Normative Compliance of Bangladesh Regarding Torture: Towards an Anti-Torture Regime

Dr. Raushan Ara*

1. Introduction

Bangladesh is committed to ensure all human rights be it civil, political, economic, social and cultural rights including the right to development and fundamental freedoms to all its citizens without any discrimination, It is also committed to building a society free from exploitation in which the fundamental human rights and freedom, equality and justice, political economic and social rights are secured. While favoring a holistic approach in this respect, Bangladesh believes in individuality, universality, non-selectivity, and interdependence of human rights. It is because of its commitment to the promotion and protection of human rights and fundamental freedoms of all its citizens that Bangladesh actively and constructively participated in the negotiations leading up to the creation of the Human Rights commission. She served the Commission on Human Rights, with distinction, during 1983-2000 and was elected to the Commission for the term 2006-2008.[1] However, among the other instruments Bangladesh ratified the Convention against Torture (CAT) on 5 October 1998 by an instrument of accession. But unfortunately Bangladesh has not ratified the Optional Protocol of the CAT.[2] Whereas Article 2 (1) and Article 4 of the Convention against Torture requires 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.[3] And it is now well known that the international ban on the use of torture has reached the status of a peremptory norm of general international law (*jus cogens*). This means that it "enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules. At the national level it de-legitimates any law,

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* Assistant Professor, Department of Law, University of Dhaka

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1 The Department of General Assembly and Conference Management of the United Nations, 'Human rights pledges by the government of Bangladesh to the UN'(2006) 5(4) *Article 2 of the International Covenant on Civil and Political Rights*, 86, 87.

2 Asian Human Rights Commission, *Torture in Bangladesh* (2013) < http://www.humanrights.asia/countries/bangladesh/torture-in-bangladesh> accessed 19 April 2013.

3 Rule of law in armed conflicts project (RULAC), *Bangladesh: National Legislation* (2009) < http://bangladesh.ahrchk.net/docs/TortureandCustodialDeathBill2009.pdf> accessed 18 May 2013.

administrative or judicial act authorizing torture. As a result of the absolute prohibition of torture, no state is permitted to excuse itself from the application of the peremptory norm. Since the ban is absolute, it applies regardless of the status of the victim and the circumstances, whether they are in a state of war, siege, emergency, or whatever. The revulsion with which the torturer is held is demonstrated by a very strong judicial rebuke, condemning the torturer as someone who has become "like the pirate and slave trader before him '*hostis humani generis'*, an enemy of all mankind", and torture itself as an act of barbarity which "no civilized society condones," "one of the most evil practices known to man" and "an unqualified evil". Following from the status of the prohibition of torture as peremptory norm, any state has the authority to punish perpetrators of the crime of torture as "they are all enemies of mankind and all nations have an equal interest in their apprehension and prosecution". The United Nations Convention against Torture (UNCAT) therefore has the important function of ensuring that under international law, the torturer will find no safe haven. Applying the principle of universal jurisdiction, UNCAT also places the obligation on states to either prosecute or extradite any person suspected of committing a single act of torture and doing nothing is not an option here.[4]

However, Bangladesh which has ratified the CAT is therefore bound by Article 4 of the CAT to ensure two different things, namely criminalization of and appropriate penalties for torture. The first obligation of Bangladesh under Article 4 of the CAT is to ensure that all acts of torture, attempt to torture and complicity or participation in torture are offences under its criminal law. The Committee against Torture has repeatedly called on states to list torture as a specific offence in domestic criminal codes and to ensure that the offence of torture is consistent with article 1 of the Convention against Torture. However, it is not the explicit opinion of the Committee that the definition of torture as offered by the CAT should be reproduced exactly in national criminal legislation. Rather States parties must include a definition of torture which covers the CAT definition. The concluding observations of the Committee in respect of the latest report of Sweden were that 'while the specific arrangements for giving effect to the convention in the domestic legal system are left to the discretion of each state party, the means used must be appropriate, that is they should produce results which indicate that the state party has fully discharge its

[4] African Policing Civilian Oversight Forum, *Investigating Torture: The New Legislative Framework and Mandate of the Independent Complaints Directorate* (2010)< http://www.ipid.gov.za/documents/report_released/research_reports/Torture%20Workshop%20Report.pdf> accessed 17 May 2013.

obligations'.[5] But unfortunately, although Bangladesh has twice gone through independence struggles, culminating in full political independence in 1971, its laws have not yet emerged from the 19th century. Meanwhile, policing has for the most part degenerated back into the feudal ages. At no stage, has there been a serious attempt to modernize it or to take advantage of significant developments happening elsewhere in the world. Legal and investigative reforms are moving so slowly as to place Bangladesh completely out of touch with the rapid developments in communications, transportation and sense of time among people in other countries.[6]

And for this it is necessary to make legislative provisions to give effect to Bangladesh's obligations under the aforesaid Convention[7] along with an audit on implementation of the CAT or any of its provision in the domestic arena of a country is utmost importance.[8] And this article focuses all the normative compliance of Bangladesh's international obligation regarding torture including both the positive assertion and the grim reality regarding this in order to find out the prevailing situations of Bangladesh towards the anti torture regime.

2. Analyzing Bangladesh's Compliance in Laws

Bangladesh has established itself as a democratic and pluralistic polity through its unwavering commitment to the principles and practices of good governance, democracy, rule of law, and promotion and protection of all human rights and fundamental freedom of all her citizens with particular attention to the rights of women, children, minorities, disabled and other vulnerable sections of her population and has been endeavoring to meet its constitutional obligations as well as its international commitments towards promoting and protecting human rights of its citizens through among others, enacting legislations and adopting administrative measures to implement them, as well as through implementation of several socio-economic development programs.[9] There are numerous sources of law in Bangladesh, ranging from the highest law of the land, the Constitution all the way down to case law. Aside from public law, there is also the possibility to bring civil proceedings for damages in private law. While international law is clear on the

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5 Md. Mahbubur Rahman and Sk. Samidul Islam, 'Obligation of Bangladesh under Article 4 of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984: A Performance Audit' (2006) 10(1 & 2) *Bangladesh Journal of Law* 119, 121.

6 Asian Human Rights Commission, *Bangladesh: the Human Rights Situation in 2006* (2006) < http://www.humanrights.asia/resources/hrreport/2006/Bangladesh2006.pdf> accessed 02 May 2013.

7 See RULAC, above n 3.

8 See Rahman, above n 5.

9 See General Assembly, above n 1.

subject, it is necessary to examine the state of domestic. Law on torture and reparation for its victims and the practical realities of the legal system to fully understand the current legal situation domestically regarding torture and reparation in Bangladesh. Thus an attempt will be made to discuss all these things in this article starting from the compliance in laws and finishes with revealing the grim reality. Therefore it is all about the rights discourse, promotion, protection regime and the prohibition, prevention and de jure eradication of torture domestically.[10]

2.1 Rights Discourse

This part focuses on the obligation to implement the prohibition of torture as a norm of *jus cogens*, compliance in enacting and implementing legislation, review of policies, procedures and practices in Bangladesh's perspective. Starting the compliance in laws the thesis has firstly the supreme law of the Republic i.e. the Constitution and the other existing laws along with certain policies and bills of Bangladesh providing the prohibition of torture in absolute term or other.

2.1.1 Constitution and the Prohibition of Torture

The Constitution of the People's Republic of Bangladesh has the prohibition of torture in absolute terms in various articles with an anti-torture spirit in the whole. So torture or cruel, inhuman or degrading treatment in police custody or jail custody are not permissible in any way or other under the Constitution and any such act is unconstitutional and unlawful.[11] Every day it is seen the casual way in which the matter of arrest and remand is dealt with in court. Regularly accused persons are remanded for the purpose of interrogation and extortion of information by application of force contrary to the spirit of the whole Constitution.[12] the Protection of the fundamental rights of individuals is the central edifice on which the concept of democracy is based. All instruments and mechanics of a democratic system of government are meant to protect these rights. These rights cannot be curtailed, abridged or compromised except in accordance with law. However, the very foundation of a democracy is shattered and frustrated if the basic rights of its people cannot be protected or enforced through legal means. On the recognition of the above, the framers of the Constitution took utmost care and gave maximum emphasis on the constitutional provisions guaranteeing protection and enforcement of fundamental human rights of its people.[13] And it should be mentioned that the

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10 Bangladesh Rehabilitation Centre for Trauma Victims (BRCT),) *Broken Promises: The State of Reparation for torture Victims in Bangladesh* (2006).

11 *Bangladesh Legal Aid and Services Trust (BLAST) v Bangladesh* (2003) 55 DLR (HCD) 363, 373.

12 Mahmudul Islam, *Constitutional Law of Bangladesh*, (Mullick Brothers, 3rd ed, 2012) 279.

13 Bangladesh Legal Aid and Services Trust (BLAST), *Seeking Effective Remedies: Prevention of Arbitrary Arrests and Freedom from Torture and Custodial Violence* (2010).

Proclamation of Independence of 10th April, 1971 which furnished the basis of the Constitution of Bangladesh indicated the willingness of the nation to submit to the obligations under international law.[14] Since the Constitution of Bangladesh which embodies the principles and provisions of the Universal Declaration of Human Rights where freedom from torture is described as a basic human rights, [15] this nation's Declaration of Independence where, human rights issues have received considerable public and governmental attention, the Constitution of Bangladesh, adopted on 4 November 1972, declared that the Republic shall be a democracy in which fundamental rights and freedoms and respect for the dignity and worth of the human person shall be guaranteed.[16] The provisions of the Constitution that pertain to international law[17] deal with two main issues. One is that international relations and the other international treaty. It is clear that constitutional provision on international law is normative in character and is the embodiment of principles of *jus cogens*. It reflects to a large extent, the desire of Bangladesh to become an active member of the international community. This notion is reinforced by the fact that article 8(2) of the Constitution declares that fundamental principles of state policies shall be fundamental to the governance, shall be applied in the making laws, shall be a guide to the interpretation of the Constitution and of the other laws of Bangladesh.[18] The Constitution sought to establish a welfare State and the preamble declared the fundamental aim of the state to be the realization through democratic process of a socialist society, free from exploitation: a society in which the rule of law, fundamental human rights and freedom, equality and justice would be ensured. The concept of a welfare state was further strengthened by the fundamental principles of state policy which set out the economic, social and political goals of the Constitution.[19] It is therefore required to take note of the scheme and objectives of the Constitution as evidenced by those principles of state policy and cannot construe any provision contrary to such principles of state policy unless the language of a

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14 It declared that the elected representatives of the people of Bangladesh would undertake to observe and give effect to all duties and obligations that developed upon themselves as a member of the family of nations and to abide by the Charter of the United Nations. See Sheikh Hafizur Rahman Karzon and Abdullah-Al Faruque, 'Status of International Law under the Constitution of Bangladesh: An Appraisal' (1999) 3(1) *Bangladesh Journal of Law* (2006)23, 26.

15 See General Assembly, above n 1.

16 Richard Greenfield, 'The Human Rights Literature of South Asia' (1981) 3(3) *Human Rights Quarterly* 129, 130.

17 *Constitution of the People's Republic of Bangladesh 1972,* Art 25.

18 See Karzon, above n 14, 27.

19 See Islam, above n 12, 19.

provision is so clear as to convince the court that in that particular instance the framers wanted to make a departure.[20]

And also starting with that, the Constitution categorically and emphatically enshrined in its Part III the fundamental rights of the people[21] where no law could be made which was inconsistent with these rights and no action could be taken by the government in derogation of such rights. To that extent, the power of the Parliament and the Executive was limited since these are basic rights which cannot be denied. In 1650, Grotius, the Dutch political thinker, propounded a theory that when a sovereign of a state infringes the basic human rights of his subjects, it becomes an international question and the sovereign forfeits his right to rule under the law of nations and other nations may be justified in intervening. Though the theory had no immediate impact, it drew the attention of the contemporary political thinkers and by the next century it was being considered that every man has certain natural and inalienable rights necessary for the development of his personality which should be inviolable.[22] The rights guaranteed by Part III of the Constitution can be classified into two groups. One the one side fall the rights which are general in nature covering the whole range of human activities and on the other fall the rights in respect of specific activities. Irrespective of the subject matter of legislation, every law must satisfy the requirements of art. 27 and 31. Article 27 is a guarantee against discrimination both in conferment of privileges and imposition of liabilities. Article 31 prohibits detrimental action affecting individuals otherwise than in accordance with law. This is an analogue of the due process concept of the American jurisdiction[23] and article 32 provides a protection in respect of deprivation of life and personal liberty.[24] However, these host of rights provide for a number of rights as fundamental which the state is prohibited from transgressing but the very purpose stated in the preamble necessitates limitations on the exercise of fundamental rights and the framers of the Constitution provided the limitations, striking a fine balance between the individuals' freedoms and the governmental needs for the welfare of the community.[25] And, considering human proneness to abuse freedom and ingenuity to misuse legal protection, the Constitution has provided for checks and balances where applicable. At the same time considering necessity of some discretionary power needed by the government to protect public interests and maintain law and order, it has provided for few circumstances when certain fundamental rights can be

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20 Ibid, 42.
21 See BLAST, above n 13.
22 See Islam, above n 12, 125.
23 *Mujibur Rahman v Bangladesh* (1992) 44 DLR (AD) 111.
24 See Islam, above n 12, 133.
25 Ibid, 129.

temporarily taken away by the government only in accordance with law.[26] And in support of that article 26 provides that all existing laws inconsistent with the fundamental rights as provided in Part III shall to the extent of the inconsistency become void on the commencement of the Constitution and the state shall not make any law inconsistent with those rights.[27] 'State' as is defined in art. 152 to include Parliament and the expressions 'all existing law' and 'state shall not make law' clearly show that the prohibition of art. 26 is principally addressed to Parliament. It must be understood that the provisions of articles 27 to 29 and 31 to 44 are primarily limitations on the plenary power of legislation of Parliament and these provisions are to be interpreted accordingly otherwise the purported entrenchment of those arts. "would be little more than a mockery". And the term 'law' is defined in art. 152 to include rules, regulations and all those instruments, customs and usages which have the force of law. Any notification issued under any statutory provision has the force of law[28] and an administrative instruction which has the precision of rules and are general in nature may have the force of law if issued by authority competent to alter or amend the rules.[29] The prohibition of art. 26 is not only applicable to the Acts of Parliament, but to all those which come within the definition of law. As a law cannot be inconsistent with the provisions of Part III of the Constitution, executive and administrative actions, which must have the backing of law to encroach upon the rights of individuals, cannot also infringe the fundamental rights guaranteed by Part III. When rights are guaranteed by the Constitution in achieving the aims and objectives stated in the preamble, those rights are to be liberally interpreted and the exceptions provided in the Constitution are not to be interpreted in a manner which renders those rights inconsequential or illusory.[30] The court will employ intensive level of scrutiny in here in assessing the lawfulness of the exercise of public powers when fundamental rights are at stake.[31]

However, according to the article 27 of the Constitution, all citizens are entitled to be treated in accordance with the law of the land administered by the ordinary law courts and it is a fundamental principle of law that every person is innocent before the law until proven guilty. Hence, until it is proved in court with all the safeguards provided by our criminal justice system, that a person is guilty, he or she should not be branded a "criminal" and in no event should he be subject to the process of extra-

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26 See BLAST, above n 21.

