

# Defining an Absence: Torture ‘Debate’ in India

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This article focuses on the absence of a torture “debate” in India. The absence is striking when considered in relation to the National Human Rights Commission’s statistics that there were 1,473 deaths in judicial custody and 124 in police custody in 2009–10. While the NHRC does not attribute all these deaths to custodial torture, there is a close link between the two as confirmed by many human rights groups. While this absence of a debate can be addressed at various levels, the paper articulates some of the theoretical framings that allow for a denial of torture to take place in India despite evidence of high levels of custodial deaths and torture. It suggests that the denial in multiple sites, most visible in the state discourses, contributes centrally to an absence of a public debate on torture in India.

In this season of parliamentary elections and heated debates in the largest democracy of the world, one issue that is striking by its absence is a debate on torture. After all, the 2009–10 Annual Report of the National Human Rights Commission (NHRC) notes that there were 1,473 cases of deaths in judicial custody and 124 in police custody in that year.<sup>1</sup> While the NHRC does not attribute all these deaths to custodial torture, there is a close link between the two as confirmed by many human rights groups.<sup>2</sup>

This particular election cycle also comes at a time when there is an anti-torture bill pending in Parliament. The Indian state signed the United Nations Convention against Torture (CAT) in 1997, but has not ratified it until date. In 2010, the Torture Prevention Bill was hurriedly passed in the Lok Sabha as a way to fulfil one of the requirements for the ratification process. The contents of the four-page bill were such that concerned human rights activists and groups asked for a Select Committee of the Rajya Sabha to revisit the bill which successfully addressed some of the major limitations in the revised version. Yet, the bill remains pending and custodial death and torture cases continue to be high, making the absence of a public debate on torture a significant lacuna.

While this absence can be addressed at various levels, in this article, I articulate some of the theoretical framings that allow for a denial of torture to take place in India despite evidence of high levels of custodial deaths and torture. I suggest that the denial in multiple sites, most visible in the state discourses, contribute centrally to an absence of a public debate on torture in India.<sup>3</sup>

## What Constitutes a Public Debate?

Let me first explain what I mean by a “public debate on torture” and thereby its absence. In the US – immediately after 9/11 – there was an attempt in the media, among scholars and various state officials, to discuss the possibility of using torture. For example, a famous journalist, Jonathan Alter (2001) wrote, “in this autumn of anger, even a liberal can find his thoughts turning to torture”, and readers responded passionately claiming that contemplating torture is like “going back into the middle ages”, and how such discussion “negates the values on which our civilisation is founded”. Similarly among scholars, there was a very major debate on the subject. For example, Elaine Scarry (2004) and Alan Dershowitz (2004), among others, argued on the very controversial suggestion made by Dershowitz that torture warrants, similar to search warrants, should be judicially authorised, especially in a ticking bomb scenario. Scarry challenged the ontological basis of any such

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ticking bomb scenario, claiming “it assumed a population that is (against robust evidence) omniscient (2004: 285)”. In other words, the ticking bomb scenario was based on an assumption that every possible bit of information about the location and time was actually accessible for a decision about torture to be made. Furthermore, among the state officials, whether it was John Yoo (who worked in the department of justice and wrote the infamous Bybee torture memo) or Dick Cheney (former us Vice President), there was some willingness to discuss the use of torture, which manifested in different state memos and in interviews (Bybee Memo 2002; Torture Memo 2008; Tran 2006). In popular culture, major arguments ensued on the show *24* portraying Jack Bauer (an Anti-Terror Squad agent) who continually justified the use of torture and the film *Zero Dark Thirty* (2012), which showed torture by the Central Intelligence Agency (CIA) leading directly to the capture of Osama bin Laden.

Here, public debate is constituted by an active engagement with the concerned problem among the citizenry, media and state officials in a way that it leads to a heightened public discussion and sometimes efforts at intervention. In the context of torture, it also mediates, to some extent, the status of torture as a public secret – a characterisation often used to describe the phenomenon of torture (Rao 2004; Lokaneeta 2012; Ramakrishnan 2013), although not limited to it (Baxi 2014). Drawing from Michael Taussig’s work (1999), this concept points to how “the information about the act is shared yet repressed such that it ‘is generally known, but cannot be articulated’” (Lokaneeta 2012: 45). As Ramakrishnan (2013: 3) explains it in the context of south Asia, “the trick to the public secret is in knowing what not to know. This is the most powerful form of social knowledge”. Thus, there is a general unwillingness to acknowledge and engage with the issue of torture and this status of torture as a public secret can be identified across different societal contexts.

