Pre-Legislative Briefing Service (PLBS)

The Prevention of Torture Bill, 2010: A Briefing Document

Submitted to the Select Committee of the Rajya Sabha on the Prevention of Torture Bill, 2010 on 22nd September 2010

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Executive Summary

The Prevention of Torture Bill, 2010 (hereinafter "the Torture Bill, 2010"/ "the Bill") is a legislation which primarily aims to provide for punishment for acts of torture committed or abetted or consented to, by public servants. As stated both in the Preamble, as well as in the Statement of Objects and Reasons, the ostensible rationale for its formulation is the fulfilment of the requirement of an enabling legislation, necessary if India is to ratify the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1975 [hereinafter "the CAT"]. Accordingly, the Bill defines torture, prescribes necessary punishment and provides certain procedural safeguards relating to the process of investigation. The precise enumerations of these aspects in the Bill however have attracted considerable popular criticism.

In this report, we undertake a detailed legal analysis of the provisions of the Bill, an approach we believe will further inform the already vibrant public debate, and thereby be of significant use to the Hon'ble Committee in suggesting reforms. To this end, we take up each clause in the Bill individually and undertake two specific assessments: *First*, whether the clause is compliant with CAT, which is the stated purpose of the Bill; *secondly*, an independent legal analysis of the words and phrases in the Bill, in light of concurrent provisions in criminal law and Supreme Court precedent in this regard. Our analysis indicates that the Bill falls short of meeting India's international law obligations, while at the same time that it contains several clauses which are theoretically unsound and may create several undesirable ramifications in practice. On the basis of this analysis, we suggest appropriate amendments to the clauses, which will secure necessary compliance with international law obligations under CAT as well as ensure that interpretive difficulties under domestic law are smoothened to the extent possible to, and make the provisions in the Bill defensible in theory and efficacious in practice.

A. Clause 2 – The Definition Section

I. Meaning of the term "unless the context requires otherwise"

1. Clause 2 at present reads as follows:

> In this Act, unless the context requires otherwise,
>
> (a) words and expressions used in this Act shall have the same meanings respectively assigned to them in the Indian Penal Code
>
> (b) any reference in this Act to any enactment or any provision thereof shall in any area in which such enactment or provision is not in force be construed as a reference to the corresponding law or the relevant provision of the corresponding law, if any, in force in that area.

2. The expression "*unless the context requires otherwise*" has a definite meaning in Indian law. In *Printers (Mysore) Ltd. v. ACTO*,[1] the Supreme Court held that an Act that uses the expression conveys thereby that courts are free to assign to the word in question a meaning other than the one specified by the Act, if the context so requires. "Context" has been held to be both "internal" and "external",[2] and external context covers ordinary linguistic usage, special meanings and so on. The Supreme Court has also held on occasion that the absence of the expression "unless the context otherwise requires" is of no moment, because a court is always free to imply that term as a matter of statutory construction.[3]

3. However, the expression is likely to have significance for the Torture Bill, 2010, because of the language of the corresponding provision in the Torture Bill, 2008,[4] which is as set out below:

> *2. Definitions*
>
> (1) Words and expressions used in this Act shall have the same meanings assigned to them in the Indian Penal Code

[1] Printers (Mysore) Ltd. v. ACTO, (1994) 2 SCC 434.
[2] Pushpa Devi v. Milkhi Ram, (1990) 2 SCC 134.
[3] See, for example, CST v. Union Medical Agency, AIR 1981 SC 1.
[4] While there is some doubt as to the permissibility in court of referring to Bills prior to final legislation, the Supreme Court has done so on various occasions on the principle that everything "logically relevant" to ascertaining the intention of the legislature may be taken into account. *See for example* KP Varghese v. ITO, 131 ITR 597. Such an exercise will be especially apposite in the case of the Torture Bill, 2010 because its predecessor is publicly available, and uses expressions that are notably different, indicating a definite shift in the intention of the legislature.

> (2) Any reference in this Act to any enactment or any provisions thereof shall in any area in which such enactment or provision is not in force be construed as reference to the corresponding law or the relevant provision of the corresponding law or to the relevant provisions of the corresponding law, if any, in force in that area.

4. On a comparison of Clause 2 of the Torture Bill, 2008, and the corresponding clause in the present Bill, it is evident that the expression "*unless the context requires otherwise*", which was absent in the predecessor Bill, has now been inserted. It is possible for a court to take the view that the legislature intended the definitions used in the present Bill to be more inclusive as a result of the addition of this phrase. In effect, the use of the expression "unless the context requires otherwise" makes the definition that follows "inclusive", i.e. allowing for varied interpretations as opposed to "exhaustive", i.e. defined strictly by the Bill.

5. We believe that an inclusive definition is <u>inappropriate</u> for the Prevention of Torture Bill, 2010, for two reasons. Before discussing the reasons for this view, it must be acknowledged that the greatest merit of an inclusive definition is flexibility. However, the *first* reason to use an exhaustive definition is that the present Bill, when enacted, will be a criminal legislation. Courts in England and India have for long held that criminal statutes must be construed strictly, on the principle that a subject cannot be charged under such a legislation unless it is abundantly clear, before he commits the punishable act, that the act is indeed punishable.[5] This applies both to punishable acts and to persons committing those acts. When a penal or charging provision is inclusive, there is a possibility that the provision will be applied to classes not obviously covered by it.

6. This principle is evident from the legislature's use of definitions in the Indian Penal Code, 1860 ["IPC"]. Section 18 IPC, defining "India", uses the expression "*India <u>means</u> the territory of India excluding the State of Jammu and Kashmir* [emphasis supplied]". In a long line of cases, the Supreme Court has held that the use of the word "means" imparts to the definition an exhaustive character. For example, in *Bharat Cooperative Bank v. Employees Union*,[6] a three-judge Bench of the Court held that any definition that is preceded by the word "means" is

[5] *See for example* Kalyani v. Janak Mehta, (2009) 1 SCC 516; State of Rajasthan v. Ajit Singh, (2008) 1 SCC 601; Arjunan v. State of Kerala, (2007) 9 SCC 516.
[6] Bharat Cooperative Bank v. Employees Union, (2007) 4 SCC 685.

normally exhaustive. Sometimes, even the expression "means and includes" has been considered exhaustive.[7] The IPC uses inclusive definitions sparingly (ss. 11, 12 etc.).

7. *Secondly*, we believe that an exhaustive definition referring back to the IPC is more appropriate for the Torture Bill. While torture is no doubt a reprehensible act wherever committed, the Bill confines the application of this law to a carefully defined class of entities. If the intention is to cover a wider class of entities, it is more appropriate to alter the definition of the term in the substantive provision [Clause 3], rather than make an inclusive definition provision, and leave open the possibility of a court applying the Act to classes not intended to be covered by Parliament. This possibility is not remote – if, for example, torture is alleged against persons in a quasi-public position who, however, do not strictly fall within the definition of "public servant" or otherwise within clauses 3 and 4, it is possible for a court to read the provision broadly on the basis that the definition is inclusive. Such a provision is best avoided in a penal statute.

II. Recommendation

8. ***On the basis of this discussion, the Hon'ble Committee may consider omitting the expression "unless the context requires otherwise" from Clause 2.***

[7] Mahalakshmi Oil Mills v. State of A.P., (1989) 1 SCC 164; Hamdard (Wakf) Laboratories v. Dy. Labour Commissioner, (2007) 5 SCC 281.

B. Definition and Punishment of Torture [Clause 3 and Clause 4]

I. Introduction

9. Clauses 3 and 4 contain the definition of torture and the punishment prescribed for it under the Bill. Clause 3 reads as follows:

> 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…

It punishes torture in clause 4 as follows:

> 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.

10. A combined reading of these provisions indicates that some very specific acts are penalised under the Bill. A person will only be punished for torture under this definition if:

(i) he is a public servant, or has been abetted by a public servant, or has the consent or acquiescence of a public servant

(ii) commits an act that either causes grievous hurt, or causes mental or physical danger to the life, limb or health of the victim

(iii) commits this act with the intention of extorting information or a confession which may lead to the detection of an offence or misconduct, *and*

(iv) does so on some discriminatory ground.

All four grounds need to be satisfied before someone can be punished for torture under the Bill. In this part, we analyse clauses 3 and 4 together. This is primarily because though nominally clause 3 is the definition section and clause 4 the punishment section, clause 4, in fact, qualifies the definition provided in clause 3. Our analysis considers select concepts in clauses 3 and 4 and examines them based on:

a. Compliance with the Convention Against Torture, 1975 ["CAT"] to assess conformity with international law

b. Other relevant considerations including consistency with IPC and drafting coherence.

