LAW & our rights
www.thedailystar.net/law
"ALL CITIZENS ARE EQUAL BEFORE LAW AND ARE ENTITLED TO EQUAL PROTECTION OF LAW"-*Article 27 of the Constitution of the People's Republic of Bangladesh*



The Daily Star

HUMAN RIGHTS *analysis*

# Police behaviour in crowd management

ELYUS RAHMAN

THE attitude of the Government and its law enforcing agencies in tackling public agitation is getting violent. In this paper four incidents were chosen where crowd management by the law enforcing agencies was scrutinised, giving rise to several questions regarding lack of accountability on the means and methods that are used in tackling public agitation.

### Case study-1: Kansat tragedy in Shibgonj, Chapainawab-gonj

The people of Kansat were struggling for a long time for want of an uninterrupted electric supply and people revolted against the highly irregular supply of electricity which cost a reported twenty lives under police firing. As usual, women and children were used as vanguards.

### Case Study-2: A movement by the people of Demra, Dhaka

On May 6, 2006 in Demra, a clash between an agitated mass and the police took place. The people of the area were suffering from want of water and power supplies as load shedding occurred 8 to 9 times a day. When the local people barricaded the Dhaka-Chittagong Highway, police allegedly attacked them. More than one hundred people (including 14/15 police officers) were reportedly injured during this clash.

### Case Study-3: Attack on journalist at Chittagong Stadium

Cricket took a back seat on the opening day of the second Test match between Bangladesh and Australia, as police swung into action against the on-duty journalists, injuring at least 20 media-men of different national dailies and satellite televisions at the Chittagong Divisional Stadium on April 17, 2006.

### Case Study-4: Opposition sit-in front of PMO

Awami League (AL) and its 14-party allies planned to stage a sit-in outside the Prime Minister's Office (PMO) on April 19, 2006 to press the demand for electoral reforms. At least 100 people, were injured in the pitched battles spanning several hours, when police lobbed teargas shells, fired rubber bullets and charged with batons on Opposition pickets, who countercharged by hurling brickbats. On the eve of the Opposition's program, the police went on a blanket-arrest drive.

The above-mentioned case studies have indicated violations of the following human rights by the law enforcing agencies. These are:

- Freedom from arbitrary arrest and detention
- Freedom of movement
- Freedom of assembly
- Freedom of press

In **case study 1 and 2** at Kansat and Demra the agitated citizens were demonstrating against the interrupted supply of electricity and the non-availability of water and which are the basic elements for living and obviously it is the responsibility of the State to provide these services and take necessary steps to maintain these services uninterrupted. Interestingly, it was political pressure that instigated the police to open fire. Nowadays, using police for political interest is a common trend and it also raises questions regarding the accountability of the law enforcers.

In **case studies 1 and 2,** the law enforcers acted as per the instructions of the local lawmakers with total indifference regarding their commitment towards the people.

The Police Regulation of Bengal, 1943 (PRB) which is the key code of conduct for the police officials, states a few sections regarding the role of using fire arms and police behaviour. Section 153 of PRB permits the use of firearms for the following three purposes only:

- to exercise the right of private defence of person or property,
- for dispersal of unlawful assemblies and
- to effect arrest in certain circumstances.

Section 33 states that, (a) No police force can work successfully unless it wins the respect and good-will of the public and secure its cooperation. All ranks, therefore, while being firm in the execution of their duty, must show forbearance, civility and courtesy towards all classes, officers of superior rank must not only observe this instruction themselves but on all occasions impress their subordinates with the necessity of causing as little friction as possible in the performance of their duties.

In **case study-4,** The opposition leaders reportedly claimed, "Police baton-charged us indiscriminately, and lobbed teargas shells and fired gunshots on our leaders and workers, when we were trying to make them understand that this is a peaceful sit-in program."

Article 37 of the Constitution upholds that the right to peaceful assembly should not be denied except in situations of national security or public safety. International standards require that the law enforcement officials should use force only as a last resort, in proportion to the threat posed, and in a way to minimise damage or injury. Besides, 'right of association' covers the right of individuals to 'associate' together and establish associations, which not only applies to individuals who wish to form associations but also guarantees associations so formed to have rights to operate freely and without interference.

Some relevant provisions of the Police Act 1861 may be relevant in this regard. (The translations mentioned below are unofficial)

**Section 30,**

i) Police Superintendent or Assistant Police Superintendent of the district can regulate any meeting, procession or assembly on public road and can also specify the roads where and when the assembly or procession should be held. ii) The district magistrate can compel the conveners of a procession or an assembly to take license if he suspects any type of breach of peace in the assembly or procession.

**Section 30 (a)**

i) If the conditions of the license are violated, any magistrate, police super, assistant police super or inspector or officer in charge of the police station can stop the procession or order for dispersion. ii) If the assembly or procession fails or denies maintaining the order, the assembly would be considered an unlawful assembly.

