

# HUMAN RIGHTS AND GOVERNANCE BANGLADESH

Edited by  
MD SHARIFUL ISLAM



Asian Legal Resource Centre



Human Rights and Governance  
**Bangladesh**

Edited by  
Md. Shariful Islam



## Asian Legal Resource Centre

Human Rights and Governance: Bangladesh

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# Prologue

So long as democracy is understood in terms of the guarantee of basic human rights, this is crucially important to examine whether space for democracy at all exists within the governance or behavioral pattern of the State. In its search for human rights in governance mechanisms, this edited volume brings under scrutiny existing institutions, laws and procedures of the Bangladesh State. In setting a parameter, three major violations seriously jeopardizing the people's democratic aspirations – corruption, torture and extrajudicial killing – have mostly been taken into consideration. Chapter 1, as introductory chapter of the book, attempts to portray an overall institutional framework of the State machinery and contextualize issues dealt with in the subsequent chapters. Although international human rights regime predominantly addresses violations by the State, corruptions in private sectors and cruelty to women in the private spheres have been analyzed in chapters 4 and 8 respectively. Such issues have been incorporated given the alarming frequency and gravity of the problems and their pertinence to the question of State's responsibility. The two chapters are written based on case studies, but they reflect the greater pictures Bangladesh has been experiencing for a long time.

This is not intended to deal with the theoretical debates pertaining to governance, but rather the behavioral patterns of the State have been examined. This work is an outcome of an ALRC project titled, "Corruption, Torture and Extrajudicial Killing in Bangladesh: Examining the Role of State Institutions" taking place mostly between July 1, 2011 – June 30, 2012. No 'index' containing list of topics at the end of the book has been provided. This is because ALRC authorities allow readers to freely download/read soft version of the book from their website, enabling one to search for her/his intended topics on PC. I hope, this will not inconvenience the readers.

I would like to record my deep gratitude to the ALRC officials, especially Basil Fernando, former Executive Director, Bijo Francis, Acting Executive Director and Md. Ashrafuzzaman, Program Officer, without whose kindhearted supports this project would not have been made possible. Due to some inevitable reasons, the publication of the book took a longer time than what was originally planned. I greatly appreciate the authors for being supportive and putting up with this delay. I am indebted to Fr. Nandana Manatunga, Patric and the HRO

staff for providing me an institutional support base during my visit to Sri Lanka.

I am grateful to the American Center, Embassy of the United States, Dhaka for considering my research works a “significant contribution...to Bangladeshi public policy” and inviting me to meet with the U.S. Deputy Assistant Secretary for South and Central Asia, Alyssa Ayres. As a State Alumnus it was a wonderful opportunity for me to share the research findings published in my previous book to the Deputy Assistant Secretary. The American Center officials took pride in my work and were keen to see this volume published. Ryan Bradeen, Parveen Elias and Sabir Amanullah have encouraged me all the time.

Professor John Richard Wagner, Cultural Anthropology, University of British Columbia provided very important insights into comparative aspects of human rights and governance that has shaped the book to a great extent. Professor Kelley Loper, Director, Human Rights program, University of Hong Kong advised me on issues of national implementation of human rights and graciously spent her busy time. Professor Ferdous Hossain’s felicitous thoughts on State and society have immensely enriched this volume. Dr. Monir Hossain Moni generously spent much of his valuable time, and of course, his ideas and thoughts have influenced this work. I terribly miss the presence of Professor Razia Akter Banu, who breathed her last before completing her research article for this volume (May her soul rest in peace).

Daniel Loevinsohn and Margot Raicek were two great friends, who shared with me very important information. Suren Perera provided an enormously useful research work on anti-defection law. I have discussed critical issues with Judge Shahriar Kabir, Associate Professor Anwar Hossen and Advocate Tanbir Siddiqui when necessary. Sinha Sayeed, Professor Shishir Bhattacharja, Associate Professor Ismail Hossain, Masaba Adneen and Tarnima W Andalib constantly inspired to get the book published soon. I could never have completed this work without the help of my parents, and my wife, Dilruba Zakia. During the project Zarin, Sabit, Esha, Wasfia, Wasim and Shabib made my hectic time pleasant.

The editorial work had to be carried out in addition to my heavy teaching load and administrative duties at the University of Dhaka. Despite the supports of many institutions and individuals, any failings of the present work are only mine.

**Md. Shariful Islam**

September, 2013

## *Chapter 1*

# HUMAN RIGHTS AND GOVERNANCE: BANGLADESH

*Md. Shariful Islam*

## A FLAWED COURSE

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.— That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,— That whenever any Form of Government becomes destructive of these ends, it is the *Right of the People to alter or to abolish it*, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

[American Declaration of Independence, in Congress, July 4, 1776. Emphasis added.]

A major part of the academic debates centering on why democracy in Bangladesh stumbles so miserably involves the question of colonial legacy. Granted that narratives on colonial inheritance provide substantive insights in understanding the morass confronting the nation, they often fall short of interpreting how problems are derived from present institutions, laws and procedures. As long as democracy is perceived in terms of human rights governance, this is vital that institutions, laws and procedures accommodate democratic principles<sup>1</sup>.

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1 As the United Nations puts it, "...governance is considered "good" and "democratic" to the degree in which a country's institutions and processes are transparent. Its institutions refer to such bodies as parliament and its various ministries. Its processes include such key activities as elections and legal procedures, which must be seen to be free of corruption and accountable to the people." See, <http://www.un.org/en/globalissues/governance/> (accessed on May 12, 2013).

Colonial experiences of oppression prompted Bangladesh, India, Pakistan and Sri Lanka to include in their constitutions fundamental rights and acknowledgment of sovereignty of citizens, paramountcy of law, explicit guarantees of civil and political rights, and enumerated social and economic rights<sup>2</sup>. After almost forty-two years of independence, Bangladeshis are yet to see these promises translated into the policy formulation and governance apparatuses of the state, and instead, state turned out to be a source of massive corruption, torture and killing.

Like most other post-colonial modernizing states, in the aftermath of the war of independence in 1971 Bangladesh found state-building synonymous with setting up of a modern, efficient and dynamic bureaucracy, and most importantly, a participatory political party system. Because its genesis was an outcome of a bloody ethnic-linguistic-nationalist movement culminating in a civil war, before the war personality cult within the party system provided much impetus to accelerate the cause. However, immediately after the independence was achieved, it should have been one of the crucial priorities for the founder of the nation, Sheikh Mujibur Rahman (Sheikh Mujib), hailed as Bangabandhu (friend of Bengal), to institutionalize his political party, Bangladesh Awami League (AL) in a way that befits an independent nation. Mujib not only failed to undertake this vital task, he went so far as to revoke parliamentary democracy, introduce one-party authoritarianism, ban opposing newspapers and curtail judicial freedom.<sup>3</sup> Subsequently, politics of personality cult has all along been associated with destruction of institutions, corruptions and killings of dissidents. It was soon after the independence that the closest associates and family members of Sheikh Mujib became involved in blatant corruption and smuggling operations<sup>4</sup>.

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2 See, for details, Devyani Srivastava, Sumant Balakrishnan, Navaz Kotwal, *Feudal Forces: Reform Delayed: Moving from Force to Service in South Asian Policing* (Commonwealth Human Rights Initiative, 2010), 10.

3 Rounaq Jahan, *Bangladesh: Promise and Performance* (Dhaka: The University Press Limited, 2000), 7-13.

4 Talukder Maniruzzaman, *The Bangladesh Revolution and Its Aftermath* (Dhaka: The University Press Limited, 2003), 152; See also (cited in, Maniruzzaman), Lawrence Lifschultz, "Bangladesh: A State of Siege", *Far Eastern Economic Review*, August 30, 1974, 51.

Sheikh Mujib himself believed in a corruption-free society, and it was a lot of grief to him that he was surrounded by swindlers<sup>5</sup>. Given the circumstances of its genesis, the record of Mujib's government is not all that bad<sup>6</sup>. The 1972 constitution under Sheikh Mujib was by far the most democratic and secular constitution despite some obvious shortcomings. However, he later went for a thorough amendment of this constitution<sup>7</sup> and took a horrendously undemocratic course suggested by his nephew Sheikh Moni and his militant groups. A new paramilitary force, *Rakkhi Bahini*, tortured and killed tens of thousands of people who opposed the regime<sup>8</sup>. Mujib subsequently reconsidered his move and "tried to back away from his reliance on the *Rakkhi Bahini*, publicly attacked their violent excesses, and called upon the regular army to contain and control the smugglers and criminal elements in and outside the government"<sup>9</sup> Mujib's experimentation of one-party, Bangladesh Krishak Sramik Awami League (BAKSAL), ended as he was assassinated by a brutal military coup on August 15, 1975.

Next fifteen years Bangladesh witnessed predominantly military rulers dominating the political landscape – in the first phase, by General Ziaur Rahman (Zia), and after his assassination, General Hussain Muhammad Ershad (Ershad) – until the later was ousted by a popular uprising in 1990. Although Zia revived multi-party democracy as part of the effort to legitimize his regime, he chose to retain many of the undemocratic clauses of BAKSAL regime in the constitution. Zia launched a new political platform, Bangladesh Nationalist Party (BNP) as he began civilianization process, in order to acquire a sustainable support base in people. Although Zia revived judicial and press freedom to a considerable extent revoked under BAKSAL regime, his controversial military tribunal to try political opponents amounted to extrajudicial executions<sup>10</sup>.

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5 See, Anthony Mascarenhas, *Bangladesh: A Legacy of Blood* (London: Hodder and Stoughton, 1986), 28.

6 Rehman Sobhan, *Bangladesh: Problems of Governance* (Dhaka: University Press Limited, 1993), 14.

7 4th amendment of the constitution, on January 25, 1975.

8 Lawrence Ziring, *Bangladesh: From Mujib to Ershad* (Karachi: Oxford University Press, 1992), 96-135; See also, Francis R. Valio, *Report on Bangladesh, India and Pakistan* (US Congress: Committee on Foreign Relations, 1976).

9 Ziring, *Bangladesh: From Mujib to Ershad*, 100.

10 See, for a detailed account, Moudud Ahmed, *Democracy and the Challenge of Development: A Study of Politics and Military Interventions in Bangladesh* (Dhaka: The University Press Limited, 1995), 26-30, 63-65.

Post-1990 transformation to democracy alternately brought two ladies, Begum Khaleda Zia (Khaleda), the widow of President Zia, and Sheikh Hasina, the daughter of Sheikh Mujib, to the center of power. However, massive corruptions that plagued the state machineries during the illegitimate and autocratic regime of General Ershad, continued unabated during the democratically elected regimes of Khaleda and Hasina. Political parties including the two major ones, AL and BNP, started to patronize swindlers, bank-loan-defaulters and notorious criminals in politics. During the first regimes of Khaleda (1991-1996) and Hasina (1996-2001), there were significant reductions in physical tortures by law enforcing agencies on the political adversaries, an infamous method practiced by Ershad regime<sup>11</sup>. The third Khaleda Zia regime (2001-2006) saw rapid increase in torture and extrajudicial executions as it introduced the Rapid Action Battalion (RAB), an elite force comprising of staffs from different law enforcing agencies, with impunity. The regime's notorious Operation Clean Heart, which was at work during 2002 – 2003, and the subsequent Indemnity Act in 2003, accounted for rapid increase in torture and extrajudicial killings<sup>12</sup>.

Torture and deprivation of life further increased during the democratically elected regime of Sheikh Hasina (2009 – present). During the military-controlled interim government (2007-2008), this was BNP and AL politicians who had to undergo inhuman treatments and degradations, and once AL is voted to power, they have been continuing, even increased, the same oppression. Enforced disappearance, a relatively new kind of human rights violation to the young generation of Bangladeshis, increased alarmingly. Between January – June 2013, 184 persons were killed extrajudicially by law enforcement agencies<sup>13</sup>. Human Rights Watch observed that Bangladesh's overall human rights situation deteriorated in 2012, as "the government narrowed political and civil society space, shielded abusive security forces from accountability, and ignored calls to reform laws and procedures in flawed war crimes and mutiny trials"<sup>14</sup>. According

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11 See, annual Human Rights Reports of the U.S. State Department.

12 See, Asian Human Rights Commission, Bangladesh: state urged to make torture a punishable crime in compliance with the UN Convention against Torture, June 25, 2007, available at <http://www.humanrights.asia/news/ahrc-news/AS-136-2007> (Accessed, February 28, 2013)

13 Odhikar, Human Rights Monitoring Report: January 1 – June 30, 2013.

14 Human Rights Watch, Human Rights in Bangladesh, available at <http://www.hrw.org/asia/bangladesh> (accessed on July 20, 2013).



to Odhikar reports, 69 persons were ‘disappeared’ between January 2010 and August 2012, allegedly by law enforcing agencies<sup>15</sup>. In 2012 although security forces tortured 72, the government rarely charged, convicted or punished the perpetrators<sup>16</sup>. RAB personnel, suspected of more than 54 unlawful killings in 2012, were neither investigated independently nor brought to justice<sup>17</sup>. According to Odhikar reports, 58 persons died in prison compared with 105 prison deaths in 2011<sup>18</sup>. Tens of thousands of opposition political activists and innocent persons have been victims to tortures by different law enforcing agencies. The unaccountability and non-transparency often supported by ‘laws’ that are at work within the institutions and governance machineries have bred both corruption and threats to right to life of the people.

Corruption strikes at the heart of the rule of law, which is central to human rights protection<sup>19</sup> and a governance system, free from corruption, never discriminates against people<sup>20</sup>. Even though in Bangladesh corruption has always been a persistent factor in politics, presently corruption seems to have been gaining government’s open patronization<sup>21</sup>. But this is the same government that has “started various investigations of Yunus [Muhammad Yunus, the Bangladeshi Nobel Peace Prize laureate] and his finances and taxes, and his supporters fear that he might be arrested on some pretext or another.”<sup>22</sup> As it has been demonstrated over more than four decades, the ruling elites of Bangladesh, in breach of the trust of the people, have installed a ‘democracy’ that is destructive to the cause of the war of independence

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15 See, for details, [www.odhikar.org](http://www.odhikar.org).

16 U.S. Department of State, Country Reports on Human Rights Practices for 2012: Bangladesh.

17 Amnesty International, Annual Report 2012: The State of World’s Human Rights

18 Cited in U.S. Department of State, Country Reports on Human Rights Practices for 2012: Bangladesh

19 See for details, Balakrishnan Rajgopal, “Corruption, Legitimacy and Human Rights: The Dialectic of the Relationship” *Connecticut Journal of Law* 14 (1999): 495.

20 See for details, C. Raj Kumar, “Corruption and Human Rights: Promoting Transparency in Governance and the Fundamental Right to Corruption-Free Service in India”, *Columbia Journal of Asian Law* (2003-2004): 33-34.

21 See, “Hall-mark Loan Scam: Modasser tried to inhibit audit team”, *The Daily Star*, April 22, 2013; see also, “Abul a patriot”, *The Daily Star*, July 27, 2012; see also, “Is it a govt or an individual?”, *The Daily Star*, June 21, 2013.

22 See in detail, Nicholas D. Kristof, *Women Hurting Women*, *The New York Times: Sunday Review*, September 29, 2012.

necessitating what the American Declaration of Independence called 'Right of the People to alter or to abolish it'.

## **HUMAN RIGHTS AND GOVERNANCE IN A PSEUDO-DEMOCRACY**

A constitutional-legal-structural approval of dictatorial elements throughout the state machinery, despite the presence of apparent democratic institutions modeled somewhat on a fusion of U.S. and Westminster type of democracy, does not understandably guarantee civil, political, economic, social and cultural rights to its citizens, as have been ensured in the Western liberal democracies. Instead, presence of apparent democratic entities, arrangement of a national election and universal adult franchise provide a blanket of legitimacy to the misgovernance of the elected regimes. The post-electoral legitimacy enjoyed by the regimes, comprised of unparalleled corrupt leadership, has invariably been used as a weapon to deceive a population, which has just reached a literacy rate of 55.9 percent<sup>23</sup>.

Scholars have often measured Bangladeshi people and their leaders with the same scale and engendered a fallacy by emphasizing more on cultural shortcomings. As far as post-independence politics in Bangladesh is concerned, Bangladeshis and their political leaders are different. The former have experienced a long trajectory of bloodsheds in striving for democracy, equity and justice, and the latter have rapidly 'earned' money while in power. Repressions like tortures, killings and enforced disappearances have been used to silence voices that have spoken about the ruling elites' corruption. Corruptions within the non-governmental organizations – often in collusion with the political leadership – are also rampant. Tortures, perpetrated by the law enforcing agencies, take place under direct or indirect control of the incumbent government. Reasons of torture are primitive, as opposed to the notion of institutional remedies: either to oppress the adversaries or to coerce the victim into paying money.

The constitution of Bangladesh guarantees all the major internationally recognized human rights and assures good governance, incorporated in its fundamental principles of state policy<sup>24</sup> and

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23 UNDP, Human Development Report 2011; See also, Bangladesh Bureau of Statistics, Report on the Bangladesh Literacy Survey, 2010.

24 Part II of the constitution of Bangladesh.

fundamental rights<sup>25</sup>. However, the same constitution negates these rights through adoption of numerous antidemocratic stipulations. A party to the International Covenant on Civil and Political Rights (ICCPR)<sup>26</sup>, International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>27</sup> and Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)<sup>28</sup>, ironically Bangladesh has been complicit in massive corruptions, extrajudicial killings, tortures, and enforced disappearances generating domestic and international concern. Bangladesh acceded to the United Nations Convention against Corruption (UNCAC)<sup>29</sup> in 2007 during the military-controlled interim government, but the government is yet to reorganize its relevant institutions, including national Anti-Corruption Commission (ACC), as per its treaty obligations. As evidenced in authoritarian regimes across South Asia, weak institutions and tradition of impunity have dismantled the potentials of international legal instruments already enforced.

## CONSTITUTIONAL, LEGAL AND STRUCTURAL SETBACKS

### People's Sovereignty versus Prime Minister's Sovereignty

In his autobiographical exposition of national socialist political ideology, Adolf Hitler conceitedly introduces his self-styled democracy, in contrast to the modern democratic parliamentary system, "...we have the German democracy, which is a true democracy; for here the leader is freely chosen and is obliged to accept full responsibility for all his actions and omissions. The problems to be dealt with are not put to the vote of the majority; but they are decided upon by the individual, and as a guarantee of responsibility for those decisions he pledges all

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25 Part III of the constitution of Bangladesh.

26 Bangladesh became a Party to the ICCPR in September 6, 2000.

27 The country became a Party to the ICESCR in October 5, 1998.

28 Bangladesh became a Party on October 5, 1998 with a special declaration limiting the effectiveness of the treaty.

29 UNCAC entered into force on 14 December 2005, and Bangladesh ratified it on February 27, 2007.

he has in the world and even his life.”<sup>30</sup> Constitutionally Bangladesh’s prime minister is not probably less powerful than Hitler on varied grounds. Bangladesh prime minister’s actions and omissions are not fateful like that of Hitler as s/he has a parliament where her/his party colleagues, voted to parliament by the people, are constitutionally bound to say only ‘yes’ to whatever decision s/he makes.

Even though the constitution acknowledges people of the Republic to be the source of sovereign power<sup>31</sup>, it prohibits an elected representative to parliament, to vote against the political party that nominated him as a candidate in the election he won<sup>32</sup>. The prime minister “wears three caps together which encompass cap of the Head of Government, cap of the leader of the House and cap of the Chief of the party concerned. He/she is the sovereign all he/she surveys and there is none to dispute him/her within the fold of the party, parliament and government. Moreover, the powers and functions allotted to the office of the Prime Minister by the Constitution (Twelfth Amendment) Act of 1991 are so wide and profound that even the council of Ministers does meaningfully forget to practice the concept of ‘collective responsibility’ and thus becomes dependent on the Prime Minister both collectively and individually. Ironically enough, the office of the Head of State, here called President, is viewed by many a critic as an extension of the office of the Prime Minister!”<sup>33</sup> This fundamental incongruity replaces people’s sovereignty vested in their deputies in parliament with *de facto* ‘prime minister’s sovereignty’, and eventually paves the way for an elected dictatorship. Pivoted on this unusual anti-democratic provision, the entire constitution provides a series of dictatorial elements, with inevitable consequences on legislative processes, institutional autonomies and governance procedures.

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30 Adolf Hitler, *Mein Kampf*, Vol. 1, Ch. 3 (New Delhi: Maple press, Script Edition 2008), p. 93. Hitler concedes, however, that “...it would be very difficult to find a man who would be ready to devote himself to so fateful a task.”

31 Article 7 of the constitution of People’s Republic of Bangladesh.

32 Article 70 of the constitution stipulates, “A person elected as a member of Parliament at an election at which he was nominated as a candidate by a political party shall vacate his seat if he-

(a) resigns from that party; or

(b) votes in parliament against that party; ...”

33 Sinha M A Sayeed, “Light upon light”, Dhaka Courier, May 16, 2013; available at [http://www.dhakacourier.com.bd/?p=11652&utm\\_source=rss&utm\\_medium=rss&utm\\_campaign=light-upon-light](http://www.dhakacourier.com.bd/?p=11652&utm_source=rss&utm_medium=rss&utm_campaign=light-upon-light) (Accessed May 20, 2013)

Historically, political defections have left dysfunctional effects on political parties jeopardizing their roles as institutions across many of the developing states like Bangladesh, India, Pakistan, Nepal, Malaysia, Sri Lanka and Thailand. Grounded in the history of repeated floor-crossing during the erstwhile East Pakistan, an anti-defection provision in the constitution was necessary. Despite the fact that defection of political platform entails the question of fundamental rights like freedom of expression, freedom of association and personal liberty, as many as forty states across the world have anti-hopping clauses in their national constitutions in order to curb unethical surge of floor-crossing. However, does that defend or justify the so called anti-defection provision in Bangladesh constitution? Not at all. Because, “[i]n most cases where the constitution imposes a penalty for defection, deputies can still exercise their right to a free vote”. “There are only 6 states (Guyana, India, Pakistan, Bangladesh, Zimbabwe, and Sierra Leone) where the constitution penalizes both defection and voting against the party line.”<sup>34</sup>

This total disregard for individual liberty and freedom of expression characterizes not only the constitution of the state, but the constitutions of major political parties. The consequence appears to be a catastrophic erosion of the space of moral principles in political and social atmospheres. The two major political alliances led by the AL and BNP, at different junctures of their journey, have implicitly or explicitly shook hands with illegitimate military regimes, war criminals and radical Islamists in politics. Political parties, being central to other institutions, have catalyzing effects on institutions that together comprise a state. When political parties themselves fail to accommodate democracy within their constitutions, they cannot democratize state institutions while in power.

## Constitution and the Question of Rule of Law

As far as the concept of rule of law is concerned, law is neither the whim of a dictator nor the collective misdeed of the majority in a legislature. “Law is the expression of the general will.” states the French

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34 Csaba Nikolenyi, constitution al Sources of Party Cohesion: Anti-Defection Laws Around the World (Concordia University: Department of Political Science). 13. [Paper prepared for delivery at the Oslo-Rome Workshop on Democracy, November 7-9, 2011]

Declaration of the Rights of Man, as it specifies the prerequisite features of law, “Every citizen has a right to participate personally, or through his representative, in its foundation. It must be the same for all, whether it protects or punishes. All citizens, being equal in the eyes of the law, are equally eligible to all dignities and to all public positions and occupations, according to their abilities, and without distinction except that of their virtues and talents.”<sup>35</sup> With a high degree of central tendency throughout its power structure, Bangladesh constitution appears to be a paradox. Even though it ensures equality before law<sup>36</sup>, right to protection of law<sup>37</sup>, protection of right to life and personal liberty<sup>38</sup>, safeguards as to arrest and detention<sup>39</sup>, enforcement of fundamental rights<sup>40</sup> and powers of the High Court Division to issue certain orders and directions in this regard<sup>41</sup>, and laws inconsistent with the fundamental rights to be void<sup>42</sup>, the constitution contradicts itself by other provisions contrary to the concept of rule of law.

Under Article 33 allowing preventive detention and Special Powers Act 1974, elected and unelected regimes have detained hundreds of thousands of people from opposition parties without trial rendering the rights mentioned above pointless. In a more powerful move to suppress opposition voices, the President, being advised by the prime minister, can declare Emergency whenever he wishes<sup>43</sup>. The provision of Administrative Tribunal<sup>44</sup> and keeping the tribunal outside the writ or supervisory jurisdiction of the High Court<sup>45</sup> contrasts with the principle of rule of law.

Even though the Criminal Law of Bangladesh has penal provisions for such crimes as wrongful confinement, grievous hurt and abduction, it has no provision for the crimes of torture and enforced disappearance. The Criminal Procedure Code has major shortcomings

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35 Article 6 of the “Declaration of the Rights of Man”, Approved by the National Assembly of France, August 26, 1789.

36 Article 27 of the constitution.

37 Article 31 of the constitution.

38 Article 32 of the constitution.

39 Article 33 of the constitution.

40 Article 44 of the constitution.

41 Article 102 of the constitution.

42 Article 26 of the constitution.

43 Article 141A of the constitution.

44 Article 117 of the constitution.

45 Article 102 of the constitution.

like the provision of requiring government sanction prior to suing a public servant. It has provided varied options for proper investigation and prosecution, however, massive corruptions within the governance of judicial and police administrations often stand in the way of justice.

## The Question of Independent Judiciary

Despite the fact that the parameters, within which the concept of the independence of judiciary operates, vary widely from cultures to cultures, systems to systems, and states to states, there have been some common sets of principles as to how an acceptable level of independence can be ensured. An apparent feature of judicial independence in a given system may sometimes curtail equity and justice, rather giving legitimacy to an authoritarian regime. In contrast, an apparent lack of independence in a certain judicial setup may not always pose threat to justice. Albert Einstein appears to be relevant, “Everything that can be counted does not necessarily count, everything that counts cannot necessarily be counted<sup>46</sup>. Against this backdrop, examination of a judicial system in terms of its degree of independence necessitates a complex task of addressing contextual realities and internationally accepted norms.

The issue of judicial independence in Bangladesh has lost much of its importance in public debates, soon after the separation of magistracy from the executive organ of the state. Because magistracy was so far notoriously affected by the executive interferences, its independence was considered to be a great achievement in the trajectory of judicial history of Bangladesh. Ironically, this achievement has been considered by many a permanent solution, which has overshadowed the question of judicial independence as a whole.

