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The Shackles of Impunity and the Legal Imperative for Anti-Torture Legislation in India

G Prabhakar
Ph.D. Research Scholar, DSNLU, Regd No: 23PhDE08 under the guidance and supervision of Prof. D. Surya Prakasa Rao, Hon'ble Vice Chancellor, DSNLU.

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Abstract

Torture is a peremptory norm of international law, a jus cogens principle, out of which no derogation is allowed, but the Republic of India is in an ironic situation in the international human rights framework with regard to this atrocious activity. This study is a comprehensive, independent, legal and socio-political study of this legislative gap, a legal vacuum that is almost thirty years after India signed the United Nations Convention Against Torture (UNCAT) on October 14, 1997. This study questions the current legal framework of the country, showing their extreme insufficiency to address the definitional and procedural requirements of UNCAT. It examines the shadow jurisprudence which the Supreme Court of India has created by way of landmark rulings such as the D.K. Basu and Nilabati Behera Cases, concluding that judicial activism has been created as a weak alternative to the legislative will. This study determines the political and bureaucratic opposition to reform by a careful analysis of the lapsed Prevention of Torture Bills and the 273 rd Report of the Law Commission. This paper will conclude by providing a list of suggestions that will lead to the reform of the current law, which is to fully criminalize torture, shift the burden of proof in custodial injury cases, and eliminate sovereign immunity, which will restore the rule of law and harmonize the domestic laws of India with the international obligations.

Keywords: *Torture, Custodial Violence, United Nations Convention against Torture (UNCAT), Impunity, Article 21 of the Indian Constitution*

Introduction:

Torture is an attack on the very essence of human dignity, a procedure that dehumanizes a human being and transforms him/her into an object of the state, depriving him/her of the agency and physical integrity. The continued use of torture is a perversion in the context of a modern constitutional democracy that calls into question the legitimacy of the rule of law. The biggest democratic nation in the world, India is in a severe crisis of credibility and justice when it comes to custodial torture being rife and the lack of a certain legal system to curb the vice. The use of so-called third-degree procedures that cause excruciating physical and mental pain to entice confessions or information is a long-standing pathology in the Indian policing system, which is most of the time justified as a measure of crime control in a resource-limited setting.[1]

The course of the law of this matter is characterized by a deep contradiction. India has signed the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) on October 14, 1997. Conclusion of a treaty gives a binding obligation under the international law not to engage in acts that would defeat the object and purpose of the treaty, until the time of ratification. Nevertheless, to ratify the act that officially binds the state to the provisions of the treaty and makes it an object of international control, it is necessary to empower domestic acts. Twenty-eight years later, the Indian governments have not passed this enabling legislation, and India is alone among the minority of countries that are not UNCAT signatories.

This lag is not simply an oversight in the form of a procedure but a greater ambivalence in the political and security establishment. The opposition to criminalizing torture as a specific offense is due to the intertwinedness of the legal frameworks of the colonial era, the absence of political interest, and the fear of the security apparatus of the threat to counter-terrorism and law enforcement activities because of strict adherence to human rights. Thus, the Indian law system is based on generic clauses of the substantive law i.e. Bharatiya Nyaya Sanhitha (BNS) 2023 that addresses the concept of hurt and grievous hurt that does not reflect the nature, intent and the severity of torture as adopted internationally.[2]

The effects of this policy vacuum are extensive. It also cultivates a culture of impunity within the country with custodial deaths often misclassified and culprits being protected by the need to be sanctioned by the government before they can be prosecuted. It has serious diplomatic consequences at the international level. Foreign courts, especially in Europe and the United Kingdom, have severally declined to extradite fugitives to India on the basis of the danger of torture and lack of legal protection, making the lack of human rights in India a liability in their national security.

