

Seeking Effective Remedies: Prevention of Arbitrary Arrests and Freedom from Torture and Custodial Violence

Soma Islam, Deputy Director,
PIL & Advocacy Cell, BLAST

I.

Protection of the fundamental rights of individuals¹ is the central edifice on which the concept of democracy is based. All instruments and mechanics of a democratic system of government are meant to protect these rights. These rights cannot be curtailed, abridged or compromised except in accordance with law. This unique feature of democracy has made it the most widely accepted system of government in the world. However, the very foundation of a democracy is shattered and frustrated if the basic rights of its people cannot be protected or enforced through legal means. In that case, democracy loses its worth and becomes a theoretical burden.

On recognition of the above, the framers of our Constitution took utmost care and gave maximum emphasis on the constitutional provisions guaranteeing protection and enforcement of fundamental human rights of its people. As a result, our Constitution is considered as one of the finest in the existing democracies across the globe.

The Constitution in its Part – III categorically and emphatically enshrined the fundamental rights of the people. Any law, rule, order, ordinance or any act that is inconsistent, or in conflict, with fundamental rights are *ultra vires*, hence unenforceable (Art. 26). However, considering human proneness to abuse freedom and ingenuity to misuse legal protection, the Constitution has provided for checks and balances where applicable (i.e. reasonable restrictions imposed by law on the enforcement of certain fundamental rights). At the same time, considering the necessity of some discretionary power needed by the government to protect public interests and maintain law and order it has provided for few circumstances when certain fundamental rights can be temporarily taken away by the government only in accordance with law (Articles 33 (3) (b), 47, 47A, for example). This little scope has allowed enactment of several abusive laws, ordinances and orders vesting unbridled discretionary power to the law enforcement agencies against the spirit of the Constitution.

Constitutionally, the country is a people's republic. However, it has been run by democratically elected governments, martial law administrators and the relatively recent system of caretaker government. Irrespective of the political identity, all successive governments (save the caretaker governments) had passed, experimented and used repressive laws, regulations, ordinances etc. in the pretext of protecting public interests and ensuring public safety². In reality, those laws have often been used unscrupulously and indiscriminately on the people overlooking or disregarding the safeguards guaranteed by the Constitution to the people. Those laws and their applications have drawn flaks from the civil society and rights activists. Quite often ruling parties use repressive laws to suppress and thwart activities of political opposition. Consequently, political parties while in opposition also criticise application of those laws and have demonstrated commitment to repeal the same if elected (the Special Powers Act, 1974, for example). However, once elected to power the same deliberately choose not to do away with the draconian Act for its use as a lethal tool to detain political rivals.

While repressive laws have been subject of endless discussions, in recent years, civil society, rights groups and media have shown serious concern about the arbitrary use of Section 54 of the Code of Criminal Procedure (Cr.P.C), Sections 86 and 100 of Dhaka Metropolitan Police Ordinance, and similar

¹ According to the Constitution of Bangladesh fundamental rights of the people include, among others, equality before law, rights not to be discriminated on the grounds of religion, race, caste, sex or place of birth, equality of opportunity in public employment, equal protection of law, right to life and personal liberty, rights not to be arrested or detained arbitrarily, freedom of movement, freedom of assembly, freedom of association, freedom of thought and conscience and of speech, and right to property.

² The Special Powers Act, 1974, Metropolitan Police Ordinances, The Public Safety Act, 2000 (now repealed), Speedy Trial Act, 2002.

provisions under Chittagong, Khulna and Rajshahi Metropolitan Police Ordinances. The said provisions of laws have vested unfettered and unbridled power with the police to arrest a person without warrant.

Article 32 of the Constitution succinctly provides that nobody should be deprived of the most cherished and inalienable right to life and personal liberty save in accordance with law. However, Section 54 of the Cr. P.C allows enough room for the police to curtail personal liberty of people in violation of Article 32. Sensing that police may abuse the power against the spirit of Article 32, the framers of the Constitution incorporated Article 33, which guarantees certain safeguards in respect with arrest and detention. The safeguards broadly are rights to be informed of the grounds for arrest, consult and be defended by a legal practitioner, and the requirement of producing the arrestee before the nearest Magistrate within 24 hours of arrest. Non-applicability of the above provisions in case of preventive detention (Article 33(1) (d)) was incorporated through Second Constitutional Amendment Act, 1973. Before, Second Amendment there was no scope for preventive detention. Inclusion of Article 33 (d) provided the legal basis for all preventive detention laws to come into force. Despite further Constitutional safeguards (clauses (4) (5) of Art.33), these laws have been routinely abused by the police.

Abuse of power by police does not end at just arresting a person without warrant on the basis of suspicion, or in the pretext of preventive detention. It serves as a license for seeking remand or sending the arrestee into the custody of police for interrogation through a detention order made by the Magistrate under Section 167 of the Cr. P.C, or Section 3 of the Special Power Act, 1974. Although law permits remand of arrestees in police custody for certain period, particularly when investigation cannot be completed within 24 hours, in most of the cases police tend to resort to physical torture and cruelty ostensibly for the purpose of eliciting information or extracting confession from the arrestee in violation of Article 35 of the Constitution.

Following disturbing and depressing reports by the media and public outcry on increasing police abuses and custodial violence in Bangladesh which included the death of Rubel, Shima Chowdhury and Arun Chakroborti, BLAST along with other rights organisations brought a writ petition before the Supreme Court of Bangladesh, the ultimate custodian and protector of people's rights, and integrity of the Constitution. Subsequently, on April 7, 2003, a Division Bench of the High Court in *Blast vs. Bangladesh* (55 DLR 363) provided clear guidelines in the form of fifteen directives on arrest, detention, remand and treatment of suspects to be followed by law enforcement agencies and magistrates. Again, in *Saifuzzaman vs. State* (56DLR 342) the Supreme Court issued certain guidelines to be followed by the government, magistrates and police in respect with arbitrary arrest, detention, investigation and treatment of suspects.