However, in the post-9/11 us, the status of torture as a public secret is mediated to some extent because of an emergence of a discussion of torture into the public sphere involving a broader section of society. For the first time, there were also detailed state memos (albeit leaked, not released) regarding the use of Enhanced Interrogation Techniques (EITs) beyond those prohibited by the Federal Torture Statute (1994) with lengthy explanations about their legal basis and official reports assessing their use and limits. While human rights activists had long pointed to the presence of torture in the United States, the entire terms of discourse about torture became embroiled in a public debate in the post-9/11 period. In that context, it was also symbolically important that President Obama signed his first executive orders in 2008 on the closing of Guantanamo Bay, prohibiting the use of particular interrogation methods and closing down of CIA prisons around the world indicating how central torture (among other issues) had become in the us political context.

Here I am not arguing that the issue of torture in the us was successfully addressed either conceptually or in practice. In *Transnational Torture: Law, Violence, and State Power in the United States and India*, my main argument was that in both

these illustrations of liberal democracies, “torture as an exception” mistakenly exists as an explanatory framework of analysis for the persistence of torture. In other words, in both these distinct contexts, torture is considered as either aberrations committed by a few bad apples, or only appears to be near permissible in exceptional contexts related to terrorism. In contrast, in the book, I point to the ways in which torture is a manifestation of law’s tension with violence and is continually accommodated and negotiated within the law itself as exemplified by the jurisprudence of interrogations in both India and the United States. Thus, in the United States, there were the usual attempts to deny the acts of torture – whether the acts happened or not, constituted torture or not, whether the acts were authorised or not – all of which resulted in the wide scale impunity regarding torture that continues to be challenged (Lokaneeta 2012; Hajjar 2012).

### Normalising the Violence

However, what I am emphasising in this article is that there were some sites of public debate on torture in the us that could be clearly identified sometimes even existing simultaneously with the denials. Conversely, it is also not to say that public debates do not take place in India. One of the major public debates that have taken place in recent years is on sexual violence – where the citizenry, state officials, and the media – have engaged with the issue prompting heightened discussions and interventions.<sup>4</sup> Similarly, there have been less prominent but still significant debates on the death penalty. In contrast, it is notable that despite the high numbers of custodial torture and custodial deaths in India that have been meticulously documented by the human rights groups, civil liberties and democratic rights groups and the NHRC – and the apparent paradox that these numbers exist despite the legal impermissibility of torture – there is ostensibly very little public debate on torture in India (PUDR 1998, 2004; NHRC 2009-10; ACHR 2008).

Here, I also make a distinction between the representation of torture which is routinely represented in Bollywood films such as in *Ardh Satya*, *Satyameva Jayate*, *Khuddar*, *Tejaswini*, *Ant*, *Droh Kaal* and *Ghayal* (Shaheen 1999) versus a public debate emerging alongside these representations. For example, in the context of the show *24*, the us military actually talked to the producers of the show about how military personnel copied the methods used by the protagonist in *24* and urged the producers to rethink the representation of the utility of torture (Mayer 2007; Lokaneeta 2010). Similarly, there was a Senatorial inquiry into the film *Zero Dark Thirty* about its portrayal of torture having led to the discovery of bin Laden (Daunt 2012). In contrast, as Kiran Shaheen points out in an article regarding portrayal of police torture in films and tv shows in India,

The use of third degree methods by police being prevalent in the society, these scenes of torture by police in a film reinforce two notions in the minds of the audience, especially the younger ones. Firstly, torture is a natural act, especially, if bad guys are beaten and secondly, flowing from the first, *the legitimisation of the act of torture. Perhaps this is also one of the reasons why such acts of torture in police lock ups are never questioned in real life.* Hindi cinema thus reinforces all kinds of stereotype relations and acts of violence in the society (1999: 17-18, emphasis added).

In other words, the Bollywood films have primarily played a role in normalising the violence used by the state (similar to *24* or *Zero Dark Thirty*) but more importantly these representations have not led to a public debate on the subject. Further, Shaheen notes that despite the serious concern that filmmakers and intelligentsia felt regarding the issue of torture, it was difficult to actually translate that into a point of debate between the producers and the consumers.<sup>5</sup> Thus, revelations in Hindi cinema do not actually address the issue of torture; instead they have predominantly normalised it almost as unworthy of debate.

Hence, despite a very high incidence of torture that is well documented by the human rights groups, and routinely portrayed and indeed normalised in films and TV shows, there is an absence of a public debate on torture in India. Let me now suggest some of the theoretical framings of torture in India that may contribute towards forming this absence of a public debate.

