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Arbitrary Arrest, Detention and Extracting Confession through Torture in Bangladesh: A Legal Analysis

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Abstract

The main objective of this paper is to analyze the various types of irregularities that are being practiced by the law enforcing agencies and the magistrates in the Criminal Justice System of Bangladesh, in case of arbitrary arrest, detention and extracting confession through torture. In doing the assessment, this paper has examined the relevant existing laws of Bangladesh along with international Conventions in this arena. All successive Government of Bangladesh has failed to prevent torture under arbitrary arrest, detention and extracting confession in the country and suppressed the rights of the citizen even fundamental rights over the years. Some evidences have also shown to suggest that convictions based exclusively on confessions are frequent occurrences in Bangladesh because it is the easiest way of proving a case. For preventing those irregularities on 24 May, 2016 Appellate Division of Bangladesh Supreme Court has upheld the directives of the High Court Division (verdicted in the BLAST and Others vs Bangladesh case[1]). Those directives have been discussed in this paper. Finally, the paper has suggested some courses of actions to be taken in order to prevent arbitrary arrest, detention and forcible extraction of confession.

Keywords: Arrest, Remand, Detention, Confession, Confessional Statement and Torture.

1. Introduction

Arbitrary arrest, detention and custodial torture by law enforcing agencies have remained a persistent feature of the criminal justice system of Bangladesh. All the successive governments of Bangladesh have failed to curb serious human rights violations arising from the use of black laws and widespread bad practices by the law enforcing agencies, which are violating international human rights standards. These human rights violations include arbitrary arrest, detention and torture in the custody, excessive use of force leading at times to extra-judicial executions; the death penalty; sporadic attacks against members of minority groups; and acts of violence against women.[2] The practices of arbitrary and mass detention of government opponents have been widespread in Bangladesh irrespective of the forms of government and successive governments have failed to stop this endemic problem[3]. Usually, the venue of custody is the police station. Bangladesh's security forces are falling back on old habits and rounding up the 'usual suspects' instead of doing the hard work of carrying out

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[1] 55 DLR (HCD) (2003) 363

[2] Amnesty International, '*Amnesty International's Report on Bangladesh '2003'*, June 8, 2003; available at https://www.refworld.org/docid/3edb47cee.html, last accessed on 10th March 2019

[3] Soma Islam, '*Prevention of Arbitrary Arrests and Freedom from Torture and Custodial Violence*', Dhaka, BLAST, 2005), p. 12.

proper investigations[4]. Sections 54 and 167 of the Code of Criminal Procedure (CrPC), 1898 gives wide powers to the police to arrest a person without warrant on reasonable suspicion. Among special laws, the vague and overly broad law under Sections 57 of the Information and Communication Technology (ICT) Act 2006has been misused repeatedly over the years to stifle criticism of Government even constructive criticism of Government.[5]Following massive criticism over the misuse of that Act by different quarters, the Government decided to gradually annul the controversial section 57 and the ICT Act altogether and has introduced the Digital Security Act, 2018. If compared, it can be argued that all the controversial issues of section 57 of the ICT Act has been left behind in some of the provisions e.g. sections 17, 25, 29 and so on of this new Act.[6]In Bangladesh, custodial confessions are outlawed unless made to a Magistrate and then, if an accused states that he is unwilling to make a confession, if not released, he must be sent only to judicial custody. According to section 27 of the Evidence Act, a statement made by the accused in police custody that leads to the recovery of incriminating information, when it is found to be true, is admissible in court. This provision enables law enforcement officials to extract material evidence obtained through torture. The United Nations has different endeavors to recognize universal respect and to protect the human rights. UN Charter is thus considered as one of the vital international instrument. Later, Universal Declaration of Human Rights 1948[7]and International Covenant on Civil and Political Rights 1966[8] mentioned the rights of human being and urged that no one shall be subjected to torture or to cruel, inhuman degrading treatment or punishment. Bangladesh has adopted these provisions in her Constitution[9]. In the light of the above conventions and laws, the present paper focuses on the legal analysis of the torture taking place in the criminal justice system of Bangladesh.

2. Methodology

The method of documentary analysis has been mostly used in this paper. Moreover, the historical, analytical and interview method has been used. This research is based on primary and secondary data. Primary data includes the provisions of the Cr.PC, 1898, the Evidence Act, 1872 and the Penal Code, 1860of Bangladesh and various international Conventions. Secondary sources include books, articles, journals, case materials, Internet sources etc.

[4]Human Rights Watch, '*Human Rights Watch's Statement on 17th June, 2016*', available at https: //www. hrw. org/ news/ 2016/ 06/ 17/ bangladesh-halt-mass-arbitrary-arrests, last accessed on 10 March 2019.

[5]*Shakhawat Liton, 'The Chilling Effect of Section 57' The Daily Star*, 02 August 2017, p. 1, available at https://www.thedailystar.net/opinion/human-rights/the-chilling-effect-section-57-1442164,last accessed on 10 March 2019.

[6]Shohel Mamun, '*How Section 57 morphed into Digital Security Act provisions*', *The Dhaka Tribune*, 10 August, 2018, p. 1.

[7]Universal Declaration of Human Rights, 1948, Article 5.

[8] ICCPR, 1966, Article 7.

