



FROM LAW DESK

Abolish Torture

Let human rights dictate the terms of arrest, detention and police remand

A.H. MONJURUL KABIR

JUN 26, 2002 was the International Day in Support of Victims of Torture. Last week, the *Law and Our Rights* published a campaign initiated by Asian Human Rights Commission (AHRC) "Take practical steps to eliminate torture". This week we publish the full text of deliberations of the 'Daily Star Dialogue on Arrest and Police Remand' coordinated by the Law Desk as a mark of solidarity for the numerous victims of harassment, ill-treatment and torture by the law enforcing agencies. In Bangladesh the power of arrest, detention and the practice remand are routinely abused. These powers and practices frequently act as official approval for committing torture and ill treatment. Eminent lawyers and human rights activists at the Daily Star Dialogue suggested check and balance in the legal system, specially for people arrested and kept on remand, to safeguard civic liberties. They also expressed deep concern at the widespread abuse of power by police in arresting innocent people and reportedly torturing them in many cases.

The United Nations (UN) General Assembly officially proclaimed 26 June as the UN International Day in Support of Victims of Torture (UNGA Res. 52/149) on 12 December 1997. It was on 26 June 1987 that the UN Convention against Torture and other Cruel, inhuman or Degrading Treatment or Punishment (CAT) first came into force. The UN Convention against Torture remains the least ratified of the core international human rights treaties, with only 128 of the 190 UN Member States having ratified the convention. On this occasion, we urge the member states of the United Nations to ratify and implement the CAT.

Society demands a much higher standard of conduct from public office holders, especially those charged with enforcement of the laws of the land, than from the public at large. Sadly, the people's confidence in the law enforcing agencies, specially the police as a whole is horribly affected by a demonstrated lack of integrity by its members. Raging corruption at all levels of society and government continued to slash hopes for improvement in the human rights situation and to thwart efforts to tackle widespread poverty and political instability in Bangladesh. Torture, including rape and death in custody, continued to be reported, and impunity for past human rights violations persisted. In fact impunity for law enforcers' failure to bring those respon-

sible for heinous crimes is endemic. A successful prosecution to be brought against an alleged member of law enforcing agency requires a combination of extraordinary circumstances. Continuing media attention, public vigilance, a pro-active judiciary are not enough for ending the culture of impunity. Proper investigation and efficient prosecution is a sine-qua-non for such trial. And combining all those conditions against the law-enforcing agency is, no doubt, the most exceptional occasion to happen.

Torture is illegal. Yet Torture is inflicted on men, women and children in



well over half the countries of the world including Bangladesh. Describing what is torture, it is necessary that the behaviour in question be carried out by, or with the approval of, a representative of the authority in power. This means that any state official could potentially be involved in torture or ill-treatment. However, considering the common purposes of torture, which may be to obtain information during an interrogation, or, increasingly, to

intimidate the population as a whole in the face of insurrection or disturbance, it is unsurprising that the principal perpetrators are those officials involved in the criminal investigation process, and those responsible for the security of the state.

This means that those most likely to be involved in torture and other forms of ill-treatment include:

- The police
- Paramilitary forces acting in connection with official forces
- The military
- State-controlled or influenced special forces
- But could also include:
- Prison officers
- Any Government official

Health professionals - doctors, psychiatrists or nurses may participate in torture either by act (direct involvement which may include certifying someone fit for interrogation) or by omission (falsifying medical reports or failure to give appropriate treatment)

Co-detainees acting with the approval or on the orders of public officials

Despite the universal condemnation of torture, it is still used to extract confessions, to interrogate, to punish or to intimidate. In Police stations and prison cells, on city streets and in remote villages, torturers continue to inflict physical agony and mental anguish. Their cruelty kills, or leaves scars on the body and mind that last a lifetime.

We must condemn torture in most unequivocal terms. Political leaders must make clear that torture and cruel, inhuman or degrading treatment will never be tolerated. Government is responsible for ensuring freedom from torture: preventive safeguards must be established and enforced, including those in *Amnesty International's* 12-Point Program for the Prevention of Torture. The authorities must promptly and effectively investigate all reports of torture. All those responsible for torture must be brought to justice, wherever they may be. Those who have suffered torture must be entitled to full and timely reparation, including compensation and rehabilitation.

We must renew our efforts to strengthen the global treaty, Convention against Torture (CAT). We need to enact an optional protocol to the CAT. "The optimal protocol is designed to assist States parties in implementing

their obligation under the Convention to prevent torture by providing for the establishment of effective international and national mechanisms for visiting places where persons are or may be deprived of their liberty," according to the statement, which was issued by the Committee against Torture and the Special Rapporteur of the Commission on Human Rights on the question of torture. The Board of Trustees of the UN Voluntary Fund for Victims of Torture and the UN High Commissioner for Human Rights, Mary Robinson, also joined in releasing the statement.

