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"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

LAW *alter views*

BANGLADESH PERSPECTIVE

Police-custody, custodial interrogation and right to silence

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THE phrase " police custody" does not send an unmixed feel-good message anywhere in the world. It has its pain and pleasure accompaniments. But one thing is found more or less ensured in the advanced societies that some kind of balance is struck between the action of police and purpose of law. And the key players in the field i.e., the police, prosecution, Bar and the Bench act in a way that excesses in action of particular policemen cannot go unaccounted for and thus social balance is virtually maintained. Police with their nature of job cannot possibly avoid the blemish of excesses altogether. But in advanced countries they have to pay heavily on accountability count. In the USA, in particular, we find occasional outcry against police excesses. And police are found to face liability lawsuits and in many cases have to pay huge amount of damages for brutality, using deadly force, assault, illegal arrest, harassment, restraint and so on. In 1981 more than $325 million claims were filed against US police officers in one state alone. This gives an idea of the frequency and size of claims annually sought in liability lawsuits against law enforcement officers and agencies in the whole country.

In our country police-custody ordinarily means something menacing and ominously obscure. The family inmates of a young boy picked up by police can no longer foresee what was going to happen to the fate of the arrestee. How much harassment and humiliation were lotted to him and how much damage might be done on his person. The causes of such mistrust suffered by our law enforcement agencies are so rooted into our socio- economic and political realities that as a dependant variable policing cannot be effectively brought back on track unless the police forces are built up in keeping with the changing needs of the time and more importantly, appropriate atmosphere is created so that they can police a modern state to their full potentials.

I must not say that the popular concern is not being shared by the successive Governments, superior courts, the law makers, and all others immediately concerned including the police department itself. Various steps are being taken for promotion of the professional performance of the police.

Supreme Court on police abuses

In this area of concern our Supreme Court has come down heavily to safeguard the life and liberty of citizens and has taken an activist approach towards bringing the police back to compliance of law. With that end in view Supreme Court has also provided a number of directives to be followed by police in matters of arrest and detention of suspects and humanising their treatment with the persons in their custody.

In *BLAST v.Bangladesh* (55 DLR 363) a Division Bench of the High Court Division has, besides making recommendations for amendment of existing law, issued fifteen directions to be henceforward followed by the police amongst them disclosure of identity of the arresting officer at the time of arrest, recording reasons for arrest, communicating the news of the arrest, if not arrested from home, to persons immediately related to him; getting the arrestee examined by a Govt. Doctor if injury is found on his person; allowing him the right to presence of a lawyer during interrogation, if any; and making interrogation, if necessary, in a place within the view of any relative or lawyer of the arrestee are the most crucial.

In a subsequent case (*Saifuzzman v. State* 56 DLR 324) another Division Bench of our High Court Division has taken serious notice of the flagrant violation of the fundamental rights of our citizens in the hands of the police and failure of the Magistrates in acting in accordance with law.

While delivering the judgement of the court SK Sinha J, observed- "There are complaints about violation of human rights because of indiscriminate arrest of innocent persons by law enforcing agencies in exercise of power under section 54 of the Code and put them in preventive detention on their prayer by the authority and sometimes they are remanded to custody of the police under order of the Magistrate under section 167 of the Code and they are subjected to third degree methods with a view to extracting confession. This is what is termed by the Supreme Court of India as 'state terrorism' which is no answer to combat terrorism".

His Lordship issued eleven guidelines in more precise terms in the judgement to be followed by the police and the magistrates in matters of arrest, detention and remand of suspects and hoped that the requirements would curb the abusive power of the police and harassment of citizens in their custody.

Custodial accountability of police

Accountability, if ensured, serves to act as a major deterrent to the propensity of violation of law. Since police custody is the foremost precondition to accountability custody needs be proved to hold police liable for excesses.

Police custody is nowhere defined in the Code of Criminal Procedure, shortly, "the Code". Nor the other oft-quoted phraseologies, namely 'judicial custody', 'safe custody' and 'jail custody' are found to be defined anywhere.

The meaning of the word 'custody' is given in Black's Law Dictionary: "The care and control of thing or person....Also detainer of a man's person by virtue of lawful process or authority..." In absence of any precise statutory definition or description the phraseologies virtually remained vague and often used interchangeably.