The Normative Framework: UNCAT and the International Standard

The gap in the Indian law can only be comprehended by first identifying the standard that has been established by the United Nations Convention against Torture. UNCAT was adopted by the General Assembly in 1984 as the international agreement on the imperative ban on torture. It interprets the prohibition on torture as absolute and that it does not admit of exceptional situations, whether a state of war, domestic political instability, or public emergency. [3]

Article 1

Article 1 of the Convention is the foundation of the Convention as it provides a clear and broad definition of torture. It considers torture to be any act upon which he or she intentionally inflicts severe pain or suffering, physical or mental, in order to obtain information or confession, punish him or her because of an act he or she or a third person has or is believed to have committed, or to intimidate or coerce him or her or a third person, or due to any other reason based on discrimination of any kind.

This definition is designed by four essential components which should be present in a cumulative manner:

- **Severity:** The act should result in great pain or suffering including mental suffering.
- **Intent:** It has to be intentional; it cannot be accidental injury.
- **Purpose:** The act has to have a certain purpose (confession, punishment, intimidation, coercion, or discrimination).
- **State Nexus:** The act has to be caused by, or at the behest of, or with the permission or acquiescence of, a public official or any other

[1] The need for an anti-torture law in India: Human rights still in chains, www.lawjournals.org/assets/archives/2025/vol11issue11/11265.pdf

[2] The indispensability of adding offences of torture in Indian Penal Code, https://www.uncat.org/resources/the-indispensability-of-adding-offences-of-torture-in-indian-penal-code/

[3] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment | OHCHR, https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-against-torture-and-other-cruel-inhuman-or-degrading

person who performs an act in an official capacity.[4]

It is especially important that it includes such terms as mental suffering and acquiescence. Mental torture recognizes that psychological destruction is as devastating as physical violence through practices such as sleep deprivation, sensory disorientation, or even threats of family. Acquiescence brings state liability up to acts where the officials are not the perpetrators of the act, but they are aware of letting non-state actors (like the private militias or other inmates) abuse the individuals.

Article 3

Article 3 makes the principle of non-refoulement binding, which forbids states to expel, return or extradite an individual to another state, where there are substantial reasons to believe that he will be under the risk of being tortured.[5] This is an effective universalization of the anti-torture provision to ensure that states cannot outsource abuse or look the other cheek on what happens to those who are deported to jurisdictions with a poor human rights record. This article has turned out to be the main impediment in the extradition relationship of India with the nations which adhere to UNCAT, as we shall see later.[6]

Article 4

Article 4 gives a positive duty on the State Parties to make certain that every torture is a criminal offense according to their criminal law. This involves trying to cause torture and being an accomplice or involved in torture. More importantly, the article requires that these offences should be subject to relevant punishment that considers their gave nature.[7] This does not mean that torture may be simply a case of a regular attack, it needs to be classified specifically and this classification is to show the misuse of state authority and the lack of human dignity.

The Domestic Legal Framework: The Fallacy of Security

The main thesis that the Indian government is making to justify the delay in ratification is that there are already domestic laws that will deal with torture. An analysis, in granules, of the Bharatiya Nyaya Sanhitha (BNS) 2023 i.e. the former Indian Penal Code (IPC), the Bharatiya Nagarik Suraksha Sanhitha (BNSS) 2023 i.e. the former Code of Criminal Procedure (CrPC) and the Bharatiya Sakshya Adhinayam (BSA) 2023 i.e. the former Indian Evidence Act, indicate that this claim is legally unsound and practically unsustainable The current system tackles the issue of hurt but does not cover the challenge of torture as sui generis offense.

The Bharatiya Nyaya Sanhitha (BNS) 2023 deals with bodily harm by using the term Hurt (in Section 114) and Grievous Hurt (in Section 116). Although these parts punish physical harm, they still do not reflect the intricacy of torture as defined by UNCAT.