On the basis of this two-part analysis we appropriately reformulate clauses 3 and 4 to achieve drafting coherence, international treaty compliance and practical workability.

[Note: At the conclusion of every sub-section, a proposal for reform is provided, and its exact reformulation is found at the end of this part]

II. Compliance with CAT: A Preface

11. The preliminary question of what constitutes compliance with the CAT in international law is addressed here. In the past, the Committee against Torture ["Committee"] has faced the question of what compliance with CAT is adequate. In General Comment No. 2, the Committee has clearly stated:

> Serious discrepancies between the Convention's definition and that incorporated into domestic law create actual or potential loopholes for impunity. In some cases, although similar language may be used, its meaning may be qualified by domestic law or by judicial interpretation and thus the Committee calls upon each State party to ensure that all parts of its Government adhere to the definition set forth in the Convention for the purpose of defining the obligations of the State. [8]

The Committee has further affirmed that the "*legislative measures*" in Article 4 include the direct implementation of provisions of the CAT in domestic legislation and has expressed approval of states that have done so.[9] However this does not imply the legal requirement of a special legislation for torture. This is because Article 4 CAT reads:

"*Each State Party shall ensure that all acts of torture are offences under its criminal law*."

[8] CAT/C/GC/2 (2008).
[9] CAT/C/SR.16, section 41; CAT/C/SR.63, section 13; CAT/C/SR.167, section 31.

A combined reading of Article 2 and Article 4 of CAT shows that it is necessary to apply the law giving effect to torture to the entire territory of India. This expected compliance is evaluated strictly. In its report on the *Democratic Republic of Congo*, for example, the Committee stated that the adoption of a definition of torture encompassing *all* elements of the definition of torture found in Article 1 of the CAT was a part of Article 2.[10] Similarly, in its report on *Senegal*, the Committee said that the CAT definition of torture should be incorporated into national legislation, and an express rejection of the superior orders defence was required.[11] Therefore, it is safe to presume that to comply with the CAT, the Bill must concord in letter and spirit with the CAT and implement the provisions it contains.

12. The CAT defines torture in Article 1 as follows:

> For the purposes of this Convention, 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...
>
> This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

13. This report suggests that provisions regarding the definition of torture and the independent and impartial prosecution of torture differ in the Bill, in comparison with the CAT, restricting the scope and punishment for torture, while at the same time, many provisions contained in the CAT find no place in the Bill. Thus the Bill in its present form does not comply with the CAT in several areas, including most notably the definition of torture in clause 3 read with clause 4 of the Bill, which is considered below.

[10] CAT/C/DRC/CO/1, section 5.
[11] A/51/44, sections 102 to 119.

III. Nature of the Offending Conduct

a. Compliance with CAT

14. Under the Bill, to amount to torture, the act must either cause grievous hurt or must cause mental or physical danger to life, limb or health. In Article 1 of the CAT, however, the equivalent provision used is "*severe pain or suffering whether physical or mental*". While there was little substantive discussion during the drafting of the CAT of what "severe" meant, the Working Group in charge made the following observation that has been seen by commentators as explaining the scope of 'severe':

The scope of severe encompasses prolonged coercive and abusive conduct which, in itself, is not severe but becomes so over a period of time.[12]

15. This element of time is crucial. It ensures that acts which in themselves may not constitute torture become so by reason of their repeated application. This is a situation which we believe would not be adequately covered by the current limitation of torture to grievous hurt and danger to life, limb or health. This is because both these aspects consider acts individually. Repeated applications of a single act will only satisfy the definition if taken together they cause hurt that is grievous or danger to life, limb or health. Since many instances of torture will be caused by repeating a single pain-inducing act, such a situation can be directly covered by severe pain or suffering. Besides, the wording brings the Bill in line with the CAT, which is a stated objective.

b. Other Relevant Considerations

Clause 3 of the Bill limits acts of torture to those of the following nature -

(i) causing grievous hurt; or

(ii) causing danger to life, limb or health (whether mental or physical)

It is necessary to consider how these formulations are to be interpreted. For this, one has to examine what grievous hurt (and 'danger to life, limb or health (whether mental or physical)') means in the Indian Penal Code and how the terms have been judicially interpreted. Under s.

[12] See M.C. BASSIOUNI, COMMENTARY ON THE DRAFT CONVENTION FOR THE PREVENTION AND SUPPRESSION OF TORTURE OF THE INTERNATIONAL ASSOCIATION OF PENAL LAW, 48 Revue Internationale de Droit Penal, No. 3 – 4 (1978) at 282; A. BOULESBAA, THE UN CONVENTION ON TORTURE AND PROSPECTS FOR ENFORCEMENT, 18.

320 of the Indian Penal Code, "grievous hurt" is defined precisely. The definition presents an exhaustive list of situations[13] where grievous hurt can be said to have been caused. Seven very specific types of injuries have been enumerated. These include exceedingly serious and specific injuries such as emasculation, permanent loss of eye or ear, fractures, disfiguration, impairment of hearing of any ear. There is one general provision, however, which is the eighth clause in Section 320. This clause provides that grievous hurt also means a hurt which endangers life or which causes the victim severe bodily pain for 20 days, or unable to follow daily pursuits for 20 days. The phrase used in clause 8 "hurt which endangers life" and danger to life in Clause 3(ii) of the Bill have the same meaning.[14]

The courts have generally relied on the expert opinion of medico- legal jurists[15] who point out that "*as a general principle, the Court is likely to consider as dangerous to life in a danger is imminent. The law appears to contemplate the more immediate rather than the more, remote possible danger*..."[16] It is also pointed out that "*[d]anger to life should be imminent before the injuries are designated 'dangerous to life', such injuries are extensive, and implicate important structures to organs, so that they may prove fatal in the absence of surgical aid*."[17]

16. Thus the bar is *extremely high*. While there has been little judicial discussion on the issue of danger to limb and health and the said terms are not terms of art with specified legal meanings, the discussion on danger to life indicates the exceedingly high gravity of the injury needed to constitute danger thereto. Some examples are pertinent. It has been held that a blow to the head with an iron rod, in the absence of contrary evidence, does not endanger life and therefore is not grievous hurt.[18] Being struck on the head with a spade and being hospitalized for ten days thereafter too not been held to be grievous hurt.[19] Even stabbing the lower abdomen of a person leading to the protrusion of the intestines has been held not to be grievous hurt.[20]

[13] Joseph v. State of Kerala, 1985 Ker LJ 859
[14] Atma Singh v. State of Punjab 1980 Cr LJ 1226, 1228 (DB).
[15] See Madan Lal v. State of Himachal Pradesh 1990 Cri LJ 310, Jalim Singh v. State of Rajasthan 2005(2)WLC829.
[16] Taylor,'Principles and Practice of Medical Jurisprudence.' 11th Edition, p. 230
[17] Modim 'Medical Jurisprudence and Toxicology, 13th Edition, p. 238
[18] Tilak Raj v. State of Delhi MANU/DE/0287/2010
[19] Saman v. State of Orissa 2009 Cri LJ 418 (Ori)
[20] Mahadevan v. State MANU/TN/8637/2007 Rajvir v. State 2005 Cri LJ 1652 (Del)

Gunshot injuries to the arms, thighs and back of a victim have, in certain cases, been held as not causing grievous hurt.[21]

17. The Indian Penal Code on the other hand, holds public servants, as well as others, liable for both grievous hurt *and* ordinary hurt. Arguably the present Bill is not meant to prevent instances of ordinary hurt but only grievous hurt. Yet, the Indian Penal Code allows police officers, and other public servants to be prosecuted for acts that cause far less injury, which is termed as "hurt" (Section 330). Section 319 of the Indian Penal Code defines "hurt" as "bodily pain, disease or infirmity." Thus "hurt" seems to cover all those cases that are not covered by "grievous hurt".

18. It is certain that torture must relate to serious sorts of injury to persons. But "grievous hurt" sets the bar *too high*, without any recourse for persons suffering slightly less but still severe hurt. The following examples of severe hurt for which a police officer would be punishable under the IPC under Section 330 (dealing with ordinary hurt) but not under the Torture Bill**.**

(i) Stubbing a cigarette on the body of a person several times

(ii) Whipping a person with various instruments

(iii) Causing severe pain to a person that lasts for less than twenty days, etc.