In the Code custody of an accused or a witness means custody of the court in its ultimate sense. The transitional custody of a person may be with the police. But the ultimate authority to decide the fate of the suspect rests with the court. In any view, custody of police stands out as crucial in determining their liability.

Law does not contemplate every restraint imposed by police as police custody. Police custody is primarily relatable to formal domain of police upon the corpus of anyone effected by arrest, remanded by court or by surrender voluntary or involuntary.

For the purpose of custodial accountability of the police 'depriving any person of his right to movement and action in a significant way' is also construed as police custody. "The ultimate determinant of whether or not a person is in custody", as said by the Supreme Court of America in *California V. Bakeler* (33CrL4108), "is whether the suspect has been subjected to formal arrest or to equivalent restraint on his freedom of movement".

The test of police custody is whether or not any person is deprived of his right to movement significantly either by arrest, remand by court or otherwise.

In that view of the matter, questioning in police car or at the police station, not allowing to leave the presence of police or asking the driver to get out of the car taking him into the nearby police box for interrogation may be considered as police custody.

A superior court in America said: " policeman's unarticulated plan has no bearing on the question whether a suspect was in custody at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his position"(*Berkemer v. McCarty*, 35 CrL 3192 , 1984).

Question may arise whether a person arrested by police and subsequently found dead in the hospital can be called a custodial death? There is no reason not to call it a custodial death for which the police must be called to account if not otherwise proved.

Since it is a question of fact "police custody", if not admitted, remains to be proved for an action against police. But I have doubt if every single death caused in police-custody constitutes a custodial death or every person once taken in custody may be said to be in police custody. Police custody, as I understand it, has to do with effective control of the police over the arrestee or over person whose right to movement is significantly curtailed.

An arrestee, for example, may suddenly turn violent, snatch away arms from a policeman and try to escape on gunpoint. This is a moment police loses custody of the arrestee. Any situation that substantially shakes or loosens dominion of the police upon the arrestee is bound to make the custody controversial but that turns out as a subject to be strictly proved by the police so as to avoid their responsibility.

Custodial interrogation

Interrogation is a device through which police endeavour to pump the suspect for disclosure of facts having bearing on the accusations. If it is effected in custody of the interrogating agency it is called custodial interrogation. In a landmark decision (*Miranda V. Arizona* 348 US 436) the American Supreme Court held - "By custodial interrogation we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way".

A roadside questioning of a motorist detained pursuant to routine traffic stop was not construed to be custodial interrogation by the American Supreme Court.

This means that the detention must be to the deprivation of the right to movement of the suspect in a significant way. It is also held in the Miranda Case that the suspect must be given four warnings before he is put to interrogation, namely, a) You have a right to remain silent b) Anything you say can be used against you in a court of law c) You have a right to the presence of an attorney and d) If you cannot afford an attorney, one will be appointed for you prior to questioning.

Unless the warning are given evidence collected through interrogation is not admitted in court. In other advanced democratic countries similar rules are followed so as to ensure rights of citizens and every other individual taken into custody.

Right to silence

Right to silence of a person accused of offence emanated from the common law jurisprudence that 'every accused shall be presumed to be innocent unless found guilty by a competent court'. Article 35(4) of our Constitution says- " No person accused of any offence shall be compelled to be a witness against himself".

Section 26 of the Evidence Act says-" No confession made by any person whilst he is in the custody of police-officer unless it be made in the immediate presence of a Magistrate shall be proved as against such person". Sections 342 and 343 of the Code of Criminal Procedure (the Code) protect the accused against making false statement or against refusal to answer, forbid administering oath upon him and prohibit influence of any kind to be exerted for disclosure of facts save as provided in sections 337 and 338 of the Code (tendering pardon to accomplice on condition of his masking disclosure of facts etc.).

Section 163 of the Code prohibits police officer or other person in authority from offering or making any inducement, threat or promise for making disclosure of facts having reference to the charge against him. For the witness the exception is he is bound to speak the truth on oath even if the statement tends to incriminate him.

But the protection provided in law (S. 132 Evidence Act) is that he shall not be liable to arrest or prosecution for such answer or the same shall not be proved against him in any criminal proceeding, except in a proceeding for lying on oath.

