

Torture and Custodial Death (Prevention) Act, 2013



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BACKGROUND AND PURPOSE OF THE ACT

Torture is the gravest form of violation of fundamental rights. The very hands, which are supposed to protect a person from inhuman and degrading treatment, show cruelty to the citizens in their custody. The prohibition of torture in Bangladesh dates back to 1972 when the constitution of Bangladesh was adopted. Article 35(5) of the constitution prohibited torture or cruel, inhuman, degrading treatment or punishment. This article along with article 31 and 32 safeguarded the people of Bangladesh against arbitrary exercise of power and provided them due protection of law.

The prohibition and criminalization of torture is also found in our penal provision. Section 330 of the Penal Code, 1860 prohibits voluntary causing of hurt for extraction of confession or information from the sufferer or any person interested in the sufferer. Such offence is punishable with imprisonment of either term which may extend to seven years and shall also be liable to fine. Section 348 prohibits wrongful confinement for similar purpose of extracting confession or information. Such offence is punishable with imprisonment for a term not exceeding three years and shall also be liable to fine.

Bangladesh is a signatory to the Universal Declaration of Human Rights (the UDHR) 1948 and International Covenant on Civil and Political Rights (the ICCPR) 1966. Article 5 of the UDHR and article 7 of the ICCPR specifically prohibited torture and provided that no person shall be subjected to torture or to cruel, inhuman, degrading treatment or punishment.

On 10 December 1984, the United Nations adopted a significant convention for prohibition of torture and other cruel, inhuman, degrading treatment or punishment popularly known as United Nation Convention Against Torture (UNCAT). The convention came into force on 26 June 1987 and Bangladesh became the first country in this Subcontinent¹ to accede to UNCAT on 5 October 1998. Article 2(1) of the UNCAT has given obligation to every signatory to take effective legislative and other measures to prevent torture in any territory under its control. Article 4 further obliges to ensure that acts of torture are offences under criminal law of the country and those offences are punishable with appropriate penalties. So being a party to the CAT required a special legislation on prohibition and criminalization of torture in the country with appropriate penalties. Unfortunately, such legislation did not come into effect until 2013.

¹ India signed in 14 October 1998 but did not ratify yet. Pakistan signed on 17 April 2008 and ratified on 23 June 2010. https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&lang=en

In the meantime, the people of Bangladesh were regularly subjected to torture and violation of fundamental right to due process of law. Gruesome accounts of custodial torture and death created huge outcry on several occasions. The members of police themselves raped women, while being in police custody. The blank cheque given by section 54 of the Code of Criminal Procedure, 1898 (Cr.P.C) led to widespread abuse by law enforcement agencies. The rape and murder of 14-year-old girl Yasmin by 3 police members in Dinajpur² and killing of private university student Rubel in police custody in Dhaka³ created uproar nationwide. Subsequently, the High Court Division in a writ petition gave seven sets of recommendation to government and directed to amend the section.⁴ The High Court Division also gave fifteen point directives in its judgment to prevent misuse and abuse of power by the law enforcement agencies.

In spite of the Constitutional guarantees, international law obligations as well as Supreme Court directives and recommendations, necessary amendments and enactments remained overdue. Consequently, arbitrary arrest, torture, custodial death and extra judicial killing became rampant resulting into growing demand to legislate a law to ensure accountability and justice for the victims of police brutality. However, that step did not start until a private members' draft bill criminalizing all acts of torture was presented before parliament in 5 March 2009. After four years of stagnancy, the bill was passed in Parliament on 27 October 2013 titled as the Torture and Custodial Death (Prevention) Act, 2013⁵ (hereinafter referred to as 'the Act').

The Act is the first of its kind in Bangladesh, even in the Subcontinent. The purpose of the law, as can be extracted from the preamble, is to make the provisions of UNCAT effective in the country. The law aims to address the incidents of torture and custodial death by the law enforcement agencies and ensure proper punishment for the criminals. At the same time, the Act has a scheme to make provision of compensation for the victims to minimize their grievance.

DEFINITION CLAUSE

The Act defines a number of terms for the purpose of its proper functioning. Most important of them are followed for better understanding of the Act.