### Denial and Containment

A major aspect of the state discourse on torture has been a claim of denial.<sup>6</sup> Here I use Stanley Cohen's (2001) brilliant classification of denials of torture as being common to all democracies. Cohen makes an important distinction between literal and interpretive denials. A statement, such as the one made by the late Indian Prime Minister Rajiv Gandhi in 1988, can best explain a literal denial, "We don't torture anybody. I can be very categorical about that. Wherever we have had complaints of torture we've had it checked and we've not found it to be true" (AI 1992). Former US President George Bush also attempted literal denial for Guantanamo Bay and other sites by claiming, "We don't torture people in America" (quoted in Greer 2004: 386). However, these denials are very difficult to sustain when pictures from Abu Ghraib prison, Iraq or, as in the Indian case, videos of torture by cops or the paramilitary emerge.<sup>7</sup> Instead, the state engages in the containment of the discourses on torture or what Cohen calls interpretive denial. One of the strategies would be to term the acts as something other than torture – for instance, by using euphemisms such as EITs. Another example of this interpretive denial is basically by pointing to the presence of laws. Cohen calls it legalism or the very use of law to negate the presence of an Act. As he puts it:

Then comes the magical syllogism: torture is strictly forbidden in our country; we have ratified the Convention against torture (or in the case of India – have a very strong jurisprudence and system of laws that prohibits the use of torture); therefore what we are doing cannot be torture (Cohen 2001: 108).

When either George Bush or Rajiv Gandhi denied the presence of torture, it is both a moral argument about democracies as well as one based on legalism.

Containment often occurs also by claiming that torture is restricted to its use by the illiterate, ignorant, lower ranked untrained police that need to be reformed and supervised. Cohen terms this as isolation of the event to the particular actor. In Iraq, it was the few bad apples – like Lyndie England, Charles

Graner, and Sabrina Herman, visible in the pictures holding the leash on Iraqi prisoners or doing thumbs up on a dead body – that were held responsible for the Abu Ghraib incidents. It is a strategy of pointing to torture as an aberrational act at the level of enforcement.

A similar strategy of containment is observed in the first scene of the 2009 Oscar hit, *Slumdog Millionaire*, where the police constable is torturing the boy Jamal and the senior officer is calmly watching. Torture is used because they both believe that the boy is cheating. Apparently, the film producers had to change this scene a little because they initially showed the officer doing the torture, and the Indian government stated that they did not want high-ranked officers to be shown as committing torture (Sengupta 2008).

So in one stroke or many, the problem of torture is reduced to the problem of policing, at the level of enforcement, to the lower echelons of the police while ignoring the fact that the higher police officer even in the film is still watching. Or even when he looks away (as shown in the film), the officer is complicit and indeed is a part and parcel of the same system and there is accommodation of violence within the policing. The British colonial powers had similarly blamed the native Indian police for torture when enquiry into incidents of torture took place in the Madras Commission Report in the 1850s (House of Commons 1855). In 1855, the Madras Commission Report found that although torture took place in a systematic manner, it was "the native Indian servants' who were actually responsible for the torture, with no relation to British policies" (Lokaneta 2012: 190; Peers 1991; Rao 2004; Bhuwania 2009). Now the postcolonial Indian state is attributing torture to the lower ranking police rather than recognising the accommodation of violence at all levels.

By asking the scene to be changed in the film, of course, the Indian state implied that torture is extremely routine in India, not an exception. After all, the number of custodial deaths in India ranges from 1,200 to 1,500 a year due to a variety of reasons, including torture, so the denial is difficult. However, there is a peculiar way in which the Indian state does articulate its denial that contributes centrally to the absence of a torture debate. The official reports often tend to deny the prominent role of torture in custodial deaths. For instance, the Asian Centre for Human Rights found that despite high figures of custodial deaths compiled from the NHRC reports (16,836 deaths between 1994 and 2008 or 1,203 per year), "India is in a worrying state of denial". The Home Minister attributes custodial deaths to "illness/natural death, escaping from custody, suicides, attacks by other criminals, riots, due to accidents and during treatment or hospitalisation" (Asian Centre for Human Rights 2008: 3).

This statement is better explained when one analyses the official presentation of statistics related to torture and custodial deaths. The National Crime Records Bureau that also records the number of human rights violations by the police (since 1999) notes very few instances of torture – sometimes as less as six – in its report (NCRB 2011). Meanwhile, it explains the reported number of custodial deaths (in that same year) as

primarily being due to a range of reasons other than torture – a claim repeated by the Home Minister in the quote above (see Table 13 B).

