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LEGAL FRAMEWORK OF ARREST AND POST-ARREST SAFEGUARDS: A COMPARATIVE ANALYSIS AS TO THE LAWS OF BANGLADESH, INDIA, AND THE UNITED KINGDOM

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ABSTRACT

The rights of arrested persons during arrests and after arrests are significantly important because the act of arrest restricts persons' rights to liberty that are protected by the laws of all countries including Bangladesh, India, and the United Kingdom (UK). These restrictions have raised several concerns over the years. While compliance with the laws on arrest is mandatory, the actual implementation of these laws is still questionable. There are obvious gaps between the provisions of the existing laws and the actual practice. Past research also suggests that the legal structure of arrest and post-arrest in Bangladesh should be revised in comparison with the criminal justice systems of other developed countries where rights of those arrested are safeguarded. However, past research has not compared other jurisdictions, and neither is there any research conducted on best practices of other jurisdictions. As such, this article analyses the various aspects of arrest and post-arrest safeguards that exist in all the three jurisdictions, and identifies good practices to safeguard the arrested person more effectively. The objective of identifying good practices from India and the UK is to use them as a paradigm for the criminal justice system of Bangladesh. This is done through the application of a qualitative research methodology using content analysis as the approach to analyse primary and secondary sources. The comparison includes discussion on the right to know the

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reason of arrest, right to be brought to court, right to be free from torture, right against self-incrimination, right to be medically examined and the remedial aspect of '*habeas corpus'*. These rights that are significantly related to the rights to life and liberty, fair trial and to be presumed innocent until proven guilty. The findings show that the UK's legal framework is far better than the ones in India and Bangladesh. It is suggested that the protection provisions enshrined in the existing criminal justice system and the current legal structure should play an important role through specific court rulings. Further, it is asserted that the police department should take accountability by incorporating the necessary changes into the existing legal structure to ensure justice prevails. The paper ends with a recommendation that monetary compensation, and a physical exemplary punishment should be imposed to ensure the safeguards of individual, both at the time of arrest and post-arrest are upheld.

Keywords: Arrest, criminal justice, police, safeguards, torture.

KERANGKA UNDANG-UNDANG PENANGKAPAN DAN PASCA PENANGKAPAN: ANALISIS PERBANDINGAN TERHADAP UNDANG-UNDANG BANGLADESH, INDIA DAN UNITED KINGDOM

ABSTRAK

Hak orang yang ditangkap semasa penangkapan dan pasca penangkapan sangat penting kerana tindakan penangkapan menyekat hak kebebasan seseorang yang dilindungi oleh undang-undang di semua negara termasuk Bangladesh, India, dan United Kingdom (UK). Sekatan ini telah sekian lama menimbulkan kebimbangan. Walaupun pematuhan undang-undang mengenai penahanan adalah wajib, pelaksanaan undang-undang ini masih dipersoalkan. Terdapat jurang yang jelas di antara peruntukan dalam undang-undang sedia ada dan amalan sebenar. Penyelidikan terdahulu mencadangkan agar struktur undang-undang penangkapan dan perlindungan selepas penahanan di Bangladesh disemak semula dengan mengambil kira sistem keadilan jenayah negara maju lain di mana hak terhadap mereka yang ditangkap adalah dilindungi. Walau bagaimanapun, penyelidikan terdahulu tidak membandingkan bidang kuasa lain, dan juga tiada penyelidikan yang mengesyorkan amalan terbaik daripada bidang kuasa lain. Artikel ini menganalisis pelbagai aspek perlindungan penangkapan dan pasca penangkapan dalam ketiga-tiga bidang kuasa ini bagi mengenal pasti

amalan yang baik dalam melindungi orang yang ditangkap. Objektif mengenal pasti amalan baik dari India dan UK ialah untuk digunakan sebagai paradigma untuk sistem keadilan jenayah di Bangladesh, melalui pendekatan metodologi penyelidikan kualitatif dengan menggunakan analisis kandungan bagi menganalisis sumber primer dan sekunder. Perbandingan tersebut merangkumi perbincangan mengenai hak untuk mengetahui alasan penangkapan, hak untuk dihadapkan ke mahkamah, hak untuk bebas dari penyeksaan, hak terhadap diri sendiri, hak untuk diperiksa secara perubatan dan aspek pemulihan 'habeas corpus'. Kesemua hak ini yang sangat berkaitan dengan hak untuk hidup dan kebebasan, hak untuk perbicaraan yang adil dan hak untuk dianggap tidak bersalah sehingga terbukti bersalah. Hasil kajian menunjukkan bahawa kerangka undang-undang UK jauh lebih baik daripada yang ada di India dan Bangladesh. Disarankan agar peruntukan perlindungan yang termaktub dalam sistem keadilan jenayah dan struktur perundangan sedia ada harus memainkan peranan penting melalui keputusan penghakiman yang khusus. Selanjutnya, ditegaskan bahawa pihak polis hendaklah bertanggung jawab dengan memasukkan perubahan yang diperlukan ke dalam struktur perundangan bagi memastikan wujudnya keadilan. Makalah ini diakhiri dengan cadangan agar pampasan kewangan dan hukuman teladan fizikal diwajibkan bagi memastikan perlindungan kepada individu semasa penangkapan dan pasca penangkapan.

Kata kunci: Tangkapan, keadilan jenayah, polis, perlindungan, penyeksaan.

INTRODUCTION

Protection of the arrested person is a key concern in all existing systems of criminal justice worldwide. Every nation has its framework of criminal justice which has been implemented to make the arrest lawful while maintaining the safety and protection of the accused person in custody. Bangladesh and India have both been subjected to British colonial rulings for a significant period which have affected most of the laws in these two nations. In many instances, existing legislations which were introduced during the colonial period have undergone a few changes to meet the current needs. However, the issue of safeguards both at the time of arrest and post-arrest are still a concern for these two countries as compared to the United Kingdom (UK). This study aims to analyse the current laws of these three jurisdictions in terms of various aspects of arrest, post-arrest, rights of the arrested individual, duties and obligations of enforcement officers and other

relevant concerns, keeping in mind differences in socio-legal and socio-political aspects. This is to identify how these safeguards differ with a view to identify the best practices in the UK and India that can be adopted in Bangladesh.