Bangladesh, the Ministry of Foreign Affairs in particular, should give the matter of an effective protocol to the Convention their earnest and immediate attention, and to move towards the final adoption of this instrument. The Ministry of Law, Justice and Parliamentary Affairs, the Ministry of Home Affairs and the Law Reform Commission with the active and substantial contributions of the human rights groups and NGOs should proceed towards enacting legislation in line with constitutional guarantees and international standards prohibiting torture, degrading punishment and ill-treatment.

We must continue our united stand against torture. The non-governmental organizations (NGOs) were already playing a leading role. The media is an active partner of the human rights movement. The work against torture requires each of us to work together - individuals, organizations, and governments at the local, national, and global level. And it requires action at many levels: the denunciation of perpetrators; redress and reparation for torture victims; psychosocial and physical rehabilitation for torture victims; training police and prison officials; developing and enforcing national and international legislation against torture; and, promoting human rights education for all.

Law Desk promises to be with you in any effort to combat this inhuman practice of torture. Let human rights dictate the term of arrest, detention and police remand not the whims or caprice of the executives or a few individuals.

Will you join us?
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The Daily Star

Dialogue on Arrest and Police Remand

THE Dialogue on 'Arrest and Police Remand' was held at the Daily Star conference room on April 10, 2002. Mr. Mahfuz Anam, Editor of the Daily Star, moderated the dialogue. Law Desk of the Daily Star coordinated the initiative. The following discussants were contributed to the dialogue:

- a. Dr. M. Zahir Senior Advocate, Bangladesh Supreme Court
- b. Barrister M. Amir-ul Islam Senior Advocate, Bangladesh Supreme Court
- c. Dr. M. Enamul Haque Former Inspector General of Police
- d. Barrister Rabeya Bhuiyan, Advocate, Bangladesh Supreme Court
- e. Dr. Shahdeen Malik Advocate, Bangladesh Supreme Court
- f. Advocate Sigma Huda, Bangladesh Society for Enforcement of Human Rights
- g. Barrister Rokonuddin Mahmud - Senior Advocate, Bangladesh Supreme Court.

Mahfuz Anam

I would request my colleague advocate Abul Hasnat Monjurul Kabir to explain the background of today's dialogue.

A.H. Monjurul Kabir

I think *The Daily Star* is the only newspaper in South Asia, which has a distinct section on law and human rights better known as 'Law Desk'. The Law Desk publishes every Sunday a specialised section 'Law and Our Rights'. The *Law and Our Rights* page constantly endeavours to promote pro-people legal system and a culture of human rights and tolerance. Since its inception, *Law and Our Rights* section of the Daily Star has always been vocal against abuses of laws, in particular national security laws and the practice of impunity of law enforcing agencies. In fact, a few years ago, the section strongly recommended to the then government a number of concrete steps for reforming the overall policing and investigation system of the country. Those were ignored as usual. The section also held an open discussion on 'Rape and Death in Police Custody' couple of years ago and published its deliberations as front-page news item followed by related analyses in *Law and Our Rights* afterwards. In fact, the *Law and Our Rights* becomes a source of inspiration and ideas for other national dailies and NGOs to follow the suit.

Recently, Law Desk is pursuing some follow-up actions on 'police laws' and 'national security laws'. For last six years, the 'Law and Our Rights' page has been instrumental in publishing different articles, features and analyses regarding these issues. We notice that these features received readers' attention and sometimes they asked many pertinent questions to respective writers, concerned lawyers, and us. We sincerely attempted to respond to their queries. Often we could not answer them due to space constraints and other preoccupations. Often we also arrange this type of public initiative to generate objective expert opinion on the issues of civil liberties. We have received increasing queries on the power of arrest and the practice of police remand. More than hundred letters and e-mails in last weeks from all over the world have poured in last week at Law Desk. People are keen to learn about the nature and extent of police law (especially legal power of arrest) and actual provision of police remand. In fact, their interests have laid the background of today's dialogue.