BLAST has taken holistic initiatives of creating awareness among the judges, magistrates, police officers, lawyers, and media, elected public representatives and rights activists about the directives and guidelines of the Supreme Court in respect with arrest, remand, detention and interrogation of suspects by the police. To this end, it has already organised advocacy meetings through its unit offices in 18 districts. The meetings were followed by researches, though in limited scope, in 18 districts to understand the pattern and nature of arbitrary arrests and remand in police custody.

As the title suggests, this paper aims to deal with people's rights not be arrested or detained arbitrarily and to ensure freedom from torture and violence in police custody as guaranteed by the Constitution. The paper will also precisely disseminate the outcomes of researches conducted by BLAST on arbitrary arrests and custodial violence. In addition, while discussing the subject, data collected through a research study by Odhikar (2004), an NGO, will also be reproduced.

II.

Arbitrary Arrests

Arbitrary arrests have become synonymous with Section 54 of the Cr. P.C and Police Ordinances under the four metropolitan cities, namely, Dhaka, Chittagong, Rajshahi and Khulna. Section 54 of the Cr. P.C dates back to the colonial era and deemed to have been invented by the British rulers as a decisive weapon to deal with unruly natives, particularly during the time when political situation was getting increasingly volatile. This Section enabled the police to arrest any person any time in any pretext

in the name of maintaining law and order. British rulers had gone long ago, so did the West Pakistani regime but Section 54 sustained. Its ghost has occupied our shoulders with firmer grips even after we became independent. Successive governments reared it with care and invented more arbitrary laws and ordinances to be supplemented by it. The respective governments, from time to time, have also created and used various special forces, often through executive orders, in the pretext of improving deteriorated law and order situations and vested them with more arbitrary powers including legal immunity. Activities of all special police forces (from Rakkhi Bahini to today's Rapid Action Battalion) have been criticised by the people for severe human rights violations record.

The liberty given to the police to arrest people without warrant under Section 54 of the Cr. P.C and Metropolitan Police Ordinances are almost similar except that Section 54 is applicable throughout the country and the latter are not applicable beyond the respective metropolitan areas.

Generally, arrests without warrant take place in two ways, namely, (a) routine arrests, and (b) mass arrests during political turmoil. The research conducted by Odhikar suggests that during the one year period of September 2003 to August 2004 a total of 91,106 arrests were made in Dhaka metropolitan area alone. Out of these arrests, 58,728 were made under different Sections of Dhaka Metropolitan Police Ordinance and 5,774 under Section 54 of the Cr. P.C. The "Daily Sangbad" reported on 26 April 2004, referring to DMP data, that a total of 14,428 persons were apprehended during 19 to 25 April 2004 following political unrest. According to data provided by unit office of BLAST at Chittagong, before a party meeting called by the opposition held on 3 October 2004 about 232 persons were arrested under Chittagong Metropolitan Police Ordinance in three days and produced before the court. All of them were found guilty and fined Tk 300-500 each or in default were sentenced to 7-15 days imprisonment. The number of arrestees released from the police station was unknown.

In most of the arrests without warrant, arrestees are not produced before the court. They are released from the police station. According to data provided by BLAST's unit office at Bogra, a total of 226 persons were arrested in June and July 2004 under Section 54 of the Cr. P.C, out of which only 23 were produced before the court. The rest were released from the police stations. During the year 2004, a total of 855 people were arrested under Section 54 and produced before the court in Sylhet out of whom 820 were subsequently released for want of evidence against them. The same situation prevailed during the year 2004 in Jessore where out of 650 people arrested under Section 54 and produced before the court 509 were released. As per data provided by the Rangpur unit office of BLAST, a total of 383 people were arrested under Section 54 in Rangpur during January to November 2004.

The Khulna office of BLAST noted that during 20 September to 2 October 2004 in the wake of rising agitation against the government by the opposition party workers, 160 people were produced before the court after arrested under different provisions of the Khulna Metropolitan Police Ordinance. Besides, another 70 people were produced before the court after being arrested under Section 54 during the same time. Similarly, 49 people were produced before the court after being arrested under Section 54 in Rajshahi during the same time.

The grounds for arrest without warrant under Cr. P.C and Metropolitan Police Ordinances are shown below:

Section 54 of the Cr. P. C:

Under Section 54 of the Cr. P.C any police officer may, without an order from a Magistrate or a warrant arrest a person who:

- a. is concerned in any cognizable offence or against whom a complaint has been lodged or credible information received or reasonable suspicion exists of his being so concerned;
- b. possesses any implement of house-breaking (onus is on him to prove otherwise);
- c. is a proclaimed offender;
- d. is suspected of having stolen property in his possession;
- e. obstructs a police-officer in performing his duty or who has escaped or attempts to escape from lawful custody;

- f. is suspected of being deserter from the armed forces;
- g. is concerned in or against whom a complaint has been lodged or credible information received or reasonable suspicion exists of his being so concerned in any act committed at any place out of the country, which if committed in the country would have been punishable offence and for which he is subject to extradition or under the Fugitive Offender Act, 1881 is liable to be apprehended in custody;
- h. is a released convict committing a breach of any rule made by magistrate under Section 565 (3) of the Cr. P.C; or
- i. is subject to arrest following a requisition received from another police officer.

Metropolitan Police Ordinances:

Under the four Metropolitan Police Ordinances, police can arrest a person without warrant, if he is found between sunset and sunrise in following situations:

- a. equipped with dangerous instruments without satisfactory excuse;
- b. with face covered or otherwise disguised without satisfactory excuse;
- c. being present in any dwelling house or other building, or on board any vessel, boat or vehicle without satisfactory reason;
- d. lying or loitering in any street or other places without satisfactory reason;
- e. having in possession implement of house breaking without satisfactory reason.

III.