The criminal justice system of Bangladesh and India is distinct from the UK, but it must be noted that in both the first two countries, the foundation of the adversary system is inherited from the British legal system. In the existing criminal justice system, law enforcement agencies play a key role in the arrest of the suspected persons. It is alleged that such agencies do not adhere to the legal norms when they arrest wrongdoers[1]. The act of arresting and detaining without proper investigation has led to many misconducts, such as false arrest, forced confessions, misrepresentation of evidence, harassment by the police, abuse in custody, death in detention and so on.[2] Furthermore, the arrested person sometimes died due to the use of undue force and this happens continuously in Bangladesh[3] and India.[4] The number of such irregularities varies from one country to another due to differences in the socio-economic circumstances and access to justice. The existing legal framework and the accountability mechanism are other factors which contribute to the differences. Similarly, rights and freedoms vary from jurisdiction to jurisdiction. Nevertheless, all the three countries, which follow the 1984 UN Convention Against Torture (UNCAT) have specifically recognised the universal practice of eradicating torture, both at the time of arrest and post-arrest. The judicial institutions in all these countries play a crucial role in expanding and

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1 Safi, M. (August 6, 2018) Photographer charged as police crackdown in Bangladesh intensifies. *The Guardian*, [Online]. Retrieved from https://www.theguardian.com/world/2018/aug/06/famed-bangladeshi-photographer-held-over-road-protest-comments (Accessed on January 10, 2021).

2 Rani, N. (et al) (2018), "Lacunae in provision of arrest: need for police accountability and reformation." (September 14, 2018). Available at ssrn: https://ssrn.com/abstract=3249342 or http://dx.doi.org/10.2139/ssrn.3249342. [Last Accessed in 2020 August 09].

3 Mollah, Md. Awal Hossain, "Crossfire and Violation of Human Rights in Bangladesh: A Critical Review." *International Journal of Law Crime and Justice*. 2. 385-397. (2019) 10.36348/sijlcj. 2019.v02i11.007.

4 Pathak A.G (*et al*), "An unusual case of death in police custody: suicide by consumption of potassium cyanide." Int J Res Med. (2015); 4(1);117-120 e ISSN:2320-2742 p ISSN: 2320-2734.

ensuring the implementation of the framework of law and court rulings to uphold the legal provisions. Actual or functional implementation of safeguards in these countries are carried out through different approaches. Due to the numerous concerns in regard to issues relating to the matters, this article analyses the relevant laws and court directions in the said countries to draw inferences.

METHODOLOGY

A qualitative research method was adopted in this study. The research encompassed document analysis of both primary and secondary sources including the relevant legislations of Bangladesh, India, and the United Kingdom. The study also includes the analysis of court decisions, articles, reports, and findings published by different researchers, non-governmental organizations, and other human rights organisations. In this study, the Constitution of Bangladesh, the Penal Code 1860, the Police Act 1861, the Criminal Procedure Code 1898, the Special Powers Act 1974, the Torture and Custodial Death (Prevention) Act 2013, the Evidence Act 1872 and other relevant laws of the State were analysed. Besides, the Police and Criminal Evidence Act 1984 of the UK together with other relevant laws[5] were analysed in relation to the protection of the arrested persons. In addition, the Code of Criminal Procedure of India 1973 along with other relevant laws[6] have also been analysed.

ARREST SAFEGUARDS

To ensure the safeguards of the arrested person, it is important to ensure that the person will be given access to a fair trial[7] which is enshrined in

5 The Terrorism Act 2000, the Criminal Justice Act 1988, the Human Rights Act, 2000 and the Habeas Corpus Act 1679.

6 The Constitution of India, the Indian Penal Code 1860 and the Evidence Act of India,1872.

7 The concept of fair trial does not merely include that the person will get access to the court of law. The concept of the fair trial also includes a number of other phenomena like the presumption of innocence; independent, impartial, and competent judge; knowledge of accusation; right to open trial; right to free legal aid; trial in presence of the accused; evidence to be taken in presence of the accused; protection against the

the Constitutions of both Bangladesh and India. In India, the Constitution is the key legal instrument and Part III contains the basic rights of the person as a form of fundamental rights. Similarly, the Code of Criminal Procedure and the Constitution include the rights of arrested person arrested. It is similar to that of Bangladesh, but the relevant articles are more detailed in India. Article 22 (1) of the Indian Constitution (which applies to section 50 of the Criminal Procedure Code) places a duty on the police to directly disclose to the arrested person full details of the offence for which he is being arrested. This safeguard is also indicated in the Criminal Procedure Code, which requires the police to inform the arrested person of the right to be released on bail if a detained person is arrested without a warrant for a bailable offence, and to arrange for sureties on behalf of him. Under Section 51 of the Code, the arrested person shall be charged, while under Section 52, a police officer may seize the offensive weapons of the arrested person, if any.

The code also stipulates that the person arrested should have a medical treatment on the recommendation of the police or on appeal by the person being arrested.[8] This is the significant part of the law as the safeguards ensure the prohibition of torture in the custodial period. Section 55 stipulates the procedures to be observed when police deputise his subordinate to arrest a citizen without a warrant. The rule of 24 hours to produce the arrested person before the magistrate is also a safeguard enshrined in the Criminal Procedure Code of India. Section 56 (corresponding to clause (2) of Article 22 of the Constitution) provides that the person arrested shall not be held in police custody for a period longer than what is reasonable and that, in any event, that period shall not exceed 24 hours exclusively of the time necessary for the trip from the place of arrest to the magistrate. Moreover, in *Khatri vs. State of Bihar*,[9] it was emphasised that it is necessary to observe conscientiously the constitutional and legal requirements for producing

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illegal arrest. right to bail, prohibition on double jeopardy and right against self-incrimination. Refer to Article 6 of the Human Rights Act, 2000 (UK), Retrieved from https://www.equalityhumanrights.com/en/human-rights/human-rights-act (Accessed 8 November, 2021).