27 See Islam, above n 25.

28 *Bangladesh v Shamsul Huq* (2009) 59 DLR (AD) 54.

29 *Bangladesh v Shafiuddin* (1998) 50 DLR (AD) 27; *West Pakistan v Din Mohammad* (1964) 16 DLR (SC) 58; *Naseem Ahmed v Azra Feroze Bakth* (1968) 20 DLR (SC) 78.

30 *Jibendra Kishore v East Pakistan* (1957) 9 DLR (SC) 21, 44; *Pakistan v Syed Akhlaque Hussain* PLD (1965) (SC) 527. 580.

31 *Bugdaycay v Secy. of State of Home Deptt.* (1987) (AC) 514; *R v Secy. of State for Home Deptt.* (1993) 4 All E.R. 539.

judicial execution practiced by law enforcers.[32] In modern times both state constitutions and international human rights instruments, have explicitly provided that arrest can only be made in accordance with law. However, the article 31of the Constitution guarantees the protection of law. It has two parts; one provides that the citizens and the residents of Bangladesh have the inalienable right to be treated in accordance with law and the other states that no action detrimental to the life, liberty, body, reputation or property of any citizen or resident of Bangladesh shall be taken except in accordance with law. The second part is illustrative of the first. Article 31is wider in its scope and operation than the due process clause of the American Jurisdiction in as much as it covers the entire range of human activities and is attracted when a person is adversely affected by any state action irrespective of the question whether it affects life, liberty or property.[33] This article must be read as guaranteeing a fundamental right and as a limitation on the power of Parliament in the enactment of laws. And finding its place in Part III it not only speaking about procedure but also cannot but be taken to be an incorporation of both substantive and procedural 'due process' as is known in the American jurisdiction[34] and the expression 'law' must mean reasonable and non-arbitrary law in both substantive and procedural aspects. Procedural due process implies procedures that the government must follow before it takes action detrimental to life, liberty, body, reputation and property[35], while substantive due process requires the government to have adequate reasons for taking away or detrimentally affect life, liberty, body, reputation and property[36]. Because of the provision of art. 31of the Constitution arbitrariness in all fields is prohibited, all laws must be tested for reasonableness. The Constitution boldly proclaims the establishment of rule of law as one of the prime objectives and incorporates article 31 as a fundamental right. As a result the concept of reasonableness pervades the entire Constitution and the provision of the Constitution cannot be interpreted in a manner which will in any way shelter arbitrariness in any degree or form.[37] Constitutional enactment should be interpreted liberally and not in any narrow or pedantic sense.[38] In interpreting a constitution, the widest construction possible in its context should be given according to the ordinary meaning of the words and each general word should be held to extend to all ancillary and subsidiary matters.[39] And as a general rule a constitutional provision is held to

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32 Arafat Hossain Khan, *Stop Extra Judicial Killings: Respect and establish an effective judiciary* (2010) <http://www.blast.org.bd/news/news-reports/101-stopextrajudicialkillings> accessed 19 May 2013.

33 See Islam, above n 12, 230.

34 See above n 23, 122.

35 *Honda Motor Co. v Oberg* (1994) 512 US 415.

36 *State Farm Mutual Automobile Insurance v Campbell* (2003) 548 US 408.

37 See Islam, above n 12, 136.

38 *C.P. & Berar Motor Spirit Sales Tax Act,* AIR 1939 FC 1*; Anwar Hossain Chowdhury v Bangladesh,* 1989 9 BLD (Spl) 1; See above n 23; *James v Commonwealth of Australia* (1936) AC 578, 614.

39 *Nur Hossain v East Pakistan* (1959) 11 DLR (SC) 423; *Golam Ali Shah v State* (1970) 22 DLR (SC) 247; See above n 23.

be mandatory unless it appears from the express terms thereof or by necessary implication from the language used that is intended to be directory.[40]

However, freedom from arbitrary arrests is usually grounded in constitutional provisions. Article 32 of the Constitution encapsulates this freedom. In this article 32 the conventional right to liberty was understood to have restricted the power of the state to arrest a citizen only to the situations or instances where there were reasons to believe that a citizen has committed a serious crime and continued denial of the right to personal liberty which was possible only upon conviction, through a fair and open trial on a charge of having committed a crime which was punishable by imprisonment.[41] In other words, though the law authorizes preventive detention and arrests on suspicion, yet such derogation of liberty must also meet other standards carved out by judicial pronouncements. The ambit of these requirements and the fulfillment of the conditions constitute the real parameters of the right to personal liberty. In general terms detention is authorized for 'prejudicial acts' while arrests can be made on valid suspicion of criminal wrong-doing. It follows from these propositions that it is the duty of the court to ensure that the conditions or requirements laid down by law is strictly adhered to. The deprivation of personal liberty must satisfy the requirement of 'in accordance with law' or 'under the due process of law' not only when the deprivation is authorized by law but also when the requirements and conditions embedded in the authorization have been meticulously followed.[42]

And the deprivation of life or personal liberty can well be covered and protected by art. 31, but in view of the fact that deprivation of life or personal liberty is far more serious a matter than detrimental action in respect of life or personal liberty, the framers of the Constitution thought it necessary to make a separate provision in respect of deprivation of life or personal liberty. Thus detrimental action short of deprivation in respect of life or personal liberty will be covered by article 31, while deprivation of life or personal liberty must fulfill the requirement of art. 32. The expression 'liberty' has a personal content in it. So when the framers of the Constitution used the expression 'personal liberty' in art. 32 after using the term 'liberty' in art. 31, the expression 'personal liberty' must have a narrow connotation meaning freedom from bodily restraint.[43] And a casual reading of Articles 31 and 32 where the requirement of 'in accordance with law' mentions twice may indicate identity and hence, repetitions, as both the Articles require that actions in derogation

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40 *Osman Gani v Moinuddin* (1975) 27 DLR (AD) 61.

41 Shahdeen Malik, 'Arrest and Remand: Judicial Interpretation and Police Practice' (2007) (Special Issue) *Bangladesh Journal of Law* 259, 262.

42 Ibid, 265.

43 In *Maneka Gandhi v India* (1978) AIR (SC) 597.

of liberty may only be taken in accordance with law. A seeming repetition of a provision, requirement or norm in a constitution cannot be taken as superfluous or redundant and must be taken to import two different meanings or requirements. Hence by providing that deprivation of life and liberty must be affected only in accordance with law, the Constitution sets a higher standard for laws which purport to deprive life and liberty. While laws affecting body, reputation and property have to be reasonable and non-arbitrary, those touching upon life and liberty must in addition to being reasonable and non-arbitrary also indicate other compelling state or social interest. Furthermore, while many constitutional rights are subject to reasonable restrictions, yet the right to personal liberty though not absolute must be judged by yard-sticks of such reasonableness which are more exacting and clearly and immediately connected to greater interest of the society and the state. The expression 'in accordance with law' does not include any law, but only laws which are not violative of fundamental rights, and incorporates both procedural and substantive safeguards. If personal liberty could be curtailed by any law, i.e. whimsical and arbitrary, the protection against deprivation of liberty would become meaningless. Hence the real import of protecting personal liberty in two Articles of the Constitution lies in the fact that laws depriving personal liberty must be a reasonable legislation reasonably applied.[44] No right is so basic and fundamental as the right to life and personal liberty and the exercise of all other rights is dependent on the existence of this unalienable right. Also the core essence of Articles 31 and 32 is the right to access to justice and fair trial, which is denied outright in the face of extra-judicial recourse.[45] While there a is difference of opinion as to the actual meaning of 'rule of law', the framers of the Constitution after mentioning 'rule of law' in the preamble, took care to mention the other concepts touching the qualitative aspects of law, thereby showing their adherence to the concept of rule of law as pronounced by the latter viewers. If the relevant paragraph of the preamble is read as a whole in its proper context, there remains no doubt that the framers of the Constitution intended to achieve 'rule of law'. To attain this fundamental aim of the state, the constitution has made substantive provisions for the establishment of a polity where every functionary of the state must justify his action with reference to law. Here 'law' does not mean anything that Parliament may pass. Arts. 27, 31 and 32 have taken care of the qualitative aspects of law and forbid discrimination in law or in state actions, while arts. 31 and 32 import the concept of due process, both

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44 See Malik, above n 41, 266-267.

45 Md. Tajul Islam, *Extra-Judicial Killings in Bangladesh: 'Cross-fires' or Violations of Human Rights?* (2010)<http://www.nipsa.in/extra-judicial-killings-in-bangladesh-cross-fires-or-violations-of-human-rights/>, accessed 07 May 2013.

substantive and procedural, and thus prohibit arbitrary or unreasonable law or state action.[46]

However, the arrest and detention of individuals are actions detrimental to liberty covered by art. 31. Yet separate provisions have been made in art. 33 to safeguard the individuals against arbitrary and unreasonable arrest and detention. Thus any law providing for arrests or detention to be valid must not only be reasonable and non-arbitrary to satisfy the requirement of art. 31, it must also be consistent with the provisions of article 33[47] where the rights of an arrested person confers three constitutional rights or safeguards upon a person arrested and they are review by an advisory board, right to communication of grounds of detention, right of fight against the detention. There is nothing in this section which provides that the accused be furnished with the grounds for his arrest. It is the basic human right that whenever a person is arrested he must know the reasons for his arrest. The clause (1) of the Article 33 provides that the person who is arrested shall be informed of the grounds for such arrest. It is true that no time limit has been mentioned in this Article but the expression 'as soon as may be' is used. This expression 'as soon as may be' does not mean that furnishing of grounds may be delayed for an indefinite period. According to one explanation, 'as soon as may be' implies that the grounds shall be furnished after the person is brought to the police station after his arrest and entries are made in the diary about his arrest. It is the duty of everyone in the country to adhere to the provisions of the Constitution since it's the Supreme law of the country and shall prevail over any other law. The Constitution not only provides that the person arrested shall be informed of the grounds for his arrest, but also that the person arrested shall not be denied the right to consult and to defend himself by a legal practitioner of his choice. From this provision it has been clear that immediately after furnishing the grounds for arrest to the person, the police shall be bound to provide the facility to the person to consult his lawyer if he desires. If these two rights are denied, this will amount to confining him in custody beyond the authority of the Constitution.[48]

However article 35 of the Constitution where 'torture' is directly prohibited as a fundamental right[49] which states that no person shall be subjected to torture or cruel, inhuman or degrading punishment or treatment. Even a person accused for criminal

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46 *West Pakistan v Begum Shorish Kashmiri* (1969) 21 DLR (AD) 1, 12.

47 See Islam, above n 12, 134.

48 See above n 11, 371.

49 Asian Human Rights Commission, *Lesson 2: The Practice of Torture and Relevant Legal Provisions in 10 Asian Countries: Bangladesh: Legal Framework Regarding Torture* (2012) < http://www.humanrights. asia/resources/journals- magazines/hrschool/lesson-61/lesson-2-the-practice-of-torture-and-relevant-legal-provisions-in-10-asian-countries> accessed 30 April 2013.

offence has the right to an independent, impartial trial which has been articulated in article 35(3) that every person accused of a criminal offence shall have the right to a speedy and public trial by an independent and impartial court or tribunal established by law.[50] As regards the custodial death and torture Clause (4) of the Article 35 clearly provides that no person accused of an offence shall be compelled to be witness against himself. So, any information which may be obtained or extorted by taking an accused on remand and by applying physical torture or torture through any other means, the same information cannot be considered as evidence and cannot be used against him. Clause (4) of Article 35 is so clear that the information obtained from the accused carries no evidentiary value against the accused person and cannot be used against him at the time of trial. Through judicial pronouncements, it is also establishment that any statement made by any accused before a police officer in course of his interrogation cannot be used against any other accused. So, it is not understand how a police officer or a Magistrate allowing remand can act in violation of the Constitution and provisions of other laws and can legalize the practice of remand. The use of force to extort information can never be justified since the use of force is totally prohibited by the Constitution. In this connection, clause (5) of Article 35 of the Constitution may be referred which provides that no person shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment. This clause is preceded by clause (4) where it is provided that no person accused of any offence shall be compelled to be a witness against himself. Due to the use of the word "compelled" in clause (4), it may be presumed that the framers of the Constitution were apprehensive of use of force upon an accused. So, it is found 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 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 person is totally against the spirit and explicit provisions of the Constitution. So, the practice is also inconsistent with the provisions of the Constitution.[51]

2.1.2 Torture and Other laws

In this part other laws include the most controversial laws which are used for the purpose of torture generally but they are actually not enacted for that purpose. Among others the thesis has procedural laws, criminal laws, law of evidence anti-torture laws of the law enforcing agencies, torture, major crimes and the Rome Statute and lastly a draft Bill criminalizing torture, all of which focuse the anti-torture regime existing in Bangladesh.

