

FOCUS

Law and Our Rights

Arrest and Remand

Towards a Framework for Safeguarding the Constitutional and Legal Rights

by Md A Rob Molla and Dr Shahdeen Malik

The abuse of power and authority by the law enforcement agencies result not only in grave violations of the constitution and human rights but is increasingly leading towards a situation in which the law enforcement agencies are seen to operate without accountability and transparency. The agencies seem to enjoy impunity and often operate beyond and above the rule of law. Also, the situation has gradually worsened over the years and very little seems to have been done by the concerned authorities to establish the necessary discipline and a transparent system of accountability.

THE law enforcement agencies of the country are being increasingly perceived as oppressors of the people rather than their friends and protectors.

The forms of misuse of power and authority, and violation of the constitution and relevant laws by the police include abusive and questionable arrests under the cover of section 54 of the Criminal Procedure Code (Cr.PC); abuse of the Special Powers Act, 1974 to preventively detain those arrested under section 54; ill-treatment during remand under section 167 of the Cr.PC; cruel, degrading and inhuman torture or assault on arrested/accused for extracting confession and/or illegal gratification and/or personal vengeance and other abuses; selective arrest, investigation, filing of charge sheets and prosecution; dishonest deployment of authority for furthering criminal intent/acts of others; frequent refusal to respond to complaints of citizens, harassment of innocent ones; questionable relationship with criminal elements.

The abuse of power and authority by the law enforcement agencies result not only in grave violations of the constitution and human rights but is increasingly leading towards a situation in which the law enforcement agencies are seen to operate without accountability and transparency. The agencies seem to enjoy impunity and often operate beyond and above the rule of law. Also, the situation has gradually worsened over the years and very little seems to have been done by the concerned authorities to establish the necessary discipline and a transparent system of accountability.

A number of recent surveys about people's attitude towards and evaluation of the police force have also demonstrated alarming lack of confidence in the impartiality of police, their integrity and commitment to rule of law.

In such a milieu, it is imperative that substantial efforts are undertaken to restore the confidence of the people in the law enforcement agencies and ensure that the law enforcement agencies operate strictly within the limits established by law. Needless to say, not all or each and every personnel of such agencies indulge in illegal actions. There is a large number of dedicated, honest and committed persons in these services many of whom even risk their lives for the safety and security of the people. We all agree that a disciplined police force and other law enforcing agencies are of vital importance for the peaceful lives of all in the society. Hence, the proposed measures do not imply a sweeping condemnation of the current practice and, to reiterate, all the concerned personnel but aim at facilitating a more effective, lawful and disciplined force which is duly respected for its contribution towards a better society for all, including persons suspected of or convicted of crimes.

The following suggestions focus on broad parameters of necessary measures and indicate certain specific areas for more concrete actions and steps. Not all of these are exhaustive or sufficiently elaborate for immediate implementation.

Nevertheless, many of the concrete measures suggested are not complicated nor time consuming and most of these would

not require immediate deployment of substantial financial or other resources.

Safeguarding Rights

1. Under the constitution
1.1 The first and foremost step is to make sure that the constitutional prohibition on all forms and modes of torture [Article 35 (5)] -- "No person shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment" is not violated under any condition, pretext, or justification whatsoever. All necessary measures to enforce this unconditional prohibition must be in place before any other measure is initiated. Therefore,

(a) Awareness
Relevant awareness campaign concerning the prohibition on torture should immediately be undertaken; Easily visible posters in sufficient numbers containing this constitutional prohibition be displayed in a number of places in all the 500 or so police stations and their surroundings;

(b) At the police station
Physical Condition Form: 1. Immediately after the arrest a standard short form must be completed by the arresting personnel to record any visible marks of injury/hurt or physical irregularities or abnormalities and the form must be counter signed by another police personnel and the arrested person with clear indication of the date and time of filling up of the form;

2. This form can be devised and police personnel trained in completing this form within a short period of time.
3. This form is not intended as a medical report, but only to record visible marks of injury or hurt and therefore no medical expertise is called for.
4. However, in a case when at the time of arrest, there are signs of injury, attributed to assaults by members of public or any person other than police, the arrested person shall first be taken for examination by an 'approved' medical doctor and a medical report detailing the injuries shall be filed in the police diary.