The definition of the BNS of the term "grievous hurt" is as follows: 116 defines a "grievous hurt" by giving a list of physical injuries, the list is exhaustive and specific: emasculation, loss of sight or hearing, privation of any member or joint, destruction or permanent impairing of the powers of any member or joint, permanent disfiguration of the head or face, fracture or dislocation of a bone or tooth, any injury that threatens life or leaves the victim largely incapacitated over twenty days. This definition is purely mechanical and biological. It does not expressly feature psychological or mental torture. In the modern methods of interrogation, psychological pressure is used, and no physical evidence, including several days of isolation, forced nudity, and simulated executions, is left. According to the strict interpretation of the BNS, these actions cannot even be viewed as hurt, let alone as grievous, which is why the offenders can get away with considerable punishment.

- The nearest that the BNS gets towards criminalizing custodial torture is in Section 120 (1), 120 (2) and Section 127 (8).
- Section 120 (1) prosecutes the voluntary infliction of hurt with the intention of obtaining a confession, or the infliction of hurt with the intention of obtaining the restoration of property.
- Section 120 (2) is used to punish the voluntary act of causing grievous hurt in order to obtain a confession, or to make someone restore his property.
- Section 127 (8) penalizes wrongful confinement in order to extort confession.

As much as these parts deal with the intent of obtaining a confession (which is consistent with UNCAT to

[4] Counter-Terrorism Module 9 Key Issues: Convention against Torture, https://www.unodc.org/e4j/en/terrorism/module-9/key-issues/convention-against-torture.html

[5] International Journal Of Law Management & Humanities,, https://ijlmh.com/wp-content/uploads/The-Imperative-of-Ratifying-the-UN-Convention-against-Torture.pdf

[6] Id

[7] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment | OHCHR, https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-against-torture-and-other-cruel-inhuman-or-degrading

some extent), they are constrained by the meaning of hurt and grave hurt. In case a law enforcement officer resorts to electric shocks but does not cause any permanent physical injuries and fractures, the act may not be classified as a grievous hurt, therefore, receiving a less severe sentence. Moreover, these sections are silent on torture applied to discriminate, intimidate and punish, which is not related to a confession or property, and this is a major gap compared to UNCAT Article 1.

Critical divergences between the international standard and the domestic legislations.

Feature	UNCAT (Article 1)	Bharatiya Nyaya Sanhitha (BNS) 2023
Scope of Suffering	Severe pain or suffering, whether physical or mental.	Limited to "Hurt" (Sec 114) and "Grievous Hurt" (Sec 116), largely focusing on physical injury.
Purpose	Confession, information, punishment, intimidation, coercion, discrimination.	Limited to extortion of confession or compelling restoration of property as enumerated under Sec 120 (1), Sec 120 (2) and Sec 127(8).
Perpetrator	Public official or person acting in official capacity (includes acquiescence).	Public officials are subject to general criminal law; specific "acquiescence" liability is weak.
Mental Torture	Explicitly covered.	Not explicitly defined; relies on judicial interpretation of "injury".
Sovereign Immunity	Not recognized (Jus Cogens).	Procedural immunity via Section 218 of BNSS 2023 (Sanction to prosecute).

One of the biggest barriers to accountability is the Section 218 of the BNSS 2023 which stipulates that no court shall have the power to assume cognizance of an offense supposed to be committed by a public servant in the performance or purported performance of his or her official duty unless the government has sanctioned it beforehand. This need serves as a strong fortification of torturers. In reality, governments seldom sanction to prosecute police officers because they consider it as demoralizing to such a force or politically inexpedient. UNCAT has no such immunity to torture; it perceives torture as something ultra vires, beyond the bounds of any lawful official responsibility. It is in the nature of the Indian law mandating sanction which effectively counterbalances the hypothetical criminalization of torture under the BNS, which poses a procedural bar and in most instances, a case will not even receive a trial.

The Burden of Proof Dilemma

During a normal criminal case, the onus of proving guilt of the accused beyond reasonable doubt falls on the prosecution. This standard can hardly be fulfilled in the case of custodial torture. It happens inside the prison or a police station, and the only people who can testify of the crime are the victim (who is dead or gagged) and the offenders (the police). Police officials have a conspiracy of silence, in which they will neither testify against their co-workers.

