A Critical Appraisal of the Prevention of Torture Bill, 2010

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The Prevention of Torture Bill, 2010 – introduced in the Lok Sabha in the budget session – only pays lip service to the obligations set by the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to which India is a signatory and is nothing but a mere eyewash. The proposed legislation is not only a climbdown from the standards set by the UN Convention against Torture, but, in many ways, is in direct opposition to the basic norm of adherence to at least the minimum standards set down with respect to the right to freedom from torture.

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The Prevention of Torture Bill, 2010 was introduced in the Lok Sabha in the recently concluded budget session, having been cleared by the cabinet on 8 April 2010. Although the government of India signed the United Nations Convention against Torture (UNCAT) and Other Cruel, Inhuman or Degrading Treatment or Punishment almost 13 years ago, it has failed to ratify it until date. Coming under heavy pressure from the "international community" and civil society, the bill is an attempt to "amend prevailing laws" so as to make torture a punishable offence. However, as we shall see, such a legislation only pays lip service to the obligations set by the UNCAT and is nothing but a mere eyewash. The proposed legislation is not only a climbdown from the standards set by the UNCAT, but, in many ways, is in direct opposition to the basic norm of non-derogability of the right of freedom from torture.

Watered Down Definition of Torture

The definition of an act of torture specified in the bill has narrowed the scope of acts to be considered as offences amounting to torture. The definition of torture is elaborated in Article 1(1) of the UNCAT, which states:

> …torture means 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. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

On the other hand, the bill defines "Torture" in clause 3 thus:

> 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, 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 an act, which is justified by law.

On "Punishment for Torture", clause 4 states:

> 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;
> (b) on the ground of his religion, race, place of birth, residence, language, caste or community or any other ground whatsoever shall be punished with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.

Given that the words and expressions of the bill have the same meanings as the Indian Penal Code (IPC) read with the comments added in the bill, it is necessary to critically examine the implications of such a proposed definition. First, there is a drastic narrowing down of what constitutes an act of torture. The UNCAT lays emphasis to the infliction of "severe pain or suffering", whereas the proposed bill uses phrases such as "grievous hurt/danger to life, limb or health". These expressions have a much narrower interpretation. For instance, acts of beating the victim with a stick, inserting chilli powder or petrol in the rectum of the victim, stretching the victims legs apart to an unbearable extent, application of electric current to the victim's body or private parts, hanging the victim upside down from the ceiling, water-boarding, illegal detention, etc, currently practised by our security agencies would cause "severe pain and suffering" but may not amount to "grievous hurt/danger to life, limb or health" even in its broadest sense. Such acts, which have conveniently evaded prosecution under

the existing penal laws, will continue to do so, even more, under the bill.

Second, certain acts, which are already considered as torture under IPC (Section 330), have been consciously evaded in the definition. Here, simple "hurt" by a public servant would call for a punishment of a seven-year term and fine. Third, the purposes of torture included in the definition of the UNCAT are as (1) obtaining information/confession, (2) punishment, (3) intimidation/coercion, and (4) based on discrimination. On the other hand, the bill restricts itself to only two of these, i e, the first and fourth. By such a restrictive definition, torture committed by overzealous public servants who see themselves as extrajudicial penal authorities would not be liable for punishment. In such cases, like the Bhagalpur blinding, torture is committed for the sole purpose of punishment. Similarly, in areas of mass resistance, acts of torture are committed on the protesters for the only purpose of forcing them into submission. Here too, such an act would not attract any punishment under the proposed bill. Finally, on the question of quantum of punishment there is no advancement to the existing provisions under Section 331 IPC, which punishes grievous hurt with imprisonment up to 10 years and fine. But, for an act causing "danger to life", which would be prosecutable under Section 307 IPC and attract punishment for life, the proposed bill, in fact, seeks to reduce the punishment.

Overall, the proposed bill, rather than providing effective punishments for torture, is instead a climbdown from the international anti-torture standards and has even gone to the extent of diluting existing penal laws concerning torture.

No Change in the Existing Systems of Impunity

A major obstacle in punishing those who are responsible for acts of torture is the fact that they are "public servants". The prosecution of a public servant becomes virtually impossible due to the existence of Section 197 of Criminal Procedure Code (CrPC), which provides that they cannot be prosecuted without prior permission from the government, either state or central, which employs them. In the areas of Jammu and Kashmir and the north-east, where the writ of the Armed Forces Special Powers Act (AFSPA) runs, prosecution of armed forces personnel responsible for torture is equally impossible, given the provision of Section 6 of AFSPA, which reads:

> No prosecution, suit or other legal proceeding shall be instituted except with the previous sanction of the Central Government, against any person in respect of anything done or purported to be done in the exercise of the powers conferred by this Act.

Without any concrete step to repeal Section 197 CrPC or the draconian AFSPA one cannot envisage any purposeful prevention of torture legislation.

Another impediment in the prosecution of public servants responsible for acts of torture is the fact that they enjoy immense power, authority and patronage in the administrative set-up. They are therefore in a position to influence the investigation of an act of torture. In addition, given the fact that most acts of torture are committed within the walls of a lock-up or detention centre, it is extremely difficult to find reliable and trustworthy witnesses. In such a situation, there is a strong possibility that corroboration of the victim's testimony may be weak. This should not be used to the victim's disadvantage.

Thus, if the fact of pain or suffering is proved and the victim testifies that the same has been caused by a public servant, the court should presume the same. The bill lacks such an approach.

