

A draft law to criminalise torture proposed by the Asian Human Rights Commission for the consideration of Government of India and the country's civil society

1. Title:

This Act may be cited as the **Torture and Custodial Death (Prohibition) Act, 2010.**

2. Definitions:

In this law, unless the context otherwise requires -

(i) "Convention" means the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment;

(ii) "Public officer" means:

(i) any person in the service or pay of the State or Central Government or remunerated by the Government by fees or commission for the performance of any public duty;

(ii) any person in the service or pay of a local authority ;

(iii) any person in the service or pay of a corporation established by or under a Central , provincial or State Act, or an authority or a body owned or controlled or aided by the Government or a Government Company as defined in Section 617 of the Companies Act , 1956 (1 of 1956);

(iv) any judge, including any person empowered by law to discharge, whether by himself or as a member of any body of persons, any adjudicatory functions;

(v) any person authorised by a court of law to perform any duty, in connection with the administration of justice, including a liquidator, receiver or commissioner appointed by such court;

(vi) any arbitrator or other person to whom, any cause or matter has been referred for decision or report by a court of justice or by a competent public authority;

(vii) any person who holds an office by virtue of which he is empowered to prepare, publish, maintain or revise an electoral roll or to conduct an election or part of an election;

(viii) any person who holds an office by virtue of which he is authorised or required to perform any public duty;

(ix) any person who is the president, secretary or other office bearer of a registered co-operative society or any corporation established by or under a Central, provincial or State Act, or any authority or body owned or controlled or aided by

the Government or a Government Company as defined in Section 617 of the Companies Act, 1956 (1 of 1956);

(x) any person who is a chairman, member or employee of any Commission or Board, by whatever name called, or a member of any selection committee appointed by such Commission or Board for the conduct of any examination or making any selection on behalf of such Commission or Board;

(xi) any person who is a Vice-Chancellor or member of any governing body, professor, reader, lecturer or any other teacher or employee, by whatever designation called, of any University or any government school and any person whose services have been availed of by a University or any other public authority in connection with holding or conducting examinations;

(xii) any person who is an office bearer or an employee of an educational, scientific, social, cultural or other institution, in whatever manner established, receiving or having received any financial assistance from the Central Government or any State Government or local or other public authority.

Explanation 1- persons falling under any of the above sub-clauses or public servants whether appointed by the Government or not.

Explanation 2 - Wherever the words "Public officer" occur, they shall be understood of every person who is in actual possession of the office of a public servant, whatever legal defect there may be in the person's right to hold that position.

(iii) "Law enforcement agencies" means uniformed and disciplined forces of the government like the Police, Customs, Immigration, Intelligence Agencies, Central Bureau of Investigation, all Para-military units and any other state or central government agencies engaged in the enforcing and implementing of the law in the country;

(iv) "Armed forces" include the members of the Army, Navy, Air Force or any other state unit that might be formed entrusted with the defence of India;

(v) "Torture" with its grammatical variations and cognate expressions means any act or omission which causes pain, whether physical or mental, to any person, -

(a) For such purposes as--

(i) Obtaining from that person or some other person information or a confession; or

(ii) Punishing that person for any act or omission for which that person or some other person is responsible or is suspected of being responsible; or

(iii) Intimidating or coercing that person or some other person; or

*(b) For any reason based on **discrimination** of any kind;*

And being in every case, an act that is done by or at the instigation of, or with the consent or acquiescence of, a public officer or other person acting in an official capacity.

(vi) "Custodial death" means the death of a person in the custody of a public officer or any person acting on behalf of a public officer.

(a) The term 'custody' includes all occasions where a person is detained by a public officer or any person acting on behalf of a public officer, irrespective of the legality, nature and the place of detention;

(b) It includes judicial custody and all other forms of temporary and permanent restraint upon the movement of a person by law, or by force or by other means enforced by a public officer or any person acting on behalf of a public officer;

(c) It includes deaths occurring whilst a person is being arrested or taken into detention or being questioned;

(d) In all cases where the death of a person is within 72 hours after his release from 'custody', or at any other subsequent occasion AND where the cause of death can be attributed to acts committed upon the deceased by a public officer or anyone acting on his behalf while the deceased was in custody;

(e) 'Custodial death' may have taken place on police, private or medical premises, in a public place or in a police or other vehicle.