Currently, (Section 120 of the BSA 2023), the Law Commission of India in its 113th Report and the 273rd Report again suggested the addition of the provision of Section 114B to the Indian Evidence Act, 1892. This offered section would form a rebuttable presumption: where one is in police custody and suffers injuries, the court can assume the injury resulted because the police officer had custody of them passing the burden of proving how the injury happened to the police officer.[8] This amendment has not been put into action even though these recommendations date back to decades. As a result, victims have a mountainous task of proving custodial torture, which is contributing to the abysmal conviction rates of custodial crimes.

Judicial Activism

With failure of legislation, the Supreme Court of India has taken the initiative and interpreted the constitution to offer safeguards which the legislature has not been able to deliver. Such judicial activism has produced a

[8] Section 114B | Review of the Indian Evidence Act, 1872 | Law Commission of India Reports https://www.advocatekhoj.com/library/lawreports/evidenceact1872/142.php?Title=Review%20of%20the%20Indian%20Evidence%20Act

jurisprudential framework that is a temporary though inadequate replacement of a specific law.

The Extension of Article 21: Dignity as a Right

By a series of broad interpretations, the Supreme Court has interpreted the right against torture in Article 21 of the Indian Constitution (Right to Life and Personal Liberty). In Francis Coralie Mullin v. The Administrator, Union Territory of Delhi (1981)[9] in which the question was the circumstances of detention by the COFEPOSA Act. In passing the judgment, Justice P.N. Bhagwati did not treat the right to life as the right to animal life; rather, he ruled that the right to life was the right to living with human dignity. He noted that any torture or cruel, inhuman or degrading treatment was going to be an affront to human dignity and would be an incursion into Article 21[10]. This decision was effective to bring the Indian constitutional law into conformity to Article 5 of the Universal Declaration of Human Rights, which made it clear that the right to detain by the state is not the right to torture.

Nilabati Behera: Making the State Liable

In Nilabati Behera v. State of Orissa (1993),[11] The Supreme Court dealt with the issue of custodial death and remedy of compensation The petitioner, Suman Behera, had lost his son, Suman Behera, who had died in the police custody and his body was recovered in a railway track where he had several injuries. Police alleged that he ran away and was struck by a train, however, this was denied by forensic evidence. The Court provided the principle of strict liability on the death of a custodian, the distinction was made on the remedy on private law (tort) and the remedy on the public law (writ jurisdiction under Article 32). It believed that the doctrine of sovereign immunity is inapplicable where the fundamental rights are violated. The Court granted the mother compensation claiming that the state is legally obligated to safeguard the life of people under its custody. This jurisprudence permits the constitutional courts to compensate, which is remedial, once the violation has taken place, as opposed to a criminal statute that prevents such an act by penalizing the individual violator.[12]

D.K. Basu v. State of West Bengal:

The greatest judicial intrusion was that of D.K. Basu v. State of West Bengal (1997)[13] . The Supreme Court realized the diabolical repetition of police torture and used its powers to grant continuing mandamus. The Court established eleven principles that should be applied in any of the cases of arrest and detention to avoid custodial violence.

These guidelines included:

- **Identification:** The police officers should have correct name labels with designations.
- **Memo of Arrest:** An arrest memo is to be drawn up at the moment of arrest and signed by a family member or a local resident.
- **Information:** The detained person is entitled to the right to inform a relative or a friend about his or her arrest location.
- **Medical Examination:** The arrestee has to undergo a medical examination during arrest and after every 48 hours.
- **Control Room:** Police control rooms should be created to monitor arrests.
- **Inspection:** The detainee should be allowed to meet his attorney at the time of questioning.

Although D.K. Basu was a turning point, it has not been applied uniformly. This ruling practically made police procedure law on its own bench but without statutory support and penalties against non-observance (except contempt of court), the guidelines are regularly ignored.