The proposed bill, in Section 5, in fact, creates another obstacle for the prosecution of the public servant. It introduces a limitation for cognisance of an offence by the court, which hitherto did not find a place in existing criminal procedural law for an offence punishable over three years. This limitation for cognisance by the court is given as six months in the bill. Existing procedural law under Section 468(2)(a) CrPC gives such time limitation for offences punishable solely by fine, such as jaywalking, spitting on the payment, etc. Such a time limit, in cases of torture is a judicial impossibility given that it would, first, take the victim quite some time to free himself/herself from the public servant's custody and administrative grip and thereafter build the confidence to file a complaint. Procedures of filing an FIR, obtaining sanction for prosecuting the public servant, arresting him/her and filing a charge sheet for the court to take cognisance would follow. Anyone well versed with the realities of the functioning of our judiciary will blatantly claim such a limitation as not only absurd, but also rather, a mala fide sleight of hand by the drafters of the bill (who see an act of torture as "serious" as spitting on the pavement). This, in effect, ensures that practically no case of torture will ever reach the stage of trial.

Silence on the Use of 'Scientific' Tests

The proposed legislation also maintains silence on the government's legally accepted practice of conducting narcoanalysis, polygraph and brain mapping tests (although, more recently, the Supreme Court has pronounced as unconstitutional the use of these tests for the purpose of criminal investigations – Ed). Such tests are conducted for the purpose of extorting information, confession, by a public servant, and amount to intentionally inflicting physical/mental suffering and degrading treatment. All these aspects amount to an act of torture as defined by the UNCAT. Such so-called scientific tests have also violated other international human rights standards such as Article 7 of the International Covenant on Civil and Political Rights (ratified by the government of India) which states:

> No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Such tests are already banned in the US and European countries. This matter is currently before the Supreme Court in a petition filed by the All India Lawyers' Joint Action Committee praying for a ban on narcoanalysis (as mentioned earlier, the Supreme Court has, in this matter, ruled the use of such tests for the purpose of criminal investigations as unconstitutional). The National Law Commission has proposed similarly. The forensic science laboratories (FSLs) in Bangalore, Gandhinagar, Mumbai and Chennai have stopped conducting these tests since the past two years. Even a committee appointed by the Union Home Ministry (headed by the director of the National Institute of Mental Health and Neuro Sciences, D Nagaraja)

has questioned the very scientific basis of use of brain mapping tests. It is therefore only logical that the proposed Prevention of Torture Legislation ought to, unequivocally, ban the practice of such tests.

Torture of Terror Suspects Legally Sanctioned

The most dangerous provision of this bill is that it would not apply when the victims of torture are covered by special laws such as the Unlawful Activities (Prevention) Act (UAPA). Presently, the UAPA is the foremost-specialised anti-terror law being used by the government. The UAPA has been used indiscriminately on Muslims, adivasis, dalits, journalists and other political, social, cultural and human rights activists. Such accused have been picked up on mere suspicion, tortured into submission, encountered, etc, for their alleged involvement in movements against the state or for their political convictions. This provision, if incorporated in the bill, while effectively closing the doors for redressal to all the above sections, gives a blatant signal for intensifying torture in such cases.

It is a well-known fact, documented by numerous human rights organisations, that incidents of torture are systematically practised by the security forces as part of a counter-insurgency policy. In Jammu and Kashmir itself, nearly 8,000 to 10,000 persons have been tortured and thereafter "disappeared" since 1989. Many cases of custodial rape and murder have taken place in Manipur and other north-eastern states: Instances of torture of Naxal suspects are quite common especially in areas of mass resistance. The Andhra government itself admitted that several innocent Muslim accused of the Hyderabad bomb blasts of 2007 had been tortured. By such a derogation, the government attempts to present the "threat of terrorism" as a pretext for denying such suspects the right to remedies under the bill. This is in direct opposition to the very letter and spirit of the UNCAT, which states in Article 2(2) that:

> No exceptional circumstances whatsoever, whether a state of war or threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

Here the government could very well draw lessons from the efforts of our prime minister's daughter, Amrita Singh's documentation along with the American Civil Liberties Union (ACLU) on reports of torture inflicted on terror suspects in US-run overseas detention centres. The Bush administration faced severe criticism for such treatment of terror suspects and the Obama administration had been forced to take cognisance. No government whatsoever can invoke the bogey of terrorism as reason for the systematic practice of "special interrogation techniques" or other such forms of torture. This part of the bill is nothing but a blatant violation of the non-derogability of the basic right of freedom from torture.

Other Serious Shortcomings

The bill has provided for the setting up of independent panels to deal with complaints of torture, both at the central and state level so that complaints would be

forwarded to such panels. One can only envisage the future of such panels in the light of the implementation of the Protection of Human Rights Act, 1993. Similar provisions for setting up of state human rights commissions and special human rights courts were provided for. But even after 17 years such bodies are absent in many states. The bill also does not grant any right to compensation and rehabilitation to the torture victim. It also lacks any provision for mandatory, un-intimidated visits by the local judiciary to all detention centres and lock-ups within its jurisdiction. Both these are essential remedial measures put forth by the human rights movement for the prevention of torture.

There, no doubt, exists a need for a special and effective anti-torture programme. Historically, torture has been institutionalised in India during the British rule, when it had been used as a weapon to keep the "natives in submission" and suppress any national liberation movement. The present ruling classes continue using this inherited institution for similar purposes, i e, to counter people's movements. Here torture is not an exception perpetuated by some "evil subordinates", but rather a deliberate practice sanctioned by top ranking officials and policymakers. Special draconian laws have further institutionalised torture. The Prevention of Torture Bill, 2010 seems to be an attempt to preserve the foundation of this institution. It is a sham with the only objective of playing to the international audience in an effort to establish the façade of being the "world's largest democracy".