(vii) "Victim" OR "Aggrieved person" means any person who alleges that an offense under this law has been committed upon him or upon a person he is concerned about.

3. Punishment:

(i) No person shall engage in torture or cause the custodial death of any other person;

(ii) Any person who **tortures** any other person shall be guilty of an offence under this law;

(iii) Any person who -

- (a) **attempts** to commit;
- (b) **aids and abets** in committing;
- (c) **conspires** to commit;

an offence under Subsection (ii) shall be punished under this law

(iv) Any person who commits an offense under Sub-section (ii) above shall be punished with rigorous imprisonment for a term of seven years AND a fine not less than Rs. 500,000. The fine upon realisation shall be paid to the victim;

(v) Any person who causes the custodial death of any other person, provided the cause of death is proved to be the result of an offense punishable under Section 3 (ii) or (iii) (b) above, the person causing the death shall be punishable with a sentence to life imprisonment AND fine of an amount not less than Rs. 1,000,000. The fine upon realisation shall be paid to the legal heir of the deceased;

(vi) Any person who commits an offense under Sub-section 3 (iii) (a) and (c) above shall be punished with a sentence of imprisonment for a period of one year and fine of Rs. 100,000. The fine upon realisation shall be paid to the victim;

(vii) The subjection of any person on the order of a competent court to any form of punishment recognised by law shall be deemed not to constitute an offence under this law;

(viii) A person convicted for any offense under this law must deposit at the trial court within 7 days from the date of conviction, the fine, as required above in Subsection (iv) or (v) or (vi) above. An appeal against a conviction for an offense under this law shall not be admitted until such deposit is made;

(ix) The court may allow the victim or his legal heir to withdraw the amount after 90 days from the date of deposit of fine, unless an appeal court stays such withdrawal;

(x) An offence under this law shall be a cognizable, non-compoundable and a non-bailable offence, within the meaning, and for the purposes, of the Code of Criminal Procedure 1973.

4. War or other contingencies no excuse:

(i) For the avoidance of doubts it is hereby declared that the fact that any act constituting an offence under this law was committed -

(a) at a time when there was a state of war, threat of war, internal political instability or any public emergency;

(b) on an order of a superior officer or a public authority;

shall not be a defence to such offence.

5. Jurisdiction of courts:

(i) No court inferior to that of a Session's Court shall have the jurisdiction to try an offence under this law committed in any place inside or outside the territory of India by any person;

(ii) The jurisdiction of the Session's Court in respect of an offence under this law committed:

(a) by a person who is not a citizen of India;

(b) or outside the territory of India;

shall be exercised by the Session's Court that has been assigned the jurisdiction by the Chief Justice, by a direction in writing under his hand.

6. Non-Citizens:

(i) Where a person who is not a citizen of India is arrested for an offence under this law, the person so arrested shall be entitled to communicate immediately with the nearest appropriate representative of the State of which he is a national or if he is a stateless person, the nearest appropriate representative of the State where he usually resides.

7. Extradition:

(i) Where a person is arrested for an offence under this law, the Ministry in charge of the subject of External Affairs shall inform the relevant authorities in any other State having jurisdiction over that offence, of the measures which the Government of India has taken, or proposes to take, for the prosecution or extradition of that person, for that offence;

(ii) Where a request is made to the Government of India, by or on behalf of the Government of any State for the extradition of any person accused or convicted of the offence of torture, the Ministry in charge of the subject of External Affairs shall, on behalf of the Government of India, forthwith inform the Government of the requesting State, of the measures which the Government of India has taken, or proposes to take, for the prosecution or extradition of that person, for that offence;

(iii) Where there is an extradition arrangement in force between the Government of India and the Government of any other State, such arrangement shall be deemed, for the purposes of the Extradition Act, 1962, to include provision for extradition in respect of the offence of torture as defined in the Convention, and of attempting to commit, aiding and abetting the commission of, or conspiring to commit, the offence of torture as defined in the Convention;