19. It is important to remember these would be covered under the lesser offence of causing hurt under the Indian Penal Code (Section 321 r/w Section 330), but under the Torture Bill there is no liability whatsoever for these actions which may in actuality cause torture. It is thus recommended that the definition of torture be amended to meet these standards.

20. Thus both for bringing the nature of the offending conduct in line with the definition of torture in Article 1 of CAT as well as to account for several situations which cause torture but will be excluded by the definition in clause 3 given that they do not cause grievous hurt and arguably may not cause danger to life, limb or health (whether mental or physical), it is recommended that ***the words "severe pain or suffering (whether physical or mental)" be added as point (iii) in clause 3 of the Bill.*** This will ensure that the language of Clause 3 is wide enough to encompass cases of an allied nature that however fall outside the letter of the provision as

[21] Jalim Singh v. State of Rajasthan 2005 (2) WLC829

presently drafted, and offer India a stronger case in connection with compliance with its international obligations.

IV. Person Responsible

21. Currently, clause 3 read with clause 4 of the Bill indicates that only the person who actually *committed* the act of torture may be punished. This implies that a public servant who abets, consents, acquiesces or conspires in an act of torture cannot be punished under the Bill. This is anomalous because it incentivises and legitimises the outsourcing of torture to private parties and provides impunity for the public servant who planned or directed the torture.

22. Though clause 3 countenances the possibility of a public servant abetting torture or consenting or acquiescing to it, clause 4, i.e. the punishment section completely absolves such person from punishment under this Bill. This occurs due to the chapeau of clause 4. The chapeau of clause 4 reads,

"*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…"*

From this reading it is clear that two categories of persons are contemplated. *First*, public servants referred to in clause 3, which includes both public servants who commit the act of torture, as well as public servants who consent or acquiesce in it, and any person who tortures, abetted by or with the consent or acquiescence of the public servant. The key qualifier in this provision is however the words which follow, i.e. "*tortures any person".* This means that both categories of persons will be punished only if they commit the act of torture. Thus public servants in clause 3 who merely abet or consent or acquiesce in such torture cannot be punished under this Bill.

a. Compliance with CAT

23. This provision does not comply with Article 4 (1) of the CAT which states that each "*state party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture"*. By failing to incorporate abetment, attempt, complicity and participation, this clause falls foul of this provision.

b. Other relevant considerations

24. Besides, the exclusion of punishment for allied acts other than the act of torture itself falls foul of an important tenet of criminal law policy. Criminal law seeks to hold people who instigate, abet, and order other persons to commit a crime responsible for the crime committed. It sometimes provides the same level of punishment for such abetment, and sometimes does not. This is explicit in the Indian Penal Code, in Sections 107 -120. This is, of course, not the same thing as saying that a superior is liable vicariously for the acts of his or her subordinate. The principle is that a person who abets commits a *separate offence*—that of abetment, which the criminal law seeks to prohibit. This is reflected in the effect of Sections 110, 111 and 116 of the IPC.

25. The Torture Bill, however, leaves such people (abettors) without any liability in this Bill. It is one thing to say, that abetment is not the same thing as committing the offending conduct, but entirely another to say that the abetment is not a problem at all. Consider how the following example would be dealt with differently under the Indian Penal Code and the Torture Bill:

Hypothetical Fact Situation: A Police-Inspector orders a Sub-inspector to fracture an accused's arms so as to extract a confession from him or her.

If this case was tried under the Indian Penal Code, not only would the sub-inspector be liable under Section 331 of the Code (grievous hurt), the police-Inspector would also be liable for abetment of the offence committed under Section 109 r/w 331. Under the Torture Bill, on the other hand, although the sub-inspector would be held liable for torture on the basis of clause 4, the police-inspector would escape liability altogether since he himself has not committed an act of torture. This would be the case even if the sub-inspector would not have committed torture but for the command of the inspector.

26. ***It is therefore recommended that in order to bring the provisions of the Torture Bill in line with CAT on this aspect and ensure that abetment and attempt to torture are not unpunished, the relevant provisions of the IPC relating to abetment of offences and attempts is expressly included within the Bill.*** There is the possibility that the IPC will apply even without such a provision – but the addition proposed will make it abundantly clear and strengthen the potency

of the Torture Bill, 2010 as an instrument to combat the offence of torture – both in form and in substance.

V. *Mens Rea*

27. In the present formulation, there are three *mens rea* requirements which operate. In Clause 3, the act of torture must be caused "*intentionally…to obtain…such information…*" In clause 4, an act amounts to torture under the Bill if it is committed for (a) "*the purpose of extorting… information or a confession which may lead to the detection of an offence or misconduct*" *and* (b) is done on some discriminatory ground. These *mens rea* requirements are not compliant with the CAT and raise several textual difficulties.

a. Compliance with CAT

28. The *mens rea* requirement in clause 4 is not compliant with the CAT for three reasons. *First*, clause 3 of the Bill defines acts that are committed with the intention of extorting information or a confession as torture. However, clause 4 (the punishment section) only punishes acts that (i) intend to extort information or a confession which may lead to the detection of an offence or misconduct, ***and*** (ii) are done with some discriminatory purpose. Thus, many acts that amount to torture under clause 3 are not punished under clause 4. For example, grievous hurt caused by a public official for extorting information that is not done with a discriminatory purpose will not amount to a punishable act under clause 4. This is an internal incoherence which violates Article 4 (1) of the CAT according to which "each state must ensure that ***all*** acts of torture are offences under its criminal law." If an act is defined as torture but not punished, it would clearly violate this provision.

29. *Second*, article 1 of the CAT clearly delineates *four* purposes for torture. These are (i) obtaining information or a confession from the victim or a third person; (ii) punishment for an act the victim has committed or is suspected of having committed; (iii) intimidation or coercion; and (iv) discrimination of any kind. The formulation in the Bill ignores the second and third factors, and only punishes if the first and last factors are found simultaneously. Therefore, for example, grievous hurt by a public official for purely discriminatory purposes without seeking to extract information is not torture under the Bill, but is so under the CAT. Hence Clause 4 is under-inclusive in comparison with CAT.

30. *Third*, article 1 of the CAT contains the phrase "*for such purposes as*" to qualify the reasons for torture, which the Bill does not include. The Committee and commentators have understood this phrase to indicate that the four factors contained in article 1 are indicative and not all-inclusive.[22] Therefore, torture for other purposes of a similar nature – such as suppressing information about misconduct - is also punishable under the CAT but not under the Bill.

31. Finally it is relevant to note that the question of torture for discrimination has come before the Committee in the past. Several state parties enacted statutes that ignored this aspect of torture, and the Committee pointed these out as instances of non-compliance. For instance, Article 243 of the new Portuguese Penal Code defined torture in a manner similar to the Convention but did not include 'discriminatory' torture. Similarly, article 127 of the Ukrainian Criminal Code, which was amended in 2005 in order to bring it into line with Article 1 of the Convention, also included torture for all purposes referred to in the Convention except for discrimination. Section 117(a) of the Norwegian Penal Code, which defines a specific offence of torture, included torture for the purpose of specifically listed forms of discrimination, rather than for the purpose of discrimination 'of any kind'. All these are noted as non-compliance by the Committee and cause significant international embarrassment to countries.

32. For these reasons it is recommended that the definition of torture under clauses 3 and 4 to clarify the precise mens rea requirement to account for these factors.

b. Other Relevant Considerations

i. <u>The scope of the expression "*for the purposes to obtain from him or any third person such information which causes…*"</u>

33. Clause 3 contains the expression "***for the purposes to obtain from him or any third person such information which causes…*"** The corresponding clause of the Torture Bill, 2008, does not contain the expression "*for the purposes to obtain from him*". It simply provides that torture is an act committed by any public servant or any person abetted by a public servant or acting with his consent or acquiescence which causes grievous hurt or danger to life or health.

[22] See the Report of the 1978 Working Group on the Draft CAT, Un Doc. E/CN.4/L.1400 (1978); also see A. BOULESBAA, THE UN CONVENTION ON TORTURE AND PROSPECTS FOR ENFORCEMENT (1988) 21.