² <https://www.thedailystar.net/in-focus/remembering-yasmin-130435>

³ <https://www.thedailystar.net/op-ed/remembering-rubel-1227520>

⁴ 55 DLR (HCD) 363

⁵ Act No. 50 of 2013

(i) Law enforcement agency

“Law enforcement agency” means any government agency enforcing and applying law of the land and includes Police, Rapid Action Battalion (RAB), Border Guard Bangladesh (BGB), Customs, Immigration, Criminal Investigation Department (CID), Special Branch, Detective Branch, Ansar VDP and Coastguard.⁶ The definition is to some extent wider and by way of interpretation similar agencies like Anti-Corruption Commission Narcotics Control Commission may be included in it.

(ii) Torture

According to section 2 (6) of the Act, ‘torture’ means any physical or mental torture that causes pain.⁷ Besides, similar actions will be deemed to be torture if done to a person,

- a) to extort information or confession from him or any other person;
- b) to punish a suspect or an offender;
- c) to intimidate him or any other person;
- d) on the provocation or instigation, consent or acquiescence of a government official based on discrimination, whether by his official capacity or by government authority.

This definition of torture resembles the definition given in article 1 of the UNCAT except that it did not include ‘sufferings’ in the definition of ‘torture’. Nevertheless, the definition is an inclusive one to cover the probable situations of torture.

(iii) Custodial death

“Custodial death” means death of a person in custody of a government official. In addition, the definition extends to death during unlawful detention, or while the law enforcement agencies try to arrest an accused including death of a person during interrogation, whether he is a witness or not.⁸ This definition included extra judicial killing as custodial death. It also safeguarded against arbitrary arrest and harassment of people in the hands of the members of the law enforcing agencies.

(iv) Aggrieved Person

⁶ Torture and Custodial Death(Prevention) Act, 2013 section 2 (4)

⁷ The Act is originally in Bangla. The English translation is unofficial.

⁸ Section 2 (7)

An aggrieved person is the victim or anyone who is concerned of the victim or anxious of him.⁹ This term broadened the scope of interference by a third party for the interest of the victim.

OFFENCES AND PUNISHMENTS UNDER THE ACT

1. For torture

The Act criminalized all acts of torture.¹⁰ Such offence is punishable with imprisonment of minimum five years or fine of minimum 50 fifty thousand taka or with both. The convict has also liability to give additional money of taka 25 twenty five thousand as compensation to the victim/aggrieved person or persons.¹¹

The amount of punishment is insufficient in consideration of the gravity of the crime. Similarly, there is no criterion of offences like causing hurt, grievous hurt etc. as found in the existing penal law. Hence, there is an undefined area regarding punishment in comparison with the Penal law of the country. On the other hand, the option of imprisonment or fine is not compatible with the nature of offence like torture. This should have been enacted to include both fine and imprisonment at the same time. In terms of punishment, the Act viewed torture as petty offence and it significantly differs from the existing penal law of the land.

However, the Act also criminalized the attempt, abetment, provocation or conspiracy to commit torture.¹² Such acts are offences punishable with rigorous imprisonment for a term not less than two years or a fine of taka twenty thousand or with both.¹³

2. For causing death by torture (Custodial Death)

The most gruesome consequence of torture is death of the victim in custody. Such death is an irony to the legal and judicial system of the country. The death resulting from torture in custody is an offence under section 13 (1) of the Act.¹⁴ The persons causing death of a victim by torture are liable to rigorous imprisonment for life or fine

⁹ Section 2 (8)

¹⁰ Section 13 (1)

¹¹ Section 15(1)

¹² Section 13 (2)

¹³ Section 15 (3)

¹⁴ Section 15(2)

not less than one lakh taka or with both.¹⁵ Moreover, the convict will have to pay a compensation of taka two lakhs to the victim or the aggrieved person/persons.¹⁶

A careful reading of the provision of punishment regarding custodial death clearly shows that there is scope for the case to be disposed of only with fine without passing a sentence of imprisonment even for a single day, let alone a sentence of death. Such a provision is anything but compatible with the penal law of the country on murder. There should be a provision of sentence of death to redress and ensure justice in diabolic crimes like custodial rape and murder. At the same time, the word '*othoba/or*' in subsection 15(2) may be replaced with 'and' to ensure a sentence of imprisonment is passed.