A bare reading of the laws set forth above suggests that any person accused of an offence is protected against making any disclosure of facts having bearing on the accusation and against cruel or degrading treatment thereby provided with right to silence.

Concluding remarks

The loopholes of the existing laws were not as much responsible for custodial violence as the declining trend of values everywhere in our lives. Law must be changed with the changing needs of time. And the Supreme Court in its anxiety has supplied the necessary legal back up to fill in the lacuna.

Now our law providing safeguards against police excesses and violation of fundamental human rights stands at par with the international standard. With the impressive body of law seeking to put the law enforcing agencies on checks and balances we must hope that some positive changes will be noticed in the arena of custodial violence.

Unfortunately law cannot go of its own. It finds expressions through diverse agencies and institutions backed by political will. Unless we mean to enforce law, I am afraid, only law cannot fulfil our dream.

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LAW*vision*

Immunities of World Bank: A Legal Overview

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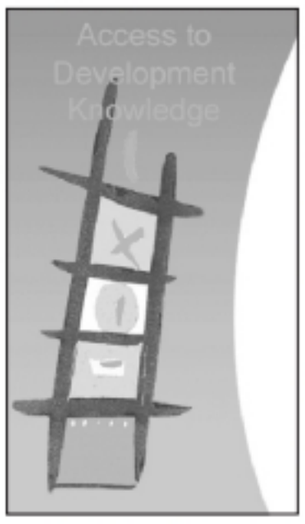
ALREADY the proposed bill regarding immunities of International Bank for Reconstruction and Development (IBRD) popularly known as World



Bank has become a debatable question in the sight of civil society of Bangladesh. In the editorials and reports of a number of national dailies the matter has been given special concern, which in sum manifest a particular standpoint of national interest. But for the sake of a more live debate on this issue in this regard, more light should be cast on another important side of this matter, and that is the footing of World Bank as an international organisation under international law.

From the very beginnings of the international organisation, privileges and immunities thereof were regarded as important requisites for smooth functioning as an international person. Article 7 of the League Covenant provided: "Representatives of the Members of the League and officials of the League when engaged on the business of the League shall enjoy diplomatic privileges and immunities." United Nations Charter provides in Article 105: "1. The Organisation shall enjoy in the territory of its Members such privileges and immunities as are necessary for the fulfilment of its purposes. 2. Representatives of the Members of the United Nations and officials of the Organisation shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organisation."

Article 105(3) of the United Nations Charter has empowered the General Assembly to make recommendations to put paragraphs 1 and 2 into effect of this Article. In follow-up the General Convention on the Privileges and Immunities of the United Nations was approved in 1946. Similarly a separate Convention was approved in 1947 on the privileges and immunities of Specialised Agencies of the United Nations.

The International Court of Justice in the *Reparation for Injuries Suffered in the Service of United Nations* case [1949] ICJ 174 drew evidences from Convention on the Privileges and Immunities of the United Nations 1946 to determine international legal personality of United Nations regarding rights and duties between each of the signatories and the Organisation. In later period other Organisations such as the League of Arab States, the Organisation of American States and the Council of Europe etc heavily relying on these two conventions in framing up their agreements of articles in relation to privileges and immunities made them as generally accepted model for the constitutions of international organisations.

International Bank for Reconstruction and Development, which mostly goes by the name World Bank is one of the seventeen Specialised Agencies of the United Nations. World Bank was born of the Bretton Woods Conference in July 1944 for the purpose of assisting in reconstruction and development, promoting private investments and other international trade related aspects.

In international plane immunities and privileges of World Bank were governed by both the Articles of Agreement of IBRD and the Convention on the privileges and immunities of Specialised Agencies1947. Article VII of the Articles of Agreement of IBRD states the status, immunities and privileges of the Organisation in relation to states, individual or other legal entities. Section 1 of Article VII makes it mandatory for every member state to accord to the Bank such privileges and immunities as enumerated in this article. Section 2 of Article VII provides that the Bank Shall have juridical personality with the power to enter into contracts, acquiring and disposing of immovable and movable property and instituting legal proceedings.

Section 3, 4 and 6 of the same set out immunities and privileges relating to assets of the Bank to the extent that the assets and properties of the Bank shall not be subject to seizure and attachment pending final judgement, shall be immune from search, requisition, confiscation, expropriation or any other form of seizure by executive or legislative action and shall be free from restrictions, regulations, controls and moratoria of any nature to the extent necessary to carry out the operations provided for in this agreement.