8 Section 53 and 54 of the Criminal Procedure Code 1898.

9 *Khatri And Others v. State of Bihar & Ors* [1981] SCR (2) 408, 1981 SCC (1) 627.

an arrested person before a magistrate within 24 hours of arrest. Section 57 refers only to the issue of time in custody. The purpose of this provision is to put the defendant before a competent court to try or convict him with the least delay. In order to prevent detention and incarceration, to obtain evidence, or as a means to compel people to provide information, the right to be taken out of police custody by being brought before a judge is essential. Moreover, the Bombay High Court has held that a police officer would be guilty of 'wrongful detention' if he failed to comply with the requirements of delivering the accused within 24 hours before the magistrate.[10]

In the UK, the Police and Criminal Evidence Act (PACE Act 1984) and Criminal Justice Act 2003 specify the rights of the arrested person. Moreover, through various court decisions, the scope and concept of safeguards are also established. The key assurance is that the arrested person is informed about the reason for arrest by the arresting police officer. Section 28(1) of the PACE Act states that where a person is arrested, the arrest is not lawful unless the person arrested is informed that he is under arrest as soon as it is practicable after his arrest. It is the right of the arrested person to know the grounds for being arrested and it is the legal duty of the police to inform the person that he is under arrest and grounds for his arrest. In *R v. Iqbal*, it was held that:

> a man who was handcuffed by the police in connection with a criminal offence was not under arrest because he was not told that he was under arrest and the officer did not consider that he was making an arrest.[11]

Furthermore, when an arrest is made in the UK, the police must identify themselves as the police, inform that the person is being arrested, what crime they think the person has committed, explain why it is necessary to arrest and explain that the person is not free to leave. Additionally, in the case of juveniles, the police must contact the parents, guardian, or carer as soon as possible after the person's arrival at the police station while in the case of an adult, the next of kin must be informed. The 'statutory rights' that are accessible to a person arrested and detained in police custody is the most important part of the PACE Act. These rights are not specified in Bangladesh and India and accordingly, the police do not have any legal obligations to provide these kinds of

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10 *Khatri, [1981].*

11 *R v. Iqbal* [2011] 1 Cr App R 24.

custodial safeguards. As the PACE Act 1984 contains those entitled rights, the arrested person is legally eligible to obtain such rights. Under the Act, the arrested person may request the police to obtain police assistance after being arrested. The police should also inform the arrested person about his rights to complain about such arrest. The police will inform the arrested person about the crime they believe the arrestee has committed and why he/she has been arrested and detained. Above all, the arrested person must be notified that he needs not answer any questions asked about the alleged crime. In fact, the police must inform the detainee, or the solicitor involved to see the paperwork and documentation as to why the suspect was arrested and detained, and how long he would be held at the police station. This is significant because the arrested person should be aware of the reason for the arrest as well as the documentation used to frame the allegation. If the arrestee is made aware of the allegations, he can prepare a defence to support his claim of innocence. However, these laws do not exist in Bangladesh and India.

Before conducting an arrest, it is necessary for the police in the UK to show their identity to the arrested person. In Bangladesh, police officers have been seen to wear plain clothes during arrests although there is a specific directive not to arrest any person without the decorated police uniform.[12] In several instances, the police have denied the claims made by made by the victim's family members[13] that the arrest was done by the plain clothes police.[14] ,

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12 *BLAST v Bangladesh and others,* [2003] 55 DLR HCD 363.

13 A third-year student who was a joint leader of the platform that spearheaded the quota reform movement was arrested. In a very early morning, a group of men named themselves detective police on 12 July 2018 and took the victim out of his residences, claimed by an alternate student leader. Throughout the whole day, however, detectives tried to refuse the victim's arrest. The family of the victim repeatedly asked those on the police gate about the location of the victim. The high police officers also told The Daily Star journalist around noon that they did not take someone by the name of the victim. However, the arrest of the victim was later revealed by the police. The daily star. (July 13, 2018) Arrest admitted after daylong DMP denial. *thedailystar.net*, [Online]. Retrieved from https://www.thedailystar.net/frontpage/arrest-admitted-after-daylong-dmp-denial-1604554 (Accessed on December 25, 2018).

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Right to Know the Reason of Arrest

The right to know the reason is very significant for an arrested person to prepare his/her defence against the alleged offence for which the arrest was made. Once the person is arrested, the arresting officer is obligated to notify the accused person of the grounds of arrest. The Bangladesh Constitution grants this right, as well as other fundamental rights in Part III. The safeguards of arrest and detention are laid down in Article 33. Article 33(1) states that:

> … no person who is arrested shall be detained in custody without being informed, as soon as may be of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice.[15]

Besides, the guidelines of the Apex Court released in the case of *BLAST and others vs. Bangladesh and others*[16] highlighted the importance of informing the grounds for arrest to the arrested person without delay and specified that he should provide an arrest statement. Article 22(1) of the Indian Constitution and the Criminal Procedure Code of India also ensures similar right. The Indian Constitution states that "no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds of such arrest." The Criminal Procedure Code 1973 contains several provisions with regards to the arrest of persons in Chapter V of the Code. Out of these rights, the most important right which has been guaranteed as a 'fundamental right' of an accused by the Constitution of India as well as by Article 9(4) of the International Covenant on Civil and Political Rights. Furthermore, in many cases, the Supreme Court held that

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15 Article 33(1) of the Bangladesh Constitution.

