



LAW reform

Reforms must to stop death in custody



Custodial violence has become a pervasive feature of law enforcement, in which nobody is seemingly accountable to anybody for anything pertaining to custodial deaths or injuries.

M RAFIQUK ISLAM

RECENTLY the Apex Court, the National Human Rights Commission, and the media expressed views on custodial deaths. The High Court Division (HCD) in its judgment of 12 July 2001 told us about police excesses and misuses of power, resulting in alarming increase in unlawful arrest, detention, and custodial rape, torture, and death (New Nation 13/7/2001). In Rubel custodial murder case on 17 June 2002, the HCD reiterated these abuses and called upon the legislators to take into consideration the procedure for interrogation in police custody (Star 18/6/2002). Police custody has become synonymous with violent tortures, degrading treatments and inhuman punishment, causing custodial deaths and irreparable bodily injuries. There appears to be an unholy nexus between the law enforcing agencies and the incumbent government in turning a blind eye to this culture of impunity for gross violations of human rights. This perennial problem received only peripheral response from successive governments.

The international human rights instruments of which Bangladesh is a party unequivocally outlaw all kinds of torture, cruel, inhuman or degrading treatment or punishment. Our Constitution guarantees complement this prohibition, which

is not barely ornamental and declaratory, but entails precise enforceable legal obligations. Remedial and reform measures pertaining to the law and procedures of police custody are long overdue. To this end, this piece pursues a triangular reformist approach to promote lawful maintenance of order and protect the human rights of persons in custody. These measures reinforce the application of the rule of law and due process in dealing with police custody cases.

Preventive measures: Transparency in dealing with the person in custody is an important procedural aspect of the fair application of law. A minimum threshold of objectivity and openness in law enforcement may be adopted in the following ways:

1. The proper identification of the police officer/s involved in dealing with the detainees is paramount. Such police officers should bear accurate, visible, and clear identification (name tags and designations). Their particulars must be recorded in a register. Sometimes the perpetrators wear masks making it difficult to identify whether they are hired or regular forces. Dr Mohiuddin Alamgir testified before the court that he was brutally tortured by three masked men (Star 6/4/2002).

2. The police must be required to notify immediately the relatives of the arrestee about the time, place of arrest and venue

of custody. There are instances where the relatives of detainees had to resort to writ petitions to know the whereabouts of the detainees.

3. The requirement that an arrestee must be presented before a competent magistrate within 24 hours must be enforced. Such a magistrate must release the arrestee should the arresting police fail to file a case within the specified time. There are instances where the arrestee died (Jamal case, Star 30/4/2002) or was taken to doctor (Nipu Rani case, Janakantha 12/6/2002) after arrest but before producing to the court required by the Constitution Article 33 of and the Code of Criminal Procedure s61.

4. The lawyer/s of the arrestee's choice must be allowed to meet him/her and stay during interrogations. If unaffordable, legal aid may be made available, or a human right organisation representative of the arrestee's choice could be allowed to be present during interrogations.

5. If the arrestee is unwilling to make any confession before the magistrate, the magistrate shall send such person to judicial, not police, custody. Any confession by the arrestee recorded in police custody will bear no evidentiary value, as confessions may have been extracted by employing 'third-degree' methods. Involuntary confessions made under coercion is inadmissible under CrPC ss 163-164, the Constitution Article 35(4), and State v Munir (1BLC345).

Punitive measures: Punitive measures are remedial and impose strict liability on the law enforcing agencies for the abuse of power. Custodial violence is a punishable offence with imprisonment under s29 of the 1861 Police Act and s53 of the 1976 Dhaka Metropolitan Police Ordinance. There are past and present

instances where the police have been punished for custodial deaths. The law enforcing personnel responsible for torture during custody must be brought to justice routinely pursuant to the Penal Code 1860. The commanding officers can take actions against their subordinates for torture under s33(b) of the Police Regulations. Being their immediate controlling authority, the commanding officers should also bear legal responsibility for the crimes committed by their subordinates, which will render them more vigilant about acts of their subordinates.

External eyewitnesses for custodial violence cannot be expected. A police officer is unlikely to testify that an arrestee was tortured to death by his/her colleague(s). The police can also easily manipulate records. In the Rubel case, a police officer was sentenced by the Court on charge for causing the disappearance of evidence of offence and giving false information to save his fellow offenders (Star 18/6/2002). Reliance on post-mortem reports in determining the cause of death must be made with utmost caution. The honesty and impartiality of government nominated pathological surgeons are often doubted for cover up.