(iv) Where there is no extradition arrangement made by the Government of India with any State, in force on the date of the commencement of this law, the Government may, by Order published in the Gazette, treat the Convention, for the purposes of the Extradition Act, 1962, as an extradition arrangement made by the Government of India with the Government of that State, providing for extradition in respect of the offence of torture as defined in the Convention and of attempting to commit, aiding and abetting the commission of, or conspiring to commit, the offence of torture as defined in the Convention;

(v) The Government shall afford such assistance (including the supply of any relevant evidence at its disposal) to the relevant authorities of any State as may be necessary in connection with criminal proceeding instituted in that State against any person, in respect of the offence of torture.

8. Complaints of an offense under this law in court:

(i) In addition to the existing provisions in the Code of Criminal Procedure, 1973 if a person brought before a judicial officer complains that he has been subjected to torture, the officer shall:

(a) **Record** *the statement of the person immediately;*

(b) **Direct** *the person/body of the person, to be examined by a registered medical practitioner immediately;*

(c) *provided that where the person is a female, the examination shall be made only by or under the supervision of a female registered medical practitioner*

(ii) The registered medical practitioner examining the person shall prepare the record of the examination, mentioning therein any injuries or marks of violence upon the person, and the approximate time when such injuries or marks might have been inflicted;

(iii) Where an examination is made under Subsection (ii), a copy of the report of the examination shall be furnished by the medical practitioner to the person

examined or to the person nominated by the person examined and also to the court within 24 hours;

(iv) If the medical practitioner is of the opinion that the person examined requires medical treatment, the judicial officer shall direct the person to be admitted in a hospital.

9. Court may direct registration of cases:

(i) After recording of the statement as mentioned in Section 8 (i) (a), the judicial officer shall immediately forward a copy of the statement, to the District Investigation Officer under his jurisdiction with a direction to register a case and investigate it;

(ii) It shall be the duty of the District Investigation Officer who receives such an order to immediately investigate the matter, and file a report to the Session's Court within sixty days;

(iii) The officer while filing the report must serve advance written notice with a copy of the report to the person whose statement was recorded by the judicial officer under Section 8 (i) (a) informing the person, the date and court in which the report is filed;

(iv) A person receiving a notice under Subsection (iii) above may file objections, personally or through a lawyer, to the report to the court within 30 days from the date of receipt of notice.

10. Investigation:

(1) The Central Government shall, for the purposes of investigating crimes committed under this law constitute a National Crime Control Agency and all crimes under this law shall be investigated by this Agency;

(2) The National Crime Control Agency shall have officers under its command stationed in every district in the country to investigate crimes committed under this law;

(3) The Central Government shall provide all necessary infrastructures required for the independent and smooth functioning of the National Crime Control Agency;

(4) No person working for the National Crime Control Agency shall be appointed on deputation or transfer from any state or central service;

- (5) The officers of the National Crime Control Agency shall, for the purposes of the investigation of crimes committed under this law have the authority to arrest and detain suspects and question witnesses irrespective of the official position of the suspect or witness;
- (6) Each District Office of the National Crime Control Agency shall have at least ten investigators under the command of a District Investigation Officer;
- (7) District Investigation Officers shall be officers recruited by the Government through a National Examination and trained in aspects of crime control and law similar to that of the selection and training of officers for the Civil Service;
- (8) The Central Government shall decide the manner of selection of officers subordinate to the District Investigation Officer;
- (9) The officers posted in any given state shall be able to read, write and speak the official language of that state;
- (10) The investigators under the command of a District Investigation Officer shall be a team comprising of medical, legal and forensic experts;
- (11) The officers of the National Crime Control Agency shall have all powers under the Criminal Procedure Code, 1973 to investigate crimes committed under this law;
- (12) The Central Government shall formulate the necessary rules required for the operation of the National Crime Control Agency;
- (13) The Central Government shall decide through appropriate legislation the service conditions of the officers appointed under the National Crime Control Agency;
- (14) All complaints of crimes committed under this law shall either be made to a Sessions Court having jurisdiction upon the place of residence of the complainant or where the crime has been allegedly committed or to a District Office of the National Crime Control Agency;
- (15) For the purposes of providing trauma counselling, the Central Government shall enlist and appoint at least six trauma counsellors of three men and three

women in every district. The counsellors so appointed shall either be a qualified psychiatrists or clinical psychologists registered by the Medical Council of India;