[9] Constitution of the People's Republic of Bangladesh, 1972, Article 35

3. Conceptual Issues

3.1. Arrest

Arrest means the taking or detaining in custody by authority of law[10]. Its purposes may be classified as: preventive (e.g. preventive detention to terminate a breach of peace), punitive (e.g. taking into custody following a judgment) and protective (e.g. mentally ill persons arrested for their own safety). In making an arrest, the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action[11]. An officer, who cannot justify his actions with lawful authority, is said to act unlawfully in the execution of an arrest. On the other hand, to take a man's arm, not intending to detain or arrest him but simply to draw his attention is neither an arrest nor an actionable trespass to that person, unless it follows a lawful course of action.

3.2. Remand

Remand means re-committal to custody, where a person cannot be detained in custody beyond a prescribed time.[12] Police remand is part of the investigation into a cognizable offence. According to section 167 of CrPC, 1898, whenever any person is arrested and detained in police custody and it appears that the investigation could not be completed within 24 hours fixed by section 61 of the CrPC, 1898 and there are grounds to believe that the accusation or information is well founded, the investigating officer forwards the accused to the court asking for further detention in the police custody. This is called remand. When a case is adjourned, the court may have the power to pass remand order against the accused for police custody or in jail, rather than simply adjourn the case.[13]A police officer may submit a prayer of 'remand' stating that the accused is involved in a cognizable offence and for the purpose of interrogation 'remand' is necessary.[14]The magistrate authorizing the detention of the accused under this section has complete freedom to remand the accused to whatever custody he thinks fit. If any accused after having been challenged has been remanded to judicial custody by the Trial Court for being produced on next date, the police cannot take his custody without taking permission from the said Court.[15] Remanding may be two types[16] such as remand in police custody and remand in prison custody or jail. The most objectionable remand in Bangladesh is remanding on police custody since police uses unlawful torture on the defendant on the pretext of extracting information the accused.

[10]Merriam-Webster Dictionary, also available at https:// www. merriam-webster. com/ dictionary/ arrest, last accessed on 1st March, 2019

[11]Cr.PC, 1898, Section 46(1)

[12]Siddiqur Rahman Miah, '*FIR Arrest Search Seizure and Investigation',* 1st ed.*,* Dhaka, New Wars Book Corporation, 2002, p. 22.

[13]Abdul Halim, '*Text Book on Criminal Procedure Code'*, 2nd ed., Dhaka, CCB Foundation, 2008, p. 100.

[14]*Ibid.*, p. 100.

[15]Zahurul Islam, '*The Code of Criminal Procedure',* 5th ed., Dhaka, Bangladesh Law Book Com., 2007, p. 514.

[16]Advocate M. Mateen, '*How Remand Under Cr.P.C Is Granted- Meaning, Types And Procedure*' available at *Www. atmateen.com/remand-under CrPC*, last retrieved on 30th October, 2018.

3.3. Torture:

Torture is the act of inflicting severe pain whether physical or psychological, as a means of punishment, revenge, forcing for getting information or a confession or simply as an act of cruelty. The word 'torture' was first entered in the language of the law of 1972, when torture was prohibited in the Article 35 of the Constitution of Bangladesh. However, neither the Constitution nor any other statute defined torture. The Torture and Custodial Death (Prevention) Act, 2013 of Bangladesh is the first legislation to attempt to provide a specific legal definition of 'torture.' According to its section 2 (6) 'Torture' means any physical or psychological torture that hurts, in addition the following acts will be considered as torture according to this section, such as (a) Extorting any information or confession from the person or any other person; (b) Punishing any suspected person or any offender; (c) Intimidating any person or any other person through him; (d) Any work done on a discriminatory basis, in each case, act done with someone's provocation, with someone's consent or by dint of the power of any government officer or government power. Throughout history, torture has taken on a wide variety of forms and has often been used as a method of political re-education, interrogation, punishment, and coercion. In addition to state-sponsored torture, individuals or groups may be motivated to inflict torture on others for similar reasons to those of a state; however, the motive for torture can also be for the sadistic gratification of the torturer. In the case of *Aksoyvs Turkey*, the court discussed about torture as, "if an individual is taken into police custody in good health and found injured at the time of release and also found that the treatment inflicted to the arrestee is deliberate, serious and cruel it will be treated as torture."[17]Article 1 of the UN Torture Convention defines torture as-

> *"... any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed or intimidating or coercing him or a third person or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."*

It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions[18].

4. Legal Framework on Arrest, Detention and Torture in Bangladesh

Sections 54 and 167 of the Cr.PC, 1898, give wide powers to the police to arrest a person without warrant on reasonable suspicion. The phrase 'reasonable suspicion' is not defined and as such it creates ample scope for misuse by police. According to section 27 of the Evidence Act, 1872, a statement made by the accused in police custody that leads to the recovery of incriminating information is, when it is found to be true, admissible in court. This provision enables law enforcement officials to use material evidence obtained through torture. There is a widespread belief that most of the informations and confessions extracted

[17]*Aksoy v. Turkey*, 23 Eur. H.R. Rep. 553 (1997)

[18]The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984, Article 1(1).