Section 30, says that the authorised officers are entitled to regulate where and when a meeting would be held but it does not mention how they fix the schedule of such events without discussing the matter with the concerned parties. This section can thus be easily abused. Very often they whimsically obstruct peaceful assemblies just to make the political patrons happy. However, this is obviously not democratic.

In **section 30 (a),** the means by which police will a disperse procession is not mentioned. In the name of 'dispersal' they use bullets where the situation might be tackled easily by tear shells, baton charging or water canons. It has been noticed that more than fifty people have reportedly been killed by the law enforcers in the name of crowd management in recent times.

Unfortunately the term 'unlawful' is not signified clearly either and thus there exists the opportunity for the law to be misused.

**Section 31,** It is the responsibility of the police to maintain law and order in places where people gather or move regularly. Police should ensure that any procession can pass along the road peacefully and that no obstacle is made baring the movement of the common people.

This provision is silent about recourse in case of failure of police to perform its responsibility. There are numbers of laws and regulations but no check and balance is available and specific provisions on ways of crowd management are absent. The freedom of assembly in order to protest sometimes conflicts with laws intended to protect public safety, even in democratic countries: in many cities, the police are authorised by law to disperse any crowd (including a crowd of political protesters) which threatens public safety. The idea is to prevent rioting. Often local law requires that a permit must be obtained in advance by protest organisers if a protest march is anticipated; the permit application can be denied. Sometimes this bureaucratic power is abused by lawmakers if the protest is not a popular one in the community.

The Universal Declaration of Human Rights has provisions that everyone has the right to peaceful assembly and association (Article 20). As a resolution, it itself is not legally binding despite common assumptions to the contrary. However, the UDHR did establish important principles and values which were later elaborated in legally binding UN treaties. Moreover, a number of its provisions have become part of customary international law.

UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990) in its principles 12, 13, 14, has set standards which emphasize that police must not interfere with lawful and peaceful assemblies, and prescribes limits on the ways in which force may be used in violent assemblies.

In the last few *hartals* it was noticed that the demonstrators were seriously barred by police in performing their activities. It has also been observed that many of the female police officials are ruder and more aggressive than their male colleagues. It is alleged that the police authority use them to turn on the female demonstrators and that they are merciless in the matter of battering female activists.

In **case study -3,** it was noticed that the journalists were the most vulnerable in the face of police atrocities. Article 39.2 (b) of our Constitution guarantees freedom of the press but personal security and freedom of pressmen is endangered in Bangladesh. A free press is also the key to transparency and good governance. The press can facilitate the protection of human rights and the rule of law. By highlighting acts of commission and omission, the press makes the government accountable to people at large.

In **case study -4,** freedom of movement of the people was seriously hampered as most of the intersections near the PMO were blocked. Students, pedestrians and professionals were the greatest sufferers. If the streets were closed on the pretext of security concern, the authority should have declared a holiday otherwise close all schools, offices or institutions in those areas. The traffic system of the capital collapsed and the residents of Dhaka faced untold sufferings.

### Recommendations

From the observations made on the given incidents, some recommendations can be drawn in order to improve the crowd management capacities of the police.

- In the background of increasing controversy over police behaviour, the existing rules, regulations and guidelines need to be revised and developed.
- A monitoring body can be set up to monitor overall police behaviour
- Human rights orientation of police personnel, particularly those who are deployed in the field has become essential.
- Police Regulations, 1943, Police Act, 1861 and other relevant laws need to be amended in the perspective of emergence of new situations and circumstances and in light with international human rights norms.
- Political use of the police force by parties in government must be stopped immediately.

The author is fact-finding officer, Odhikar.

LAW *opinion*

BANGLADESH BANK PERSPECTIVE

# *Judicial intervention in administrative action*

FORRUKH RAHMAN

THE writ jurisdiction of the honourable High Court Division is conferred by Article 102 of the Constitution of Bangladesh in order to protect the fundamental rights and also other procedural rights of the citizens as well as to ensure check and balance of powers exercised by the executive. Under Article 102, the High Court Division can give directions to government/statutory bodies to refrain from doing or to do some thing; or to declare any action as having no legal effect etc. Bangladesh Bank (BB) is established under Bangladesh Bank Order 1972. Writ petition can be filed against it.

A petitioner normally places a demand for justice to the respondent before filing petition. This is not a mandatory procedure, as it may not serve any purpose in situations where the public bodies are not asked to take any positive action. [Zamiruddin Ahmed vs. Bangladesh 1981 BLD 304]. A reasonable notice [Commissioner of Customs vs. Giasuddin 50 DLR (AD) 129] is served on the Attorney General before the writ petition is filed. [Article 102(4)(1)(b)]. The petition is moved before the Division Bench consisting of two Judges by way of motion. The court has power to grant any direction, as may be appropriate. When it is admitted, a rule nisi/show cause notice is issued to the respondent. Later, under Rule 7 Appendix IV (A) of the Rules of the High Courts the show cause notice and the petition filed by the petitioner is served on all parties directly affected by the order made.