34. We believe that the expression "*for the purposes to obtain from him or any third person…*" is inappropriate, for two reasons. *First*, the phrase "from him" does not properly reflect the intention of Parliament, because, textually, it refers to the public servant himself. Since the opening part of the provision speaks of a person who is either a public servant himself or acts in abetment with one (or with his consent/acquiescence), the phrase "*from him*" that follows can only be considered to refer to the public servant who acts in abetment. For example, suppose a private person, 'X', is told by a police officer, "Y", to cause grievous hurt to an individual with the object of extracting a confession, the expression "*from him*" will mean that "X" must inflict the act of torture for the purpose of obtaining information from *Y*. This we believe is an inadvertent drafting error since it can only be the intention of Parliament that the information be obtained from the person being tortured rather than the person causing or abetting the torture. Hence we propose that the Hon'ble Committee delete this formulation.

35. *Secondly*, the phrase "*for the purpose of obtaining from him…*" introduces a *mens rea* requirement to clause 3. *Mens rea*, in simple terms, refers to the principle of law that certain acts are punishable only if their commission is accompanied by a particular "state of mind". Typically, this state of mind is "intention", and occasionally, it is "motive". For example, s. 302 IPC defines murder as (*inter alia*) an act that causes death committed with the "intention of causing death". The simplest way of describing the distinction between intention and motive is that intention refers to "whether" a person knew he was committing the act in question, while motive is "why" he was moved to commit that act. Most offences in the IPC do not require the Prosecution to establish motive. The expression "*for the purposes of obtaining from him…*", however, imposes a motive requirement, and not an "*intention*" requirement, which is imposed independently. An example illustrates the way in which this provision is likely to apply. Suppose a police officer "A" causes grievous hurt to an individual "B" to extract a confession from him as to a crime which he suspected of committing, the expression "*for the purpose of obtaining from him…*" will clearly be satisfied. However, if the *same* act is committed by the *same* person because of, for example, a vendetta between them, this expression will mean that clause 3 does not apply. We believe that this is contrary to the true intention of Parliament and to the spirit of the Torture Bill, 2010. It will be a simple matter for a person to evade the legislation by specifying a reason other than investigation of crime, and claim that the confession extracted was "*incidental*".

36. This same point, regarding the scope of the said expression, can be illustrated by a significant difference between clause 3 of the Torture Bill and the IPC. Clause 3 limits torture to cases relating to the extraction of information or a confession (further qualified by clause 4). The Indian Penal Code (Sections 330 and 331), on the other hand, also includes cases of grievous hurt for the restoration of, or demand for, property or other valuable security. This, we believe, is a vital difference since it shows that there may be a number of reasons as to why grievous hurt may be caused, on occasion, by public servants. The police may torture persons for any reason whatsoever, whether to extract information, or cause the person to return property, or to compel a person to commit an act (whether lawful or unlawful). The Indian Penal Code includes not all, but at least some of these instances. The Torture Bill includes even less. There seems to be little reason why the Bill should limit the liability for torture to cases only involving the extraction of information or a confession. The fact of the matter is that torture is committed for a variety of purposes, not all of them linked to one particular purpose.

37. The following examples are important instances where the Torture Bill ought to apply but does not, in the present form, apply (this is not an exhaustive list):

Cases falling under the Indian Penal Code

(i) A public servant who causes grievous hurt in order to a person to compel that person to hand over certain property, moveable or non-moveable, to state agencies.[23]

(ii) A public servant who causes grievous hurt to a person (A) in order to compel A to pay monies owed or movable property to another person (B) who is owed such money or property.

Cases not falling under the Indian Penal Code

(iii) A public servant causes grievous hurt to person (A) to compel to A perform actions like enticing another person (B) into a trap set by the police.

(iv) A public servant causes grievous hurt to a person (A) in order to compel that person's relative or friend or other such person (B) to give himself or herself up to the police for any purpose including further investigation, arrest etc.

[23] See Illustration (c), Section 330, Indian Penal Code, 1860

38. It is expedient that the scope of the torture provision be enlarged so as to encompass all circumstances in which such torture may be committed. Thus the purposes for which the offending act of torture is committed need to be significantly widened. ***Hence we recommend that the phrase "for the purposes to obtain from him or any third person..." for being anomalously drafted and under-inclusive is re-drafted.*** This leads to two direct benefits. The first is that a phrase that is likely to engender interpretive controversy and ensuing litigation is deleted without any damage to the overall effect of the provision, and the second is to make the provision sufficiently inclusive to cover every case that is within its spirit.

ii. <u>Intention under Clause 3</u>

39. Another difference between the Torture Bill and the Indian Penal Code is the question of intention. It may be plausibly contended that Clause 3 of the Bill requires specific intention in relation to the offending conduct. It states that acts which cause grievous hurt or which cause danger to life, limb or health (whether mental or physical) *done intentionally* constitute torture. While it is a general principle of the law that to hold someone criminally liable for acts committed must require the accompanying intention, the law makes notable exceptions. The law on murder and grievous hurt are two important examples. For our purpose, we can focus on grievous hurt. Section 321 of the Indian Penal Code provides that to voluntarily cause ordinary hurt a person must intend to cause such hurt, **or must have knowledge that he or she is likely to cause such hurt**. Similarly, Section 322 provides that a person must intend to cause grievous hurt **or know him or herself likely to cause grievous hurt, when he or she has actually caused such grievous hurt.** This means that even though a person may only intend to cause simple or ordinary hurt, but knows that his or her actions *may* cause grievous hurt, and does so cause grievous hurt, that person would be liable for grievous hurt.

40. Clause 3, on the other hand, it may be contended, excludes the operation of the second part of these *mens rea* provisions. It requires *specific intent* to commit grievous hurt. That is clearly at odds with the Indian Penal Code. The Indian Penal Code uses a phrase, "*voluntarily causing grievous hurt*," which is punishable. This includes, both specific intention to cause grievous hurt as well as knowledge that an act may cause grievous act.

41. There seems to be no principled or pragmatic reason why the Bill should absolve persons of acts which ought necessarily to be within the knowledge of persons (that they might cause grievous

hurt) but not specifically intended. This is particularly important because there would be **no liability at all** for public servants in such a case. It is thus recommended that the provision on defining torture be amended to clarify the above concern.

iii. <u>The scope of the proviso, in particular the expression "*in accordance with any procedure established by law*"</u>

42. Once again, this marks a conscious departure from the provisions of the Torture Bill, 2008, and is therefore likely to be a significant question of interpretation. The Torture Bill, 2008, provided that nothing in Clause 3 would apply to any "pain, hurt or danger as aforementioned" caused by any act which is "justified in law". The present Bill adds an additional qualification, and provides that Clause 3 is inapplicable 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".

43. Thus, under the present formulation, an act of torture is outside the remit of this Bill if it is (a) inflicted in accordance with any procedure established by law; or (b) justified by law. The implication of the change is that it allows a court to potentially construe "procedure established by law" narrowly, to hold that an act of torture that complies with a certain procedure is legal regardless of the purpose for which it was inflicted. While it is difficult for such a view to gain currency, especially in view of the decision of the Supreme Court in a line of cases following *Maneka Gandhi v. Union of India*,[24] the Hon'ble Committee may consider omitting it altogether, so as to leave no room for doubt that an unjustified act of torture is illegal regardless of its compliance with any procedural requirements. In *Maneka Gandhi*, the Court held that Art. 21's edict of "procedure established by law" refers to a "*just, fair and reasonable procedure*", and while the application of that principle to an ordinary legislation is not beyond doubt, it is also symbolically appropriate to delete the expression. ***Thus we recommend that the phrase "inflicted in accordance with any procedure established by law" is deleted.***

iv. <u>Clause 4</u>

44. Clause 4 is the penalty provision of the Torture Bill, 2010, and the provision with whose violation persons accused under the Bill will be formally charged. It reads as follows:

[24] *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248.

> 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 [emphasis supplied].

45. Thus it is clear that clause 4 imposes liability for torture with two *further* qualifications. It provides that the purpose of grievous hurt must be the extraction of information or of a confession, which may lead to the detection of an offence or misconduct **and** that such torture should be on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever.

46. Although the Indian Penal Code contains the first of such qualifications, it lacks the second. For the purposes of Section 330 and 331, it does not matter what the ground of extracting such information is. There is a clear dilution of standards under the Torture Bill.

47. This dilution of standards, simple at first sight, raises two potentially controversial issues. *First*, the definition confines punishable acts of torture to those committed for a specific purpose – those enumerated in sub-clause (a) and (b). There is a need, as argued above, that an act of torture committed by a public servant in such capacity must be punishable *regardless* of the reason for which that act was committed. This is not to imply that purely private acts of torture committed by a public servant are covered – a qualification that the provision applies only when the act is committed in his public capacity is sufficient.