It is important to note that, the Act has provisions for compensation to the victims or aggrieved persons. This is a good step to redress the grievance of the victim and a tool to ensure justice for them. But it is quite unsatisfactory that the amount of compensation provided is not sufficient. This amount should be increased so that it becomes a punishment for the perpetrators. At the same time, the family of the deceased left behind can have a living by the money.

It is notable that there is no provision of departmental proceeding against the persons accused or convicted of torture. There should be clear provision for suspension and removal of the officer concerned, so that the law enforcers will be careful and responsible in performing their duty.

TRIAL OF OFFENCES

Sessions Judge's Court has the exclusive jurisdiction to try and adjudicate offences of torture and custodial death.¹⁷ However, law is not clear which court is authorized to take cognizance of the offences. Such ambiguity needs to be clarified for facilitating proper functioning of the procedure under the Act.

The trial has to be concluded within 180 days after filing a case. In the case of failure to conclude trial on time for a reasonable cause, the court is bound to conclude within next 30 days.¹⁸ However, it is not clear what will be the rule in case of a second failure. It may be mentioned that the Appellate Division held in a case under section 10 of Druto

¹⁵ *ibid*

¹⁶ *ibid*

¹⁷ Section 14(1)

¹⁸ Section 14(2), (3)

Bichar Tribunal Ain, 2002 that the requirement of concluding trial within a specified time is directory only; unless there is a consequence provided by the law itself.¹⁹

LAW ON TRIAL PROCEDURE

The Code of Criminal Procedure, 1898 is applicable in filing, investigation, trial and disposal of cases. This applicability is subject to provisions of the present Act.²⁰ The Act itself has a number of sections to deal with filing of case, investigation, grant of bail and procedure to file an appeal against judgment pronounced by the trial court. The special provisions in Act indicate that these are in addition to the general application of Code of Criminal Procedure.

COMMENCEMENT OF THE PROCEEDINGS

a) Complaint to the Court of Sessions Judge by the victim

Victim of torture himself can make a direct complaint to the court of jurisdiction under this Act.²¹ When such a complaint is made before the court, the court shall record the statement of the victim immediately. Thereafter, the court shall order for a medical examination of the victim by a registered doctor of his/her same sex.²² The doctor will prepare a report within 24 hours stating the marks of injury and torture on the body of the complainant including the probable time of torture.²³ A copy of such report shall be sent to the complainant or person nominated by him and another shall be produced before the court.²⁴ The court may pass an order to get the complainant admitted to a hospital upon advice of the doctor.²⁵

Upon recording statement under section 4(1) of the Act, the court shall send a copy of the statement to the Superintendent of Police or a police officer of higher rank and order to file a case.²⁶

However, it is not clear how the complaint to Sessions Judge will be made when the person himself is in custody of police. There shall be a process of filing complaint by

¹⁹ 68 DLR (AD) 370, [para-14]

²⁰ Section 9

²¹ Section 4(1)

²² *ibid*

²³ Section 4(2)

²⁴ Section 4(3)

²⁵ Section 4(4)

²⁶ Section 5(1)

the victim behind the bar. Otherwise, the whole purpose of the Act will be vitiated, as most of the times victims of torture remain behind the bar.

b) Complaint by third person

A third person can also inform the court that somebody has tortured or is torturing another person. In such case, the court will record its opinion on the statement of the complainant and ensure protection of the complainant.²⁷ If the court satisfies that there is necessity to visit the place of occurrence, he may do so.²⁸ This is to stop any ongoing torture by the court itself or to protect evidence. The purpose of the visit needs to be clarified in the Act, so that, there is no confusion on the duty of the court.

According to section 7, a third person may also file a complaint of torture to the Court of Sessions or a Police Officer not below the rank of Superintendent of Police. In that case, he need not follow the procedure of sections 5 and 6.²⁹ Upon receipt of such complaint, the Police Super or an Officer of higher rank shall file a case immediately and record statement of the complainant. The officer will also inform the complainant of the number of the case registered and of the probable steps to be taken on the instant facts.³⁰ The police officer taking actions under section 7(2) shall submit a report to the Sessions Court within 24 hours of filing the case.³¹

This section enlarged the scope of filing a complaint of torture. The purpose is to bring the information of torture to the court in whatever way possible. However, it is not clear what will be the procedure after submission of report by the police officer.