A petitioner needs to make out a strong prima facie case that his fundamental right or any other right has been violated or is in imminent threat of being so, to obtain an interim relief by way of stay or injunction order pending final hearing of the petition. An interim relief is given in aid of or an ancillary to the main relief, which may be available to the petitioner on final determination of the petition. The grant of the interim relief is discretionary with the court and the court normally takes into account the principles under Order 39 of Civil Procedure Code 1908 i.e. the question of balance of inconvenience of the parties, loss of the petitioner and the effect of the relief on the public interest etc.

Presently there are more than 150 writ petitions pending against BB. Most of the cases have been filed by the loan defaulters against the classification made in the Credit Information Bureau (CIB) report or by the directors of commercial banks against BB's direction or by the employees of BB for change of promotion policy etc. In most cases, the High Court has granted ex parte (hearing the petitioners only) interim stay of the action taken by BB. Initially such stays have been granted for a short period. Further extensions of stay have also been granted in many cases. Consequently, many cases where stay orders have been granted are pending for full hearing for even two years or more. In several writs BB has not tried to vacate the stay order or appealed against the order in the Appellate Division by engaging advocates as the number of writs is huge. Surely this involves cost. Consequently, the petitioners have been enjoying the benefits of time. The petitioners do not want final hearing as the interim stay order serves their purpose. Cases are therefore pending for final hearing for years.

Some cases were however disposed of finally even after long delay. Such cases are not uncommon where BB lost in the final disposal. This does not give a healthy picture and suggests that there are some flaws in the system. Some efforts have been made below to identify the problems in the system.

### Decision taken by BB

The fact that BB lost in some cases in the final hearing suggest that there are some problems in the decision making process. BB while taking any decision/giving direction/issuing circular has a duty to comply with the fundamental rights and also procedural rights of the citizens. The rights protected by Part III of the Constitution are known as fundamental rights. On the other hand, the non-fundamental procedural rights are originated from common law/law made by judge. At present, there is no practice within BB regarding compliance with such rights before decision making. Some banking legislation like Bank Company Ain 1991 tried to incorporate some rules of natural justice in the decision-making process. However, this is not enough.

Some examples of fundamental rights relevant for the purpose of BB are as follows. BB cannot issue a circular inconsistent with the fundamental rights. A law inconsistent with any of the fundamental rights is void [Article 26). All citizens are equal before law and entitled to equal protection by law. Therefore, any discrimination or favour towards a person is violation of this right. [Article 27). Every citizen has the right to be treated in accordance with law and only in accordance with law. BB cannot behave arbitrarily. If there is law, whether in statute or regulation or circular, a person can only be treated by such law. If there is no law, BB is under a duty to make such law and then take any action. [Article 31] etc.

The procedural rights made by judge are such that there are no questions relating to the merit of the decision. The court does not ask the question why BB takes a particular decision. Rather, the court only asks: How the decision is taken? This means that the court examines whether BB followed proper procedure in taking the decision.

Examples of some procedural rights relevant for BB are as follows. BB cannot act beyond its power (ultra vires) as conferred by statute/regulation/circular [Bangladesh vs. Dr Nilima Ibrahim 1981 BCR (AD) 175]. BB is under a duty to follow such procedure of decision making, which is prescribed by statute/regulation/circular. [State vs. Zahir 45 DLR (AD) 163].

BB needs to follow principles of natural justice. Which are as follows: (a) It has a common law duty to give fair hearing before taking any decision or issuing show cause notice. The presentation made by such person must be taken into account. [Ridge vs. Baldwin]. (b) BB cannot be biased while taking any decision. Such bias need not be actual bias. If it can be shown that there is a likelihood of bias, it will satisfy the court. Bias needs to be apparent. There is a saying that "Justice should not only be done, but should manifestly and undoubtedly be seen to be done."

Before changing its policy, BB needs to take into account the interest of such persons, who relied on its present policy, which is communicated to them by representation or circulars etc. Such persons may have legitimate exception that they will be treated in accordance with the existing policy. Some transitional or provisional policy must be made to accommodate the matters in pipeline. [Coughlan Case].

BB must ensure that the above rights are being complied with before reaching any decision on policy or issuing circulars or giving direction etc. This will definitely increase BB's chance of success in the final disposal. Further, the High Court Division will surely reject many petitions summarily at the motion stage, as there will be no case against BB. This will reduce the number of writ petitions succeeded in obtaining stay order.