Unless a holistic approach to the question of judicial independence is adopted, this apparent freedom of magistracy will make little sense towards justice. A holistic approach involves addressing the loopholes in the constitutional and legal provisions that question the integrity and competence of the Supreme Court as well. As per the Minimum Standards of Judicial Independence, 1982 set by the International Bar Association, Montreal Universal Declaration on the Independence of Justice, 1983 and UN Basic Principles on the Independence of Judiciary 1985, it cannot be ascertained that the Supreme Court of Bangladesh

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46 Quoted in Asian Development Bank, *Judicial Independence*, 2002.

stands independent. The combined effect of the relevant Articles<sup>47</sup> of the constitution appears detrimental to the fundamental premise of independent judiciary in two ways: a) lawyers with strong ruling party background will be recruited, who will favor the government, and b) a judge may be tempted by the opportunities opened for him after his retirement and may favor the government<sup>48</sup>. From this point, the entire Subordinate Judiciary (popularly known as the Lower Judiciary) including the magistracy, can never be considered independent under the supervision of such a Supreme Court<sup>49</sup>. The hitherto achievements of the Supreme Court can often be attributed to the individual integrity of the judges, instead of the system.

### **Anti Corruption Commission and National Human Rights Commission**

It was a remarkable development that the government of Bangladesh established an Anti Corruption Commission (ACC) in 2004. The government established a National Human Rights Commission (NHRC) as well under Act No. 53 of 2009, in conformity with the Paris Principles<sup>50</sup>, even though the Act does not provide a wide mandate to the NHRC as stipulated in the Paris Principles. However, within the greater framework of pseudo-democratic institutions and procedures, these institutions have little scope to function independently. With most of their functions, adjudications and omissions these two institutions have undertaken since their genesis, they appear to be the two legitimizing machines for the state's crimes. Their de jure and de facto dependence on the government in terms of financial allocation and other facilities made them 'toothless tigers'.

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47 Articles 95, 98, 99 and 66(3) of the constitution.

48 See also, Badrul Haider Chowdhury, *Evolution of the Supreme Court of Bangladesh* (Dhaka: University of Dhaka, 1990), 168.

49 For a detailed account of corruptions in Subordinate Judiciary see, Md. Shariful Islam, *Politics-Corruption Nexus in Bangladesh: An Empirical Study of the Impacts on Judicial Governance* (Hong Kong: Asian Legal Resource Center, 2010), xviii+126.

50 Endorsed by the UN Commission on Human Rights in 1992 and subsequently endorsed by the UN General Assembly in 1993.



## The Police

Decades of political manipulation and lack of true institutional autonomy made police force a source of instability and fear rather than a key component of a democratic society<sup>51</sup>. This is to the utter dismay of the people that no political regime, despite their repeated pledges, has initiated to reform the Police Act of 1861, a colonial hangover used till today to intimidate and harass political oppositions<sup>52</sup>. The first comprehensive Police Reform Project funded by the UNDP and UK Department for International Development (DFID) initiated in 2005 almost failed due to the successive governments' indifference.

## MOVING FORWARD

As Upen Baxi puts it, “an understanding of constitutionalism at work from the perspective of internationally proclaimed human rights is never quite the same as the constitutionally based understandings of human rights put to work by judges and lawyers, social movements, and the political processes in each national context”<sup>53</sup>. Again, like most other common law countries, in Bangladesh international conventions are not directly enforceable in courts of law unless they are incorporated into domestic law by legislation. In this context the highest court of the state may consider to widen their horizon and “to have regard to these international norms for the purpose of deciding cases where the domestic law – whether constitutional, statute or common law – is

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51 International Crisis Group, Bangladesh: Getting Police Reform on Track, Asia Report No 182 – 11 December 2009.

52 The present AL government wrote in their Election Manifesto in 2008, “In order to provide security to every citizen of the country, police and other law and order enforcing agencies will be kept above political influence. These forces will be modernised to meet the demands of the time. Necessary steps will be taken to increase their remuneration and other welfare facilities including accommodation”, cited in, International Crisis Group, Bangladesh: Getting Police Reform on Track, Asia Report N°182 – 11 December 2009.

53 Upen Baxi, “Production of Human Rights and Production of Human Rightlessness in India”, in Randal Peerenboom, Carole Peterson and Albert Chen (eds), *Human Rights in Asia* (London: Routledge, 2006), 348.

uncertain or incomplete”<sup>54</sup>. A constitutional guarantee of rights for citizens flowing from the ‘general rules of international law’ may be included in an appropriate section of Bangladesh constitution<sup>55</sup>.

On the grounds of absence of a regional human rights mechanism in South Asia and ineffectiveness of the NHRC, Bangladesh’s human rights situation needs to be seriously monitored by international and national human rights watchdogs. Bangladesh’s media, civil society and non-governmental human rights organizations need to actively engage with international and regional human rights bodies. Whether what Bangladesh promises in the Universal Periodic Review (UPR) process at the UN matches with its post-UPR performances, should be brought under open debate. As a state, Bangladesh has been taking one of the weaknesses of modern international law – the option of reservation for the State Party – to suppress its own citizens. Even after fifteen years of being a Party to the CAT, this is due to the reservation in terms of Article 14, paragraph 1 that Bangladesh continues to deny any compensation for victims of torture. Bangladesh must withdraw this reservation to let CAT work meaningfully within the national system. Bangladesh immediately needs to ratify International Convention for the Protection of All Persons from Enforced Disappearance<sup>56</sup> given its long history of disappearances in all the regimes, though in varied numbers.

While Bangladesh needs to reform existing institutions, laws and governance procedures in line with UNCAC, recourse to Public Interest Litigation (PIL) may reduce corruption to a considerable extent<sup>57</sup>. Most importantly, this is crucial that Bangladesh understands democracy not only in terms of a national election every five years, but in terms of an institutional democracy capable of providing basic human rights and equal treatment to all of its citizens. Until a greater

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54 No. 4 of the concluding statement of the “Bangalore Principles”, judicial colloquium on Domestic Application of International Human Rights Norms, Bangalore, India, February 24-26, 1988; We can recollect that Sati and Caste system in ancient India were understood as ‘laws’ until these were repealed under the influence of international norms during the British colonial rule.

55 For example, see Article 25 of the German Basic Law, “[Primacy of international law] The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory.”

56 Adopted by the General Assembly on December 20, 2006, and entered into force on December 23, 2010.

57 See for further details, Naim Ahmed, Public Interest Litigation (Dhaka: BLAST, 1999).

framework for institutional change to that effect can be undertaken, intermittent institutional and procedural changes will play a little role in achieving an equity-based society. Democratization of institutions involves a governance system capable of providing not only political rights but economic, social and cultural rights. As per the obligations created under ICCPR and ICESCR, governance entails not only decentralization of power but justifiable distribution of wealth.

The post 9/11 global realities have demanded strong state vigilance on terror organizations and individuals, increasing the possibility of massive abuse of power in developing states. However, if anti-terror initiatives on the part of a state are accompanied by rapid increase in extrajudicial killings, this is not because of those initiatives but because of the lack of transparency and accountability within the methods/legislations used. As the U.S. responds with regard to RAB's commission of extrajudicial killings in Bangladesh, "Our recent Human Rights Report stated RAB members committed extrajudicial killings that went publicly uninvestigated and unpunished. The training we are providing is aimed at helping RAB develop a capacity to transparently report and investigate allegations of human rights violations and, when necessary, hold accountable those individual RAB officers who may have acted improperly. We believe it is critical that those protecting this country from terrorists also protect the human rights of its citizens."<sup>58</sup> Bangladesh needs to strike a balance between fighting terror and protecting human rights.

## SCOPE OF THE STUDY

Outcome of a democracy can be comprehended in terms of to what extent it has governed human rights within institutions, laws and procedures. The chapters of this volume demonstrate how the prevailing structures, laws and governance mechanisms have denied people's minimum democratic rights and have accounted for massive human rights violations. It is not intended to enter into the theoretical debates of governance.

Authors have been drawn from diversified academic backgrounds to go, what Amartya Sen calls, "beyond the legislative route" and

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58 Remarks by U.S. Ambassador James F. Moriarty at RAB Human Rights Training Workshop, available at [http://dhaka.usembassy.gov/9\\_feb\\_09\\_moriarty\\_remarks\\_rab\\_hr\\_training\\_workshop.html](http://dhaka.usembassy.gov/9_feb_09_moriarty_remarks_rab_hr_training_workshop.html) (accessed on June 30, 2012)

put the authors' ethical claims "... linked with the importance of human freedom and the robustness of an argument that a particular claim can be seen as a human right has to be assessed through the scrutiny of public reasoning, involving open impartiality."<sup>59</sup> It is not widespread corruptions and siphoning off public exchequer but torture and extrajudicial killing that has traditionally gained most human rights focus. However, given the fact that flagrant corruptions have both discrete and overlapping (with torture and extrajudicial executions) impacts on human rights, questions of corruption have been incorporated in this scheme aiming at an assessment 'through the scrutiny of public reasoning'.

It would not have been a pragmatic approach to deal, in this volume, with the full range of human rights issues confronting Bangladesh. Nor does this project attempt to portray a complete account of how incidents of corruption, torture and extra-judicial killing have been taking place across the country<sup>60</sup>. This is, rather, an endeavor to examine the interplay of institutions, procedures and laws generating and facilitating the crimes.

Issues of corruption, torture and extrajudicial execution in Bangladesh are often inextricably interwoven with the issues of religious extremism, minority rights, refugees, and such other burning questions confronting the nation. Sources of the problems are often embedded in geopolitics of the region, external to the government. Due to fund constraints and other inconveniences, these overlapping aspects remained unaddressed, and instead, a generalized treatment has been opted for throughout the volume.

Although human rights regime tends to address acts and omissions on the part of state, there are private sector or individual violations where state cannot disclaim its responsibility. In some instances state agencies may not be complicit in the crime, however, long-practiced misgovernance and corruption on their part may trigger crimes that apparently fall within the ambit of non-government entities. Chapter 4 and chapter 8 have treated violations of such nature and their implications on state governance. Chapters 4 and 8 deal with corruptions in the private sectors and cruelty to women in the private

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59 Amartya Sen, *The Idea of Justice* (New York: Penguin, 2009), 364-366.

60 For detailed accounts of such incidents please follow monthly reports of *Odhikar* at <http://www.odhikar.org/>; See also reports from *Ain O Salish Kendra* at <http://www.askbd.org/web/?p=2634>.

spheres, and such issues have been incorporated given the worrying frequency and intensity of the problems in Bangladesh.

### **An Overview of the Chapters in this Volume** <sup>61</sup>

In chapter 2, *Rule of Torture, Rites of Terror and the Mirror of Fascism: A Further Tribute to Frantz Fanon*, Salimullah Khan has taken torture, for purposes of his essay, as a fascist political form and not, in the name of progress or whatsoever, at all as a historical norm or an ordinary everyday experience of human civilization. Fascism is a culture of terror ‘based on and nourished by silence and myth in which the fanatical stress on the mysterious side of the mysterious flourishes by means of rumor and fantasy woven in a dense web of magical realism’. It is argued that the torturer needs, among other things, the tortured *to objectify his imaginary in the discourse of the other*. The torturer wants not only information but desires in fact to control massive populations through the cultural elaboration of fear.

Khan argues, crimes attributed to victims of torture (and institutional terror) often mime crimes perpetrated in the name of ‘rule of law’ and ‘good governance’ by states and civil society agents. This often gives expression to certain elements of fascism and projects back to civil society the terrorism and criminal foundations of its own structure frequently imputed to its own expletive elements. Thus a broadside against torture can hardly be simply a humanitarian concern. To subvert this apocalyptic dialectic, it is argued here, one needs to undermine or disrupt *foundations of fascism in the discourse of civil society* itself.

Khan believes that the fight against torture and institutionalized terror hardly makes sense unless one realizes that this is part of the struggle against fascism. International conventions, covenants and treaties and extensive ethical rules created by the medical profession, Khan argues, go a long but not all the way as yet. What stands in the way is not the fact that the torturers don’t understand. In fact they understand only too well. The truth of torture, rape, or collective murder is not to be found in the body of these crimes as such. Khan

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61 Amongst the authors, Salimullah Khan, Mohammad Mohabbat Khan and Mohammad Ashraful Haque, Sabbir Ahmed, Muhammad Sazzad Hossain Siddiqui and Gazi Delwar Hosen, and Tazin Aziz Chaudhury provided me with their research abstracts, which I have incorporated in this section with editing where necessary. I gratefully acknowledge their contributions.

asserts that they are sustained by a structure (or if you like a culture) of terror.

Chapter 3, *Combating Political and Administrative Corruption in Bangladesh: Institutionalizing Accountability and Transparency in the Public Domain*, examines the institutional and governance settings of Bangladesh, underlying the reasons of being one of the most corrupt states in the world. In this chapter Mohammad Mohabbat Khan and Mohammad Ashraf Haque observe that political and administrative leadership has been equally corrupt under democratic and military regimes, giving the idea that democracy cannot be a solution to corruption. During the last decade, a flurry of anti-corruption initiatives have been implemented only to see that corruption has become a bastion of political and administrative elite who seem to stay above the law.

The authors argue that the fundamental weakness of the past anti-corruption drives is adoption of government and law centric approach. Contrary to this, they suggest a public domain approach in combating political and administrative corruption. To explain the concept of public domain, the term corruption has been defined from academic as well as contextual perspectives. Khan and Haque found significant discrepancy between academic/legal definition of corruption and politicians' and administrators' perception of corruption. They have briefly discussed history of political and administrative corruption in Bangladesh and past anti-corruption measures to demonstrate the ineffectiveness of the anti-corruption measures. Based on public domain concept, the authors have made broad-based recommendations in this chapter.

In chapter 4, *Governance and Human Rights: Experiences of Bangladeshi NGOs*, Sabbir Ahmed examines internal governance in Bangladeshi NGOs and its implications for human rights, in particular social and economic rights of the poor NGO clients/members. He explains the weaknesses in government's regulatory mechanisms and regulations for NGOs' internal governance that spawned the Executive head's corruption within three national NGOs in Bangladesh such as GSS, Proshika and Samata. Ahmed argues that this corruption resulted from internal governance failures arising from the Executive head's unlimited power within the organization. As a result, the Executive head exclusively dominated the decision-making of the organization, engendering corruption. The author finally suggests corrections in the regulatory frameworks both external and internal to the organizations, to stop corruption within NGOs.

In chapter 5, *National Security and Rights to Information Principles in Bangladesh*, Adilur Rahman Khan focuses on the legacy of repression in the name of national security laws. Having portrayed a chronological and vivid account of the relevant legislations on national security, he examines them in terms of the laws and institutions relating to rights to information. Khan argues that exclusion of certain security and intelligence agencies from the purview of rights to information act provides them with impunity and unaccountability. He examines the jurisdiction of the Information Commission and believes that government intends to see the Commission as a “toothless” body. The author recommends a holistic approach and a national strategic dialogue instead of opting for shortcuts to resolve the setbacks.

Chapter 6, *Need to Criminalize Torture in Bangladesh*, authored by Saira Rahman Khan examines the existing laws and institutions dealing with torture and asserts that new legislations criminalizing torture are crucially important for Bangladesh. The author observes an enabling atmosphere of torture in the legal framework of the state and recommends remedial measures.

In Chapter 7, *Torture During Police Remand: Laws and Practices*, Muhammad Sazzad Hossain Siddiqui and Gazi Delwar Hosen observe that incidence of torture at police remand in Bangladesh has increased alarmingly over the years. Even in the post modern era of 21st century, we languish in police torture along with inhuman and degrading treatment at remand. Police related human-rights abuses are plentiful - unlawful detention, excessive use of force, forced confession, fragile investigation report, torture and deaths in custody - stories abound in the media and elsewhere. Death, rape, sexual harassment, and blackmail are endemic at police remand. Though it is the duty of the police to protect citizens against violence, they themselves have allegedly killed many people and destroyed many lives in custody. Remand has become synonymous with violent torture, degrading treatment and inhuman punishment leading to many custodial deaths. Gaping violations of human rights at remands culminate in missing confidence in the basic state institutions and the very notion of justice.

In chapter 8, *Rumana Manzur: A Case Study and Jigsaw Pieces of Domestic Violence in Bangladesh*, Tazin Aziz Chaudhury begins with a case study of the highly publicized Rumana Manzur domestic abuse case which shocked the entire nation and served as an alarm with regard to domestic abuse in Bangladesh. Next the author gives a synopsis of the situation of Bangladeshi women in private and public spheres focusing on the violence they are subjected to. The paper concludes

with a review of national policies, institutional frameworks and suggests preventive measures.

Chapter 9, *Implications of the Ratification of Optional Protocol to the Convention against Torture*, examines the inherent shortcomings in laws and practices pertaining to police and judiciary. Author Md. Ashrafuzzaman discovers some potentials in the existing laws as well, application of which may reduce abuses during police remand. But most importantly, he eyes substantial degree of remedies in the ratification of Optional Protocol to the Convention against Torture.



*Chapter 2*

**RULE OF TORTURE, RITES OF TERROR AND  
THE MIRROR OF FASCISM:  
A FURTHER TRIBUTE TO FRANTZ FANON**

*Salimullah Khan*

The tradition of the oppressed teaches us that the ‘state of emergency’ in which we live is not the exception but the rule. We must attain to a conception of history that accords with this insight. Then we will clearly see that it is our task to bring about a real state of emergency, and this will improve our position in the struggle against fascism. One reason fascism has a chance is that, in the name of progress, its opponents treat it as a historical norm.

[Walter Benjamin, ‘On the Concept of History,’ *Selected Writings*, vol. 4 (Cambridge, MA: Harvard University Press, 2006), p. 392.]

Torture, as many would readily agree, is the most abhorrent form of ‘human rights violation’. I have often wondered why not call it a ‘crime’? Why do they all the time keep inventing neologisms like violation? I propose to argue here that torture (and institutional terror or, as more often known, ‘extra-judicial killing’) is also a crime like any other crime. The difference, if any, lies only in its being condoned often by civil society in surreptitious, nay in unperceived ways sometimes. Torture and institutional terror is ‘like a ritual art form’ and as I would like to argue here, with Michael Taussig, ‘that far from being spontaneous, sui generis, and an abandonment of what are often called “the values of civilization,” such rites have a deep history deriving power and meaning from those values.’<sup>1</sup>

It would also be interesting to research further how the crimes and terror attributed to the victims of torture and institutional terror more often than not mime the crimes perpetrated by agents of state and civil

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1 Michael Taussig, ‘Culture of Terror—Space of Death: Roger Casement’s Putumayo Report and the Explanation of Torture,’ in Nicholas B. Dirks, ed., *Colonialism and Culture* (Ann Arbor: University of Michigan Press, 1992), pp. 135-173, p. 164.

society themselves in the name of rule of law and good governance. This mimesis often gives expression to a priori synthetic conditions of fascist culture and projects back to civil society the terrorism and criminal foundations of its own social structure which it imputes to uncivil elements.

It cannot therefore be only a humanitarian concern to draft a broadside contra torture and institutional terror. I need hardly say that I am not concerned here to produce a politically neutral or objective essay. I believe I am writing, on the contrary, in the tradition of the oppressed, of all those who gave up more than their lives in the struggle against fascism, and those survivors of torture who in bringing us their testimony help us in our job of rehabilitating man against the assault of fascism.

I should also say for the record before I say it all that all whatsoever I know about torture is derived from the work of other writers, some cited and some remains unnamed. Tyranny and terror, appearing periodically in the form of forced disappearances, extra-judicial killings, and also unjust executions is only too ubiquitous a phenomenon to need introduction. Torture is there out in the world everywhere, it has always been.

So what can be done about it? The least we can is to break the silence, to talk and write about it. 'Why do they torture us,' if you ask the subject supposed to know you are more likely to get the answer, 'because they don't understand'. That is but only half the answer. They torture you because you don't understand. Not the torturer but the tortured or the threatened are the ones who stand in need of understanding. This is essay addressed to them.

I should perhaps avoid also getting locked up in intricacies of certain 'objective' definitions of torture. I take torture, for the purposes of this essay, as frankly a fascist political form and do not treat it (in the name of progress or whatsoever) at all as a historical norm or an ordinary everyday experience of human civilization. I know, however, not everyone would agree on this. Those who would not make common cause with fascism, Michel Foucault among them comes to mind, would not either take torture for what it really is or at any rate what it would mean were they themselves subjected to the abhorrent practice. One might as well ask, 'What is fascism anyway?'

Fascism is also a culture of terror 'based on and nourished by silence and myth in which the fanatical stress on the mysterious side of the mysterious flourishes by means of rumor and fantasy woven in a dense web of magical realism'. The torturer, the terrorist here needs the

tortured among other things to objectify his imaginary in the discourse of the other. What is it that the torturer wants? In the official prose, all he wants is information, to make the victim work in accordance with master's desire or for that matter in concert with the strategies of economic development laid out by the master class. 'Yet equally, if not more, important,' as Michael Taussig shows in his analysis of torture in Putumayo jungles of Peru, 'is the need to control massive populations through the cultural elaboration of fear.'<sup>2</sup>

## TORTURE IN THE MIRROR OF FASCISM

For the purposes of this essay I invoke the work of Aime Cesaire who takes fascism as a species of colonialism that returns home to rule the roost.<sup>3</sup> Fascism as many will recognize came to power in certain nations of Europe in the 1920s and 1930s as a tyranny based on a fair extent of popular following and aspired to rule the world by terror. But it did not descend down from pure blue heaven. Before fascism at home there was fascism abroad, it was only named colonialism.

Aime Cesaire puts its history in a capsule. Colonialism works, as Cesaire says, to *de-civilize* the colonizer, to *brutalize* him in the true sense of the word, to degrade him, to awaken him to buried instincts, to covetousness, violence, race hatred, and moral relativism. Cesaire shows that Europe proceeded towards savagery slowly but surely through the everyday practices of colonialism, namely violence, murder, rape and torture. Each time a head was cut off or an eye put out in Vietnam they accepted the fact in France, he pointed out. Each time a little girl was raped or a man tortured in Madagascar they accepted the fact in France. Thus civilization acquired another dead weight, a universal regression took place, a gangrene set in, and a center of infection began to spread.

That center eventually, at the end, became fascism, or savagery in the name of civilization. In Cesaire's eloquent words, 'at the end of all these treaties that have been violated, all these lies that have been propagated, all these punitive expeditions that have been tolerated, all these prisoners who have been tied up and interrogated, all these patriots who have been tortured, at the end of all the racial pride that

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2 M. Taussig, *ibid.*, p. 139.

3 Aime Cesaire, *Discourse on colonialism*, trans., Joan Pinkham, reprint (New York: Monthly Review Press, 2000).

has been encouraged, all the boastfulness that has been displayed a poison has been distilled into the veins of Europe,' and the continent slowly but surely proceeded toward savagery.

The European bourgeoisie begot colonialism, slavery and torture in other worlds, colonialism in turn begot fascism, murder and holocaust in Europe and yet European peoples were surprised and got indignant at fascism because Europe has so long been hiding the truth of fascism, its true paternity, from itself. One day Europe recognizes fascism as a true barbarism, nay the supreme barbarism, the crowning barbarism that sums up the daily barbarisms Europe perpetrated in its colonies. But the ruling classes of Europe still failed to admit, even after fascism's last defeat, in good faith that 'before they were its victims, they were its accomplices; that they tolerated that Nazism before it was inflicted on them, that they absolved it, shut their eyes to it, legitimized it, because until then, until then it had only been applied to non-European peoples; that they have cultivated that Nazism, that they are responsible for it, and that before engulfing the whole edifice of Western, Christian civilization in its reddened waters, it oozed, seeped, and trickled from every crack.'<sup>4</sup>

Steps taken by fascism, or German fascism in particular, serve in Aime Cesaire's retrospective judgment, 'to reveal to the very distinguished, very humanistic, very Christian bourgeois of the twentieth century that without his being aware of it, he has a Hitler inside him, that Hitler *inhabits* him, that Hitler is his *demon*.' The European humanist, the Christian bourgeois that is, argues Cesaire, cannot really rail against fascism without being inconsistent. So what is it that the indignant European bourgeois doing when he is railing against that demon, that alter ego of theirs? 'At bottom,' Cesaire writes, 'what he cannot forgive Hitler for is not the crime in itself, the crime against man, it is not the humiliation of man as such, it is the crime against the white man, and the fact that he applied to Europe colonialist procedures which until then had been exclusively reserved for the Arabs of Algeria, the 'coolies' of India, and the 'niggers' of Africa.'<sup>5</sup>

Torture, in the words of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted by the United Nations General Assembly on 10 December 1984, is purported to mean 'any act by which severe pain or suffering, whether physical

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4 A. Cesaire, *ibid.*, p. 36; translation modified.

5 A. Cesaire, *ibid.*, p. 36.

or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.' The Convention, however, compromises certain forms of violence, and excludes certain practices such as 'pain or suffering arising only from, inherent in or incidental to lawful sanctions' from the purview of torture.<sup>6</sup>

These limitations reflect rather difficult negotiations and liberal concessions to fascism. But the compromises, it must be recognized, are embedded also in cultural constructs, in the discourses of mythology and history that precursors so tenaciously built up. 'And what is put into discourse through the artful storytelling of the colonists,' as says Michael Taussig, 'is the same as what they practiced on the bodies of the Indians.'<sup>7</sup>

Colonialism did not leave also the medical profession untainted. French medical professionals in Algeria, following the particularly edifying example of the medical corps in the concentration camps in Nazi Germany, also did not refrain from participating in tortures and other war crimes. Allow me to cite only a few instances from Franz Fanon. 'When judicial inquiries into the cases of Algerians who had not died in the course of police questioning began,' Fanon writes, 'it would happen that the defense would ask for a medico-legal examination. This demand would sometimes be met. The European doctor assigned to examine the patient always concluded that there was no evidence to suggest that the accused had been tortured.' 'Not infrequently,' also reports Fanon, 'the European doctor in Algeria would deliver to the legal authority a certificate of natural death for an Algerian who had succumbed to torture or who, more simply, had been coldly executed. Similarly, it invariably happened that when the demand of the defense for an autopsy was granted, the results would be negative.'<sup>8</sup>

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6 B. Sorensen, 'Modern Ethics and International Law,' in M. Basoglu, ed., *Torture and its consequences: current treatment approaches*, reprint (Cambridge: Cambridge University Press, 1993), 511-19, p. 512.