**Table 13(B): Details on the Custodial Deaths in Police Custody during 2008-2010**

Sr No	Death during/due to	Years		
		2008	2009	2010
1	During production, process in courts, journey connected with investigation	19	18	12
2	During hospitalisation, treatment	15	9	16
3	Due to accidents	2	4	5
4	In mob attacks/riots	5	2	0
5	By other criminals	2	3	0
6	By suicides	38	21	18
7	During escape from custody	6	8	7
8	Illness/natural deaths	28	33	19

Source: NCRB Chapter on Custodial Crimes. <http://ncrb.nic.in/CII2010/cii-2010/Chapter%2013.pdf>

Many of the state narratives that attribute these custodial deaths to illness/natural deaths, suicides, accidents, and journey for investigation and treatment have been challenged by fact-finding teams as unconvincing (PUDR 1998, 2004; ACHR 2008). Just to give a couple of examples, Peoples Union for Democratic Rights (PUDR) fact-finding reports on custodial deaths point to how some accounts of suicide were entirely improbable and many people who died due to illness/natural death were in good health before they were sent into custody (ibid). But most striking is the fact that torture is not even listed in the list of reasons for custodial deaths.

Even the NHRC under-emphasises the impact of torture and custodial violence in custodial deaths in its annual reports. As the 2009-10 NHRC report states in explaining more than 1,500 deaths in that year:

It is pertinent to mention not all the cases of custodial deaths can be attributed to custodial violence or torture. In fact, many of these deaths were due to natural factors such as illness and old age. In the remaining cases, there appeared to be a variety of other reasons, inter alia, illness aggravated by medical negligence, violence on the part of public servants or between prisoners, suicide and other incapacitating factors (85).

Even though NHRC does not deny the role of torture in at least some custodial deaths, the report does not focus on torture as much. The NHRC guidelines also require that all custodial deaths<sup>8</sup> have to be reported to the NHRC within 24 hours of the death, which is not the case for custodial torture. Thus, one observes that while the number of custodial deaths cannot be ignored, the state attempt is to deny the role of torture in these deaths and that I suggest centrally contributes towards the lack of a public debate.

In addition to these statements of denial and containment by state officials, the role of the jurisprudence in the context of torture is extremely important. While there is a powerful jurisprudence on custodial violence, I point to the ways in which the jurisprudence has (even if inadvertently) also contributed towards an absence on a public debate on torture.

### Combating Custodial Deaths, Not Injuries

The Indian jurisprudence on custodial violence is best represented by two landmark cases, namely, the *Nilabati Behera vs State of Orissa* (1993) and the *D K Basu vs State of West Bengal*

(1996).<sup>9</sup> Here I also want to point out that if we are not to be restricted to a critique of only the actors of torture, namely, the police, for custodial violence, the legal interpretation or jurisprudence remains the main space in which the discourse on torture bares itself. A close examination of the jurisprudence indicates, for instance, that despite a general proclamation against torture by the Indian state, prior to the Basu and Behera cases in the 1990s, there was no systematic jurisprudence on custodial violence. Consequently, sometimes the Court easily accepted that the violation of procedural safeguards (no time given to reflect outside of police custody) was adequate to throw out the confessions (*Sarwan Singh vs State of Punjab* 1957) while at other times even a proven custodial death due to torture was inadequate to lead to a conviction – almost as if it happened on its own (*Maiku vs State of UP* 1989).

In contrast to the pre-1990s, as I note below, the Basu and Behera cases (among others) were remarkable in ensuring a systematic concept of custody jurisprudence. The Nilabati Behera case involved the death of a 22-year-old man who had been picked up by the police on theft charges and was found dead on the railway tracks with multiple injuries. In the Basu case, it was the custodial deaths in lock ups and the lack of redress mechanisms that was at issue. One of the most important principles of custodial jurisprudence that emerges in these cases was the assertion that the burden of proof was on the police to explain what happened to the person if last seen in their custody.<sup>10</sup> Subsequently, pointing to the unique vulnerability of a person in custody, the Court ended up coming up with very creative remedies to ensure accountability such as an arrest/custody memo to involve the family/public as a witness to the arrest, a right to a lawyer even at the stage of interrogation, and regular medical examinations. Another major intervention by these cases was regarding a right to compensation.

