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Laws relating to Prosecution Service in Bangladesh: A Critical Analysis

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The Laws relating to Muslim Women-Initiated Divorce in Bangladesh: An Overview from Right-Based-Approach



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Manuscripts submitted for publication must be in three copies, double-spaced typescript or electronic print-out on A4 size (8.5"×11") white sheets with margins of 1" on all sides and pages consecutively numbered. The manuscript should have a title-page with the title of the article and the author's name, designation and contact address. The author's name or anything that may identify the author should not appear anywhere in the text paper. An abstract in English must be provided within 200-300 words at the beginning of the article. Submissions should be addressed to the Editor in Chief, Rajshahi University Law Journal, Faculty of Law, University of Rajshahi, Rajshahi 6205, Bangladesh.

Bangladesh's Response to Custodial Torture: A Critical Overview

Sharmin Afroj*
Asma Bint Shafiq**

Abstract: Custodial torture has become a common phenomenon in Bangladeshi society. The Law Enforcement Agencies (LEA), Bangladesh Police, Parliamentary forces such as the Rapid Action Battalion (RAB), the Border Guards Bangladesh (BGB), the Directorate General of Forces Intelligence (DGFI), and the National Security Intelligence (NSI) inflict systematic torture in the name of interrogation in their respective custodies, camps, safe-houses, and secret detention centers upon an alleged accused. This custodial torture is prevalent in the country despite the constitutional guarantee of the prohibition of torture and other cruel, inhuman, or degrading treatment. Bangladesh also holds an international obligation to prevent this inhuman practice as it acceded to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), 1984. Following the provisions of the CAT, 1984 Bangladesh has enacted the Torture and Custodial Death (Prevention) Act 2013. By analyzing different provisions of the CAT and the Act of 2013 this paper argues that Bangladesh's response to custodial torture is inadequate. It recommends that this inadequacy can be addressed by the amendment of the Act of 2013, ensuring its proper implementation, and creating awareness amongst LEA as well as the people at large about the prevention of torture.

Keywords: Custodial Torture, Law Enforcement Agencies, Punishment, Investigation

1. Introduction

Custodial torture and death termed as custodial violence under the criminal jurisprudence has emerged as a major human rights concern in different countries across the world.¹ This is particularly so in

* Associate Professor, Department of Law, University of Chittagong, Chittagong, Bangladesh.

** Associate Professor, Department of Law, University of Chittagong, Chittagong, Bangladesh.

¹ For example, a study on custodial torture in India maintains, 'Custodial torture persists worldwide, not just in India'. Referring to a report by the National Crime Records Bureau, it shows that 1888 custodial deaths occurred in India in twenty years. See, Vijay Kumar Beniwal, 'Custodial Torture and India: Legislative and Judicial Approach', *International Journal of Law Management and Humanities*, Vol.5, 2022, pp 1869-70.

developing countries. The case of Bangladesh is no exception. The most worrying issue about this violence is that the law enforcement agencies (LEA), Bangladesh Police, Parliamentary forces such as the Rapid Action Battalion (RAB), the Border Guards Bangladesh (BGB), and similar authorities who are entrusted with the duty of protecting the rights of citizens commit it (custodial violence). Their custodies, camps, safe houses, and secret detention centres situated across the country remain at the centre of this human rights violation.² It may be noted that torture in police custody leads not only to human rights violations but also to the loss of people's confidence in the administration of justice.³

Affirmatively the constitution of Bangladesh⁴ and other laws such as the Penal Code 1860⁵ and the Torture and Custodial Death (Prevention) Act, 2013 (hereinafter the Act) prohibits the use of torture and other ill-treatment. Bangladesh also acceded in 1998 to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) adopted by the General Assembly in 1984. Despite the country's commitment under national and international instruments to prohibit torture and other inhuman treatment, custodial torture is widespread in Bangladesh. According to a report by Ain O Salish Kendra, a non-government legal aid and human rights organization based in Dhaka, 1426 incidents of custodial torture occurred in Bangladesh from January 2017 to July 2020.⁶

Against this background, this article investigates how Bangladesh responds to custodial torture. It reveals that the country's response to this crime is inadequate. This study identifies the reasons behind this and suggests how Bangladesh can effectively deal with custodial

² Asian Human Rights Commission, 'Bangladesh: Torturous policing system marked by impunity and UNHRC membership cannot co-exist'; A Written Submission to the 34th Regular Session of the United Nations' Human Rights Council by the Asian Legal Resource Centre, 27 February to 24 March 2017, available at <http://www.humanrights.asia/news>, accessed on 30 October, 2023.

³ M. Abdul Hannan, *Human Rights of the Accused in the Criminal Process*, 1st Edition, Madhav Books, Haryana, 2009, p.79.

⁴ Article 35, *The Constitution of the People's Republic of Bangladesh*.

⁵ Section 330, *The Penal Code 1860*.

⁶ ASK prepared the report based on the news published in leading newspapers. Ashutosh Sarkar, 'Custodial Deaths: Law there, victims afraid to file cases' *The Daily Star*, Dhaka, 9 September 2020, available at www.thedailystar.net, accessed on 26 December 2020.

torture by addressing this inadequacy. In doing so, it explores the nature of Bangladesh's obligations of prohibiting custodial torture recognized under human rights treaties and domestic law. In addition, this article provides a general idea about torture including custodial torture. It also details the features of the Act along with its shortcomings. This paper recommends how custodial torture including death in custody can be mitigated in Bangladesh by addressing these limitations of the law.