(c) During the judicial process
If remand is granted by the concerned magistrate, he/she must fill up a similar 'physical condition form', as detailed below, before granting the remand request.
2. The second constitutional rights which needs to be safeguarded is the right enumerated in Article 33, particularly the right to be informed about the grounds of arrest.
'Reasons for arrest' form
Again, this can be recorded

at a separate part of the physical condition form or in another short form detailing the reasons for arrest or the crimes for the suspicion or commission of which the person has been arrested.

This form is not a substitute for the FIR or Complaint recorded with/by police but only for information of the arrested and must be signed by the arresting person.

This right to be informed of grounds must also, particularly in the backdrop of prevailing practices, extend to friends and/or relatives and/or neighbours of the arrested persons. In other words, it must be the duty of the police to inform persons named by the arrested to be informed of the arrest within and not later than 4 hours in metropolitan areas; 8 hours in pourashavas, and 12 hours in rural areas.

The time limit may be extended if the arrested person is a resident of a thana other than the thana in which he/she was arrested. Appropriate methods for relaying such information can be devised and implemented without substantial cost or deployment of resources.

Initially such information may be passed, if the persons named by the arrestee can not be located, to respective ward commissioners for metropolitan areas, members of pourashavas and union parishads for other areas so that persons interested in the welfare of the arrestee can gather information from such offices. But this is suggested only as an interim measure.

3 Under the Criminal Procedure Code

3.1. It is recognised that the power conferred under section 54 is necessary for prevention of crimes and arrest of certain persons.

However, the application of this section is often fraught more with ulterior motives than prevention of crimes or arrest of persons suspected of having committed or about to commit crimes. Secondly, an arrest under section 54 is often a prelude to issuance of detention order under the Special Powers Act, 1974. Thirdly, sometimes bail for those arrested under section 54 are denied, which is a clear violation of the right to bail.

Thus, there is an immediate need to narrow/reduce the possibility of these or similar other abuses by providing specific guidelines for exercising the 'arresting' power under this section. These may include:

1. A separate form for arrest under the last part of the first clause of section 54, i.e., "a reasonable suspicion exists of his having been so concerned." If

someone is arrested under the power conferred by the above clause of section 54 then the reason for suspicion must be recorded and more so because section 54 is not a provision of the Penal Code and, hence, it provides discretionary power, the exercise of which must be subjected to scrutiny by the judiciary.

2. The arresting police personnel must wear visible and accessible to general view, identification marks (name, rank, number) and must verbally communicate such identity if asked by the arrestee or his/her friends/neighbours/relatives.

Other discretionary police power to arrest, such as under section 55 (b) of CrPC or sections 86(c) and (d) and 100 of the Dhaka Metropolitan Police Ordinance, 1986 and others must also made the subject of similar scrutiny and oversight.

3.ii. The term 'remand' is used in section 344 of the CrPC and not in section 167. However, the term in its popular parlance is associated with sending back of an accused to

police custody under section 167. Remand, it is generally acknowledged and known, is synonymous with torture for extracting confession, rather than investigating proper into the causes of crimes and identification of persons responsible.

Section 46 to 67 of the CrPC prescribe the procedure for dealing with the arrested person, whether arrested on a warrant or without warrant and sections 167 and 344 deal with remand of an accused.

Section 167 concerns the procedure for dealing with the arrested and detained accused in custody and also with remand of accused. The word 'forward' used in this section means an act of sending. Unless the accused is forwarded and sent to the magistrate and the magistrate passing the order of remand without the accused be-

ing forwarded to him, the legal requirement is not complied with for the magistrate to assume the jurisdiction. The accused must be brought before the magistrate prior to passing an order of remand, irrespective of whether the accused is in police lock-up or custody.