The scopes for abuse of power by police during arrest:

All arrests under or without warrant deprive a person of his fundamental right to life and liberty as guaranteed by Article 32 of the Constitution. Given that in applicable cases arrest of a person is necessary for the administration of criminal justice, or maintain law and order, his rights to life and liberty can be curtailed only to the extent permissible by law and not otherwise. However, in no cases an arrest can be made without lawful authority. The exception is that Section 54 of Cr. P.C and Metropolitan Ordinances have left enough room for the police to make whimsical and illegal arrests. In such cases, the validity of the arrests can be adjudged only after the arrestee is produced before a competent magistrate and proper investigation is conducted. Until then the police is free to book anybody at their discretion. While law provides for punishment of concerned police officer for arresting a person illegally, the stark reality is that instances of such punishment hardly exist. This makes things easier for the police to arrest a person capriciously and remain unaccountable for the same.

In *BLAST and others vs. Bangladesh* (55 DLR 363) the honourable Judges of the High Court Division of the Supreme Court categorised four conditions under the first item of Section 54 of the Cr. P.C which enable a police officer to arrest a person without warrant:

- (a) any person who has been concerned in any cognisable offence;
- (b) against whom a reasonable complaint has been made;
- (c) a credible information has been received; and
- (d) against whom a reasonable suspicion exists of his having been so concerned in any cognisable offence.

According to the honourable Judges “the word ‘concerned’ used in first condition is a vague word, which gives unhindered power to a police officer to arrest any person stating that the person arrested by him is concerned in a cognisable offence.” “[T]o safeguard the life and liberty of the citizen and to limit the power of the police, ... the word ‘concerned’ is to be substituted by any other appropriate word or words” the Judges continued. The Judges also opined that only interpretation of the words will not be sufficient. The provision shall be amended to incorporate safeguards in it. They were of the view that “there should be some restrictions so that police officers will be bound to exercise the power within some limits.”

In the same decision, the Judges also considered the terms “reasonable” and “credible” used in the Section. As regards ‘reasonable suspicion’ the Judges opined that suspicion should be followed by

reasonable thinking not mere guessing. According to them “[A] police officer can exercise the power (*of arrest*) if he has definite knowledge of the existence of some facts and such knowledge shall be the basis of arrest without warrant.” In short, police should not use the power of arrest only because they are vested with such power; rather, they should have reasonable justifications before using that power. To ensure this, the concerned police officer will be required to be satisfied about the genuineness and *bona fide* of the complaint or the information received. The Judges stressed that “[I]f a person is arrested on the basis of credible information, nature of the information, source of information must be disclosed by the police officer and also the reason why he believed the information.”

Finally, the Judges made some recommendations to be incorporated in relevant sections of the Cr. P.C, Penal Code, Evidence Act and the Police Act. The Judges also issued 15 directions with immediate effect to be followed by the law enforcement agencies in respect with arrest, detention and interrogation of a suspect. Subsequently, in *Saifuzzaman vs. Bangladesh* (56 DLR 2004) the Supreme Court again pronounced certain guidelines to be followed by police and magistrates as to arrest and remand of a suspect. For the purpose of discussion the Supreme Court directions and guidelines have been presented in this paper in three groups i.e. those relating to arrest without warrant, and others to remand and custody.

Arrest without warrant:

The following directions and guidelines may be related to arrest without warrant:

1. Disclosure of identity, and identity card, if demanded by the person arrested and the persons present, during the arrest and informing relatives or friends of the arrestee about the arrest within one hour of bringing him in the police station (*directives 2 and 6 in BLAST and others vs. Bangladesh and guideline (ii) in Saifuzzaman vs State. Notably, in the latter case the time requirement has been relaxed for up to six hours from arrest*):

Most of the socio-legal surveys have established that police do not disclose identity to the arrested persons³. The plain-clothed police, in particular, hardly show their identity cards to the arrestees. Neither do they bother to inform the relatives of the arrestee about the arrest. This creates confusion as to the arrest of a person by police. It often also denies the arrestees and his relatives the opportunity to take initiatives for his release or prefer a writ of *habeas corpus* in applicable cases. As shown in the attached research report, 44% of the respondents stated that police disclosed their identity and according to 79% of the respondents police did not inform their relatives of the arrests. However, in contrast, 72% of the police officers interviewed said that they informed the relatives, friends or family of arrested persons through various means including village watchmen, messengers or telephone.

2. Furnishing reasons for arrest to the arrestee within three hours of bringing him in the police station and allowing him to consult a lawyer of his choice or meet his relations (*directives 5 and 7 in BLAST and others vs. Bangladesh*):

Article 33 of the Constitution mandates that every arrestee shall be informed about the reasons of his arrest, as soon as may be, and be allowed to consult and defended by a legal practitioner of his choice. In *Madhu Limaye v. State* (AIR 1969 Punj 506), it was held that failure to inform the arrestee of the reason of arrest render the arrest unlawful and entitle the arrestee to be released. 95% respondents to BLAST’s research did not know the reason for the arrest and 79% of them had no chance even to ask about the grounds of arrest. The respondents alleged that police did not allow them to communicate with their families or with a lawyer. 71% of them wanted to communicate either with families or with the lawyers and 51% were deprived of this right.

3. Recordation of the reasons for arrest and other particulars including the knowledge about the involvement of the person in a cognizable offence, particulars of the offence, circumstances under which arrest was made, the source of information and the reasons for believing the information, date and time of arrest, name and address of the persons, if any, present at the time of arrest and

³ Odhikar Report 2004, survey by BLAST during 2004 are the most recent ones.

getting it signed by the arrestee (*directive 3 in BLAST and others vs. Bangladesh and guidelines (i) and (iii) Saifuzzaman vs. State*):

Section 172 of the Cr. P.C and Regulation 263 of the Police Act require the police officer to maintain a case diary to record time of receiving information, and beginning and closure of investigation related to arrests and searches. A police officer also has to note the place(s) visited by him pursuant to the investigation and write a statement of the circumstances ascertained through his investigation.