In this connection, I would like to mention an issue very briefly. Bangladesh is one of the countries in Asia, who is a signatory to the six major UN treaties/conventions on human rights. A host of country obligations has been imposed on Bangladesh including those imposed through the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and UN Covenant on Civil and Political Rights. Through the first one, an obligation is imposed on the state that there is no torture and inhumane, degrading treatment or punishment and state will take necessary positive measures to stop these. Article 35(5) of the Constitution of Bangladesh also clearly describes the prohibition of cruel and inhumane torture, punishment or behaviour. However, our anxiety is some safeguards of these laws (which are main elements of civil liberty) have not been followed by the members of the police force and other agencies when they use these provisions in day-to-day policing. In addition, in many cases, they are not even conscious about the legal safeguards. I would like to give a little example - section 54 is a provision of law, which is increasingly being discussed now a days. This is part of the Code of Criminal Procedure, people tend to think that by this section 54, members of the police have been given enormous power, and they can arrest any person from anywhere with the help of this law. This is not a mere generalistic popular perception; I am surprised to see many lawyers of district courts, even many lawyers of the supreme court also think that section 54 is an all powerful law where some qualifying words are vague (i.e. reasonable complaint or credible information or cognisable offense). So, on behalf of a newspaper, which is truly committed to human rights, we would like to clarify these issues and I believe our respected discussants would do that. Secondly, people are very much concerned about police remand. The word 'remand' is nowhere mentioned in our law but it is being widely practiced. It is said that police can ask for remand if s/he is not in a position to complete her/his task within 24 hours. Then the magistrate will review the notes taken in the diary of the police and finally grant remand not exceeding 15 days. This provision is being flagrantly violated every day. The magistrate does not apply her/his judicial mind in these cases and never ask the police to show the court the entries registered in their diaries. The Law Desk is very pleased to receive you all and would like to request our respected discussants to spell out these issues to so many

readers of the Daily Star around the world.

Mahfuz Anam

May I request, Dr. M. Zahir to discuss what is the law, why we have this law, what are the relevant constitutional and other legal provisions, and how these provisions are being used? I would request you to present an overall picture.

Dr. M. Zahir

Section 54 is a provision in the Code of Criminal Procedure inserted by the British. Now, I think this section was initially used to give a value power to the police and the power was used mainly against petty offences. It was a tool when the police suspected big seditious charges in the British period. Mind it, sedition in the British period had a different dimension than what we have today. I will brief you on section 54 for your understanding:

Police officers may without an order from a magistrate and without a warrant, arrest -

Firstly, any person who has been concerned of any cognisable offense, or against whom any reasonable complaint or credible information has been received or a reasonable suspicion exists of his having been so concerned. This section (54.1.fir) is the most important segment of section 54. With regard to any cognisable offence and arrest any person under this subsection, the police officer must make it sure that he has been either concerned in any cognisable offence or against whom any reasonable complaint has been made or any credible information has been received, or reasonable suspicion exists of his having been so concerned;

Secondly, any person having in his possession without lawful excuse, the burden of proving any implement of house making;

Thirdly, any person who has been proclaimed as an offender either under this code, which means judgement or an order of the government;

Fourthly, any person in whose position, anything is found, which may reasonably be suspected to be stolen property and who may reasonably be suspected having committed an offence with a reference to such thing;

Fifthly, any person who obstructs a police officer while in the execution of his duty or who has been escaped in a lawful custody;

Sixthly, any person reasonably suspected of being deserted from the armed forces of Bangladesh;

Seventhly, any person who has been concerned in, or against whom any reasonable complaints or credible suspicion exists of his having been concerned in any act committed in any place out of Bangladesh. If committed in Bangladesh would have been punishable as a cognisable offence and he is under law relating to extradition or under the fugitive offenders act 1881, or otherwise liable to be apprehended and defended into the custody;

Eighthly, if any released convict, committing the breach of any rule under section 565, sub section (3).

Ninthly, any person for whose arrest a requisition has been received from another police officer.

Why have I read all these sub-sections? These are the grounds; these are the circumstances, by which police officer may arrest a person. Now, in most of the cases, what we find of the excessive tendency to arrest under section 54 by the police. Are they aware of the reasonable complaint credible information or reasonable suspicion based on his or her being involved with a cognisable offence?

Do not forget the British rule in India is about 200 years ago. One of the reasons people still remember the rule - the good part of the rule, (...the bad part of the rule we have already forgot), is the restrained use of law by the police. They attained certain degree of professionalism because of the reason and restraint used by them while applying the law. It is an application of the law not the law itself that creates problems.

What I am trying to clear that, there must be reasonable complaint or credible information before you exercise the power of section 54 otherwise it will be an instance of misapplication. And it will cost people and concerned

citizen dearly. Often I wonder whether we should do away with this law, the section 54, totally.

Article 33 of our Constitution, a fundamental right, deals with safeguards as to arrest and detention. No person who has been arrested shall be taken in custody without being informed of the grounds for an arrest. Nor shall he be denied the right to consult and be defended by a legal practitioner of his choice. Under the Special Powers Act, 1974, the detainee must be communicated within 15 days. But that is a different thing.