(16) The service contracts and the remuneration of the counsellors shall be decided by the Central Government;

(17) Every officer serving, as an officer under the National Crime Control Agency shall have the minimum tenure of three years at the station of appointment;

(18) Every investigating officer or any superior officer thereof working for the National Crime Control Agency shall have the right to carry firearms and shall be provided with appropriate training and weapons;

(19) A case once initiated registered by the National Crime Control Agency or pending trial in any court shall not be withdrawn from prosecution by the Government;

(20) To register a crime under this law against a public officer of any category and for its investigation no prior sanction is required from any authority;

(21) However, if the accused is a judge appointed by the High Court or a judge of the High Court or that of the Supreme Court, the National Crime Control Agency prior to the prosecution shall obtain a sanction for prosecution from the High Court or the Supreme Court, as the case may be;

(21) For the prosecution of a minister in any State Government, if the minister is in office at the time of prosecution, the National Crime Control Agency shall obtain a sanction from the High Court entertaining jurisdiction upon the state where the minister serves;

(22) For the prosecution of a minister in the Central Government, or that of the Governor of a State if the minister or Governor is in office at the time of prosecution, the National Crime Control Agency shall obtain a sanction from the Supreme Court;

(23) All applications for sanction for prosecution under Subsections (21), (22) and (23) shall be decided by the respective court within 30 days from the date of filing of the application. An appeal or revision, if preferred upon the decision of the court, the same shall be decided within 30 days from the filing of such appeal or revision.

11. Special Prosecutor:

(i) The offenses punishable under this law shall be prosecuted by a Special Prosecutor. A Special Prosecutor shall be a person enrolled as a lawyer in India with a minimum active legal practice of 14 years;

(ii) If the victim/aggrieved person so requires, upon an application to the Session's Court, may appoint a lawyer of his own choice to conduct the prosecution of the case;

(iii) On the appointment of such a lawyer as provided in Subsection (ii) above, it shall be the duty of the Special Prosecutor to provide all necessary assistance for the lawyer so appointed in order to conduct the prosecution, including the furnishing of the copies of all documents, statements, reports, and other information related to the case, and any other information concerning the case which the lawyer may require to conduct the prosecution;

(iv) A lawyer appointed as provided in Subsection (ii) above shall upon appointment have all powers of a Special Prosecutor for the purposes of the conduct of the prosecution of the case the lawyer is appointed as the Special Prosecutor;

(v) The Central Government shall provide adequate facilities in every District for the functioning of the Special Prosecutor, including a modern and furnished office, vehicles and the required staff.

12. Protection:

(i) Any person who alleges that he requires protection from a person accused of having committed an offense under this law, shall, file a petition to the Session's Court;

(ii) The state and the person against whom such a protection is sought for shall be made parties to such petition;

(iii) The court receiving the petition, after giving seven days notice to the opposite parties shall hear the matter and pass an order on the petition within three days;

(iv) The court while disposing off such a petition as mentioned in Subsection (iii) above, shall make such orders as deemed necessary, including but not limited to, the detention of the accused for periods not beyond 14 days, which may be extended as required from time to time;

(v) The Court may also direct the officer investigating the offense punishable under this law to take such measures as directed by the court to ensure the compliance of the court's order;

(vi) If the Court allows the petition for protection, it shall handover the charge for protection of the person to the National Crime Control Agency. Protection shall include all steps necessary according to the court to safeguard the security of the petitioner or his family members. The Court shall make such decision after consultation with the Special Prosecutor in charge of the prosecution of the case.

