, in absence of a functioning anti-torture law;
- Introduce a minimum standard of interrogation;
- Get the State Human Rights Commissions (SHRCs) to monitor the compliance of its recommendations on arrests;
- Explore the possibility of appointing and training Non-official Visitors (NOV) to check for instances of torture in prisons;
- Explore the possibility of setting up a litigation department.

During this session, speakers also discussed the role of civil society groups in preventing torture. Several civil society organisations have already been working to document instances of torture at the grass-root level, in providing support to victim families as well as pushing for litigation in cases of blatant human rights violations. Civil society groups are also an important part of the implementation mechanism, and can work to hold state institutions accountable and end the culture of impunity around torture. These groups are especially indispensable, given the institutional constraints that India continues to face regarding torture, and therefore, civil society participation and interventions, as well as public and expert consultations are critically important in the process of creating a more comprehensive and effective anti-torture bill.

## **5. Why should India ratify the UNCAT?**

The penultimate session of the conference focused specifically on aspects of the UNCAT that made it a critical tool for torture protection and defense across the world. Ambassador Claude Heller reminded the audience of the holistic, multi-faced nature of the treaty due to which it not only sought the prevention of and intensive investigation into torture, but also pushed for the welfare of its victims through complaint redressal, compensation and rehabilitation. Indeed, the definition of torture in Articles 1 and 4 of the UNCAT specifies the need to incorporate it into a domestic law. Over the years, the UNCAT has contributed to public policy in the domestic legal systems of various countries, acted as a channel of communication for international bodies, and has been indispensable in improving conditions of correctional institutions in several places through its clear provisions on matters such as prosecution, confessions, investigation and holding public officials accountable. This session also included comparisons of domestic laws in different

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<sup>6</sup> Ibid.

countries, along with practice and policy measures, and finally, the presentation of a policy paper on torture in India.

Ratification is not the end of a process; instead, it is the beginning of a constructive dialogue between the state and UNCAT, said Ambassador Heller. Encouraging more dialogue between India and the UNCAT, he stressed that the UNCAT is not a tribunal or an NGO, nor could it ever replace the state. It was the state's responsibility to analyse its state of affairs, and improve its capacity to deal with its torture-related issues, with help from the UNCAT in implementing best practices. State parties should view treaty bodies as a tool for cooperation to improve the situation on the field.

Panelists agreed that ratification would have a positive effect on India's human rights conditions since it would keep the country beholden to international standards of human rights and its own voluntary pledges to assess and reduce instances of violations within its territory. Needless to say, ratification would also provide human rights defenders, civil society organisations and individuals on the ground with a powerful tool to aid in their work against torture.

Often, the first national report is an indication of the state of affairs in a country and serves as a reminder for it to begin working on its issues. The data can also encourage states to realise the need for more systematic data on national conditions. Ratification, thus, would also help India gather better data on national conditions.

## **6. The way forward**

The final session focused on solutions, suggestions and advocacy, and began by re-emphasising the urgent need for India to ratify the UNCAT and introduce a comprehensive domestic legislation against torture, in light of everything that had been discussed in the conference. Panelists made a host of suggestions, including the setting up of special courts for dealing with torture cases as specified under Section 30 of the Protection of Human Rights Act, 1993, using media coalitions to mobilise against torture, using civil society groups and Universal Periodic Reviews as a means for imposing checks and balances in the system, and bringing about interventions through better training of medical officers at medical forensic institutions. Frederick Rawski, Asia-Pacific Regional Director of the International Commission of Jurists (ICJ) also advocated the role of the ICJ in helping form closer partnerships with state judicial academies and regional academies. Following this, the room broke into three groups that separately analysed different aspects of UNCAT ratification in India. Key suggestions from each session follow.

### **a) Groups 1's ideas on creating alliance and partnerships to approach key actors for UNCAT ratification:**

- Alliances should be built between organisations working on a variety of issues: groups working for sectional minority communities or persons with disability, women commissions, indigenous peoples organisations, labour parties, law schools and students, educational institutions, student unions, independent journalists, peace networks, retired bureaucrats, the Indian medical association, former army and police officers, and forensic experts, among others;
- These alliances should work with the government to ensure implementation of anti-torture legislation and to push for accountability;
- A core group of three-four people should be set up for coordination, with online groups for coordination, planning and maintaining a public presence;
- This group suggested a tentative name for the alliance: 'CAT Initiative in India'