7 M. Taussig, *ibid.*, pp. 164-65.

8 F. Fanon, *A Dying Colonialism*, trans., H. Chevalier, reprint (Boston: Grove Press, 1965), pp. 136-37.

This is only collaboration at a remove, in a sense. The crime became explicit when it touched on the strictly technical level, where the European doctor actively collaborated with the colonial forces in 'their most frightful and most degrading practices'. The European doctors in Algeria used the 'truth serum' with staggering frequency. 'The principle of this drug,' as Fanon writes, 'is well known: a chemical substance having hypnotic properties is injected into a vein, which, when the operation is carried out slowly, produces a certain loss of control, a blunting of consciousness. As therapeutic measure used in medicine it is obviously a very dangerous technique, which may cause a serious impairment of personality. Many psychiatrists, considering the dangers greater than possible improvements, have long ago abandoned this technique for examining spheres of the unconscious.'<sup>9</sup>

The deleterious effects on men and women subjected to torture for days are legion, one of the important consequences being, in Fanon's words, 'a certain inability to distinguish the true from the false, and an almost obsessive fear of saying what should remain hidden.' 'We must always remember,' as Fanon put it, 'that there is hardly an Algerian who is not party to at least one secret of the Revolution. Months after this torture, the former prisoner hesitates to say his name, the town where he was born. Every question is first experienced as a repetition of the torturer-tortured relationship.'<sup>10</sup>

Professional morality, medical ethics, self-respect and respect for others, gives way to the most uncivilized, the most degrading, the most perverse kind of behavior under colonial conditions. In Algeria doctors attached to various torture centers 'intervened after every session to put the tortured back into condition for new sessions'. 'Under the circumstances,' Fanon remarks, 'the important thing is for the prisoner not to give the slip to the team in charge of the questioning: in other words, to remain alive.' The doctor becomes an accomplice to the highest degree under these circumstances. 'Everything—heart stimulants, massive doses of vitamin—is used before, during, and after sessions to keep the Algerian hovering between life and death. Ten times the doctor intervenes,' as Fanon reminds us, 'ten times he gives the prisoner back to the pack of torturers.'

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9 F. Fanon, *ibid.*, p. 137.

10 F. Fanon, *ibid.*, p.138; see also F. Fanon, *The Wretched of the Earth*, trans., C. Farrington, reprint (London: Penguin Books, 1990), ch. 5, series A, case 4.

Fanon, himself a French-trained professional psychiatrist, accused certain psychiatrists of flying to the aid of the police. 'There are,' he writes, 'for instance, psychiatrists in Algiers, known to numerous prisoners, who have given electric shock treatments to the accused and have questioned them during the waking phase, which is characterized by a certain confusion, a relaxation of resistance, a disappearance of the persons defenses. When these men are liberated because the doctor, despite this barbarous treatment, was able to obtain no information, what is brought to us is a personality in shreds. The work of rehabilitating the man is then extremely difficult.' 'This is only,' remarks our author, 'one of the numerous crimes of which French colonialism in Algeria has made itself guilty.'<sup>11</sup>

To crown it all Fanon recalls certain experience with French military doctors refusing treatment to an Algerian soldier wounded in combat, when called to his bedside. 'The official pretext was that there was no longer a chance to save the wounded man. After the soldier had died, the doctor would admit that this solution had appeared to him preferable to a stay in prison where it would have been necessary to feed him while awaiting execution.' 'The Algerians of the region of Blida know,' adds Fanon, 'a certain hospital director who would kick the bleeding chests of the war wounded lying in the corridor of his establishment.'<sup>12</sup>

Modern medical ethics, based on the ethical code laid out in the Hippocratic Oath and laid out by official organizations as well as professional associations, expresses commitment to the cause of a universal humanitarianism. Principles of medical ethics adopted by the United Nations General Assembly, on 18 December 1982, for instance, implicates all health personnel, particularly physicians, 'in the protection of prisoners and detainees against torture and other cruel, inhuman or degrading treatment or punishment.' 'It is a gross contravention of medical ethics,' as one of the six principles enjoins it, 'to participate in torture or other cruel, inhuman or degrading treatment or punishment.' It is prohibited, as another principle puts it, 'to assist in the interrogation of prisoners or detainees in a manner that may adversely affect their physical or mental health,' just as it is forbidden to certify the sickness of prisoners and detainees for any form of treatment or punishment that may adversely affect their physical

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11 F. Fanon, *A dying colonialism*, pp. 138-39.

12 F. fanon, *ibid.*, p. 139.

or mental health.<sup>13</sup> World Medical Association also adopted similar ethical principles. Of paramount importance on the subject of torture is the Tokyo Declaration adopted in 1975.

However, all this did not have the desired effect. If it did we would not have heard of Abu Gharaib or Guantanamo for that matter. Faced with the endemic nature of torture, terror and horror we, the condemned to the New World Order, are assailed with a new emergency or to call a spade a spade, a new fascism. Walter Benjamin's observation has alas again attained to a new urgency: 'The tradition of the oppressed teaches us that the "state of emergency" in which we live is not the exception but the rule.' Not everyone, for instance, the French philosopher Michel Foucault would agree.

## **TORTURE AS NORMAL: MICHEL FOUCAULT'S APOLOGIA**

In his later work especially *Discipline and Punish*, Michel Foucault claims among other things that 'torture' give way to 'discipline' in modern society. By modern society, Foucault indicated mostly European societies since at least the French revolution of the eighteenth century. This flies in the face of all evidence even after the two world wars (or a long thirty years war if you will) of the twentieth century, especially in societies where the European mode of colonial governance prevails.<sup>14</sup> In an interesting defense of Foucault, Talal Asad argues that the French philosopher is not concerned with torture as such but with rather power or disciplinary power, which works with normalization of everyday behavior, as opposed to sovereign power which needs to exhibit itself publicly.<sup>15</sup>

One of my purposes in this essay is to re-examine the robustness or otherwise of the distinction introduced by Michel Foucault. I argue, following the work of Frantz Fanon, that the distinction between 'sovereign power' (which needs an expression) and 'disciplinary power'

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13 B. Sorensen, 'Modern ethics and international law,' in M. Basoglu, ed., *Torture and its consequences: current treatment approaches* (Cambridge: Cambridge University Press, 1993), pp. 516-17.

14 Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans., A. Sheridan, reprint (Harmondsworth, Middlesex: Penguin Books, 1986).

15 Talal Asad, 'On Torture, or Cruel, Inhuman, and Degrading Treatment,' in Arthur Kleinman et al., eds., *Social Suffering*, reprint (New Delhi: Oxford University Press, 2000), p. 288.



(which needs a means) tends to wither away as one confronts face to face a colonial formation. ‘Torture,’ Fanon claimed in 1957, ‘is an expression and a means of the occupant-occupied relationship.’<sup>16</sup>

Talal Asad has claimed also that Foucault’s thesis about disciplinary power is not subverted by evidence of surreptitious torture in the modern state. That torture is administered in secrecy (or one admits in quasi-secrecy) is proof that it is just policing, a governmental activity directed supposedly at defending some fundamental ‘interest of society’. ‘On the contrary,’ writes Asad, ‘precisely because torture carried out in secret is said to be intimately connected with the extraction of information, it is an aspect of policing.’<sup>17</sup>

To believe that torture is simple policing, or a mode of pure disciplinary power rests, I would here argue, on a fundamental misreading of the colonial (or semi-colonial for that matter) situation. Curiously, as Fanon noted it, neither the French police agents perpetrating torture in Algeria (in a sense ever since 1830), nor the Algerian people in the vanguard of their liberation war had little misgiving about the true nature of what was involved.

Recent evidence of the US torture in Afghanistan and in Iraqi theater of war serves to redeploy and recharge, and perhaps to supplement, certain lessons of earlier colonial wars. The necessity to legitimize torture, as Fanon noted, has always been considered by the French police to be ‘an outrage and a paradox’. To them maintenance of French domination in Algeria made torture absolutely necessary. The Algerian people too were not unaware of the fact that the colonialist structure rested on the necessity of torturing, raping and committing massacres.<sup>18</sup> As the case of Algeria preeminently points out the question of torture is a core problem of civilization or rather the civilizing mission, not of barbarism or even savagery for that matter; it is, as an observer remarked lately, ‘but one that concerns the very moral fabric of the democratic societies in which we live.’<sup>19</sup>

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16 Frantz Fanon, ‘Algeria Face to Face with the French Torturers,’ *Towards the African Revolution: Political Essays*, trans., H. Chevalier, reprint (New York: Grove press, 1988), p. 66. ‘Torture in Algeria,’ alerted Fanon right ahead of this, ‘is not an accident, or an error, or a fault. Colonialism cannot be understood without the possibility of torturing, of violating, or of massacring.’

17 Talal Asad, *ibid.*

18 Franz Fanon, *ibid.*, pp. 66, 72.

19 M. Basoglu, ed., *Torture and its consequences: current treatment approaches*, reprint (Cambridge: Cambridge University Press 1993), p. 3.

Torture in the world continues. That torture is practiced to a great and frequent extent is recognized by the United Nations and other large international bodies such as the Council of Europe, either directly or at a remove, in many a declaration, convention, covenant or other regulations introduced. As is well known the United Nations was created as World War II was about to end and as early as 1948 the General Assembly adopted the Universal Declaration of Human Rights. 'No one shall be subjected,' Article 5 of this Declaration reads, 'to torture or to cruel, inhuman or degrading treatment or punishment.' The intent was reiterated both in the *Declaration on the Protection of all Persons from being subjected to Torture and any other Cruel, Inhuman or Degrading Treatment or Punishment* adopted on 9 December 1975 and in the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* adopted by the General Assembly on 10 December 1984.

In his later work Foucault argues that the exercise of power and resistance to work in a disruptive rather than a dialectical relation to each other, suggesting that 'points of resistance are present everywhere in the power network'. Foucault's point is that resistance does not operate outside power, nor is it necessarily produced in opposition to it: 'it is imbricated within it, the irregular term that consistently disturbs it, rebounds upon it, and which on occasions can be manipulated so as to rupture it altogether': 'Just as the network of power relations ends by a dense web that passes through apparatuses and institutions, without being exactly localized in them, so too the swarm of points of resistance traverses social stratifications and individual unities. And it is doubtless the strategic codification of these points of resistance that makes a revolution possible, somewhat similar to the way in which the state relies on the institutional integration of power relationships.'<sup>20</sup>

As Foucault has once put it, he began his analysis 'from a question posed in the present.' It is in this way that Foucault returned to doing historical work that has political fallout through his notion of genealogy. Curiously few references to the question of torture in the French colony of Algeria is to be found in the works of Foucault or for that matter Jean-Francois Lyotard who wrote extensively on colonial Algeria.<sup>21</sup>

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20 Michel Foucault, *The History of Sexuality: An Introduction*, vol.1, trans., R. Hurley (London: Allan Lane, 1979), p. 96; cited in Robert J. C. Young, *White Mythologies: Writing History and the West*, 2nd ed., (London: Routledge, 2004), p. 124.

21 Jean-Francois Lyotard, *Political Writings*, trans., Bill Readings and K. Paul Geiman (London: UCL Press, 1993), p. 214.

Foucault's legacy is at best ambivalent. For him tyranny, which he often calls rather simplistically power, is heterogeneous as is resistance. His point is simply that 'there is no single locus of great Refusal, no soul of revolt, source of all rebellions, or pure law of the revolutionary'.<sup>22</sup> Foucault stresses the local or the specific resistance without assuming the global possibility of emancipation. What he misses is the asymmetry of the institutional integration of power relationships where a state or civil society exists and the absence of strategic codification of points of resistance marks the existence of the other.

## **TORTURE AS PATHOLOGICAL: FANON ON COLONIALISM AND MENTAL DISORDERS**

Franz Fanon, in his last work, placed torture most succinctly in its proper historical basis, namely when the colonized person and the colonial system are violently brought together. Dehumanizing the colonized, argues Fanon, is of the essence of torture as a modality of political action. 'It must in any case be remembered that,' writes Fanon, 'a colonized people is not simply a dominated people. Under the German occupation the French remained men; under the French occupation, the Germans remained men.' But the Algerians, the veiled women were not men and women to the French; they together with the palm trees and the camels simply formed the landscape, the *natural* background to the human presence of the French.<sup>23</sup>

The colonial situation produces pathologies of various orders. In the calm period of successful colonization, that is when it is not contested by armed resistance, oppression directly produces a regular and important mental pathology. At that hour, 'the sum total of harmful nervous stimuli overstep a certain threshold, the defensive attitudes of the natives give way and they then find themselves crowding mental hospitals.'

In times of national liberation wars, which are total wars for the colonized, the colonial theater of war becomes a veritable breeding-ground of mental disorders. Most of them, known as 'reactionary psychoses' in clinical psychiatry, are as a matter of fact produced by the

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22 Michel Foucault, *The History of Sexuality: An Introduction*, vol.1, *ibid.*, pp. 95-96; cited in Robert J. C. Young, *White Mythologies: Writing History and the West*, *ibid.*, p. 124.

23 F. Fanon, *The Wretched of the Earth*, trans., C. Farrington, reprint (London: Penguin Books, 1990), p. 201; emphasis in the original.

oppressive regime, by 'chiefly the bloodthirsty and pitiless atmosphere, the generalization of inhuman practices and the firm impression that people have of being caught up in a veritable Apocalypse.' A colonial war, either in part or as a whole is, as Fanon notes, 'singular even in the pathology it gives rise to'. Colonial psychoses induced by torture, to put it in brief, 'upsets most profoundly the personality of the person who is tortured'.<sup>24</sup>

Fanon's second observation also merits further comments. He vigorously confutes the claim that these 'reactionary psychoses' so-called are relatively harmless and rather exceptional phenomena. Fanon, on the contrary, holds that 'the frequent malignancy of these pathological processes' is rather the rule. 'These are disorders which persist for months on end, making a mass attack against the ego, and practically always leaving as their sequel a weakness which is almost visible to the naked eye. According to all available evidence, the future of such patients is mortgaged.'<sup>25</sup>

The colonial war dehumanizes not only the colonized; the torturer also becomes a victim. In his chapter 'Colonial Wars and Mental Disorders,' in *Wretched of the Earth*, Fanon writes on the case of a twenty-eight year old European policeman who was sent to Fanon in Blida-Joinville by his superiors because he had behavior disturbances. 'His trouble was that at night he heard screams which prevented him from sleeping.' For a few weeks prior to coming to the psychiatrist the poor policeman, before going to bed, used to shut the shutters and stopped up all the windows, and that in the summer, to the complete despair of his wife who was stifled by the heat. 'Moreover, he stuffed his ears with cotton-wool in order to make the screams seems less piercing.' He, sometimes even in the middle of the night, used to turn on the wireless set or put on some music in order not to hear his nocturnal uproar. Sometime ago he was employed at the police headquarters, where he mostly came to deal with interrogations. Fanon quotes quite a bit of the patient's testimony. 'Interrogations,' the policeman tells Fanon, never occurred without some 'knocking about'. 'The thing was that they never would own up to anything.'

'Sometimes we almost wanted to tell them that if they had a bit of consideration for us they'd speak out without forcing us to spend hours tearing information word by word out of them. But you might as well

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24 F. Fanon, *ibid.*, p. 202.

25 F. Fanon, *ibid.*, p. 203.

talk to the wall. To all the questions we asked they'd only say 'I don't know.' Even when we asked them what their name was. If we asked them where they lived, they would say 'I don't know'. So of course we had to go through with it. But they scream too much. At the beginning that made me laugh. But afterwards I was a bit shaken. Nowadays as soon as I hear someone shouting I can tell you exactly at what stage of the questioning we've got to. The chap who's had two blows of the fist and a belt of the baton behind his ear has a certain way of speaking, of shouting and of saying he's innocent. After he has been left two hours strung up by the wrists he has another kind of voice. After the bath, still another. And so on. But above all it's after the electricity that it becomes really too much. You'd say that the chap is going to die any minute. Of course there are some that don't scream; those are the tough ones. But they think they are going to be killed right away. But we are not interested in killing them. What we want is information. When we're dealing with those tough ones, the first thing we do is to make them squeal; and sooner or later we manage it. That's already a victory. Afterwards we go on. Mind you, we would like to avoid that. But they don't make things easy for us. Now I've come so as I hear their screams even when I'm at home.' 'Especially,' added the policeman, 'the screams of the ones who died at the police headquarters.' He wanted to resign his job and save his soul.<sup>26</sup>

Another European torturer, a thirty-year old police inspector, also married and with three children, was intent on persevering with his job. He had lost his appetite and his sleep, as he told Fanon, was frequently disturbed by nightmares. What bothered him most was not the nightmares as such, but what he called 'fits of madness'. He disliked being contradicted: 'as soon as someone goes against me, says he, 'I want to hit him.' 'Even outside my job, I feel I want to settle the fellows who get in my way, even for nothing at all.'

The police inspector dislikes noise. At home he wants to hit everybody all the time. In fact he does hit his children, even the twenty month old baby, with unaccustomed savagery. One evening he did beat up and tie down his wife who dared to criticize him for hitting his children too much. He wasn't like that before, the inspector recounted. He said he very rarely punished his children and at any event rarely fought with his wife. The present phenomena, in his opinion, had appeared 'since the troubles'. 'The fact is,' he said, 'nowadays we have

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26 F. Fanon, *Wretched of the Earth*, pp. 213-14; Series A, Case 4.

to work like troopers. Last week, for example, we operated like as if we belonged to the army. Those gentle men in the government say there's no war in Algeria and that the arm of the law, that's to say the police, ought to restore order. But there is a war going on in Algeria, and when they wake up to it it'll be too late.'

'The thing that kills me most is the torture,' admits our troubled Inspector. 'Sometimes,' adds he, 'I torture people for ten hours at a stretch...' 'What happens to you when you are torturing?' Fanon asks him. 'It's very tiring,' the Inspector chips in. 'It's true we take it in turns, but the question is to know to let the next chap have a go.. Each one thinks he is going to get the information at any minute and takes good care not to let the bird go to the next chap after he has softened him up up nicely, when of course the other chap would get the honor and glory of it. So sometimes we let them go; and sometimes we don't.'

'Sometimes,' goes on the Inspector, 'we even offer the chap money, money out of our own pockets, to try to get him to talk. Our problem is as follows: are you able to make this fellow talk? It's a question of personal success. You see, you are competing with the others. In the end your fists are ruined. So you call in the Senegalese But they hit either too hard and destroy the creature or else they don't hit hard enough and it's no good. In fact you have to be intelligent to make a success of that sort of work. You have to know when to lay it on and when to lay it off. You have to have a flair for it.'

'But the thing that worries him most is this affair with his wife. 'It's certain that there's something wrong with me,' he realizes. But he is far from seeing the real behind his troubles. 'This man knew perfectly well, remarks Fanon, 'that his disorders were directly caused by the kind of activity that went on inside the rooms where interrogations were carried out, even though he tried to throw the responsibility totally upon "present troubles".' Since he could not imagine a way out of the interrogation rooms he asked Fanon to help him to go on torturing Algerian freedom fighters without any pricking of conscience, without any behavior problems and with complete equanimity. 'With these observations, writes Fanon, 'we find ourselves in the presence of a coherent system which leaves nothing intact. The executioner who loves birds and enjoys the peace of listening to a symphony or a sonata is simply one stage in the process. Farther on in it we may well find a whole existence which enters into complete and absolute sadism.'<sup>27</sup>

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27 F. Fanon, *The Wretched of the Earth*, p. 217.

Sadistic police agents who lost their sleep and the torturing soldiers who ‘run the risk of turning into fascists’ no doubt constituted a precise problem for the Algerians, and that was to get rid of them at the shortest possible time. The human legacy of torture, just one of France’s numerous crimes in Algeria, cast indeed a longer shadow. In ‘Colonial Wars and Mental Disorders’, Fanon presents his cases in four consecutive series. The two cases we chose above, examples of ‘reactionary psychosis,’ belong to series A. In series B certain cases in which the events giving rise to the illness is in the first place the atmosphere of total war were brought together. Fanon grouped together, in series C, those cases in which the disorders appeared after or during the tortures. Characteristic morbidities appeared depending on the methods of torture employed, independent of the evil effects upon the personality of the tortured. Fanon finally put together in a fourth series illnesses met with among Algerians who were interned in concentration camps. Illnesses of the ‘psycho-somatic’ type, as they used to be known, were not the only consequences of the colonial war. Quite apart from the pathology of torture, the pathology of combat, violence and conflict were enough to produce these mental disorders, including certain forms of criminality. Under a colonial regime such as existed in Algeria, as Fanon finds it, the ideas put forward by colonialism not only influenced the European minority, but also the Algerians. ‘The Algerian’s criminality, his impulsivity and the violence of his murders,’ concludes Fanon, ‘are therefore not consequences of the organization of his nervous system, nor of a peculiar trait in his character, but a direct product of the colonial situation.’<sup>28</sup>

## **TORTURE AND CIVIL SOCIETY: THE PUTUMAYO REPORT**

Michael Taussig’s analysis of colonialist torture in Putumayo region in South America yields remarkably similar conclusions as in Fanon’s treatment of Algeria. Taussig, in fact, goes a trifle further than Fanon in exploring the torturer in his fantasy, namely the culture of terror that sustain him. Taking up an early twentieth century official report on torture perpetrated on the Putumayo Indians by an Anglo-Peruvian rubber company Taussig shows that while condemning the torture, cruel, inhuman and degrading treatment of the Indian the narrative

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28 F. Fanon, *ibid.*, p. 250; translation modified.



framework and explanations put forward in the report do miss the very culture of terror, the image of the Indian as cannibal and savage, that sustained the colonialist rationality of torture.

The British Consul Roger Casement's report, written in 1910 and published by the House of Commons in 1913, was based on extensive field investigations on the middle reaches of the Putumayo and the Amazon basin. Its essence, in Taussig's words, 'lay in its detail of the terror and tortures together with Casement's explanation of causes and his estimate of the toll in human life.' 'Putumayo rubber would be unprofitable,' as Taussig writes, 'were it not for the forced labor of local Indians, principally those called Huitotos. From the twelve years from 1900, the Putumayo output of some 4,000 tons of rubber cost thousands of Indians their lives. Deaths from torture, disease, and possibly flight had decreases the population of the area by around 30,000 during that time.'<sup>29</sup> However, in 1909 a London magazine, *Truth*, published a series of articles by an unknown adventurer from the United States, Walter Hardenburg by name, on the Putumayo region depicting the brutality of the rubber company, which since 1907 has been a consortium of Peruvian and British interests in the region.

The articles chronicled the saga of the plantation workers of Putumayo region declaring that the peaceful Indians work night and day collecting rubber without the slightest remuneration. As Taussig restates, '[The Indians] are given nothing to eat or wear. Their crops, together with the women and children, are taken for the pleasure of the whites. They are inhumanly flogged until their bones are visible. Given no medical treatment, they are left to die after torture, eaten by the company's dogs. They are castrated, and their ears, fingers, arms, and legs are cut off. They are tortured by means of fire, water, and crucifixion tied head-down. The whites cut them pieces with machetes and dash out the brains of small children by hurling them against trees and walls. The elderly are killed when they no longer can work. To amuse themselves, the company officials practice shooting, using Indians as targets, and on special occasions such as Easter Saturday—Saturday of Glory—shoot them down in groups, or, in preference, douse them in kerosene and set them on fire to enjoy their agony.'<sup>30</sup>

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29 M. Taussig, *ibid.*, p. 143.

30 M. Taussig, *ibid.*, pp. 143-44, citing Walter Hardenburg, *The Putumayo: The Devil's Paradise. Travels in The Peruvian Amazon Region and an Account of the Atrocities Committed upon the Indians Therein* (London: T. Fisher Unwin, 1912), p. 214.



The British administration felt obliged to send Roger Casement to the Putumayo on account of the public outcry caused. Casement's report confirmed, more or less, the stories depicted in the *Truth* articles. From the evidence gathered at the scene the Consul reported that the 'great majority' (perhaps up to 90 percent) of the more than 1,600 Indians he saw had been badly beaten. 'Some of the worst affected were small boys and,' as one reads in the resume, 'deaths due to flogging were frequent, either under the lash, or more frequently, a few days later when the wounds became maggot infested.' It continues: 'Floggings occurred when an Indian brought in insufficient rubber and were most sadistic for those who dared to flee. Flogging was mixed with other tortures such as near drowning, "designed," as Casement points out, "to just stop short of taking life while inspiring the acute mental fear and inflict much of the physical agony of death."<sup>31</sup>

'Casement was informed,' Taussig writes furthermore, 'by a man who had himself often flogged Indians that he had seen mothers flogged because their little sons had not brought in enough rubber. While the boy stood terrified and crying at the sight, his mother would be beaten "just a few strokes" to make him a better worker.' In addition, deliberate starvation was resorted to repeatedly, sometimes to frighten, more often to kill. Men and women were kept in stocks until they died of hunger. An eye witness reported that he had seen Indians in this situation 'scraping up the dirt with their fingers and eating it.' Another declared that he had seen them eating the maggots in their wounds.' Thus the narrative goes on, apparently unending.

Yet these are the victims who were accused of savagery and cannibalism by their tormentors, the company employees and the civil society. One would ask why. 'Such men,' Roger Casement remarked, 'had lost all sight or sense of rubber-gathering—they were simply beasts of prey who lived upon the Indians and delighted in shedding their blood.' Yet they were there to begin with ostensibly for making a profit. How can shedding blood be profitable? How did torture become their preference?

Moreover, the station managers from the areas where Casement got his most precise information were in debt (despite their handsome rates of commission), running their operations at a loss to the Company that in some sections ran to many thousands of pounds sterling. Asked by Casement if he did not know it to be wrong to torture Indians, one

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31 M. Taussig, *ibid.*, p. 145.

of the Barbados men replied that he was unable to refuse orders, 'that a man might be a man down in Iquitos, but 'you couldn't be a man up there'.<sup>32</sup>

Casement argued that it was not rubber but labor that was scarce in Putumayo and that this scarcity provided the basic cause of the use of terror. Putumayo rubber was of the lowest quality, the remoteness of its source made its transport expensive relative to rubber from other zones, and wages for free labor were very high. Hence, he reasons, the company resorted to the use of forced labor under a debt-peonage system and used torture to maintain labor discipline. But, as Taussig notes, this explanation does not sit in well with certain facts to be found in the Putumayo Report such as the slaughter of this precious labor on a vast scale beyond belief. The explanation 'while not exactly wrong' is in some way inadequate. Taussig raises two further points on the question of 'scarcity' of labor and the debt-peonage system which bound the Indian to the plantations. It was obvious, to begin with, that torture and institutionalized terror is not rational in the business sense of the term but was nevertheless resorted as one observes a ritual. Also torture was neither spontaneous, *sui generis*, nor constituted an abandonment of 'the values of civilization' so-called such. Such rites, Taussig contends, 'have a deeper history deriving power and meaning from those values.'

