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India's Denial of Torture and Non-Ratification of the UN Convention Against Torture

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ABSTRACT

This research paper delves into the complex issues surrounding India's non-ratification of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The paper examines India's reasons for not ratifying the Convention, emphasizing concerns about sovereignty and the impact on domestic laws. It scrutinizes the notorious Armed Forces (Special Powers) Act (AFSPA) and its implications for human rights, emphasizing the need for accountability and reform. The paper also explores the international perspective on India's stance, highlighting the criticism and recommendations from various international organizations and human rights bodies. India's failure to ratify the Convention, despite being a prominent democracy and a member of the UN Human Rights Council, is underscored as a significant concern. In conclusion, the research paper sheds light on the urgency of addressing issues related to torture, non-ratification of international conventions, and the need for stronger anti-torture legislation in India, providing recommendations for a way forward.

Keywords: Human rights, UN convention against torture, law against torture, AFSPA.

I. INTRODUCTION

Every human being born on this planet is said to have certain inalienable and fundamental rights, this means that, every person is subject to protection that guarantees a life of dignity.

According to the United Nations, human rights can be defined as rights inherent to all human beings, regardless of race, sex, nationality, ethnicity, language, religion, or any other status.

These rights can be distinguished from legal rights with the help of a hierarchy, human rights protect the individual in a State and are universal while the latter are privileges that are not inalienable or universal.² The State must first provide basic human rights to an individual before providing any other. Legal rights are more important in the context of the State and can even be

¹ Author is a student at NMIMS, Navi Mumbai, India.

² Luminita Dragne & Cristina Teodora Balaceanu, *The Right to Life – A Fundamental Human Right*, 2, SOC. ECON. DEBATE (2013).

altered by the State on reasonable grounds. An individual should be allowed to have human rights despite his/her legal status.

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment had come into force in 1987 after many instances of (and not limited to) use of torture in European countries especially during the Nazi regime when “third-degree interrogations” were used and as of now has about 173 countries as its state parties, and India is not one of them.

Torture is condemned all over the world, however, some countries have come up with a way to not allow it but to some extent, justify it. For example, America has justified using torturous methods to combat the rampant terrorism in the country.³

D.K. Basu v. State of West Bengal explained the concept of torture and declared to be a “darker side of the human civilization”.⁴ It was said to be a phenomenon wherein a person who has more power in society imposes his/her will on to a person who does not have the same power, this is a violation of our most basic human right – our right to life.

The NCRB has reported over 1,600 deaths in custody in the year 2020 out of which a wide array of them were described to be by “natural causes” such as illnesses and maladies while some of them were due to negligence of the police personnel.⁵ This number is too high for any democratic state that has sworn to be a protector of an individual’s right.

The European Court of Human Rights has time and again stated that an individual entering the confined rooms of a jail healthy, should return in the same healthy condition when he is released and if there are any injuries or maladies that have accrued within that time, the State should give a proper reasoning for it.⁶ Human rights are rights that are beyond the arena of rights and duties that a State has undertaken, they are rights that answer the question as to what defines the “human” in a human being.⁷

This research paper aims at analyzing the response by India along with reasons for not ratifying the Convention, the existing legal framework in India related to anti-torture and its drawbacks, an examination of the Armed Forces (Special Powers) Act, perspectives of international entities regarding India’s decision of non-ratification and lastly, evaluating the scenario in India and providing conclusions and recommendations for paving a way forward.

³ Ronald D. Crelinsten, *The world of torture: A constructed reality*, THEOR. CRIMINOL., 7, 293–319 (2003).

⁴ D.K. Basu v. State of West Bengal, AIR 1997 SC 610.

⁵ National Crime Records Bureau, *Prison Statistics India 2021* (2021).

⁶ Yavuz v. Turkey, 2011.

⁷ Hans Kolstad, *Human Rights and Democracy—Obligations and Delusions*, 7, MPDI, 1-2 (2022).