48. *Secondly*, the Bill has inserted a "conjunctive" between sub-clauses (a) and (b) of Clause 4. This was notably absent in the Torture Bill, 2008. The clear implication is that an act of torture is not punishable unless it is committed for the purpose of extracting a confession ***and*** on the ground of the religion, race etc. of the victim. We believe that the conjunctive clause is inappropriate (apart from being non-compliant with CAT) because it has the effect of defining punishable torture unduly narrowly. For example, suppose a police constable tortures a suspect for the purpose of obtaining a confession that he committed a certain crime, without knowing of his

religious or other affiliation, it may not be possible to convict him under this provision, for although the act of torture was committed for the purpose of extracting a confession, it was not committed "*on the ground of religion, race…*"

49. ***It is therefore recommended that the conjunctive provision be amended to reflect that both of these are separate, independent bases of holding officials liable for torture, i.e. they be made disjunctive***. This is imperative, for retaining the conjunctive will render the Torture Bill, 2010 inapplicable in almost every case in which it is sought to be applied, for it is difficult to imagine evidence or even the possibility of a person committing torture *both* for investigative and for discriminatory purposes at the same time in relation to the same person.

VI. Recommendation

50. On the basis of the discussion above and keeping in mind the salutary drafting requirements of clarity and coherence, we recommend that Clauses 3 and 4 be reformulated in the following manner, the former containing the definition of torture, including its *mens rea* requirements and the latter containing the provision for punishment. Further, that Clause 4A be introduced to make the IPC chapters on abetment, criminal conspiracy and attempts applicable to the Torture Bill, Clause 4B be introduced to exclude certain specific defences from being taken, in line with the CAT, while preserving general exceptions under Chapter IV of the IPC. The addition of Clause 4A and 4B will ensure, first, that abetment and conspiracy are specifically contemplated within this Bill, and secondly, that a defence that is excluded by the CAT is also excluded by the Torture Bill, while allowing for the possibility of an accused person invoking the general defences available to him in a prosecution for an offence under the IPC. Thus, the redrafted clauses read as follows:

Redrafted Clauses 3 and 4

Clause 3: Whoever, being a public servant or being abetted by a public servant or with the consent or acquiescence of a public servant or at the instigation of a public servant, intentionally does any act that causes, or does any act with the knowledge that it is likely to cause and such act causes—

(i) grievous hurt; or

(ii) danger to life, limb or health (whether mental or physical), or

(iii) severe pain or suffering (whether physical or mental)

to any 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 on any discriminatory ground, is said to inflict torture.

Provided **that nothing contained in this section shall apply to any pain, hurt, danger or suffering as aforementioned caused by any act, which is 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.

Clause 4: Where the public servant or any person abetted by or with the consent or acquiescence of such public servant commits an act of torture as defined in section 3, he shall be punishable with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.

Clause 4A: For the removal of doubts, it is hereby declared that the provisions of Chapters V, VA and XXIII of the Indian Penal Code, 1860 shall apply to offences under this act.

Clause 4B:

(1)No exceptional circumstances, such as a state of war or a threat or war, internal political instability or any other public emergency, may be invoked as a justification of torture.

(2) An order from a superior officer or a public authority may not be invoked as a justification of torture.

Provided **that nothing contained in this section shall affect the application of Chapter IV of the Indian Penal Code, 1860.**

C. Cognizance of Offences (Clause 5):

I. Introduction

51. Clause 5 of the Bill reads as follows:

> 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.

It is evident that clause 5 prevents a court from taking cognizance of an offence of torture unless the complaint is made six months from the date on which the offence is alleged to have been committed. This implies that if, for some reason, a victim of torture files a complaint six months after the act was said to have been committed, the court cannot take cognizance of it.

52. We appreciate that under the general principles of criminal procedure, delays in registering a formal complaint would be a factor against the prosecution. We also appreciate that delayed complaints in cases of allegations of torture are likely to be motivated by extraneous considerations and that there is a strong state interest in preventing the provisions from being abused in such a manner. Though these concerns may be the likely underpinnings of Clause 5 as currently formulated by the government, we believe that they must be seen in light of certain extenuating circumstances insofar as their applicability to cases of torture are concerned. *First,* is the question of compliance of this provision with the CAT; *second,* is its inter-relation with other domestic criminal statutes in India; *third,* are the practicalities of filing a complaint against torture and victim-centric concerns arising therefrom.

II. Compliance with CAT

53. Article 12 of the CAT states,

> *Each State Party **shall** ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.*

Placing a limitation period of six months on the prosecution of torture cases is non-compliant with this provision of the CAT since there exists a real possibility that several cases of torture will

remain unprosecuted owing to the limitation. Clause 5 does not allow prosecution if competent authorities either find out about a case of torture only six months after it happened, or only form a legally reasonable ground to believe that an act of torture was committed six months after the act occurred.

54. Furthermore, recent statements of the Committee have indicated that states must repeal, or make non-applicable to prosecutions for torture any statutes of limitation and other time-limits.[25] This is based on a reading of Article 4 (2) of the CAT as per which, state parties must make torture punishable by 'appropriate penalties which take into account (its) grave nature'. The Committee has stated that a part of recognising the special seriousness of torture is an adequate limitation period, and therefore any limitation period on the crime of torture must rank amongst the longest provided for by the national law, i.e. equal or greater to those that apply to the most serious crimes.[26] As is shown below this is not the case in India as limitation periods for less serious offences are longer and more serious offences have no limitation period whatsoever. Hence Clause 5 as it currently stands is not compliant with both Article 12 of CAT as well as Article 4(2) as interpreted by the Committee.

III. Other relevant considerations:

a. Comparison with CrPC and other Penal Statutes

55. Clause 5 imposes a six month limit from the date on which torture has been committed to when a court can take cognizance of that offence and such that the matter can then be prosecuted if there is sufficient evidence. There is a *non-obstante* clause that excludes the operation of the Code of Criminal Procedure, 1973. It is pertinent to look at what the CrPC contains regarding this issue whose effect has been expressly excluded.

56. The period of cognizance that the Code of Criminal Procedure, 1973 prescribes for criminal offences of the same gravity of torture is, to put it simply, *none*. There is no limit on how long after the offence has been committed that the court can take cognizance of the offence. The provision relevant for limitation in the CrPC is s. 468 which reads:

[25] Nigel Rodley, "State Obligations under the UN CAT" 2 EUROPEAN HUMAN RIGHTS LAW REVIEW (2006) 115.
[26] *See* Nigel Rodley, "State Obligations under the UN CAT" 2 EUROPEAN HUMAN RIGHTS LAW REVIEW (2006) 115; Turkey, CAT/C/CR/30/5; Slovenia, CAT/C/CR/30/4; Prosecutor v Furundzija (International Criminal Tribunal for the Former Yugoslavia), December 10, 1998, paras 155 and 157.

> (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.

Since the crime of torture has the maximum punishment of ten years imprisonment and fine under this Bill, had the CrPC been applicable to torture, there would have been no limitation period regarding courts taking cognizance of such complaints. Not only has the government not made it so applicable, it has also, by limiting the period to six months equated torture with offences such as failure to keep election accounts, which are punishable by a fine only. This is unjustified both in principle and practice.

57. Moreover, the CrPC allows a court the discretion to take cognizance after the period of limitation if it feels that it should so in the interests of justice (Section 473). However, the wording of the Bill in clause 5 excludes everything in the CrPC relating to the issue of time-period of cognizance. Thus, where it says, "Notwithstanding *anything* contained in the Code of Criminal Procedure, 1973," the effect seems to be that even the ameliorative provision in Section 473 is excluded from operation.

58. This was the position under the Negotiable Instruments Act, which contains a similar non-obstante clause.[27] There was, however, an amendment in 2002 to S. 142 of the NIA, which allows for condonation of delay.[28] This further proves the position that a provision for

[27] Rayala Simo Agro Enterprises v. Gujarat Agro Industries, 2003 CrLJ 1627 (1633) AP

[28] Section 142 of the Negotiable Instruments Act, 1881 now reads -

S.142 Cognizance of offences

Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974).-

(a) No court shall take cognizance of any offence punishable under section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque; (b) Such complaint is made within one month of the date on which the cause of action arises under clause (C) of the proviso to section 138: ***Provided that the cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period.***

condonation of delay needs to be specifically mentioned in the special statute, an aspect which is missing in the current Bill.