The question remains why despite this progressive custody jurisprudence, I suggest, that the jurisprudence has actually contributed towards a lack of a debate on torture? One of the major reasons, I suggest, is precisely that in this jurisprudence, custodial deaths become the focus of attention not so much the custodial torture per se. Here it is important to clarify that for the Supreme Court, of course, torture was closely related to many custodial deaths. Therefore, one finds both a strong assertion of condemnations of torture and practical remedies that would prevent its use. There was also recognition of many of the lacunae that led to the custodial torture such as a denial of when a person was actually arrested or how long the person was detained for and whether certain procedures were followed or not. However, despite that, the jurisprudence by focusing on custodial deaths in the custody jurisprudence had the unfortunate effect of de-emphasising those cases where “just” the occurrence of custodial torture (short of death) takes place.<sup>11</sup> The limits of only reporting custodial deaths to the NHRC within 24 hours of its occurrence also become clearer in this context. The emphasis on compensation in primarily custodial death cases also meant that there are fewer cases of

compensations being given in cases where “only” custodial torture occurred.<sup>12</sup> To that limited extent, the focus of some democratic rights groups on mostly custodial deaths has also contributed to this lack of focus on torture.<sup>13</sup> While the expectation was that by addressing custodial deaths, torture would also be checked, this was belied in subsequent years.

The limits of the jurisprudential focus on custodial deaths become especially stark when contrasted with cases where only “torture” was the issue. Here I discuss three kinds of cases to illustrate how torture per se remained unaddressed in the jurisprudence on interrogations. The trend of ignoring or inadequately addressing torture was most visible in the pre-1990s phase, in a case like *Dagdu vs State of Maharashtra* (1977) which was a mass murder case in a small Maharashtrian village. Ruling on a number of procedures followed in the case, in the judgment, there is a casual mention that Shankar, a witness in the case, was charged for attempted suicide because he “struck his head against a wall while in police custody and sustained a head injury (77)”. Regarding another witness, Ganpat, the opinion notes, “the approver was driven to admit that he was tortured while in the lock up and we have serious doubts whether the injury caused on his head was, as alleged by the police, self-inflicted...(92).” Despite these doubts, the judges note,

We have resisted the failing which tempts even judicially treated minds to revolt against such methods and throw the entire case out of hand. But we must, with hopes for the future, utter a word of warning that just as crime does not pay, so shall it not pay to resort to torture of suspects and witnesses during the course of investigation (ibid).

There is some reference to the need to challenge the “tendency and temptation of the police to use a strong arm” but the Supreme Court only intervenes to exclude the evidence of one witness not because of the torture but rather the “unreliability and character of the witness” often linked to being uneducated and superstitious. Thus, there were actual instances of acceptance of torture in the jurisprudence, which did not necessarily disappear in the post-Behera and Basu contexts either (as explained below).

The second set of examples is regarding cases related to extraordinary laws. In the 1990s, while the custody jurisprudence in the routine context was emerging in the custodial death cases, the diluting of safeguards against torture was formally occurring in the context of the extraordinary laws such as Terrorist and Disruptive Activities (Prevention) Act, TADA (1985, 1987) and Prevention of Terrorism Act, POTA (2002). One of the fundamental shifts in these laws (with implications for torture) concerned the recording of confessions by senior police officials in case of terrorists and/or disruptionists that was not allowed in routine cases.<sup>14</sup> The Supreme Court, in turn, upheld both these laws and this provision as constitutional. The Supreme Court in the Kartar Singh case (1994) regarding the constitutionality of TADA even acknowledged the use of torture and the occurrence of custodial deaths, but agreed to uphold this provision based on the exigencies of the situation and this particular judicial Act was defined by K Balagopal (1994) as an implicit sanction of

torture. Here too was a moment similar to 9/11 where debates on terrorism, detention and rights came up more publicly in the Indian context but were not followed by an explicit debate on torture.

### **Bypassing the Lanes**

The Supreme Court in the Kartar Singh case had suggested certain guidelines to prevent the use of coercion but which were easily bypassed subsequently. For example, in *Gurdeep Singh vs State (Delhi Administration)* (1999), the Court was even willing to allow a confession which was recorded while the person was in handcuffs, even as the police holding the chains were standing near him, and the armed guards were just outside the room. An additional safeguard suggested by the court of presenting the accused in front of the judicial magistrate was also deemed as unnecessary in certain cases. For instance, in *Lal Singh vs State of Gujarat* (2001), the Court ignored the bypassing of this safeguard even though certain allegations of “cutting the tongue and injury on the head” could have prompted a closer examination. The irony in many of these cases was that the complaints of torture were of course made against the very officers who had been given the responsibility of ascertaining the voluntariness of the confessions and recording them.