II. INDIA'S REASONS FOR NOT RATIFYING THE CONVENTION AGAINST TORTURE

(A) Threat against Sovereignty

Lebanese philosopher and diplomat Charles Malik believed that with the entry of the Universal Declaration of Human Rights a new era of global peace and optimism could be envisaged. However, a single uniform system via ratification of treaties for the protection of human rights could not provide for the need of the hour and such a system was bound to have a few flaws in its system. This is because international human rights norms and standards can be said to be extremely contested and secondly, norms and rules for a nation state can prove to be a challenge over a state's sovereignty and independence.⁸ Ratifying a treaty has serious implications on the nation state. It not only signifies the commitment of the nation to the treaty but also the intention to make changes within their domestic legal framework.⁹

The Convention contains heavy enforcement mechanisms that can alter a states behaviour meaning that other states can hold the ratifying state accountable for their actions or inactions.¹⁰

India had signed the Convention on 10th December in 1984 but has not yet ratified it. This is because has showed clear dissonance with respect to certain Articles such as Article 20, Article 21, and Article 22 of the Convention.

Article 20 which allows inquiry through a Committee against Torture (CAT) in the State if they have sufficient reason to believe that the State is indulging in torture practices. This is a confidential inquiry and requires the State to co-operate with CAT. Many times, this inquiry has to be completed with a visit to the State party. Viewing this mechanism through India's lens, sovereignty can be said to be compromised because of its universal jurisdiction.

Article 21 allows the influx of state complaints against a State who is believed to not follow its obligations under the Convention and bring the matter to its attention. The same mechanism also applies to individual complaints via individuals who belong to the State's jurisdiction and who have exhausted all remedies provided to them by the State.

Now, in India torture is still practiced to obtain information out of those held in custody.¹¹ In the DK Basu judgment, it was acknowledged that torture and death that takes place in custody and lockups can prove to be detrimental against the rule of law. In a U.P case, a civilian was

⁸ Rachel George, *The Impact of International Human Rights Law Ratification on Local Discourses on Rights: the Case of CEDAW in Al-Anba Reporting in Kuwait*, 21, HUM. RIGHTS REV., 43-64 (2020).

⁹ Natalie Baird, *To Ratify or Not to Ratify? An assessment of the case for ratification of international human rights treaties in the Pacific*, 12, MELB. J. INT. LAW, 4-5 (2007).

¹⁰ Brett Franzie, *Does International Law Change State Behavior?*, BSU (2018).

¹¹ Vishal Prasad & Shruti Katiyar, *Torture and Human dignity- AN Indian Scenario*, 5, IJRAR, 555-558 (2018).

murdered by the police because he refused to pay a 100-rupee bribe for a petty crime.¹² The Prevention of Terrorism Act, 2002 (POTA) has also been weaponized by the State in order to force confessions or falsely accuse the arrested in the name of prevention of terrorism. Violations of human rights such as these in open sight can certainly bring forward stifling dissent if individuals were empowered to complain against the state via **Article 22** of the Convention.

III. THE ARMED FORCES (SPECIAL POWERS) ACT (AFSPA)

What started off as a short-term resolution of the disputes and uprisings arising in the Naga hills, turned out to be a continuing abuse of draconian power in the hands of the Government. It was introduced in the states of Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland, and Tripura, and was later extended to the states of Jammu and Kashmir by the 1990s.

Even in the pre-independence era, this law emerged as an Ordinance which gave Commissioned Officers the right to use unaccountable force to arrest, seize any property or hurt civilians. After Independence, the Ordinance was gradually converted into the Armed Forces (Special Powers) Act, 1958 that we see today.

Coming to the “special powers” that have been granted to the armed forces within the Act, the initial goal of containing the violence in some disturbed areas can be heavily questioned. The Act gives powers to commissioned officers, warrant officers, non-commissioned officers or any other person who has a rank equivalent to the previously mentioned officers. The Act gives extensive powers of declaring any area as a “disturbed area” with little to no remedy as this decision cannot be challenged under any court of law.