Every person who has been arrested and detained in custody shall be produced before the nearest magistrate, also within a period of 24 hours of such arrest excluding the time for journey and no such person shall be detained in custody beyond the said period without the authority of the magistrate. Under section 61, no police officer shall detain in custody a person arrested without warrant for a longer period than all circumstances of the case is reasonable and such period shall not, absent of the special order of magistrate under section 167, exceed 24 hours exclusive of the time necessary for the journey from the place of arrest to the magistrate court. What the constitution has done is summarized section 60, 61 of the Cr. P.C. Then the Constitution exempts the authority from the production of the enemy alien or who is arrested or detained under any law providing for preventive detention e.g., the Special Powers Act. That is what I called the 'black law'. We are not only concerned for section 54, but we are also concerned for arrest and detention. Whether you are arrested under the Special Powers Act, 1974 or the section 54 and taken to remand repeatedly for frivolous reasons.

Mahfuz Anam

I want to go further, beyond arrest or detention, the situation of the person detained - how he is being treated. In fact, it is a 'dark phase'. We do not know how he has been protected in custody or jail.

M. Zahir

We Bengalees are genius in finding out the ingenious ways of misapplication of laws. What is the source of remand? The source is section 54, 60 and 61 and then 167 of the Cr.P.C. Under section 167 - you go to the magistrate with a report and the magistrate thinks there is a cause for further investigation. Then, section 167 provides for the procedure when investigation cannot be completed within 24 hours. If you are arrested under section 54, the magistrate should ask the police officer the cause of arrest. How can the

Supreme Court is financially dependent on the Ministry of Finance. Unless you do away with such influence in the real sense, there will always be the lark of suspicion and please remember, justice must not be done but justice must have seen to be done as well. The general suspicion and belief is that the magistrate does not apply his/her mind and allowing the practice of remand for nothing.

Mahfuz Anam

Barrister Amir-ul Islam, could you share with us your impression about existing criminal justice system and abuse of law?

Amir-ul Islam

Actually, I am a bit cynical in a way having seen so many abuses of law. There is, I am afraid, a tendency in our country that all the blames are given to law, and people try to escape the responsibility about the mindset. All those constitutional rights, which can be referred to under article 33, 35 and whole lot of it; these are to be protected by the state itself at various stages. And the first and most important protector is supposed to be the police. Have we created the police in such a way that they will protect us against lawbreakers?

Therefore, question is whether the police power has been dictated by law or by its masters. That should be the first question; we must address and clarify it to the people. Unfortunately, most of the deliberations I have come across both in writings or in seminars, attempts are made to shift the blame to law. It is not really the law but the men behind the law who really exercising power of law.

Have we motivated, trained, equipped and monitored police adequately, which protect our rights, not violate them. This is the first question that should be answered. Do the police serve the law? Alternatively, do they serve the master? Can the police be independent enough to serve the people rather than their master? The Constitution of Bangladesh provides for certain bodies, e.g., Public Service Commission, Election Commission, Auditor and Comptroller General etc. However, we have not yet thought of the other monitors for law enforcing agencies. A human rights Commission is essential. There is a need for a separate department for public prosecution and an independent bribery commission.

The formation of those institutions is extremely important. Who will really appoint the members of those Commissions? How do you make them independent, so that they could hold the police accountable? We need to think about all these issues and structures. For instance, the police have to apply the mind in using section 54 e.g., someone has been concerned in a cognisable offence. There is also another part whether there is a reasonable suspicion, complaint or credible information exists. So a complaint has to file with the police and depending on the credible information, the police will go and arrest a person without a warrant. So there is, at least, a reference point. There is also another area, which is not any reference point, and, in my experience, the section 54 is used more from those areas rather than the reference point or First Information Report (FIR). Also find that FIRs are very difficult to activate. The citizens' complaints do not activate the police.

Police becomes *pro active* in areas where there is no complaint; there is no FIR. But there is a vested interest where the police want to act and the police acts, but not there, where the citizens have been suffering from violations of their rights. Police has its interests to cater power - the money power, executive power and even the muscle power. There may be mistakes, or difficulty in making reasonable FIR or any complaint one can do or what one can work out.

The second aspect of the section 54 is that within 24 hours police has to decide on the basis of investigation and verification, whether there is a case to proceed further at all - whether the police should produce the matter before the magistrate. So if no application of mind is made, police must verify whether there is any cognizable offense done by the person or not. This is the most critical aspect, which is totally absent in day-to-day policing.

If there is any case, the police must investigate that all the complaints, information are well founded, and that application of mind is done. For this, they must be trained properly. If s/he finds that it is well founded then s/he has to act to write it in his diary. S/He must give his opinion that it is well founded. However, it is true that, no police maintained such a diary.

Based on the diary it goes then to the magistrate. Magistracy is the second guardian of our constituency. So the first guardian is actually the police and the second guardian is the magistrate. Magistrate then has to be satisfied what information s/he gets from the diary. That is the provision of section 167 - the remand. Section 167 says based on the diary the magistrate must be satisfied that there are enough grounds for granting police remand. The magistrate must give the reasons if he grants remand.

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