Regulation 264 of the Police Act provides for the procedure to maintain the case diary (B.P form no. 38).

The honourable Judges in *BLAST and others vs. Bangladesh* observed that “if copy of the entries of this diary is produced before the Magistrate and if there are materials before the Magistrate to decide whether the accusation against the person or the information against the person is well founded, he can decide the question whether the person shall be released at once or shall be detained further.” The Judges concluded that though the legal requirements are not fulfilled, the Magistrate as a routine matter passes order on the forwarding letter of the police officer either for detaining the person for further period in jail or police custody. In both *BLAST and others vs. Bangladesh* and *Saifuzzaman vs. State* the Supreme Court of Bangladesh stressed on the maintenance of case diary by police and arrest memo detailing everything related to the arrest.

Earlier, the matter was considered in *D. K. Basu vs. State of West Bengal (1997) 1 SCC* and the Supreme court of India issued a directive as follows:

“[T]he police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of the arrest and such memo shall be attested by at least one witness, who may either be a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be counter-signed by the arrestee and shall contain the time and date of arrest.”

IV.

Remand in police custody:

The term ‘remand’ does not exist in Section 167 of Cr. P.C. However, under the Section the concerned magistrate can send an arrested person to jail or police custody in specified circumstances. Therefore, getting back the arrestee from magistrate to the police has long been termed as remand by police as well as magistrates. Although the main purpose of detention in police custody is to conduct investigation, as most of the researches suggest, police to elicit information or extract confessions resort to physical and mental torture, which sometimes lead to death or physical deformity of the detainee. This kind of behaviour of the police is in violation of the provisions of Article 35 of the Constitution, Article 5 of United Nations Declaration of Human Rights, as well as Article 7 of International Covenant on Civil and Political Rights.

In both *BLAST and others vs. Bangladesh* and *Saifuzzaman vs. State* the subject of torture was considered and the Judges issued directives and guidelines with a view to prevent such heinous practices by the police. For the convenience of discussion the relevant directives and guidelines are briefly described below:

1. Not to arrest a person under section 54 of the Cr. P. C to detain under Special Powers Act, 1974 and the magistrate shall not make an order of detention in that case (*directive 1 in BLAST and others vs. Bangladesh and guideline (x) Saifuzzaman vs. State*) :

In *BLAST and others vs. Bangladesh* the petitioners ably established that police officers often arrest people without warrant under Section 54 of the Cr. P. C and seek remand under Special Powers Act, 1974. Lacking the necessary knowledge, magistrates often grant detention of arrestees in such cases. Clearly, arrest under Special Powers Act is preventive in nature. A person is arrested under this Act not for his involvement in any offence; rather to prevent him from getting engaged with any prejudicial activity (*BLAST and others vs. Bangladesh*). Therefore, in this case the Supreme Court decided that

“police officer cannot arrest a person under section 54 of the Code with a view to detain him under section 3 of the Special Powers Act, 1974. Such arrest is neither lawful nor permissible under section 54.”

2. Police officer to incorporate reasons in his forwarding letter as to why investigation could not be completed within 24 hours of arrest of a person and why he considers that the accusation or the information against the person is well founded along with transmitting a copy of the case diary (directive 8 in BLAST and others vs. Bangladesh):

According to Section 61 of the Cr. P.C, police cannot detain a person arrested under Section 54 for more than 24 hours unless an order thereof has been made by a competent magistrate. Article 33 of the Constitution makes it mandatory for a police officer to comply with such requirement. The main objective of this provision is to ensure that a judicial mind is applied in respect with the legality of the arrests or detention made without warrant.

Section 61 of the Cr. P. C. requires that police shall complete investigation in respect with an arrest without warrant within the permitted time limit of 24 hours. In certain circumstances investigation may not be completed within 24 hours. Section 167 (1) provides that a person arrested without warrant shall be produced before the magistrate (a) if the investigation cannot be completed within 24 hours and (b) if there are grounds for believing that the accusation or information received against the person is well founded. Fulfilment of this requirement will enable the magistrate to decide upon the legality of the detention.

3. To take an arrested person to the nearest hospital or government doctor for treatment if the police officer finds or discovers any marks of injury on him (directive 4 in BLAST and others vs. Bangladesh):

The objective of this directive is to ensure that marks of injury, if any found in the body of the accused persons are noted in the case diary so that the injury sustained before arrest cannot be alleged to have had inflicted in police custody. At the same time, it will also prevent the police to claim that such injuries were sustained before arrest. In D.K. Basu vs. State of West Bengal, the Supreme Court of India directed that if the arrestee requests so, he shall be examined at the time of his arrest, and injuries, if any detected shall be recorded in the “Inspection Memo”. Such Inspection Memo shall be signed both by the arrestee and the concerned police officer and its copy shall be provided to the arrestee for record.

4. To make detention order only if the magistrate is satisfied with the reasons stated in the forwarding letter of the police officer. Otherwise to release the person (directive 9 in BLAST and others vs. Bangladesh). To release the accused on taking a bond if the case diary, as prescribed, is not produced (guideline (vii) in Saifuzzaman vs. state):

As discussed earlier, the police officer is required to state reasons in its forwarding letter seeking detention of a person arrested under Section 54 so that a magistrate can apply judicial mind before granting or rejecting the prayer for detention. The forwarding letter shall be attached with the case diary. If the case diary does not include the required entries, the magistrate shall forthwith release the arrestee. If the magistrate is satisfied with the reasoning and the entries of the case diary he shall order detention of the accused after recording the reasons (Section 167 (3) and (4) of the Cr. P.C). Irrespective of the explicit provisions under Section 167, in most of the remand cases magistrates hardly apply judicial mind or record reasons for detention. On the other hand, the “Magistrate ... passes a parrot like order authorising detention in police custody” (*Blast and others vs. Bangladesh*).

V.