This qualitative research is based fundamentally on secondary sources such as journal articles, newspaper articles, books, and reports by national and international organizations. Primary sources such as international human rights instruments and national legislation dealing with torture also form its basis. The constitution, and the Act at the national level and the CAT at the international level remain the three important primary sources of this study. This article is structured as follows: first, it explains the concept of custodial torture. Secondly, this article explores the features of custodial torture in Bangladesh. Thirdly, it focuses on the laws related to custodial torture which identifies Bangladesh's obligations under international and national laws to prevent torture. Fourthly this study identifies the challenges to control custodial torture in Bangladesh. It particularly emphasises the challenges Bangladesh encounters due to the limitations of the Act. Finally, this article recommends how the inadequacy of the Act can be addressed to combat custodial torture.

2. Concept of Custodial Torture

Custodial torture is a crime against humanity and an aggravated form of human rights violation. To learn about Bangladesh's obligation to prevent custodial torture, it is important to know what constitutes this form of violence. Accordingly, this section provides an idea about custodial torture particularly and torture generally.

The term 'custodial violence' includes all types of physical and mental torture inflicted upon a person in the custody of LEA. Torture usually denotes intense suffering, physical, mental, and psychological, aimed at forcing someone to do or say something against his or her will. It means breaking down under severe physical pain and extreme psychological pressure.⁷ The World Medical Association, in its Tokyo

⁷ R.S Saini, 'Custodial Torture in Law and Practice with Reference to India', *Journal of the Indian Law Institute*, Vol. 36 (2), 1994, pp. 166, 167.

Declaration 1975 defined 'torture' as "the deliberate, systematic or wanton infliction of physical or mental suffering by one or more persons, acting alone or on the order of any authority to force another person to yield information, to make a confession or for any other reason."

This definition is allied with the legal definition of torture. However, the latter definition is significantly different from the definition of torture used in the media and general conversation. The non-legal conception of torture often emphasises the intensity of pain and suffering whereas the legal definition is concerned with the purposes of using the pain. The CAT provides a comprehensive definition of torture which offers a guideline for defining torture under any domestic law. The CAT states:

[A]ny 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.⁸

To deal with the cases of custodial torture effectively every state should adopt such a definition. In the context of Bangladesh, the legal definition of torture is available under the Act. It (the Act) states that torture refers to any act or omission which causes physical or mental pain to any person aiming to obtain "information or a confession from that person or some other person"; punish "any person for any act or omission for which that person or some other person is responsible or is suspected of being responsible"; intimidate or coerce "any person or some other person" and similar other acts.⁹ This definition's reference to only physical or mental pain and abstinence from considering all

⁸ Article 1, *The United Nations Convention against Cruel, Inhuman or Degrading Treatment or Punishment*, 1984

⁹ Section 2(6), *The Torture and Custodial Death (Prevention) Act*, 2013.

cruel, inhuman, and degrading treatments as torture indicate that the Act has failed to provide a comprehensive definition of torture. This issue¹⁰ along with others have been further discussed in section 5 which deals with the challenges to control custodial torture in Bangladesh.

3. Custodial Torture in Bangladesh

LEA in most Asian countries including Bangladesh routinely practice custodial torture.¹¹ LEA's employees are public servants, and they are assigned to protect the people's rights and maintain law and order.¹² But contrary to this, LEA sometimes inflict torture and other inhuman treatment upon suspected accused.¹³ Beating with a stick or rifle butt, giving electric shocks, pouring hot water in the nose, using bar fetters, and other various forms of violence used by these agencies are widely reported as custodial torture in Bangladesh.¹⁴ The other forms of violence constituting torture can be explained through a report jointly published by the World Organization Against Torture (OMCT) and Odhikar, a Non-Government Organisation (NGO). The report states:

[T]he most common forms of torture include keeping the detained standing for long periods of time; beating with wooden or iron rods on the body or the soles of the feet; suspension from the ceiling by the wrists; or upside down by the ankles; inserting chilli powder in eyes, nostrils or open wounds; and pouring water mixed with chilli powder up nostrils; electric shocks to fingers, genitals or toes. More extreme forms include using a drill machine on legs and arms, burying with cigarettes, breaking bones, tearing out nails with pilers, inserting needles under nails, and water boarding. Psychological forms of torture include intimidation, mock executions, sleep deprivation, continuous verbal abuse, threats to harm family members, and threats of death in 'crossfire', or keeping the detained in an unsanitary holding cell.¹⁵

¹⁰ Section 5, *Ibid*

¹¹ REDRESS, *Torture in Asia: The law and practice*, Special Edition, October 2013, p.8 available at <https://www.refworld.org/docid/52fa25204.html>, accessed on 31 October 2023.

¹² *Afzalul Abedin and others vs. Bangladesh*, 8 [2002] BLC (HCD) 601, 648.

¹³ *Supra* note 7, p. 166.

¹⁴ *Supra* note 3, p. 133.

¹⁵ World Organisation Against Torture (OMCT) and Odhikar, 'Cycle of Fear: Combating Impunity for Torture and Strengthening the Rule of Law in

All types of actions mentioned above, are used by LEA in Bangladesh while they commit custodial torture. The worst form of such practice is custodial death. According to Odhikar and Ain O' Salish Kenra (ASK) there were 54 alleged deaths in custody in the first nine months of 2022 whereas the number of custodial deaths was the same (54) between 2014 and 2019.¹⁶ During 2020, almost 19 people were tortured to death in custody.¹⁷ These statistics show that the number of custodial deaths has been increased in time.