The rites of terror and torture cannot be sense of unless one goes further. What claims attention is 'the mimesis between the savagery attributed to the Indians by the colonists and the savagery perpetrated by the colonists in the name of what they call "civilization".' 'The reciprocating yet distorted mimesis,' argues Taussig, 'has been and continues to be great importance in the construction of colonial culture—the colonial mirror that reflects back onto the colonists the barbarity in their own social relations, but as imputed to the savage or evil figures they wish to colonize.' Lurid tales of Indian cannibalism and colonial folklore of savage Indians serve only to confirm the fact that civil society in fact was founded on savagery. To cite Taussig once more: 'In their human or human like form, the wild Indians could all the better reflect back to the colonists the vast and baroque projections of human wildness that colonists needed to establish their reality as civilized (not to mention business like) people. And it was only because the wild Indians were human that they were able to serve as labor—and

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32 M. Taussig, *ibid.*, pp. 146-47.

as subjects of torture. For it is not the victim as animal that gratifies the torturer, but the fact that the victim is human, thus enabling the torturer to become the savage.’<sup>33</sup>

From all accounts of the Putumayo terror it appears that colonists and rubber company employees not only feared but themselves created through narration fearful and confusing images of savagery—images that bound colonial society together through the epistemic murk of the space of death. ‘The systems of tortures they devised to secure rubber,’ Taussig writes, ‘mirrored the horror of savagery they so feared, condemned—and fictionalized.’ ‘And what is put into discourse through artful storytelling of the colonists is the same as what they practiced on the bodies of the Indians.’<sup>34</sup>

More interestingly, well meaning reports such as those by Hardenburg or Casement too did not free themselves from the same sources that created such myths of Indian savagery. ‘Torture and terror in the Putumayo were motivated by the need for cheap labor. But labor per se—labor as a commodity—didn’t exist in the jungles of the Caraparana and Igaraparana affluents of the Putumayo. What existed was not a market for labor but a society and culture of human beings whom the colonists called Indians, irrationals, and savages, with their specific historical trajectory, form of life, and modes of exchange. In the blundering colonial attempt to forcibly dovetail the capitalist commodity structure to one or the other of the possibilities for rubber gathering offered by these modes of exchange, torture, as Casement alludes, took on a life of its own: ‘Just as the appetite comes in the eating so each crime led on to fresh crimes.’<sup>35</sup>

‘To this we should add that, step by step, terror and torture became the form of life for some fifteen years, an organized culture with its systematized rules, imagery, procedures, and meanings involved in spectacles and rituals that sustained the precarious solidarity of the rubber company employees as well as beating out through the body of the tortured some sort of canonical truth about civilization and business.’<sup>36</sup>

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33 M. Taussig, *ibid.*, p. 152.

34 M. Taussig, *ibid.*, pp. 163-165.

35 M. Taussig, *ibid.*, p. 164.

36 M. Taussig, *ibid.*, p. 164.

## CONCLUSION

How do we go from here? If you want to subvert this apocalyptic dialectic, we must begin by undermining or disrupting the foundations of fascism in the discourse of civil society itself. It needs to be understood, as a minimalist program would have it, that the fight against torture and institutionalized terror hardly makes sense unless one realizes that this is part of the struggle against fascism. It is the point on which our path diverges from the saddle point of Michel Foucault and converges on the one tread by Franz Fanon.

Fascism, as Walter Benjamin once famously said, founds politics on aesthetics. That's true. Fascism sensationalizes, it builds on a folklore that forecloses, an otherness that imprisons mankind. The struggle against fascism, however, must found its aesthetic on a politics of openness. Its poetics will not close 'with cataclysmic resolution of contradictions but with their disruptions.'

Possibilities of eliminating torture must be considered to exist. International law has created a myriad of conventions, covenants and treaties and the medical profession also has laid down extensive ethical rules. But what stands in the way of implementation is not the fact that 'they' don't understand. In fact they understand only too well.

Likewise, paradoxical as it may sound, the truth of torture, rape, or collective murder it is not to be found in the body of these crimes as such. We must understand that they are sustained by a structure or if you like a culture of terror. The revolution of our times—and I am not using the word as an exorcism—must now turn on a new leaf. A new culture demands new tasks.

*Chapter 3*

**COMBATING POLITICAL AND ADMINISTRATIVE  
CORRUPTION IN BANGLADESH:  
INSTITUTIONALIZING ACCOUNTABILITY AND  
TRANSPARENCY IN THE PUBLIC DOMAIN**

*Mohammad Mohabbat Khan and Mohammad Ashraful Haque*

**INTRODUCTION**

Pervasive corruption in public domain, especially in political and administrative affairs has long legacy in the Indian subcontinent. In ancient India large-scale corruption dominated public life<sup>1</sup>. As has been observed “corruption prevailed on a larger scale in India during the ancient period and the ones that followed”<sup>2</sup>. From this, one can assume the nature and scale of corruption from medieval to the present time in the countries of the Indian sub-continent. One of the greatest evils of medieval administration in India was the extortion of perquisites and presents<sup>3</sup>. Corruption was evident during the British rule in India. There was almost regular and systematic corruption involving almost all officials at different levels in the political and administrative hierarchy. There was an underlying belief among officials of “making hay while the sun of British Raj shone”<sup>4</sup>. So there is nothing new in reporting large- scale political and administrative corruption in Bangladesh. However, the scenario would be different if one takes note of the fact that corruption is on the rise in Bangladesh despite investment of significant resources in anti-corruption institution building. What is more alarming is that institutions established for curbing corruption

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1 Thakur, U., *Corruption in Ancient India* (New Delhi: Abhinav Publications, 1979), 12.

2 Padhay, K.S., *Corruption in Politics: A Case Study* (Delhi: B.R. Publishing Corporation, 1986), 26.

3 Sarkar, J.N., *Mughal Administration*. (Calcutta: M.C. Sarkar and Sons Limited, 1935), 83.

4 Dwivedi, S.N. and G.S. Bhargava, *Political Corruption in India* (New Delhi: Popular Book House, 1967), 7.

have been marred with corruption. The TIB Household Survey in 2010 found people have perceived Judiciary as the most corrupt sector in Bangladesh<sup>5</sup>. One can therefore assume that something must be going wrong with the anti-corruption drive and careful review of this drive is an urgent necessity.

This paper contains discussion about (1) definition, nature and forms of corruption both from academic and contextual perspectives, (2) history and rise of political and administrative corruption in Bangladesh, and (c) recommendations of appropriate anti-corruption strategies premised on ensuring accountability and transparency in the public domain and in Bangladesh.

## **CONCEPTUALIZING POLITICAL AND ADMINISTRATIVE CORRUPTION: ACADEMIC PERSPECTIVE**

Corruption is a social, legal, economic and political concept enmeshed in ambiguity and consequently encouraging controversy. The ambiguity and controversy result from the fact that a number of competing approaches to understanding corruption are available. Naturally, definitions of corruption focus on one of several aspects of the phenomenon. Various approaches to corruption can be placed into five groups. These are public-interest-centered, market-centered, public-office-centered, public-opinion-centered and legalistic. Proponents of the public-interest-centered approach believe that corruption is in some way injurious to or destructive of public interest<sup>6</sup>. Market-centered enthusiasts suggest that norms governing public office have shifted from a mandatory pricing model to a free-market model, thereby considerably changing the nature of corruption<sup>7</sup>. Public-office-centered protagonists stress the fact that misuse by incumbents of public office for private gain is corruption<sup>8</sup>. Those who believe in public-opinion-

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5 The Daily Sun, 24 December 2010

6 Rogow, A.A. and H.D. Laswell, "The Definition of Corruption" in A.J. Heidenheimer ed. *Political Corruption: Readings in Comparative Analysis* (New York: Holt, Rinehart and Winston, 1970), 54.

7 Tilman, R.O., "Black Market Bureaucracy" in A.J. Heidenheimer ed. *Political Corruption: Readings in Comparative Analysis* (New York: Holt, Rinehart and Winston, 1970), 62-64.

8 Theobald, R., *Corruption Development and Underdevelopment* (London: Macmillan, 1990), 2.

centered definitions of corruption emphasize the perspectives of public opinion about the conduct of politicians, government and probity of public servants<sup>9</sup>. Others have suggested looking at corruption purely in terms of legal criteria in view of the problems inherent in determining rules and norms that govern public interest, behavior and authority<sup>10</sup>. The five approaches, as discussed above, have concentrated on the nature of corruption. Though the approaches throw some light they do not clarify the meaning of corruption to any satisfaction. Now there are four divergent views on the definition of corruption. The definitions have come from moralists, functionalists, social censurists and social constructionist realists. Nye, portrays corruption from a moral perspective as “a behavior that deviates from the formal duties of a public role (elective or appointive) because of private-regarding (personal, close family, private clique) wealth or status gains, or violates rules against the exercise of certain types of private-regarding influence”<sup>11</sup>. But this way of defining corruption suffers from a number of limitations. It tends to individualize a societal phenomenon and attempts to dichotomize as to what is good and what is bad. In the process societal contexts are ignored and the gap between formal norms and the underlying practice-girded norms are not analyzed<sup>12</sup>. The functionalists usually look at corruption in terms of the actual function that it plays in socio-economic development. Claims are made by functionalists that corruption flourishes as a substitute for the market system; offers an acceptable alternative to violence; increases public participation in public policy<sup>13</sup>. Some functionalists believe that

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9 Leys, C., “What is the Problem about Corruption?” in A.J. Heidenheimer ed. *Political Corruption: Readings in Comparative Perspective* (New York: Holt, Rinehart and Winston, 1970), 31-37.

10 Scott, J.C., *Comparative Political Corruption* (Englewood Cliffs, N.J.: Princeton Hall, Inc., 1972)

11 Nye, J.S., “Corruption and Political Development: A Cost-Benefit Analysis” in M.U. Ekpo ed. *Bureaucratic Corruption in Sub-Saharan Africa: Toward a Search for Causes and Consequences* (Washington, D.C.: University Press of America, 1979), 12

12 Caiden, G.E. and N. Caiden, “Administrative Corruption”, *Public Administration Review*, 37 (2009):3.

13 Leff, H.N., “Economic Development through Bureaucratic Corruption” in M.U. Ekpo ed. *Bureaucratic Corruption in Sub-Saharan Africa: Toward a Search for Causes and Consequences* (Washington, D.C.: University Press of America, 1979); see also Gould, D.J., “Administrative Corruption: Incidence, Causes, and Remedial Strategies in A. Farazmand ed. *Handbook of Comparative and Development Public Administration* (New York: Marcel Dekker, Inc., 1991) 467-480.

political and bureaucratic leaders may see a national interest in actively pursuing or tolerating a certain degree of administrative corruption<sup>14</sup>. The major criticisms against functionalists are that they ignore the political significance of deviance and lack any consideration of power, interest and social structure in their analyses and at the same time the whole question of the origins of corruption is not considered<sup>15</sup>. The two comparatively recent perspectives, i.e., social censure and social construction reality, view corruption radically differently from the other two approaches, i.e. moralists and functionalists. Both the approaches tend to look at corruption from a broad societal perspective. The proponents of social censure believe that in understanding corruption one should take into consideration the capacity of the state to produce a particular form of social relations and shift the theoretical emphasis to the interplay of law, ideologies and political economy<sup>16</sup>. On the other hand, social construction reality views corruption as problematic and the actors involved can be studied by relating them to contextual information on their social positions, interests and stakes in the system as well as on the political, economic and social conditions within which they function<sup>17</sup>.

In view of the multitude of approaches and views on corruption it is not easy to agree on a unanimous definition of the term. Two definitions of corruption can prove handy. The shorter definition of corruption includes “abuse of authority, bribery, favoritism, extortion, fraud, patronage, theft, deceit, malfeasance and illegality”<sup>18</sup>. The broader definition of corruption refers to “use of one’s official position for personal and group gain and that includes unethical actions like bribery, nepotism, patronage, conflict of interest, divided loyalty, influence-peddling, moonlighting, misuse or stealing of government property, selling of favors, receiving kickbacks, embezzlement, fraud, extortion, misappropriation, under- or over-invoicing, court-tempering, phony travel and administrative documents and use of regulation as

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14 Klitgaard, R., *Controlling Corruption* (Berkeley, C.A.: University of California Press, 1988).

15 Lo, T.W., *Corruption and Politics in Hong Kong and China* (Buckingham: Open University Press, 1993), 3.

16 *Ibid*, 5.

17 Pavarala, V., *Interpreting Corruption: Elite Perspectives in India* (New Delhi: Sage, 1996), 25.

18 Caiden, G.E., “What Really is Public Maladministration?” *IJPA* (1991) 37 (1):1-16.



bureaucratic capital<sup>19</sup>. In conformity with these two definitions of corruption the following definitions of political and administrative corruption are adopted here. Political corruption is “the behavior of (elected) public officials which diverges from the formal components - the duties and powers, rights and obligations - of a public role to seek private gain”<sup>20</sup>. Administrative corruption is defined as “the institutionalized personal abuse of public resources by civil servants”<sup>21</sup>. In both cases public officials (elected and appointed) can convert public office into private gain in many ways.

## FORMS OF CORRUPTION

Corruption takes many forms. These forms are: acceptance of money and other rewards for awarding contracts, violation of procedures to advance personal interests, kickbacks from developmental programs or multi-national corporations, pay-offs for legislative support, diversion of public resources for private use, overlooking illegal activities, intervening in the justice process, nepotism, common theft, overpricing, establishing non-existing projects and tax collection and tax assessment frauds<sup>22</sup>. These many types of corruption can be categorized further in terms of their nature. Corruption can be foreign-sponsored, institutionalized, outcome of political scandal and administrative malfeasance<sup>23</sup>. In foreign-sponsored corruption the main actors are public officials, politicians, representatives of donor and recipient countries. Bureaucratic elites, politicians, businessmen and middlemen are responsible for political scandal. Corruption becomes institutionalized as a result of the support provided by

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19 AAPAM, “Ethics and Accountability in African Public Services.” Report of the XIIIth Round Table of the African Association for Public Administration and Management (AAPAM) held at Mbabane, Swaziland, December, 1991, 2-6.

20 Kramer, J.J, “Political Corruption in Post-Communist Russia: The Case for Democratization”, paper presented at the XVIIth World Congress of International Political Science Association (IPSA) held in Seoul, Korea on August, 1997, 17-21.

21 Gould, D.J., “Administrative Corruption: Incidence, Causes, and Remedial Strategies in A. Farazmand ed. Handbook of Comparative and Development Public Administration (New York: Marcel Dekker, Inc., 1991) 467-480

22 United Nations, Corruption in Government. Report of an Interregional Seminar held in The Hague, The Netherlands on December (1990) 11-15. New York: The United Nations.

23 Caiden, G.E., “Toward a General Theory of Official Corruption”, Asian Journal of Public Administration (1988), 10(1): 3-26.

bureaucratic elites, politicians, businessmen and white-collar workers. In administrative malfeasance petty officials and interested individuals play major role. Corruption has been differentiated into three types - collusive, coercive and non-conjunctive<sup>24</sup>. In collusive corruption the corruptees themselves are willing and active participants in the process and use of corruption as an instrument for inducing wrong action or inaction on the part of authorities, deriving benefit greater than the costs of corruption on their part. Those in the position of power and authority force corruption upon the corruptee in coercive corruption. In non-conjunctive corruption benefits are obtained at someone else's cost and victims are unaware of their victimization. Five major strategies - mystification, distancing, folklore, colonization and pacification - have been used by the beneficiaries to protect, promote and sustain corruption in diverse contexts<sup>25</sup>.

In terms of size, corruption takes three forms- petty, middling and grand corruption<sup>26</sup>. Petty corruption involves lower level public employees, while middling corruption involves mid-level civil servants and local government representatives and local politicians. Grand corruption takes place at the behest of top most political and administrative functionaries of the state in connivance with top brass of multi-national companies.

## **CONTEXTUALIZING POLITICAL AND ADMINISTRATIVE CORRUPTION**

From sociological perspective, corruption is a social construct and therefore perception of corrupt behavior and responses thereto are society specific. Since the nature of social exchanges vary from country to country and so is the corruption, it is very unlikely that a uniform model of corruption prevention would be equally applicable in all societies. The success of anti-corruption drive will invariably depend upon its congruence to particular social norms and its capacity to invoke appropriate responses from the existing social exchanges. Before going into the discussion on combating political and administrative

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24 Arora, D, "Conceptualizing the Context and Contextualizing the Concept: Corruption Reconsidered", *Indian Journal of Public Administration (IJPA)* (1993), 39(1): 1-19.

25 Arora, D, "Conceptualizing the Context and Contextualizing the Concept: Corruption Reconsidered", *Indian Journal of Public Administration (IJPA)* (1993), 39(1): 1-19.

26 HDC, "The Corruption Menace," in *Human Development in South Asia 1999: The Crisis of Governance* (Karachi: Oxford University Press, 1999), 95-110.

corruption, it is therefore essential to look into our prevalent legal and cultural norms so as to understand our unique way of perceiving political and administrative corruption in the social exchanges.

### **Legal Perspective**

Anti Corruption Commission Act, 2004 and the Prevention of Corruption Act, 1947 are the two major statutes under which political and administrative corruption are defined and tried. Offences under sections 109, 120, 161-169, 217, 218, 408, 409, 477A, and 511A of the Penal Code 1860 constitute political and administrative corruption<sup>27</sup> as per the Anti Corruption Commission Act 2004. Sections 161-163 refer to the acts of taking illegal monetary and non-monetary gratifications by a public servant to favor or disfavor a person bypassing the law or influence other public officials for doing so. Section 164 deals with abetment in corruption by a public servant. Taking valuable gifts by a public servant from a client of his office is also a corruption as per section 165. Flouting law or fabricating a document by a public servant for inflicting injury to a person is also acts of corruption as per sections 166 and 167. Section 168 and 169 deter public servants from such trading and bidding for properties that they are legally barred from. Section 109 deals with abetment in corruption and section 120 with any act of concealment or omission for facilitation of a corrupt act.

According to the Prevention of Corruption Act 1947, dishonest or fraudulent misappropriation and conversion by a public servant of public properties entrusted under him in a motive to get private benefits is corruption. If a public servant or any of his dependents is found in possession of pecuniary resources or of property disproportionate to his known sources of income for which the public servant cannot reasonably account for, is also termed as corrupt under this Act.

The Government Servants (Conduct) Rules 1979 and the Government Servants (Discipline and Appeal) Rules 1985 also contain some acts of administrative corruption. The Conduct Rules 1979 considers the buying or selling properties and engaging in trade within the local limits of a government official without prior sanction of

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27 In term political and administrative corruption has not been used in the Act. Instead, the Act categorizes these offences as done by public servants that actually mean incumbent politicians and bureaucrats as per section 21 of the said Act.

the government as an act of misconduct. The Government Servants (Discipline and Appeal) Rules 1985 includes gross negligence of duty as misconduct. This Rules also clearly spells out administrative corruption in section 3e saying, a government servant may reasonably be considered corrupt, because (i) he is, or any of his dependents or any other person through him or on his behalf is, in possession (for which he cannot reasonably account) of pecuniary resources or of property disproportionate to his known sources of income, or (ii) he has assumed a style of living beyond his ostensible means, or (iii) he has a persistent reputation of being corrupt.

From the above discussion, it seems that Bangladesh has apparently an elaborate legal regime against administrative and political corruption. It encompasses all sorts of corruption from bribery/extortion to fraudulent use of public property, unaccounted possession of property, negligence of duty and even unsanctioned private financial transactions. A careful observation however gives the impression that there is fairly large scope for legal interpretation in most of these provisions. For example, defining a favor or disfavor by a public servant objectively is quite improbable in an administration where discretionary power of public servants is considerable. Similarly, abuse of power can also be put under cover through varied interpretation of official regulations. Fraudulence or dishonesty in misappropriation or conversion of public property is also subject to situational interpretation. Other legal provisions like unaccounted property, living standard or trading that might be fairly objectively defined can be effective only when complainants and law enforcers foster a value system that conforms to the legal provision. Otherwise, high degree of formalism is the likely possibility where both people and law enforcers remain indifferent to legal provisions and take the prevailing corruption as the order of the day<sup>28</sup>. It is therefore essential to construct the social perception of corruption and design anti-corruption measures accordingly, or undertaking initiatives to change the existing social construct of corruption to suit the anticipated anti-corruption measures.

### **Social Perspective**

No systematic survey has as of done on politicians and government

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28 Riggs, F. W, Administration in Developing Countries (Boston: HMC, 1964), 15-17.

officials to know their construct of corrupt activities. However, one can partially assume their perception about corruption from their comments and remarks. For example, in a recent row between the Deputy Commissioner of Pabna and the local MP over recruitment in district administration reveals that the concerned MP does not think recommending local persons for appointment as corruption<sup>29</sup>. During a conversation with a senior MP who is also a member of the Standing Committee on Law Ministry of the 9th Parliament, he revealed to this second author that recommending for appointment, transfer and posting, and distributing government social safety nets (VGD, VGF, TR, GR) fall under MP's discretion are not acts of corruption as people of their constituency mandated them for doing so. Thus politicians' perception of corruption creates room for misinterpreting legal terms like favor, fraudulence as mentioned in anticorruption laws.

Perception of the government officials is no less awry. An interesting work done by Hussain<sup>30</sup> revealed that bureaucrats of this country are prone to perceive corruption depending on the nature of the act and the circumstance under which it is done. For example, coming habitually late in office or taking gifts from others are not seen as corrupt acts. Even a corrupt act done under pressure from a powerful individual is not deemed as corruption by most of the public officials. There are innovative interpretations as well. During conversation with a Upazila Nirbahi Officer of a nearby Upazila of Dhaka, he said to the second author that taking gifts or other pecuniary benefits from clients in exchange for speedy and hassle free service is not corruption. He rather suggested that these should be seen as contingency adjustment for better functioning of the administration. Showing his cell phone, he explained that government provides only Tk. 600 a month for the cell phone. If he restrains himself to that limit, he could hardly coordinate the activities of Upazila (sub-district) administration, as he would not be able to make many important phone calls. Paying a bill by a client can be seen as contingency adjustment in this respect, he stressed.

People's perception is also equally enigmatic. A survey conducted by Institute of Governance Studies (2008) shows that people do not trust politicians and bureaucrats. But, most of them (64%) claimed that they elected honest candidates in the 9th parliament election.

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29 The Daily Star, 29 September 2010.

30 Hussain, S., *Corruption in Public Offices: Some Conceptual Issues in the Context of Bangladesh* (Kotbari, Comilla : Bangladesh Academy for Rural Development, 1990).

However the fact says that 46% MPs of the 9th parliament had criminal charges against them and 31% have criminal cases pending against them. At least, 54 MPs have strong allegation of corruption against them<sup>31</sup>. In other words, there is proven discrepancy between the social perception of corruption and the legal perspective to that end. In such a situation, an anti-corruption model based on legal regime that works hierarchically is likely to produce little result.

## HISTORY OF POLITICAL AND ADMINISTRATIVE CORRUPTION IN BANGLADESH

Corruption has a deep root in the society in this part of the world. A chapter in Kautilya's Arthashastra titled "Detection of what is embezzled by government servants out of state revenue" is so vivid and detail that it resembles largely any meticulously prepared official report of today on modes of corruption and how to control such corruption. Kautilya writing many centuries ago identified forty types of embezzlement committed by public servants<sup>32</sup>. In ancient India corruption was prevalent in administration, judiciary and trade. As indicated earlier corruption in one form or another became an integral part of politico-administrative systems during the Khilji and Tuglaq dynasties. The situation did not change during the rule of Mughals and the British. Many politicians were charged with corruption and debarred from politics after the promulgation of the first martial law in Pakistan in 1958. Many civil servants, some belonging to the elite Civil Service of Pakistan (CSP), were dismissed on corruption charges. It has been argued by some that Bangladesh society is a highly complex network involving reciprocal favors and obligations, and that as a result payoff is the lifeblood of the country<sup>33</sup>. Payoff benefits include money, jobs, luxury gifts, building supplies, overseas travel and the payment of foreign tuition bills, foreign medical bills, overseas hotel and restaurant bills and personal liabilities<sup>34</sup>. The symptoms of patron-client relationship are further reflected by the practice of some businessmen to maintain rest houses and high-class exclusive hostesses to entertain

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31 The Daily Prothom Alo, 5 January, 2009.

32 Padhay, K.S., *Corruption in Politics: A Case Study* (Delhi: B.R. Publishing Corporation, 1986).

33 Maloney, C., *Behavior and Poverty in Bangladesh* (Dhaka: UPL, 1986), 173.

34 Kochanek, S.A., *Patron-Client Politics and Business in Bangladesh* (Dhaka: UPL, 1993), 258.

important foreign guests and big bosses<sup>35</sup> Many of these big bosses are no doubt top-ranking politicians and senior civil servants.

### **Political Corruption**

Using position while in power to grant undue favor and benefit to one's relatives, friends and key supporters is a hallmark of politics in Bangladesh. All the effective rulers have been accused of either direct or indirect involvement in large-scale corruption. During the rule of Sheikh Mujibur Rahman (Mujib) that lasted little over three-and-a-half years (1972-1975) corruption became a major issue in public discussion. Mujib's tendency to grant political and financial benefit to his close relatives and associates is well known. Awami League (AL) activists received jobs in nationalized industries, grew rich as smugglers, appropriated Pakistani houses and sold off government permits and licenses to the highest bidders<sup>36</sup>. Sheikh Abu Naser, Mujib's only brother, and four sisters were believed to have benefited excessively from their ties of kinship with Mujib<sup>37</sup>. Some of the nouveaux-riches created through the distribution of patronage by the Mujib government were ringleaders of smuggling operations<sup>38</sup>. Election-related corruption was prominent during Mujib's rule.

Though General Ziaur Rahman (Zia) was not personally involved in corruption, he is credited with institutionalizing corrupt activities<sup>39</sup>. It must be said that he instituted legal actions or sacked some ministers on corruption charges, but these people were calling for decentralization in the internal working of his party, i.e. Bangladesh Nationalist Party (BNP). Local units of BNP became pockets of corruption. Zia's failed initiative of Sawmirvar Gram Sarker (Self-Reliant Village Government) as the model of "grassroots democracy" was built on loyalty to his party and patronage distribution. During his time corruption and misuse of power resulted in the wastage of almost 40% of the total resources

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35 Siddiqui, K.et al., *Social Formation in Dhaka City: A Study in Third World Urban Sociology* (Dhaka: UPL, 1990).

36 Kochanek, S.A., *Patron-Client Politics and Business in Bangladesh* (Dhaka: UPL, 1993), 258.

37 Franda, M., *Bangladesh: The First Decade* (New Delhi: South Asian, 1982).

38 Maniruzzaman, T., *Group Interests and Political Changes: Studies of Pakistan and Bangladesh* (New Delhi: South Asian, 1982).

39 Franda, M., *op. cit.*

earmarked for development<sup>40</sup>. Under Zia presidential, parliamentary and local level elections were to some extent manipulated in favor of his party<sup>41</sup>.

General Hossain Mohammad Ershad's (Ershad) government established record levels of venality<sup>42</sup>. Ershad's government was primarily based on calculated and selective patronage distribution to a favored few. In fact, under Ershad corruption prevailed in each and every sector of national life and the forms of corruption included petty corruption, project corruption and programmatic corruption<sup>43</sup>. Ershad holds the record of totally destroying the credibility of the electoral system of the country. Like Mujib and Zia before him Ershad considered the Election Commission as a normal administrative unit to be used and misused to serve his personal, coterie and party interests. The control of the Election Commission was ensured through the appointment of weak and pliable persons as Chief Election Commissioner and Election Commissioners. Introduction of the upazila (sub-district) system in 1982 not only legitimized and strengthened his rule but also at the same time contributed immensely to the spread of corruption to the grassroots level and in the process vitiated local development and adversely affected local participation. Politics of patronage and corruption became the order of the day in the delivery of local services. An overwhelming majority (93%) of the respondents in a survey conducted in 1991 and 1992 in two upazilas in the districts of Kurigram and Mymensingh held the view that corruption had increased significantly since the introduction of the upazila system<sup>44</sup>. Most respondents in the same survey felt that the upazila council was the nerve centre of corruption, nepotism and patronage networks<sup>45</sup>. The study based on survey indicated how upazila councils in study areas extended their patronage networks by distributing various construction tenders and work orders to their relatives, friends and political allies; leasing out hats, bazars (rural

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40 Kochanek, S.A., *op. cit.*

41 Khan, M.M. and H.M. Zafarullah, "The 1979 Parliamentary Elections in Bangladesh", *Asian Survey* (1979), 19(10): 1023-1036.