When a magistrate passes an order of remand to police custody, he performs a judicial function. Non-production of an accused person before the magistrate who does not know what is the charge against him and his subsequent order of remand in the absence of the accused will actually amount to travesty of judicial process.

Therefore, the magistrate granting an order of remand must ensure that the following requirement of law are observed:

i. The magistrate fixes an appropriate time on each day when the police must produce the accused person before the magistrate so that the members of the bar engaged by the accused are in a position to appear and represent the accused and oppose grant of remand;

ii. Before considering the prayer for remand, the magistrate shall ensure that the accused has been able to contact a lawyer or legal aid organisation as well as his/her relatives/friends.

Considering the prevalent abuse of remand'

i. Granting of remand' must be accompanied by a form, to be filled up by the magistrate concerned, recording the physical state of the remanded prisoner;

ii. After an arrestee is sent back to the police station on 'remand' for more than 24 hours, a medical doctor must check the condition of the arrestee every 24 hours and record the physical condition. Implementation of this guarantee of the right not to be tortured or subjected to cruel, inhuman or degrading punishment will require arrangements for inspection by doctors and this ought to be implemented forthwith.

iii. The arrestee must be allowed access to a lawyer during 'remand', though not necessarily throughout the remand. A waiting room in police stations must be specifically arranged for those interested in the news or condition of the arrestee.

iv. A 'remand form' or detailed reasons for granting of the prayer for remand must also be completed/recorded by the concerned magistrate containing the reason(s) which justified the granting of the prayer for remand. Such a form must include the following information: name and age of the accused; address of the accused; case number; grounds for remand; substance of the statement of the accused, if any; name of the lawyer or relative/friend present, if any, and their signature; name of person/organisation to be contacted; the period of remand, specifying date and time.

v. The magistrate before granting the remand must study the police diary to ensure that the accusation against accused and evidence secured justify the remand;

vi. The magistrate passing an order for remand shall record the reasons for doing so in detail.



Transparency and Accountability of Police

As indicated in the "Introduction" above, the impunity of police, i.e., the notion that no member of the police force has not been subjected to punishment, upon conviction, for crimes of torture, killing or hurt committed during the course of their 'duty' is pervasive and widespread. Obviously, there are such examples as Baharul Islam (OC of Ramna, whose sentence was reduced through the 'pardon' power of the President) or the convictions in the 'Yasmin of Dinajpur' case, but these are few and rare.

Therefore, without public information concerning conviction of police for torture, death or hurt in police custody and other crimes committed against people, hundreds of which have been recorded over the years, we can not even begin the process of restoring confidence in police, let alone contemplate any measure for their transparency or accountability.

The creation of the office of an independent and effective Ombudsman, with authority to receive grievances or complaints in respect of the police should now be done as a matter of immediate priority.

Secondly, the reports and the actions/measures taken in response to the reports of the 'Munim Commission' on Jail; 'Aminur Rahman Khan Commission' on Police; Judicial Inquiry Commission Reports of recent years such as the ones of Yashmin of Dinajpur; abduction of Kalpana Chakma of the Hill Tracts; killings of seven woodcutters of the Hill Tracts; of Nuruzzaman at police custody after his arrest at the Prime Minister's Office; of Suruj Miah at the Zia Airport, and so on have not been made publicly available. Consequently, without public knowledge of the content of such reports and the subsequent measures/actions taken by the government following the recommendations of such Commissions, the constitution of Judicial Inquiry Commission is increasingly seen as political posturing, reflecting dimly upon the political authorities who happen to exercise power at relevant times.

2. A larger issue for the disciplined force is the manner in which the chain of command is

enforced. Recent separation of the police from the district administration has been effected through, as far as we are aware, an executive circular and without amendment of the relevant laws. Whether such circular should be rescinded and prior accountability of the police to the respective district administration should be restored needs serious consideration.