Torture and Custodial violence

In criminal jurisprudence the wider interpretation of the term ‘custodial violence’ may include all kinds of physical and mental torture inflicted upon, or inhuman or degrading treatment given to, a

person in police custody. It also includes death and torture in police lock-ups.⁴ In the absence of a specific definition given to it in law, but considering the spirit of Article 35 of the Constitution of Bangladesh, custodial violence may be divided into two categories (a) torture and cruel punishment; and (b) inhuman or degrading treatment. Again, our law books lack definition of the term torture and cruel punishment. However, in Article 1 of the Convention against Torture and Other, Cruel, Inhuman or Degrading Treatment or Punishment 1984, to which Bangladesh is a signatory, torture has been broadly defined as act of a public official, or other person acting with the consent, instigation or acquiescence of a public official by which severe pain or suffering, whether physical or mental is intentionally inflicted on a person for the purposes of obtaining information or confession or punishing him for an act he has committed or suspected of having committed. On the other hand, inhuman and degrading treatment may be construed to include any act that affects a person's fundamental rights to life and liberty i.e. right to food, sanitation, medical care, humane behaviour, recreation, skill development etc.

Allegedly, in Bangladesh, people are subjected to torture as a substitute for police investigations other than a number reasons which include harassing and implicating innocent people through fabrication of cases, extortion and bribery, saving influential people and godfathers of criminal activities, extracting statements that would ensure real perpetrators to go scot-free, for maintaining law and order as well as seeking revenge and settling the score by the rich and powerful. Violence in police custody varies from calling names, slapping, kicking, beating, sexual harassment and rape to most heinous instances like death. Keeping people in lock-up like animals, providing inadequate or no food or drink, keeping man, women, children together are also inhuman practices existing in police custody.

While any kind of torture is unacceptable to the civilized people, recent rise in death of people in police custody or during investigation has shocked every conscious being. In particular, extra-judicial killing of accused persons in crossfire has become a hot topic of discussions and is being strongly condemned by the civil society, rights groups and media. According to news paper reports a total of 256 suspects were killed in cross-fire since the inception of Rapid Action Battalion (RAB). Notably, all instances of crossfire killing did not happen during investigation by RAB. Police killed a large number of people in crossfire during investigation as well. Whether death of a person in crossfire (during investigation) should be held as custodial death is yet to be determined. In recent public meetings the government has assured of due investigation and enquiry of each of crossfire death case. In addition to the recent phenomenon of crossfire a total of 10 suspects died in police custody in the first three months of 2005 (the Daily Star report in April 2005).

Our Constitution emphatically prohibits any kind of torture or cruel, inhuman or degrading punishment or treatment on a detainee. Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984, to which Bangladesh is, signatory also prohibits any kind of torture or degrading treatment of an arrested person.

While considering torture in police custody, the Supreme Court of India observed that torture is "committed under the shield of uniform and authority in the four walls of a police station or lock-up, the victim being totally helpless" (*D. K. Basu vs. State of West Bengal*). In the same judgment the Judges also stated "custodial torture is a naked violation of human dignity and degradation which destroys, to a very large extent, the individual personality. It is a calculated assault on human dignity and whenever human dignity is wounded, civilisation takes a step backward." Eventually, the Supreme Court of India held that any form of torture or cruel, inhuman or degrading treatment would fall within the inhibition of the constitutional provisions as to right to life and liberty of a person whenever it occurs during investigation, interrogation or otherwise.

The Constitution of Bangladesh expressly prohibits torture and other forms of cruel and degrading treatment under Article 35 (5). Several provisions of the Cr. P.C call for judicial scrutiny by magistrates in the event of granting detentions and remand with a view to reducing if not eliminating custodial torture. Causing hurt to a person in order to extract confession, wrongful confinement, voluntarily causing grievous hurt, rape and murder are punishable offences under the Bangladesh Penal

⁴ D.K. Basu vs. State of West Bengal, 1997, 1 SCC.

Code. Also, Article 35 provides that a person shall not be compelled to be a witness against himself and Section 25 of the Evidence Act provides that an arrested person should not be coerced and intimidated to answer self-incriminating questions.

Despite relevant safeguards available under the Constitution, international conventions and procedural laws, the instances of torture in police custody have significantly increased in recent years. According to the survey report prepared by BLAST, nine out of 46 respondents confirmed that they were taken to remand. Their count of torture in police custody included misbehavior, beating, slapping, and electric shock, beating on the feet, beating with the arrestee hung from the roof, indiscriminately kicking several arrestees together, and coercing to elicit information and extract confession. Some respondents however said that police behaved generously and one said he was not questioned at all, because the remand was unnecessary. None was found saying that his relative or lawyer were present during remand. Supreme Court's directives and guidelines relating to torture and custodial violence are described below:

1. The investigating officer to interrogate the accused for the purpose of investigation in a room in the jail specially made for that purpose with glass wall and grill in one side within the view but not hearing of a close relation or lawyer of the arrestee. In the application for taking the accused in police custody for interrogation, the investigating officer to state grounds for taking the accused to the custody (directives 11 and 12 in BLAST and others vs. Bangladesh):

The above directives are meant to ensure that police refrain from torturing an arrestee in the custody for eliciting information or extracting confession. If the interrogation chamber is transparent, any abuse to an arrestee will be detected by senior police officers as well as the relative and the lawyer of the arrestee, if present.

The Supreme Court has also directed the investigation officer to state grounds for taking the accused to the custody. If the grounds for remand stated are not satisfactory to the magistrate the accused should be released forthwith instead of sending to the custody.