42 Blair, H. et al., "The Bangladesh Democracy Program (BDP) Assessment: Final Report". Washington, D.C. (Bureau for Private Enterprise, USAID, 1992).

43 Kochanek, S.A., *op. cit.*

44 Siddiquee, N.A., *Decentralization and Development Theory and Practice in Bangladesh* (Dhaka: University of Dhaka, 1997).

45 *Ibid*



markets) and jalmahals (water bodies) to their chosen parties; issuing these same people with licenses and permits and selecting the members of their own lobby for various project committees<sup>46</sup>. During Ershad's time the politics-business nexus in the arena of corruption became rather prominent. He is known to have received a fixed percentage on any deal involving any amount of money. This contributed to the emergence of a class of fabulously rich people without much effort on their part and who had little understanding of business ethics or norms and adversely affected those who wanted to pursue business in the traditional manner. These new rich people also became prominent in politics as members of parliament and cabinet and eventually some of them became leaders of different chambers and other business bodies, thereby cementing a close link between politics and business premised on corruption and patronage. One of the outcomes of such a development has been increasing criminalization of politics. Individuals with proven track records as criminals became an indispensable party in this unholy alliance between Ershad and his promotees in business. It needs to be added that both Mujib and Zia were instrumental in making individuals with obscure background millionaires. But the difference between Ershad and Mujib and Zia is that the former transgressed all norms, bent rules and broken regulations in order to excessively profit from all state business transactions while the latter two operated within limits of civility.

It has been anticipated that corruption will be reduced to a tolerable limit with the restoration of democracy in 1991. Contrary to this ideal as well as popular belief, corruption has not only skyrocketed but also taken up many new dimensions. Among them, tender hijacking by ruling regime hooligans, block allocation in annual budget, politically motivated award of Monthly Payment Order (MPO) of schools and colleges, giving licenses/permits on political considerations, politicization of state-sponsored rural development and livelihood programs, politicization of administration and judiciary are prominent.

The 1996 AL regime was notorious for granting banking and private university licenses on partisan consideration. During this regime, the rise of so called Mafia MPs and their unrestrained corruption and terror put a lasting imprint in the public mind.

Instead of solely promoting and depending on Mafia MPs, the 2001 BNP regime institutionalized a form of syndicate corruption

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46 Ibid

popularly known as ‘2% of Hawa Bhaban’. The “Hawa Bhaban” was organized and run under the leadership of the prime minister’s elder son. It was widely believed that no state contract could be awarded or large business launched without giving generous commission to Hawa Bahaban- centric political syndicate. It was alleged that this syndicate has siphoned off Tk. 20000 crore from the power sector alone. Another conspicuous dimension is the extortion of businessmen by political cadres. During this time Bangladesh also earned the ignominious distinction of the top most corrupt country for consecutive five times (from 2001 to 2005) in the global corruption barometer of Transparency International since the revival of democracy. The global corruption barometer report of 2010 also blamed the politicians for instigating private sector corruption<sup>47</sup>.

The Probe Committee for unearthing the culprits behind the share market debacle of 2010 found in its report that frontline politicians of the ruling and opposition parties and government officials have made windfall money out of this crisis. Many business enterprises offered private placement shares to those politicians and government officials at below face value as bribe to hide their wrongdoing<sup>48</sup>. Party finance and maintaining the much needed patron-client relationships starting from minister and MPs to rank and file of political parties also fueled corruption under subsequent democratic regimes.

Such unrestrained political involvement in corruption poses many dangers to the nascent democracy of Bangladesh<sup>49</sup>. First, continued corruption may fuel and perpetuate discontent and resentment among citizens and force them to look for and live with an alternative form of government. This has been evident from the media reports and civil society’s reaction that welcomed the last army-backed caretaker government. Second, shameless selling of politics in many democratic counties leads to distortion of policies and contributes to transforming the political playing field even more uneven. This is conspicuous from desperate move of the subsequent ruling regimes to establish control over state apparatuses to win upcoming elections and the opposition parties’ all out effort to destabilize the incumbent government. Third, corruption if unchecked, only spreads and engulfs other institutions

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47 The Daily Sun, 23 December 2010.

48 The Daily Star, 10 April 2011.

49 Khan, M. M, “Political and Administrative Corruption: Concepts, Comparative Experiences and Bangladesh Case”, paper commissioned by Transparency International Bangladesh, 1997.

and sectors including public administration and business. Fourth, though corrupt leaders can be thrown out of office in a democracy; the situation changes drastically if the culture of corruption is widespread in it. Then the possibility remains that the incumbent corrupt leader is to be replaced by another who is equally corrupt. Finally, widespread cooperation among different segments within the society is needed for appropriate functioning of a democracy. But under conditions of widespread corruption diminution of cooperation is likely as in such a situation only the corrupted would cooperate with each other as long as mutual benefits persist.

### **Administrative Corruption**

Corruption has been and continues to be an integral part of culture. The level of corruption varies depending on how influential a position the particular civil servant holds<sup>50</sup>. The civil servants have by and large become accustomed to live a life style far beyond their legal income. The citizens have accepted the stark reality that nothing moves without adequately satisfying the concerned civil servant<sup>51</sup>. An opinion survey conducted in 1992 of household heads in Dhaka City found that 68.25% of respondents paid bribes to concerned officials to get services<sup>52</sup>. The findings of the survey indicated that members of law enforcing agencies, customs and income tax departments were involved in administrative corruption<sup>53</sup>. Another finding of the survey reaffirmed the commonly held belief that (a) the higher the level of bureaucracy the less the frequently but higher the amount of bribe; and (b) the lower the level of bureaucracy the higher the frequency but less the amount of bribe. The household survey of TIB regularly publishes ranking of government agencies in terms of prevalence of corruption perceived by the citizens. The alarming aspects of these reports clearly point out two glaring facts. First, large spending government agencies are more corrupt than other agencies, meaning that substantial chunk of public resources is vulnerable to embezzlement and larger portion of the citizens are likely to fall victims of corruption. Second, law

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50 Khan, M.M., *Administrative Reforms in Bangladesh* (New Delhi: South Asian, 1998).

51 Ibid

52 Aminuzzaman, S.M., "Accountability and Promotion of Ethics and Standard of Behavior of the Public Bureaucracy in Bangladesh", *Asian Review of Public Administration* (1996), 8(1): 13-27.

53 Ibid.

enforcing and regulatory bodies are more corrupt than other agencies; meaning agencies that are supposed to act as protectors are increasingly turning out to be predators.

Now one may ask the question as to why such large-scale administrative corruption exists. The reasons for such corruption can be summed up<sup>54</sup>. First, civil servants involved in corrupt practices in most cases do not lose their jobs. Very rarely they are dismissed from service on charges pertaining to corruption. Still more rarely they are sent to prison for misusing public funds. They have never been compelled to return to the state coffer their ill-gotten wealth. Second, people have a tendency not only to tolerate corruption but also to show admiration to those civil servants who make a fortune through dubious means. The underlying assumption is that it does not matter how one has acquired wealth as long as he has done so. Third, it is easier for a citizen to get quick service because he has already paid the civil servant rather than wait for his turn. Fourth, there is now social acceptance of corruption by public officials. Fifth, barring occasional public pronouncements, the representatives of the people, i.e. politicians in power, are unwilling to take effective measures to curb corrupt practices in public dealings.

## **ANTI CORRUPTION MEASURES TAKEN SO FAR**

Bangladesh inherited from British and Pakistani rulers a fairly elaborated legal regime for anti-corruption. The important laws that formed the legal regime included:

1. Criminal Law Amendment Ordinance, 1944 (Ord. XXXVIII of 1944)
2. Prevention of Corruption Act, 1947
3. Anti-Corruption Act, 1957 (Act XXVI of 1957)
4. Anti-Corruption Rules, 1957
5. Criminal Law Amendment Act, 1958 (Act XL of 1958)
6. Anti- Corruption (Tribunal) Ordinance, 1960 (XVI of 1960)
7. Criminal Law Amendment (Sanction for Prosecution) Rules, 1977

The Bureau of Anti- Corruption under the Prime Minister's Office was the entrusted body to probe and frame charges of corruption cases. A Conduct Rules and the Discipline and Appeal Rules for the

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54 Khan, M.M., *Administrative Reforms in Bangladesh* (New Delhi: South Asian, 1998).

civil servants were formulated in 1979 and 1985 respectively. Despite increasing intensity of political and administrative corruption, no reviews of the prevailing legal and institutional regime meant for anti-corruption was undertaken till 2003. After continuous pressure from the development partners and civil society elements with Transparency International Bangladesh (TIB), an international NGO involved in anti-corruption campaign, at the lead, a flurry of reforms came one after another. Interestingly, the non-elected Caretaker Government of 2007 introduced many of these reforms. These reforms undertaken during the tenure of various governments include:

1. Public Procurement Regulation 2003. This was an interim measure to establish uniform standard, transparency and accountability in public procurement before framing of a full-fledged law.
2. Establishment of Independent Anti Corruption Commission (IACC). With the passage of Anti-Corruption Commission Act 2004, an Independent Anti Corruption Commission was established in place of the now defunct the Bureau of Anti Corruption (BAC). With the promulgation of the new Act, Anti-Corruption Act 1957, Anti-Corruption Rules 1957, and Anti-Corruption (Tribunal) Ordinance 1960 ceased to exist. The IACC was supposed to be financially and operationally free from the control of the executive branch.
3. Public Procurement Act 2006 (PPA 2006) and Public Procurement Rules 2008 (PPR 2008). These statutory guidelines prepared to bring uniformity, efficiency, transparency and accountability in public procurement that traditionally has been the major source of corruption. The Central Procurement Technical Unit (CPTU) under the Implementation, Monitoring and Evaluation Division (IMED) was established to oversee the public procurement management.
4. Office of Tax Ombudsman. This Office was created in 2005 with a view to establishing transparency and accountability of the tax officers in valuation and realization of taxes and duties. However, the office was disbanded in 13 September 2010.
5. Independent Regulatory Bodies for Service Sectors. Bangladesh Telecommunication Regulatory Commission (BTRC) and Bangladesh Energy Regulatory Commission (BERC) were established in 2002 and 2003 respectively with a view to service and ensure quality and effective service delivery and price fixation in the concerned sector.
6. Independent Election Commission Secretariat. Initiated by the

- last Caretaker Government, an independent secretariat of the Election Commission (EC) was established through promulgation of an Act in 2009 by the present government. The objective is to increase Commission's control over the manpower, finance and regulatory enforcement in order for EC to undertake free, fair and credible national and local elections.
7. Amendment of Electoral Laws and Regulations. Initiated by the last Caretaker Government and ratified by the present government, many significant changes were brought in the Representation of People (Amendment) Act 2009 and Revised Code of Conduct for candidates participating in elections at different levels. Mandatory registration of political parties, revelation of important information about party management, submission of audited financial statement of parties, mandatory disclosure of eight categories of information on affidavit by electoral candidates is among the few important changes.
  8. Right to Information Act 2009 (RTI Act 2009). This Act was promulgated in March 2009 based on an earlier ordinance made by the last Caretaker Government to ensure people's access to government information that was long kept secret under Official Secrecy Act 1923 and Conduct Rules 1979. An Information Commission (IC) has also been established to oversee the process and investigate into complaints filed by information seekers.
  9. National Human Rights Commission (NHRC). The NHRC was established in July 2009 by promulgating the concerned Act. The NHRC aims to protect human rights, especially rights to life, liberty, equality and dignity as defined in different international conventions and ratified by Bangladesh government. The NHRC is authorized to investigate any act of human rights violation by public officials upon complaints filed by the aggrieved person and suggest punitive measures to government for redressing such violation.
  10. Separation of the Judiciary from the Executive. The last Caretaker Government made amendments to code of criminal procedure to separate the judiciary and make it independent.
  11. Money Laundering Prevention Ordinance 2008. This Ordinance provides for preventing ill-motivated transfer, transformation and illegal remittance to and from abroad of unaccounted money. This statute also provides for recovering assets that has been unlawfully transferred abroad. A Financial Intelligence Unit (FIU) has been established under Bangladesh Bank for this purpose.

12. Ratification of United Nations Convention Against Corruption (UNCAC). The last Caretaker Government ratified the UNCAC in February 2007. An action plan was prepared with four thematic areas: (1) changes in the legal framework to conform to UNCAC standard, (2) changes in practice, (3) sharing progress with United Nations Office on Drugs and Crime, and (4) coordination, management and communication of UNCAC compliance<sup>55</sup>. The Ministry of Law, Justice and Parliamentary Affairs (MOLJA) identified existing gaps to meet the promised UNCAC standard and also completed an UNCAC compliance and gap analysis. The gap analysis was conducted in five thematic areas<sup>56</sup>. The areas were: (1) prevention of corruption includes anti-corruption policies and measures, public sector integrity, public procurement, public finance and access to information; (2) criminalization and law enforcement; (3) international cooperation including extradition and mutual legal assistance; (4) asset recovery includes laundering and proceeds of crime, prevention and detection of proceeds of crime, and recovery of proceeds of crime; and (5) technical assistance including capacity building of government officials and collection, exchange and analysis of information on corruption.

The aforesaid brief list of anti-corruption reforms gives an impression that Bangladesh is on the brink of success in its combat against corruption. But in reality corruption remains unabated and unrestrained.

## **WHAT WENT WRONG WITH THE PAST ANTI-CORRUPTION DRIVES?**

Much of the failures of the immediate past and current anti-corruption measures can be explained by lack of political commitment, old bureaucratic orientation and absence of a vibrant civil society (Khan, 1997:22). Therefore, following recommendations are premised on demonstrated political commitment, right sizing of bureaucracy and reducing administrative discretion, making anti-corruption laws and enforcing institutional accountability and increasing opportunity for public participation in governmental decision making. The factors

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55 MOLJA, UNCAC Action Plan. Dhaka, 2009.

56 MOLJA, (2008). UNCAC: A Compliance and Gap Analysis. Dhaka.



identified as 'causes' of corruption are actually symptoms of some deeper malaises. For example, lack of political commitment is a symptom of the established political norms that consider a well-fed party rank and file and loyal bureaucracy are more important to win an election rather than combating corruption. Overtly manipulated privatization programs and collusive state-market nexus are possible under any government. Foolproof anti-corruption laws and independent law enforcers if formulated and appointed will result in formalism without substance. Therefore, the existing symptom based anti-corruption approach should be replaced with cause-effect approach for better result in the future.

Referring to Susan Rose-Ackerman, Ahmad identified four types of political and administrative corruption in Bangladesh<sup>57</sup>. The first type is kleptocracy in which monopolist bribe taker extracts rent by restricting supply of an output far lower than the demand. He mentioned corruption in energy and telecommunication sector, licensing of banks and insurance companies and privatization under this category. Government in such cases follows a system of taxes, regulation or deregulation; subsidies and price control policy that maximize rent seeking opportunities. Here politicians and bureaucrats convert their political and administrative power into economic power and behave like a businessman and foster market values like self interest maximization and property rights.

The second type, i.e. bilateral monopoly is a situation where a bribe taker faces one or few syndicated bribe givers and extracts rent through mutual understanding on sharing the illegal benefits. The bribe taker willfully distorts the term of government contracts, or misinterprets rules, or hides information in order to give undue favor to bribe giver. Corruption in advanced and highly restrictive sectors like energy and mineral resources and defense fall within the purview of bilateral monopoly. In this type of corruption, politicians and bureaucrats turn into family members of the syndicate bribe givers and foster private values like loyalty, nepotism, and favoritism.

Mafia domination is the third type of corruption in which few bribe givers face multiple bribe takers. The Mafia, as an organized crime group, protects bribe givers and takers for gaining control over its zone of influence and restricts entry of others thereto. When businessmen

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57 Ahmad, M., "Governance, Structural Adjustment and Corruption in Bangladesh", paper commissioned by Transparency International Bangladesh, 2000.



patronize ‘mastaans’ (musclemen) and bribe police to protect their ‘mastaans’, they act like Mafia. Similarly, when trade union leaders and bureaucrats resist administrative reforms they fall in this category. In this case, bureaucrats and businessmen turn into politicians and foster political values like power to make public decisions and act as loyal followers of those who protect their interests.

The last type is competitive bribery where multiple bribe takers face multiple bribe givers and the exchange between them takes place on competitive terms and conditions. Petty corruption at the lower level of administration falls under this category. Here street-level bureaucrats, politicians and clients all convert into buyer and seller and foster market values like exit, profitable exchange and competition.

In all the four cases of corruption, politicians and bureaucrats convert public properties that are supposed to be public or common goods into toll goods (exclusive but non-rival) and even into private goods. They also transform their public character into businesslike or family like character. Bureaucrats and businessmen also convert their roles like that of the politicians for getting secure access to corrupt use of public offices. By converting their ideal role into distorted one, they integrate political, administrative and economic power to maximize rent. In other words, whenever corruption takes place it distorts the public nature of the government and fosters derailed values that are in contradiction with public values. Earlier we explained that the social perception of corruption by politicians, bureaucrats and people is at odds with legal perspective and that is why high degree of formalism prevails. In such a situation, anti-corruption strategy solely based on legal regime is unlikely to produce the desired result as no actors find it useful to their interests. Rather, the maximum possibility is that such legal regimes might turn into another instrument for extracting rent.

On the other hand, anti-corruption is essentially a social good. It cannot be traded like commodity. If anti-corruption prevails all will get benefit irrespective of paying for such benefits. Likewise, if anti-corruption takes back seat all has to suffer. It can therefore be argued that effective anti-corruption strategy should strive for creating a public domain where public values like public interest and collective action will prevail.

## **THE NATURE OF PUBLIC DOMAIN**

Public domain is an overlapping sphere between the state and the market that relies on interdependency of state, non-state and market

actors for the supply of non-tradable social goods<sup>58</sup>. The social goods underscore that these are created and supplied based on social needs and in no way are the products of market failure. Social goods are non-tradable like public goods that come out of market failure. Social goods fundamentally differ from public goods as the latter is the sole responsibility of the government and the former is the collective responsibility of the society that consists of state, non-state and market actors. It is this very nature of collective responsibility, that public domain creates inevitable interdependency among different actors and operates relying on cooperative as well as strategic collective action.

Maintaining neighborhood roads and environment in good shape can be a good example of cooperative social good for local people. The state might not be willing to put optimum effort in this respect because of complex land acquisition requirement and budgetary support for maintaining and monitoring the environment. Market can be distorted since each individual might find alternative use of land and environment best suited to his unique need. Such inertia from state and market to neighborhood roads and environment will put each of them worse off in the long run. The state might find it more costly to acquire land and restore environmental balance once the neighborhood becomes congested. Each individual might find the locality increasingly deficient to meet his movement and safety needs in the environment and sees his land value decreasing. Cooperative collective action from each of those actors earlier in the form of voluntary release of land, compensation and regulation would make them better off.

Anti-corruption initiative can be a good example of strategic collective action when seen as social good and thus an ingredient of public domain. Anti-corruption initiative is a social good because it is non-exclusive and non-rival and not a product of market failure. Many instances can be given from the market where corruption is rare. Deregulation of the telecommunication sector in Bangladesh is a good example in this respect. Before deregulation, this was one of the biggest corrupt sectors. After market penetration of private cell phone and PSTN companies, cost of talk time, line connection charge, waiting time, frequency of wrong calculation of bills has been significantly reduced (Cameron, 2005).

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58 Drache, D., "The Return of the Public Domain After the Triumph of Market" in Dreche, D. (ed.) *The Market or the Public Domain* (London: Routledge, 2001).

The four types of political and administrative corruption that we earlier discussed clearly show that corruption takes place either because politicians and administrators bypass rules to extract rent, or they collude with selected businessmen to establish control over public property, or government fails to regulate market behavior that violates competitive norms. All those cases suggest that corruption originates from government failure. If so, it can be reasonably argued that an anti-corruption system heavily dependent on the government which itself is corrupt is destined to fail to achieve its objective.

As a social good in the public domain, anti-corruption initiatives demand strategic collective action from the state, non-state and market actors. Strategic collective action relies on long-term goal and goal alignment between actors, active institutional partnership, and actions based on environmental assessment. Public domain does not undermine the state. Drache (2001) argues that public domain though not synonymous of the state but the state has to play big role in advancing many public purposes. Neither is the role of market redundant in public domain. Consumer's rights protection is a public domain in which market mechanism plays vital role. The primary emphasis of public domain is on the interdependency between different actors to secure a social good and make arrangements for collective action. The boundary of public domain is flexible and expands with the creation of new interdependencies and contract when interdependencies cease.

The problem of public domain is therefore not a legal or regulatory problem, but a problem of interdependency and collective action. The success of anti-corruption initiatives will depend on how effectively they could encourage interdependency among different actors and secure their collective action through incentives. Marquand (2001) argues that the reduced transaction cost instead of individual cost and benefits works as incentive for collective action in the public domain. Transaction cost as an incentive requires establishment of private contracting and mechanisms to institutionalize transparency and accountability to avoid post-contract moral hazard<sup>59</sup>. Explaining transaction cost nature of public domain is outside the scope of this paper. What is relevant here is to mention that anti-corruption initiatives should consider creating role for each actor through contracting and establishing measures for collective accountability

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59 Haque A. M. and Kalimullah, N. A., "Transaction Cost Analysis of Statutory Audit in Bangladesh", *The Journal of Administrative Studies* (2010), 3.

and transparency of all actors. In public domain, accountability and transparency are not unilateral, i.e. government has to be accountable and transparent to others. Collective accountability and transparency is multilateral whereby each actor is accountable and transparent to other actors based on the contract.

The following could be some general strategies to bring anti-corruption drive in Bangladesh into public domain:

1. State parties would involve in anti-corruption institutions. These institutions should not be monolithic like solely depending on an IACC. Monolithic institutions will hold so large jurisdiction that they will create difficulties for non- state actors and market actors to define contract and impose excessive burden for collective action. Rather, sector specific anti-corruption bodies can be created with relatively small jurisdiction that helps establish properly defined contract.
2. Sector specific organizations can be civil society organizations (CSOs), research and advocacy groups (R&AGs), community based organizations (CBOs), associations of print and electronic media could act as non-state actors.
3. Whereas applicable, sector specific business and consumer associations can act as market actors.
4. To bring anti-corruption drive into public domain, sector specific actors can work out contracts defining specific role and responsibilities of each actor, mode of collective action, mode of resource sharing and performance goal. This contract will be used as standard for accountability and transparency.
5. Information asymmetry should be reduced between all actors by free flow of information under contractual obligation.
6. Value alignment on anti-corruption should get primacy. There should be consensus on the definition of corrupt acts, what cost they inflict, what contribution each actor to make to anti-corruption, what incentives they could have and what could be their strategies. Marquand<sup>60</sup> argues that value alignment in public domain can only be established if established values are public in the sense that they secure cooperation and collective action.

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60 Marquand, D., "Reinventing Gladstone: the Public Conscience and The Public Domain", in Dreche, D. (ed.) *The Market or the Public Domain* (London: Routledge, 2001).

## RECOMMENDATIONS FOR FUTURE ACTION

We have already discussed that Bangladesh has an elaborate legal regime for combating political and administrative corruption and an Independent Anti Corruption Commission (IACC) has been created as the monolithic organization for enforcing that legal regime. Prevailing anti-corruption laws provided for a unilateral accountability system that specifies responsibilities of the government agencies only. Nevertheless, R&AGs like TIB, Institute of Governance Study and CSOs like Shujan emerged as active non-state actors for anti-corruption. However, these organizations play mainly undefined and voluntary role, and even sometimes engage in conflict with government agencies. Market actors under the current anti-corruption arrangement do not have any role. This scenario is antithetical to public domain approach to anti-corruption drive. Some broad based recommendations are given below to bring Bangladesh's anti-corruption drive into public domain and institutionalize accountability and transparency of each actor of the public domain.

1. Creating value alignment through research, education and advocacy among different actors of the public domain. Collective action and cooperation needs consensus among the actors involved in the anti-corruption. Consensus would be impossibility if there were gulf of difference among the actors in terms of values about anti-corruption. We have earlier showed that people, politicians and administrators differ in their respective perception of corruption and what have been said in the laws. Research should be conducted to identify values of different actors pertaining to corruption. A minimum consensus has to be reached through education and advocacy and anti-corruption laws have to be amended to conform to those values. Otherwise, laws would exist only to violate or abuse them.
2. The size of the government should be reviewed to reengineer its operations so that contract between state, non-state and market actors can be easily reached. If provisions are made through market or NGOs, contract can be reached with relative ease, as was the case in telecommunication and health sectors in Bangladesh.
3. Sector specific anti-corruption agencies should be created instead of a monolith like IACC. The current IACC can be reconstituted into sector specific ACCs, e.g. an ACC (Finance) to deal with corruption of Ministry of Finance and other financial

- institutions, an ACC (Regulation) for ministries with regulatory responsibilities, e.g. land, home, commerce and industry, environment, etc. an ACC (Development and Service) to deal with ministries like local government, public works, education, health etc. Sector specific ombudsman can be created to prevent abuse of power and to ensure compliance of citizen charters. Like Bangladesh Energy Regulatory Commission (BERC), a consumer rights protection commission can be established to fix quality and price of consumer goods.
4. Sector specific CSOs and CBOs should be created to deal separately with corruption like graft, abuse of power, poor quality, political corruption, consumer rights, human rights violation, etc.
  5. Anti-corruption laws should be amended to establish contractual obligations among sectoral anti-corruption actors. For example, laws related to regulatory corruption will establish mutual obligations of ACC (Regulation), regulatory government agencies, Ombudsman (Regulation), CSOs that deal with regulation and market actors. Contract will include mutually agreed definition of corrupt act, each actor's responsibility in anti-corruption, the mode of operations, the mode of collective accountability and transparency.
  6. For accountability of state agencies, punitive actions can be initiated. But, CSOs and market actors should make contribution and have incentive to make them accountable. Business organizations can contribute to a fund that will be distributed among CSOs that will render service to anti-corruption following contractual standard. Nominal anti-corruption levy can be imposed on the service seekers to make them aware about anti-corruption drive and to build habit of making contribution thereto.
  7. Current laws of Information Commission and National Human Rights Commission are reactive in the sense that they act on citizens' complaint. More active engagement between these bodies, CSOs and people should be encouraged. These bodies and CSOs can even think of providing value added service. For example, people can seek information on government through Information Commission as well and pay a service charge for it.