An alleged accused could face cruel, inhuman, and degrading treatment at the time of arrest or detention or investigation. However, custodial violence is mainly committed at the investigation stage. For example, the police often torture the probable accused to secure evidence or confession.¹⁸ The Human Rights Committee maintained in 2017 that LEA in Bangladesh inflicted torture and ill-treatment mostly "during interrogations to extract confessions."¹⁹ The UN Committee against Torture (UNCAT)'s observation in 2019 reveals a similar result. It noted that LEA tortured widely and routinely people in custody in that year to obtain "confessions or to solicit the payment of bribes."²⁰ These agencies inflicted torture and ill treatment following arrest or detention.²¹

Bangladesh', July 2019, p.23, available at <https://www.omct.org>, accessed on 31 October 2023.

16 Amnesty International, 'Bangladesh 2022', available at www.amnesty.org, accessed on 31 October 2023. Multadir Rashid, 'Custodial torture, death on in Bangladesh as victims hardly see justice' *New Age* (June 25, 2021), available at <https://www.newagebd.net/article>, accessed 31 October 2023.

17 Rashid, *Ibid*.

18 Justice A.S. Anand, 'Speech' (VIII the International Symposium on Torture, India, 1999, available at <http://www.ebcindia.com/lawyer/articles/9907a2.html>, accessed on 10 June 2020.

19 The Human Rights Committee, concluding observations on the initial report of Bangladesh on the International Covenant on Civil and Political Rights', 22 March 2017, (CCPR/C/BGD/CO/1).

20 UN Committee Against Torture (UNCAT), 'Concluding Observations on the initial report of Bangladesh', 2019, CAT/BGD/CO/1, para 7, available at <https://www.ecoi.net>, accessed 31 October 2023.

21 Human Rights Forum Bangladesh (HRFB), 'Stakeholder' Submission to the United Nation Committee against Torture', 22 June 2019, available at <https://www.ecoi.net>, accessed 31 October 2023.

It should be reiterated that custodial torture continues unabated in the country despite Bangladesh's adoption of the Act and ratification of the CAT. To prevent custodial torture the Act criminalises custodial death and the act of torture by uniformed and disciplined forces such as the Police, RAB, BGB, Customs, Immigration, Criminal Investigation Department (CID), Special Branch, Intelligence Agencies, Ansar VDP, Coast Guard any other state agencies engaged in the enforcement of law in the country.²² These agencies' commission of custodial torture precludes Bangladesh from fulfilling its legal obligations to prevent custodial torture.

4. Laws Concerning Custodial Torture: International and Domestic Obligations

Bangladesh's obligation to prohibit custodial torture is widely recognised under various international human rights instruments to which it is a party. National laws also contain important provisions in respect of this. These instruments as well as judicial decisions signify the nature of Bangladesh's obligations, under international and domestic law, of prohibiting custodial torture. Explaining the relevant provisions of human rights instruments, national laws, and judicial decisions, this section identifies the nature of Bangladesh's obligation regarding the prohibition of custodial violence.

4.1 Bangladesh's Obligations under International Human Rights Law

Bangladesh has ratified eight out of nine core human rights instruments. Most of these instruments directly or indirectly prohibit torture or inhuman treatment against all human beings including the persons detained by the LEA. For example, article 3 of the Universal Declaration of Human Rights (UDHR) 1948 states that "everyone has the right to life, liberty and security of person." Article 5 of the UDHR strengthens this right by affirming that "no one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment." Other human rights instruments such as the Geneva Convention on the Protection of the Prisoners of War, 1949, the International Covenant on Civil and Political Rights, 1966 and the Declaration on Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Punishment 1975 echo this provision of the UDHR. Later the CAT was adopted to deal exclusively with torture which entered into force on 26 June 1987.

²² The Act as mentioned at *Supra* note 9.

CAT requires state parties to prevent torture in any territory under their jurisdiction.²³ This prohibition is absolute and non-derogable. In other words, the use of torture cannot be justified as a means of protecting public safety or meeting emergencies. This means that torture by anyone including LEA is exclusively prohibited under the CAT. In 1998, after sustained efforts by national and international NGOs, Bangladesh ratified the CAT, which obliges the state, inter alia, to take 'effective legislative, administrative, judicial, or other measures to prevent acts of torture' and "other acts of cruel, inhuman or degrading treatment or punishment in its jurisdiction."²⁴

The CAT includes more detailed provisions on the prevention and punishment of torture and other ill-treatment than any other human rights instrument. It imposes specific obligations upon the states in this respect. It requires them to prohibit torture through criminal laws which would include recognition of strong principles of criminal responsibility, elimination of certain defences, adoption of regulations for security forces, conducting training for these people, prosecution of the perpetrator of torture regardless of where it was committed, exclusion of statements obtained through torture. States' obligation under the CAT also extends to the adoption of additional criminal procedures that would enable victims and their families to obtain civil reparations from those responsible for torture.²⁵ In other words, the CAT requires each state party to adopt domestic legal mechanisms that would recognise an act of torture, cruel, inhuman, and degrading punishment, and treatment as a crime.²⁶

Indeed, a strong national legal framework on the prohibition of torture is crucial to redress custodial torture. The legal framework should reflect relevant international human rights standards and include

²³ Article 2, *The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)*, 1984.

²⁴ *Ibid.*

²⁵ General Assembly resolution 39/46, 10 December 1984.