16 *BLAST and others v. Bangladesh and others* [2003] 55 DLR 363.

although it was not necessary for the police to provide full details of the alleged offence, adequate information had to be given to allow the arrested person to understand why he was arrested. Through the Indian Supreme Court rulings in *Joginder Kumar v. State of UP*[17] and *D.K. Basu v. West Bengal State,*[18] substantial amendments were made in Section 50-A of the Criminal Procedure Code in 2006 making it compulsory for the police officer who made an arrest to inform the arrested person's friend, relative or any nominee about his arrest, to inform the arrested person of his rights and to enter the arrest in the register maintained by the police. In this way, the magistrate is also under a duty to satisfy himself on the action of the police.

In the UK, after the arrest, the individual is taken into the police custody at the police station. Once having been taken to the police station, the arrested person has the right to receive a paper where he should be told of his rights, which is the most significant part of the UK law.[19] If the detainee does not understand what it means, he or she should ask questions to the custodial police. These rights include that the arrestee is entitled to tell someone that he has been arrested. For example, the arrestee may ask a police officer to call his parents/guardians or next of kin. Moreover, he has the right to have a solicitor and talk to them on his own in private, the right of medical help if he is feeling ill, and the right to see the rules that the police must follow.[20] In addition to the above, if the arrested person is under 17 years old, he also has the right to have an appropriate adult with him at the police station and to talk to them in private if he wants to. In the case of under 18, the police must try to contact the arrested person's parents, guardian, or carers.

Although the Supreme Court of Bangladesh issued guidelines on arrest and detention safeguards, it is recommended that the Criminal Procedure Code 1898 of Bangladesh be amended as done in India. Similarly, an arrested person in Bangladesh should be entitled to receive a prescribed form outlining the rights to which he/she is entitled.

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17 *Joginder Kumar vs. State of Uttar Pradesh* AIR [1994] SC 1349.

18 *D.K Basu v. State of W.B.* [1997] 1 SCC 416.

19 Part 3.1; 3.2; 3.7; 3.7A of CODE C of the PACE Act 1984.

20 CODE C of the PACE Act 1984 prescribes about Practice for the Detention, Treatment and Questioning of Persons by Police Officers.

Presenting the Arrestee to the Court of Law

The general rule is that the person under arrest should be presented before a magistrate in a court within 24 hours of the arrest. For India, Bangladesh, and the UK, this is a provision in the law. The purpose of this provision is to validate the legality of the arrest by a court of law. The court has the authority to rule on the implementation of laws in both arrest and detention proceedings. It must be noted at this point, an individual's right to freedom is the most significant right that must be upheld. However, it is alleged that torture and other inhuman or degrading treatment of an arrested person during this period is constantly happening, specifically in Bangladesh and India.[21] At first glance, this rule of 24 hours may seem appropriate to safeguard the correct procedure and the interests of the arrested person. However, it must still be questioned why the police should be allowed to keep the arrested person for up to 24 hours before presenting him/her to court.[22] If the police are acting on an arrest warrant, the arrested person would have to be taken before a competent court as soon as legally possible.

In India, it is necessary to observe scrupulously the constitutional and legal requirements for producing an arrested person before a magistrate within 24 hours of arrest.[23] Section 57 of the Criminal Procedure Code refers to the issue of time in custody. Moreover, in deciding *Khatri* case, the Bombay High Court has held

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21 In India, the home ministry on 3rd August 2021, told the Parliament (Lok Sabha) on that 348 people died and 1,189 were tortured in police custody between 2018-19 and 2020-21. Retrieved from https://timesofindia.indiatimes.com/india/348-died-and-1189-tortured-in-police-custody-in-2018-19-2020-21-home-ministry/articleshow/85005287.cms.
Similarly, Human Rights Watch (2021) claimed that in Bangladesh, law enforcement and intelligence services, including both police and troops seconded into civilian law enforcement, have been credibly accused of torturing and ill-treating detainees and suspects. Retrieved from https://www.hrw.org/news/2021/06/26/bangladesh-hold-security-forces-accountable-torture.

22 Although it is a question as to the necessity of 24 hours, there are some reasons as to the necessity such as transportation, asking general questions about the allegation, deciding whether there is sufficient ground to ask for further detention or not (known as remand), or collecting any evidence that needs to be collected immediately, and so on.

23 Khatri, [1981], 5.

that a police officer would be guilty of 'wrongful detention' if he failed to comply with the requirements of delivering the accused within 24 hours before the magistrate. In the United Kingdom, the arrested person shall not be kept in police custody for more than 24 hours without being charged at the court of competent jurisdiction.[24] However, if a person is arrested in the UK under the Terrorism Act 2000, the arrested person can be detained for fourteen days without being charged.

The 24-hour police detention followed by an arrest is a legal requirement, and it is the absolute maximum for all three jurisdictions. In accordance with the decision in the *Khatri* case, it is recommended that the courts in Bangladesh should investigate every instance of the police conduct that occurs during the 24-hour period. If it is discovered that the detainee was detained in a police custody for more than 24 hours, the responsible police officer will be held liable for wrongful detention.

POST-ARREST SAFEGUARDS

The post-arrest safeguards are also significantly important for an arrested person. These rights include the right to consult with a lawyer, prohibition of torture during the investigation, right against self-incrimination, right of *habeas corpus* for wrongful detention and access to medical facilities.

Prohibition of Torture

The torture prohibition is universal and is practised in several countries, including Bangladesh, India, and the UK as it is also guaranteed by different international Conventions or Protocols.[25] The United Nations Convention Against Torture (UNCAT) 1984 is the set of safeguards under which the signatory countries must follow and uphold in their domestic laws. Besides, there are other international laws which also

[24] Section 41 of the PACE Act 1984.

[25] Bangladesh ratified the UNCAT in 1998, while India is only a signatory state but not ratified. The United Kingdom ratified the Convention in the same year as Bangladesh, in 1998. Retrieved from https://indicators.ohchr.org/, Accessed on 07.03.2020.

prohibit custodial torture. Among these are the 'Universal Declaration of Human Rights' (UDHR) 1948[26] and 'International Covenant on Civil and Political Rights 1966,' which are the major set of laws that prohibit torture.