Most Recent Judicial Interventions:

The tolerance of the judiciary on executive laziness has been visibly thinning in recent years. In 2020, in *Paramvir Singh Saini v. Baljit Singh*[14], the Supreme Court ordered the installation of CCTV cameras[15] in all police stations as a way of deterring torture . The Supreme Court took a very stern disapproval towards the Union and State governments during suo motu proceedings on non-compliance with this order. The bench noted that the ineffective CCTVs were enabling a sustained spurt of custodial killings with even 11 reported in Rajasthan alone in eight months in 2025.

[9] (1981) 2 SCR 516

[10] Francis Coralie Mullin vs The Administrator, Union Territory of Delhi on 13 January, 1981, https://indiankanoon.org/doc/78536

[11] 1993 AIR 1960

[12] Nilabati Behera (alias Lalita Behera) v. State of Orissa and Others - Refworld, https://www.refworld.org/jurisprudence/caselaw/indsc/1993/en/18638

[13] D.K. Basu v. State of West Bengal | Naya Legal https://www.nayalegal.com/dk-basu-v-state-of-west-bengal

[14] AIR ONLINE 2020 SC 871

[15] Custodial torture: Supreme Court raps govt over CCTV compliance | Current Affairs, https://visionias.in/current-affairs/upsc-daily-news-summary/article/2025-11-26/the-hindu/polity-and-governance/custodial-torture-supreme-court-raps-govt-over-cctv-compliance

The Centre was also unsuccessful in its submissions that CCTV installations outside the police stations could be a security issue and the government was criticized by the Court because it was very careless in accepting the directives of the court and required individual affidavits to be given by the Home Secretaries.[16] This new court stress highlights the fact that the approach of guidelines is at its end; without legislative coercion and parliamentary support, the architecture of accountability is weak.

The executive and legislative branches have periodically attempted in half-baked efforts to pass anti-torture bills, often at the international pressure and not due to domestic political goodwill. The history of legislature is a history of bills that were dropped and unnoticed inquiries. With the Indian government undergoing the Universal Periodic Review (UPR) at the UN Human Rights Council in 2010, the government came up with the Prevention of Torture Bill in the Lok Sabha. The Lower House hurriedly passed the Bill but came under intensive criticism of being toothless and not in compliance with UNCAT by the civil society and the legal experts. The Bill was sent to a Rajya Sabha Select Committee, which suggested many changes, such as increasing the definition of torture to include mental pain, and the period of limitation to two years, and providing a separate investigation mechanism. Nevertheless, the Bill expired along with the 15th Lok Sabha in 2014.

After an observation made in the Supreme Court in Ashwani Kumar v. The Law Commission of India, Union of India, filed its 273 rd Report, entitled, Implementation of UN Convention against Torture. The Commission was categorical in advising India to ratify UNCAT and come up with separate Prevention of Torture Bill.

- **The Anatomy of Resistance:** Systemic Foundations of Torture. Is the legal, moral, and diplomatic case against the anti-torture law so strong that the Indian state has never been able to put it into law? The opposition seems to be the result of bureaucratic inertia, political calculation and institutional insecurity.

- **The "Hand-Tying" Argument:** The security agencies and police forces have been imbued with the idea that the third-degree approach is a necessary evil when it comes to investigating and this is due to the absence of modern forensic tools and the pressure to get the crimes solved. The security establishment fears that a well-stated anti-torture statute, particularly one that eliminates the necessity of sanction, would result in a torrent of false allegations against law enforcement and counter-terrorism agencies. This perception exists even in the light of the fact that scientific interrogation is more accurate as compared to confessions caused by torture.

- **Federal Structure and Political Will:** The split of powers between the Centre and States is an impeding structural factor. This is, however, a common procrastination strategy. Article 253 of the Constitution gives the Parliament the authority to enact any law applicable to the entire or some portion of the territory of India to put into effect any treaty, agreement, or convention with any other country or decision made at any international conference. Thus, by constitutional definition, the Centre has the constitutional mandate to pass an anti-torture legislation to ratify UNCAT without consensus of all states but it does not do so, arguing that it requires consensus.