If any of the officers mentioned are of the opinion that there is a threat to public order because of a gathering or an assembly of more than 5 persons or if any person is carrying an weapons or ammunition, then the officer can use force or fire against these persons. Force can be used even till the point of death. This in itself, is a huge attack against Article 21 of the Indian Constitution because it gives the officers discretion of the wildest amplitude, making a question of life or death essentially up to their judgment and decisions.

Further, the Act does not distinguish between people who have gathered as a peaceful assembly or people who have gathered with the intention of wreaking havoc. This can trigger any situation that can be against public order leading to the use of force or causing grievous injury or even

¹² State Of Uttar Pradesh v. Ram Sagar Yadav, 1985 SCR (2) 621.

death. Apart from this, the Act also permits officers to arrest without warrant, any person under suspicion and enter any premises or dwellings, this can be a vicious tool in the hands of someone who wishes to harass victims.

In a “botched” anti-surgency operation, 14 civilians were killed by the Indian Army in the December of 2021 and the true intent of the Act was questioned yet again.¹³ Another instance was the 2009 Shopian tragedy wherein 2 women were found dead and were allegedly raped and killed by the army officers and there was no FIR placed and the medical records seemed to be manipulated.¹⁴

This Act is an example of not only a violation of our right to life and liberty, but also a violation of the right to remedy. **Section 6 of the Act** grants immunity to these officers against any lawsuits or legal proceedings unless there is authorization given by the Government which is a violation of Article 14 (Indian Constitution) as people are not able to seek redressal.¹⁵ The true essence of this provision is to protect the State against allegations and complaints that can hamper the working of the officers but has been succumbed to a tool that provides immunity to the State for committing ghastly violations of human rights.

In a Supreme Court Case, NPMHR v. Union of India it was stated that “an officer exercising those powers” forms the opinion that it is necessary to take action for maintenance of public order against the person/persons acting contravention of such prohibitory order.¹⁶ Upholding the AFSPA, it was also stated that the officers are required to use minimal force against these persons. However, the core of the Act still allows heinous torture and abuse of human lives through arbitrary detentions, arrests, and murders.¹⁷

India being a signatory to the Convention against Torture, it is quite apparent why the Government wouldn't want to ratify the convention yet. Ratifying the convention will lead to accountability and responsibility being taken by the Government to revoke the Act. India believes that ratifying the Convention is a gateway to international scrutiny and a threat to sovereignty. Ratifying the convention will also lead to major changes in India's domestic laws while also changing the definition of torture intensifying the debate of the validity of the

¹³ Jayanta Kalika, The Mon massacre: Time to withdraw AFSPA from the Northeast?, ORF (Jan. 11, 2022), <https://www.orfonline.org/expert-speak/time-to-withdraw-afspa-from-the-northeast/>.

¹⁴ Gulzar, *Asiya, Neelofar rape & murder: No justice to victims as a decade passes*, GREATER KASHMIR (May. 29, 2019), <https://www.greaterkashmir.com/kashmir/asiya-neelofar-rape-murder-no-justice-to-victims-as-a-decade-passes>.

¹⁵ Indrajit Barua v. The State of Assam & Anr., AIR 1983 Delhi 513.

¹⁶ Naga People's Movement of Human Rights v. Union of India, AIR 1998 SC 431.

¹⁷ Dr. Sailajananda Saikia, *9/11 of India: A Critical Review on Armed Forces Special Power Act (Afspace)*, and *Human Right Violation in Northeast India*, 2, JSWHR, 265-279 (2014).

AFSPA.