59. At the same time it is instructive to analyse comparative provisions for limitation for special penal legislations:

(i) Dowry Prohibition Act, 1961 - None.
(ii)The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Same as Code of Criminal Procedure, 1973
(iii) The Protection of Civil Rights Act, 1955 - Same as Code of Criminal Procedure, 1973.
(iv) The Prevention of Corruption Act, 1988 - Same as Code of Criminal Procedure, 1973

Thus it is clear that other special penal legislations either use the same formulation as the CrPC for limitation periods or dispense with limitation altogether as the Dowry Prohibition Act does. In this context, the six month limitation period set by the Bill is an anomaly.

b. Victim-centric Concerns with the 6-month limitation period

60. Consider, for a moment, the effect on a prisoner who has been tortured.

Police Officer, X, repeatedly tortured an under-trial, Y to obtain some sort of confession or information relating to an offence he or she is accused of committing. No information was given. Y is kept in isolation for 4-5 months thereafter. No torture was committed during this period. When Y was finally allowed to meet some relatives, it was already 5 months since he had been tortured. Y's relatives scramble to find a lawyer to help them with what has happened. They are, unfortunately, and as is usually the case, poor and do not know what to do. Finally, by the time of filing the FIR against X, 6.5 months have passed.

61. The Court, will not take cognizance of the offence under the Torture Bill. Worse still, even if it seems that it is in the interests of justice to extend the time for Y's complaint for the purposes of cognizance, the court is disabled from doing so. The court can further pass no order in using its inherent powers to do justice in relation to the cognizance of the issue. Anything relating to cognizance has been specifically excluded from application to offences committed under the Torture Bill, leaving the victim with no recourse.

62. In cases of torture such an eventuality is not remote. Given long periods of incarceration and the damage which can be caused thereafter, the limitation period of six months imposes an arbitrary restriction on cognizance of cases relating to torture by courts. It prioritises the interests of speedy prosecution excessively such that genuine grievances faced by potential victims are not accounted for. Thus Clause 5 as it currently stands is not pragmatically justified, apart from being non-compliant with CAT and statutorily anomalous.

IV. Recommendation

63. It is therefore recommended that keeping in mind Article 4(2) and Article 12 of CAT, provisions relating to limitation (or their lack thereof) in special penal statutes, the practical eventualities of a complaint alleging torture and especially Section 468 of the CrPC under which a crime whose maximum punishment is 10 years has no limitation period, Clause 5 be deleted in its entirety.

At any rate, irrespective of whether the above proposal is accepted or not, clause 5 must save the power of the courts in condoning delay in filing a complaint and ensure that no such delay affects the grant/ refusal of sanction under clause 6. Hence, if the Hon'ble Committee decides not to delete Clause 5, the amended clause 5 should read:

"5. Notwithstanding anything 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.

Provided **that a Court may take cognizance after the prescribed period if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period.**

Provided further that nothing in this Section shall be relevant for the purposes of grant or denial of sanction under Section 6."

D. Previous Sanction for Prosecution [clause 6]

I. Introduction

64. Clause 6 of the Bill states,

> 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.

Thus it is clear that 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, sanction is required from that Government. 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 sanction is required from that Government. In the case of any other person, sanction is required from the authority competent to remove him from his office. Three relevant issues arise in this context: *First,* compliance with CAT, *second,* the meaning of the term 'during the course of his employment' and *third* policy arguments regarding sanction. These are considered in turn in this section.

II. Compliance with CAT

65. This provision does not comply with the CAT for three reasons. *First*, Article 12 of the CAT states

> *Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.*

On the one hand, it may be argued that the requirement for sanction violates this provision because Article 12 cannot be complied with if the relevant superior does not give the court sanction to prosecute the public official who is suspected of having committed an act of torture. This is strengthened by the comments of the Committee in the case of *Serbia and Montenegro* where it said that judges are obliged to investigate allegations of torture whenever they come to their attention, even if no compliant has been filed.[29] Hence, clause 6 may conflict with article 12 of the CAT. On the other hand, it may be argued that the sanction is only required for cognizance and not for investigation which can be carried out independent of the sanction, under the Cr.P.C. However, we argue that despite this, clause 6 is problematic because in practice Clause 6 may not comply with CAT. In most cases, the relevant authority will not proceed with the investigation of an offence if there is a high chance or knowledge that no sanction for its cognizance and prosecution will be given.

Secondly, article 12 requires that such an investigation be impartial. In their treatise on the CAT, Burgers and Danelius have argued that impartiality is important because "*any investigation that proceeds from the assumption that no such acts have occurred or in which there is a desire to protect the suspected officials cannot be considered effective*".[30] It may be argued that, given judgments of the Supreme Court,[31] such sanction amounts to an executive action and there is a presumption of fairness accorded to such acts. Therefore, clause 6 would comply with the CAT as it provides for a *prima facie* fair and impartial process. If such a presumption of fairness was rebutted, it would be a question of domestic administrative law and not international law. However, the fact that the Government may employ the person in question, that the relevant functionaries of the Government on several occasions may be complicit in torture themselves, calls into question the possibility of partiality. At any rate, the complete lack of safeguards regarding the grant or denial of sanction may conflict with article 12 of the CAT.

66. *Thirdly*, article 12 of the CAT also requires that any investigation into an allegation of torture be prompt. Clause 6 does not comply with this provision. The fact that a court cannot take

[29] A/59/44, section 213 (j). Also see MANFRED NOWAK ET AL, THE UN CONVENTION AGAINST TORTURE – A COMMENTARY (2008) 430.
[30] BURGERS AND DANELIUS, A HANDBOOK ON THE UNITED NATIONS CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (1988) 145.
[31] State (NCT of Delhi) v. Navjot Sandhu, (2005) 11 SCC 600.

cognizance of a complaint of torture without prior sanction from specific authorities violates the requirement of promptness under the CAT.

67. ***Thus it is recommended that Clause 6 be reformulated in order to incorporate essential safeguards which will allay apprehensions of delay and partiality in grant of sanction.***

III. Other Relevant Considerations:

a. Constitutional Interpretation of Clause 6

68. Before adverting to the specific terms used in Clause 6, it may be useful to determine what the general approach of the Courts in terms of the depth and standard of judicial review in such cases is likely to be. A sanction requirement is not new to Indian criminal law. S. 197 of the Criminal Procedure Code, 1973, provides, in essence, that a public servant alleged to have committed an offence "*while acting or purporting to act in the discharge of his official duty*" cannot be prosecuted without the sanction of the Government competent to remove him. The Supreme Court has held that the object of the provision is not the protection of a public servant who is accused of offences, but the creation of an environment where a public servant is not deterred from discharging his functions by the threat of frivolous prosecution.[32] In *Matajog Dobey* v. *HC Bhari*,[33] the Supreme Court rejected a challenge to the constitutionality of this provision, holding that the classification of accused persons into public servants and others is reasonable, because it bears a rational nexus with the object of the legislation. The argument that Section 197 gave unbridled discretion to the executive was rejected on the ground that a discretionary power is not necessarily a discriminatory power.

69. However, with the special nature of torture and its direct connection to the right to life, it is arguable that a stronger challenge can be made on the basis of Article 14 read with Article 21. In such a case, Courts may decide to apply a stricter standard of scrutiny than usually applied. Courts may treat a statute imposing limitations on prosecutions for violations of the right to life as being inherently suspect. Should courts adopt this approach, they may review Clause 6 [and clause 5] on the basis of a "strict scrutiny" threshold. For instance, in *obiter* observations in a different context, the Supreme Court has observed, "*the greater the restriction, the more the*

[32] State of M.P. v. Sheetla Sahai, (2009) 8 SCC 617.
[33] Matajog Dubey v. SC Bhari, AIR 1956 SC 44.

need for strict scrutiny by the Court."[34] At least arguably, a provision restricting prosecutions in cases of torture is a greater restriction on fundamental rights than a provision restricting prosecutions in cases of "ordinary" crimes. It might be contended that Indian constitutional law has rejected the application of any kind of 'strict scrutiny' over and above a proportionality-based review which is typical in fundamental rights adjudication. It has now been clarified that the rejection of strict scrutiny applies only in affirmative action cases.[35]

70. In *Saurabh Chaudhari*,[36] while the Court refused to apply strict scrutiny in the specific facts, the Court left open the possibility of a strict scrutiny threshold being applied where "*by reason of a statute the life and liberty of a citizen is put in jeopardy*". This could, arguably, be extended even to cases where the citizen's redressal against violations of life and liberty are sought to be regulated. Sinha J. speaking for the Court in a more recent judgment,[37] has stated *inter alia* the following conditions, which can be looked into in applying a stricter standard of scrutiny,

> We are of the opinion that in respect of the following categories of cases, the said test may be applied: 1. Where a statute or an action is patently unreasonable or arbitrary. 2. Where a statute is contrary to the constitutional scheme. 3. Where the general presumption as regards the constitutionality of the statute or action cannot be invoked... 6. Where a statute seeks to take away a person's life and liberty which is protected under Article 21 of the Constitution of India or otherwise infringes the core human right...