This is another way in which I interpret the request from the Indian government to change the role of the torturer in the film *Slumdog Millionaire*. Sengupta (2008) who was the *New York Times* reporter wrote that “the Indian authorities told Christian Colson [the producer] to take out the police commissioner from the scene. No police officer above the rank of inspector should be shown administering torture, they said.” The coincidence between the Indian government’s request and extraordinary laws is striking, and if this is true, it appears that instead of asking for torture scenes to be removed per se, the Indian government appears to be more concerned that no senior police officer be implicated in an act of torture, even in a film.

The final example about the Court inadequately addressing torture emerges from the post-1990s jurisprudence even in the routine cases. In the *Sube Singh vs State of Haryana* case (2006), Sube Singh was picked up in relation to a case concerning his son accused of killing a police official, and illegal detention and torture was alleged on more than one occasion. The Court in turn not just challenged that there was incontrovertible evidence of torture, but also denied his right to compensation by stating that even though “there is prima facie evidence...” that he was “subjected possibly to some third degree methods”, at the same time, “it was clearly exaggerated and many a time false also” (ibid). The absence of injury or a mark/scar was crucial in the case and the Court also stated that “it may not be prudent to accept claims of human rights violation by persons having criminal records in a routine manner for awarding compensation” (ibid).

Thus, in the jurisprudence on custodial violence, there have been instances when either torture is ignored, or there is a need expressed for visible marks or a dead body for it to be compensated. A regime of violence is allowed to be accommodated (not

just at the level of the enforcers but at the level of the jurisprudence itself) until it reaches the level that would leave scars and/or produce an unexplained dead body in custody and only then it becomes more likely the subject of progressive jurisprudence.

### Emergence of a (Public) Debate

I now discuss one recent instance of a debate in the Indian Parliament on the anti-torture bill, the status of which is unclear at the moment. Fascinatingly, the Parliamentary debate in 2010 once again refers to *Slumdog Millionaire* and in fact acknowledges the lack of a public debate on torture. Shashi Tharoor, a Lok Sabha member, noted that

there was no public uproar about the fact that this film opens with a scene of astonishing police brutality where the Indian policeman is shown torturing the hero including with electric shocks to get him to confess...to cheating in a quiz show. What was startling with that, it seems to me, was that the mindset of our public has become such that we are immune to it. We took these scenes for granted. No one said how outrageous it is that our country should be shown in this way because, in fact, the assumption appears to be, well, this happens all the time (Lok Sabha Debates 2010).

What is striking about this admission is that the acknowledgement of the pervasiveness is not reflected in the anti-torture bill, at least in the version that was passed in the Lok Sabha in 2010. The bill portrayed a lack of comprehensiveness on the issue; since torture was narrowly defined, there was no reference to custodial deaths or Cruel Inhuman and Degrading Treatment (CIDT), and torture was primarily considered as a problem of the police at the level of the enforcement. As Panna Lal Punia, another legislator, mentioned in the course of the legislative debates: “*aaj thanon mein wohi angrezi hukumat ki boo aati haih*” (from today’s police stations, one can still smell the same stink of English rule) (ibid). Such a perspective continues to isolate the problem of torture to police reform as opposed to the various levels of intervention that are required.

During the Parliamentary debate, Tharoor further said,

Indeed, the next time if somebody wants to make an Oscar-winning movie showing an Indian policeman behaving in that way, we can surely hope that they will also show him being punished and sentenced for his actions... (ibid).

In reality, the draft of the bill that was being discussed and subsequently passed in the Lok Sabha required prior approval from the government for prosecuting officials, which had been an issue even earlier. The bill even required complaints to be made within six months of the incident, thereby limiting prosecutions and making Tharoor’s words and the Act itself more symbolic than substantive.

How does one explain the fact that the earlier version of the bill completely ignored the custody jurisprudence of the Supreme Court and even the fact of custodial deaths? The debates on the bill show that if the legislative (and executive branches of the) government finally did acknowledge the torture, they did not connect it to the custodial deaths because in their understanding deaths occurred due to a range of other reasons corresponding to the denials presented in the earlier part of the article. Ironically, they could also

bypass the Court’s jurisprudence on custodial violence since the Court also focused more on custodial deaths, not on torture per se.