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[50] Assignment Point, *Assignment on Human Dignity and Torture in Bangladesh* (2013)< http://www.assignmentpoint.com/arts/law/assignment-on-human-dignity-and-torture-in-bangladesh.html> accessed 11 June 2013.

[51] See above n 11, 370-371.

2.1.2.1 Procedural Laws

Within the procedural laws it's the Code of Criminal Procedure, with the special sections nessary 167, 54, 61, 163, 132, 197 fous that even if all these are the most controversial sections but following those in totality gives no scope of abusing it for the purpose of torture. Section 167 provides that, when investigation cannot be completed in twenty four hours of the arrest, a magistrate can authorize the detention of an accused in police custody for up to 15 days for further investigation.[52] Under the following two circumstances a person can be arrested without warrant and to be produced before the Magistrate if the investigation cannot be completed within 24 hours; and if there are grounds for believing that the accusation or information received against the person is well founded.[53] This section provides that if the FIR is complete in that case the accused arrested in this case must be forwarded to the nearest judicial magistrate within 24 hours, but if the materials which are very vital are not found in that case the police may for the ends of justice and for the investigation forwarded to the nearest Magistrate beyond 24 hours.[54] The police are required under this section to transmit to the nearest Magistrate copies of the entries in the diary relating to the case.[55] If the police do not transmit copies of the entries in the police diary, the Magistrate will have no jurisdiction to direct detention of the accused. Though there is no procedure in the Code of Criminal Procedure authorizing a Magistrate to order arrest of a person who he thinks is guilty of the commission of an offence unless he has taken cognizance of the case. This section applies only when the police are investigating the case; that Magistrate who makes an investigation under this section keep the accused persons in custody. The mere leveling of an accusation against a person in the FIR does not make him accused person within the meaning of this section, until and unless some evidence implicating such person in the commission of offence is available. It is the duty of the Magistrate to inform the accused that he is a Magistrate and a remand has been applied for, and whether the accused has any objection to the grant of that remand. If the Magistrate in his discretion refuses to remand accused to police custody a superior Magistrate cannot direct him to do so. If the Magistrate is permitted to make orders in police station where the accused have no means to have recourse to a

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52 See Malik, above n 41, 273-274.

53 See above n 11, 363, 369.

54 M.A. Wahab Ex Justice, *The Code of Criminal Procedure*. Dhaka: (Kamrul Book House, 2007) 333.

55 This case diary is B.P. Form No. 38. In Police Regulation No. 264, details are given as to how this diary shall be maintained. Regulation No. 263 provides that in the diary, the police officer is to show that time at which the relevant information reached him, the time at which he began and closed his investigation the place or visited by him, and statement of the circumstances ascertained through his investigation.

lawyer or their relatives, the whole significant of section 167 of the Code of Criminal Procedure would disappear and it will amount to a farcical performance.[56] And it was not at all the intention of the law giver that the police officer should at his own sweet arrest anybody he likes, although he may be a peace loving citizen of the country.[57] The Code enjoins on the police and the Magistrate strict compliance with the provisions of section 167 of the Code.[58] And the Code says that the judicial officer while granting remand should weight the evidence to decide whether the accused should be detained in custody or not, the remand to police or judicial custody being an infringement of liberty[59] should not be granted in a mechanical manner or as a matter of course. The Application of mind is a must and remand should be granted in case of real necessity. And in the absence of a reasonable cause no further remand should be granted.[60] If the police officer justifies the arrest only by saying that the person is suspected to be involved in a cognizable offence, such general statement cannot justify the arrest.[61] A vague information that a crime was likely to be committed would not justify an arrest under this section. 'Credible information' or 'a reasonable suspicion' under this section upon which an arrest can be made by a police officer must be based upon definite facts and materials placed before him, which the officer must consider for himself before he can take any action.[62] And if detention in police custody is ordered, the Magistrate must record his reasons.[63] It is to be remember that in many ways, the power conferred to police by section 167 to ask the magistrate for remand for further investigation is an exceptional power to be applied only in exceptional instances. In ordinary course of things, police must have enough credible and justifiable information implicating the arrested person in the commission of a crime.[64]

Another controversial section is section 54 which specifies the cases where the police officer may arrest without a warrant and it is specified in Schedule II, column 3 of the Code. The section enumerates nine categories under which the police may arrest without warrant.[65] Section 54 of the Cr. P. C. lays down certain procedures to be observed once an arrest has been made. This includes that the accused must be produced before a magistrate within 24 hours, and that a magistrate must give prior

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56 See Wahab, above n 54.
57 Ibid, 48.
58 *Aftabur Rahman v State* (1993) 45 DLR 593.
59 Zahirul Huq, *Law and Practice of Criminal Procedure* (Ayesha Mahal, 1996) 288.
60 See Wahab, above n 54, 340.
61 See above n 11, 115.
62 See Wahab, above n 54, 46-48.
63 See Huq, above n 59.
64 See Malik, above n 41, 277.
65 See Wahab, above n 54, 45.

permission if police want to hold a prisoner for longer.[66] The object of section 54 is to give widest powers to the police in cognizable cases and the only limitation is the necessary requirement of reasonability and credibility to prevent the misuse of the powers. 'Reasonable suspicion' here means a *bonafide* belief on the part of the police officer that an offence has been committed or is about to be committed. And the powers under this section must be cautiously used.[67] Now-a-days in most of the cases different persons are arrested under section 54 of the Code on political grounds in order to detain him under the provisions of section 3 of the Special Powers Act, 1974. A person is detained under the preventive detention law not for his involvement in any offence but for the purpose of preventing him from doing any prejudicial act. So, there is no doubt that a police officer cannot arrest a person under section 54 of the Code with a view to detain him under section 3 of the Special Powers Act, 1974. Such arrest is neither lawful nor permissible under section 54 since a police officer may arrest a person under this section, under certain conditions and the main condition is that the person arrested is to be concerned in a cognizable offence and the purpose of detention is totally different. If the authority has any reason to detain a person under section 3 the Special Powers Act, the detention can be made by making an order under the provisions of that section and when such order is made and handed over to the police for detaining the person, the order shall be treated as warrant of arrest and on the basis of that order, the police may arrest a person for the purpose of detention.[68] However, when a person is arrested under section 54 without a warrant, the provisions of section 61 of the Code applies in his case. Section 61 provides that no police officer shall detain in custody a person arrested without warrant for a period exceeding 24 hours unless there is a special order of a Magistrate under section 167 of the Code. So, it is found that there is reference of section 167 in section 61 of the Code. Section 61 implies that if there is a special order of a Magistrate under section 167, the police may keep a person in its custody for more than 24 hours.[69] The object of sec. 61 is two-fold; one that the law does not favor detention in police custody except in special cases and that also for reasons to be stated by the Magistrate in writing and secondly, to enable such a person to make a representation before a Magistrate.[70] However, it needs to be remembered that grant of remand in every case should not be a mechanical exercise and it must be ascertained by a Magistrate concerned that the accusation is well

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66 UNHCR, *Country of Origin Information Report – Bangladesh* (2009) < http://www.unhcr.org/refworld/docid/4a8d005b2.html> accessed 16 January 2013.

67 See above n 11, 64-65.

68 See above n 11, 372.

69 Ibid, 368.

70 *Gauri Shankar v State of Bihar* (1972) AIR (SC) 711, 715.

founded and remand would render substantial assistance in investigation of the matter.[71]

Among the others, section 163 prohibits a police officer or a person in authority from offering or making any inducement, threat or promise[72] to any accused while recording his statement under section 161 of the Code.[73] And section 132 provides for protection against prosecution for acts done in good faith except with the sanction of the government. However, this section should therefore be construed broadly. It is the policy of the Legislature to afford adequate protection to public servants, to ensure that they are not prosecuted for anything done by them in the discharge of their official duties without reasonable cause. And no sanction is necessary when the police officer is not an officer-in-charge of a police station as his action is illegal; nor when police officers are charged under sections 302, 304, 326, 148 of the Penal Code.[74] However, section 197 provides that at any time before taking cognizance of an offence the proper authority can grant sanction and the prosecution is entitled to produce the order of sanction. The bar may be removed when sanction is given by the Government. This section gives protection from false, vexatious or *malafide* prosecution to important public servant performing onerous and responsible duties fearlessly. It does not mean that the section has laid down a wall around the public servants from prosecution for criminal offences committed by them, but the protection extended only to a public servant but not all the servants. This section does not bar to make complaint or to submit a police report but only bars a Magistrate from taking cognizance of the offence on such complaint. The court must take sanctions from the prosecution to proof that the prosecution has really takes sanction from the appropriate court.[75] And it is not every offence committed by a public servant that requires sanction for prosecution under section 197 of the Code nor even every act done by him while he is actually engaged in the performance of his official duties but if the act complained of is directly concerned with his official duties so that, if questioned, it could be claimed to have been done by virtue of the office, then sanction would be necessary.[76] However, criminal act such as outraging the modesty of a women and killing a man while the culprit was being chased, has no connection with acts done or purported to be done in the discharge of public duty[77] and if a public servant commits an offence of cheating or abets another to cheat, the offence is not within the span of his official duty and so

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71 See Wahab, above n 56, 55.
72 Ibid, 299.
73 See above n 11, 370.
74 See Wahab, above n 54, 166.
75 Ibid, 446.
76 *Sudhir Das Gupta v Bhupal Chandra Chowdhury* (1986) 38 DLR 343.
77 *Rakanuddin Bhuiya v The State* (1966) 18 DLR 412.

no sanction is necessary. The police can investigate into the conduct of public servant for alleged offences against the law even before the sanction of the government. The question of sanction under section 197 will arise only when a charge is preferred before a court and the court's function begins.[78]

2.1.2.2 Criminal Laws

The Penal Code, 1860 is the principal penal legislation of Bangladesh. It defines and prescribes punishments for various offences. Besides, there are other penal laws in Bangladesh but the criminal laws prevailing in Bangladesh do not have the definition of torture in particular. However, there are a number of offences that penalize conduct that may amount to torture[79] in line with the article 1 of the CAT.[80] The Penal Code, 1860 criminalizes hurt and grievous hurt.[81] And all these offences are widely categorized for the purpose of punishment where these offences may in certain circumstances cover the offence of torture[82] as defined by the CAT.[83] Among

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78 See Wahab, above n 54, 451-452.

79 Conduct amounting to torture may be prosecuted under the following offences: - Voluntarily causing hurt to extort confession or to compel restoration of property (punishable by up to seven years imprisonment and liable to a fine, and, if the hurt caused is grievous, the maximum punishment is ten years imprisonment and liability to pay a fine); - Wrongful confinement to extort confession or compel restoration of property (maximum punishment of three years imprisonment and fine1); - A public servant disobeying the law, with intent to cause injury to any person (up to one year imprisonment and/or a fine); - A public servant concealing the design to commit an offence that it is his or her duty to prevent (punishment depends on the imprisonment or fine that is provided for the related offence.

80 See Wahab, above n 54, 138.

81 Different categories of hurt and grievous hurt consists of , amongst others voluntarily causing hurt not in consequences of grave and sudden provocation, voluntarily causing hurt with dangerous weapons or means, voluntarily causing hurt in consequences of grave and sudden provocation, voluntarily causing hurt with the intention to extort property or to constrain to an illegal act, voluntarily causing hurt with the intention to extort confession or to compel restoration of property, voluntarily causing grievous hurt not in consequences of grave and sudden provocation, voluntarily causing hurt with the intention to extort property or to constrain to an illegal act, voluntarily causing hurt with the intention to extort confession or to compel restoration of property.

82 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* 10 Dec. 1984, G.A. Res. 39/46, U.N. GAOR, 39th Sess. Article 1(1) CAT defines torture as follows: For the purposes of this Convention, torture means 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.

83 See Wahab, above n 54, 141.

those, section 330 that provides for voluntarily causing hurt to extort confession or to compel restoration of any property,[84] the principle object is to prevent torture by the police but the section covers every kind of torture for whatever purpose it may be intended. This section requires that the assault should be proved to be solely for the purpose of extorting confession or restoration of property and has to be read along with sections 30, 39 and 327[85] and for voluntarily causing grievous hurt to extort confession or to compel restoration of any property[86] seeks to punish if suspect is tortured causing him grievous hurt. Sections 330 and 331 as mentioned earlier are similar, the only difference being that this is an aggravated form and the hurt caused is grievous.[87] There is another offence defined as wrongful confinement of a person to extort from him or from any other person interested in him any confession or any information which may lead to the detection of an offence or misconduct is a punishable offence under the Penal Code, 1860.[88] To some extend certain acts of torture can be punished under this penal provision.[89] Also section 348 that corresponds to section 330 substantially and may be read along with sections 30, 40 and 330 of the Penal Code, the only difference being the nature of the act made punishable. A police officer detaining a person not concerned with investigation for more than 24 hours is punishable under this section.[90] In case of

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84 Whoever voluntarily causes hurt, for the purpose of extorting from the sufferer or any person interested in the sufferer, any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the sufferer or any person interested in the sufferer to restore or to cause the restoration of any property or valuable security or to satisfy any claim or demand; or to give information which may lead to the restoration of any property or valuable security shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine.