## CONCLUSION

Traditional approach to anti-corruption in Bangladesh has proved inadequate and ineffective. People, politicians and administrators differ in their perception of corruption. The government- centric enforcement of anti corruption legal regime has also been ineffective due to conflict of interest. In contrary, the prescribed public domain approach to combating political and administrative corruption advocates for a multiple actor centric and consensus based anti-corruption drive that is primarily based on collective action and collective accountability. The broad based recommendations given here will facilitate interaction among different actors to get into a contract that will assign mutual responsibility against corruption and multilateral accountability for result.





## *Chapter 4*

# GOVERNANCE AND HUMAN RIGHTS: EXPERIENCES OF BANGLADESHI NON-GOVERNMENTAL ORGANIZATIONS

*Sabbir Ahmed*

## INTRODUCTION

The enormous growth of Non-governmental Organizations (NGOs) with increased foreign funding has brought the issue of internal and external governance of NGOs into the limelight of discussion amongst policy makers and academicians in Bangladesh. The funding that the NGOs receive mostly from foreign donors and partly from the government is public money. So the proper use of this money for the development of the targeted poor is only considered as legitimate and expected. The use of this money for personal gains is simply corruption, stultifying the role of NGO as an effective agent of development in Bangladesh. In recent times, some national NGOs in Bangladesh drew wider media attention due to corruption by their leaders. Consequently, donors and the state have withdrawn their support from those NGOs. Allocation of resources stopped midway, resulting in the loss of human rights (social and economic rights) of the poor NGO clients/members. The right to credit, health care and education were thus denied to the poor. The pilferage of resources was made possible due to lack of sound financial accountability of Bangladeshi NGOs. Be that as it may, it is not claimed in this article that all NGO leaders are corrupt. Some NGOs, for example, *Rangpur Dinajpur Rural Services (RDRS)*, *Manusher Jonno Foundation* have earned appreciation for their professionalism. But corruption in those NGOs whose heads are also the founder of that organization has been an evident phenomenon in Bangladesh. Against this backdrop, this paper addresses corruption in Bangladeshi NGOs and its implications for human rights, in particular for economic and social rights of the poor.

For the convenience of analysis, this paper is divided into six sections. The first section deals with the role of NGOs in development of Bangladesh. It further discusses the trends of financing into NGOs.

The second deals with weaknesses of internal and external regulatory governance of NGOs causing corruption in Bangladeshi NGOs. The third section delineates the concepts used in this paper. The fourth section looks into corruption in three national NGOs: *Samata*, Gano Shahajja Sangstha (GSS) or Association for People's Help and *Proshika*. The selection of these NGOs was influenced by the involvement of Executive heads of these two NGOs in the abuse of organization's resources and decision-making power to their personal gains. The fifth section sheds light on the implications of corruption for human rights. The sixth section outlines the recommendations. This section ends with a conclusion.

## NGOS IN DEVELOPMENT OF BANGLADESH

Bangladesh's NGO sector grew to its present size and prominence at a remarkable speed. Bangladesh has a long history in the community-level welfare activity. The institutionalized nonprofit sector was insignificant at the time of Bangladesh's independence in 1971. The leading NGOs of the present cut their organizational teeth on postwar relief activities in the 1970s. Their initially radical edge was blunted early on, as most NGOs began to prioritize service provision over 'conscientization' and mobilization work in the 1980s. This new thrust reflected donor preferences for a less radical model of civil society and for more emphasis on service provision; also NGOs themselves began to recognize that efforts to mobilize the poor without also providing them with economic inputs were unlikely to succeed. This shift meant that NGOs were, with some justification, viewed as aid-dependent service delivery agents.

Bangladesh's achievements in poverty reduction and human development have been credited in substantial part to the mix of public and private service provision, including the pioneering approaches of its development NGOs. A plural approach to poverty reduction and social service delivery in Bangladesh remains necessary because of the scale of the problem, and because of its severe and intractable nature. Acting alone, the government of Bangladesh cannot command the resources, personnel, expertise, or administrative reach necessary to maintain progress on poverty reduction. Between them, government and NGO programs have achieved wider total coverage in terms of services for the poor and have developed innovative, replicable approaches to tackling poverty. Government-NGO partnerships also permit the scope for both to exploit their comparative organizational advantages to enhance service provision outcomes.

The growth of NGOs in Bangladesh has occurred in response to the fragile and fragmented development of the country's formal political institutions and policy bodies on the one hand, and trends in donor aid, on the other. The 1970s and 1980s witnessed a political process in which successive national leaders adopted remarkably similar strategies – political power was personalized and centralized and resources were used arbitrarily to serve respective networks of followers and allies. The reciprocal exchange of favours and loyalty not only served to manipulate vote banks, but it also became the only medium through which political leaders could emerge. Leadership therefore reflected a competence in the art of managing followers, not in grappling with the fundamentals of economics, policy and other development issues.

Since NGOs have significantly expanded their services by scaling up innovative antipoverty programs nationwide. Notable innovations that were expanded include delivering credit to the previously “unbankable” poor, developing a non-formal education program to cater to poor children, particularly girls, and using thousands of village-based community health workers to provide doorstep services. The poor women constitute a large proportion of NGO beneficiaries, despite the persistence of strong patriarchal norms, also exemplifies of institutional innovation. The unique role of Bangladeshi NGOs is not confined to the delivery of social services and pro-poor advocacy. NGOs have developed commercial ventures in order to link poor producers with input and output markets, as well as to develop a source of internally generated revenue for the organizations. The 2005 Poverty Reduction Strategy Paper (PRSP) viewed the NGOs' role as an integral part of efforts to achieve national poverty reduction targets, particularly by delivering and facilitating pro-poor services.

In Bangladesh, there are an estimated 2,000 development NGOs in Bangladesh, and small group of them are among the largest such organizations in the world. These big NGOs: Bangladesh Rural Advancement Committee (BRAC), Association for Social Advancement (ASA), and *Proshika*- have nationwide programs, with tens of thousands of employees and multimillion dollar budgets. Most NGOs in Bangladesh are small, however, and have limited managerial and staff capacity.

NGOs in Bangladesh provide a strikingly homogeneous set of services, with credit dominating. A survey of 300 branches carried out by the World Bank in 2003 showed that while the total range of NGO interventions is wide, the typical NGO branch provides only three or four services. About 90 percent of all NGO branch offices

provide credit services, followed by health (56 percent), sanitation (52 percent), and education (45 percent). A parallel community survey conducted as part of the 2003 NGO survey shows that the service delivery priorities identified by communities closely match the services that NGOs provide. Public awareness and advocacy are also common areas of NGO work: 93 percent of NGO branches reported awareness-raising activities, usually relating to sanitation, health and social issues, while 42 percent reported having lobbied local or national government during the previous year<sup>1</sup>.

The impact of microcredit on incomes and reducing household vulnerability to seasonal and other shocks is of critical importance to the rural poor. Improvements in key social indicators of well-being are also associated with microcredit borrowing, most notably measures of female empowerment, children's schooling and health status. These social gains in part reflect the complementary social mobilization, training and awareness-raising activities that typically go hand in hand with microcredit. While microcredit has brought benefits to borrowing households, these have not been large enough to have had a significant impact on community-level employment creation and growth. The strong emphasis on financial sustainability, vital to the sector's success, has led to controversy about purportedly high interest rates.

NGOs use village-based community health workers to provide door-to-door health services, focusing mainly on preventative care and simple curative care for women and children. While a nationwide network of these NGO para-professionals is successfully extending health care to large numbers of poor households, NGO facility-based care is relatively sparse. Hence, while expenditures by NGOs on health have grown significantly since the mid-1990s, they constitute only about one-third of public sector expenditures and less than 10 percent of total expenditures on health (the latter include household spending on private care). NGOs also contribute to health outcomes by providing water and sanitation services, with notable successes in community-based programs promoting behavioral change. Achievements in health include programs on child nutrition and tuberculosis treatment in partnership with government.

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1 *Economics and Governance of Nongovernmental Organizations in Bangladesh*, World Bank Report (Poverty Reduction and Economic Management Sector Unit), South Asia Region, 16 April 2006, p.iii.

The impact of NGO interventions on a range of health and nutritional indicators is striking. Cure rates averaged 85 percent in the tuberculosis program. Malnutrition rates dropped about 20 percent among the poor due to the presence of NGOs in the community. Neonatal mortality has been found to be significantly lower among NGO clients than in a control group of households<sup>2</sup>.

About 1.5 million children- approximately 8 percent of primary enrollment-are in schools run by NGOs, most in non-formal primary schools for which the NGO sector is best known. The NGO education sector is highly skewed, with one large organization, BRAC, receiving about three-fourths of donor resources and accounting for a similar share of primary enrollment in NGO schools. BRAC also franchises its model by subcontracting 200 small NGOs to deliver non-formal education programs<sup>3</sup>.

NGO schools have a positive impact on school enrollment, particularly of girls, and record higher attendance and completion rates than formal schools. Educational achievements are mixed. NGO school students perform considerably better than their counterparts in government schools on reading and writing skills, but only slightly better on other basic competencies<sup>4</sup>.

Advocacy activities of NGOs have become somewhat controversial. Most NGO advocacy focuses on issues affecting the poor (e.g., violence against women, dowry, land rights, access to justice, housing, education) and is seen as fully legitimate. However, in 2000-1 the government accused a few NGOs of stretching their advocacy work into partisan political activity and electioneering, and funding for their service delivery programs was stopped as a result. As government funding for NGO services grows in importance, NGOs have become more reluctant to antagonize the government. Hence, the more prominent advocacy-oriented NGOs tend to get involved only slightly in direct service delivery activities, while large NGOs with many activities and services tend to avoid issues that could seriously antagonize the authorities. Nevertheless, even without taking on contentious issues such as human rights and electoral reform, multi-activity NGOs engages in a range of low-key advocacy activities that are of significant benefit to the poor, for example, campaigns to

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2 World Bank Report 2006: iv.

3 Ibid: iv.

4 Ibid: v.

reduce violence against women and to promote poor people's access to resources.

The role of NGOs in strengthening relations of accountability between policy makers and poor service users has been mixed, as NGO advocacy efforts are to an extent constrained by their dependence on government. NGOs have had more success in bridging the gap between service users and providers in Bangladesh through their own services and by facilitating government, community and private sector provision. NGOs heavily rely on foreign funds for their development activities. This has constituted one of the core issues in the discourse of NGO accountability.

## TRENDS OF FINANCING INTO NGOS

The share of aid going to NGOs has risen sharply. An estimate shows that aid to NGOs rose from an annual average of US \$233 million (0.7 percent of GDP) in 1990-95 to US \$343 million (0.7 percent of GDP) in 1996-2005. Meanwhile, total aid to Bangladesh fell from an annual average of US\$1.62 billion (4.9 percent of GDP) to US \$1.39 billion (2.9 percent of GDP) during those periods. As a result, the share of aid to NGOs in total aid to Bangladesh has risen from 14.4 percent in the first half of the 1990s to 24.6 percent since then. These figures include estimates of aid to NGOs from multilateral development agency loans, typically through Annual Development Programs projects that contract NGOs. Estimates suggest that on average 20 percent of the aid that is provided to NGOs comes through government from lending agencies, an amount averaging about \$82 million a year<sup>5</sup>.

There are a number of ways in which donors provide direct financing to NGOs in Bangladesh. The most common is funding for specific projects. Where financing needs are large, donor funds may be pooled and a donor-liaison function introduced to coordinate support and reduce transaction costs for the NGO. In some instances donors have financed the whole range of NGO activities, and in a few of these cases the institution develops into a different legal entity by the end of the funding period. In recent years, the recognition that partnerships with smaller NGOs carry high transaction costs has increased reliance on wholesale vehicles, in which an agency manages a pool of money for which smaller NGOs compete. NGO accountability entails internal

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5 World Bank Report 2006, p.vi .

and external dimensions. The state makes NGOs accountable through regulatory mechanisms.

## **THE REGULATORY FRAMEWORK AND FINANCIAL ACCOUNTABILITY**

The legal framework relating to NGOs is obsolete, with an overabundance of laws and official agencies with limited capacity. The NGO Affairs Bureau (NGOAB) is widely recognized as the primary regulator of development NGOs, administering the laws relating to foreign donations. Staffing at NGOAB has barely changed since 1990, even though the number of NGOs the agency is supposed to oversee has tripled. As a result, delays are common, financial reports are not scrutinized adequately, and basic data relating to foreign-funded NGOs are not maintained systematically. There are 12 laws for registering and regulating NGOs, but most NGOs register under the Voluntary Social Welfare Agencies (Regulation and Control) Ordinance 1961, administered by the Ministry of Social Welfare. The Registrar of Joint Stock Companies registers 'societies and nonprofit companies,' but this agency suffers from weak capacity which is compounded by the absence of computerized systems. There are other weaknesses in the legislative framework. Tax exemptions are increasingly complicated by NGO commercial activity to fund development programs. Appropriate appeals procedures and mechanisms for merger or exit of NGOs are also absent<sup>6</sup>.

Laws relating to internal governance and financial accountability of NGOs are inadequate. The reporting and accounting burdens placed on NGOs are contradictory, and weak capacity means that regulators present a feeble deterrent against cases of poor internal governance. Capacity and computerized accounting systems vary in different NGOs and are related to the size of the NGO. Palli Karma Sahayak Foundation (PKSF) introduced some standardized financial management practices for microfinance programs, but accounting and auditing practices are also influenced by donor financial reporting requirements that are highly variable and that typically focus on the donor-financed project rather than on the whole institution. The quality of audit reports varies significantly, and regulators rarely focus on the comprehensiveness and quality of these reports. There is little

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6 World Bank Report 2006, p.viii.



oversight of NGO audit standards within the profession. Moreover, audit reports are rarely posted in public spaces, such as on relevant Web sites.

## **NGOS IN BANGLADESH: DEFINITION AND CLASSIFICATION**

There is a wide range of association and organization within what is commonly referred to as the 'third sector' or 'civil society'. The definitions and terms used to describe the sector are frequently contested, understandably given the variety of form and orientation. In the 1970s it was appropriate to call the relatively new group of formal organizations emerging in Bangladeshi NGOs. Initially they were funded mainly by international NGOs or were branches of those NGOs. They were separate from government and established to benefit others rather than for mutual benefit. They were formed by volunteers, people who came together spontaneously following the War of Liberation to undertake relief and rehabilitation activity. They were value-based and not-for-profit. Over the subsequent years the sector has grown dramatically, as have the NGOs – the more formal, structured, development oriented organizations.

NGO is an all-embracing, residual category; an imprecise word used in many different ways depending on the perspective of the user. Increasingly the term has been found to be 'uncomfortable', particularly for some of the organizations themselves. Many have attempted individually, and collectively, to identify and establish other terms. Private Voluntary Development Organization (PVDO) is one often used as it encapsulates clear defining features, but the NGO label, possibly because of its international connotations and appeal, has remained.

The development-oriented NGOs in which we are interested in are a subset of a larger body of nongovernmental organizations. In Bangladesh, civil society includes approximately 45,000 clubs local-level organizations, religious organization, foundations, and development oriented NGOs that are registered with the Department of Social Welfare. It also takes in notional and local trade unions, professional and business associations, and numerous local community-based organizations, the latter including savings, religious, community development, and social welfare groups, many of which temporary and informally constituted.



Although part of the wider body of civil society, development-oriented NGOs in Bangladesh have a distinctive set of features. They constitute a coherent set of organizations, readily identifiable on grounds that they feature most or all of the following: (a) tight focus on poverty alleviation and on disadvantaged group through direct delivery of services to poor people and/or advocacy and social mobilization activities aimed at improving services to organizing, or establishing the rights of the poor; (b) a formal organizational presence (e.g., a board or formal governing structure, institutionalized reporting and accounting procedures, and legal registration with relevant authorities); (c) receipt of foreign funds, either directly from aid donors or indirectly through contractual arrangements with government agencies or other NGOs; (d) Bangladeshi staff and management in most cases, and a predominance of professional as opposed to volunteer staff; and (e) a secular orientation<sup>7</sup>.

## GOVERNANCE AND HUMAN RIGHTS

### Governance

Governance for the purpose of this article is defined as the efficient steering of NGOs organizational power in a transparent and accountable manner so as to ensure social and economic development of the poor members.<sup>8</sup> This steering role is vested in the leaders of NGOs within the organization. In Bangladeshi organizational culture, decision-making within the NGO organized is highly centralized. In a significant number of Bangladeshi NGOs, decisions sometimes flow from a single NGO leader. Contextualizing NGOs organizational culture in Bangladesh, a well-known British researcher on Bangladeshi NGOs rightly said: "Most NGOs in Asia (and Bangladesh is certainly no exception) are started by one or a few individuals who retain charismatic control over the organization subsequently as it grows. As these organizations increasingly interact with other large organizations (i.e. donors and government and donors), these contacts are monopolized by a narrow NGO leadership. Indeed, donors----- are often very guilty of reinforcing the position of central leaders at

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7 World Bank Report 2006, p.13.

8 B. Guy Peters, *Politics is About Governing*, in (ed.), Adrian Leftwich, *What is Politics?* UK: Polity Press Ltd. 2004: 26-27.

the expense of other staff by insisting upon dealing with the ‘executive director’ only”.<sup>9</sup>

Given this context of organizational culture of Bangladeshi NGOs, decision-making within NGOs in Bangladesh became highly centralized. Decisions frequently flowed from the Executive head of that organization who happened to be the founder of the organization. Corruption was the inevitable outcome of this trend. In many cases, the money that was expected to use for the poor, has been used for private gains by the founders of NGOs.

### **Human Rights**

Human Rights are those rights that the human being is entitled to enjoy leading their life in dignity. In the Bangladesh context, NGOs are providing credit, education, health care, they are also creating awareness about the right to vote and the right to take part in governance that concern the collective interests of the poor NGO members. Since development NGOs run their activities based on resources received from the government and mostly from the foreign donors, the appropriation of these resources result in the loss of jobs of the NGO staffs. When corruption cases are caught red handed, fund is terminated by the donors. It affects all kinds of NGO programs such as credit, education and the health care. NGO advocacy for the establishment of rights for the poor loss its momentum. As most of the clients of national NGOs are poor, the termination of fund by donors plunge them into the loss of those rights that they were entitled to enjoy with the help of foreign resources. With this conceptual map in mind, we would now move on to analyzing governance failure within three national Bangladeshi NGOs such as *Samata*, *Proshika* and *GSS*. We mainly focus on corruption in these three NGOs and see how corruption has affected the poor clients/members of the said three NGOs.

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9 Geoffrey D Wood, *Bangladesh Whose Ideas, Whose Interests?*, Dhaka: The University Press Limited, 1994: 549.

## GOVERNANCE FAILURE AND LOSS OF HUMAN RIGHTS

When the designated government bodies fail to ensure accountability of NGOs, the government disbands NGOs and establishes direct control over the governing body. Most of the established NGOs are smart enough to manage government auditing by offering handsome honorarium, perks and privileges to the auditors. NGOs even could manage the donors by offering them lavish treatment of food, accommodation and transport. They have to pay handsome money to the consultant both foreign and local. But the most important aspect of NGO accountability is hampered by the founder and executive director of NGOs. If the members of the governing board are chosen people of the Executive director, that board remains ineffective to make the Executive head accountable. A key issue of NGOs internal governance is constrained by the centralization of power that the founder leader enjoys. Exclusive control over the finance of NGOs by one or a few leaders of NGOs also breeds corruption. It has happened in Bangladesh that the founder of NGOs has abused the foreign funds for personal gains, taking the absolute risk of displeasing donors. The donors hence stopped their funding, for projects have been closed down. Consequently, the NGO staff has lost their jobs. The poor continue to live in abject poverty by being deprived of getting health care and primary education. All are these required for a dignified living. In what follows we shall examine corruption in three Bangladeshi national NGOs: *Proshika*, *Samata* and *GSS*. The discussion that follows shall proceed case by case.

### *Samata*<sup>10</sup>

*Samata* is a voluntary development organisation based in Santhia Thana (or sub-district), in Pabna District in north-west Bangladesh.

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10 Regarding the analysis on *Samata*, I have extensively used materials from my Ph.D. thesis titled 'NGOs and Local Political Participation in Bangladesh' submitted in accordance with the requirements for the degree of Doctor of Philosophy, University of Leeds, June 2004. The thesis is yet to be published. The information used regarding *Samata* is relevant to explain the theme of the article. However, the author regrets that the information on the three NGOs under study is disproportionate. For better understanding of the theme, rigorous field-work is necessary. One of the main limitations of this study is its bias towards secondary sources.

With donor funding, *Samata* turned into a national NGOs since 1999 from a village Youth Club set up in 1976. *Samata* got registered as non-governmental organization (NGO) with the Department of Social Welfare (Reg 116 (233) 83 under Foreign Donations (Voluntary Activities) Regulation Ordinance, 1978 (Reg No FD 180).

*Samata* is a social mobilisation NGO, governed by its members' commitment to the struggle for land rights. The vision of *Samata* is to establish a just society based on the equitable distribution of wealth.<sup>11</sup> Although *Samata's* staff and members see themselves as embodying a social 'movement' (*andolan*) incorporating the principle of increasing 'strength in numbers' and issue-based mobilisation,<sup>12</sup> over the years the growth of *Samata* has perhaps inevitably involved formalisation and bureaucratisation. Its radical mission was mitigated by its increasing commitment to legal action or at least action pursued within existing legal boundaries.

On the other hand, since the early 1990s *Samata's* policies developed in a coherent manner. Its core policy, derived from the struggle to occupy *khas* land, survived unaltered, though connected with other issues complementary to that of land rights. For example, *Samata* explicitly sought to highlight gender issues, and had been struggling for the establishment of justice and respect for the rights of the landless in all aspects of their lives, through its new relationship with DfID.

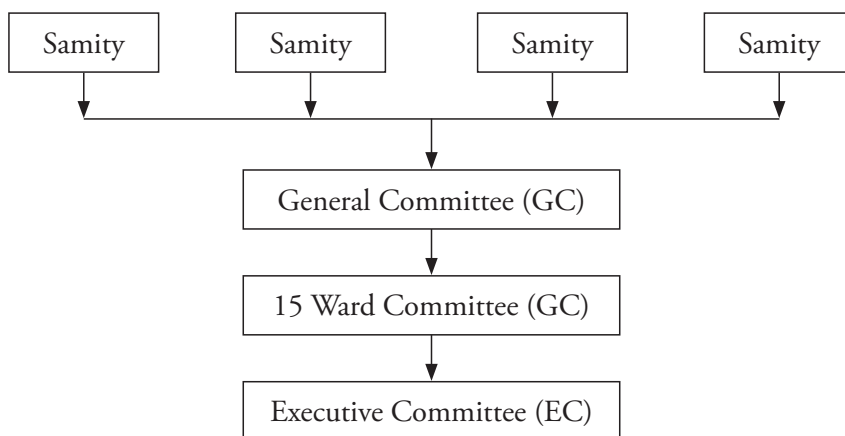
*Samata* was unique among NGOs in Bangladesh, as its trusteeship lied with the landless. Its organisational structure until April 2001 was illustrated in the diagram below.<sup>13</sup>

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11 Interview with *Samata's* Executive Director, 3 May 2001.

12 'Samata – Empowerment Through Resource Mobilisation' (Plan and Budget 2001–2008), Final Draft, 9 August 2001: 13.

13 *Samata* underwent a significant organizational restructuring with the support of DfID. Preparations have been underway since DfID/NORAD began their appraisal of *Samata's* project proposal.

**Figure: Organisational structure of Samata**

Every *samity* elects one representative to the GC. The GC members then elect fifteen ward committees (there are eight female and seven male committees). The ward committees equally represent *Samata's* working areas, so the number of members in each ward committee may vary. All ward committees then elect their own chairperson for a period of two years and these become *ex-officio* members of the organisation's Executive Committee. Finally, the general committee members directly elect the chairperson, secretary and treasurer of the Executive Committee from among their fifteen members.

Although the Executive Committee is theoretically responsible for the overall running of the organisation, *Samata's* staff carries out the actual formulation and execution of programmes. The link between the trustees and the staff is maintained and institutionalised around the figures of the organisation's Executive Committee chairperson and the Executive Director. While the latter is a non-voting member secretary of the Executive Committee, the former is a full member of the organisation's senior level management structure.

*Samata* has 289 staff, comprising eleven senior management, 207 field staff, 48 other programme staff and 23 support staff.<sup>14</sup> One third of the staff is women. Most of the senior management and managers

<sup>14</sup> 'Samata – Empowerment Through Resource Mobilisation' (Plan and Budget 2001–2008), Final Draft, 9 August 2001: 11.

in the field are graduates or hold postgraduate degrees, while the field staff (Social Development Organisers and Agricultural Development Organisers) and other staff are generally educated to SSC or HSC standard. Many of the senior staff has been associated with *Samata* for over ten years. The new expansion plan aimed to increase staff numbers to 635 during the period 2001–2008.<sup>15</sup> The additions to the programme profile – for example, national level advocacy – suggested that *Samata* would have to concentrate on influencing the government's policy decisions, for which it would require staff with a good educational background and with skills enabling them to influence public opinion. These criteria were likely to encourage *Samata* to recruit staff from the urban middle class. Until this new expansion, *Samata's* management structure was not exclusively dominated by urban-based highly educated staff, but by rural-based staff, only a few of whom had university degrees. Recruiting urban-based highly educated staff was likely to give them wider control over the organisational environment than their rural counterparts could have exercised.

### **Management Structure of Samata**

*Samata's* central management consisted of two tiers: senior-level management and mid-level management. Senior-level management consists of the Executive Committee Chairperson, Executive Director, Director of Programmes, Director of Finance, Policy Analysis, Lobbying and Advocacy Co-ordinators, Training and Research Co-ordinator. Mid-level management consists of the Education Co-ordinator, Chief Accountant, Training and Research Assistants, Core Programme Co-ordinators, Cultural Co-ordinators and Health Co-ordinator. Although the Executive Committee (EC) is supposed to play a key role in *Samata's* decision making, in practice it remains rather marginal. Senior management plays an active role in developing different policies. Although EC is supposed to play the key role in this regard, they are not able to do so due to their lack of knowledge and capacity. It is the management whose voice finally prevails. The EC's voice is accommodated in the policies/decisions, especially regarding the expansion of working areas, group formation, khas land distributions, organising rallies and processions and so on.<sup>16</sup>

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15 Ibid: 22.

16 Interview with Sohel Ibn Ali, Programme Facilitator, *Samata*. This interview was conducted by e-mail on 14 January 2002.