In light of these Conventions, Bangladesh has included some of its provisions into the Torture and Custodial Death (Prevention) Act 2013.[27] According to this Act, all forms of torture are prohibited during the custodial period in police custody which includes both physical and mental torture.[28] The definition of custodial deaths is also defined in the Act as the death of a person in the custody of a public officer. Moreover, any death of any person during illegal detention, at the time of arrest by any law-enforcing agent, is also considered as custodial death. Furthermore, any death occurring whilst a person is being arrested or taken into detention, being questioned, irrespective of the fact that whether the person is a witness in a case or not (Section 2 (vii) of the 2013 Act) is also considered to be custodial death. Most significantly, the Constitution of Bangladesh, which is the supreme law, also prohibits all forms of torture to ensure the rights to trial and punishment.[29]

The laws of India give prisoners some rights while in police custody. Such rights are so fundamental that nobody can violate them legally. In comparison to the International Covenant on Civil and Political Rights, the Indian Constitution does not expressly guarantee the protection from torture in detention. Nevertheless, the prisoners also have access to certain fundamental rights enumerated in Part III of the Constitution. These privileges are primarily found in Articles 19, 20, 21, 22, 32 and 226 of the Indian Constitution. In addition to these constitutional rights, the people of India also enjoy some other legal rights under the Indian Penal Code, the Code of Criminal Procedure and the Indian Evidence Act 1872. Numerous laws and guidelines on

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26 Articles 1, 3, 5, 6, 8, 9, 10 and 11 of UDHR 1948.

27 In the Preamble of the Torture and Custodial Death (Prohibition) Act, 2013, it states that "WHEREAS a Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, was signed in New York on December 10, 1984; AND WHEREAS by an instrument of accession dated 5th October 1998, Bangladesh has acceded to the aforesaid Convention."

28 Section 2 (v) of the Torture and Custodial Death Prevention Act 2013.

29 Article 35(5) of the Bangladesh Constitution.

police and custody often stipulate some rules and regulations prohibiting torture in detention. In several cases, the Indian Supreme Court, conscious of human rights, has not only recognised these rights but has broadened their reach through the mechanism of judicial activism giving new and radical meanings. In *Nilabati Behera vs. State of Orissa and Ors*, a three-Judge bench of Supreme Court held that:

> It is an obligation of the State, to ensure that there is no infringement of the indefeasible rights of a citizen to life, except in accordance with law while the citizen is in its custody.[30]

Further, in the landmark Indian case of *D.K Basu v. State of West Bengal*,[31] it was held that the use of third-degree methods or any form of torture to extract information is not permitted and that police personnel carrying out arrest and interrogation must have accurate, visible with clear identification or name tags with their designations. It was also held that a memo of arrest stating the time and place of arrest must be prepared by the police officer carrying out the arrest. The Supreme Court of India also issued directives as to the use of handcuffs on the arrested person in *Citizens for Democracy v. State of Assam* [1995][32] and it was held that it is necessary to obtain the magistrate's permission before handcuffing a person who has been remanded in judicial or police custody. In fact, torture in detention is a legal breach in compliance with the Indian Penal Code and the Criminal Procedure Code. The former stipulates that the third-degree punishment or abuse that causes harm to any citizen while in custody is an offence punishable with 10 years of imprisonment.[33] Death due to torture in custody is equated to murder under the Indian Penal Code for which the maximum punishment is the death penalty. Moreover, the crime of custodial torture against prisoners can be brought under Section 302, 304, 304A and 306 of the Penal Code.

In the UK, Section 134 of the Criminal Justice Act 1988,[34] and the existing common law provisions, make it a crime for any public

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30 *Nilabati Behera v. State of Orissa and Ors* [1993] AIR 1960, 1993 SCR (2) 581.

31 *D.K Basu v. State of W.B.* [1997] 1 SCC 416.

32 *Citizens for Democracy v. State of Assam* [1995] Scc 743.

33 Section 330 and 331 of the Indian Penal Code 1860.

34 The significant part of this section is the punishment for the wrongdoer who is convicted of torture being the public official. Section 134 (6) states that "a person who commits the offence of torture shall be liable on

official to 'intentionally inflict severe pain or suffering on another in the performance of his official duties.' This law was adopted to uphold British obligations under the United Nations Convention Against Torture 1984. Although it is prohibited in accordance with the law, the law enforcement or the security officers of the State are still alleged to be suspected of inflicting torture upon the arrested person.[35] While the official position of the UK is that it does not use or approve abuse or cruel inhuman and degrading treatment (CIDT), credible evidence suggests differently.[36]

According to the analysis, torture is prohibited in all three jurisdictions. However, it is recommended that the Torture and Custodial Death Prevention Act 2013 of Bangladesh be amended to comply with the UN Convention Against Torture of 1984. It is also suggested that the maximum punishment for custodial torture and subsequent death conform to Bangladesh's Penal Code 1860, which is life for life.[37]

Right against Self-Incrimination

Self-Incrimination or self-accusation is a statement that a person accuses himself of a crime that may result in criminal prosecution now or in the future'.[38] Self-incrimination can be direct or indirect. Direct means that the suspect made self-incriminating testimony during questioning, while indirect means that the testimony was made voluntarily and without pressure from another person.[39] The detainee

conviction on indictment to imprisonment for life." Retrieved from http://www.legislation.gov.uk/ukpga/1988/33/part/XI/crossheading/torture. Accessed on May 26, 2020.

35 Blakeley, R., & Raphael, S. "The prohibition against torture: why the UK government is falling short and the risks that remain." *The political quarterly*, (2019) 90(3), 408-415.

36 Blakely, "Prohibition Against Torture," 10.

37 According to Section 302 of the Bangladesh Penal Code 1860, whoever commits murder shall be punished with death, or 2[imprisonment] for life, and shall also be liable to fine.

38 Miranadarights.org; Retrieved from http://www.mirandarights.org/selfincrimination.html

39 *Ibid.*

has a right not to answer any question which will expose him to any charge.