²⁶ See for example Article 2(1) and Article 4(2) of the CAT. Article 2(1) provides that each State Party shall take effective, legislative, administrative, judicial, or other measures to prevent acts of torture in any territory under its jurisdiction and Article 4(2) of the CAT states that each state party to the Convention shall ensure all acts of torture are offences under its criminal law and shall ensure that the relevant penalties sufficiently reflect the gravity of the offence in question.

specific provisions to prohibit and prevent torture.²⁷ Being a party to the CAT²⁸ and other human rights instruments, Bangladesh is under an obligation to prohibit torture through its domestic law. To comply with this obligation, the country adopted the Torture and Custodial Death (Prevention) Act in 2013. This legislation specially addresses the cases of custodial torture. However, it was not the case that there was no law before the Act of 2013 to deal with the issues of torture. The constitution of Bangladesh expressly prohibits torture.²⁹ It also recognises the right to life and liberty as inalienable rights of every person.³⁰ Different other laws also prohibit torture. This indicates that Bangladesh's obligation of prohibiting torture is recognized under not only international treaties but also its domestic legal instruments. The constitution, the supreme law of the land, particularly refers to this obligation.

4.2 Obligations under National Law

Under articles 44 and 102 of the Constitution of Bangladesh, the High Court Division (HCD) of the Supreme Court exercises writ jurisdiction to enforce the fundamental rights of the citizens. Accordingly, an individual facing a violation of fundamental rights can move to the HCD. So far as the rights of prisoners are concerned articles 31, 32, and 35 contain important provisions which expressly indicate Bangladesh's obligation of protecting them and others from torture. For instance, article 31 states "That to enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law." According to Article 32, no person shall be deprived of life or personal liberty save in accordance with law." While torture is inflicted by LEA to extract confessional statement Article 35(4) explicitly prohibits self-incrimination. The Article reads: "no person accused of any offence shall be compelled to be a witness against himself." The Constitution of

²⁷ Asia Pacific Forum of National Human Rights Institutions, 'Preventing Torture: An Operational Guide for National Human Rights Institutions', May, 2010, available at <https://www.ohchr.org/sites/default>, accessed on 30 October 2023.

²⁸ Bangladesh acceded to the CAT on 5th October 1998.

²⁹ Article 35(5), *The Constitution of Bangladesh*.

³⁰ Articles 31 and 32, *Ibid*.

Bangladesh further states that freedom from torture, cruel, inhuman, degrading treatment or punishment is a fundamental human right of every citizen. The combined effect of these constitutional provisions mean that torture is absolutely prohibited in Bangladesh.³¹

Besides the constitution, some existing laws contain provisions against torture. Sections 330 and 331 of the Penal Code, 1860 penalises "hurt" or "grievous hurt" caused by public officers to obtain confessions or compel restoration of property. Some provisions of the Evidence Act, 1872 also intend to protect people under investigation from torture. For example, section 24 states that a confession by an accused should be irrelevant if it appears to have been obtained by threat or inducement. To remove the scope of such a threat or inducement by the police, Section 26 of the Act says that confessions made by a person in police custody is inadmissible. In addition, section 161 of the Code of Criminal Procedure obliges a police officer not to make any inducement or threat to obtain the statement.

Positively, regarding the custodial torture the Supreme Court of Bangladesh pronounced landmark decisions where it acknowledged the rights of the prisoners/suspects/accused. It directed the police to refrain from custodial torture.³² The most important judicial decision in this respect is *Bangladesh Legal Aid and Services Trust (BLAST) and Others vs. Bangladesh and Others* case.³³ In this case, the Supreme Court took a proactive stand in the protection, promotion, and implementation of the rights of torture survivors and in enforcing the constitutional obligations of the State. It provided some important recommendations for amendments to relevant laws and contains directions to reduce the scope and possibility of the abuse of power by the LEA. It particularly restricted the exercise of the police power of arrest and investigation under respectively sections 54 and 167 of the Code of Criminal Procedure, 1908 (Cr.P.C).

Section 54 of the Cr.P.C remains at the centre of discussion relating to custodial torture. It enables the police to arrest without a warrant under nine circumstances. Section 167 which is also considered responsible for custodial violence authorises police to take an accused

³¹ Article 35(5) of The Constitution of Bangladesh states that no person shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment.

³² *Supra* note. 7, p.183.

³³ *Bangladesh Legal Aid and Services Trust (BLAST) and Others vs Bangladesh and Others* 55DLR [2003] (HCD) 363.

to custody for investigation and interrogation. Section 167 provides that, when an investigation cannot be completed within twenty-four hours of the arrest, a Magistrate can authorise the detention of an accused in police custody for up to 15 days for further investigation. If the magistrate allows the detention the accused is brought back to the police station. This practice of sending the arrested person to the police station instead of jail is known as 'remand' (though this term is not used in the section). During remand "the police try to extort information or confession from the person arrested by physical or mental torture."³⁴ Although the confession should be made voluntarily by the detenu, tortures in police custody during remand often lead him/her to confess his/her guilt before the magistrate.³⁵ In addition to the Cr. P.C., other legislations such as sections 86 and 100 of the Dhaka Metropolitan Police Ordinance, and similar provisions under other Metropolitan Police Ordinances encourage custodial torture. These provisions provide the police with unrestricted powers of arresting a person without a warrant, the abuse of which gives rise to custodial violence.³⁶ The degree of violence sometimes increases to such a level that it causes death. The Blast case mentioned above (also known as Section 54 Guidelines Case, Rubel Killing Case, and Guidelines on Arrest and Remand Case) deals with such a case.

The BLAST filed writ petition no 3806 in 1998 following the tragic death of Shamim Reza Rubel, a student of the Independent University of Bangladesh, in police custody. The brutal torture of Rubel by police had led to widespread condemnation and outcry. The focus of the judgment is on Sections 54 and 167 of the Cr.P.C. This is because the abuse by the police of powers provided under these two sections gave rise to this violence. It is worth noting that the police's powers of arresting without warrants under section 54 and detaining an accused for investigation under section 167 mostly cause violations of fundamental rights to a fair trial, freedom from torture or cruel, Inhuman, or degrading treatment. The abuse of these powers is mainly

³⁴ Shahdeen Malik, 'Arrest and Remand: Judicial Interpretation and Police Practice', Special Issue, *Bangladesh Journal of Law*, 2007, pp. 259, 277.