during remand are not voluntary. The involuntary means for extracting confession goes against Article 35(4) of the Constitution, which makes provision against self-incrimination and Article 35 (5) which provides that "No person shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment." In many incidents, however, victims died after arrest even before they were produced before the courts. Many detainees are also deprived of the right to consult lawyers and to see relatives despite the court orders for the same. There are a number of special criminal laws which also contribute to a culture of arbitrary arrest, detention and torture. The most infamous piece of special law is the Special Powers Act, 1974 under which a person can be 'preventively detained' by the executive, i.e., detained to prevent that person from committing any prejudicial act, which the administration deems detrimental to the interest of the state. The most important power conferred by this Act is that a person can be detained if the government 'suspects' that he is about to commit a 'prejudicial act'[19], though the individual has not yet committed such an act. It is a common practice that persons arrested under section 54 of the Cr.PC are subsequently charged under the Special Powers Act, 1974[20]. Another infamous piece of special law that are being misused is section 57 of the ICT Act, 2006 [21]and presently the updated version of this Act is the Digital Security Act, 2018.

5. Safeguards against Torture in Bangladesh

Torture is prohibited in the Universal Declaration of Human Rights, (UDHR) 1948, Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) 1984, and the International Covenant on Civil and Political Rights, (ICCPR) 1966. Moreover, the Geneva Convention, 1949 on humanitarian law, contains a common Article 3, which prohibits torture and other degrading treatment during an armed conflict of "not of an international character." Bangladesh ratified the CAT 1984, on 5 October 1998 and as such it is a state party to this Convention and it has become obligatory on it to eliminate torture. Article 2 of the Convention against Torture contains the fundamental state obligation in the following way:

> *"1.Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.*
>
> *2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.*
>
> *3. An order from a superior officer or a public authority may not be invoked as a justification of torture."*

The Constitution of Bangladesh and criminal law absolutely forbid in all circumstances, any actions amounting to torture. The Constitution of Bangladesh states that, no person shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment.[22] Section29

[19] The Special Powers Act, 1974, Section 2(1).
[20]Act No. 14 of 1974, Bangladesh.
[21]The Information and Communication Technology Act, 2006 (amended by an Ordinance on 20 August 2013), Act No. 39 of 2006
[22] The Constitution of the People's Republic of Bangladesh, Article 35 (5)

of the Police Act, 1861 and section 48 of the Dhaka Metropolitan Police Ordinance, 1976 also speak against torture. Article 35(4) of the Constitution of Bangladesh has stated that no person accused of any offence shall be compelled to be a witness against himself. Bangladesh Constitution also states that, no person shall be deprived of life or personal liberties save in accordance with law.[23]The Penal Code, 1860 of Bangladesh makes it clear that physical and psychological ill-treatment of the accused by law enforcement officials is impermissible and punishable. Causing of 'hurt' or 'grievous hurt' by public servants to obtain confessions or to compel restoration of property carry sentences up to seven and ten years imprisonment respectively under section 330and 311. Sections162,163,172 and 173 of the Cr.PC, 1898;read with sections 24, 25 and 26 of the Evidence Act, 1872 provide rules of conduct and procedure to prevent torture of persons under interrogation. Section 24of the Evidence Act lays down that a confession by an accused person is irrelevant if it appears to have been caused by an inducement or threat. Section 25of this Act provides that no confession made to a police officer shall be proved as against the accused person. Section 26 of this Act also excludes confessions made by a person in police custody unless made in the immediate presence of a magistrate. It is to be read with section 164 of the CrPC.

Article 2 (1) and Article 4 of the UN Torture Convention require the state party acceding to it to enact a domestic law to recognize an act of torture, cruel, inhuman and degrading punishment and treatment, as a crime in the country. Accordingly, Bangladesh has enacted the Torture and Custodial Death (Prevention) Act in2013. This Act was not made by pursuing the Convention against Torture because most of the sections of this Act go against the core spirit of the said convention. Section 2 (6) has defined torture which has not closer conformity with Article 1 of CAT, 1984. In section 4 of the Torture and Custodial Death (Prevention) Act in 2013, the phrase "The Court having jurisdiction" should be clarified. Section 5 of this Act should be amended by replacing the provision of judicial investigation in lieu of investigation against the law enforcement agencies themselves. Again this Act does not include a definition of "person" to remove ambiguity of meaning of some provisions under sections 6 (1), 7 (1), 8 (3) and 13 (1),(2) of the Act. Therefore, the Act should include a definition of the word "person", mentioning especially in section13 (1) that 'person meaning public official or other person acting in an official capacity' inconformity with the CAT 1984.

6. Judicial Decisions on Arrest, Detention and Torture

Despite the legal and constitutional provisions against arbitrary arrest and detention, the practice of arbitrary arrest, detention and torture is rampant in Bangladesh. Fortunately, the higher judiciary in Bangladesh has taken a proactive stand in prevention of arbitrary arrest and detention and protection of people from torture. The most important judicial decision in this regard in recent years is ***BLAST*** (Bangladesh legal Aid and Services Trust) ***and others vs. Bangladesh***[24]**.** The Court developed a list of guidelines on the use of arrest and detention that are discussed later.