IV. EXTRADITION LAWS IN INDIA

In *Dr. Ashwini Kumar v. Union of India Ministry of Home*, the applicant highlighted that when it comes to extradition of criminals, there is difficulty faced by India because of having no proper law against torture.¹⁸ Extradition requests were denied because extradites such as Nirav Modi and Vijay Mallya have claimed that the standard of living in Indian prisons is plagued by torture and there is a possibility of “inhumane and degrading treatment”.¹⁹ Not ratifying the treaty shows the world that India is not yet ready to fully commit to human rights. The convention acknowledges extradition prohibitions and makes accountability apparent thus providing a haven and a medium through which remedy can be sought against a State.²⁰ Ratifying the treaty will cause India to make strict changes in its internal law and it would attract more international surveillance upon the condition of prisons and its inmates.

(A) The Existing legal framework

India’s Constitution under its Article 21 protects an individual right to life and liberty, and it is way more complex than just mere existence or an animal existence. Article 20(3) also provides protection against self-incrimination. Article 22(2) caps the hours of detention to 24 hours thereby limiting the amount of time a person can be held in custody.

Under the Indian Penal Code (IPC) sections 330 and 331 that punish using voluntary means to hurt or grievously hurt any individual to extract a confession out of them or cause restoration of property. However, these sections do not expressly mention the word “torture”.

The Protection of Human Rights Act was also passed in 1993 which established the National Human Rights Commission. With the aim of holding the State liable for their actions, the task failed rather fantastically. At the face of it, the Commission was supposed to be independent but was gradually made dependent on the Government because the law that gives the commission power relies on the Governments assent when it comes to finances in order to act on its duties. Complaints regarding the AFSPA are also not within the ambit of the Commission. Therefore, lack of leadership and independence has rendered this Act and its Commission a mere “toothless tiger”.

The Indian Evidence Act has several provisions to prevent the usage of torturous method in a

¹⁸ The observations made by the Court while passing interim directions, in WP (C) No. 193 of 2016.

¹⁹ Shrabana Chattopadhyay, *Refusal of Fugitive Criminals - Current Status of India through Extradition Treaty– A Critique*, 1, IJLSI, 7-8 (2019).

²⁰ *R v. Evans & Anr. & The Commissioner of Police for the Metropolis and Ors.*, (1991) 1 SCR 869.

custody such as sections 25, 24 and 27 which prevents any form of self-incrimination as well as evidence that is collected through illegal or hurtful means. The Code of Civil Procedure also provides provisions such as sections 46, 49 and 54.

One of the reasons for non-ratifying the convention was that India wanted to establish a proper effective legal framework related to anti-torture laws. Initially, when the Prevention of Torture Bill was introduced in 2010 it was criticized on 2 bases. The first one being its regulation, it had a time limit of 6 months for trying cases and it also required governments' assent to start the trial. The second was the fact that it only acknowledged the physical repercussions of torture and completely ignored the underlying mental aspect. The "upgraded" bill that was introduced in 2017 was also plagued by numerous loopholes. The new bill considered the mental aspect of torture and had also widened its scope of the definition of "torture". Unlike the Convention that prohibits any sort of statute of limitation, a case needs to be filed within 6 months of any alleged crime. The Bill also does not require the setting up of a different body to deal with the cases that come up thereby increasing the chances of a torture related case to get lost in the various cases that burden the Courts. Additionally, the Bill disregards use of torture because of a person's race, ethnicity, caste, etc. and only recognizes elements such as using torture to obtain information or a confession.

India believes in its legal system and is confident in its laws through which a citizen can seek protection. However, accountability is blatantly refused by the Government.²¹ Introducing a global eye into the workings of the State would lead to more rigorous check-ups and investigations related to torture. Even the Prevention of Torture bill 2017 has been introduced multiple times but has been lapsed making it clear that India has no plans of bringing a strict legislation into action.²²

V. INTERNATIONAL PERSPECTIVE ON INDIA AND THE TORTURE CONVENTION

(A) Observations of international organisations

NHRC's Chairperson, Justice J.S. Verma had expressed great anguish while urging India to ratify the Torture Convention in the year 2000. Falling behind several countries in this regard, there have still not been any winds of change in the attitude of the Government since their promise to ratify it in 1997. Since then, many organisations have come forward to criticize

²¹ Mohd Rameez Raza & Ujjwal Singh, *Interrogations and Custodial Tortures: Why India Needs To Re-Analyse Its Lacunae Of Anti-Torture Laws?*, THE LEGAL ARC (2020).