71. If Courts do choose to apply a higher standard of scrutiny, the typical presumption of constitutionality may not apply with its usual vigour. In view of this, it may be more desirable for Parliament to frame Clause 6 such that it is narrowly tailored to meet identifiable and compelling state interests.

b. Meaning of the expression "during the course of employment"

72. This expression qualifies the sanction requirement in Clause 6, just as "*while acting or purporting to act in the discharge of his official duty*" qualifies s. 197 CrPC. The expression "*during the course of*" is often used in contradistinction to the expression "*in the course of*". In different contexts, the phrase "in the course of" can denote one of two possible meanings -

[34] Narendra Kumar v. Union of India, [1960] 2 SCR 375; per Das Gupta J.
[35] Anuj Garg v. Hotel Association of India, AIR 2008 SC 663; Union of India v. Rakesh Kumar, Civil Appeals No. 484-491/2006, Judgment dated 12 January, 2010, 2010 (1) SCALE 281.
[36] (2003) 11 SCC 146.
[37] Subhash Chandra v. Delhi SSB, (2009) 1 SCALE 728.

either a period of time, or "a step in" the process of something. The expression "during the course of" is synonymous insofar as the first meaning is concerned, but very different *vis a vis* the second meaning. The use of the phrase "in the course of" and its contrast with "during the course of" has attracted judicial attention in the context of s. 162(1) of the CrPC. S. 162(1) provides, in brief, that a statement made to a police officer "in the course of an investigation" may not be used for any purpose in any inquiry or trial against that person. This is based on the principle that evidence obtained by a police officer is presumed to be tainted, because of the distinct possibility of coercion and torture.[38] In *Baleshwar Rai v. State of Bihar*,[39] an anonymous letter was written to the police admitting to murder. This statement was held admissible because it was not obtained by the police consciously "in" the course of investigation, although it was received "during" the course of investigation. This distinction has been reaffirmed in other decisions as well.[40] However, s. 164 of the CrPC, which uses the expression "in the course of" has been held to mean a time requirement,[41] and there is some ambiguity over the precise scope of these expressions in Indian law today.

73. Given the context of Clause 6 of the Torture Bill, 2010, it is possible for a court to take the view that "*during the course of*" must be construed narrowly (assuming it upholds constitutionality), making sanction a requirement only when a public servant commits an act of torture "*in the course of*" or "*in discharge of*" his official duty. This possibility is strengthened by the fact that the Explanation to Clause 3 of the Bill provides that public servant, for the purposes of the Bill and without prejudice to the IPC, includes "*any person acting in his official capacity under the Central Government or the State Government*". That will make Clause 6 of the Torture Bill very similar to s. 197 of the Cr.P.C.

74. Under s. 197 of the Cr.P.C, the test for "discharge of his official duty" has been held to be a "*direct and reasonable nexus*" between the offence committed and the official duty concerned.[42] In *Saha*, the Court held that the two "extreme interpretations" of s. 197 – one requiring sanction for every offence and the other dispensing with it in every case on the basis that it is no part of a public servant's official function to commit an offence – must be rejected,

[38] State of U.P. v. Deoman Upadhyaya, AIR 1960 SC 1125.
[39] Baleshwar Rai v. State of Bihar, [1963] 2 SCR 433.
[40] Emperor v. Aftab Mohd. Khan, AIR 1940 All 291; Tika Ram v. State, AIR 1957 All 755, ¶ 17.
[41] Noor Uddin v. State, AIR 1965 All 40; Shrilal Jadho v. State of Madhya Pradesh, 1976 Cri LJ 1325 (M.P.).
[42] B. Saha v. M.S. Kochar, (1979) 4 SCC 177.

favouring a middle path that requires sanction for every offence that is reasonably and directly connected with official duty.[43] Consequently, offences such as criminal breach of trust, forgery, misappropriation of public funds[44] etc. do not attract a sanction requirement, because the discharge of public functions does not in any way require the commission of these offences, and the expression is construed narrowly.[45] An instructive example of the manner in which the present Clause 6 is likely to apply is a recent case the Supreme Court heard – *Choudhury Parveen Sultana v. State of West Bengal*.[46] In that case, a police officer was accused of threatening and intimidating a person with a view to secure the withdrawal of a complaint that had been filed by that person. It was argued that the act of intimidation, if committed, was in the course of the police officer's official duties and hence protected by s. 197. The Supreme Court rejected this contention, holding that such acts "cannot be said to be part of the duties of the investigating officer".[47]

75. In sum, the use of the expression "*while acting or purporting to act in the discharge of his official duty*" in s. 197 makes the sanction requirement inapplicable to almost every case of torture.[48]

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[43] Saha v. Kochar, (1979) 4 SCC 177, ¶ 17.
[44] Shambhoo Nath Misra v. State of U.P., (1997) 5 SCC 326.
[45] Bholu Ram v. State of Punjab, (2008) 9 SCC 140.
[46] Chaudhury Parveen Sultana v. State of W.B., (2009) 3 SCC 398.
[47] *Chaudhury Parveen Sultana*, (2009) 3 SCC 398, ¶21.
[48] It should, however, be noted that there is some doubt over the scope of certain observations in *SK Zutshi* v. *Bimal Debnath*, (2004) 8 SCC 31. The Supreme Court observed as follows:

> **9.** It [s. 197] has been widened further by extending protection to even those acts or omissions which are done in purported exercise of official duty. That is, under the colour of office. Official duty, therefore, implies that the act or omission must have been done by the public servant in the course of his service and such act or omission must have been performed as part of duty which, further, must have been official in nature. The section has, thus, to be construed strictly while determining its applicability to any act or omission in the course of service. Its operation has to be limited to those duties which are discharged in the course of duty. But once any act or omission has been found to have been committed by a public servant in discharge of his duty then it must be given liberal and wide construction so far as its official nature is concerned. For instance, a public servant is not entitled to indulge in criminal activities. To that extent the section has to be construed narrowly and in a restricted manner. But once it is established that that act or omission was done by the public servant while discharging his duty then the scope of its being official should be construed so as to advance the objective of the section in favour of the public servant. Otherwise the entire purpose of affording protection to a public servant without sanction shall stand frustrated. For instance, a police officer in discharge of duty may have to use force which may be an offence for the prosecution of which the sanction may be necessary. But if the same officer commits an act in the course of service but not in discharge of his duty and without any justification therefor then the bar under Section 197 of the Code is not attracted [emphasis supplied].

Since the Court speaks of to the use of force that *constitutes an offence*, it seems to refer to *illegal* uses of force – such as torture. Thus, although the passage is not unequivocal, it is possible to take the view that this judgment

Similarly, the provision in this Bill that a sanction requirement is necessary if a public servant is accused having committed an offence during the course of employment is likely to make Clause 6 a dead-letter provision. Indeed, one of the tests the Supreme Court laid down recently, in CPIL v. Union,[49] is whether "the omission or neglect on part of the public servant to commit the act complained of could have made him answerable to a charge of dereliction of his official duty." Clearly, an act of torture does not fulfill this test.

76. *Secondly*, it is important to recognise that the Torture Bill, 2010 applies almost exclusively to public servants. The Prevention of Corruption Act, which similar in this respect, provides in s. 19 simply that sanction is necessary for "*any offence punishable under ss. 7, 10…*" The reason s. 197 CrPC does not contain such a qualification is that it does not exclusively apply to offences that are unconnected with the duties of a public servant. For example, a Law Officer in the employ of the Government may, in the course of his duties, have occasion to make statements that create a prima facie case for a charge of defamation. Such a case will fall within s. 197, and the requirement of "*direct and reasonable nexus*" will be met. On the other hand, a legislation that proposes to punish a public servant for committing an illegal act that is recognised (more or less) as unconnected with the discharge of his official duty cannot also require sanction for offences committed "*during the course of employment*" – for such a case will never arise.[50] Therefore, unless the Hon'ble Committee decides to omit the sanction requirement altogether from the Bill, we propose that the expression "*during the course of employment*" be deleted.