[23]*Ibid*, Article 32.
[24]55 DLR (HCD) (2003) 363

6.1. Extra-judicial Killing

In ***ASK, BLAST and Karmojibi Nari Vs. Bangladesh and others***[25] the court issued a Rule Nisi returnable within four weeks on 29.06.2009 calling upon the respondents to show cause as to why the extra-judicial killing, in the name of cross-fire/encounter by the law enforcing agencies should not be declared to be illegal and without lawful authority and why the respondents should not be directed to take departmental and criminal action against persons responsible for such killing. Abuse and custodial torture and killing by the special forces like the Rapid Action Battalion (RAB) also remains virtually unchallenged, precisely because victims or relatives of victims are intimidated, or because of the reluctance of the police to accept a case against members of such special forces[26]. Only in a few instances, the High Court issued Rules to protect the rights of persons taken into custody by the RAB. Human Rights and Peace for Bangladesh (HRPB), a human rights organization, appearing as intervener in a case, submitted that despite the fact that there was a provision in the Cr.PC for producing a citizen before a court within 24 hours of arrest, the police and the RAB personnel had not observed this in many cases[27]. The High Court Division directed the law enforcing agencies, especially the RAB to follow the Cr.PC provisions in the case of the arrest of any citizen[28].

6.2. Interpretation of 'Reasonable suspicion

The words 'concerned' and 'credible' or 'reasonable' information under section 54 of the Cr.PC are frequently invoked as grounds by police for arrest without warrant. The judiciary scrutinized the meaning of 'concerned' 'credible' or 'reasonable information' in several pronouncements. In *Saifuzzaman vs. State*[29], the Supreme Court held that what is a "reasonable suspicion" must depend upon the circumstances of each particular case, but it should be at least founded on some definite fact tending to throw suspicion on the person arrested and not on a mere vague surmise. The court also observed:

> *"The 'reasonable suspicion' and 'credible information' must relate to definite averments, which must be considered by the police officer himself before he arrests a person under this provision. What is a 'reasonable suspicion' must depend upon the circumstances of each particular case but it should at least be founded on some definite fact tending to throw suspicion on the person arrested and not on a mere vague surmise. The words 'credible' and 'reasonable' used in the first clause of Section 54 must have reference to the mind of the person receiving the information which must afford sufficient materials for the exercise of an independent judgment at the time of making the arrest."*

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[25] 65 DLR (HCD) (2005) 261

[26] The Daily Star, 'Mehedi Murder Case against RAB in Barisal refused', *The Daily Star,* November 07, 2004, available at: www. the daily star.net/2004/11/07/d41107012319.htm; 'Khilgaon Police refuse to take case against RAB: Sumon's family', *The Daily Star*, June 04, 2005, available at: http:// archive. The dailystar. net/2005/ 06/05/ d50605012920.htm, last accessed on 1st March 2019.

[27] Adeeba Aziz Khan, 'Right to Freedom from Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, in Human Rights in Bangladesh, 2006', ASK, Dhaka, 2007, p. 49.

[28] *Kishore Kumar Vs State,* (2006); *TheDaily Janakantha*, 24 July 2006, p. 1.

[29] *Saifuzzaman vs. State* 56 DLR (2004) HCD 324

In ***BLAST and others vs. Bangladesh***[30], the court held: "…..use of the expression 'reasonable suspicion' implies that the suspicion must be based on reasons and reasons are based on existence of some fact which is within the knowledge of that person. So when the police officer arrests a person without warrant, he must have some knowledge of some definite facts on the basis of which he can have reasonable suspicion."

6.3. Limitation on Magisterial Power of Remand

Considering the fact that torture is a routine matter at police remand of accused, the judiciary has ruled against frequently ordering remand by police, to prevent its abuse. In the case of *Ain-o-Salish Kendra vs Bangladesh*[31], the accused Shaibal Saha Partha was apprehended by plain-clothes police, and after four days he was produced at a police station. The accused was taken on remand by the police on two occasions but no confession could be recorded from him. Thereafter, Partha was also shown arrested in a bomb blast case and in connection with that case, the accused was once again taken on police remand. The court held that the accused had already been remanded in custody twice by the police, yet there is nothing before the court to show the outcome of such remand. The court directed respondents not to go for further remand of the accused and in the case of the ongoing remand, he should not be subjected to physical torture of any kind. In the case of *Hafizuddin vs. State*[32], the Magistrate did not issue warnings before recording confessions and did not give time for reflection. In this case, the Magistrate was held liable by HCD for failing to inform the accused that they would not be sent to police custody after making confessional statements.

6.4. Change in the Burden of Proof

Since, in most cases, acts of torture by police are carried out as far as possible without any evidence, it is very difficult to hold the offending police officer accountable due to lack of witnesses. The High Court Division in *BLAST and others vs. Bangladesh*[33] observed that if death takes place in police custody or jail, it is difficult for the relation of the victim to prove who caused the death. Therefore, the High Court Division recommended a change in the burden of proof in cases of torture in police custody, by amending the relevant provisions of the Evidence Act, 1872. The High Court Division drew an analogy from its decisions on the wife-killing cases[34]. In that case the higher judiciary of Bangladesh took the position that the burden of proof can be shifted onto the accused husband to prove the circumstances of his wife's death, if at the time of her death, she was in the custody of the husband.