²² Karan Thapar, *India's 23-Year-Old Failure to Ratify UN Convention Against Torture is Shameful*, THE WIRE (Jul. 2, 2020), <https://thewire.in/rights/watch-indias-23-year-old-failure-to-ratify-un-convention-against-torture-is-shameful>.

India's decisions related to anti-torture laws and non-ratification of the torture convention.

In an international conference held in Geneva in 2018 titled “**On Strengthening Legal Protection Against Torture in India**” various lawyers, experts, activists, and many other campaigners along with organisations such as international organisations such as World Organisation against Torture, the Quill Foundation, etc. as well as the UN's Committee against Torture gave their opinion on India not ratifying the torture convention. India was recommended that they should emulate an effective framework in their legal ecosystem to introduce an anti-torture law. Being the world's largest democracy and a part of the UN Human Rights Council, not ratifying this convention is nothing but a giant hypocrisy.

In 1997, numerous international NGOs had come forward with accusations against state governments to the Commission on Human Rights. India was condemned for its torture practices in the Northeast which included unlawful imprisonment of people, rape and sexual violence against women and children. A journalist from the International Human Rights Association of American Minorities went as far as to say that using torturous methods to achieve procedural “justice” has become a daily routine.²³

The International Commission of Jurists along with several other countries and state parties have also urged India to ratify the convention during the Universal Periodic review.

Finally, the Human Rights Council (HRC) has also called India out on not being able to ratify the Convention. Cases related to lockups and illegal imprisonments were worsening and India's response of enacting a proper anti-torture law before ratification of the convention was highly criticized, it was stated that putting forward a law before ratification was not mandatory and was a “misconception” and just an excuse to not ratify the treaty.²⁴

VI. CONCLUSION

By not ratifying the Convention, India is tacitly accepting that torture is an accepted phenomenon in India. India in 2017 introduced the Prevention of Torture Bill but there were no plans of any strict legislative action. The Bill itself did not have the basic requirements of a proper law, it also failed to define certain terms such as “severe or prolonged pain or suffering” meaning that torture is not sufficiently defined. The threshold of “physical injury” to be considered as torture was also painfully raised as compared to the standards of the Convention.

²³ Press Release, *Non-Governmental Organisations Claim Numerous Violations of Human Rights around the World*, UNITED NATIONS (Apr. 2, 1997), <https://press.un.org/en/1997/19970410.hrcn796.html>.

²⁴ Colin Gonsalves, *Stand up against torture*, THE HINDU (Dec. 5, 2017), <https://www.thehindu.com/opinion/opened/stand-up-against-torture/article21261356.ece>.

India's reason of introducing an anti-torture law before ratifying the treaty and the prevalence of AFSPA has made ratifying the Convention a herculean task. India is one of the few nations along with countries such as North Korea who are not State parties which should be nothing short of a wake-up call for India.

There are some recommendations that India can implement within their legal framework regarding prevention of torture:-

1. India should immediately ratify the UN Convention Against Torture.
2. Investigations should be supervised by a "command responsibility". Concealing proof of torture should be meticulously overseen by this entity.
3. The Prevention of Torture Bill should be given a revival and should properly define torture and methods used to impose torture on victims.
4. Scientific and proven methods should replace the use of third-degree methods of interrogation and intimidation by the Police.
5. Lastly, the draconian law giving power to AFSPA should ideally be repealed but until that happens, every state that has forces deployed should have an independent cell to address grievances of the people and sexual violence of any kind should be penalized under India's criminal law.