Bahauddin Nasim and Mohiuddin Alamgir were tortured in police custody, but the government chosen medical board reported that they had only minor injuries. The credibility of the reports was widely challenged by the press and Amnesty International, urging the government to form independent and impartial medical body (Star 2&6 April 2002). The best option is to embrace the principle of presumed guilt/fault. It should be a conclusive proof that any death in custody is caused by torture and the police officer, who has the custody, must be held liable for the death. An act of death by torture is presumed unless otherwise is proved and the onus of proof should be on the accused police officer(s), who is in a better position to defend him/herself than the victim or his/her relatives. There are commendable judicial and legislative precedents for such a liability regime. In Shaikh Baharul Islam v State (43 DLR 336), the Bangladesh Supreme Court held that it was not possible to prove the cause of death of a person in the police station, because only those who beat him had special knowledge how he was beaten to death. The Law Commission of India in its 113th Report recommended that a new section be inserted in the law of evidence that the court may presume that the injury was caused by the police officer having the custody of that person during that period, which the Indian Supreme Court endorsed in Shyamsunder Trivedi case (4 SCC 262).

Curative remedies: Curative remedies offer compensation to the victims and/or

their relatives for custodial deaths or injuries. It imposes vicarious liability on the State. The maxim salus populi suprema lex (the safety of the people is the supreme law) lies at the heart of this liability regime. Custodial crimes include not only the infliction of body pain but also the mental agony which an arrestee undergoes within police lock-up. Sufferings of the defendants are of paramount significance in cases, where the victim was the sole breadwinner for the whole family. The victims and their families are entitled to compensation, the amount of which will be determined on a case by case basis by the court. Many apex courts through their judicial activism have awarded compensation for the established violation of personal right to life or liberty. In Md Shahaneuwaz v Bangladesh (18 BLD 337), the HCD ordered the delinquent police officer to pay Taka 20,000 to the victim as compensation for false arrest. Granting compensation as a remedy to the victims of custodial deaths or injuries is common in the decisions of the Indian Supreme Court, the Irish court, the New Zealand Court of Appeal, and the Privy Council.

Judicial inquiry: Incidents of custodial violence must be investigated by a senior judge. The police department undertaking such investigation appears patronising, as it invariably records custodial deaths as unnatural deaths and finds no fault with the police. Investigating alleged police crime by the police is contradictory to the principle of natural justice, as no one can act as a judge of his/her own cause. An objective and impartial result of judicial inquiry is mirrored in the verdict on the Rubel custodial murder case (June 2002) in which 13 police officers were sentenced for life, which happened on the recommendations of a judicial committee headed by a judge of the Supreme Court.

Role of the Supreme Court: The paramount duty of any judiciary is to protect the legal rights of every citizen. The Indian Supreme Court in State of M P v Shyamsunder Trivedi (4 SCC 273-74) held that the death in police custody is one of the worst kind of crimes and suggested that the judiciary must adopt a realistic rather than a narrow technical approach in dealing with custodial crimes so that the guilty should not escape and the victim has the satisfaction that the majesty of law has prevailed. It would be a double jeopardy for poor citizens if financial constraints inhibit them from receiving redress. In such circumstances, the Court can play a pro-active role by taking actions suo motu to dispense justice. In Re Death of Sawinder Singh Grover (4 SCC 4500), the Indian Supreme Court took suo motu notice (from the media) of the custodial death of Sawinder Singh Grover and directed the authority to compensate the widow. The Indian Supreme Court

decision on custodial violence in the Basu case (1997 AIR 615) was an outcome of a letter from a legal aid organisation addressed to the Chief Justice of India drawing his attention to deaths in police custody. The letter was considered as a writ petition. Stories of custodial violence are frequently and readily available in the media. Human rights NGOs can take the initiative by referring those stories to the attention of the Chief Justice, who can trigger the jurisdiction of the HCD to play its crucial constitutional role of judicial activism against custodial violence.

Human rights campaigns: Good governance presupposes respect for human rights. Nationally, the Human Rights Commission should take a stand against all custodial violence. The citizens need to be made aware of their rights. Human rights organisations can form pressure/lobby groups to launch a public consciousness-raising campaign about the constitutionally guaranteed rights through easily available and accessible publicity means and educational programs. This would help remind the general public and the law enforcing agencies about the due treatment during police custody. Readily available free legal aids may be the only option to protect the powerless and voiceless poor victims of custodial brutality. Internationally, there are individual complaint procedures. Pressures may be brought to bear on the government to ratify these procedures to enable the victims of police custody to invoke international remedies as a last resort.

Custodial violence has become a pervasive feature of law enforcement, in which nobody is seemingly accountable to anybody for anything pertaining to custodial deaths or injuries. Reforms to create mechanisms for transparency and accountability of actions of the law enforcing agencies is in order and indeed imperative to protect potential victims of custodial violence. The suggested reforms merely underscore the need for a judicial mind to ensure a just and lawful maintenance of order. Law cannot be enforced by breaching the law. Members of the law enforcing agencies are not above the law. Police custody and interrogations should be derived from and exercised by the limits of the law. It would be rewarding for those victims who despair in police custody, should the government becomes self-reflective in bringing its law enforcing functionaries within the bounds of law. Bangladesh cannot have a dignified existence unless the barbarous acts of custodial violence are subject to the law and their perpetrators are brought to justice.