After the detainee is produced in the court, it is a common practice that the police will request the Magistrate to keep the detainee in the police custody to interrogate him/her. The purpose is to obtain information of the detainee's participation in the crime he/she is being held for. It is widely alleged that the police would torture the arrestee during this remand period[40] and these incidents of torture are constantly published in the mainstream daily newspapers on various occasions. One of the main purposes of torture in police custody is to extract the suspect's confession for the crime he has allegedly committed.[41] Constantly, the detainee is subjected to various types of continuous torment until he breaks down and finally makes the confessions.[42] The presumption of innocence unless proven guilty is the utmost safeguard of any arrested person and it is the duty and sole obligation of the State to prove the guilt of the suspected person beyond all reasonable doubt which is the fundamental principle of criminal law. Now, it is the question of the acceptability of such confessional statement presented before the court of law. It is alleged that the law of confessions is heavily burdened with the scope of abuse. It is one of the key points in the entire criminal justice system as to the law of evidence. It is generally accepted law and common practice that if a person confesses, it simplifies the entire investigation process of an investigation.

In Bangladesh, references to self-incrimination are included in Article 35(4) of the Constitution.[43] This provision has the main objective of shielding an accused person from any temptation to make self-incriminating statements, including confession and plays the role

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40 Rafiqul, M and Solaiman, SM, "Torture under Police Remand in Bangladesh: A Culture of Impunity for Gross Violations of Human Rights." *Asia Pacific Journal on Human Rights and the Law*, (2003), 4(2), 1-27.

41 It is also accepted by the law that any confessional statement made before the police will not be accepted as of evidence by the court of law. This is ensured by the legislation of all three jurisdictions, Bangladesh (the Criminal Procedure Code 1898, India (The Criminal; Procedure Code 1973), and the United Kingdom (the PACE Act 1984).

42 Blakely, "Prohibition Against Torture," 10.

43 Article 35(4) of the Bangladesh Constitution states that 'no person shall be forced to be a witness against himself guilty of any crime.'

as a substantive law whereas the Criminal Procedure Code and the Evidence Act work as the procedural law.[44] The confessional statement can be taken from the arrested person in two ways, first, to be taken as judicial confession and second, the non-judicial confession. In informer the confession made before the magistrate is legally acceptable as the magistrate is duly authorised to get the confessional statement from the arrested person. The latter is confession made outside of the court termed as a non-judicial confession is usually made to the police immediately after being arrested. These non-judicial confessions are not admissible in the court and can only be used to show the validity of the evidence found.[45]

In India, the Constitution also grants this privilege under Article 20(3) to the suspect or accused person. It is the arrested person's constitutional right not to be put upon himself to be a witness. The provision reads as follows: "no person accused of any offence shall be compelled to be a witness against himself." Furthermore, sections 24, 26 and 27 of the Indian Evidence Act and sections 162, 163(1), 315 and 342(a) of the Criminal Procedure Code also prohibit forced confession or testimony as these are inadmissible in court and protect the suspect or accused from such confession. The Supreme Court of India also directed that an accused person cannot be coerced or influenced into giving a statement pointing to his/her guilt and the accused person must be informed of his/her right to remain silent and of the right against self-incrimination.[46]

In the UK, when the police arrested someone, they will caution the arrested person, this is when they say, "you do not have to say anything, but it may harm your defence if you do not mention when questioned something which you later rely on in court."[47] This is commonly known as '*Miranda Warning'* which is developed through the judgment of *Miranda v. Arizona*[48] in 1966. This means that the arrested person can remain silent when questioned by the police.

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44 Section 164 of the Code of Criminal Procedure, 1898 contains the requirements necessary in this regard, under the heading "Power to Record Statements and Confessions." Sections 24 to 30 of the Evidence Act, 1872, discuss 'confessional statements.'

45 Sections 25 and 27 of the Evidence Act, 1872 of Bangladesh.

46 *Nandini Satpathy vs. P.L Dani Air* [1978] Sc 1025.

47 Being arrested: www.gov.uk.

48 *Miranda vs. Arizona*, 384 US 436 [1966].

However, if the arrestee remains silent during his interview with the police and then later explains his actions when he is in court, the judge and jury might wonder why he did not say that to the police at the initial stage of arrest and interview. They might then decide not to believe what the arrestee is saying in the court.

Even though to remain silence is a constitutional safeguard in Bangladesh, it is recommended that the true application of this safeguard must be ensured. Furthermore, the Supreme Court guidelines in the BLAST case should be followed in regard to interrogation while in police custody.

Medical Examination of Arrested Person

In Bangladesh, while delivering the BLAST case judgment in 2003, the Honourable Supreme Court of Bangladesh placed its judicial view on the necessity of a medical examination after arrest.[49] The Court issued fifteen guidelines as directives which need to be honoured by the police at the time of the arrest. In delivering the judgement, the High Court said that "the officer concerned shall record reasons for marks of injury, if any, on the person arrested and take him/her to the nearest hospital or government doctor."[50] Although this is not stipulated in the statute, this is a requirement under the guidelines that the police need to follow. Besides, the Torture and Custodial Death Prevention Act 2013 contains some provisions as to the medical facility for an arrested person. However, the provisions only operate when a complaint about torture in the custody is made. According to Section 4 of the 2013 Act, if a a complaint is received that the person arrested has been subjected to torture, the court has the jurisdiction under this Act to record the statement of the person immediately; or direct the person or body of the person, to be examined by a registered medical doctor immediately. If the complainant is a female, the examination shall be made by a female registered medical doctor. The registered medical doctor examining the person shall prepare a report within 24 hours on injuries, wounds, or marks of violence upon the person, mentioning the approximate time when such injuries or marks might have been inflicted. Where an examination is made, a copy of the report of the

49 BLAST, [2003], 6.
50 BLAST, [2003], 6.

examination shall be furnished by the medical doctor to the person examined or to the person nominated by the person examined and also to the court. If the medical doctor is of the opinion that the person examined requires medical treatment, the court shall direct the person to be admitted in a hospital.