³⁵ *Ibid*, pp. 272-273.

³⁶ Md. Monjur Hasan, Md. Arifuzzaman, Mohammad Mizanur Rahaman, 'Torture in Lawful Custody: Violation of United Nations Convention against Torture in Criminal Justice System in Bangladesh', *The Beijing Law Review*, Vol. 8, 2017, pp. 397, 406.

responsible for this. The judgment in the BLAST case delivered on 7 April 2003 asserts:

The use of force to extort information can never be justified. Use of force is totally prohibited by the Constitution.So we find that even if the accused is taken in police custody for the purpose of interrogation for extortion of information from him, neither any law of the country nor the Constitution gives any authority to the police to torture that person or to subject him to cruel, inhuman and degrading treatment. Thus it is clear to us that the very system of taking an accused on 'remand' for the purpose of interrogation and extortion of information by application of force on such a person is totally against the spirit and explicit provisions of the Constitution.³⁷

The court emphasises that the police should exercise the powers under sections 54 and 167 of the Cr. P.C. in accordance with the safeguards provided under articles 27, 31, 32, 33, and 35 of the constitution.³⁸ The court also prescribed 15-point directives to be followed by the LEA in arresting, detaining, remanding, and treating suspects. It further suggested that some changes should be introduced to the CR.P.C, the Police Act 1861, the Penal Code, 1860, and the Evidence Act, 1908 to prevent arbitrary arrest and custodial death. In response to this judgment, the Appellate Division (AD) pronounced its verdict in 2016 which required the government to amend the relevant provisions stipulated in the Cr. Pc. It also provided 10 fresh directives on law enforcers and 9 directives on judicial magistrates and judges that would guide them while dealing with arrest and detention. Although these directives have the potential to limit the powers of the police to some extent, their failure to remove the defective provisions of laws renders these directives unable to respond properly to the cases of custodial torture. Despite this, the higher judiciary's intervention with them can be considered a positive step toward preventing violence in custody.

In addition to judicial decisions, various laws contain important provisions which can help to combat custodial violence. Other laws which can be used to address torture are the Children Act, 2013, the

³⁷ 55 DLR 2003, *Supra* note 33, p. 371.

³⁸ *Ibid.*

Criminal Rules and Order, 2009; the Domestic Violence (Prevention and Protection) Act, 2010, the Extradition Act, 1974, the Identification of Prisoners Act, 1920, the Government Servants (Discipline and Appeal) Rules, 1985, the Legal Aid Services Act, 2000, the Mutual Legal Assistance in Criminal Matters Act, 2012, the Police Act, 1861, the Prisons Act, 1894, the Prisoners Act, 1900, the Police Regulations, Bengal-1943, the Probation of Offenders Ordinance, 1960, the Police Officers (Special Provisions) Ordinance, 1976, the Prevention of Cruelty to Women and Children Act, 2000.³⁹

An analysis of these laws reveals that Bangladesh holds obligations under both domestic laws and international human rights treaties to prevent custodial violence. This obligation has been specifically recognised under the Act of 2013. As a part of its obligation under the CAT Bangladesh passed the Torture and Custodial Death (Prevention) Bill in November 2013. The bill was previously introduced to the parliament in 2009 by Saber Hossain Chowdhury, an Awami League Member of Parliament, as a private member's Bill. After a prolonged struggle for the enactment of an anti-torture law, finally the term 'torture' has been criminalised in Bangladesh.

It appears from the above that Bangladesh holds specific obligations to the prevention of torture under both national laws and international human rights treaties. Yet, despite this, custodial torture has been frequently observed in the country over the years. For example, Professor Mizanur Rahman, the then Chairman of the National Human Rights Commission (NHRC) stated in a seminar organised by the organisation on 16th June 2015 that about 70 percent of complaints of violations of human rights received by the NHRC are against the LEA. About half of all complainants raise allegations of torture and custodial death by the LEA.⁴⁰ This indicates that the LEA routinely violated the fundamental rights of citizens by inflicting custodial violence. This situation continues unabated. This involves an investigation into what changes, if there are any, the Act of 2013 introduced to the national legal regime on custodial torture.

³⁹ Initial Report submitted by Bangladesh under article 19 of the Convention, Committee against Torture, 23 July 2019, p.4, available at binternet.ohchr.org.BGD, accessed on 2 December 2020.

⁴⁰ Seminar: Prevention of Torture AND Custodial Death: Our Responsibilities organized on Tuesday 16th June 2015 at Azizur Rahman Conference Hall, The Daily Star Centre, Dhaka.

The absence of any comprehensive law regarding the prevention of torture and custodial death would encourage the LEA in committing custodial torture. From this perspective, the Torture and Custodial Death (Prevention) Act can be treated as a significant response to this violence. The purpose of passing this Act was to prevent torture by the LEA against common people in custody. This Act for the first time defines the words 'Torture' and 'Custodial Death'. It was also the first attempt to formally introduce effective victim protection mechanisms against the LEA. It can be argued from this that the enactment of this Act has been a great achievement in the criminal justice system in Bangladesh. The example provided below affirms this.