**b) Changes proposed by group 2 in the Draft Bill 2017:**

- The definition of torture in the Bill assumes a high threshold for torture, and no comprehensive definition of mental suffering caused by torture. There needs to be a descriptive definition of physical hurt and mental pain;
- Multiple provisions in the bill are limited in scope; this needs to be addressed to make it more holistic;
- In the previous Select Committee Bill of 2010, the punishment had a lower limit for three years (which the group considered a good provision). The 2017 bill inadequately sets an upper limit of 10 years on punishment, which must be altered;
- Compensation to victims would only be given after a departmental enquiry, according to the 2017 bill. The group felt this was not needed since torture would already be established in previous proceedings;
- The group recommended removing the imposition of statutory limitations of six months;
- The bill suggests that enquiry into torture be conducted by officers not below the rank of SP. The group suggested an independent investigative agency for all cases of torture;
- The bill makes it necessary for prior sanction to be obtained for prosecuting public officials; the group felt this provision too should be removed;
- The group also felt that the judiciary needed special trainings for sensitisation; if possible, a special court should be set up for handling cases of torture.

**c) Suggestions from group 3 on preparing advocacy strategies at the national and international levels:**

- Create a coalition on networking and appoint a point person to report to different states;
- Formulate a coalition of campaigners
- Keeping in mind India's diversity, propose advocacy efforts in regional languages across states;
- Present the anti-torture campaign to political parties, while cautioning that it should not be an election strategy;
- Implement the success of the UPR group in India;
- Use media coalitions effectively to push ratification campaigns;
- Introduce anti-torture campaigns to the academia, in judges training, and in law education curricula;
- Make police and prison officials collaborators for positive reforms; during their training, maintain that refraining from torture is non-negotiable;
- Have public discussions to remind citizens of the reality of torture. "We need the public to abhor torture in the same way as slavery is and deconstruct the counter-narratives," said the group.
- Circulate the draft bill across several forums;
- Identify, document and publish past instances of torture in an openly-accessible repository;
- Raise awareness by identifying perpetrators of torture in the country, who have in the past been hailed as 'heroes' and not held accountable for their action. Also include narratives by torture victims;
- In light of the murder of journalist Jamal Khashoggi gaining traction globally, the international community can push for an anti-torture bill for India. CHRI can raise this issue in Geneva, hosting side events at UN Geneva and at various international community meetings;

- Convention against Torture Initiatives for trans-continental effort to ratify torture can also be sought out for support for India's campaign
- Emphasise on the point that India remains the only Southeast Asian democracy to not have ratified the CAT and that ratifying it will enhance India's image globally;
- Urge India to also ratify the Additional Protocol to Geneva conventions related to conflict areas, and highlight India's voluntary pledges, which includes ratifying the torture convention.

## 5. Conclusion

Extraordinary crimes demand extraordinary punishment. This cannot be possible without specific laws that not only recognize torture and abetment to torture, but include provisions for acknowledging, documenting, and punishing such crimes. The draft bill on torture in India, therefore, must provide for all these – and more.

This two-day conference yielded a host of recommendations by panelists, which included human rights defenders, UN representatives, lawyers, and state functionaries, as well as audience participants, most of whom spoke from the experience of a lifetime of human rights work on the ground. The conference examined the state of torture in India – the nature and scope of it, deficiencies in redress mechanisms, and the gap between the country's promises on the international stage and its ground realities. It considered victim testimonies, activist accounts and failures of the state on various levels. Participants used these as the basis to formulate recommendations for incorporation in India's draft anti-torture bill, which in its current state (the 2017 bill), left much to be desired in securing both justice and rehabilitation of torture victims.

Thus, one of the key points agreed to by the group was to push for a comprehensive, holistic bill. While documentation of torture is severely, with the state often deliberately ignoring physical injuries suffered in custody, one must remember that torture needn't always be visible. A truly comprehensive bill must therefore take cognizance of 'invisible' injuries – those that do not leave marks on the body, mental torture, as well as the trauma that a victim may suffer throughout their life. Therefore, not only would such a bill need to expand its definitions of torture, it would also need sensitive and well-trained personnel on the field. At the conference, panelists noted the need for reforming education and training programmes for medical officers; Senior Supreme Court advocate Dr Colin Gonsalves even suggested using Public Interest Litigations (PILs) against under-reporting of custodial torture by doctors to push for better documentation of torture. Needless to say, the next step for the bill is to ensure the welfare of victims and witnesses – providing legal support in their fight against their perpetrators, medical treatment, protection homes, as well as compensating them for their suffering.

It must be noted that while these are curative measures, India must take proactive steps to *prevent* torture. It must, therefore, indicate its willingness to work on this issue by ratifying the UNCAT. Civil society organisations, activists, and human rights defenders must come together to campaign for this, both nationally and internationally.

As the world's largest democracy, and a country aspiring to join the UN Security Council, India can no longer shy away its human rights responsibilities. It must uphold the values enshrined in its constitution to protect the safety, security and life of every single one of its citizens.