INVESTIGATION AND INQUIRY

The investigation/inquiry needs to be completed within 90 working days after a complaint is recorded. However, if the investigation is not completed on time for reasonable cause, the investigation officer shall appear in person before the court and explain the reasons for delay.³² The court has to hear the victim or aggrieved person before disposing the issue of extending time within 30 days.³³

²⁷ Section 6(1)

²⁸ Section 6(2)

²⁹ Section 7(1)

³⁰ Section 7(2)

³¹ *ibid*

³² Section 8(1),(2)

³³ Section 8(3)

The investigation may be conducted by police or the court may direct to hold a judicial inquiry.

I. Investigation by police

Immediately after receipt of the order under section 5(1) of this Act, the Police Super shall have to investigate and submit a report with or without charge.³⁴ The court will order the investigation to be conducted by a police officer superior to the officer accused of torture.³⁵

II. Power to direct judicial inquiry

The court may order for a judicial inquiry upon satisfaction on an application by the aggrieved person that a fair investigation is not possible by the police.³⁶ This is the only option for a judicial inquiry. But the investigation or inquiry into police misconduct or brutality should always be conducted by an independent body. Otherwise, there is possibility of the investigation being bias, evidence distorted and ultimately the proceeding being delayed.

The main difficulty in ensuring justice in torture related offences is to protect evidence from distortion. For this reason, countries around the world are moving to create independent bodies for investigation of police misconduct including torture and custodial death.³⁷

The investigation/inquiry officer shall, while submitting his report before court, notify the complainant of date of submission of report and inform the court of such notification.³⁸ Within 30 days of receipt of notice, the complainant may put forward his objection before the court in person or by a lawyer.³⁹

SPECIAL PROVISIONS REGARDING BAIL

As per section 10(1), the offences punishable under the Act are cognizable, non-bailable and non-compoundable. Any application of bail for a person privy to and directly accused of an offence punishable under the Act shall not be considered unless the

³⁴ Section 5(2)

³⁵ Section 5(5)

³⁶ Section 5(2), proviso

³⁷ USA, UK, Australia, Malaysia etc

³⁸ Section 5(3)

³⁹ Section 5(4)

complainant has been given an opportunity of being heard. He shall not be enlarged on bail if the court satisfies that there is reasonable cause of being convicted of offences alleged against him.⁴⁰ However, he may be enlarged on bail if he is sick or infirm and the court satisfies that justice will not be hampered by his release.⁴¹

For other accused, the court may enlarge them on bail after recording reasons for its satisfaction that it will be just and appropriate to release them.⁴² The protection and security of the victim may be seriously hampered on the release of the accused. As there is no requirement to suspend or remove the accused officer, he may use his power to threaten the victim or aggrieved parties and force them for withdrawal of case.

POWER TO ORDER FOR SECURITY OF THE COMPLAINANTS

The complainant may file an application for security against any accused person. The court may pass an order for detention of such person complained against for seven days and may extend the period from time to time.⁴³ This is a good initiative to ensure protection of the victim harassment and threats from the perpetrators. However, the period of such detention needs to be extended till disposal of the trial.

APPEALS

The judgments of the Sessions Court can be appealed against before the High Court Division under section 16(1) of the Act. Before filing an appeal, the convict has to submit the amount of fine and compensation to the trial court within 14 days of the pronouncement of judgment. No appeal can be preferred without complying with this obligation.⁴⁴

The Act recognized the right of the victim or aggrieved person/persons to resort to higher courts to prefer 'appeal' or 'review'.⁴⁵ The word 'review' should be replaced by 'revision' as there is no concept of review in the present scheme of criminal procedure in the country.

NON-BANGLADESHI CITIZEN AND EXTRADITION

⁴⁰ Section 10(2)

⁴¹ Section 10(3)

⁴² Section 10(4)

⁴³ Section 11

⁴⁴ Section 15(4)

⁴⁵ Section 16(2)

Special protections are provided for foreigners arrested for commission of an offence under the Act. He/she has the right to communicate with high commission of his country in Bangladesh or in neighboring countries.⁴⁶

Upon arrest of a foreigner, the Ministry of Foreign Affairs will request his extradition from the concerned country. If the government of any country requests for extradition of a Non-Bangladeshi person accused of committing torture, the concerned department of the Ministry of Foreign Affairs will immediately communicate the actions taken or proposed regarding that trial or extradition of that person.⁴⁷ Bangladesh will follow the Extradition Act, 1974⁴⁸ in dealing with extradition of foreigners accused of offences under the Act. While extraditing a foreigner, Government may also communicate necessary evidences for filing criminal cases to the concerned authority of that country.