On September 9, 2020, the Metropolitan Sessions Judge's Court in Dhaka held three police officers guilty of custodial torture which is the first known judgment under the Act. These police officers were sentenced to life imprisonment, fined Tk. 1 lakh each, and notably ordered to pay 2 lakhs each to the plaintiff as compensation. On February 8, 2014, the police arrested the two brothers Ishtiaque Hossain Jonny and Imtiaz Hossain Rocky on a dubious complaint. The brothers faced extreme custodial torture which led to the death of the former. Later Rocky filed a case in August 2014 against the police seeking justice for his brother. Following the filing of the case Rocky's family went through an immense difficulty. They faced harassment, intimidation, threat and lost their resources. With the assistance of Bangladesh Legal Aid and Services Trust (BLAST) they were finally able to win the fight for justice.⁴¹ This landmark judgment created much hope of preventing torture and custodial death in Bangladesh. This is because it provided a strong message that none including LEA is above the law and everybody can be punished for committing torture.

Despite various legal developments discussed above, the incidents of torture and custodial death by the LEA have increased over the years. The frequent occurrence of these incidents destroys the holistic symbol of the police as the protector of human rights.⁴² The following section highlights the reasons behind this.

⁴¹ Taqbir Huda, 'Justice for Jonny: Ending impunity for custodial torture at last' *The Daily Star*, Dhaka, 11 September 2020, available at www.thedailystar.net/opinion, accessed on 20 September 2020.

⁴² *Supra* note 3, p. 82.

5. Challenges to Control Custodial Torture in Bangladesh

Various reasons are responsible for the rise of custodial torture in Bangladesh. Because of the limited scope of the study, it does not detail all of them. Instead, this article concentrates on a key factor that is largely responsible for the custodial torture in Bangladesh. It argues that the shortcomings of the Act of 2013 and the lack of its implementation preclude the country from complying with its obligation of prohibiting torture including custodial torture.

5.1 Challenges Related to the Act

The enactment of the Act of 2013 was certainly a positive step on the part of Bangladesh to address the cases of torture. However, as noted above, despite the presence of this Act, the cases of torture, particularly custodial torture, are high in Bangladesh. This raises some specific questions: how this Act responds to custodial torture, why this response is inadequate, and how a suitable response can be offered to the cases of this torture. This section answers these questions. In doing so, it compares the provisions of the Act with those of the CAT. This reveals that the Act lacks the standards that are required to provide adequate remedies for custodial torture. Substantive and procedural flaws of the Act, as this section shows, obstruct a suitable response to custodial torture in Bangladesh.

5.1.1 Absence of a Comprehensive Definition

The Act lacks an exhaustive definition of custodial torture. A comparison between the provisions of the Act and those of CAT on the definition of torture affirms this inadequacy. It reveals that the definition of torture stated in the Act fails to reflect an international standard prescribed in the CAT. This is because the Act limits the definition of torture to only physical or mental pain used to obtain information and confession which does not capture the multiple and complex aspects of torture. The definition fails to include the physical or mental pain experienced by those who are imprisoned awaiting trial or under remand order of the court. The definition also does not specifically refer to cruel, inhuman, and degrading treatment as torture. The most surprising fact regarding the definition is that it does not include gender-based violence such as rape and sexual harassment

in torture.⁴³ To deal with all the cases of custodial torture, irrespective of their recognition under the Act, effectively it is crucial to define the term 'custodial torture' from a wider perspective. The jurisprudence of the Indian Supreme Court can offer a useful guideline in this respect (explained in section 6).

5.1.2 Inadequate Investigation and Other Processes

Impartial investigation, adequate remedies, training of LEA, and other various issues are prime requirements to redress torture. Accordingly, they receive significant attention under the CAT whereas the Act of 2013 does not properly reflect these principles. Although the Act mentions these factors, it has hardly been successful in handling cases of torture since its creation. Identification of the Act's limitations would help to deal with the cases of torture including custodial torture efficiently.

Beginning with the issue of investigation, the Act primarily entrusts the police with the power of investigation. Regarding custodial torture, it states that the court will assign a police officer whose rank is not below the rank of the alleged perpetrator to conduct an investigation against the latter.⁴⁴ This provision involves a significant challenge. This is because a police officer is not likely to give an investigation report against his colleague. Moreover, the police hardly register cases regarding custodial violence as the allegations in such cases are filed against their colleagues. This reveals that the Act fails to comply with the requirement of an impartial investigation which is recognised under the CAT.⁴⁵ Due to this lack of impartiality, the complaints of torture against LEA do not proceed toward prosecution.⁴⁶ Consequently, in contrast to the numerous incidents of custodial torture that routinely occur throughout the country, the number of

⁴³ Bangladesh Legal Aid and Services Trust (BLAST), 'Review of the Torture and Custodial Death (Prevention) Act, 2013', 2015, available at. www.BLAST.org.be/content_publication, accessed on 1 May 2020.

⁴⁴ Section 5(5), *Supra* note 9.

⁴⁵ Article 12 of the CAT states, "each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction".

⁴⁶ *Supra* note 18.

cases redressed is small.⁴⁷ The situation could have been improved by resorting to judicial investigation. But it is rarely practiced.

A praiseworthy provision of the Act is that it allows an investigation by the judicial authority in some cases.⁴⁸ An aggrieved person can seek judicial investigation before the court if he/she thinks that proper investigation is not possible by the police. If the court is satisfied it can allow the judicial investigation.⁴⁹ However, this provision is not mandatory, which is the case for the investigation by police. As the police are primarily authorised under the Act to investigate, the credibility of a neutral investigation encounters a significant challenge. The time limit of the investigation creates a further problem. The Act states that the investigation must be completed within 90 working days from the date when the complaint was first made. It also allows to extend this time limit to another 30 days on reasonable grounds.⁵⁰ But the Act remains silent on what would happen if the investigation were not completed within this time. It also does not prescribe any punishment for the investigative officer who commits misconduct during the investigation.⁵¹

A similar problem is found in the provision relating to Punishment and the amount of compensation under the Act. The prescribed punishment for torture under the Act is either imprisonment for a minimum of five years, or a fine the minimum amount being fifty thousand *taka*, or both. The court could also award an additional twenty-five thousand *taka* as compensation to the victims.⁵² Moreover, in case of torture resulting in death, the convicted will be punished with imprisonment for life, or a fine of a minimum of one lac *taka*, or both. The court could award an additional two lakhs *taka* as compensation to the victim.⁵³ Although the inclusion of provisions for remedies, under the Act, as punishment and compensation is appreciable, they are not adequate. For example, a comparison

⁴⁷ Arifur Rahman Rabbi, 'The ugly truth about custodial deaths' *Dhaka Tribune*, Dhaka, 30 May 2018, available at <https://www.dhakatribune.com>, accessed on 30 October 2023.