2. Magistrate to proceed against the concerned police officer as per Section 190 (1)(c) of the Cr. P.C for committing offence under Section 220 of the Penal Code if the grounds for remand stated in the forwarding letter of the police is not satisfactory or if there are no materials in the case diary (directive 10 in BLAST and other vs. Bangladesh):

With a view to minimising and discouraging common practice of police to arrest people without warrant and seek remand, the Supreme Court in BLAST and others vs. Bangladesh issued the above directive. The directive requires a magistrate to take cognisance of an offence committed by the concerned police officer as per Section 220 of the Penal Code if he does not maintain the case diary properly and the reasoning for arrests as well as seeking remand of the suspect stated in his forwarding letter or arrest memo are not satisfactory to the magistrate.

Section 220 of the Penal Code enables the magistrate to invoke a sentence of imprisonment up to seven years or fine or both to a person who with the legal authority to send people for trial, for confinement or keeping persons in confinement does so in contrary to law and with the knowledge of such violation. In BLAST and others vs. Bangladesh the Judges stressed on the maintenance by police proper case diary and provide adequate reasoning for arrest of a person without warrant or for seeking remand. Non-compliance of these requirements will be treated as committal of offence by the concerned police officer under Section 220 of the Penal Code.

3. To comply with recommendations B(2)(c)(d) and B(3)(b)(c)(d) should the magistrate authorise detention of an accused (directive 13 BLAST and others vs. Bangladesh):

Recommendations B(2)(c) and (d) of the Supreme Court in BLAST and others vs. Bangladesh require a magistrate to be satisfied with the reasons of arrest and remand stated in the case diary and forwarding letter of the police and to ensure that the accused was accorded an opportunity to consult a

lawyer of his choice. The magistrate also needs to hear the accused before passing of a remand order, which shall not exceed three days.

Recommendations B(3)(b)(c)(d) are related to medical examination of the accused on remand as well as proceedings against torture in police custody. The directives require that before taking a person to remand he shall be examined by a designated doctor or medical board constituted for the purpose. In *D.K. Basu vs. State of West Bengal*, Indian Supreme Court required that a trained doctor should examine the person on remand once every 48 hours.

The accused on remand is required to be produced before the relevant magistrate before the expiry of the remand period. If the accused alleged of any torture in police custody the magistrate is directed to send the accused to the same doctor or medical board for further examination. If the medical examination confirms infliction of torture on the accused in police custody the magistrate has to take action against the investigation officer under 330 of the Penal Code. This Section deals with causing voluntary hurt to extort confession or compel restoration. Under this Section, the magistrate can sentence the concerned police officer up to 7 years of imprisonment or fine or both.

Instances of actions taken by magistrates under 330 of the Penal Code are extremely rare. Absence of specific guidelines is alleged to be responsible for such inaction by the magistrates. The implementation of the directives and guidelines in *BLAST and others vs. Bangladesh and Saifuzzaman vs. State* hopefully should be able to narrow the gap.

3. To inform the concerned magistrate of the death of a person in police custody and the magistrate to enquire into the matter (*directives 14 and 15 in BLAST and others vs. Bangladesh*):

Any kind of death in police custody is unexpected and unwarranted. Police are meant to protect people's life not to kill them. While death may happen naturally or following injury sustained before arrest, the most unacceptable death in police custody is one which results from torture. In *D. K. Basu vs. State of West Bengal*, the Indian Supreme Court observed that custodial death is one of the worst crimes in a civilised society governed by the rule of law. In the same judgement the court held "[I]f the functionaries of the government becomes law-breakers, it is bound to breed contempt for law and would encourage lawlessness ... leading to anarchism."

In *BLAST and others vs. Bangladesh* the Supreme Court considered the issue of granting compensation to a victim of torture in police custody and the nearest relatives of a person who died in police custody. The Judges were of the opinion that "compensation may be given by this Court when it is found that confinement is not legal and death resulted due to failure of the State to protect the life." The Court however, did not award compensation in this case on the grounds that the subject matter of the case was pending before the competent court.

Article 9 of the Covenant on Civil and Political Rights states that "anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation." The right to compensation has not been expressly guaranteed under the Constitution of India. However, this right has evolved through a number of judicial pronouncements by the Supreme Court of India which has held that in the event of failure by the State to protect the most cherished and indefeasible right to life and personal liberty of its citizen, it shall be liable to award compensation to redress the wrong. In *D. K. Basu's* case the Supreme Court held that "monetary compensation for redressal by the court finding the infringement of the indefeasible right to life of the citizen is the only effective remedy to apply balm to the wounds of the deceased victim who may have been the bread winner of the family (1997 (1) SCC, p. 421)."

In *Nilabati Behera vs. State of Orissa*⁵ the Supreme Court held that "there is a great responsibility on the police or prison authorities to ensure that the citizen in its custody is not deprived of his right to life ... the duty of care on the part of the State is strict and admits of no exceptions. The

⁵ (1993) 2 SCC , p. 767

wrongdoer is accountable and the State is responsible if the person in custody of the police is deprived of his life except according to the procedure established by law.” In this case, the Supreme Court awarded compensation amounting Rs 150,000 in the form of damages to the mother of the deceased who died in police custody. In *Ajab Singh vs. State of Uttar Pradesh*⁶ the Court ordered the State of UP to pay a sum of Rs. 500,000 as compensation within three months to the parents of the deceased died in judicial custody.

The directive requires the concerned police officer to inform the magistrate immediately about the death of any person in custody. After receipt of such information the magistrate is required to proceed for a judicial inquiry into such death.

VI.

Concluding Remarks

Arbitrary arrest and custodial violence is not peculiar to Bangladesh. It is a global problem and has become a serious concern for all civilised people. Resorting to torture and inhuman and degrading treatment to the arrestees for the purpose of eliciting information or extracting confession or simply out of revenge and vengeance is often found in the behaviour of the police of United States, allegedly the most effective democracy in the world. Recent examples of prisoners’ abuse in Abu Gharib jail of Iraq and detainees of Guantanamo jail have drawn sheer condemnation from all corners of the world. However, the matter was brought before the court and the culprits are facing trial and disciplinary actions. In a system of government that is transparent and accountable, violation of human rights of the people cannot continue unabated. If it does, then that nation cannot claim to be civilised.