13. Accusations by third parties:

(i) Whenever an allegation of torture is made by a person brought before a judicial officer, the officer shall, in addition to the procedures laid down in Section 8 above, record the officer's observations about the person making the allegation and shall take appropriate measures to ensure the safety of the person making such allegation;

(ii) When the allegation so made is concerning the torture of a third person, it shall be the duty of the judicial officer to direct the officer from the National Crime Control Agency to visit such place of detention, record his observations and take all measures necessary to ensure the safety of the person so detained within 24 hours.

14. On receipt of complaints:

(i) In addition to the procedures mentioned here above, any person who wishes to file a complaint of torture, either concerning him or a third person may do so either to the Session's Court or to an officer of the National Crime Control Agency;

(ii) Upon receipt of such a complaint as mentioned in Subsection (i) above, the concerned officer shall immediately register a case, record the statement of the complainant, serve a copy of the complaint to the complainant specifying the case number and inform in writing what action is taken upon the complaint;

(iii) The National Investigation Officer upon receiving and taking action upon a complaint as provided above in Sub-section (ii), shall within 24 hours furnish a report mentioning the facts of the complaint and the actions taken, to the Session's Court entertaining jurisdiction;

(iv) The National Investigation Officer shall complete the investigation of every case within a reasonable time, and such time shall not exceed six months from the date of filing of the complaint;

(v) For the purposes of investigation of a complaint, all police officers and other public servants in a District, shall be subordinate to the investigative authority of a District Investigation Officer. Provided, if the accused in the crime under investigation is a judicial officer of the rank of a Sessions Judge, the National Investigation Officer should obtain permission from the High Court entertaining jurisdiction upon the area only for arresting or detaining the suspect. For all other matters concerning the case no such permission is required;

(vi) The District Investigation Officer or his subordinate officers shall have free and unquestioned access to all police stations, police records, public and other government offices and the records maintained therein, including military and para-military establishments concerning the crime he is investigating.

15. Appeals:

(i) Any appeal against a conviction for an offense under this law shall be made to the High Court;

(ii) The victim or his legal representative shall also have the right to file appeals or revisions against the finding in a case tried under this law;

(iii) An appeal shall not be admitted until Section 3 (viii) is complied with.

16. Termination or suspension from public office:

(i) A public servant under investigation for an offense punishable under this law shall be immediately placed on suspension;

(ii) If the person under investigation for an offense punishable under this law is a member of any of the law enforcement agencies in India, including the armed forces, the accused officer shall be immediately relieved from all active duties;

(iii) A person convicted for an offense under this law shall be terminated from public service, from the date of conviction. However, if the sentence is reversed in Appeal, the appeal court shall make necessary orders to reinstate the person into service.

17. In case of conflict with existing laws:

Irrespective of the provisions in any other law in force in India if any provision of this law is in conflict with any other law in India, the provisions in this law shall prevail.

18. Time limit for investigation, trial & appeal:

(i) The investigation of an offense must be completed within six months from the date of recording of the first complaint;

(ii) Should there be an extension of time required for the completion of the investigation of an offense punishable under this law, the investigating officer, shall in person, submit an application to the Session's Court entertaining jurisdiction to try the case, specifically mentioning the grounds for the extension of time;

(iii) Such extension shall not be allowed without hearing the victim/aggrieved person;

(iv) The court shall give the victim /aggrieved person a minimum period of 7 days to file counter applications for any applications seeking extension of time;

(v) If the court hearing such applications is of the opinion that an extension is not warranted, it shall deny the same;

(vi) A decision concerning the application seeking extension shall be made within ten days from the date of filing the application;

(vii) The time taken to decide such an application shall not be excluded from the six-month period fixed for the completion of investigation;

(viii) The trial of an offense punishable under this law shall be completed within six-months from the date of the filing of the charge against the accused;

(ix) An appeal or revision from any order against a proceeding initiated under the provisions of this law shall be concluded within 12 months from the date of filing of the appeal.

18. Presumption and burden of proof:

If it is proved that a person has suffered injuries or died in custody, it shall be then the burden of the person accused of an offense punishable under this law to prove

that the injuries were not suffered or the death occurred in an act amounting to a crime punishable under this law.