⁴⁸ Section 15 (2), *Supra* note 9.

⁴⁹ Section 5(2), *Ibid*.

⁵⁰ Section 8(1), *Ibid*.

⁵¹ *Supra* note 39, Initial report submitted by Bangladesh.

⁵² Section 15(1), *Supra* note 9.

⁵³ Section 15(2), *Ibid*.

between the provisions of punishment under the Act and that of the Penal Code for similar offences affirms that the latter inflicts more severe punishment than the former. The fact that no death penalty is provided for death resulting from torture evidence that the Act sometimes does not inflict severe punishment in required cases. The provision of such punishment could have helped to address custodial death efficiently. To respond to custodial torture, the Act could have also included departmental proceedings such as 'suspension and dismissal from job'. However, its scope is limited to punishment and compensation.

Another fundamental challenge involved with the Act is that it does not prescribe a specific procedure for the realization of compensation. Further, unlike the CAT⁵⁴ it does not clarify whether the dependents of a victim who was tortured to death will be entitled to compensation. The Act also does not include any provision for the rehabilitation of victims. This indicates that the Act fails to comply with the CAT's requirement regarding compensation which states, "each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible."⁵⁵

In addition to the substantive and procedural flaws of the Act discussed above, its failure to include some provisions obstructs the application of the Act. The absence of provisions on the protection of witnesses and training and education can be considered two important factors that hamper the effectiveness of the Act. Although the Act contains provisions on the protection of complainants, it lacks similar provisions regarding the protection of witnesses.⁵⁶ Custodial violence is an offence of serious nature and those who witness it are often at high risk. Accordingly, they need sufficient protection. The lack of such protection not only places a witness's life at stake but also undermines

⁵⁴ Article 14 of the CAT, *Supra* note 8.

⁵⁵ *Ibid.*

⁵⁶ According to Section 11(1) of the Act, a complainant may submit a petition before the Session's Judge Court seeking protection against the accused and the Court may make appropriate orders as required to safeguard the persons who seek protection, to be relocated, provided security, or pass other prohibitory orders against the respondent like limiting the respondent's entry into a particular territory under Section 11(5).

the spirit and objects of the Act. At the same time, it prevents Bangladesh from complying with its obligation under the CAT which requires each state party to take steps to protect witnesses "against all ill treatment or intimidation as a consequence for his ... any evidence given."⁵⁷ Since the Act does not consider intimidation of witnesses as a separate offence, they are likely to abstain from providing evidence. This creates a major challenge in proving a case of torture.

The above limitations largely obstruct the implementation of the Act. Accordingly, despite the presence of this specific legislation on the prohibition of torture, the cases of custodial torture are high in Bangladesh. An important means of responding to the challenges related to the implementation of the Act can be to conduct educational programs and training amongst people involved with the torture such as police and other LEA. The CAT requires state parties to ensure that education and information regarding the prohibition against torture should be fully included in the training of law enforcement personnel - civil or military, public officials, and other persons who may be involved in the custody, interrogation, or treatment of any individual subjected to any form of arrest, detention or imprisonment.⁵⁸ Since this important provision regarding education and training to prohibit torture is not included in the Act, LEA hardly think of the consequences of inflicting torture.

It appears from the above that the Act responds to the case of custodial torture halfheartedly. The shortcomings of the Act related to both substantive and procedural provisions prevent it from addressing this issue of gross human rights violations effectively. Specific suggestions made below to amend these provisions would guide them to offer a suitable response to custodial torture. In addition to this, the following recommendations can facilitate redressing the torture.

6. Suggestions

To ensure the government's compliance with its obligation of prohibiting torture it is crucial to redress the violation of human rights through torture, specifically custodial torture. This can be done through the amendment of the important provisions of the Act of 2013 discussed above, proper implementation of existing provisions when torture occurs, creating awareness, and taking various other steps. This

⁵⁷ Article 13, *Supra* note 8.

⁵⁸ Article 10, *Ibid.*

section details these aiming to show how Bangladesh can offer a suitable response to custodial torture.

6.1 Amendment of the Act

As mentioned above, various provisions of the Act require amendment. The first thing to concentrate on in this respect is the definition of 'torture' as provided in section 2(vi) of the Act. The definition should be amended to reflect an international standard provided in the CAT. This would help include complex and multiple aspects of torture. The adoption of such a broader definition as prescribed by the Indian judiciary would enable the judiciary of Bangladesh to intervene in more areas of torture.

The Supreme Court of India explains the concept of custodial violence from a broader perspective in *D.K. Basu vs. State of West Bengal*.⁵⁹ The court considered custodial torture as a complete "violation of human dignity... which destroys, to a very large extent, the individual personality." It urges the prevention of custodial torture by emphasising that "whenever human dignity is wounded, civilization takes a step backward."⁶⁰ It can be argued from this that all kinds of actions by LEA that disregard the human dignity of a person in custody can be treated as torture. To implement Bangladesh's obligation to prohibit custodial torture, it should adopt such a definition. This would enable the country to intervene with any kind of violation of the dignity of a person in custody.