In the last few years, there appears to be some shift in the custody jurisprudence. Even now, the Supreme Court has come out most strongly against custodial deaths and, in most of the cases, successfully termed them as custodial deaths due to torture.<sup>15</sup> For example, the Supreme Court accepts the police responsibility of death in a case where an asthmatic person is kept in an unfit room (*Indu Jain vs State of Madhya Pradesh* 2008), rejects the arguments of suicide being suggested by the police in another case (*Mehboob Batcha & Ors vs State Rep by Supdt of Police* 2011) and upheld the convictions of police officials in a case where famous Punjab human rights activist Jaswant Singh Khalra was tortured and killed (*Prithipal Singh etc vs State of Punjab & Anr* 2012).

However, with custodial torture cases, the jurisprudence remains more complex. In the first instance, there is sometimes still mention of torture in particular cases, but these are actually either not followed up (see *State of MP & Anr vs Ram Prakash Singh & Anr* 2012 or *Rabindra Kumar Pal vs Republic of India* 2011); or the person is disbelieved (*Mohmed Amin @ Amin Choteli, Rahim Miyan Shaikh & Anr vs CBI* 2008). Nonetheless, it also appears that more cases of torture are being explicitly brought into the courts and the Supreme Court has been more responsive. For example, in *Dr Mehmood Nayyar Azam Versus State of Chhattisgarh and Ors* (2012), where a doctor was tortured and his photograph was circulated, the court accepted that mental agony had resulted and should lead to compensation. Similarly, the Supreme Court noted that custodial torture had actually occurred in another case even if the case was possibly helped by the intervention of a state human rights commission (*Jaywant P Sankpal vs Suman Gholap & Ors* 2010). Another case decided by the Court was regarding the disallowing of confession to be the sole piece of evidence even in a terrorism case because of the alleged torture (*Arup Bhuyan vs State of Assam*, 2011). Elsewhere, the Court allowed the lawyer to be a part of the interrogation in a case where torture was being alleged (*Senior Intelligence Officer vs Jugal Kishore Samra* 2011). Thus, we see some shift in the discourse on torture, at least on the part of the Supreme Court, in order to address the issue more directly and comprehensively.

This shift may coincide with the emergence of campaigns and debates on the torture bill that is seen as necessary for the ratification of CAT and has been prompted by prominent civil society initiatives in recent years.<sup>16</sup> The revised bill suggested by the Select Committee of the Rajya Sabha in 2010 also reflects a number of demands made by the critics such as a broader definition of torture, a notion of command responsibility, modification of the sanction provision, expanded conception of public officials to incorporate educational institutions, and inclusion of custodial deaths in its ambit.<sup>17</sup> The question is whether the final torture bill will actually be passed in this form. One has to, thus, observe whether all parts of the Indian state adopt a framework of custody jurisprudence that recognise the continuum of violence between

CIDT, torture and custodial deaths regardless of whether there is a body or marks, and that remove the legal lacunae preventing convictions and additionally ensuring adequate compensations.

### In Conclusion

Why is the discussion of denial of torture and therefore the questioning of the denial so crucial? Because the denial contributes towards the self-definition of states as liberal democracies and the presence of particular laws, and instances of progressive jurisprudence on custodial violence often obfuscate the ways in which law itself accommodates violence. The lack of a debate is to some part thus integrally connected to an inadequate framework of analysing torture itself.

Of course, the creation of a public debate on torture brings up its own set of normative considerations. As Žižek stated right after 9/11,

essays... which do not advocate torture outright, [but] simply introduce it as a legitimate topic of debate, are even more dangerous than an explicit endorsement of torture, for we therefore legitimise torture and this 'changes the background of ideological presuppositions' and opinions much more radically than its outright advocacy (2002: 102-03).

In other words, the very creation of a public debate on a subject such as torture is dissuaded. However, here I draw

from Upendra Baxi's contention that "absolutist stances lead to complacency: to regard torture as self evidently bad prevents us from meeting the arguments of those to whom, for weal or woe, it is not so manifestly bad" (1982: 140). Here the plea, thus, is to consider ways in which a "public debate on torture" can emerge, where the citizenry, media and the state officials are engaged in a heightened public discussion and efforts at intervention. To some extent, that would mean making central the debates on why exactly torture is so normalised and used in the Indian criminal justice system in both routine and exceptional contexts tackling multifaceted challenges that may emerge in the process. Even in the public debate on sexual violence and the Delhi gang rape case, the custodial death of one of the accused was categorised as a suicide, and did not point towards custodial deaths, and within this, towards the issue of custodial torture. Nor did the protests on Soni Sori,<sup>18</sup> which critiqued the use of sexual violence as a form of custodial torture, directly focus on the problem of those who are tortured more routinely. The passage of (or lack of movement on) the anti-torture bill thus becomes a moment to articulate some of these concerns more centrally in Indian politics, society and culture.