Undoubtedly, the police are under a legal duty and have legitimate right to arrest and interrogate the offenders. However, in exercising this legal right police have to be aware that law does not permit the use of torture, cruel and inhuman treatment on an arrestee during interrogation and investigation of an offence. Section 119 of the Police Act also provides that “an officer will be judged not by his percentage of success in the investigation and prosecution of offences ... but by his display of method and intelligence in detection.”

In *D. K. Basu’s*⁷ case the Supreme Court of India noted the following:

“[P]olice have to perform a difficult and delicate task particularly in view of the deteriorating law and order situation, communal riots, political turmoil, student unrest, terrorist activities and among others the increasing number of underworld and armed gangs and criminals. Many hardcore criminals like extremists, terrorists, drug peddlers, smugglers who have originated gangs, have taken strong roots in the society. It is being said in certain quarters that with more and more liberalisation and enforcement of fundamental rights, it would lead to difficulties in the detection of crimes committed by such categories of hardened criminals by soft peddling interrogation.”

The Court also mentioned, referring to the feeling of certain quarter, that “if we lay too much of emphasis on protection of their fundamental rights and human rights, such criminals may go scot-free without exposing any element of iota of criminality with the result, the crime would go unpunished and in the ultimate analysis the society will suffer.” In consideration of this reality, the Court stressed upon the adoption of a balanced approach to meet the ends of justice.

Police cannot be licensed to resort to criminal activities to curb crimes. In *D. K. Basu’s* case the Court was of the view that “[S]tate terrorism is no answer to combat terrorism. State terrorism would only provide legitimacy to terrorism.” Therefore, the Court suggests that the State must “ensure that various agencies deployed by it for combating terrorism act within the bounds of law and not become law unto themselves.”

⁶ AIR (2000) p.3421

⁷ (1997)1 SCC, p.434

Acting within the bounds of law and applying a balanced approach is easier said than done. All the directives and guidelines issued by the Supreme Court of Bangladesh in BLAST and others vs. Bangladesh and Saifuzzaman vs. State are meant to strike the said balance. However, only judicial directions, how meticulously they are made, are not enough to meet this challenge. As we mentioned earlier, it will require an all-out effort by all concerned and well-thought out plan drawn and carried out to translate the Supreme Court's directions and guidelines into reality. Now the paper will aim to advance few suggestions to that effect:

Recommendations:

The paper categorises suggestions in three groups, namely actions to be taken immediately, mid-term activities and long-term activities to be undertaken.

1. Immediate actions to be undertaken:

a. *Changing the mindset of the government and police:* Recently, in the wake of criticism by the media and rights groups about the activities of RAB, Cheeta, Kobra etc., the elite police forces, government ministers appeared to have endorsed the death of criminals in cross-fire and lamenting that no violation of human rights is involved in case of cross-fire. These kinds of remarks by government ministers or high police officials would only act as license to cross-fire and encourage police to kill criminals extra-judicially. This kind of approach is regrettable. Police cannot be licensed to kill even a killer. The solemn duty and responsibility of the police is to bring the culprits to justice and ensure that criminals receive the punishment as prescribed by law. Both the police and State will be accountable for any lapses in performing this duty. Unless and until the government realises this and acts accordingly, there is no hope that the situation will improve.

b. *Dissemination of Supreme Court directions and guidelines as directed by the Court:* In BLAST and others vs. Bangladesh the Court required the government to implement the recommendations within six months. In Saifuzaman vs. State, the Secretary, Ministry of Home Affairs has been asked to circulate and get the guidelines to every police station for compliance within three months. At the same time the Court directed the Chief Metropolitan Magistrate to circulate the relevant guidelines to the magistrates for compliance within three months. The Ministry of Home Affairs and Chief Metropolitan Magistrates are not only mandated to circulate the guidelines but also to ensure that those are being complied with by the respective police officers and magistrates properly.

c. *Arranging training for police and magistrates:* In D. K. Basu's case the Supreme Court of India stressed on the training and orientation of police as to maintenance of human rights of the people not to violate them. The Court held that attention is required to be paid "to properly develop culture, training and orientation of the police force consistent with basic human values. ... The police needs to be infused with basic human values and made sensitive to the constitutional ethos."

In the same judgment, the Court also blamed trial courts and High Courts for exhibition of "a total lack of sensitivity and a 'could not care less' attitude in appreciating the evidence on the record and thereby condoning the barbarous third-degree methods which are still being used at some police stations, despite being illegal." The court continued that "the exaggerated adherence to and insistence upon the establishment of *proof beyond every reasonable doubt*, by the prosecution, ignoring the ground realities, the fact-situations and the peculiar circumstances of a given case, ... often results in miscarriage of justice and makes the justice delivery system a suspect. In the ultimate analysis the society suffers and a criminal gets encouraged."

The Court suggested the lower courts to "have a change in their outlook and attitude, particularly in cases involving custodial crimes and they should exhibit more sensitivity and adopt a realistic rather than narrow technical approach." To achieve the above, the magistrates of trial courts need to be properly trained as to acceptance of evidence and examination of case diary, letter of forwarding, medical examination reports etc. prescribed by the Supreme Court.

d. *Providing police with necessary technology and logistics:* There is no denying the fact that our police lack up-to-date technology for conducting investigations; whereas the criminals have occupied latest technology to conceal their crime record. In developed countries police have been armed with better technologies than the criminals. Use of cutting edge technologies such as DNA test, pathological test etc. makes investigation easier. In our country, getting a medical report of a suspect is often a very difficult job. In addition, our police also lack logistic support such as vehicles, mobile phones, IT

support which are essential to tap modern day criminals. Instead, they are using the age old method of investigation 'make the horse speak' by beating up. In the absence of necessary technological and logistic support police may be constrained to resort to torture in police custody to prove a case.

e. *Conducting a base-line research:* So far, only few researches and surveys on arbitrary arrests, remand and custodial violence have been conducted by rights organisations, donors and media on piecemeal basis. Therefore, conducting a base-line research on arbitrary arrests, remand and custodial violence as well as people's perception and observation to these has become a pressing need of time. In the absence of an objective and comprehensive base-line study the misgivings and misunderstandings of the government, police could not be dispersed. The research will discover the problems as well as suggest the changes needed to be undertaken. Government may take help from the rights organisations and media in this regard.