Section 54 of the Indian Criminal Procedure Code provides for a compulsory medical examination by a medical officer in service of Central or State government, or by a registered medical practitioner, upon non-availability of such medical officer. Female arrestees can only be examined by a female medical officer or registered medical practitioner. However, Section 53 and 53A of the Criminal Procedure Code provide that if there are reasonable grounds for believing that an examination of the arrestee, on a charge of committing rape or other offence, will afford evidence so as to the commission of such offence, it shall be lawful to medically examine blood, bloodstains, semen, hair samples, fingernail clippings through the use of modern and scientific techniques including DNA and such other tests, which the medical officer thinks necessary in a particular case, acting at the request of a police officer.

England and Northern Ireland are protected by the Police and Criminal Evidence Act 1984 and their code of practice. Several codes for England and Wales and Northern Ireland are issued by this 1984 Act. The codes A, B, C, D and E are separated as distinct guidelines. Code C deals with the powers of arrest, treatment and questioning of people by police officers including administering medical attention. Code D refers to the identification of body examination of individuals by police officers. If a person is arrested, the custodian must contact an appropriate medical practitioner or if possible, to send the person to a hospital. Furthermore, if the person in custody is suffering from a physical illness, disability, mental disorder or in need of medical care, he/she should get access to the medical facilities. Even where a detained person does not seek medical care and has already received health assistance elsewhere, the obligation to contact a physician shall apply.

In Bangladesh, a medical examination is recommended immediately following an arrest. Any health issues of the arrested person must be documented to be forwarded to the magistrate, and this documentation is mandatory. Furthermore, this recommended medical check-up should be performed after every remand.

Habeas Corpus

Habeas corpus[51] is a significant safeguard which is available to the arrested person in custody who has been unlawfully detained. It is a form of order which is passed by the court after making a writ petition to the competent court. The order is passed to the concerned authority to bring the arrested individual before the court to determine whether the person's detention is lawful or not. The writ generally applies against the State's law enforcing agency which holds the defendant in custody. This form of safeguard is available in different legal instruments in Bangladesh, India, and the United Kingdom.

In Bangladesh, the Constitution contains this provision. Article 102 (2) (b) (i) empowers the High Court Division (HCD) with original jurisdiction to accept the writ application as to *habeas corpus*. According to this Article, the HCD of the Supreme Court may direct the State agency to present the arrested person before it to determine the legality of the detention.[52] Besides the constitutional provision, after its promulgation by the British-India parliament, the *habeas corpus* principle has been integrated into the 1898 Code of Criminal Procedure. The current Section 491 includes the principle that the High Court Division may issue an order to bring before it any detained person in public or private custody. Moreover, under their inherent power as Justice of the Peace, judges of the High Court Division may issue *Suomoto*[53] on their own behalf the writ of *habeas corpus*. Even beyond the existence of a constitutional provision relating to habeas corpus, the most valuable use of the provisions of Section 491 of the Criminal Procedure Code 1898 comes when constitutional provisions are suspended at the time of the State of Emergency; a case can then be brought before the High Court Division pursuant to Section 491 of the Criminal Procedure Code 1898 to seek directives or guidelines on the nature of the proceedings.

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51 *Habeas corpus* is a Latin term which means "(you) have the body." That also denotes that as you (the state agency) have the person (body), you must bring him or her before the court to determine the validity of the detention.

52 Article 102 (2) (b) (i) of the Bangladesh Constitution.

53 *Suomoto* is a Latin legal term which means "on its own motion" and implies that an action was taken by the High Court Division of Bangladesh Supreme Court on their own.

In India, the safeguard is also found in the Constitution which contains similar provisions as that of the Constitution of Bangladesh. This also shows that it is the constitutional safeguard that is available against unlawful or wrongful detention. Section 32 of the Indian Constitution states that the Supreme Court may issue the order of *habeas corpus* accompanied by other three forms of the writ petition.[54] In line with Article 32, Article 226 of the Constitution empowers the High Court of India to issue an order in the form of *habeas corpus*. In India, the principle of *locus standi*[55] applies in the application procedure of habeas corpus where any other person other than the detainee can file the writ petition of *habeas corpus*. A justification for not applying the conventional doctrine of *locus standi*, the Supreme Court held that if the detained person is unable to petition for the writing of *habeas corpus*, someone else must petition on his behalf for such a writ.[56] That is why it has been said that the writ of *habeas corpus* is the key that unlocks the door to freedom.[57] In the case of *State of Maharashtra & Ors vs. Bhaurao Punjabrao Gawande*, the Supreme Court of India viewed that**:**

> The celebrated writ of habeas corpus has been described as 'a great constitutional privilege' or 'the first security of civil liberty'. The writ provides a prompt and effective remedy against illegal detention. By this writ, the Court directs the person or authority who has detained another person to bring the body of the prisoner before the Court so as to enable the Court to decide the validity, jurisdiction or justification for such detention. The principal aim of the writ is to ensure swift judicial review of alleged unlawful detention on liberty or freedom of the prisoner or detenu.[58]

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54 Article 32 (2) of the Indian Constitution.

55 Locus Standi is the legal principle which allows any person other than the victim to access to the courts to file a case where the victim is unable to file the complaint or petition in the court of law. While relaxing the traditional doctrine of locus standi in *Sheela Barse v. State of Maharashtra* [1983], the Supreme Court held that if the detained person is unable to pray for the writ of habeas corpus, someone else may pray for such writ on his behalf. Retrieved from https://www.legalserviceindia.com/articles/wha.htm.

56 *Sheela Barse vs. State of Maharashtr*, 5 AIR [1983] SC 378.

57 The Common Law in India-1960 by M.C. Setalvad, page 38.

58 *State of Maharashtra & Ors vs. Bhaurao Punjabrao Gawande* (Laws (SC)- [2008]-3-90; Para 19.