85 Zahirul Huq, *The Penal Code* (Anupam Gyan Bhandar, 2001) 663.

86 Section 331:Whoever voluntarily causes grievous hurt, for the purpose of extorting from the sufferer or any person interested in the sufferer, any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the sufferer or any person interested in the sufferer to restore or to cause the restoration of any property or valuable security or to satisfy any claim or demand; or to give information which may lead to the restoration of any property or valuable security shall be punished with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.

87 See Huq, above n 85, 664.

88 Section 348:Whoever wrongfully confines any person for the purpose of extorting from the person confined or any person interested in the person confined, any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the person confine or any person interested in the person confined to restore or to cause the restoration of any property or valuable security or to satisfy any claim or demand; or to give information which may lead to the restoration of any property or valuable security shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine.

89 See Rahman, above n 5, 142.

90 See Huq, above n 85, 684.

personal violence or threats by a police officer, who shall offer any unwarrantable personal violence to any person in his custody, may amount to torture. In that sense, these offences are punishable[91] under the laws regulating the police forces.[92] Also the Penal Code criminalizes criminal intimidation[93] where torture, primarily arising out of severe mental pain or suffering may fall under the offence of criminal intimidation.[94] And under certain aggravating circumstances, culpable homicide[95] may amount to murder. In fact an act of torture cannot be punished as a culpable homicide. The definitions and jurisprudentially basis of these offences are altogether different from each other. Nevertheless the statutory provisions relating to culpable homicide can be relevant and accordingly employed when death is caused as a consequence of torture. However, an attempt to commit torture is punishable under the laws of Bangladesh only to the extent torture is addressed as a criminal offence under the laws of Bangladesh. However, according to the Penal Code, 1860, complicity or participation to in offence depending on the circumstances of a case can be punished as a joint liability or abetment of the offence. The principle of joint liability states that when a criminal act is done by several persons in furtherance of the common intention of all, each of such person is liable for that act in the same manner as if it were done by him alone. On the other hand the abetment of an offence means instigating any person to do the offence or engaging with one or more other person or persons in a conspiracy to commit the offence or intentionally aiding a person to commit the offence. When an offence is committed its abetment is punishable with punishment provided for the offence. Therefore complicity or participation in torture is punishable under the laws of Bangladesh only to the extent torture is addressed as a criminal offence under the laws of Bangladesh.[96] The Penal Code, 1860 also criminalizes criminal force[97] and assault[98]. As per this penal law the

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91 *Police Act 1861,* s 29 and *Dhaka Metropolitan Police Ordinance 1976,* s 53, *Chittagong Metropolitan Police Ordinance 1978,* s 55, *Khulna Metropolitan Police Ordinance 1985,* s 55, *Rajshahi Metropolitan Police Act1992,* s 55.

92 See Rahman, above n 5, 146.

93 It means threatening a person with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with an intention to cause harm to that person or to cause that person to do any act which he is not legally bound to do or to omit ot do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat.

94 See Rahman, above n 5, 145.

95 Culpable homicide means causing death by doing an act with the intention of causing death or with the intention of causing such bodily injury as is likely to cause death or with the knowledge that the doer of the act is likely by such act to cause death.

96 See Rahman, above n 5, 146-147.

97 Criminal force is defined as an intentional use of force to any person without that persons consent, in order to the committing of an offence or without the intention or knowledge of causing injury, fear or annoyance to that person.

term criminal force includes what in English law is called 'battery'. On an analytical look at the penal provisions of Bangladesh concerning criminal force and assault, it is evident that these provisions being very limited in application are not wide enough to deal with the offence of torture although on some occasions some particular aspects of torture can be punished under these provisions.[99]

2.1.2.3 The Evidence Act

It has been observed that the inadmissibility of statements made under torture, as based on international law, does not depend on any further consideration, be they related to the identity of the torturer state or to the persons concerned. This conclusion is in line with the general attitude international law takes towards the practice of torture and therefore underlines that the exclusionary rule 'is a function of the absolute nature of the prohibition of torture'. It may therefore be said that international law provides a comprehensive set of rules to combat torture and that the inadmissibility of evidence found to have been obtained by coercion is an important tool designed to eradicate torture once and for all.[100] The question of the admissibility of such evidence is broken down into several different cases. All those cases come within the exclusionary rule of Article 15 of the the UN Convention against Torture. The article further argues that the inadmissibility is also comprehensive under the right to a fair trial, having regard to the right against self-incrimination and to the unreliability of statements obtained by torture. It is also argued that this exclusionary rule is the part of customary international law and that the very concept of *jus cogens* obliges all states including Bangladesh to distance them from any violation of its substantive content and therefore refuse to accept any evidence obtained by torture.[101] However, the Evidence Act does not permit under various provisions the use of any inducement, influence, and force in making a person to confess.[102] First of all it is the section 24 that provides a confession[103] or

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98 The offence of assault is defined as an act of making any gesture or any preparation with the intention or knowledge of causing any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person. It is to be noted here that mere words do not amount to an assault unless the words used by a person gives to his gestures or preparations such a meaning as may make those gesture or preparations amount to an assault.

99 See Rahman, above n 5.

100 Tobias Thienel, 'The Admissibility of Evidence obtained by Torture under International Law' (2006) 17(2) *The European Journal of International Law* 349, 367.

101 Ibid, 349.

102 Farzana Akhi, *Confession in police remand* (2008) <http://farzanaakhi.blogspot.com/2008/02/remand-and-confession-are-most.html> accessed 12 June 2013.

103 As the term confession is not defined in the Evidence Act, the courts in this sub-continent adopted Stephen's definition of confession given in his Digest of the Law of Evidence. Stephen defined confession as an admission made at any time by a person charged with

admission is evidence against its maker, unless its admissibility is excluded by provisions embodied in the Evidence Act. The provisions of section 24 are general and are intended to exclude confessions which have been improperly obtained. A confession which falls within the mischief of this section is not admissible in evidence. Under section 24 a confession made by an accused is irrelevant in a criminal proceeding if the confession has been made by an accused person to a person in authority[104]; it must appear to the court that the confession has been caused or obtained by reason of any inducement, threat or promise proceeding from a person in authority; the inducement, threat or promise must have reference to the charge against the accused person, and the inducement, threat or promise, in the opinion of the court , be such that it would appear to the court that the accused in making the confession believed or supposed that he would, by making it gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him. All these conditions must cumulatively exist and in deciding whether particular confession attracts section 24, the confession has to be considered from the point of view of the confessing accused as to how the inducement, threat or promise proceeding from a person in authority would operate in his mind. If the confession is caused by inducement, threat or promise, as contemplated by section 24, the whole of the confession is excluded by this section, which excludes proof of all the admissions of incriminating facts contained in a confessional statement. The prohibition also provides in section 25 that covers a confession which was made when the maker was free and not in police custody, as also a confession made before any investigation was begun. A statement or confession made in the course of an investigation may be recorded by a Magistrate under section 164 of the Cr. P.C. subject to the safeguards imposed by that section. Even a confessional first information report to a police officer cannot be used against the accused in view of section 25 of the Evidence Act. And except as provided in section 27, a confession by an accused to a police officer is absolutely protected under section 25 and if it is made in the course of an investigation, it is also protected by section 162 of the Cr. P.C. and a confession to any other person made by him while in custody of a police officer, is protected by section 26 unless it is made in the immediate presence of a Magistrate. These provisions seem to proceed upon the view that confession made by the accused to a police officer or made by them while in custody of police officer are not to be trusted and should not be used in evidence against him. This principle is based upon grounds of public policy and fullest effect should be given to them.

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crime stating or suggesting the inference that he committed a crime. See M. Ansaruddin Sikder, *Law of Evidence* (M. Tanveer Foysal, 1991) 406.

104 A person in authority in section 24 is one who is engaged in the apprehension, detention or prosecution of the accused or one who is empowered to examine him. See Obaidul Huq Chowdhury, *Evidence* Act (Esrarul Huq Chowdhury, 1999) 66.

And the ban, which is partial under section 24 and complete under section 25, applies equally whether or not a person against whom evidence is sought to be led in a criminal trial was, at the time of making the confession in custody. For the ban to be effective the person need not have been accused of an offence when he made the confession. The expression 'accused person' in section 24 and the expression 'a person accused of any offence', have the same connotation and describe the person against whom evidence is sought to be led in a criminal proceeding.[105] However, in case of section 26, custody does not mean custody after formal arrest, but includes any sort of surveillance or restriction or restraint by the police. When a person is called to the police station and is interrogated as an accused in connection with the investigation of a crime, he must be deemed to be in the custody of the police while he is so interrogated and no formal arrest is necessary.[106] Similarly sections 25 and 26 provide bar for not only proof of admissions of an offence by an accused to a police officer or made by him while in the custody of a police officer, but also admissions contained in the confessional statement of all incriminating facts relating to the offence.[107] The objection contained in section 25 and 26 is to prevent the practice of torture etc. by the police for the purpose of extracting confessions from the accused persons.[108] And section 24 and 25 were enacted not because the law presumed the statements to be untrue, but having regard to the tainted nature of the source of the evidence, the law prohibited them from being received in evidence.[109]

There is much of controversy regarding section 27 of the Evidence Act but the real fact is that this section is one of a group of sections relating to the relevancy of certain forms of admissions made by persons accused of offence. It is founded on the principle that even though the evidence, relating to confessional or other statements made by a person, whilst he is in the custody of a police officer, is tainted and therefore inadmissible, if the truth of the information given by him is assured by the discovery of a fact, it may be presumed to be untainted, and is therefore, declared provable in so far as it distinctly relates to the fact thereby discovered. Even though section 27 is the form of a proviso to section 26, the two sections do not necessarily deal with the evidence of the same character. The ban imposed by section 26 is against the proof of confessional statements. Section 27 is concerned with the proof of information, whether it amounts to a confession or not, which leads to the discovery of facts. By section 27 even if a fact is deposed to as discovered in consequence of information received, only that much of the information is

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105 See Sikder, above n 103, 406-407.
106 Ibid, 483.
107 See Sikder, above n 103, 407.
108 Ibid, 469.
109 See Sikder, above n 103, 409.

admissible as distinctly relates to the fact discovered.[110] However, regarding the corroboration of confession, the High Court Division has confirmed in its jurisprudence that convictions based solely on the confession of an accused to a police officer are unsafe, and other corroborative evidence is required.[111] Though the conviction of the maker can be founded on his confession alone, as a rule of prudence the courts require corroboration. There is no legal bar to a conviction being on a voluntary confession if believed to be true, but the rule of prudence does not require each and every circumstances mentioned in the confession with regard to the participation of the accused in the crime must be separately and independently corroborated, nor is it correct that confession can only be corroborated by facts and circumstances discovered after the confession was made. A judicial confession which has been corroborated by other evidence is sufficient for conviction of the accused. But where the version of events given in the judicial confession of the accused was highly improbable and the confession was yet not corroborated by any other evidence and circumstance, the accused was given the benefit of the doubt and acquitted. If there is ocular evidence in a case to which no exception can be taken, then that portion of the confessional statement which is not corroborated by ocular evidence can be discarded by the courts.[112]

2.1.2.4 Anti-torture Laws of the Law Enforcing Agencies

There are certain laws of the law enforcing agencies that portray the anti-torture regime in them. According to the Police Act of 1861 maintaining law and order is the principal function of the police.[113] In addition, the Police Act of 1861 lists the following offences for which a police officer can be disciplined or prosecuted and they are, a willful breach or neglect of any rule or regulation or lawful order, withdrawal from duties of the office or being absent without permission or reasonable cause, engaging without authority in any employment other than their police duty, cowardice and causing any unwarrantable violence to any person in their custody. The penalty for these offences ranges between "a fine of up to three months pay" to "imprisonment of up to three months" or "a combination of both". As mentioned earlier, any aggrieved person can file a criminal case with the police station or with a judicial magistrate against a police officer accused of any offence, such as brutality, harassment, and any abuse of power. The Human Rights Commission is another means of holding the police accountable in cases of misconduct, abuse of power, or police excess. The law authorizes the Commission to

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110 Ibid, 407-408.

111 REDRESS, *Torture in Bangladesh 1971-2004 Making International Commitments a Reality and Providing Justice and Reparations to Victims*. (2004).

112 See Sikder, above n 103, 439.

113 See Point, above n 50.

inquire into complaint of violation of human rights by a person, state or government agency or institution or organization. The Commission can do it *suo-moto* or on a petition presented to it by a person affected or any person on his behalf.[114] However, section 153 of the Police Regulations of Bengal (PRB), 1943 says about the principles governing the use of firearms in the terms that firearms should not be used other than in emergencies. Under the aforementioned section, the use of firearms is applicable only in the following three situations; to exercise the right of private defence of person or property, for dispersal of unlawful assemblies and to effect arrest in certain circumstances.[115] A police officer belonging to the forces of the Metropolitan Dhaka area faces a punishment of up to one year and/or a fine of up to two thousand taka (approximately $33) for personal violence or threats against any person in his or her custody.[116] Furthermore, the Police Act, 1861, Police Regulations of Bengal 1943 and the Dhaka Metropolitan Police Ordinance empower police authorities to impose disciplinary sanctions.[117] In the case of delimiting political interference in the activities of the Police, the Draft Police Ordinance, 2007 in Chapter IV says that the NPC would be a nonpartisan body that would oversee the functioning of the Police Service so as to limit and ideally eliminate political interference.