[30] *Supra*, note 26.
[31] 56 DLR (HCD) (2004) 620
[32] 42 DLR (HCD) (1990) 397
[33] *Supra*, note 26.
[34] *State vs. Md. Shafiqul Islam alias Rafique and another,* 43 DLR (1991) AD 92; *State vs. Khandhker Zillul Bari* 57 DLR (2005) AD 29; *Shahjahan Mizi vs. State*, 57 DLR (2005) HCD 224; *Shamsuddin vs State,* 45 DLR (1993) HCD 587

6.5. In respect of unlawful detention of the prisoners

In *ASK (Ain 0 Salish Kendra) vs. Bangladesh and others*[35], the unlawful detention of the prisoners languishing in Dhaka Central Jail despite having served out their terms of conviction was challenged. According to law, after pronouncing conviction, the court will send the conviction warrant to the jail authority. But due to negligence of court staff and jail authorities, the said conviction warrants did not reach the jail and many prisoners could not be released from jail, even after serving out their terms of conviction. The Court issued a rule nisi upon the respondents on April 16, 2005, to show cause as to why the continued detention of the persons in Dhaka Central Jail, in violation of their fundamental rights as guaranteed under Articles 31, 32, 35 (1) and 36 of the Constitution and in spite of serving out the terms of their respective sentences, should not be declared to be without lawful authority and why an independent commission should not be appointed to conduct an inquiry into that matter. The Court also directed the respondents to submit a list of such prisoners. Accordingly Jail authority submitted the report. Recently A worker of Bangladesh Jute Mills in Narsingdi's Ghorashal, Jahalam, was arrested in 2016 after he was mistaken for Abu Salek; who was originally accused in 33 cases filed over loan fraud and embezzlement of Tk. 18.5 crore from Sonali Bank Limited. On February 3, 2019 after a legal process, the High Court passed a ruling over the illegality of his imprisonment and directed the jail authorities to immediately release Jahalam.[36] The High Court observed that the Anti-Corruption Commission must take the responsibility for not securing the bail of Jahalam, who was wrongly-convicted and imprisoned for three years due to an identity mix-up.[37] In this case the court has ensured the strict responsibility for the concerned authority about unlawful detention though the case is still pending.

7. Guidelines of the Honorable Supreme Court of Bangladesh to Stop Torture

Abusing of power by police does not end at just arresting a person without warrant on the basis of suspicion or in the pretext of preventive detention. It serves as a license for seeking remand or sending the arrestee into the custody of police for interrogation through a detention order made by the Magistrate under section 3 of the Special Power Act, 1974. Following disturbing and depressing reports by the media and public outcry on increasing police abuses and custodial death in Bangladesh which included the death of Rubel[38], Shima Chowdhury[39] (A young woman who was picked up by the police and raped at Raojan Police Station in Chittagong on 9 October, 1997) and Arun Chakroborti[40] (A young boy lost his life in police custody at Malibagh Police Station in Dhaka, 1998) BLAST along with other human rights

[35] 57 DLR (HCD) (2005) 261

[36] Zakir Mostafiz Milu, '*Jahalam and Abu Salek, a curious case of mistaken identity*' *The Dhaka Tribune*, 6th February, 2019, P. 1

[37] The Dhaka Tribune, "*High Court rips into ACC over Jahalam blunder*" *The Dhaka Tribune*, 6th March, 2019, P. 1

[38] *Supra,* note, 26

[39] Tabibul Islam, '*BANGLADESH: Police Role in Rape Case Triggers Huge Protests*' Inter Press Service, 31th July 1997, p. 1, available at http://www.ipsnews.net/1997/07/bangladesh-police-role-in-rape-case-triggers-huge-protests/, last accessed on 1st March 2019

[40] The Daily Star, '*Dacoit has as he jumps from rooftop to flee*' *The Daily Star,* 24th January, 1998, P. 1, available at https://www.thedailystar.net/news/dacoit-has-as-he-jumps-from-rooftop-to-flee, last accessed on 1st March 2019

organizations brought a writ petition before the Supreme Court of Bangladesh. Subsequently, on 7th April, 2003, a Division Bench of the High Court Division provided clear guidelines in the form of fifteen directives on arrest, detention, remand and treatment of suspects to be followed by law enforcement agencies and magistrates. Again, the Supreme Court[41] issued certain guidelines to be followed by the government, magistrates and police with respect to arbitrary arrest, detention, remand, investigation and treatment of suspects.

7.1. Background of the BLAST and others vs. Bangladesh Case

On 23 July 2003, a 24 years old University student died in the office of Detective Branch under police custody. He was arrested under section 54 of the Criminal Procedure and later reportedly tortured to death. It led to serious public outcry that instigated the Government to address the issue of custodial violence. The Government forms a judicial inquiry commission headed by Justice Habibur Rahman Khan to investigate the matter. The commission suggested some amendments to section 54 of Cr.PC. However, this failed to change the situation. Within a few months more people were reported to have been tortured, raped and killed in police custody. Following disturbing and depressing situation BLAST along with other rights organizations filed a Writ Petition in the High Court Division (HCD) of the Supreme Court challenging the arbitrary arrest under section 54 and respectively remand and torture under section 167 of the Cr.PC. The High Court Division comprising Justice Md. Hamidul Haque and Ms. Justice Salma Masud Chowdhury issued 15 point directives on 7th April 2003 regarding the arrest, detention, remand and treatment of suspects to be followed by law enforcement agencies. The court also suggested that some changes be made in the procedural law relating to sections 54 and 167 with a view to preventing arbitrary arrests and custodial deaths and asked to the Government to comply with the order immediately.