77. *Thirdly*, the expression is somewhat anomalous in the context of this Bill. Clearly, the sanction requirement is relevant only to offences alleged to have been committed under this Act – and an additional qualification that the allegation must pertain to an "offence committed by a public servant during the course of his employment" leaves the exact intention of Parliament unclear. For example, one possible construction of Clause 6 is that the sanction requirement is not necessary for offences alleged to have been committed by public servants outside the course of their employment, or at times not "during the course of their employment". The further

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applies the sanction requirement in s. 197 Cr.P.C to acts of torture. However, in view of several decisions to the contrary, some of which are discussed above, it cannot be stated with any confidence that this represents the existing position of law. We propose alternatives above on that basis.

[49] CPIL v. Union of India, (2005) 8 SCC 202.

[50] Unless "during the course of employment" is construed narrowly along the lines of s. 162(1) Cr.P.C as discussed above. This is unlikely given that the context of the Torture Bill is very different, and also because the narrow reading of "in the course of" is not settled law.

question may then arise as to whether the accused is at all a public servant acting in such capacity. Another question is whether Clause 6 indirectly makes the penal provision narrower, by imposing the requirement of "during the course of employment" over and above the tests laid down in Clauses 3 and 4. All of the anomalies identified above can be avoided by simply omitting the expression "during the course of employment".

c. Policy arguments regarding sanction

78. Clause 6 as it presently stands contains a requirement of prior sanction for prosecution. Two policy questions arise: *first*, why is a sanction requirement necessary for the Torture Bill, 2010? *Secondly*, if so, what is the most appropriate form? As to the first, the Government has been widely criticised for having inserted a sanction requirement,[51] on the basis that sanction is almost never granted. Justice Santosh Hegde, the Lok Ayukta of Karnataka and a former Judge of the Supreme Court of India, recently endorsed the view that the sanction procedure is widely abused.[52]

79. While there is some merit to this criticism, we believe, on balance, that a sanction requirement is appropriate for the Torture Bill, 2010. While the Bill furthers the salutary goal of punishing torture, it is not difficult to imagine the abuse of this Bill to intimate public servants. In such an eventuality, allowing a prosecution to proceed and leaving quashing to the judiciary can endanger a lawful and honest public servant's career. It is not surprising that other legislations that apply specifically to public servants – such as the Prevention of Corruption Act, 1988 – also envisage a sanction requirement. While the concern expressed in several quarters that sanction has become a tool to protect errant public servants is not entirely without merit, it should be noted that judicial safeguards already exist to guard against such a possibility. It is well settled that sanction cannot be mechanically denied, and that the Court is entitled to scrutinise the *materials* on the basis of which the complaint was assessed.[53] In the *Parliament Attack* case,[54] the Supreme Court noted that while sanction remains an *executive*, not a quasi-judicial act, it must be shown that all and only relevant material was placed before the sanctioning authority, and that the sanctioning authority perused that material.

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[51] For example, S. Varadarajan, *Last Chance to Fix Flawed Torture Bill*, THE HINDU, August 27, 2010, available at http://www.thehindu.com/opinion/columns/siddharth-varadarajan/article596310.ece.
[52] Justice N. Santosh Hegde, NANI PALKHIVALA MEMORIAL LECTURE, Chennai, 4 September, 2010.
[53] B. Saha v. M.S. Kochar, (1979) 4 SCC 177.
[54] State (NCT of Delhi) v. Navjot Sandhu, (2005) 11 SCC 600.

80. On a balance of considerations, we thus believe that the existence of sanction should not be the key issue before the Hon'ble Committee. The more appropriate question is with regard to whether existing safeguards in the Bill are sufficient to prevent misuse of the authority to sanction. Broadly, the sanctioning authority is the authority which is competent to remove the alleged offender from his position. While we do not deny the possibility that this requirement is based on a compelling interest of the State to prevent abuse of the provisions of the Bill, we do have some concerns over the desirability of the directly superior authority acting as the sanctioning authority. We believe that in individual cases, there may be concerns in the public mind that torture is part of a covertly sanctioned programme run by a few rogue agents of the government. Unfortunately, there may be a situation where the public perception is that a sanctioning authority is itself a covert participant in the chain of events alleged to constitute the torture. This is clearly a greater possibility for sanction in case of torture, which can be used as state strategy rather than ordinary crimes. Thus in order that justice not only be done but seen to be done, we believe that the legislature could consider in the interests of transparency an alternate formulation of the sanction requirements. This can be compassed by the legislature specifically laying down guidelines as to the exercise of the powers of sanction. Such guidelines, as provided below, will ensure: *first,* that sanction will not be denied unless there are cogent reasons for doing so; *second,* that such denial (or grant) will be compulsorily accompanied by reasons in writing and *third,* expressly providing for judicial review by a statutory provision, thereby expressly deterring the misuse of the provision for sanction.

IV. Recommendation

81. ***Accordingly, we recommend that the following proviso and clause 2 be appended to Clause 6 and the words 'during the course of his employment' be deleted:***

6(1) No court shall take cognizance of an offence punishable under this Act, alleged to have been committed by a public servant, 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.

Provided **sanction shall not be refused by the Government or the competent authority, as the case may be, except with cogent reasons to be recorded in writing.**

(2) The appropriate High Court shall be entitled to review the reasons for denial or grant of sanction by the Government or the competent authority as the case may be.

Summary of Recommendations

- **Clause 2**

For the reasons stated above in paragraphs 1-7, the Hon'ble Committee may consider omitting the expression "unless the context requires otherwise" from Clause 2.

Clause 2

In this Act,

(a) words and expressions used in this Act shall have the same meanings respectively assigned to them in the Indian Penal Code

(b) any reference in this Act to any enactment or any provision thereof shall in any area in which such enactment or provision is not in force be construed as a reference to the corresponding law or the relevant provision of the corresponding law, if any, in force in that area.

- **Clauses 3 and 4**

For the reasons stated above, in paragraphs 9-50, the Hon'ble Committee may consider redrafting clauses 3 and 4 as follows with the incorporation of additional clauses 4A and 4B:

Clause 3

Whoever, being a public servant or being abetted by a public servant or with the consent or acquiescence of a public servant or at the instigation of a public servant, intentionally does any act that causes, or does any act with the knowledge that it is likely to cause and such act causes—

(i) grievous hurt; or
(ii) danger to life, limb or health (whether mental or physical), or
(iii) severe pain or suffering (whether physical or mental)

to any 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 on any discriminatory ground, is said to inflict torture.

Provided that nothing contained in this section shall apply to any pain, hurt, danger or suffering as aforementioned caused by any act, which is 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 re-drafted Clause 4 along with Clauses 4A and 4B will read:

Clause 4

Where the public servant or any person abetted by or with the consent or acquiescence of such public servant commits an act of torture as defined in section 3, he shall be punishable with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.

Clause 4A

For the removal of doubts, it is hereby declared that the provisions of Chapters V, VA and XXIII of the Indian Penal Code, 1860 shall apply to offences under this act.

Clause 4B

(1) No exceptional circumstances, such as a state of war or a threat or war, internal political instability or any other public emergency, may be invoked as a justification of torture.

(2) An order from a superior officer or a public authority may not be invoked as a justification of torture.

Provided that nothing contained in this section shall affect the application of Chapter IV of the Indian Penal Code, 1860.

- **Clause 5**

For the reasons stated above in paragraphs 51- 63 it is recommended that the Hon'ble Committee consider deleting Clause 5 in its entirety. *In the alternative,* the Hon'ble Committee may be pleased to redraft clause 5 as follows with the addition of two provisos:

Clause 5

Notwithstanding anything 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.

Provided that a Court may take cognizance after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period.

Provided further that nothing in this Section shall be relevant for the purposes of grant or denial of sanction under Section 6."

- **Clause 6**

For the reasons stated in paragraphs 64-81 we recommend that Clause 6 be redrafted as follows:

Clause 6

6(1) No court shall take cognizance of an offence punishable under this Act, alleged to have been committed by a public servant, 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.

Provided sanction shall not be refused by the Government or the competent authority, as the case may be, except with cogent reasons to be recorded in writing.

(2) The appropriate High Court shall be entitled to review the reasons for denial or grant of sanction by the Government or the competent authority as the case may be.

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