Another controversial agency in the matter of torture is the RAB but regarding the formation of it, the formation illustrates a common trend in antiterrorism approaches to blur police or military distinctions. The Armed Police Battalions (Amendment) Act, 2003 placed the RAB under the command of the Inspector General of Police and, by extension, the Minister of Home Affairs. The Act requires the RAB to be commanded by an officer not below the rank of Deputy Inspector General of Police or a person of equivalent rank from the army, navy, air force, or other disciplined force. Human Rights Watch notes that the main tasks of the RAB, according to the law, are to provide internal security; conduct intelligence into criminal activity; recover illegal arms; arrest criminals and members of armed gangs; assist other law enforcement agencies; and investigate any offense as ordered by the government. As long as they are within these activities, they are doing it reasonably; there is no possibility of abusing power by them resulting no torture by them.[118]

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114 Dr. Zahidul Islam Biswas, *Police accountability and the 'rule of politics* (2012)< http://www.blast.org.bd/content/news/police-accountability-and-the-rule-of-politics.pdf> accessed on 20 May 2013.

115 See Tajul, above n 45.

116 *Dhaka Metropolitan Police Ordinance 1976*, s 53.

117 See REDRESS, above n 111.

118 Human Rights Initiative, *Bangladesh Country Report: Anti-terrorism Laws and Policing* (2003)<

2.1.2.5 Torture, Major Crimes and the Rome Statute

Bangladesh is the 111th state to ratify the Rome Statute international criminal court of international criminal court and the seventh in Asia to do so, joining Afghanistan, Cambodia, Mongolia, the Republic of Korea, Timor-Leste and Japan. By ratifying the Rome Statute, Bangladesh has demonstrated an important commitment to international justice and working to end impunity for genocide, crimes against humanity and war crimes. With this ratification Bangladesh has become the first country to join the International Criminal Court in South Asia and 111th State party to the Statute. Joining of this international justice system by Bangladesh would grant the region a stronger voice and a more meaningful role in supporting this truly effective mechanism for the protection of human rights and the rule of law.[119] It seems fair to argue that torture could fit very easily into any of the three major crimes, ratifying the Rome Statute and would send a clear signal against impunity in Bangladesh.[120]

2.1.2.6 Torture and Custodial Death Prevention Act, 2013

Bangladesh signed the UN Convention against Torture and Cruel, Inhumane or Degrading Treatment or Punishment on October 5, 1998, during the tenure of an Awami League-led government, promising to create effective legislation and take administrative, judicial or other measures to prevent acts of torture.[121] In pursuance of this obligation a tough new law named the Torture and Custodial Death (Prevention) Act, 2013 that provides for life imprisonment for members of police and other law enforcement agencies if they found guilty of custodial deaths, has been passed by Bangladesh's Parliament. The Bill was introduced a few months after the Parliament first sat in 2009 and was passed nearly five years after ruling Awami League lawmaker Saber Hussian Chowdhury brought it as a Private Member's Bill.[122] It was drafted aimed at curbing tortures by the law enforcement agencies on

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http://www.humanrightsinitiative.org/publications/chogm/chogm_2007/docs/country_reports/071004_chogm07_bangladesh_anti_terrorism_policing_country_report2007.pdf> accessed 30 April 2013.

119 Coalition for the International Criminal Court, *Bangladesh Ratification: CICC Ratification Campaign Backgrounder; Related Members Media Releases; EU Statement* (2010)< http://www.iccnow.org/?mod=newsdetail&news=3868> accessed 30 April 2013.

120 See BRCT, above n 10.

121 The Daily *Star,* 'Life sentence for custodial death, torture convicts', *The Daily Star* (online), 2013 <http://www.thedailystar.net/beta2/news/life-sentence-for-custodial-death-torture convicts/>accessed 28 October 2013.

122 Anisur Rahman, *New Bangladesh Law to Prevent Custodial Deaths* (2013) < http://news.outlookindia.com/items.aspx?artid=814925> accessed 28 October 2013.

common people under custody[123] and to conform to the UN Convention against Torture and Cruel, Inhumane or Degrading Treatment or Punishment, adopted in 1984.[124] However, police torture on Awami League MP Saber Hossain Chowdhury during the previous tenure of the BNP, prompted the leader to frame a law to prevent torture and death in custody of the police and other law enforcement agencies. He said the law would be a big "no" to such human rights violations in Bangladesh.[125] However, the AHRC termed the enactment unique as the Bill was placed in the Parliament as a Private Member Bill by a lawmaker from the Treasury Bench. The enactment is the quintessence of the struggles and demands of the people, survivors of torture, families of extrajudicial executions, and human rights defenders to end the culture of custodial violence in the country. With the passing of this special statute, which criminalizes all forms of custodial violence, Bangladesh shares a covetable position amongst its counterparts in Asia. This law, which will enable everyone in Bangladesh to fight against all forms of custodial violence, is thereby one that draws from both the experience of a human rights group and the personal experiences of a torture survivor. Today, exceptional challenges exist for those that dare to make complaints of custodial violence in Bangladesh. While this has been addressed to a certain extent by the new law, now a complainant can approach the Court to file a complaint against torture and other forms of custodial violence.[126]

As per the law, torture means acts which cause physical or mental pain and are intended to intimidate, coerce or punish someone to obtain information or a confession. It also says that any person who attempts to commit, aid and abet in committing, and conspires to commit an offence shall also be guilty of an offence.[127] Under the law, personnel of Police, Rapid Action Battalion (RAB), Border Guard Bangladesh (BGB), Customs, Immigration, Criminal Investigation Department (CID), Intelligence Agencies, Ansar and Village Defence Party, Coast Guard and other public servants cannot extract confessional statement through torture. Any person attempting to commit, aiding and abetting to commit, or conspiring to commit an offence must be considered as an offender according to this law. The Court will immediately record the statement of any person who declares he was

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123 Kamran Reza Chowdhury, *JS passes bill to stop custodial deaths* (2013)< http://www.dhakatribune.com/law-amp-rights/2013/oct/25/js-passes-bill-stop-custodial-deaths> accessed 28 October 2013.

124 See above n 122.

125 See above n 123.

126 The Financial Express, *AHRC urges BD to implement new law against torture, custodial violence* (2013) < http://www.thefinancialexpress-bd.com/index.php?ref= MjBfMTBfMjdfMTNfMV8yXzE4ODExOQ==> accessed 28 October 2013.

127 See Star, above n 121.

tortured in custody and then order physical examination of the victim by doctors.[128] The new legislation provides for adverse presumption against the State agent, if it is proven that a person under the State's custody has been tortured or has died whilst in custody, the statement said.[129] Besides, any suspect or criminal cannot be physically or mentally coerced or intimidated. The law enforcement agencies could not justify their offences even during war-like situation, threat of war, internal political instability and emergency.[130] And for the first time in Bangladesh, the law addresses delays in investigation and adjudication of the cases of custodial violence.[131] The new law mandates suspension of the accused from service during investigation into the charges, regardless of whether the suspect is a member of a regular law-enforcement agency, the armed forces, or any other government office.[132] The law mandates that investigations into cases of torture will have to be completed within 90 days of registration of a complaint, and the trial will have to be completed within 180 days.[133] The law further says, any aggrieved person can turn to the Court if they thought that the police could not carry out any investigation. In that case, the Court could instruct for a judicial inquiry into the allegation. And for any death in custody, the custodian would be awarded with rigorous life imprisonment or a fine of Tk100, 000. In addition, they must compensate the family members of the affected with Tk 200, 000 also.[134]

2.2 Promotion and Protection Regime

The promotion and protection regime is for ensuring redress for the victims of torture. In general terms, redress in the form of reparation is granted to an injured party to make up for the damage caused by a wrongful act. For torture survivors, the act of procuring reparation, if handled with the proper support and care by assisting parties, may be an important part of the healing process. The pursuit of reparation can be empowering, allowing torture survivors to transform feelings of pain, isolation or stigmatization through a public process that may result in a public acknowledgement that a wrong was committed and that those responsible will be punished. Very often, the term "reparation" is wrongly thought to be synonymous with "financial compensation". Although compensation is a very common form of reparation, it is not the only form. As elucidated in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the UN General Assembly in 2005,

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128 See Rahman, above n 122.
129 See Express, above n 126.
130 See Chowdhury, above n 123.
131 See Express, above n 126.
132 See Rahman, above n 122.
133 See Express, above n 126.
134 See Chowdhury, above n 123.

reparation can include restitution, such as restoration of liberty, legal rights, social status, family life and citizenship; physical and psychological rehabilitation, and legal and social services; satisfaction, which comprises verification of the facts and revelation of the truth, acknowledgment of the suffering, public apology, judicial and administrative sanctions against the perpetrator, commemoration and tributes to the victims; guarantees of non-repetition, to prevent recurrence of similar crimes such as measures to control the military, strengthen the independence of the judiciary, and reform human rights laws; and compensation, which includes any monetary award calculated on the basis of the estimated damage resulting from the crime, including physical and mental pain and loss of opportunities, such as education. However, cultural differences and diversity of backgrounds and experiences can impact on perceptions of reparation.[135] And that is why national authorities commitment to implementing the right to reparation may take many and varied forms. It is unlikely that all victims will find the same form of reparation beneficial or desirable. National authorities should therefore facilitate access to a variety of reparations, including judicial, compensatory, rehabilitative, restitutive, declaratory and commemorative forms. And as all states are obliged to provide reparation to victims of torture, a precondition for successful reparation is that those responsible for making and interpreting laws and policies within the national administration are empathetic to the rights and needs of victims.[136] States are therefore not only obliged to refrain from acts of torture and to take measures to prevent its occurrence, but also have a duty to punish the perpetrators. The right to reparation also entails the obligation of States to afford effective remedies for victims to obtain reparation, including access to justice.[137] In Bangladesh victims may submit a written application to the High Court Division of the Supreme Court that has the power to provide relief for violations of fundamental rights. The court has asserted its competency in this regard that the Constitution of Bangladesh does not provide for the defence of sovereign immunity so there is no bar to awarding compensation to an aggrieved person under writ jurisdiction for a violation of his or her fundamental rights". Thus the possibility exists for constitutional relief in Bangladesh including the others also.[138]

2.2.1 Constitutional Remedies

As a matter of Constitutional law, torture victims may seek relief through a writ application[139] to the High Court Division of the Supreme Court.[140] The High Court

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135 Torture Abolition and Survivor Support Coalition TASSC International, *Reparation* (2011) < http://tassc.org/blog/about-torture/reparation/> accessed 09 May 2013.

136 Paul Dalton, *Some perspectives on torture victims, reparation and mental recovery* (2003) < http://www.article2.org/mainfile.php/0106/63/> accessed 09 May 2013.

137 REDRESS, *Reparation for Torture* (2003).

138 See BRCT, above n 10.

139 Writ petition under the Constitution is maintainable in case of a violation of any fundamental right of the citizens, affecting particularly the weak and downtrodden or deprived section of the community, or if there is a public cause involving public wrong or public injury, any

Division has the power to provide appropriate relief for the violations of fundamental rights, including a violation of the prohibition of torture under Article 35 (5) of the Constitution.[141] Article 102(1) of the Constitution confers power on the High Court Division to enforce fundamental rights, while article 102(2) confers power of judicial review in non-fundamental right matters.[142] Article 44(1) provides that the right to move the Supreme Court for enforcement of any of the fundamental rights is itself a fundamental right. Article 44(2) enables the Parliament to confer the jurisdiction to enforce fundamental rights on any other court, but such conferment cannot be in derogation of the power of the Supreme Court under article 102(1) which means that such other court may be given concurrent, but not exclusive, power of enforcement of fundamental rights. The Supreme Court must always have the power for enforcement of fundamental rights.[143] The Constitution does not stipulate the nature of the relief which may be granted. It has been left to the High Court Division to fashion the relief according to the circumstances of each particular case.[144] It need not be confined to the injunctive relief of preventing the infringement of a fundamental right and in an appropriate case it may be a remedial one providing relief against a breach already committed.[145] And where any person illegally detained then in favor of him any person can file a writ of *habeas corpus* under article 102(b) (1) of our Constitution.[146] The UNDP report of 2002 noted that detentions under the SPA may be challenged on the basis of *habeas corpus* petitions moved before the High Court under Article 102 of the Constitution and under Section 491 of the Cr. P. C. which provides power to issue directions of the nature of a *habeas corpus*.[147] If the detention is not in conformity with the provisions of law under which he is purported to be detained he may secure release by moving the courts of law. It is to be mentioned that there is no hard and fast rule for this application.[148] And it is not discretionary with the High Court Division to grant relief

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member of the public or an organization whether being a sufferer himself/itself or not may become a person aggrieved if it is for the realization of the objectives and purposes of the Constitution. See Justice Muhammad Habibur Rahman, 'Our Experience with Constitutionalism' (1998) 2 (2) *Bangladesh Journal of Law* 115, 123.

140 *Constitution of People's Republic of Bangladesh 1972,* arts 44 (1) and 102 (1).

141 See REDRESS, above n 111.

142 See Islam, above n 12, 593.

143 Ibid, 385.

144 *Bangladesh v Ahmed Nazir* (1975) 27 DLR (AD) 41.

145 *Mehta v India* (1987) AIR (SC) 1086, 1091.

146 Md. Ashraful Arafat Sufian, 'Preventive Detention in Bangladesh: A General Discussion' (2008) 1(2), *Bangladesh Research Publications Journal*, 166, 173.