In addition, *Samata's* management structure showed that there had been a centralising tendency within the organisation. The links pertaining to the director of programmes indicate that he had seven areas of responsibility. This centralisation also applied to the role of the Executive Director in relation to organisational governance.

### **The Executive Director and Organisational Governance**

Regarding *Samata's* organisational governance, the Executive Director plays a key role both within and outside the organisation. Tandon defines governance as 'the totality of functions that are required to be carried out in relation to the internal functioning and external relations of the organisation.'<sup>17</sup> *Samata's* internal and external relations are in most cases maintained by its Executive Director.

The Executive Director<sup>18</sup> has had a unique influence on the internal relations of the organisation. Although management and the Executive Committee have a role in decision-making, every decision must have his approval. Even when staying in the capital city, he manages everything from Dhaka by mobile phone. As a sign of this overwhelming control, every single *Samata* document to be exposed has been subject to his approval. A Dhaka-based intermediate NGO sent its consultant for appraisal to *Samata*, and this person had to go through a lengthy bureaucratic procedure to get all the necessary documents that ended only when the Executive Director gave his final approval.<sup>19</sup> On at least two occasions I had the same experience. The supervisory power of the Executive Director gives rise to a tendency to 'executive centralism'.<sup>20</sup> I observed the influence of this tendency amongst the staff, remain nervous and suffer from a lack of confidence in his presence. In addition, as the Executive Director is one of the founders of the organisation, his position was unassailable. Of the other co-founders, some left the organisation, one of them had died and the rest have become loyal followers of his leadership. His pre-eminence enabled him to influence the style and culture of the organisation. Tandon has drawn attention to the consequences of "situations where

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17 Rajesh Tandon (1995) 'Board Games: Governance and Accountability in NGOs' in Edwards, Michael and Hulme, David (eds.), *Non-Governmental Organisations-Performance and Accountability-Beyond the Magic Bullet*, London: Earthscan.

18 The Executive Director is the Chief Executive of *Samata*.

19 During my residence in *Samata's* regional office, she stayed there for a few days.

20 I am using this term to denote the Executive Director's power within the organization.

the founder is the leader of the NGO for a substantial period of time. By its very nature the NGO begins to reflect the vision and perspective of its founder; its culture and programmes imbibe the style and background of the founder too. Over a period of time, the NGO's identity becomes very closely linked to the person of the founder leader. In such situations the board is initially assembled by the founder, and most board members are individually known to and associated with the founder leader – the long-term sustainability of the NGO requires the institutionalisation of energy and ideas beyond one person<sup>21</sup>

The Executive Director and his family share a secular political background that contributed to shaping *Samata's* political stance.<sup>22</sup> The motivation behind *Samata's* involvement in direct and indirect political activities at both the national and local levels derived from the Executive Director's political beliefs. Moreover, as the Executive Director had an unrivalled position within the organisation, it empowers him to recruit staff from his own kith and kin. Even at field level his authority remained unchallenged in this regard. In Bangladeshi NGOs, recruiting one's own people into the NGO is not an unusual practice despite the shortcomings of entrenched nepotism within the organisation. This tendency threatens organisational accountability.

Despite some negative features pertaining to the role of *Samata's* Executive Director, his charismatic leadership greatly contributed to the sustainability of *Samata*. He certainly used his immense personal capacities to deal with all kinds of problems in the field. His dedication and commitment made his acceptability and popularity amongst the staff unrivalled and his down-to-earth approach in dealing with the grassroots made him a popular leader of the poor.<sup>23</sup> However, this 'executive centralism' allowed the Executive Director to be involved in corruption making the organization's future development role

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21 Rajesh Tandon, op. cit.

22 I conducted extensive interviews and had informal discussions with the Executive Director's three brothers, who helped confirm my view of his political mindset. His brothers were active workers of the AL student's wing.

23 While in *Samata's* guest house, I frequently observed poor members waiting to vent their grievances as soon as the Executive Director(ED) arrived at the *Samata* office from Dhaka. I developed my assessment of the ED through observing his dealings with his colleagues and other members in the regional office at Santhia. Moreover, informal discussions with the ED himself and with other staff and members taught me much about him. I had intensive discussions with his three brothers on different occasions during my fieldwork.



vulnerable. This became evident when *Samata* received funds from DfID, NORAD and SIDA.

### ***Samata* and DFID, NORAD and SIDA** <sup>24</sup>

*Samata* entered into a close relationship with DFID in Bangladesh in 2001. NORAD and SIDA also joined with DFID to fund *Samata*, but DFID contributed the main share and acted as the lead funding agency amongst these three. The DFID–*Samata* relationship is not new: from 1996 to 2000, DFID provided 17 percent of *Samata's* expenditure on emergency relief.<sup>25</sup> However, the renewal of their relationship emerged from DFID's policy shift towards helping rights-based NGOs. Under this new policy shift DFID had already funded the country's most prominent social mobilisation NGO, *Nijera Kori*, to which DFID committed £5.30m (2001–08).<sup>26</sup>

The new policy recommended that donors give greater priority to the efforts of social mobilisation organisations and other NGOs to build demand for health, education and other social services at the point of delivery, and establish mechanisms for poor people to improve the quality of and access to these services. The report further recommends that governance agendas should be furthered through supporting small human rights-based NGOs and civil society actors.<sup>27</sup> Regarding this policy change, one of DFID's staff in Dhaka explained that the 1980s and the 1990s were the period of the micro-credit movement, when donors followed the 'money available', but now some donors like the DFID changed their thinking and adopted a more rights-based approach.<sup>28</sup>

However, the motivation behind donors support to *Samata* was influenced by their ideological positions regarding NGO in general.

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24 DfID stands for Department for International Development. It is the UK's official development agency. NORAD stands for Norwegian Agency for Development Co-operation; SIDA stands for Swedish International Development Agency.

25 'Samata – Empowerment Through Resource Mobilisation' (Plan and Budget 2001–2008), Final Draft, 9 August 2001: 11.

26 Source: Project Memorandum, dated 9 April 2001, *Nijera Kori*, Social Mobilisation, Voice and Democracy Programme (2001–2008).

27 Partners in Development – A Review of Big NGOs in Bangladesh Commissioned by the DfID (13 February–6 April 2000): 68–9.

28 Interview with Richard Montgomery, DfID-B, (Bangladesh), Social Development Advisor, 7 August 2001.

They all saw NGOs as potentially important civil society actors in Bangladesh. According to a NORAD official, “NGOs (in Bangladesh) are a part of civil society. They are not the only part, but they are significant, and particularly in Bangladesh given that there are so many of them. Having said that, the extent to which they engage with government/other parts of civil society differs from NGO to NGO. In our view, *Samata* engages more than many, with the view to mobilise the society at large for social change (poverty alleviation and social justice). As such, we see *Samata* as a strategic partner that works towards the same goals as the over all goals for Norwegian Development Co-operation”.<sup>29</sup>

Similar views were also expressed by SIDA. One of its officials said, “*Samata* and other NGOs do constitute an integral part of civil society. They are albeit one but an important and vital part of that constituency. .... *Samata* works with social mobilisation, aiming to empower people (landless poor) and their striving to make a social change is an important reason for Swedish support. We see them also as a potentially strategic partner as regards their work in relation to and with the local government system (Union Parishad) as a demander of service as well as functioning as a “watchdog”.<sup>30</sup>

From the above observation emerges the fact that, donors see NGOs in Bangladesh as potential actors of civil society. *Samata* has been viewed by donors as one of the significant actors in civil society, since it has been striving for ensuring social justice for the poor. They wanted to deepen the role of *Samata* as a pressure group, which would ensure better service from the state and local government for the poor.

With donors’ influence, the structures of *Samata* became more bureaucratic and formal; and organisational culture become urbanised, because of the influence of westernised techniques of development management. Consequently, *Samata’s* long tradition of rural-centred activism seems to have been affected by its increasing urban attachment. Instead of bridging the gaps between the landless members and the staff, these widened. Expert knowledge came to dominate the interactive space between *Samata’s* staff and its landless members. The

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29 Interview with Hasle Lena, 1st Secretary, Development Affairs, Royal Norwegian Embassy, 27 March 2003.

30 Interview with Johan Norqvist, First Secretary Development, Swedish Embassy, Dhaka, 15 April 2003.

distinctive character of Samata's leadership was its informality and spontaneity, which was changed with more responsibility.<sup>31</sup>

With the expansion of the organisational structures, policy, rules and regulations were modified in order to attune them to the larger contexts. Moreover, the conditions set by donors caused *Samata* to strengthen its reporting, auditing, monitoring and evaluation.<sup>32</sup> Thus upward accountability to its donors had become a significant aspect of *Samata's* transformation under the influence of DFID.

Rights-based development was unsustainable without some form of public funding,<sup>33</sup> so the question of sustainability spurred *Samata* to look for alternative sources. Thus dependency on donors was a *fait accompli* for *Samata*. However, *Samata's* relationship with three main donors largely curtailed the freedom of action of the bureaucratic elite and members too. In a meeting with donors, donors strictly advised *Samata* to abide by the 'contract'<sup>34</sup> signed between them, denying any informal action pursued by *Samata*. In addition, donors expressed their concerns about *Samata's* poor financial management and poor quality of reporting to them.<sup>35</sup>

*Samata's* organizational capacity to handle with large funding by DFID was a mismatch. Therefore, financial accountability became a prime concern for donors. The meeting with DFID regarding this issue revealed that actual expenditure for land rights component was more than the approved budget as money was used to buy motor cycle. For gender and LAND components, running and travel costs were higher. The expenditure in organizational strengthening was more than that of the allocation in the budget. Clarifications regarding these expenditures were sent to DFID. DFID did not approve of those clarifications. With some unreported expenditures, *Samata* spent 10 million takas over than that of the allocation in the budget.<sup>36</sup> *Samata* argued that

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31 During my stay in the *Samata* office at Bishnupur, the Executive Director offered everyone unmediated access. Any landless member of *Samata* could meet him without any prior appointment. Many of his close associates have confirmed his style of leadership as popular and down-to-earth.

32 In a recent talk with the Executive Director, March 2003, I came to understand his method of dealing with donors.

33 Interview with Richard Montgomery, DfID-B, Social Development Advisor, British High Commission, Bangladesh. 7 August 2001.

34 *Samata* Development Partners Meeting 2004 (Meeting Minutes), 4 May 2004, pp.1-6.

35 *Ibid.*

36 *Ibid.*: 3

there were some sectors, which *Samata* could develop by itself. But the development partners<sup>37</sup> emphasised that unfortunately they would not compromise with some specific issues like finance, governance and management. Finance is their first priority.<sup>38</sup>

Donors concern for financial accountability proved correct as the NGO Bureau and the DFID found Abdul Kader, *Samata's* Executive Director, implicated in amassing huge personal wealth from organization's coffer. At one point of time Abdul Kader struggled as a school teacher in the remote village of Pabna, but now he lives in a massive apartment in Dhaka thanks to his NGO which 'caters' to the needs of the landless poor. Even in the village he has a palace-like home now. The vehicle he uses costs 55 lac takas. He would draw a monthly salary of 59,800 takas, but during his son's wedding he cut 15% off all the employees' salary.<sup>39</sup> Like the other NGOs, Kader purchased mobile phones for all his family members with office funds and the bills are paid by the office too. The several servants at his house are all registered as *Samata* staff and would receive their wages from the office. *Samata* also purchased land in various places for staff housing, but all that land has been registered in Abdul Kader's name. In order to make sure there were no hitches in all this, he appointed a close relation, Nurul Islam, as the *Samata* accountant. Such a corruption has been going on for long, but it has only been recently that the donors' have noticed and they have lodged complaints with the NGO Bureau.<sup>40</sup>

The NGO Bureau issued a show-cause notice against Abdul Kader, after corruption charges involving crores of taka was proved. Even in responding to this notice Kader resorted to fraudulence. He quickly stepped down from the office of Executive Director, appointing younger brother Amjad Hossain in his stead as Acting Executive Director. The NGO Bureau got furious as the response to their notice was signed by Amjad Hossain. They decided to take action against this step. However, the inquiry team and the audit team of the NGO Bureau collected enough evidence against Kader and all this appears in the Bureau's report. The NGO Bureau successfully brought out 13 allegations against Kader which have been proven.

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37 *Samata's* donors are referred here as development partners.

38 Meeting minutes, op.cit: 3

39 Selim Sarwar, Our NGO Sector, [http://www.accountabilitybd.org/index.php?option=com\\_content&view=article&id=86:our-ngo-sector&catid](http://www.accountabilitybd.org/index.php?option=com_content&view=article&id=86:our-ngo-sector&catid); access date: 1 October 2011.

40 Ibid.

The allegations listed in the NGO Bureau report against Abdul Kader include:<sup>41</sup>

- Abdul Kader bought land with the organization's funds and a house in his own name meant for the housing of the employees
- Kader used foreign funds to make many foreign trips without permission of the NGO Bureau
- Motorbikes and cycles were purchased for the staff with donor funds, but the cost of these were cut from the salary of the staff
- Kader bought himself luxury cars and houses but did not pay VAT in the purchase of six vehicles

The report states that though the monthly remuneration of Executive Director Abdul Kader in a DFID-funded project was to be 38,500 takas, he actually drew 59,800 taka a month. Finance Director Nurul Islam's monthly salary was shown as 29,512 takas, but in actuality he drew a monthly sum of 57,619 taka. Deputy Director Shahida Khatun officially was to draw a monthly salary of 18,400 takas, but actually drew 23,563 takas a month.

*Samata* staff complained that when Kader's son got married in May 2004, a total of 15% (Taka 12 lac) was cut from all their salary for the wedding expenses. Abdul Kader would simply draw up vouchers and use *Samata* funds to pay for his house rent in Dhaka, utility bills, gifts for various occasions, mineral water and more. In 2004, he and his family went on a pleasure trip to India by the office Pajero.

Getting involved in a movement for the rights of the landless in Pabna and Rajbari, Abdul Kader transformed overnight from a schoolmaster to an NGO leader. With huge sums of foreign funds, Kader's lifestyle changed rapidly. In 2001, *Samata* obtained funds amounting to almost 70 crore takas from the DFID, NORAD and SIDA consortium fund for the 'Empowerment Through Resource Mobilisation' project. With the value of the pound going up in the international market, this amount went even higher, reaching about 100 crore takas in Bangladeshi currency. Paying no attention to donor guidelines and in violation of the NGO Bureau rules, he used the money as he wished, building up his personal wealth with no scruples whatsoever. His accounts department was manned with his own relations, so he had no cause of worry there. His cousin Nurul Islam,

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41 Ibid.

totally unqualified for the job, was made Director, Finance of *Samata*. The donors objected but Kader did not pay heed to it.

When DFID brought allegations against Kader in 2007, he resorted to changing the organization's constitution and changed the name of his position from Executive Director to Founder Chairman. As the allegations had been brought about against *Samata's* Executive Director, he felt he could shield himself from the donors by becoming Founder Chairman instead.

All the members of *Samata's* 15-member executive committee are landless. It was alleged that persons loyal to Kader were selected for the committee. They had been provided with motorbikes, their mobile phone bills were paid for and they received many other facilities and so they never uttered a word against Kader. If anyone does protest, he or she is immediately removed from the committee. Committee Chairman Sikander Ali was thus removed from his post in 2005.<sup>42</sup> After meeting with Abdul Kader, it appears to be clear that the pomp and glamour of *Samata* has lost. Its highly luxurious office set up in an expensive apartment at the Capital city no longer exists. His office has now moved to a normal apartment with fewer staff than before. The 'national' image of *Samata* hides into its previous local identity. While discussing over these ups and down, Kader deftly passes a large part of the buck on donors. Abdul Kader said, "The last installment of the fund was not released. They (donors) have left us putting blames on our shoulder. We did not listen to DFID's objections regarding some individuals. I could not fire them as they had contributed to the organization. They did more good deed than bad. In particular, DFID withdrew their fund due to the policy shift of the Conservative government. The Labour party was pro-NGOs in Bangladesh. But the Conservative Party is different. Moreover, donors are more interested to work with the government. Internally, I failed to develop sound management and accounts division. As I have always been busy with the poor, so I could not concentrate on developing organizational efficiency."<sup>43</sup>

It appears from the above discussion that *Samata* grew up from a small into a national NGO. With donors' financial assistance, it developed internal governance structure largely leaving the issue of

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42 Anwar Parvez Halim, *Samata and Kader's uncontrolled corruption*: <http://www.probenewsmagazine.com/index.php?index=2&contentId=5149>, access date: 1 October 2011.

43 Interview with Abdul Kader, Founder and Chairman, 24 January 2012.

Executive director's accountability unaddressed. Being the founder of the organization, ED took advantage of his position by exercising his unlimited power. The organizational governance thus became one man show. Appointing family members in different positions of the organization, he could, amongst other policy matters, control finance of his organization. In addition, it seems obvious that internal audit and accounting of the organization was dysfunctional.

### *The Gono Shahajjo Sangstha (GSS)*

GSS was founded by Dr. F. R. Mahmud Hasan in 1983, a left leaning intellectual and development activist. Dr. Hasan and some of his close 'old left' associates started GSS operation from Khulna, initially registering as Gonoshongothon (People's Organization) under the Social Welfare Directorate. The main objective of the organization was to eradicate poverty through social movement and social mobilization. Gonoshongothon, initially operating at a local level, was gradually transformed into a national organization called GSS.

Since inception, GSS took to village education programs and engaged in social mobilization and advocacy. By 1999, GSS, with funding from the European Union and the British, Canadian, and Danish Development agencies, was one of the largest NGOs in Bangladesh. At that time GSS's education program reached 200,000 poor children in 750 primary schools across the country.<sup>44</sup>

In 1999 the government of Bangladesh took over the administration of a large NGO after investigations revealed misuse of foreign donations. This was the first time the government had stepped in and taken over the running of a big NGO in Bangladesh.

The allegations against GSS and executive body, brought primarily by GSS staff members, led to an investigation by the NGO Affairs Bureau and a High Court order for the dissolution of the executive body in 1999. These allegations concerned the misuse of funds relating to the development of the NGO's new headquarters office, as well as gender discrimination. The management of GSS was transferred to the Ministry of Social Welfare, which in turn appointed a three-member caretaker body. The High Court order was contested in court by the previous executive body, which claimed that allegations against GSS were politically driven.

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44 World Bank Report, 2006, p.59.



In September 2003, the High Court cleared GSS of all the charges. The arrangement and administration together with GSS's assets and liabilities were handed over by the caretaker body to a newly formed executive committee. GSS started operating again in 2004, following its registration with the NGO Affairs Bureau. Since then, under a project that subcontract smaller NGOs to implement education programs, BRAC has given a US \$0.5 million grant to GSS's education program for a period of three years beginning January 2004. As of 2006, 350 schools are operating with approximately 50,000 students enrolled.<sup>45</sup>

This crisis had genuine causes. GSS organizational culture was basically informal and the emphasis was on participatory development programs. Economic and political empowerment became the central focus of GSS programme interventions. GSS programs were developed by incorporating social movement with social development. The main areas of programme interventions were in the areas of education, health care, women empowerment and income generating activities. Recognizing GSS's expertise as well as realizing the need for social mobilization, the donor community pumped in huge resources in this organization. However, the donors also recognized the need for professionalism and efficient use of human resources to make the program effective.

On 27 February, 1999 a dramatic incident took place. One of the female staff Momtaj Begum lodged a harassment complaint against the Executive Director and a pamphlet was circulated among the employees condemning his actions. In response to this, on 02 March, 1999 the Executive Director issued some strict instructions on code of conduct, office practices and conditions of service. A general meeting of employees was also called at the head office on 11 March, 1999. The agitated GSS staff prepared a communique and demanded resignation of the Executive Director, more transparency in central management, and a congenial working environment. The staff put forward a 6 point demands which were:<sup>46</sup>

- Decentralization of the existing administration into an acceptable and well defined structure.
- Immediate withdrawal of amendments to the services rules.

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45 Ibid.

46 Sheikh Tawfique M. Haque and Khondoker Shakhawat Ali, 'NGO Governance in Bangladesh: Quest for Transparency and Accountability', (ed.) by Salahuddin M. Aminuzzaman, Governance and Development-Bangladesh and Regional Experiences, Dhaka University: Department of Development Studies 2006, pp.195-196.



- Change of organization's present service rules by removing all rules that are against employees' interests.
- Reform of the salary structure by removing the discriminations present within the existing structure.
- Declare a well focused and clear policy for recruitment, evaluation, transfer and promotion of employees.
- Neutral and independent investigation into the complaint against the Executive Director petitioned by Momtaj Begum.

To mitigate this organizational crisis, the Executive Committee and the Advisory Committee of GSS held several meetings between 22 March and 27 March 1999. The Executive Committee in its meeting held on 27 March 1999 made the following decisions:<sup>47</sup>

- Members of the Executive Committee and the Advisory Committee will discuss with program heads and both senior and junior employees about their major concerns regarding the management.
- The Executive Director's instructions on service rule issued on 02 March 1999 will not be effective until further notice.
- Immediate initiatives will be made to review and reform the service rules. Reforms will be made in the following areas:
  - Organization's current salary structure to be effective soon.
  - Policy on staff leave will follow BRAC rules and regulation.
  - Reform of TA/DA rules and regulations.
- Administrative decentralization process will be carried out gradually.
- Written appeal of Momtaj Begum and her complaints will be investigated by a four member committee. This committee will investigate the matters as early as possible and will report to the Chairperson of the Executive Committee within 15 days.

There were mixed reactions about the outcome of the meeting. And all of a sudden on 15 April, 1999, GSS's top management, citing "financial crisis" as the main reason, announced the closure of its head office and entire program. At this stage the NGO Bureau got into the picture and initiated an investigation. The High Court, by then, ordered the dissolution of Executive body for its supervision. The High Court order was contested by the defunct Executive body

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<sup>47</sup> Ibid: 196.

claiming those allegations were politically motivated. The NGO Bureau also made critical observations on financial irregularities of GSS. In summary, the irregularities identified by the bureau were as follows:<sup>48</sup>

- Transfer of funds from one head to another without due authorization.
- Irregularities in purchase and procurement especially at the central office.
- Collection of extra service charges for program support unit.
- Expenditure on non project related activities without the approval of donors and the bureau.
- Violation of income tax rules.

One of the major criticisms of the management practices is the issue of absolute power and authority being exercised by the Executive Director. An evaluation of the decision making process within the organization revealed that despite GSS's claims to promoting participatory management process, it followed a centralized top-down planning and decision making process in practice. The lower ranking employees had little opportunity to contribute to organizational planning and decision making processes. Mid level and professional staff were frustrated and unhappy due to the lack of opportunity for career progression and skills development. These frustrations subsequently culminated into a large scale employee unrest and agitation.

Participation of beneficiary group and employees at the institutional level was high at the time of initial program development. It had been reduced later on when program size and area was expanded. The role of the donors increased while their investment grew comparatively higher than before. Similarly, NGO Bureau authorization due to enhanced funding from foreign donor agencies made GSS more dependent on the state than any other previous period.

Nature of working environment of GSS was found to be informal and friendly in its initial stage. However the scope of participation at various levels of organizational activities and decision making declined due to the rapid growth of organizational size as well as active pressure from the donors to institutionalize the management system.

It was easier to maintain financial transparency when the organization was small. For that reason GSS did not face any such crisis in financial transparency at its formative stage, it became an important

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48 Ibid: 194.

issue due to huge influx of donor resources. Sufficient and capable human resource was also a critical requirement to ensure financial transparency. GSS unfortunately failed to meet the standards and expectations in terms of financial management as set by the donors. Such failure to establish a transparent financial management led the donors to discontinue their financial support to GSS. All of a sudden, GSS lost its steady flow of foreign resources amounting to 150 crore takas.<sup>49</sup> Furthermore, it is said that the donors even influenced and put pressure on the NGO Bureau to take further action against GSS.

The absence of neutral and specific organizational rules and regulations made its internal and external governance more complex. Rigid leadership style and “inappropriate behavior and practice” further complicated organizational practices and affected employee morale. Absence of an internal conflict resolution mechanism within the organization accelerated the scope and intensified staff unrest. Like *Samata*, GSS suffered similar problems in internal governance. In spite of the scope for participation of beneficiaries and employees in the decision-making of the organization, concomitant growth of the organization led to the rise of top-down governance model in practice. Here, too, the ED played a dominant role in the decision-making breeding corruption within the organization.

### ***Proshika***

One of the largest national NGOs in Bangladesh, *Proshika* scaled back its service delivery program significantly following a government clampdown on donor funding of *Proshika* in 2002. Accusations against *Proshika* ranged from serious financial irregularities, uncovered by a government audit, to sedition. On the issue of fraud and misuse of resources, the donors who had been instrumental in *Proshika*'s rapid growth in the 1990s rallied behind the organization and questioned the validity of the audit report, contrasting it to the clean bill of health given to *Proshika* by the international auditing firm PricewaterhouseCoopers in successive annual audits. Meanwhile, the coalition government led by the Bangladeshi Nationalist (BNP) accused *Proshika* officials of plotting with the main opposition party, the Awami League (AL) to overthrow the government. Specifically,

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49 Interview with Ali Hossain Sarder, 14 February 2012 (Coordinator, Monitoring & Evaluation Unit, Education Programme, GSS).

*Proshika* officials were accused of encouraging thousands of group members across the country to assemble in the capital to launch an opposition platform. The time frame of the alleged plot coincided with the April 30, 2004 deadline the AL had issued for dislodging the BNP-led government. *Proshika's* president was arrested along with a number of other employees in May 2004.

In the mid-1990s the AL launched a movement for a neutral caretaker government and *Proshika* played a prominent role in this campaign, drawing criticism from within and outside the NGO sector for its involvement in a highly sensitive political issue. During the 1996 elections *Proshika* was heavily engaged in voter education programs along with other NGOs. The material in *Proshika's* program, and that of five other NGOs, was considered to be pro-AL League by the BNP, which lost that election. The same perception also prevailed in the 2001 election that the BNP won. At the same time the president of *Proshika* also headed the NGO apex membership body, ADAB, and the BNP government's misgivings about *Proshika* threatened to spill over to the rest of the sector. Draft legislation was prepared to strengthen controls over NGOs, but the legislation was strongly opposed by donors and NGOs and has not yet been discussed in Parliament. A separate NGO apex body, the Federation of NGOs in Bangladesh, was formed by NGOs who sought to distance themselves from *Proshika's* involvement in politics<sup>50</sup>.

*Proshika's* President, Kazi Farukh Ahmed, who ran the organization for 33 years, virtually tarnished his image implicating himself in corruption. The employees of *Proshika* revolted and removed Kazi Farukh from the organization. The documented evidence against him offered by the employees gave ample evidence of his corruption. Like other NGOs, there was gross imbalance in *Proshika's* salary structure. For example, Kazi Farukh's son Kazi Rubayet was the head of the organization's computer department. His monthly salary was 98 thousand takas.