2. Mid-term activities to be undertaken:

a. *Amending laws as directed by the Supreme Court:* The government needs to take initiatives to amend the laws to reflect the Supreme Court directives and guidelines. Despite the fact as to whether procedural law can be amended following decision of the High Court exercising writ jurisdiction, it is better for the government to realise the need to make necessary amendments in the age-old laws taking the ground realities into account.

b. *Forming a national committee:* With a view to ensuring transparency and accountability of the police, a national committee with representations from civil society, registered rights groups, professionals and journalists need to be constituted to monitor police activities and implementation of the Supreme Court directions. Sub-committees at district and Upazilla level also need to be formed. The members of these committees should be allowed to visit police stations and examine custodial records.

c. *Designing an implementation strategy in consultation with all stakeholders and rights groups:* As mentioned earlier, implementation of the directives is easier said than done. In the absence of a well thought-out strategy and planning with inputs from all concerned, implementation of Supreme Court directions and guidelines will be near impossible.

d. *Pursuing awareness campaigns by the government, media and NGOs:* Government agencies, rights groups, electronic and print media need to come forward to raise awareness of the people about basic human rights and required police behaviour to be accorded to the arrestees as well as general public. The awareness materials should be produced in simple and non-technical languages and expressions so that people can easily understand the same. Fundamental rights of the people need to be included in the school texts and the teachers should be trained accordingly.

e. *Establishing a legal aid clinic in few police stations on pilot basis:* The Constitution and the Cr. P.C require that an arrestee shall not be deprived of consulting and being defended by a lawyer of his choice. Unfortunately, there is hardly any opportunity for consulting a lawyer by an arrestee, especially in rural areas, due to non-availability of lawyers, or lack of awareness or resources. BLAST's research reveals that most of the arrested persons under Section 54 of the Cr. P.C and Metropolitan Ordinances are poor, indigent and helpless people. These people are not aware of their constitutional rights to consult and being defended by a lawyer, neither do they have the necessary resources to hire a lawyer. To mitigate this real problem, the government may establish, or allow the NGOs to establish, legal aid clinics within the compound or vicinity of the police stations. These legal aid clinics will assist the poor and indigent people in the enforcement of their constitutional rights. Supervision and monitoring by lawyers would also ensure transparency in police behaviour. Initially, few police stations may be included under the legal aid programme on a pilot basis. If it achieves the expected goals the same may be replicated throughout the country.

3. Long-term activities to be undertaken:

a. *Separating law enforcement activities from investigation:* During BLAST's researches police officers gave account of their ordeal. They said that they are overburdened with various works -they are

maintaining law and order in one hand and prosecuting offenders on the other. This makes their investigation all the more onerous. In addition, they have very little scope for leave or vacation; occasionally they have to work for more than fifteen hours, seven days a week. They are not adequately compensated and there is no benefit for risking lives. Quite often they are overburdened with the duties of maintaining protocol for ministers, to remove stray dogs and cattle from the roads. Despite all of the above, they are always denounced and made scapegoats for negligence of duty, crime and corruption. The observation of police officers cannot be overlooked. Police also need to be provided with the assurance of living a dignified life. Unless proper incentives, opportunities and benefits are given, the motivation for performing in accordance with law cannot be expected. The recent police reform project undertaken by the government with assistance from UNDP and DFID is a welcome approach. In the long run steps need to be taken to separate law enforcement activities of police from that of prosecution.

b. *Initiating prisons run by private entities, particularly for juvenile, women and other inmates convicted of petty crimes:* Prisons run by private entities is quite well-known. In many countries, private prison systems have been adopted. Given that government lacks necessary resources to develop modern prison infrastructure, private sector may be encouraged to run prisons particularly for juvenile, women and other inmates convicted of petty crimes. Government can regulate the performance of those privately run prisons.

c. *Restoring people's trust in police:* Police is one of the most important public institutions of any nation. We cannot think of peaceful sustenance without an efficient and responsible police force. It is not necessary that every person will always need assistance of police in his day to day life. However, in the absence of police a total anarchy will let loose upon us. We have witnessed the instances of looting during the fall of Saddam regime in Iraq. In the absence of law enforcement agencies, the looters just ran berserk on people's property. Therefore, police, directly or indirectly, is part and parcel of our life and their contribution in maintaining law and order cannot be overlooked and ignored.

We can just take personal comfort by blaming police for their misdeed. However, the problem is not remedied in doing so. We need to acknowledge the positive role played by police to ensure safety and security of all of us. The civil society, people's representatives, rights groups, media need to come forward to scrutinise police activities and extend support where applicable.

There is no room for the police as well to segregate themselves from the people. They have to realise that they are public servants and accountable to the public. They are meant to ensure public security within the limits prescribed by law. Realising the necessity of interaction between police and people, the Police Act requires police to work with people's representatives and community police during investigation. If the community assists police, the investigation of crimes would be effective and efficient resulting in the overall improvement of law and order situation.

d. *Judiciary and administration need to be free from corruption:* Likewise police, lower courts and government administration are also blamed of corruption. Police alone cannot continue with corrupt practices unless the judiciary and administration abet such practice. Government needs to look into the matter seriously because if corruption in judiciary and administration remains intact police cannot be expected to become fair and transparent.

e. *Police should not be used for political motives:* The Government should refrain from using the police for the achievement of political motives. If the government continues to do so, it will be unable to regulate police, on the other hand, will become dependent on them and people will continue to suffer at the hands of their protector.