### NOTES

- I choose to use the statistics from 2010 because the anti-torture bill was debated and passed in the Lok Sabha in that year.
- See Suhas Chakma (2010) on the close relation between the two.
- I acknowledge that there are other sites that also need to be studied in order to understand this lack of public debate such as the role of media and citizenry, but in this article I primarily focus on the state discourses.
- Here again the argument is not to compare sexual violence as an issue with torture, but rather just state the absence of a debate in one instance and presence in another.
- There is of course a difference between a film such as *Ardh Satya* where there is an effort to analyse the dilemmas of the police versus films where the violence is completely normalised but the discussion on different kinds of representation of torture is beyond the scope of this particular article.
- Here it is a claim of denial because of the shifting and unsuccessful nature of the claim.
- In this context, the emergence of a video of a Border Security Force person torturing a Bangladeshi was explained away both as an aberration and also because of the illegality of the border crossing.
- This reporting is also required for custodial rape cases.
- In the absence of a single law against torture, constitutional provisions including Article 21 (not depriving persons of life and liberty except by following a procedure established by law) and 20 (3) (self-incrimination clause) and number of statutory provisions such as Section 330 of the Indian Penal Code related to voluntarily causing hurt or grievous hurt to get confessions are available as protections against torture. See Ramakrishnan (2013); Lokaneeta (2012) for details.
- This change in the burden of proof under Section 114 (B) has been recommended in other cases and also by the Law Commission in the *One Hundred and Fifty Second Report on Custodial Crimes*, 1994.

- Here I am not suggesting that in custodial death cases, the Supreme Court has taken adequate action in all instances or that the Court never took any action in torture cases. Rather I am suggesting cases these as illustrations of how the Court has been more responsive in custodial death cases than in torture cases and consequently led to an inadequate focus on the latter. For a general assessment of Judicial trends at the high court and Supreme Court level, see Ramakrishnan (2013).
- In fact ACHR points to how in recent years they have managed to get compensation and some criminal action in custodial torture cases though that is still rare (Chakma 2010).
- See for instance PUDR's (People's Union for Democratic Rights) exceptional reports on custodial deaths since the 1980s. While torture is mentioned, it is not the primary focus of the reports. The country reports of Amnesty on the other hand focus more on incidents of torture in part due to their efforts to follow the international initiatives on torture. In this article, I focus more on the state discourses.
- In the routine interrogations, any statement or confession recorded by the police is not admissible under the law. The process for recording of confessions is specified in Section 164 of the Criminal Procedure Code and the admissibility determined by Sections 24-27 of Indian Evidence Act.
- There are some exceptions. See *Yasin vs NCT, Delhi* in 2009 in which interestingly the Court accepts the death to be the result of heart disease, not the beating, even though that is a standard argument used to deny torture as resulting in death.
- See campaigns in recent years by ACHR, Peoples' Vigilance Committee on Human Rights (PVCHR) and National Alliance on Testimonial Therapy (NATT) in collaboration of Rehabilitation and Research Centre for Torture Victims (RCT) and European Union project. <http://www.dignityinstitute.org/media/1500961/100673836-national-consultation-report.pdf>
- See Rajya Sabha Select Committee Report, Ramakrishnan (2013), ICJ Report (2011).

- An Adivasi schoolteacher was subjected to torture and sexual violence in custody in Chhattisgarh.

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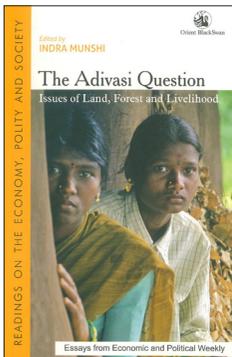
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## The Adivasi Question

Edited By

INDRA MUNSHI



Depletion and destruction of forests have eroded the already fragile survival base of adivasis across the country, displacing an alarmingly large number of adivasis to make way for development projects. Many have been forced to migrate to other rural areas or cities in search of work, leading to systematic alienation.

This volume situates the issues concerning the adivasis in a historical context while discussing the challenges they face today.

The introduction examines how the loss of land and livelihood began under the British administration, making the adivasis dependent on the landlord-moneylender-trader nexus for their survival.

The articles, drawn from writings of almost four decades in EPW, discuss questions of community rights and ownership, management of forests, the state's rehabilitation policies, and the Forest Rights Act and its implications. It presents diverse perspectives in the form of case studies specific to different regions and provides valuable analytical insights.

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