3. Another organisational issue is the separation of investigation and prosecution agencies of the government. Recently this issue has attracted some public attention in the form of proposals for setting up of the Office of Prosecutors as a separate cadre, instead of the current practice of *ad hoc* arrangements. The law must ensure that such officers can function independently and effectively, free from external influence of all kinds.

Since the constitution provides for "establishing one or more public service commissions for Bangladesh" (Article 137), a separate public service commission for the judiciary and the 'government lawyers' (public prosecutors and government pleaders) may also be considered.

4. In the wake of Rubel's killing, a large number of media reports have detailed properties and assets owned by various law enforcement personnel which, even if such reports are only partially correct, is another clear indication of the impunity of these 'disciplined' forces.

The law and procedure for investigation of corruption including a specialised agency have long been in place. The obvious question, therefore, is whether anything would be done about reports of such wealth and property amassed, presumably, illegally. Without belabouring the issue of corruption, it is submitted that restoration of public confidence in the law enforcement agencies surely requires inquiry into these reports of corruption.

The creation of the office of an independent and effective Ombudsman, with authority to receive grievances or complaints in respect of the police should now be done as a matter of immediate priority.

5. A Citizens' Committee, comprising of persons who enjoy public confidence and representing different walks of life under each police station, to be constituted, authorising it to submit periodic reports on activities of the police personnel, similar to the provision of the Jail Code concerning jail visitors.

The right of any person not to be subjected to torture or other cruel, inhuman or degrading punishment or treatment is absolutely inalienable and does not admit of any exception. This constitutional right has been violated most frequently by the law enforcing agencies and with horrendous consequences. A disciplined force, such as police, is disciplined by the limits of law. It is in regard to the constitutional right enshrined in Article 35 (5), i.e., right not to be tortured and subjected to cruel or inhuman punishment or treatment that our police force has continuously 'functioned' with impunity and this must now come to an end and come to end immediately.

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LAW WATCH

Birth registration: Flawed figures

THE child shall be registered immediately after birth... mandates article 7 of the Convention on the Rights of the Child. But despite almost universal ratification of this human rights treaty, one third of all births -- about 40 million babies -- go unregistered every year. While the industrialized nations register virtually all their children, civil registration systems are still rudimentary in many developing countries. Many are uncertain as to what proportion of their children are registered; some do not even have a registration system. For these reasons, the league table presents broad percentages of coverage rather than precise numbers.

The problems in estimating birth registration coverage include the following:

→ While many countries have estimates of the percentage registered, most of these estimates are approximate. Very few countries have made the effort to assess coverage objectively and thoroughly.

→ Registration rates differ widely within many developing countries. Cities tend to have higher rates than rural areas because civil registries are centralized. Similarly, babies born in hospitals are more likely to be registered than babies born at home because the registration process often takes place in the hospital.

→ In many countries, ethnic minorities have lower rates of registration than the general population.

→ Despite the fact that the Convention on the Rights of the Child calls for children to be registered "immediately after birth," many children are registered later in life; such as when they enrol in school.

→ Civil registration systems lag in sub-Saharan Africa because of underdevelopment. In some countries, the leftover structures of colonial governments, which in many cases did not register the black population, have impeded progress on registration.

→ The responsibility for registering children at birth typically falls on mothers, adding another burden to their heavy workload. This is especially true in Africa and southern Asia where more than half of babies are born outside of hospitals.

The evidence of improvement in birth registration coverage is mixed. While many countries report increasing rates of registration, coverage is falling in others. Rates in Kyrgyzstan and Tajikistan have declined in the past 10 years due to the disintegration of administration structures following the breakup of the Soviet Union. China's registration system is being strained by an increasingly mobile population.

Registration must not be left to chance. Better quality and more timely information is vital to fulfilling children's rights and for national planning, and it is not that difficult to obtain. Countries including Brazil, Pakistan and Turkey have recently used household surveys to assess birth registration coverage.