In deciding the case of *Ummu Sabeena vs. State of Kerala & Ors*,[59] the court drew the reference to the Law of *Habeas Corpus* by James A. Scott and Charles C. Roe of the Chicago Bar[60] that:

> A writ of habeas corpus is a writ of right of very ancient origin, and the preservation of its benefit is a matter of the highest importance to the people, and the regulations provided for its employment against an alleged unlawful restraint are not to be construed or applied with over technical nicety, and when ambiguous or doubtful should be interpreted liberally to promote the effectiveness of the proceeding.[61]

It is the UK the principle of *habeas corpus* originated back to many years ago. In the history of the UK, the foremost human rights instrument is the Magna Carta which was adopted in 1215. The concept of *habeas corpus* also took birth in the *Magna Carta* where it states that no person shall be imprisoned without lawful judgement.[62] This provision is so important in England and other parts of the UK based on a specific Act known as 'Habeas Corpus Act 1679.' Although the law was passed long ago, the spirit and objective of the law are in full operation and the right of *habeas corpus* is available to every person.[63] This aspect of *habeas corpus* writ makes it the greatest constitutional value to be a redress available against the most powerful authority for the lowest or weakest person.[64] Besides the *habeas corpus* remedy, judicial review is also in existence in the UK through which any action taken by the public body can be challenged. In *Council of Civil Service Unions v. Minister for the Civil Service*, Lord Diplock summarised on four grounds which a judicial review can be sought by the aggrieved

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59 *Ummu Sabeena vs. State of Kerala* [2011] 10 SCC 781.

60 T.H. Flood & Company, Publishers, Chicago, Illinois, 1923.

61 *Ware vs. Sanders* [1910]146 Iowa, 233, 124 N.W. 958.

62 Article 39 of the Magna Carta, 1215.

63 Habeas Corpus Act 1679 is an Act of Parliament, still in force which ensures that no one can be imprisoned unlawfully. Literally translated, 'habeas corpus' means 'you may have the body' (if legal procedures are satisfied). This sounds like a strange phrase, but in medieval times it was the expression used to bring a prisoner into court. It later became used to fight against arbitrary detention by the authorities. Retrieved from https://www.bl.uk/learning/timeline/item104236.html. Accessed on July 20, 2020.

64 Lord Mackay of Clashfern, *Halsbury's Laws of England*: Volume 11, (LexisNexis Butterworths; Fourth Edition Reissue, January 1, 2006), para 1454.

party and the grounds are illegality, irrationality (unreasonableness), procedural impropriety and legitimate expectation.[65] As the first two grounds known as substantive grounds, any unlawful detention or illegal detention can be remedied with the judicial review by the administrative court. However, for the deportation case, the person arrested under the Immigration Act 1971 does not have the right to apply for *habeas corpus*. In the case of *R v. Governor of Durham Prison, ex parte Singh*, it was decided that the Secretary of State can detain a person to deport under the power of Immigration Act 1971.[66] That power is subject to the following limitations: (i) the power may only be used for the purpose of detaining the individual concerned pending his removal from the UK, (ii) the power is limited to a period which is reasonably necessary for that purpose, and (iii) the Secretary of State must exercise all reasonable expedition to ensure that steps are taken to secure the person's removal from the UK within a reasonable time. The Secretary of State should not exercise the power at all if it appears to him that he is not going to be able, within a reasonable time, to operate the machinery provided under the 1971 Act for the removal of the person who is to be deported.

The right to habeas corpus is a fundamental right that operates against a wrongful detention and is similarly applied in all three jurisdictions, Bangladesh, India and the UK. This right is mentioned in both the Bangladesh Constitution and the Criminal Procedure Code 1898 of Bangladesh. While the authority of has declared a state of emergency in Bangladesh, this remedy is available through the application of the Criminal Procedure Code as the constitutional safeguards remain unenforceable. However, in India, through the 44th constitutional amendment in 1978, it has stated that Article 21, which deals with personal liberty, cannot be suspended even during an emergency.[67] Personal liberty has thus been strengthened, and the writ of *habeas corpus* remains effective even in times of emergency.[68]

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65 *Council of Civil Service Unions vs. Minister for the Civil Service* [1985] AC 374, [1985] ICR 14.

66 *R vs. Governor of Durham Prison, Ex parte Singh*, [1984] 1 All ER 983, [1984] 1 WLR 704, [1983] Imm AR 198.

67 Legal Service of India; Retrieved from https://www.legalserviceindia.com/legal/article-1328-habeas-corpus.html.

68 *Ibid.*

CONCLUSION

The challenges to wipe out the arrest irregularities and custodial torture have grown worldwide. These arrest issues which violates the fundamental right of citizen exists in developed, developing and in the least developed countries. It is further found that the weaker segments of society include that of the victims of custody, torture, illness, or death.[69] The weak, the powerless and the ignorant are unable to defend their rights with little or no political or financial influence. However, developing countries like Bangladesh and India are trying to minimise the arrest abuse by enacting laws and by the pronouncement of sound judgements by the judiciary. However, such incidents in the UK which is a developed country is relatively low compared to the other two countries. It must be concurred that a country's economic status cannot be an indicator of the price of life or cannot put a bar to follow the exact laws. In conclusion, the current UK legal framework is acceptable while India and Bangladesh still have a long way to go to tackle the issue. The protection provisions enshrined in the existing criminal justice system and the current legal structure still play an important role through specific court rulings. The Law Commission of these two countries also has a constructive role to ensure the implementation of the available safeguards alongside existing legislation and case decisions. As acceded to the 1984 UN Convention against Torture which is universally accepted, each State has a moral and legal obligation to respect the provisions agreed upon by including them in their domestic law. At the same time, it is important to uphold justice by ensuring accountability of the police through the incorporation of the necessary changes into the existing legal structure. In addition, the guilty person should receive both monetary and physical exemplary punishments to prevent others from repeating such inhuman acts against persons in custody to ensure the safeguards of the individual, both at the time of arrest and post-arrest.

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69 Kumar, S, "Custodial death in Kerala: threats of human rights." *Journal of the Gujarat research society*, (2019), 21 (16), 634-639.