The Act provided provision for ensuring justice to the criminal accused of committing torture in other countries. The Act safeguarded non-citizens and foreigners and kept provisions so that anyone cannot get a safe haven in Bangladesh after committing torture in other countries.

INDIVIDUAL RESPONSIBILITY AND BURDEN OF PROOF

The liability of offences under the Act is individual.⁴⁹ No invocation of order of superior officer or government authority will be accepted as a justification for torture.⁵⁰ If any government officer or any person under his authority is accused of negligence or unawareness resulting to loss of complainant, then the accused has to prove that such loss did not arise from that negligence or unawareness.⁵¹

These provisions are good safeguard against acts of torture by negligence of the higher authorities. The responsibility of the superior and inferior authorities has been balanced by these provisions.

APPLICATION OF THE ACT

The Act has been given overriding effect over all other laws under section 3. Moreover, offences under the Act cannot be justified by invocation of a state of war, threat of war,

⁴⁶ Section 17

⁴⁷ Section 18(1)(2)

⁴⁸ Act No. 58 of 1974

⁴⁹ Section 13(3)

⁵⁰ Section 12

⁵¹ Section 20

internal political instability or an emergency.⁵² This provision is in conformity with the article 2(2) of the UNCAT. It ensures the application of law irrespective of the situations.

EFFECT OF THE APPELLATE DIVISION'S DECISION

The Appellate Division on 24 May 2016 upheld the judgment of the High Court Division in *Blast vs Bangladesh*⁵³ and formulated new guideline on arrest and remand in the full judgment.⁵⁴ The Appellate Division in its judgment praised the Act, 2013 as “one of the finest legislation so far promulgated after the independence of the country.”⁵⁵ The Appellate Division also held some recommendations of the High Court Division redundant in view of the promulgation of the new Act, 2013. The court found the recommendation to amend sections 176, 202 of the CrPC, sections 220, 330 and 348 of the Penal Code and section 44 of the Police Act is not required.⁵⁶

The Court noted that the application of the Act in its true letter and spirit can only be ensured by the Magistrates only. They are the authority to ensure its enforceability and see that this piece of legislation does not remain in the statute only.⁵⁷

Keeping in mind the above view, the Appellate Division formulated Guidelines to the Magistrates, Judges and Tribunals imposing positive duties upon the magistrates. According to the Guidelines, if the magistrate finds from police report or otherwise that the accused is dead after police remand, he shall direct examination of victim by a medical board or direct exhumation for fresh medical examination if already buried. If the report of the medical board reveals the death is homicidal in nature, the magistrate will take cognizance of the offence punishable under section 15 of the Act, 2013 against such officer and officer in charge of the police station or commanding officer of such officer in whose custody the death of the accused took place.⁵⁸

The magistrate shall also take cognizance of offence suo-motu under section 190(1)(c) of the CrPC without awaiting the filing of a case under section 4 and 5 if materials or information comes to him that a person has been subjected to ‘torture’ within the

⁵² Section 12

⁵³ Supra note, 4

⁵⁴ *Bangladesh vs Blast*, 69 DLR (AD)63

⁵⁵ Ibid. para-120

⁵⁶ Ibid. para-183

⁵⁷ Ibid

⁵⁸ Ibid, para-222(h)

meaning of section 2 of the Act, 2013 and upon examination by a medical board, the medical reveals the person detained has been tortured or died due to torture.⁵⁹

CONCLUSION

This law is the first of its kind in this sub-continent. Since 2013, as many as 14 cases have been lodged under this law. Of them, the investigation agency submitted final reports in 10 cases. Concerns have been raised by the stakeholders that a sense of fair is prevalent in the society. We all should come forward to create an environment for effective implementation of the provisions of this Act.



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⁵⁹ Ibid, para-222(i)