Later on Government filed an appeal with the AD praying for staying the execution of the Judgment. In the petition filed by Government it was stated that without examining sections 54 and 167 the HCD has passed orders, since both these sections are proper, opining further no amendment or no new law needed to be implemented in addition 102 of the Constitution.[42]Leave was granted for the Government though; Appellate court did not pass any stay order over the observation of the HCD[43].

Lastly the Appeal was disposed of considering the question whether HCD can pass an order for amending the law, by keeping the fifteen directives in the judgment intake. The Appellate Division has upheld the High Court order asking for the implementation of the 15-point guidelines for the reforms of the provisions of arrest without warrant and interrogation on custody under sections 54 and 167 of the CrPC[44].A four-member Appellate Division bench

[41] *Supra,* note 31

[42] Bangladesh Legal Aid and Services Trust, "BLAST Bulletin (In Bengali)", 2nd ed., Special Issue, Dhaka, January 2008, p. 2

[43] *Ibid.,* p. 2

[44] The Financial Express, *'SC upholds reform of CrPC Sections 54, 167'*, 24 May, 2016, available at http://www.thefinancialexpress-bd.com/2016/05/24/31496/SC-upholds- reform-of-CrPC Sections-54,-167, Retrieved on 17th August 2018

headed by Chief Justice Surendra Kumar Sinha issued the order on 24 May 2016. The other members of the bench were Justice Syed Mahmud Hossain, Justice Hassan Foyez Siddique, and Justice Mirza Hossain Haider.[45]

7.2. The Fifteen Directives approved by the Appellate Division of Bangladesh Supreme Court are as follows:

i. No Police officer shall arrest anyone under section 54 of the Cr.PC for thepurpose of detention under section 3 of the Special Powers Act, 1974.
ii. A police officer shall disclose his/her identity and show his/her ID Card on demand to the person arrested or those present at the time of arrest.
iii. A record of reasons of arrest and other particulars shall be maintained in a separate register till a special diary is prescribed.
iv. The concerned officer shall record reasons for marks of injury, if any, on the person arrested and take him/her to nearest hospital or government doctor.
v. The person arrested shall be furnished with reasons of arrest within 03 hours of bringing him/her to the Police Station.
vi. If the person is not arrested from his residence or place of business, the relatives should be informed over the phone or through messenger within 01 hour of bringing him/her to Police Station.
vii. The person concerned must be allowed to consult a lawyer of choice or meet nearest relations.
viii. While producing the detained person before the Magistrate under section61 of the Cr.PC, the police officer must forward reasons in a forwarding letter under section 167 (1) of the Cr.PC as to why the investigation could not be completed within twenty four hours and why s/he considers the accusation and information to be well founded.
ix. On perusal of the forwarding letter, if the Magistrate satisfies him/herself that the accusation and information are well founded and materials in the case diary are sufficient for detaining the person in custody, the Magistrate shall pass an order of detention and if not, release him/her forthwith.
x. Where a person is released on the aforesaid grounds, the Magistrate shall proceed under 190 (1) (c) of the Cr.PC against the Officer concerned under Section 220 of the Penal Code.
xi. Where the Magistrate orders detention of the person, the Officer shall interrogate the accused in a room in a jail until a room with glass wall or grille on one side within sight of lawyer or relations is constructed.
xii. In any application for taking accused in custody for interrogation, reasons should be mentioned as recommended.
xiii. The Magistrate while authorizing detention in police custody shall followthe recommendations laid down in the judgment.

[45]The Daily Star, *'No more blanket powers for cops'*, 25 May, 2016, P. 1, available at https://www.thedailystar.net/frontpage/no-more-blanket-powers-cops-1228963,Retrieved on 17th August 2018

xiv. The police officer arresting under Section 54 of the Cr.PC or the Investigating Officer taking a person to custody or the jailor must inform the nearest Magistrate about the death of any person in custody in compliance with these recommendations.

xv. The Magistrate shall inquire into the death of any person in police custody or jail as per the recommendations.

7.3. Status of Implementation of the SC Guidelines

The guidelines delivered in the judgments of *BLAST and others vs. Bangladesh*[46] and *Saifuzzaman vs. State*[47] are yet to be implemented by the government by undertaking necessary amendments to the relevant provisions of the CrPC. Implementation of these guidelines requires political will on the part of the government. The National Human Rights Commission of Bangladesh and civil society should vigorously pursue the implementation of these guidelines.[48] According to a commentator, "The directives of these two judgments are not likely to be implemented by the executive organs of the State on their own volition. Experience suggests that major changes in the way powers are exercised require sustain engagements on the part of the civil society and the legal community for implementation."[49] The National Human Rights Commission (NHRC)[50] of Bangladesh should recommend the government for the implementation of these guidelines to prevent arbitrary arrest, detention and torture and to end impunity of the law-enforcing agencies responsible for such acts.