147 See UNHCR, above n 66.

148 Md. Jahid Hossain Bhuiyan, 'Preventive Detention and Violation of Human Rights: Bangladesh, India and Pakistan Perspective' (2004) 8(1& 2) *Bangladesh Journal of Law*, 103, 126.

under article 102(1) but a constitutional obligation to grant the necessary relief.[149] It provides that on the application of any person the court may direct the person having custody of another to bring the latter before it so that it can satisfy itself that the detenu is not being held in custody without lawful authority or in an unlawful manner. The expression 'custody' is not confined to executive custody[150] and includes custody of private person also. [151]

However, the avowed purpose of the exercise of writ jurisdiction is to further justice.[152] The High Court Division will exercise its discretion in accordance with judicial consideration and well established principles[153] and will interfere where any improper exercise of power or non-exercise of jurisdiction has caused manifest injustice.[154] It is reported in two cases of Indian jurisdiction specially the case reported in AIR 1977 SC that while fundamental rights to life and liberty is curtailed or infringed, this Court in exercise of its power given under Article 102 of the Constitution may also give compensation to the victim if it is found that the confinement or detention of the victim is not lawful and that the victim was subjected to torture, cruel, inhuman and degrading treatment. He has further submitted that the victim should not be asked to seek relief in any other civil court for damages and compensation.[155] For certain grounds[156] when High Court is satisfied that the detenu has been detained arbitrarily then court can declare the detention illegal and order to release him immediately. In the time of emergency when writ of *habeas corpus* is withheld then a case filed under section 491 of Cr. P. C. to get directions or rule of the nature of a *habeas corpus*. Though it is stated that under the Special Power Act there is no chance of filing a *habeas corpus* writ but it can be filed under constitutional law which is stronger than the general law i.e. the

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149 *Kochuni v Madras* (1959) AIR (SC) 725; *Romesh Thapar v Madras* (1950) AIR (SC) 124.

150 *Bangladesh v Ahmed Nazir* (1975) 27 DLR (AD) 41.

151 *Ayesha v Shabbir* (1993) BLD 186; *Abdul Jalil v Sharon Laily* (1998) 50 DLR (AD) 55; *Farhana Azad v Samudra Ejazul Haque* (2008) 60 DLR 12; *Bangladesh Jatiyo Mahila Ainjibi Samity v Ministry of Home Affairs* (2009) 61 DLR 371; *Zahida Ahmed v Syed Nooruddin Ahmed* (2009) 14 BLC 488.

152 *Brihan Mumbai Electric Supply & Transport v Loqshya Media (P) Ltd* (2010) 1 SCC 620.

153 *Janardhan Reddy v Hydrabad* (1951) AIR (SC) 217.

154 *Kallolimath v Mysore* (1977) AIR (SC) 1980.

155 See above n 11.

156 Most of the cases the court found the weak grounds, vague & not any specific grounds. as a result the high court can relax the detenu for following grounds like detaining by governments unlawful authority, failure to state the grounds within time, failure to give chance to be defend himself, lack of nexus with the reason of detention, not to produce the detenu before advisory board within specific time, mixing good grounds with bad grounds, retrospective issuance of orders and failure to submit essential documents before court or not in proper time.

Special Power Act.[157] The High court Division has power to issue the order of release of a person in custody under section 491 of the Code of Criminal Procedure and this power can be exercised *suo motu*.[158] But this power is hedged with limitation[159] and can be taken away or curtailed by ordinary legislation. In codifying the writ of *habeas corpus*, the framers of the Constitution have freed the jurisdiction from any limitation and have conferred wide power of judicial review[160] which can in no way be curtailed by any legislative device.[161]

However, in the case of exceeding powers, committing injustice and violating the legal provisions by the law enforcing agencies through the practice of torture, judicial review is available.[162] Courts exercise the power of judicial review on the basis that powers can validly be exercised only within their true limits and a public functionary is not to be allowed to transgress the limits of his authority conferred by the Constitution or the laws.[163] In the same way the court can exercise the power of judicial review if the decision is *mala fide* or in violation of the principles of natural justice.[164] The duty of the review court is to confine itself to the question whether the authority has exceeded its powers, committed an error of law, failed to consider all relevant factors, failed to observe the statutory procedural requirement and the common law principles of natural justice or procedural fairness, reached a decision which no reasonable authority would have reached, or abused its powers.[165] The court quoted the observation of Lord Brightman that in judicial review the court is concerned not with the decision, but with the decision making process. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing the abuse of power, be itself guilty of usurping power.[166] The power of

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157 See Sufian, above n 146.

158 *State v D C Satkhira* (1993) 45 DLR 643 (HCD took action on the basis of news published in a newspaper).

159 Sub-section (3) of sec. 491 shall not apply to a person detained under any law providing for preventive detention. The High Court Division held that this sub-section will not bar the remedy under sec.491 when a detention order is patently illegal or passed in colorable exercise of the detention law. *Panajit Barua v State* (1998) 50 DLR 399; *Pearu Md. Ferdous Alam v State* (1992) 44 DLR 603; *Sultanara Begum v Secy. Ministry of Home* (1986) 38 DLR 93.

160 *Aruna Sen v Bangladesh* (1975) 27 DLR 122, 142; *Abdul Latif Mirza v Bangladesh* (1979) 31 DLR (AD) 1; *West Pakistan v Begum Shorish Kashmiri* (1969) 21 DLR (SC) 1.

161 *West Pakistan v Begum Shorish Kashmiri* (1969) 21 DLR (SC) 1.

162 Judicial review is available where a decision making authority exceeds its powers, commit an error of law, commits a breach of natural justice, reaches a decision which no reasonable tribunal could have reached, or abuses its powers.

163 See Islam, above n 12, 590.

164 *Shamsul Huda v BTMC* (1980) 32 DLR 114.

165 See *Tata Cellular v India* AIR 1996 SC 11.

166 *Chief Constable of the North Wales Police v Evans* (1982) 3 All E.R. 141, 154.

the judicial review of the superior courts has been a matter of Constitutional conferment and is a basic feature of the Constitution[167] in our country and it cannot be taken away or abridged by ordinary legislation.[168] And this Court (HCD) in exercise of its power of judicial review when finds that fundamental rights of an individual has been infringed by colorable exercise of power by the police, is competent to award compensation for the wrong done to the person concerned. Indian Supreme Court held the view that compensatory relief under the public law jurisdiction may be given for the wrong done due to breach of public duty by the state of not protecting the fundamental right to the life of citizen. So it is accepted that compensation may be given by this Court when it is found that confinement is not legal and death resulted due to failure of the state to protect the life but where it is found that the arrest was unlawful and that the person was subjected to torture while he was in police custody or in jail, in that case, there is scope of awarding compensation to the victim and in case of death of a person to his nearest relation.[169]

2.2.2 Common Law Remedies in Civil Courts

Torture survivors may invoke common law remedies in civil courts, such as public misfeasance or trespass to the person, or assault and battery. The State is vicariously liable for damages caused by its officials, so that both may be held jointly liable. Victims are entitled to damages, which are to be awarded to the extent that the victims can be put in the position they would have been in had the tort not been committed. Damages encompass both actual pecuniary loss, i.e. any expenses reasonably incurred by the plaintiff and future loss of income, as well as non-pecuniary damages for pain and suffering and loss of enjoyment of life. The amount of compensation depends on the facts and circumstances of each case. Exemplary damages may be awarded where the damage has been caused by the oppressive, arbitrary, unconstitutional action of Government officials. Torture survivors may file a civil claim for damages at the court of first instance in the place where the tort occurred or where the defendant resides. The Court has discretion in awarding costs and they usually follow the event. However, judgments are enforced by way of decrees issued by courts and executed by competent officers.[170]

2.2.3 Remedies under Criminal Law

A victim of a crime cannot claim reparation as part of criminal proceedings. However, a court hearing a criminal case has the discretion to order compensation

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167 See Islam, above n 12, 592.

168 *Farzand Ali v West Pakistan* (1970) 22 DLR (SC) 203; *Fazal Din v Custodian of Evacuee Property* (1971) PLD (SC) 779.

169 See above n 11.

170 See Islam, above n 12.

when imposing a fine as the sentence. Section 545 (1) (b) of the Criminal Procedure Code might be utilized by courts in torture cases to order a convicted perpetrator to compensate the victim.[171] If there is a subsequent civil suit, the Court will take into account any sum already paid or recovered by the way of compensation under section. The Special Tribunals constituted to deal with offences under the Suppression of Violence against Women and Children Act, 2000, have been expressly vested with the power to award compensation to victims[172] in cases of custodial rape by ordering the offender to pay the imposed fine as compensation.[173] Custodial violence much as torture, rape or death involving not only physical suffering but also mental agony constitutes violation of human dignity and infringes the right guaranteed under art. 32 and strikes a blow at rule of law. A victim of custodial violence and in case of death while in custody, his family members are entitled to compensation under public law in addition to the remedy available under the private law for damages[174] for tortuous act of the police personnel.[175] In the case of investigations into allegations of torture a victim of torture may lodge a complaint with the police[176] or a magistrate.[177] In the absence of an independent body responsible for investigating human rights violations, investigations are carried out by the police and the magistrate. Complaints to the police[178] may be made by any person in writing or they can be made orally and recorded.[179]

2.2.4 Legal Aid

The Constitution of Bangladesh has in clear terms recognized the basic fundamental human rights. One of the basic fundamental rights is that all citizens are equal before

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171 Section 545 (1) Cr. PC reads: "Whenever under any law in force for the time being a Criminal Court imposes a fine or confirms in appeal, revision or otherwise a sentence of fine, or a sentence of which fine forms a part, the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied- (a) in defraying expenses properly incurred in the prosecution; (b) in the payment to any person of compensation for any loss or injury caused by the offence, when substantial compensation is, in the opinion of the Court, recoverable by such person in a Civil Court."

172 Section 15 of Act No. VIII of 2000: "From section 4 to 14 [listing offences of rape and sexual abuse], the offences for which fine is imposed by the tribunal, such fines may be treated as compensation for the victims and if it is not possible to realize the fine from the existing wealth of the convicts, the fine shall be receivable from the future wealth to which the convict will be owner and in such cases realization of fine will have priority than that of other claims."

173 See Islam, above n 12.

174 *DK Basu v W.B.* (1997) AIR (SC) 610.

175 See Islam, above n 12, 269.

176 *Code of Criminal Procedure* 1898, s 154.

177 *Code of Criminal Procedure* 1898, s 200.

178 See above n 176.

179 See above n 142.

law and are entitled to equal protection of law. In Bangladesh majority people are improvised. They cannot access themselves to justice to protect and vindicate their legal rights and lawful causes. To address this problem legal aid services have been activated under the Aingoto Sohayota Prodan Ain (Act No. VI of 2000) i.e. the Legal Aid Act, 2000.[180] However, The Government legal aid in Bangladesh has nationally existed since the late 1990s. The current version was enacted in 2001 as the Legal Aid Services Act 2000 (LASA). It is a *judicare* program, delivered at the District level through a committee chaired by the District and Sessions judge under the central authority of a semi-autonomous body corporate named the National Legal Aid Organization (NLASO). [181] It comprehensively provides for the decentralization of activities in national and district level. At national level there is a National Legal Aid Board, at district level there are District Legal Aid Committees, in the Upazilla or Thana level there are Upazil1a Legal Aid Committees and in Union level there are provisions of Union Legal Aid Committees.[182] These Legal Aid Committees are headed by the respective District Judges, have been constituted with Government officer, Lawyer, Voluntary and Woman Organizations in each district. A statutory body called National Legal Aid Organization has been established and there is a National Board of Director consisting of 19 members. The members represent Ministers of Ministry of Law, Justice and Parliamentary Affairs as chairman, Members of the Parliament, Attorney-General of Bangladesh, Government officials as well as representatives from civil societies. [183] This Act is an honest attempt of the Government to lend its assistance to the poor people to institute or defend cases in courts. This Act along with guidelines and rules framed under it presents a comprehensive, nation-wide and state-funded legal aid scheme. It is mentioned in the preamble that the aim of enacting the Act is to provide legal aid[184] to the people who are unable to get the justice due to financial crisis or due to different socio-economic reasons.[185] Legal aid is theoretically available for all sorts of criminal,[186] family and civil matters[187] and is defined to include legal advice, legal

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180 Ministry of Law, Justice and Parliamentary Affairs, Bangladesh, *Legal Aid Service* (2013) < http://www.minlaw.gov.bd/legalaidservice.htm> accessed 21 July 2013.

181 Ian Morrison, *Legal Aid in Bangladesh* (2013)< http://www. ilagnet.org/ jscripts/tiny_ mce/ plugins/filemanager/files/papers/Legal_Aid_in_Bangladesh_-_Ian_Morrison.pdf> accessed 21 July 2013.

182 Shaila Islam, *Legal Aid in Bangladesh: A theoretical study on Govt. & Nongovt. Organization* (2010)< http://shailallb.blogspot.com/2010/02/legal-aid-in-bangladesh-theoretical.html> accessed 21 July 2013.

183 See Ministry, above n 180.

184 According to section 2(a) of the Act, "Legal Aid" means to provide legal aid to people who are unable to get the justice due to financial position or due to different socio econoimc condition such as the payment of lawyer's fees, etc. Thus, section 2 (a) of the Act broadly defines 'Legal Aid' so as to include counseling, payment of lawyers fees and other incidental cost for expenses of litigation. See above n. 182.

185 See Islam, above n 182.

186 The need for legal aid is felt more in criminal matters as the life, property and personal liberty of a person are inseparably connected there. As regards criminal matters, section 340 Cr. P.C. states that an accused should be defended by a lawyer and he must pay the fees and

representation and (since 2006 amendments) limited ADR services in civil matters. By 2008, the pilot Districts had well-known and accessible offices, easy to locate for poor justice seekers. Applications had more than doubled, and the number and percentage of women receiving legal aid increased greatly.[188] Processing time for cases was greatly reduced, quality standards for legal services were set and monitored, and panel lawyers received training, including gender training, more lawyers participated in legal aid including a higher percentage of women lawyers. In the pilot Districts, the government legal aid is collaborated with NGO services with mutual referrals and supports. The possibility of delivering legal aid services to an acceptable standard through the government legal aid mechanism was clearly demonstrated.[189]

However, the government is contemplating the constitution of a separate legal aid cell for the workers of mills and factories to help them getting legal assistance. The legal aid cell for worker of limited income group would help them taking step to protect their service and seek justice. The cell will work side by side existing Legal Aid Service,[190] and the National Legal Aid Committee is looking into the jail appeal matter as a result there are many poor convicts who are getting benefits of the law.