### High Court Rules applicable for Writ Petition

The public bodies like BB should be freely allowed to frame and change policy, take necessary decisions on public interest. Litigation aimed mainly to kill time should not be entertained. Lord Diplocks in O'Reilly vs. Mackman, a landmark judgment of the House of Lords stated that the judicial review procedure (writ petition in Bangladesh) is designed to protect public authorities against irresponsible and protracted litigation, by certain procedural restrictions, for example, the need to obtain leave, locus standi, the need to file affidavit, speedy procedure, the time limit etc. He also stated that allowing ordinary actions for public law matters might subject public authorities to lengthy delays, which would defeat the policy of the reform and the interest of the good administration.

The difference between ordinary action and writ jurisdiction is that in writ the procedure is specially designed to avoid delay. Under Article 107 of the Constitution, the Supreme Court is given power to make rules for regulating the practice and procedure of both High Court Division and Appellate Division. The Supreme Court is therefore the master of its own procedure. However, no new rule has been framed yet after liberation. The present Rules of the High Court Judicature were framed in 1960s under the High Court (Bengal) Order 1947. The rules under Appendix IV (A) Part I of the High Court Rules applicable for writ petition can be criticised as not suitable for the present position.

Under the present rule there is no requirement of serving demand of justice or letter of claim to the respondent(s) before filing writ petition. Serving demand for justice is not made a mandatory procedure in the case laws. Further, there is no requirement of obtaining proof of service. In practice, the petitioners often do not serve it although they annex it with the petition filed, as if it has been served before filing petition. The respondent is therefore remain unaware that a writ petition is going to be filed in the High Court. He does not get the opportunity to reply or contest the petition at the motion stage.

As in the UK, the petitioner may be required by rule of the High Court to serve a claim or demand of justice on the respondent and interested parties and file the same in the court before filing a writ petition. All respondents must file an acknowledgement of service containing summary grounds for resisting the claim. The court will decide whether permission to be given to petitioner to file a petition should be granted having had the benefit of submissions from all parties. Permission will be granted where the court considers that the petitioner has made out an arguable case which merits fuller investigation.

Essentially the requirement for permission will act as a filter to eliminate cases which are hopeless, misguided or trivial, or which have no real prospects of success. In urgent cases the petitioner must file a separate claim setting out the need for urgency. The urgent claim must be served on the respondent and interested parties by fax and post.

Once initial permission is granted, the petitioner must be required to file a writ petition. The respondent must be welcomed to contest the petition at the motion stage. The respondent may or may not file an affidavit in opposition at the motion stage. A rule nisi can be issued and interim relief like stay order may be given ex parte at the motion stage if the court has received the acknowledgement of service from the respondent containing summary grounds for resisting the claim. Stay order must be given for a temporary period. It must not be extended in such a manner that the petitioner postpones the final hearing.

As stated above, a reasonable notice is served on the Attorney General before the writ is filed under Article 102(4)(1)(b) of the Constitution. Normally 24 hours time limit is considered as reasonable. However, it is BB who will be in a better position to understand the interest of public. Serving a notice to the attorney general is a futile exercise.

Article 102 of the Constitution gives discretionary power to the High Court in granting any order, which includes interim orders e.g. stay order. Since this power is given under the Constitution of Bangladesh, the rules framed before liberation cannot adequately assist in exercise of this power. Therefore, there is a need for new rules as stipulated in Article 107 of the Constitution to bring uniformity in the exercise of this discretionary power. The discretion is surely a very strong one. Some rules or guidelines should always support such strong discretion.

### Vigilant BB

BB needs to be more vigilant. BB needs to engage good advocates in some cases, which seem to be plainly intended to kill time, and where stay order has been obtained. Appeal can be preferred to the Appellate Division against the stay orders already granted by the High Court Division. If BB can convince the court that public interest is suffered seriously once such stays are granted, it is likely that some positive judgments will be announced giving some guidelines. The law declared by the Appellate Division shall be binding on the High Court Division. It is likely that the High Court Division will take into account the issues of public interest at the motion stage as a general rule in any writ filed against BB. This will act as a filer and eventually number of cases will be reduced.

### Conclusion

The O'Reilly vs Mackman case rightly stated that the writ petition procedure was designed to protect public authorities against irresponsible and protracted litigation, by certain procedural restrictions, for example, locus standi, the need to file affidavit, speedy and summary procedure etc. Allowing ordinary actions for public law matters might subject public authorities to lengthy delays, which would defeat the policy of the reform and the interest of the good administration. We were able to introduce the alternative system but we could not avoid delay. There is a genuine need for review of the whole system. Further improvement can only be achieved by bridging positive reform. Such reforms frequently take place in Western countries. We can surely do the same.

The author is an Associate of A Hossain & Associates currently working in Legal Counsel, Central Bank Strengthening Project, Bangladesh Bank. The views expressed are of the author's own.