A recent Interviews with 30 Victims is given below for better understanding of the present situation in Bangladesh-

Table 1. Kinds of torture:

Physical Torture	Mental Torture	Both mental andphysical torture	Total
13	04	13	30

Table 2. Torture in custody:

Torture in Jail Custody	Torture in Police Custody	Both Jail and Police Custody	Total
06	20	04	30

Table 3. Arrested persons taken under remand or otherwise:

Remanded	Without remand	Not applicable	Total
22	06	02	30

[46] *Supra*, note, 26

[47] *Supra*, note, 31

[48] Abdullah Al Faruque, '*Analysis of Decisions of the Higher Judiciary on Arrest and Detention in Bangladesh*', National Human Rights Commission, Bangladesh, 2013, p. 51, available at http:// nhrc.portal. gov.bd/sites/ default/files/ files/nhrc.portal.gov.bd/page/348.pdf, last accessed on 30 December, 2018

[49] Shahdeen Malik, '*Arrest and Remand: Judicial Interpretation and Police Practice*', Bangladesh Journal of Law, Special Issue, 2007, p. 277

[50] Established by Act No. 53 of 2009

Table 4. Implementation of UN torture convention[51]:

Fully implemented	No implementation	Partly implemented	Total
00	18	02	20

Table 5. Whether the guidelines of the honorable high court division in respect of remand of an arrested person is followed or not[52]:

HC directions are followed in respect of remand of an arrested person	Not followed	Total
01	09	10

Table 6. Arguments against/in favor of remand[53]:

Argument in favor of granting remand	Against granting remand	Total
11	09	20

8. Loopholes in the existing Criminal justice system

i. Section 5 of the Torture and Custodial Death (Prevention) Act, 2013 provides the provision of departmental investigation themselves instead of judicial investigation, which is a great loophole of the act. There is also no provision for providing protection to the victims witnesses related to the torture prosecutions.

ii. There is no clear provisions regarding remand in section 167 of the Cr.PC but it becomes retrospective[54].

iii. If any police officer wrongfully detains any person, he is liable to punishment under section 29 of the Police Act of 1861 but when an accused has been tortured in the police custody then most of the time the police would not be liable for doing such torture. There is no proper guideline as to when prayer of remand should be accepted and when rejected by the Magistrate and this legal lacuna gives the police officer and Magistrates to abuse the same.

iv. According to Article 33 of the Bangladesh Constitution, no person shall be detained in custody without being informed as soon as may be the grounds for such detention nor shall he be denied the right to consult and to defend by a legal practitioner of his choice. But there is no provision regarding it under sections 54 and 167 of the Cr.PC that is why an accused is faced to torture[55].

[51]20 learned lawyers were interviewed on UN Torture Convention implementation in criminal Justice system of Bangladesh

[52]10 judicial officers were interviewed on whether High Court Division's directions regarding remand of an arrested person are followed or not

[53]20 learned lawyers were interviewed on whether in order to get information from the accused, remand is necessary or not

[54]49 DLR (1996) 115

[55]Abu Ala Mahmudul Hasan, '*Arbitrary Arrest and Unreasonable Use of Power'*, Dhaka, BLAST, 2005, P. 120

v. There is no provision for victim compensation under criminal law in Bangladesh. In *BLAST and others v. Bangladesh*[56], the Supreme Court considered the issue of granting compensation to a victim of torture in police custody. The Court however, did not award compensation in this case because the subject matter of the case was pending before another competent Court. Article 9 of the Covenant on Civil and Political Rights states that, anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation. In *D. K. Basu's case*[57] the Supreme Court held that, monetary compensation for reprisal by the court finding the infringement of the indefeasible right to life of the citizen is the only effective remedy to apply balm to the wounds of the deceased victim who may have been the bread winner of the family.

vi. Finally, remand under police custody totally violates Article 35(4) of the Bangladesh Constitution because during the remand an accused gives confession against him through the undesirable pressure of police.

9. Suggestions

1. In order to ensure transparency and accountability of actions of the police authorities, it is imperative that the directives of the Supreme Court in *BLAST and others vs. Bangladesh*[58] and *Saifuzzaman vs. State*[59] should be implemented as soon as possible.

2. The Torture and Custodial Death (Prevention) Act, 2013 should be amended as soon as possible. Amendment is needed in the definition of torture in Section 2 (6) of the Torture and Custodial Death (Prevention) Act, 2013, to bring it into closer conformity with article 1 of CAT, 1984. Section 5 of the Act should be amended by adding the provision of judicial investigation instead of the current provision of investigation against the law enforcement agencies by the law enforcement agencies. The punishment of the offences mentioned in the Act should be increased. Amending the Act for providing protection to witnesses related to torture prosecutions is badly needed.

3. Bangladesh should implement obligations under the Convention against Torture through adopting necessary legislative and administrative measures and institutional reform. The Penal Code should define and criminalize torture as required by the CAT, 1984.Sections 54,167, 344 of the Cr.PC should be amended according to the guidelines provided by the Supreme Court in the BLAST case.

4. The government should repeal all provisions on impunities of law enforcement agencies and securities agencies for committing torture. The immunity provisions for public officials that engage in torture within the Cr.PC must be repealed in particular Section 132 of the Code, and other legal provisions which impede alleged victims of human rights violations from lodging complaints against State officials suspected of being the authors, instigators or accomplices of such acts.

[56] *Supra*, note, 26
[57] SCC (1997) 421
[58] *Supra*, note, 26
[59] *Supra*, note, 31

5. Relatives, doctors and lawyers should have access to detainees immediately and regularly thereafter. Government should take urgent steps to ensure access to detainees, especially during periods of custodial interrogation.