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nothing more. Commenting on section 340 (1) of the Code of Criminal Procedure, 1898, the Supreme Court of India observed that the right conferred by section 340 (1) does not extend to a right in an accused person to be provided with a lawyer by the State, or by the police or by the Magistrate. That is a privilege given to him and it is his duty to ask for a lawyer if he wants to engage one and to engage one himself or get his relations to engage one for him. The only duty cast on the Magistrate is to afford him the necessary opportunity. In the case of Clarence *Earl Gideon v Wainwrght*, 1963, the USA Supreme Court has recognized that it is the right of undefended accused to have a lawyer at the cost of the state. In all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defence. The leading case on Sixth Amendment to USA Constitution provides that as to the right of counsel, the Courts have "no power and authority to deprive an accused of his life or liberty unless he has or waived the assistance of counsel".

187 As regards civil matters, Order XXXIII of CPC deals with the 'pauper' suit. The Conscious Law Dictionary says that a pauper, is a poor person especially one so indigent as to depend on charity for maintenance or one supported by some public provisions; one so poor that he must be supported at public expense. The words 'pauper' and 'poor' have nearly the same meaning and they both embrace several classes. But Explanation to rule 1 of Order XXXIII of CPC provides that a person is a "Pauper" when he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit, or where no such fee is prescribed, when he is not entitled to property worth five thousand taka other than his necessary wearing-apparel and the subject-matter if the suit. See above n. 181.

188 The Prime Minister Sheikh Hasina said over the last four years, some 48,444 people including women, men and children have received legal aid services. Some 19,010 cases have been disposed of under the government legal aid services. See Bangladesh Sangbad Sangstha (BSS), *Govt plans separate legal aid cell for workers: PM* (2013) < http://www1.bssnews.net/newsDetails.php?cat=0&id=327950$date=2013-04-28&dateCurrent=2013-04-30> accessed 21 July 2013.

189 See Morrison, above n 181.

190 See above n 188.

Under the Legal Aid Program, private lawyers are also being engaged to press and conduct the jail appeals in courts.[191]

2.2.5 National Human Rights Commission

For many years the people of Bangladesh lacked an effective mechanism for addressing their grievances when basic human dignities were involved. With the reconstitution of the National Human Rights Commission people's confidence is beginning to be revived. The Government took initial steps to establish a National Human Rights Commission more than a decade ago, in 1998. Although a draft law was prepared and debated, it was not finalized. The NHRC was later formally established by the National Human Rights Commission Ordinance 2007 and commenced activities on 1 September 2008 with the appointment of a Chairman and two other Members. The 2007 Ordinance was superseded by the Jatio Manobadhikar Commission Ain, 2009 i.e. the National Human Rights Commission Act, 2009 which was approved by the Parliament on 14 July 2009 with retrospective effect from 1 September 2008. Under the 2009 Act, the NHRC was reconstituted on 22 June 2010 with the renewed aim of establishing and securing human rights in every sphere of Bangladeshi society. The present Commission is dedicated to securing and upholding human dignity through the protection of fundamental rights and by advancing human security. The reconstituted National Human Rights Commission began its journey on 23 June 2010, envisioned as a pre-eminent organization of the State, having been created to support and embody the philosophy of Bangladesh. According to article 11 of the Bangladesh Constitution, the guarantee of 'fundamental human rights and freedoms and respect for the dignity and worth of human person' has been promulgated as the main mission of the State. Likewise, the National Human Rights Commission Act, 2009 preamble read with section 2(f) establishes the institution in order to protect, promote and foster human rights as envisaged in the Bangladesh Constitution and international instruments.[192] However, the NHRC's Draft Strategic Plan lays out the vision and mission of the Commission, with the vision being to establish "a human rights culture throughout Bangladesh" and the mission being to ensure "the rule of law, social justice, freedom and human dignity through promoting and protecting human rights". The Commission has also established four Long-term Goals[193] for itself and the country, which the NHRC will

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191 See Ministry, above n 180.

192 National Human Rights Commission, *National Human Rights Commission Annual Report 2010* (2010).

193 Goal One: A human rights culture throughout Bangladesh where the dignity of every person is respected. Goal Two: A just society where violence by state is an episode of the past and officials know, and are held accountable for, their responsibilities. Goal Three: A nation that is respected internationally for: its human rights compliance, ratification of all human rights

vigorously pursue during the current terms of the Commissioners and the beyond.[194] The Commission also identified sixteen thematic areas as pressing human rights issues on which it will pay particular attention, while being responsive to other human rights-related concerns or matters that may arise. One of these pressing human rights issues is 'violence by state mechanisms, particularly enforced disappearance, torture and extra-judicial killings (the highest priority[195] area in 2011), NHRC is endowed with a comprehensive mandate as outlined in the 2009 Act. A glimpse at the functions of the Commission reflects several major areas of responsibility like investigation and enquiry, recommendations, legal aid and human rights advocacy, research and training on human rights laws, norms and practices.[196] The functions of the commission will include investigating any allegation of human rights violation received from any individual or quarter, or the commission itself can initiate investigation into any incident of rights violation.[197] If a human rights violation has been proved, the NHRC can either settle the matter or pass it on to the court[198] or relevant authorities.[199] One of the key mandates of NHRC is to intervene in human rights violations depending on merits of the case. National Human Rights Commission of Bangladesh bearing powers of civil court, can initiate contempt case in grave violations. NHRC Bangladesh, can intervene *suo moto* or with the permission of High Court and can appoint special rapporteur on specific issue to monitor HRVs.[200] NHRC can monitor[201] whether international standards are followed or not[202] and may provide guidelines also.[203]

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instruments, up-to-date reporting to treaty bodies, Open cooperation with UN special mechanisms. Goal Four: An NHRC that is credible, apolitical, objective and effective and respected for leading human rights protection throughout the country. See National Human Rights Commission, *Strategic Plan of the National Human Rights Commission 2010-2015* (2011).

194 See NHRC, above n 192.

195 See above n 193.

196 See NHRC, above n 192.

197 *National Human Rights Commission Act 2009*, s 12.

198 Ibid, s 14.

199 Human Rights Initiative, *Bangladesh Country Report: Anti-terrorism Laws and Policing* (2007) < http://www.humanrightsinitiative.org/publications/chogm/chogm_2007/docs/country_reports/071004_chogm07_bangladesh_anti_terrorism_policing_country_report2007.pdf> accessed 16 January 2013.

200 See above n 197, ss 17, 18, 19.

201 In 2009, Anti Torture Bill adopted by Lokshabha, the lower house of Parliament of India, was possible only for NHRCs consecutive intervention. See Ain o Salish Kendra (ASK), *Preventing Torture within the Fight against Terrorism* (2010)< http://www.askbd.org/web/wp-content/uploads/2011/01/Eng_report_journ_workshop_final.pdf> accessed 19 April 2013.

202 See ASK, above n 201.

3. Prohibition, Prevention and *De Jure* Eradication of Torture: Revealing Grim Reality

According to Article 2 and 6 of the ICCPR, the Bangladeshi authorities have the obligation to ensure the right to life of the country's people and must provide prompt and effective remedies in cases where any violations take place. Bangladesh also has the obligation to introduce legislation that is in conformity with the ICCPR, but continues to fail in this regard even though Bangladesh has ratified all the core human rights treaties (ICCPR, ICESCR, CERD, CEDAW, CAT, CRC) and is subject to the Universal Declaration of Human Rights (UDHR). Extra-Judicial Killings in the name of "crossfire", "gunfights" or "encounters", unwarranted arrests, torture in police remand practiced by the law enforcing agencies in Bangladesh constitute flagrant violations of basic human rights enshrined in the UDHR and in the Constitution that ensured right to life for all. Since 2004, extra judicial killings by law enforcing agencies, custodial deaths and torture, and lack of any public reports of investigation and prosecution of those responsible demonstrate the vulnerability of the right to life of Bangladeshi citizens. In the vast majority of instances, the state failed to publish any information regarding actions taken to investigate, prosecute or punish those responsible for such. In reality however, the authorities can and do get away with murder and function as if they are above the law and even the supreme law, the Constitution.[204] There are certain provisions of the Constitution[205] which are not followed by the police officers and are very much over jealous in exercising the powers given under section 54 but they are reluctant to act in accordance with the provisions of the Constitution itself.[206] Even if Bangladesh has anti-torture laws but unfortunately the grim reality is different. Sometimes it's the law itself or the implementation of it makes the whole anti-torture regime a gloomy one. This part 'prohibition, prevention and *de jure* eradication of torture' first provides certain loopholes in the existing laws and then focuses on the shortcomings in the enforcement and monitoring measures basing upon the previous part i.e. the 'compliance in laws' in order to understand the anti-torture regime perfectly.

3.1. *De Jure* Eradication and the Reality

Amnesty International reports that a number of laws in Bangladesh create the conditions which facilitate torture.[207] In all the cases of detention the detainees

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[203] Indian initiative was cited where NHRC gave direction on how to deal encounter killings & specifically mentioned that any officer goes into encounter must report to the NHRC on how much ammunition has been used. See ASK, above n 201.

[204] See Khan, above n 32.

[205] *Constitution of People's Republic of Bangladesh 1972*, art 33.

[206] See above n 11, 371.

[207] The most commonly used of these is Section 54 of the Code of Criminal Procedure. It is also found that under eight conditions a person may be arrested by a police-officer without warrant but from the first condition we find that this condition actually includes four

claimed that they had been tortured and that torture began from the moment of their arrest'.[208] However, section 54 of the Cr. P. C. grants police qualified power of arrest of any person on reasonable suspicion without warrant on nine grounds. Practically section 54(1) is the most abused section of the Code. The Police, in fact do not comply with the provision in its totality. They bluntly ignore the qualifying terms mentioned in the section e.g., 'cognizable offence', 'reasonable complaints', 'credible information', and 'reasonable suspicion'. It is being indiscriminately used by the police and as application of this section fraught more with ulterior motives than prevention of crimes and or arrest of persons suspected of having committed or about to commit cognizable crimes. Most of the arrests under section 54 are caused on fanciful suspicion and in most cases to fill in the quota allotted to an individual police officer to make an arrest each day. This incredible practice has been going on with impunity for many years. An arrest under section 54 is often a prelude to issuance of detention order under the Special Powers Act, 1974 (SPA) that allows the authorities to detain any person on eight grounds, vague enough to detain any person according to the whim and caprice of the executives and the party in power. Such detention can extend to six months, and may extend beyond this period, if so sanctioned by the Advisory Board. The use and abuse of the SPA in the name of securing law and order have resulted in steady pattern of human rights violations.[209] The Act provides no guidance on the burden of proof necessary for the Government to conclude that an individual is likely to commit a prejudicial act. As a result, detentions under the SPA 1974 can occur on allegations with very little evidence. The Commonwealth Parliamentary Association reports that the wide ranging powers of detention without express reasons under the SPA 1974 have been widely used[210] against political opponents and that, in reality, detainees are held for much longer periods than those specified in the Act. Amnesty has also identified the way in

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conditions under which a police officer may arrest without warrant and these four conditions are couched in such wards that there is scope of abusive and colorable exercise of power. See above n. 206; but see p. 366. However, it is reported that despite the safeguards, Section 54 effectively allows the police to arrest anyone at any time for almost any reason, and is one of the most easily abused provisions in the Bangladesh legal system. See UNHCR, *Country of Origin Information Report – Bangladesh* (2009) <http://www.unhcr.org/refworld/docid/4a8d005b2.html> accessed 16 January 2013.

208 See HRI, above n 118.

209 A. H. Monjurul Kabir, *Police remand and the need for judicial activism* (2011)< http://saqebmahbub.wordpress.com/2011/06/06/a-case-for-defining-and-criminalising-torture-in-bangladesh/> accessed 05 June 2013.