- **Sovereign Pride and Denial:** Sovereignty is the subject of a certain body of political thinking which sees international scrutiny as an encroachment on sovereignty. By ratifying UNCAT, India would be subjected to the scrutiny of the UN Committee Against Torture, which might question the actions of armed forces in the troubled regions under the Armed Forces (Special Powers) Act (AFSPA).

Conclusion:

The lack of anti-torture laws in India is a basic paradox of constitutional values and legal facts, of international obligations and national tradition, of ideals of democracy and the impunity of the system. The Constitution itself, which guarantees dignity, the repeated statements of the Supreme Court that torture infringes upon the basic rights, the signature of the UNCAT in 1997, and the ratification of the ICCPR by the country, all impose the obligation which has not been yet fulfilled, almost thirty years after the date of the signing of the UNCAT by India. The Prevention of Torture Bill has been proposed several times but has never reached the status of passing into law by both a legislative failure and a lack of political interest and the Supreme court claiming separation of powers. The result is that thousands of the poorest and most marginalized citizens of India are tortured with impunity on those who perpetrate the act, no known remedies to victims and the negative impact on the international reputation of India. Passing of extensive

[16] Custodial torture: Supreme Court raps govt over CCTV compliance - The Hindu, https://www.thehindu.com/news/national/is-the-centre-taking-us-very-lightly-supreme-court-asks-government-in-suo-motu-case-hearing/article70320631.ece

anti-torture laws that are in line with UNCAT requirements is not just an international compliance or judicial recommendation. It is a constitutional necessitate based on Articles 21, 51(c) as well as 253. It is a humanitarian necessity which is based on the magnitude of custodial violence. It is a democratic imperative which is an extension of the rule of law principle that the state power should be accountable and limited. It is a strategic necessity that emanates out of the regional and international ambitions of India. The way forward would be to ensure that the government focuses on enacting the Prevention of Custodial Torture Bill, 2023, with amendments to provide full alignment with UNCAT; to proceed with the ratification of UNCAT and OPCAT without waiting to get domestic legislation done; to undertake police and institutional reform to eradicate systematic torture; to put in place the independent accountability mechanisms; and to facilitate documentation and international monitoring of torture allegations by the civil society.

Suggestions:

In order to close the gaps in the legislation and meet the requirements of UNCAT, the following recommendations are suggested:

Immediate Ratification of UNCAT: India needs to stop being a signatory and ratify the convention. This will be an indication of a commitment to the international community and domestic constituency, which was promised in 1997.

Introduction of Standalone Legislation: Parliament needs to adopt an Anti-Torture Legislation. This Act should:

- **Define Torture Generally:** Under the UNCAT Article 1 definition, with a cursory addition of mental torture and discrimination or intimidation acts.
- **Eliminate Sanction Precondition:** There should be no previous government sanction explicit requirement to prosecute an officer who has committed torture since torture cannot be a aspect of legitimate official duty.
- **Extend Limitation Period:** The period of time to make complaints must be no less than three years, or preferably, the crime of torture should not have any limitation period, with the victims in mind due to the long-term trauma they are exposed to.
- **Command Responsibility:** Incorporating the provisions that make superior officers accountable when they are aware or ought to have been aware of torture by their subordinates and did not stop it.
- **The Evidence Act (Bharatiya Sakshya Adhinayam) 2023:** as suggested by the Law Commission, is needed to be added to invert the burden of proof in the cases of custodial injury, and the police must justify how a detainee was injured during his custody.

Institutional Reform:

- **Independent Investigation:** The complaint of torture should be investigated by some independent body that is not part of the police chain of command (a court of law or a special human rights investigative department).
- **CCTV Compliance:** The directives of the Supreme Court regarding the installation of CCTV in every part of the police stations should be strictly followed with independent monitoring and severe punishment to those found tampering with the footage.
- **Forensic Investment:** Reforming the police force through investing in forensic science and trainings on interrogation to make the police less reliant on crude third-degree techniques of solving crimes.

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