6. Witnesses including family members and human rights defenders should be protected against possible reprisal by the perpetrators of torture or other human rights violations. State should ensure the protection of the persons who file a case against a member of law enforcement agencies.

7. Interrogation should take place only at official centre and any evidence obtained from a detainee in an unofficial place of detention and not confirmed by the detainee during interrogation at official locations should not be admitted as evidence in court against the detainee. The detainee should have the right to have a lawyer present during any interrogation. The judiciary should exercise a close scrutiny on conditions of detention and interrogation by the police during the remand procedure.

8. The Probation of Offenders Ordinance, 1960 should be strictly followed to avoid mass prison. The law of 1960 had no application in the post-independence context for Bangladesh. The Bangladesh Supreme Court has issued a circular on February 12, 2019 with the directives to the judges across the country to apply the law to reduce the pressure on prison and to implement 'corrective' punishment policy based on the recommendation of a Reform Committee headed by Justice Imman Ali.

9. The police officer responsible for arbitrary arrest, detention and torture should be strictly accountable to the law for his criminal wrongdoing as like as the general citizen. Investigation process should be separated from the police department where police is accused.

10. Section 24 of the Evidence Act, 1872 should be amended to include the terms ‘coercion’, ‘torture’ and ‘violence’ along with the terms ‘inducement, threat or promise’ as conditions that make a confession irrelevant and thus inadmissible.

11. Modern methods of investigation should be introduced and more forensic facilities should be put in place to detect crime and gather evidence of crime. A separate criminal database should be kept. Adequate training should be given to the investigating officers about modern scientific methods of investigation.

12. The Ministry of Home Affairs and Chief Metropolitan Magistrates should not only circulate the guidelines but also to ensure that the respective police officers and magistrates are complying those properly. Law enforcing agencies should be trained on human rights and they should not be used for political motives.

13. With a view to ensuring transparency and accountability of the police, a national committee with representations from civil society, registered rights groups, professionals and journalists need to be constituted to monitor police activities and implementation of the Supreme Court directions. Police is overburdened with various works; they are maintaining law and order in one hand and prosecuting offenders on the other. Steps need to be taken to separate law enforcement activities of police from that of prosecution.

14. Likewise police, lower courts and government administration are also blamed of corruption. Police cannot continue corrupt practices alone unless the judiciary and administration abet such practice. Police should not be used for political motives. If the government continues to do so, it will be unable to regulate police.

15. The government immediately needs to take initiatives to amend the laws to reflect the Supreme Court directives and guidelines. More power and autonomy should be given to the National Human Rights Commission (NHRC). Necessary skilled manpower as required by the NHRC should be appointed for performing its act smoothly. Strengthening its investigative functions is needed.

16. The *Zihad case*[60] should be considered as a benchmark for the development of victim compensation in the judicial system of Bangladesh since for the first time the High Court Division embraced judicial activism, analyzed gross negligence and breach of statutory duty of a government authority and applied principles of constitutional tort.

17. The immunity provisions for public officials that engage in torture within the Code of Criminal Procedure must be repealed in particular section 132 of the Cr.PC, and other legal provisions which impede alleged victims of human rights violations from lodging complaints against State officials suspected of being the authors, instigators or accomplices of such acts.

10. Conclusion

Any kind of death through torture is unexpected and unwarranted. Law enforcing agencies are to protect people's life, not to hurt or kill them. It is very unfortunate that torture in lawful custody is a common scenario in Bangladesh and it is a much-talked topic in criminal justice system at this moment in Bangladesh. Yet law enforcement agencies have been arbitrarily arresting thousands of innocent citizens for decades, in most cases either for political end or for getting bribes. The magistrates have been ordering remands indiscriminately for extracting confessions, where violence and torture are endemic. In such a situation, both the police and the lower judiciary are on the verge of their doom by losing public confidence. The higher judiciary is more cautiously restrained than proactive as a custodian of the citizen's constitutional guarantee. The Constitution makes it clear that no one must be compelled to be a witness against himself and that no one must be subject to cruel, degrading and inhuman treatment. What is now necessary is the proper and effective implementation of these laws and required amendment as per the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 in order to enforce the directives of HCD as upheld by AD. The citizens of Bangladesh cannot have a dignified human existence unless the ongoing barbarous acts of arbitrary arrest, detention and torture under police remand in the name of extracting confessional statements are subject to the law and their perpetrators are brought to justice. Protecting civic freedoms is also part of Bangladesh's commitments under Sustainable Development Goals (SDG)[61]Agenda 2030 and

[60]*BLAST &Others VS Bangladesh Railway &Others,* 5 CLR (HCD) 2017

[61]The 17 SDGs of the 2030 Agenda for Sustainable Development officially came into force on 1st January 2016, adopted in September 2015, by an historic UN Summit

these violations highlight that the country is failing abysmally to meet targets set under SDG number16, on promoting peaceful and inclusive societies and particularly target 16:10 to protect fundamental freedoms, in accordance with national legislation and international agreements. So with the assistance and awareness of NGOs and various professionals the Government should start to take effective steps to eradicate this inhuman practice right now along with the effective implementation of the UN Convention against Torture.