Section 5 and 7 of the said Article speaks for immunity of Bank Archives and privilege of communication among Bank officials.

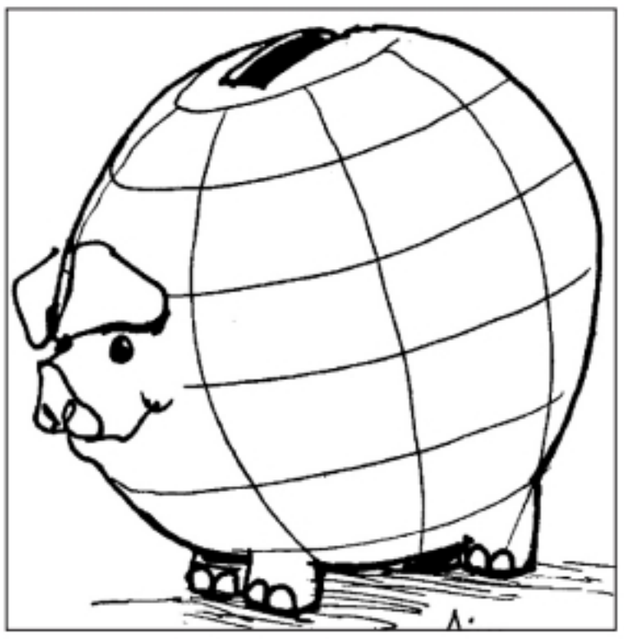
Section 8 of the same Article provides that all governors, executive directors, alternates, officers and employees of the Bank shall be immune from legal process with respect to acts performed by them in their official capacity except when the Bank waives this immunity; shall be provided with the immunities from immigration restrictions, alien registration requirements and national service obligations.

Section 9 exempts the Bank as well as its aforementioned officials from tax obligation in several respects. Section 10 imposes obligation upon every member to take necessary steps in their own territories for the purpose of making effective the principles set forth in this Article in terms of its own law. The Convention on the Privileges and Immunities of Specialised Agencies 1947 contains more or less same directives with special reference to World Bank in Annex VI thereof.

Much as international organisations enjoy certain privileges and immunities, it is also true that in most of the cases at the national level, international laws regarding immunities and privileges of International Organisations are applied through domestic statutes.

For example UK International Organisations Act 1968 and the US International Organisations Immunities Act 1945 may be mentioned. The usual way of these legislations is that the empowering provisions contained in those Acts are applied to named international organisations by specific secondary acts, notification or order.

In the case of the International Organisations Act 1968, the privileges and immunities are conferred upon the international organisations by Order of Council. In US, the same process is normally conducted by means of Executive Order issued by president. Both the UK and US



statutes feature a similarity that one single piece of legislation regulates the whole regime of privileges and immunities of all the international organisations in each country.

In Bangladesh the state practice regarding privileges and immunities of international organisations is considerably at variance with that of either UK or US. In our country there is no comprehensive legislation as such which covers this area as a whole. For instance we can cite International Financial Organisations Order1972 and the Asian Development Bank Order 1973. By virtue of these statutes, privileges and immunities have been accorded to four international organisations namely the Asian Development Bank, International Monetary Fund, International Bank for Reconstruction and Development (World Bank) and International Development Association. The chief characteristic of these statutes is that provisions of Articles of Agreements concerning privileges and immunities of the aforesaid institutions have been directly incorporated and endowed with legal force.

From the foregoing discussion it is clear that as per the law of international organisations, they should be provided with privileges and immunities but the question is why should the government legislate anew to provide privileges and immunities for World Bank which it already enjoys under an existing statute? And if the government thinks to provide extra immunities, the counter argument will be in accordance with the Articles of Agreement of IBRD, the government is not at all bound to provide any extra immunity than agreed upon. So the government is solely accountable to justify it before the countrymen.

On the other hand the fact should be admitted that in this era of globalisation international entities will be more and more overarching, that is why it is high time the government should deal this matter not on an ad hoc basis but in a comprehensive way as the government can not chuck up what it is provided under international law. So it may be a better idea the government should take to steps for enacting laws like that of UK or US to give its policy a firm basis.

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