The author is a Professor of Law at Macquarie University, Sydney, Australia.

LAW interview

"National Human Rights Commission will be institutionalised"

The National Human Rights Commission (NHRC) and its new Chairman have drawn attention of the media and general public in recent times for its strong position against the incidents of extra-judicial killings and gross violations of human rights allegedly by a section of the members of the law enforcement agencies. Dr. Uttam Kumar Das has talked with Dr. Mizanur Rahman, the Chairman of the Commission on various aspects of human rights situation and the commission itself.

What is your comment on the recent observation of the High Court Division on the investigation by law on enforcement agency on the alleged incident of human rights violations by themselves? Dr. Mizanur Rahman (MR): Those who will carry on an investigation on an alleged incident of human rights violation, they need to have relevant skill, competence and independence to undertake such an activity in an impartial and efficient manner. They have to show through their work that they are impartial. Then, the general public would have a confidence to them, otherwise not. For that the respective members of an agency need appropriate training. However, this is not easy to make sure; it is a time-bound and

resource-consuming activity as well. The NHRC would be pleased to facilitate such training programmes in future.

So, will the NHRC undertake investigation of such allegations of human rights violations?

MR: As per legal authority, the NHRC has such power. However, the reality is different. The NHCR is not in a position at this moment to carry on such activity. It does not have required manpower, technology and other resources for such activities. There is no research cell in the NHRC yet.

When are you having those facilities?

MR: For this, we need support of the government and donor agencies. In this connection, we are having assistance from a project of the UNDP. The Country



Representative of UNDP has already met me. However, we want to make sure that the activities of the NHRC is not dictated by any donor agency, rather it is dictated by national priority and interest.

What is the role of the NHRC?

MR: The Commission has two main roles: promotion and protection of human rights. When there is a question of violations or attempt of violations of human rights then the question of protection comes in. We will make sure that the commission has a balance in both types of activities.

What about human rights situation in the country?

MR: We are having an absence of the culture of human rights. The reasons are obvious; there are poverty, illiteracy, lack of awareness, and corruption among other. At the same time, there is no institutional mechanism to educate and train people on human rights. The training activities what are now going on those have various limitations and lack of continuity and follow-ups.

Also, we are focused on mainly civil and political rights. Economic, social and cultural rights are not in the debate. The media is also following the same suite.

So what will be your stake on this?

MR: The NHRC will take initiative to incorporating human rights issues in the curriculum starting from primary to higher secondary levels. The law teachers and law students will be performing as instructors and trainers. At the same time there will be initiative to have opportunity for studying and researching on human rights at higher educational levels. The concept of "Street Law" will also be explored. We are planning to meet the Minister for Education and others to talk about the issue. We will also be considering experience of other countries having similarity with our context.

The NHRC will also take initiative for

training programs on human rights for the members of various law enforcement agencies. For this, we will have round of discussion with the authorities of Bangladesh Police, Police Academy, Police Staff College, and Metropolitan Police.

The Commission will seek assistance, cooperation and participation of all concerned which include human rights organisations, respective professionals, government, the media and all concerned for promotion and protection of human rights. This is a joint work of all of us.

How do you see impact of those activities?

MR: Education and training has a cumulative effect. If we could introduce issues like civic and human rights from the very beginning then that will have a positive effect on our children. We will have a future generation sensitised on human rights who will be the vanguard for the democracy, good governance and rule of law.

If the members of the law enforcement agencies have proper training on human rights and they would be able to use that knowledge in their services. They will get immediate benefit in their professional career as well. The members of the law enforcement agencies are

desired to be deployed in the UN Peacekeeping and others missions. It that type of postings, knowledge and skill on human rights is of paramount consideration.

What is NHRC busy with now?

MR: We are now drafting the organogram and rules and regulations for the commission. Those are to be done within a month. Then, we will be submitting it to the Ministry of Law, Justice and Parliamentary Affairs for its approval.

Any plan on expansion outside the capital?

MR: At the first place, the Commission will be strengthened and fully operative centrally. Then, we will look into whether it is necessary and feasible to open up branches at divisional levels. Again, it will warrant for resources and other supports from the government. However, we might consider having a liaison with local level human rights organisations or even with individuals given their contribution to the promotion and protection of human rights. For this, the gravity of a particular human rights problem, geographical consideration and other issues will be taken into table. However, this is not a priority issue for us now.

The interviewer is a Researcher and Practitioner specialising in International Human Rights Law.