Source: The Progress of Nations 1998

When Women Seek Divorce

by Ila Chanda

IT is too often that we see Bangladeshi women suffering various forms of torture within their marriage. Unfortunately, it is these women again who face innumerable obstacles when seeking divorce. Those who have a registered *nikahnama* are not spared these obstacles, not to mention the plight of women who do not have this document. The obstacles are directly attributable to various capricious rules created by the Union Parishad Chairmen and Kazis who register marriage and divorce. Moreover, the Chairman's office, along with the personnel of the Dhaka City Corporation, demand extra fees for services, among other misdeeds, which only increases the tormenting process for women.

In order to understand the divorce procedure I would first briefly highlight the law on divorce.

Section 7(1) of the Muslim Family Laws Ordinance, 1961, states "Any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of *talaq* in any form whatsoever, give the Chairman notice in writing of his having done so, and shall supply a copy thereof to the wife."

Thirty days after receiving the notice the Chairman will set up an arbitration meeting and will take all necessary measures to bring about a reconciliation between the husband and wife. If, after ninety days of sending the divorce notice the husband revokes the notice, the divorce becomes effective. But if he does not revoke the notice the divorce becomes effective ninety days after the date of sending the notice. During those ninety days the husband and wife are considered a married couple.

A woman can initiate divorce proceedings only if she was delegated the right to do so by her husband at the time of marriage. This right is called *talaq-e-taufiq*. Clause 18 of the *nikahnama* contains this provision. In exercising this right

the same provisions of divorce, such as sending the divorce notice to the Chairman with a copy to the husband, will remain. Of course, in the *khula* and *mubarat* forms of divorce the right to claim divorce through the Courts is available. In all of these forms of divorce the divorce has to be registered within ninety days of the notice. The *Nikah Registrar* enters the registration on the basis of applications for such registration within his own specified jurisdiction.

Problems faced by Ranu in Seeking a Divorce

Ranu was given the right to initiate divorce proceedings as per Clause 18 of her *nikahnama*. On her having extreme difficulty in living with her husband, she sent a divorce notice to the Chairman with a copy to her husband, as per the law (The Muslim Family Laws Ordinance, 1961; The Family Courts Ordinance, 1985). On receiving notice from the Chairman of the Arbitration Council, Ranu went to the Chairman's office and personally informed him that it is impossible for her to live with her husband and that she needs to have a divorce. Upon completion of ninety days after serving the divorce notice, Ranu did not receive a certificate informing her of the divorce taking effect, as is the provision under the law. When she sought this certificate from the Chairman, he informed her that the divorce did not take effect as the husband did not receive any notice of divorce and that both parties had not met for reconciliation. He claimed that Ranu and her husband had always come to him individually rather than together. He stated that he would reissue a notice to both sides to attend a reconciliation session. When Ranu again requested him to provide her a certificate, the Chairman stated that it would take a long time to do so.

In this way the matter had

been pending for nearly five months, beyond the ninety-day period. She was informed that her divorce notice was not made in a "proper" manner. According to the Chairman, the "proper" way is to complete the notice according to the format provided by the Kazi Office, after which ninety days are to lapse before the divorce becomes effective. This means that seven or eight months would lapse before Ranu can get a divorce.

The general situation is such that even when women receive their divorce certificates after ninety days of the notice, the Kazis refuse to register the divorce on the ground that the divorce notice had not been sent through them (the Kazis). In situations like this, women have to start the procedure all over again and wait uncertainly for their divorce to come through. In other words, women are denied divorce on certain grounds which are absolutely made up on the whim of the Chairmen and the Kazis. Some of these false grounds include, insisting that the women have the divorce notice written out in the format provided by the Kazi's office, and insisting that there are witnesses present at the time of issuing the notice.