210 A 2002 study by the Bangladesh Law Commission found that in 99% of cases challenging preventive detention under the SPA 1974 (between 1998–2001), the detention orders were found to be illegal and without lawful authority. Its report stated," this fact indicates how carelessly and without regard to the provisions of the law of detention as they stand today in Bangladesh, the detaining authorities applied this law'. See HRI, above n 118.

which Section 54 is reinforced by Section 167 to exacerbate the likelihood of torture.[211] There are certain legal requirements to be fulfilled on the part of the Magistrate to apply his judicial mind in case of granting remand. But unfortunately though these are not fulfilled, the Magistrate as a routine matter passes his order on the forwarding letter of the police officer either for detaining the person for further period in jail or in police custody.[212] Though there are a good number of formal requirements for recording confession by a magistrate to ensure that confessions are 'voluntary', yet tortures in police custody during remand have often led to 'confession' by arrestees who had spent a few days in police custody. Voluntariness of confessions has been an issue in much criminal litigation but, again, these had hardly been scrutinized in terms of Article 35(4) and 35(5) of the Constitution.[213]

Though the Constitution contains provisions as to ensure the rule of law, no right can compared with the right to life without which all other rights are meaningless and the rule of law can play its most significant role in this aspect. But the tolerant and rather approving attitude of the successive governments in respect of extra-judicial killings by the law enforcing agency has seriously dented the operation of rule of law so much that it will not be a misstatement to say that rule of law for the common men in the country exists only in the pages of the Constitution.[214] However, 1972 Constitution includes various fundamental rights which should provide safeguards including to the victims of security laws of the country. Despite temporary suspension of these safeguards during various periods, these provisions survive till now. These safeguards are not applicable during emergency and may become non-applicable during other time. If they fall within the restrictions defined in the very chapter of the Constitution that describes the fundamental rights.[215]

In the case of offences in the nature of torture as described in the Penal Code in 'compliance in laws part' have two significant limitations. Firstly, the acts prohibited are limited and fail to encompass a wide range of established practices of torture by state officials, which would however fall under the Convention definition. Secondly, from a principled point of view, the offences and the punishments fail miserably to reflect the particular wrongness of such acts being committed by the

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211 See HRI, above n 118.
212 See above n 11, 369.
213 See Malik, above n 41, 273-274.
214 See Islam, above n 19, 85.
215 Dr. Asif Nazrul, *The Security and Emergency Related Laws in Bangladesh: Tools for Human Rights Violations* (2009)< http://www.southasianrights.org/wp-content/uploads/2009/10/securitylaw_BD.pdf> accessed 12 June 2013.

state as opposed to private individuals.[216] However, these provisions have no manner of application when the act of torture is committed in a legally authorized custody. Similarly an act of torture committed with a purpose other than the purpose mentioned in the penal provisions cannot be addressed under this law and also the punishments for those offences are not adequate enough to take into account the gravity of the offence of torture[217] which are so negligible that it will betray the international obligation of Bangladesh if torture is tried under these penal provisions. However, sometimes offences under these sections become difficult to detect[218] and the reasons behind paucity of evidence in cases of torture and even death of a person while in police custody are obvious. In a criminal case, the burden of proving the guilt of the accused is invariably on the prosecution according to the scheme and various provisions of the Evidence Act, 1872. In cases of torture on a person while in police custody one can rarely expect to get eye-witnesses to such incidents, excepting police personnel some of whom themselves happen to be the perpetrators of torture. It is an extremely peculiar situation in which a police personnel alone, and none else, can give evidence regarding the circumstances in which a person in police custody receives injuries. This results in paucity of evidence and probable escape of the culprits.[219]

3.2 Enforcement and Monitoring Measures in Reality

The Torture Convention was ratified by the government of Bangladesh in October, 1998 reserving the article 14 paragraph 1 of it, which states that 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. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation. While ratifying the CAT Bangladesh declared that it will apply article 14 Para 1 in consonance with the existing laws and legislation in the country. Again Bangladesh has not accepted the competence of either the Committee against Torture or the Human Rights Committee to received individual complaints about torture. In absence of any

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216 Saqeb Mahbub, *A case for defining and criminalizing torture in Bangladesh* (2011) < http://saqebmahbub.wordpress.com/2011/06/06/a-case-for-defining-and-criminalising-torture-in-bangladesh/> accessed 13 June 2013.

217 See Rahman, above n 5, 142.

218 See Haq, above n 85.

219 Lawcommissionbangladesh.org, *Law commission final report on the Evidence Act, 1872 relating to burden of proof in cases of torture on persons in police custody* (1998) < http://www.lawcommissionbangladesh.org/reports/17a.pdf> accessed 20 June 2013.

international mechanism, victims of torture can only recourse to the domestic remedies which are very poor in Bangladesh.[220]

3.2.1 Availability of Civil Redress for Victims

There were no comprehensive official statistics on the number of torture related complaints filed with magistrates or the police and subsequent action taken. A large number of cases remained unreported. Some complaints were withdrawn due to police pressure, including offers of money to victims to drop their claims. Only a few prosecutions of perpetrators had been successful; inadequate investigations and difficulty in finding witnesses and obtaining medical evidence were cited as problems. There had, apparently, been several instances of out-of-court settlements in torture cases. Citizens who wish to file a complaint with the police face many hurdles. First is the fear of reprisal, sometimes based on direct threats not to file a complaint. When the families of victims are brave enough to come forward, the police frequently refuse to accept the case. Another reason why criminal complaints are not filed is widespread police corruption. The police are over-worked and do not have sufficient time off. Police officers secend time doing errands for higher officials or on protocol functions or VIP protection or collecting incentives or bribes, or could not perform their duties properly. According to the US State Department Country Report on Human Rights Practices 2008 (USSD 2008 report), released 25 February 2009 which stated that corruption, judicial inefficiency, lack of resources, and a large case backlog remained serious problems. It also stated that corruption and a substantial backlog of cases hindered the court system, and trials were typically marked by extended continuances, effectively preventing many from obtaining a fair trial due to witness tampering, victim intimidation, and missing evidence.[221] In the majority of cases, investigations into allegations of torture have been inconclusive. In several instances, investigations have not been opened either because the alleged perpetrator enjoys immunity under special law, or because the prosecution of the alleged perpetrators has not been authorized by the Government as required by law. Other cases were closed without any charges being brought against the alleged perpetrators. The police, often the same institution allegedly responsible for the violations, are not independent and there appears to be little interest on their part to investigate torture allegations promptly and effectively. There are several reports of police officers shielding their colleagues and discouraging victims from pursuing their cases, or otherwise obstructing investigations. It often appears that the only actions taken against the alleged perpetrators are administrative measures such as temporary suspension and transfer

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220 See Point, above n 50.
221 See UNHCR, above n 66.

to other police stations. Prompt and thorough investigations into death in custody cases remain exceptional. It was only after public outcry that a 'Probe Committee' was established to investigate the circumstances of death and possible criminal responsibility. However, official inquiries are said to lack transparency and most inquiries have apparently not resulted in any subsequent criminal prosecutions of those responsible. One of the main reasons for the lack of charges being brought is the difficulty that victims face in obtaining evidence, especially medical evidence, and the paucity of other evidence in the absence of any witnesses other than the victim in those cases where he or she survived the torture. Where police officers remain silent or present a differing account of events, the prosecution will find it immensely difficult, if not impossible, to secure a conviction unless other compelling evidence is available. This constellation, resulting in widespread impunity, has been identified by the Law Commission and the High Court Division,[222] both of which recommended that the burden should be on the police officer responsible for taking a person into custody to explain the reasons for injury or death and to prove the relevant facts to substantiate the explanation.[223] At present to get the most rudimentary investigation opened often requires a huge effort through the media, demonstrations and lobbying. After that, the entire legal process is so slow that it is almost unendurable for the average litigant. There is no witness protection scheme to shield victims from the inevitable pressure and harassment by the accused. Nor has the state acknowledged its responsibility to rehabilitate victims. And the slowness and inefficiency of all levels of bureaucracy makes the pursuit of complaints very difficult.[224]

In case of legal aid although the legislative framework has existed since 2001, the government legal aid scheme is still very much in its infancy; the government never established the central authority envisaged by the legislation nor did it choose to appoint any full time staff. The allocated legal aid fund was disbursed to Districts,

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222 See above n.11. Recommendation F: "If death takes place in police custody or in jail it is difficult to prove by the relations of the victim as to who caused the death. In many cases, this court has decided that when a wife dies while in custody of the husband, the husband shall explain how the wife met her death. Similar principle may be applied when a person dies in police custody or in jail. To give a legal backing to the above principle, we like to recommend that a section in the Evidence Act (after section 106) or a clause may be added in section 114 of that Act incorporating the above principle. The new section in the Evidence Act shall provide that when a person dies in police custody or in jail, the police officer who arrested the person or the police officer who has taken him in his custody for the purpose of interrogation or the jail authority in which jail the death took place, shall explain the reasons for death and shall prove the relevant facts to substantiate the explanation."

223 See REDRESS, above n 111.

224 Basil Farnando, 'Foreword: Short stories about home truths in Bangladesh' (2006) 5(4) *Article 2 of the International Covenant on Civil and Political Rights* 2, 5.

but without any unaccountably or any particular rhyme or reason, to an outsider. For poor justice seekers who learned of the program, the application process was intimidating and often completely beyond reach. Most legal aid cases came as referrals by jailers for unrepresented inmates, but this too was a haphazard process. Where legal aid was granted, services were often provided or additional fees were demanded by lawyers. Although there were honorable exceptions amongst some motivated judicial officers and lawyers who made efforts from time to time to use the legal aid fund, there were neither incentives nor mechanisms to move these beyond the level of individual initiative. As late as 2008-2009, only about 25% of the national legal aid fund was actually spent.[225]

3.2.2 Appropriateness of Penalties

The second obligation of Bangladesh under Article 4 of the CAT is to ensure that all acts of torture, attempt to torture and complicity or participation in torture are punishable by appropriate penalties, which take into account their grave nature. Though the CAT demands 'appropriate penalties for torture, it doesn't outlines the exact gravity of the penalties. Similarly the Committee against Torture has not prescribed a rule for the required punishment by specifying a minimum or maximum length of imprisonment. It has however, indicated the limits of appropriate sentences, finding on the one hand that short sentences of three to five years imprisonment are inadequate, and on the other that too serious penalties might deter the initiation of prosecutions. The punishment of torture provided for under the domestic law of a state party must not be trivial or disproportionate, but must take into account the grave nature of the offence. This means that torture must be punishable by severe penalties. So far as the expected length of sentence for the offence of torture is concerned; one commentator argues that it must be calculated in the same way as other serious offences under international law. Lenient penalties may fail to deter torture, while rigid and draconian penalties may result in courts being unwilling to apply the law as it fails to flexibly take into account individual circumstances. The practice of the committee indicates that a significant custodial sentence is generally appropriate. Although the committee as a whole has not commented on the appropriate level of the sentence for torture, it is according to one commentator, possible on the basis of the individual opinions of members to establish a range within which such sentences should fall. [226] Human Rights Watch (HRW) stated in their report 'Ignoring Executions and Torture' published on 18 May 2009 that there has been a lack of political will under successive governments to hold accountable those responsible for human rights violations. Of the thousands of killings of individuals in the custody of the security forces since independence in 1971, Human Rights Watch knows of very few cases that have resulted in a criminal conviction. The situation is not significantly different when it comes to other forms

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225 See Morrison, above n 181.

226 See Rahman, above n 5, 137-138.

of human rights abuses, including torture, which is endemic in Bangladesh. The internal justice and disciplinary systems of the military, RAB, and police have utterly failed to deliver justice. Although these institutions have claimed that in some cases their personnel have been punished, details are not made publicly available. There is every indication, however, that the sanctions handed out to the perpetrators are wholly inadequate and stand in no relation to the gravity of the crimes committed. While the cases described in this report have not resulted in criminal convictions, it appears that in several cases those responsible have been subjected to disciplinary actions.[227] In Bangladesh today, the prospects of punishing the perpetrators of "crossfire" killings, torture and other grave abuses is remote, to say the least. Sometimes internal inquiries may lead to transfers or dismissals, and very occasionally, limited action in the courts.[228]

3.2.3 Monitoring Measures

Among the monitoring measures Bangladesh has the National Human Rights Commission along with the prison authorities while the accused persons are in custody. Despite certain encouraging modifications, the National Human Rights Commission Act still contains some sections in the Act which seems to be gray and needs clarification. In respect of violation by the law enforcement agencies the Commission has limited jurisdiction and can only demand report from the Government. There is no clear provision about Commission's further action in case of non compliance of the reporting of the Government.[229] The Home Ministry has asked the National Human Rights Commission not to go beyond its jurisdiction regarding the activities of the disciplined forces, especially police and RAB personnel.[230] Odhikar believes that the NHRC has become a powerless institution as it has no specific jurisdiction to take action against the accused persons or law enforcement agencies. The Commission ought to file cases against human rights violations; however, according to the Human Rights Commission Act, the Commission can only give recommendations to the government to take action against perpetrators. It appears that the NHRC does not have any effective power. Odhikar questions the actual necessity of the Commission, if the Government is going to ignore it.[231] However, in the case of prison, the prison authorities still followed statutes framed by the British colonial authorities in the nineteenth century, the main objective of which is the confinement and safe custody of prisoners

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227 See UNHCR, above n 66.

228 See Farnando, above n 224.

229 See NHRC, above n 192.

230 Sources said the Ministry made the comments following the NHRC's reactions regarding extrajudicial killings by law enforcement agencies and the recent incident of maiming college student Limon during a RAB shooting.

231 Odhikar, *Human Rights Monitoring Report: 2011* (2011).

through suppressive and punitive measures. There is an absence of programs for the reform and rehabilitation of offenders and vocational training programs did not cater for all classes of prisoners. The recruitment and training procedures of prison officers was inadequate to facilitate the reform of prisoners. The number of medical doctors is disproportionate to the size of the prison population, and women prisoners were attended to by male doctors. There are no paid nurses in prison hospitals; literate convicts work as hospital attendants, without training. There are no trained social welfare officers or psychologists. However, it was stated in the USSD 2008 report that in general the government did not permit prison visits by independent human rights monitors, including the International Committee of the Red Cross. Government-appointed committees of prominent private citizens in each prison locality monitored prisons monthly but did not release their findings. District judges occasionally visited prisons, but rarely disclosed their findings.[232]

4. Conclusion

The normative compliance of Bangladesh reveals that Bangladesh is 'towards' an anti-torture regime even though complete eradication of torture be a long way away. However, one of the fundamental rights guaranteed by the Constitution of the People's Republic of Bangladesh is that "no person shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment. So torture is expressly prohibited by the Constitution of Bangladesh. There are certain other encouraging developments and successful initiatives that might provide an opportunity to quell the practice of torture, impunity and lack of justice and reparation for the victims. In particular, a number of initiatives providing legal reforms bound to result over time a change in the human rights culture in Bangladesh. Nevertheless, Bangladesh's obligation under Article 4 of CAT to which the country has committed itself in normative aspect falls even to date, far below to the international standards. Added to this, there are various shortcomings in the process of implementation with the excessive use as well as abuse of powers by the concerned authorities that inhibit accountability and effective recourse for torture survivors and relatives of torture victims to courts or other bodies.

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[232] See UNHCR, above n 66.