Torture shadows India's justice system

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Views expressed are personal

The ruling by the King's Bench Division of the High Court of Justice in London on February 28 in the Sanjay Bhandari extradition case, upholding the fugitive's defence against extradition, and the proceedings in Tahawwur Rana's appeal in the U.S. Supreme Court challenging the latter's extradition are significant judicial developments with larger implications for a constitutional state. Hopefully, these proceedings will spur the government to reinforce India's claim as a professed defender of human rights by enacting a comprehensive law against torture, enabling it to ratify the United Nations Convention against Torture (UNCAT).

This is because the defence of Bhandari, facing Indian prosecutors for tax evasion and money laundering, and of Rana, whose extradition is sought for his role as a conspirator in the 26/11 Mumbai terrorist attack, is premised essentially on credible evidence of endemic custodial torture in India including its non-ratification of the Convention.

In Bhandari's case, Justices Holroyde and Steyn, while denying the Indian government's plea for extradition, found that Bhandari faced a real risk of custodial torture in Indian jails and that India had not ratified the UNCAT.

Rana, in his renewed application for a stay on extradition to India pending the decision of his *Habeas Corpus* petition, has cited the U.K. judgment and its reasoning. Other fugitives from Indian law have also challenged the government's extradition request on similar grounds, exposing a legal lacuna that has compromised the effectiveness of the country's criminal justice system.

Although one of the earliest Unilateral Declarations against Torture (Resolution number 32/64) was initiated by India in the UN General Assembly and has ratified several other international treaties against torture, including the Universal Declaration of Human Rights (1948) and the International Covenant on Civil and Political Rights (1976), its ambivalence in ratifying the UNCAT is confounding. Articles 51(c), and 253 of the Constitution mandate respect for international treaties to which India is a party (*NALSA* (2014), *Vishakha* (1997) et al. Regrettably, India finds itself in the company of discredited non-ratifying dictatorial regimes such as Angola, Brunei, Comoros, the Gambia, Haiti, and Sudan.

Judicial abdication

Reflecting a broad political consensus on the outlawing of torture based upon deeply felt popular sensitivities, the Select Committee of the Rajya Sabha had recommended a comprehensive anti-torture legislation as early as 2010. The Law Commission also recommended this in its 273rd Report (2017) and furnished a draft of the proposed law for consideration. The Human Rights Commission of India has similarly supported a stand-alone domestic law against torture.

In an expansive interpretation of Article 21 of the Constitution, the Supreme Court has declared that torture in any form is an unacceptable infringement of the sacrosanct right to dignity and privacy (*D.K. Basu* (1997), *Puttaswamy* (2017), *Nambi Narayanan* (2018), *Romila Thapar* (2018). Even so, in *Ashwani Kumar* (2019), the constitutional court found itself unable to even nudge the government to consider enacting the requisite law, despite its several pronouncements suggesting suitable laws on different subjects (*Tehseen Poonawalla* (2018), *Ranveer Allahabadia* (2025), etc.). The Court failed to appreciate that "a lack of legislation may be contrary to the principle of legal certainty," that 'it is the function of the court to provide effective remedy' and that 'it is legitimate for constitutional courts to caution legislatures against their failure to introduce what they consider as adequate legislation." [Opinion No.18 [2015] Consultative Council of European judges]. Nor did it heed D.Y. Chandrachud's declaration in *Jeet S. Bisht* (2007) that the doctrine of separation of powers" allows methods to be used to prod and communicate to an institution either its shortfalls or excesses in discharging its duties..." Even as the Court cautioned in *Sharaya Bano* (2017) that constitutional rights can be defeated through inaction, indifference, or ambivalence on the part of other organs of the State, its failure to facilitate the enactment of a comprehensive law against torture is an impermissible abdication of its remit.

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In these premises, the extradition cases raise profoundly important questions about a democratic State baulking at fulfilling its compelling constitutional and international obligations. Surely, the price of security cannot be an unconscionable brutalisation of the incarcerated. Whether a democratic State can, by its inaction, demonstrate a brazen disdain for national consensus on a core humanitarian issue is a disconcerting interrogatory. India's continued failure to enact a credible anti-torture law indicates the impoverishment of our politics and the indifference of political parties as democratic agents, to mediate fundamental policy choices in furtherance of the republic's core values.

Whether or not the cited cases validate Professor Harold Laski's profound insight that "ideas must wait upon events that give them birth," only time will tell. Wiser with the lesson of Guantanamo Bay that torture in State custody irretrievably dents democracy's soft power, the Indian State is expected to vindicate the republic's foundational principles by ratifying the Convention. It is time for a nation wedded to democracy and seeking a role as the world's moral arbiter to recognise that a flailing democracy is antithetical to a resurgent Bharat and that torture in any form is "... a wound in the soul so intangible that there is no way to heal it..."