As just stated, none of these grounds sanctioned by law. In other words, the law does not require a woman seeking divorce to have the notice sent by the Kazi or in the notice format of the Kazi office. These grounds are simply the vagaries of the Chairmen of the Arbitration Council and the Kazis. To make matters worse, women fall victim to bribery within the Dhaka City Corporation to secure their divorce certificates. The government has set a fee of Tk 100 for registering divorces. However, until today none of our clients have been able to register their divorces under Tk. 400.

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Lawscape

August 1-15, 1998

The State of Law and Order

ACCORDING to the news, published in the National Newspapers during August 1-15, 1998, the highest cases of human rights violation were rape. Then comes, women murder for general reason, murder after rape, child murder, women murder for bride wealth, acid throwing, kidnapping, women oppression for general reason, women oppression for bride wealth, attempted rape by the members of the Law Enforcing Agencies, oppression in the Thana Hajot, oppression outside Thana,

death in hospital for oppression in Thana, death by torture in Jail, death by mass beating, child oppression and imprisonment in safe custody without trial respectively. In the cases of acid throwing and kidnapping, the female victims were considered only.

Against these incidents, 78 per cent cases were held, while 4 per cent not held and the rest of the incidents it is not mentioned in the newspapers, whether any cases were held. 23 per cent of all the accused could

be arrested by the law enforcing agencies, while 40 per cent arrested and the rest of the incidents it is not mentioned in the newspapers, whether the victims were arrested. It, however, shows the instant picture, published in the newspapers.

Besides these incidents of human rights violation, 54 other incidents of the law and order situation (murder and injury) were also recorded, but they are not shown in the chart below. Details of the data is shown through the chart:

| Types | Case filed | Case not filed | Not mentioned | Accused arrested | Accused not arrested | Not mentioned | Total case recorded |
|---|------------|----------------|---------------|------------------|----------------------|---------------|---------------------|
| Rape | 32 | 2 | 4 | 12 | 5 | 11 | 38 |
| Murder after rape | 10 | 0 | 0 | 1 | 5 | 4 | 10 |
| Kidnapping | 6 | 1 | 1 | 2 | 4 | 2 | 8 |
| Acid throwing | 5 | 0 | 3 | 1 | 3 | 4 | 8 |
| Women murder (bride wealth) | 8 | 0 | 0 | 2 | 5 | 1 | 8 |
| Women murder (general) | 2 | 1 | 5 | 6 | 12 | 10 | 28 |
| Women oppression (bride wealth) | 2 | 1 | 0 | 0 | 2 | 1 | 3 |
| Women oppression (general) | 7 | 0 | 0 | 2 | 3 | 2 | 7 |
| Child murder | 8 | 0 | 2 | 3 | 4 | 3 | 10 |
| Child oppression | 1 | 0 | 0 | 1 | 0 | 0 | 1 |
| Oppression in Thana Hajot | 1 | 0 | 1 | 0 | 1 | 1 | 2 |
| Oppression outside Thana | 1 | 0 | 1 | 0 | 1 | 1 | 2 |
| Death in hospital under thana/jail custody | 0 | 0 | 2 | 0 | 0 | 2 | 2 |
| Death by torture in Jail | 1 | 0 | 1 | 0 | 0 | 2 | 2 |
| Imprisonment without charge | 0 | 0 | 1 | 0 | 0 | 1 | 1 |
| Attempted rape by the members of the Law Enforcing Agencies | 1 | 0 | 1 | 0 | 0 | 2 | 2 |
| Imprisonment without trial (Safe custody) | 0 | 0 | 1 | 0 | 0 | 1 | 1 |
| Killed by mass beating | 2 | 0 | 0 | 1 | 0 | 1 | 2 |
| Others | 3 | 1 | 2 | 1 | 1 | 4 | 6 |
| Total | 110 | 6 | 25 | 32 | 35 | 53 | 141 |

Courtesy: Information & Documentation Center, Advocacy Programme, G.S.S.