The Act should also provide a specific definition of 'custody' which is absent under it. Since the punishments provided under the Act are insufficient and have no correlation with similar types of offences under the Penal Code, these provisions of punishment embodied in section 15 of the Act should be amended. This will render the penalties consistent with those provided for similar offences under the Penal Code. The Act should also be amended to provide adequate compensation in accordance with the provision of the CAT. The proposed amendment should include specific procedures for the payment of compensation.

Other areas which the proposed amendment should focus on are: it should include provisions to provide compensation to the dependent

⁵⁹ (1997) 1 SCC, p. 434.

⁶⁰ *Ibid.*

or legal successors of a deceased, ensure impartial investigation, guarantee a fair trial, provide protection to witnesses, and specify a time limit for the completion of the investigation. To bring impartial investigation it should make judicial investigation mandatory. In addition, a separate investigative body, independent from the participation of the police, can be established to deal with the cases of custodial torture. Sections 8 and 14 of the Act dealing respectively with investigation and trial should be modified to incorporate these recommendations in the Act. Sections 54 and 167 of the Cr. P.C. should also be amended to stop abuse of the powers by the police which would decrease the cases of custodial torture. The directives provided by both the HCD and AD in *BLAST vs Bangladesh* should be pursued in making the proposed amendments and implementing the same. This will facilitate the prevention of torture including custodial violence.

6.2 Training of LEA and Judicial Officers

There should be compulsory educational courses in the Constitution and human rights for law enforcement and security personnel at all levels. Mere knowledge of various sections of the Penal Code and Criminal Procedure Code is not sufficient. They should be made familiar with the basic provisions of the Constitution of Bangladesh, particularly the fundamental human rights of the citizens, the International Bill of Human Rights, and other instruments relating to the rights of the prisoners/suspects/accused persons. The LEA in Bangladesh hardly receives such kind of training which is one of the factors leading to custodial torture. Therefore, these people should be provided with different training during their service. This could include training in behavioral science; using scientific aids in investigation such as the use of forensic science laboratories, lie detectors, computers, and similar means. Moreover, the judicial officers should be provided adequate training by the Judicial Administration Training Institute (JATI) to hold the law-enforcement system accountable in the courts.

6.3 Creation of Awareness

In addition to the above, a strong means of addressing custodial torture should be to create awareness among common people against it. Once they are aware of it, they will raise their voices against custodial torture. Most people are ignorant of the fact that the LEA do not have any legal authority to inflict torture or any other punishment upon an accused or a suspect. Accordingly, they rarely raise their voice

against such a practice. This requires that the government should take the initiative to create massive awareness about the illegal practice of torture as well as the existence of the Act of 2013 which prohibits torture. Human Rights NGOs and the media can play a vital role in this respect. Along with this, the government should be willing to ensure the punishment of LEA involved with torture and provide compensation to the victims and their legal successors in relevant cases.

It appears from the above that amendment of the Act and ensuring its implementation will facilitate remedying custodial torture. Dissemination of education on human rights and constitutional provisions amongst law enforcing agencies and conducting training for them on various important factors would encourage them not to practice torture. Creating awareness among the people about the Act of 2013 would also facilitate the redressing of custodial torture. To quote Saber Hossain Chy, a member of parliament who initiated this Act:

A law is only as good as the extent to which it is implemented. This is where the challenge lies and the first task is to formulate a road map. Awareness-raising is needed across the board – the general public needs to be aware that they now have this legal protection from torture and can pursue accountability and justice, the judiciary must become informed, lawyers be trained, law enforcers need to be made aware of their responsibilities. It is a huge task.⁶¹

Undeniably, the lack of resources and funds would create a large challenge in addressing these requirements. Yet, a specific plan and timeline should be set, and relevant sectors of the government should endeavour to achieve it gradually. This would eventually enable Bangladesh to respond effectively to its obligations of preventing custodial as well as other forms of torture.

7. Conclusion

This article has revealed that Bangladesh holds a specific obligation under both human rights treaties and national laws of prohibiting torture including custodial torture. The country's acceding to the CAT and adoption of the Act of 2013 can be considered two significant steps in this respect. The Constitution and other legislations also contain

⁶¹ Amnesty International, 'Bangladesh's landmark law banning torture', 4 November 2013, available at <https://www.amnesty.org/en/latest/campaigns/2013/11/bangladeshs-landmark-law-banning-torture>, accessed on 31 October 2023.

important provisions regarding the prohibition of torture. Despite this, torture, particularly custodial torture, continues unabated in Bangladesh. This article has identified the reasons behind this. It has argued that shortcomings of the Act and the non-implementation of its existing provisions are mainly responsible for custodial violence. Unawareness of the people about the existence of the Act remains another important issue that obstructs actions against this human rights violation. Accordingly, this paper has suggested the amendment of the Act. At the same time, it argues that proper implementation of the Act should be ensured.

This article has emphasised that the government should create massive awareness about the law, take the initiative to provide adequate compensation to victims and their families, and provide protection to witnesses. If people are aware of the law, they will be interested in complaining more about custodial torture which would discourage the LEA from repeating it. The government should also comply with the directives issued by the Supreme Court of Bangladesh to prevent the misuse of power by the LEA. The government should prioritise the training of these people (LEA) on human rights laws and other relevant laws where human rights NGOs should actively participate. This training might inspire the LEA to perform their duties properly and abstain from violating people's rights. This would eventually decrease the cases of custodial torture in Bangladesh in the future.