Kazi Farukh sent this son abroad for higher studies all at *Proshika's* expense. In fact, 99 lacs 74 thousand takas of *Proshika's* funds were used for this purpose. The employees also mentioned that funds of 25 lacs takas and 64 lacs were also taken from *Proshika* for Kazi Farukh's other son and daughter. *Proshika's* funds also went in the direction of Kazi Farukh's wife and other relations. He involved his wife in *Proshika*

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50 World Bank Report 2006, p.36.

Fabrics and appointed his brother-in-law Mir Habibur Rahman as a director of *Proshika*.<sup>51</sup>

There were allegations that Proshika's Kazi Farukh invested money and manpower in the nationwide clashes of 2006 where rioters wielded sticks and oars in an unprecedented outbreak of violence. Kazi Farukh was even involved in the "trump card" threat issued by AL's General Secretary against the BNP government. The *Proshika* workers during were forced to take part in political programmes. They were told they would lose their jobs if they did not take part in the opposition movement at that time<sup>52</sup>. Then at one point of time Kazi Farukh Ahmed himself formed the party, *Oikyabaddha Nagorik Andolan* (United People's Movement), and forced the employees to become members. The employees said, "We were told to make out vouchers for funds supposedly used on food for slums dwellers whose homes had been gutted by fire; in actuality these funds were used for political purposes."<sup>53</sup> At a meeting of *Proshika's* governing body (105th meeting, held on May 24, 2009), it was also pointed out that "he (Kazi Farukh) used the organization's funds and facilities for his election purposes. He not only used the two cars of the organization assigned to him, he used the other vehicles of the organization too for his election purposes and this was against the rule. Till the very last day of the election, he used thousands of persons involved in *Proshika's* micro-credit programme for four months of the election campaigning of *Oikyabaddha Nagorik Andolan*." This was termed as a moral crime<sup>54</sup>.

Kazi Farukh's case demonstrates another dimension of corruption within NGO. He not only used organization's resources for personal gains but also he utilized the organization's position for his personal political ambition. Direct participation in party politics is an immoral act, a deviation from NGOs mandate for development functions. Being unhappy by these activities, donors such as DFID, EU, SIDA and

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51 Selim Sarwar, Our NGO Sector, [http://www.accountabilitybd.org/index.php?option=com\\_content&view=article&id=86:our-ngo-sector&catid](http://www.accountabilitybd.org/index.php?option=com_content&view=article&id=86:our-ngo-sector&catid); access date: 1 October 2011.

52 Source: New Age, May 22, 2009.

53 Ibid.

54 Selim Sarwar, Our NGO Sector, [http://www.accountabilitybd.org/index.php?option=com\\_content&view=article&id=86:our-ngo-sector&catid](http://www.accountabilitybd.org/index.php?option=com_content&view=article&id=86:our-ngo-sector&catid); access date: 1 October 2011.

CIDA withdrew their fund amounting to 350 crore takas.<sup>55</sup> This fund withdrawal left Proshika's development functions in limbo.

## GOVERNANCE IN NGOS: ANALYSIS OF INSTITUTIONAL CONTEXT

Internal governance failures in NGOs takes place in an institutional context. The discussion about governance in NGOs remains incomplete without taking into cognizance of its institutional context. The vast majority of NGOs are registered under the Societies Act 1860 with some registering under the Trusts Acts 1860 & 1920 and a few as companies (under the Companies Act 1913 which allows for charitable companies with tax free status). Still others are simply registered with the relevant government department and the NGO Affairs Bureau. The form of internal governance is very similar with the Chief Executive reporting to an Executive Committee or Governing Body composed of Trustees, Directors or elected representatives from a larger General Body. None of the legislations is designed for large, national, multi-million dollar organizations.

The NGO Affairs Bureau suffers from many shortcomings which create opportunities for irregularities and corruption in the sector.<sup>56</sup> It has an acute shortage of human resource and logistic support. It has 60 employees against 67 allocated staff, which is too insufficient to effectively play its facilitating and monitoring role. The largest number of registered NGOs is registered with the Directorate of Social Welfare. Many government organizations register NGOs as their associate in order to implement their projects. Such NGOs have to submit their program report to the concerned government office, are mandated to monitor and evaluate its assigned NGO(s) to ensure accountability. In reality, the registration-providing government offices cannot efficiently monitor these NGOs. Research has shown that registration often takes place allegedly without due process in exchange of bribes of 5,000 to 10,000 takas many NGOs have got registration from government offices such as Social Welfare Directorate, and Women and Children Welfare Directorate. At the local level the Upazila and District

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55 Interview with Mohammad Abdur Rab, 7 February 2012 (Member, Management Committee & Director, Micro Finance Field Operation).

56 Hasan Zaman, 'Corporate Governance, Financial Accountability and Management of NGOs', (ed.), Hossain Zillur Rahman, *Unbundling Governance*, Dhaka: Power and Participation Research Centre, 2007, p.140.

administration authority is responsible for monitoring the activities of NGO in their respective areas and send report to the NGOAB. The research shows that because of heavy workload they have neither time nor resources to do so except holding of monthly meetings, which also do not take place on a regular basis<sup>57</sup>. The governing body is formed according to the choice of founding executive head. As a result, the governing body does not oppose the executive head's opinion and decision. Moreover, meetings of the governing body are held only to maintain formality. Meeting proceedings are prepared even if a meeting is not held. Membership of the governing body is given to people for their social and political reputation although they are not able to give time to the organization. Members of the governing body often recommend for recruiting their relatives into that NGO. No action is taken against the executive head despite he or she acts against the interest and objective of the organization.

Decision is taken only by the executive head; participation of employees is ignored. Many times decision is taken to promote organizational interest of that of the executive head, without considering the need of the beneficiaries/service recipients. This happens as the 'executive centralism' remains dominating within the organization. *Samata's* experience falls into this category.

The chief executive has unlimited discretion in financial decision. He has complete control over the communication with donors, preparing the project budget, the common fund of the organization and other crucial issues. In most cases, the employees know nothing about the chief executive's salary and other benefits. The employees are not given their salary and other benefits according to the project proposal or approved budget. A portion of the employees' salary is deducted in the name of the sustainability of the organization or increasing the common fund.

Employees are not recruited according to the project proposal. One employee, even if s/he works for different projects, gets salary from one project whereas salary drawn against her/him from all such projects. The chief executive can spend from the common fund upon his/her free will. There is discrimination with regard to salaries of the high, medium, and low level staff. Properties such as vehicle, computer, and furniture bought for the organization are often used for personal purposes.

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57 Ibid, pp.140-142.



Staff salary is drawn from multiple projects by showing the same employee serving more than one projects whereas the staff is paid for only one. The salary mentioned in the circular is often less than that as per approved project proposal. The salary as mentioned in the circular is not fully paid. Staff salary is deducted on different grounds. Salary is not paid according to the project budget, even if signatures are taken on the pay-slip. Two salary statements are often maintained to cover such irregularities. Income tax is deducted at source, but is not submitted to the treasury. Many NGO high officials avoid income tax by showing the basic salary less and other facilities high. The chief executive often takes salary from many projects, but does not reflect it in the accounts. Such irregularities take place with the connivance of tax consultants.

The NGO organogram, job description and work hour, vacations and holidays are not maintained according to the rule. The employees do not have job security. There is no provision of provident fund in many NGOs. The higher officials often do not show proper respect to the employees. The employees often face mental torture, and verbal abuse. In some cases there are clear complaints against the chief executive and other higher officials for physical and mental abuses. Female employees cannot express harassments committed upon them for fear of a negative impact. The jobs of higher officials are secured even after the allegations of physical abuse against female employees are proven. One of the biggest scopes for irregularities in the NGO sector is that this sector has no uniform pay structure and has no connection with the national pay scale. The executive chiefs create pay scales at their will and have it approved by their hand-picked governing body. Even mid-level NGO heads draw monthly salaries of 50 to 60 thousand takas, while the lower staff members get only two to three thousand takas a month. One of the failures of Bangladesh's parliamentary system of government is that there is no discussion in parliament about the exploitation carried out through micro-credit and the other corruption and irregularities in the NGO sector. Even during the 1/11 crusade against corruption, the NGOs remained above board, with only a few exceptions. We have so far discussed about governance failures in three national NGOs of Bangladesh: *GSS*, *Proshika* and *Samata*. This governance failure resulted in corruption leading to the violation of human rights of the NGO staff and the poor members/clients of NGOs. We now move on dealing with this matter in the discussion that follows below.



## IMPLICATIONS OF CORRUPTION FOR HUMAN RIGHTS

The above analysis shows that governance deficit in NGOs results from both agency and structural problems. Structural problems here are referred to legal and institutional mechanisms that are supposed to regulate NGO activities. The weaknesses in structural problems have allowed the agents or NGO leaders to get involved in corruption violating human rights of the poor members/clients.

When the donors stopped their funds, the 1400 officers and employees of *Samata* fell in dire straits. They had not been receiving any salary. Several employees of *Samata* complained that there should be a total of 8 crore 3 lac 16 thousand takas in provident funds and gratuity at *Samata*, but in actuality there was only 1.5 crore takas in these funds. They alleged that Kader used these funds to purchase land in his own name. Many employees left their jobs with *Samata*, but were still not being given their amount from these funds<sup>58</sup>. Withdrawal of donors' funding happened in the past making adverse impact on *Samata*. When Bread for the World and the Asia Foundation stopped their funding, *Samata's* members suffered and the organisation was forced to reduce its staff's salary increments.<sup>59</sup> This financial difficulty led to irregularities in the handling of the *samities'* (small groups of members) savings. It was alleged that money from these savings was siphoned off to pay staff salaries.<sup>60</sup>

DFID funded *Samata's* Land Rights program through which the legal assistance was to give to the landless so that he could survive in the legal fight against the *Jotedars* (landowners). With DFID's withdrawal landless people who found *Samata* with their side retreated. *Samata's* advocacy program for the poor consequently lost its momentum. *Samata* motivated the poor people to demand service to the local service delivery agencies. By providing information to the poor, they could assist the poor.<sup>61</sup>

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58 Selim Sarwar, *Ibid*.

59 Interview with Sohel Ibn Ali, Director of *Samata's* Central Advocacy Cell. The interview was conducted on 29 April 2001.

60 This has been confirmed by one of the field level staff, who preferred to remain anonymous. Meetings with different levels of *Samata's* membership also gave indications of this. Some group members complained that their savings had not been returned.

61 Interview with Abdul Kader, Founder and Chairman of SAMATA, 24 January 2012.

About 6400 employees, including 4000 teachers, were made redundant due to termination of funding in GSS.<sup>62</sup> As 700 schools were stopped due to fund shortage, it made 4000 teachers redundant. Children who were used to receiving education from these schools were denied to enjoy their right to education. Of the 4000 redundant teachers, 90 percent were women. Along with education programme, GSS self-help credit programme suffered a serious blow.

The lack of funding resulted in a sharp squeeze on *Proshika's* education programs, which at one point were second only to BRAC's in size. In 2000-1, *Proshika* operated 10,100 non-formal primary schools and 11,586 adult literacy centers. By 2004-5, the number of primary schools had dropped to 450 and the adult literacy program had closed. The social forestry program, one of *Proshika's* flagship programs, at one time had 2,419 part-time caretakers, but in 2004-5 there were only 54 left.<sup>63</sup> In addition, *Proshika's* credit programme lost its momentum to operate in full swing.

Thus from this discussion we get a clear sense of human rights violation emanating from the failure of governance in NGOs. In the absence of institutionalization of NGOs, domination of one person or the Executive Director gradually planted the seeds of corruption. Donors, therefore, withdrew their money. Eventually, the NGO staff lost their jobs, projects covered credit, education and providing health care became stalled. To establish human rights for the poor by NGO initiatives, however, required corrections in NGO governance. Major areas of NGO governance reforms are recommended below.

## RECOMMENDATIONS

There are a number of issues that are currently at the forefront of the public policy debate on NGOs. These include (i) perceived weaknesses in the regulatory framework and in the financial accountability of NGO's (ii) the scope, impact and cost-effectiveness of NGO activities including the trade-offs between service delivery and advocacy, (iii) the implication of shifts in NGO financing that has resulted in greater financing through commercial activities and micro-finance revenues (iv) the nature of Government-NGO partnerships, their respective roles and contracting arrangements (World Bank, 2005).<sup>64</sup>

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62 World Bank Report 2006, p. 59.

63 *Ibid*, p,36.

64 World Bank Report 2006, p.5

Regulatory focus should change from government micro-management of NGOs foreign funds to support for better corporate governance, strengthened accountability, and transparency by NGOs. Relevant regulations need to be harmonized to incorporate standardized requirements relating to corporate governance, financial disclosure, and accountability to regulatory agencies. Other necessary modifications include changes to reflect the contemporary scope of NGO activities, such as NGO commercial ventures, and to simplify registration. New laws could define NGOs as “public benefit organizations”, merging dated definitions of “social welfare agency” and “organizational involved in voluntary activity” to focus on organizational purposes and activities.<sup>65</sup>

The composition, tenure, and functions of NGO boards need to be strengthened, and apex bodies can play a key role in fostering consensus on these issues. Uniform accounting standards are also necessary for the whole sector. The value of audit reports can be improved by setting up an oversight system to monitor the quality of audits through the proposed Financial Reporting Council. Public perceptions about the transparency of NGOs would be improved if financial disclosure were strengthened, such as by ensuring uniform public access to NGO audit reports.

Improving NGO regulation also requires addressing institutional capacity weaknesses. One option that the government could consider is setting up an independent NGO Commission that would take over the functions of the current regulatory bodies. The commission could be empowered to deal with the establishment of NGOs and encourage standardized reporting and disclosure practices, similar to the role played by the Securities and Exchange Commission for listed companies. The NGO Commission could be supported by certification bodies that are licensed to rate and certify medium and small NGOs, reducing the regulatory burden of the proposed commission. The proposed commission would need to build on the practical lessons of establishing other independent commissions in Bangladesh such as the regulatory bodies in energy and telecommunications. Setting up a multi-stakeholder NGO Law Reform Committee mandated to modernize legislation governing NGOs is a recommended next step. This proposed committee could also assess the experience with the new microfinance legislation assuming it is enacted in the next few months.

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65 *Ibid.*: 68.

Concern from within government about alleged partisan political activity and financial irregularities has placed the need for improved regulation of NGOs on the public policy agenda. The renewed emphasis on advocacy with respect to the state and, in some cases, on social mobilization since the 1990s has produced its own controversies, highlighting graphically how fine the line between civil society activism and partisan politics is in Bangladesh. The Government-NGO relationship has deteriorated as foreign funding of a handful of NGOs, including a large national NGO, *Proshika*, had been frozen and due to proposed amendments to regulations governing foreign-funded NGOs that were perceived as heavy-handed. In response to strong criticism the draft legislation had been withdrawn, pending further round of amendment. In this context, the increasing prominence of NGO advocacy work stimulated debate about the political space and limits to NGO activism.

Leadership succession is currently a key issue in many NGOs in Bangladesh. Concerns are frequently voiced about the domination of the big Bangladeshi NGOs by their founder-leaders. It is evident that many NGOs will face turbulent times as they are forced to rely more on the soundness of their formal management structures and processes than on a single individual's leadership. However, comparative analysis of management practices in south Asian NGOs shows that the link between strong, personality-driven modes of leadership in Bangladeshi NGOs and undesirably authoritarian forms of management has been highly exaggerated. The study acknowledges the existence of hierarchies in South Asian NGOs, but finds that leaders in successful NGOs are characterized by their ability to listen to those below them in the management hierarchy and to respond to what they hear they are skilled at managing multifunctional terms and at delegating to others in decentralized operations. Patterns of NGO growth also suggest that qualities of a charismatic leadership are less likely to be vital to future expansion, given that the organizational capacity to replicate with an NGO branch manager-a franchise holder-may be more significant than the capacity to innovate.<sup>66</sup>

The legislative framework relating to internal governance of NGOs, including accounting, disclosure, and transparency, is rudimentary. For instance the Societies Registration Act does not require the submission of annual accounts or audits. The Trust Act

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66 Hasan Zaman , op.cit., p. 139.

requires clear accounts to be maintained, but there are no requirements for external audit. The Companies Act is the only law that contains any fiduciary responsibility rules, and non-for-profit companies face extensive bookkeeping, audit and report-filing requirements. However, the Registrar of Joint Stock Company's is unable to enforce these requirements due to capacity constraints.<sup>67</sup>

There are risks with the current structure and composition of NGO boards. The founder typically heads management as well as holds important board positions such as the chair or secretary. These dual roles threaten to create conflicts of interest and to compromise organizational accountability.

Donor financial reporting requirements are questionable. Smaller NGOs with different donors supporting separate projects have to devote more time and resources to meeting multiple reporting requirements. Another common practice of donors that raises transaction costs is their insistence that NGOs open separate accounts for their funded projects. Discussions with NGO accountants indicate that standardizing donor financial reporting formats would significantly reduce their workload. The perception of a sample of NGO accountants is that donors use a range of lax accounting principles for their reporting requirements. These include dependence on cash basis accounting, disregarding trial balance as tool for verifying the double-entry system of accounting, and a propensity to focus only on their funded projects as opposed to consolidated accounts and audits.

Internal audit practices vary significantly by size of NGO. Some of the smaller organizations do not have internal audit teams or an internal auditor, while larger institutions with multiple branches do. The internal audit team in BRAC reports directly to the executive director and is the largest among NGOs, with around 100 auditors employed. The Grameen Bank's internal audit team is required to check whether targeting criteria for borrower identification has been followed by visits to a sample of client households.

Public access to audit reports is limited, which undermines accountability. An extensive Web search failed to find any NGO other than BRAC that posted its audit report on the organization's Web site. While the laws under which NGOs are registered do not require public disclosure of audit reports, voluntary disclosure would improve public accountability and transparency. In an effort to promote transparency,

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<sup>67</sup> *Ibid*: 140.

the Washington based Consultative Group to Assist the Poor has instituted a yearly award that recognizes microfinance institutions with exemplary financial reporting practices.

Public access to annual audits can help to strengthen public accountability. Public misconceptions about NGOs would be limited if there were a consistent set of disclosure requirements and greater information on NGO programs, funding, and expenditures. The laws under which NGOs are registered do not require public disclosure, nevertheless, ensuring uniform public access to NGO audit reports would be an important part of strengthening public accountability. In cases where NGOs handle public savings deposits, obtain financing from the Bangladesh government, or receive benefits such as tax-deductible donations from citizens, public access to audit reports should be mandatory. This could be done by posting the audit report on the organizations Web site making copies freely available in the head and branch offices, making copies available at public libraries and so forth.<sup>68</sup>

The focus of regulation ought to be shifted to fostering better governance and accountability in the NGO sector, rather than micro-managing foreign funds. All laws and regulations related to the NGO sector need to be harmonized and streamlined to create a uniform regulatory framework that avoids duplication, overlapping and contradictory requirements. This does not necessarily mean that existing laws and regulations should be repealed and replaced with a new, all-encompassing stature. Instead, the existing laws can be modified by incorporating standardized requirements for board structure, holding of annual general meetings, financial reporting, accountability to regulatory agencies and so forth.

NGO Accountability works at the macro-level as well as the micro-level. Accountability at the macro level ensures congruence between institutional policy and actual implementation and the efficient distribution and use at organizational resources. This requires not only financial accountability but also efforts for internal and external actors to monitor the overall economic performance.

There are two main aspects of macro accountability, financial accountability and accountability for economic performance. Financial accountability involves proper functioning of the accounting system for effective expenditure control and cash management, and an external

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68 *Ibid*: 142.

auditing system, which reinforces expenditure control by exposure and sanctions against bad spending and corruption. It also includes mechanisms to review and act on the results of audits and to ensure remedial action. Accountability for economic performance relates to the effectiveness of NGO policies and implementation, efficiency and efficacy of resource use, internal actors (governing board) as well as external actors (government and donors) have a responsibility to monitor the efficiency of resources use by the NGO sector.

Every NGO, irrespective of its size and range of operation, has a governing body and an executive committee, which its management is to accountable. Almost of NGOs have constitutions which set their goals and activities and can be used by the sponsors to hold NGOs accountable. But in reality, specially in matters of strategic decisions, NGOs usually do not 'listen' to their clients/beneficiaries rather they are prone to consult with their governing bodies with the assumption that the later have required skills and qualifications compared to the former. Observing the situation, a prominent NGO specialist comments that NGOs have never developed a countervailing system of downward accountability to the poor (Hashemi1995).<sup>69</sup> Participation of beneficiaries in key decision-making of NGOs does not take place. Rather, it is the members of governing bodies with assistance and feedback from top management take key decision. Consultation with beneficiaries at the grassroots level is important for two reasons – for program sustainability and organizational inconsistency resolution.

NGO workers at field level are much more accessible and decisions taken at that level are rudimentary nature. As Hashemi said that the beneficiaries are seldom allowed to make decisions on programs or budgets or even to participate in monitoring and evaluation rather their participation is limited to relatively inconsequential areas of decisions making.<sup>70</sup>

Financial delegation authority and payment procedures vary considerably across NGOs. Smaller NGOs tend to have Board members as signatories to the organization accounts. In the case of large organizations, the Board delegates authority at different levels. Certain NGOs set up purchase committees. Accounting capacity in most NGOs appears reasonable though the use of technology varies.

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69 S. Hashemi (1995), "NGO Accountability in Bangladesh: Beneficiaries, Donors and the State", in M. Edwards and David Hulme, 103-110. London: Earthscan.

70 *Ibid*: 107.



Large national NGOs like BRAC and *Proshika* have a large extent computerized accounting system down to the branch level while ASA is automated centrally. The smaller organizations are more likely to have full manual system. PKSF has recently started rolling out an accounting software program for the partner organizations.

Financial management practices of NGOs have been shaped by donor requirements, absence of a coherent and uniform accounting standard within the regulations, and lack of awareness on the benefits of adopting sound accounting practices. The Bangladesh Accounting Standards (BAS) are normally not applied and differences in presentation, disclosures, terminologies and accounting policies exist. The key factor, of course, is the absence of a set of principles and standards for financial accounting of NGOs as a separate sector. Accounting and reporting of NGOs are basically guided by a combination of principles and practices followed by other relevant sectors, which do not necessarily meet the requirements specific to the sector. It is therefore important to adopt accounting and reporting standard applicable to the specifications and particulars of the NGO community as a separate sector (World Bank, 2005).<sup>71</sup>

The quality of internal and external audit practices varies significantly by size of NGO. The most important issue regarding this matter is: public access to audit reports is limited and it undermines the accountability. Among the big NGOs only BRAC posted their audit report on the organization's website. While the laws under which NGOs are registered do not require public disclosure of audit reports, doing so voluntarily would improve public accountability and transparency.

Most NGOs, barring few exceptions, are not very transparent or efficient in reporting about their programs and strategies. They do publish annual reports, often in attractive and expensive formal most often aimed at public relations. But in real terms these reports lack substantive information regarding programmatic and institutional strategies, and more importantly very few of them contain vital financial information. This gives rise to skepticism about accountability and transparency. The absence of proper reporting prevents the free flow of information, insights and experiences, which could be beneficial to sharing among NGOs.

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71 World Bank Report 2006, p.64.



## CONCLUSION

From the preceding analysis, it appears that corruption of NGO leaders is primarily the outcome of their moral deviation from the commitment to servicing the poor. However, the regulatory context- as discussed above- largely created the context for such corruption. There has been a common factor to all the afore-studied NGOs: *GSS*, *Proshika* and *Samata*. Executive heads of these three NGOs have exercised unassailable power within these organizations. Common deficit lies in these three NGOs has been the absence of sound financial management. Though an accounts cell existed in these NGO, the organizational set-up merely acted as foot-soldier to fulfill Executive head's ambitions. As these NGOs were heavily dependent on foreign resources, the termination of funds, due to corruption by the Executive heads, significantly violated human rights of the poor members/clients of NGOs. Enjoying human rights by the poor needs resources were denied to them by donors' withdrawal of resources. It has been further stressed upon the fact that the governance deficit within NGOs can be overcome by introducing appropriate regulatory framework enacted by the government. By not stopping financial support, donors can rectify their process of giving money to NGO in which an anti-corruption clause can be included. Donors' even can set-up an integrity desk in NGOs they provide assistance in order to ensure financial transparency.



## *Chapter 5*

# NATIONAL SECURITY AND RIGHTS TO INFORMATION PRINCIPLES IN BANGLADESH

*Adilur Rahman Khan*

## OVERVIEW

Under the colonial rule of the British and Pakistanis, laws, such as the Indian Safety Act, Defence of Pakistan Ordinance, etc., sanctioned preventive detention, the seizure of property and restrictions on the press - all in the name of protecting the security of the State. The struggle against colonial rule and for independence had been deeply imbued with the aspiration to ensure the right of all women and men to a life of human dignity and to enjoyment of their fundamental human rights and freedoms. It envisaged a democratic society allowing for the full exercise of political freedoms.

Within a year of the independence of Bangladesh, a Constitution was drafted by some experts without establishing a new and elected Constituent Assembly; which deprived the people from giving their own opinions as to what the new Constitution should contain. Though the Constitution which came into being guaranteed some civil and political rights as fundamental rights, the aspirations of the liberation struggle remained largely unfulfilled and democratic rights unprotected. Moreover, the survival of millions remained threatened by vicious poverty.

On the one hand, the security of the people, to live with dignity, to enjoy access to food, shelter, health and education has not been ensured<sup>1</sup>, and on the other, in the name of 'national security', the Bangladeshi State continues to deploy repressive laws to violate the people's political rights. Such laws violate their right to life, to liberty and to security of the person – as guaranteed by the Constitution. The laws are discriminatory in their application, and they violate all

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1 These rights are placed under 'Fundamental Principles of State Policy', and cannot be judicially enforced.

safeguards against arrest and detention and the prohibition of torture or cruel, degrading or inhuman punishment. Such repressive laws may be found in the following: Articles 33, 141A, 141B and 141C of the Constitution of Bangladesh; special laws, such as the Special Powers Act of 1974 and the Anti Terrorist Act of 2009; and ordinary criminal laws, such as Section 505A of the Penal Code of 1860 and Section 99A of the Code of Criminal Procedure of 1898; and, more recently, in the Anti-Terrorism Act of 2009.

The use of the law to repress citizens not only deprives them of their right to life, liberty and justice, but also deprives them of information, in the sense that they are unaware of the decisions and policies undertaken by the government as to the management of the country – and they are unaware of the laws they are being repressed under; and fail to get information from the law enforcement agencies assigned to carry out such repression. In Bangladesh, torture and enforced disappearances are human rights violations carried out by law enforcement agencies; and in both instances, not only is the victim not told the actual reason of his being arrested, but also it is his family who are kept running from pillar to post to find some information as to his whereabouts, due to lack of information or its repression by unwilling officials.

## **REPRESSION UNDER THE LAWS**

### **The Removal of Safeguards on Arrest and Detention**

Within a year of adopting the Constitution on December 16, 1972, the first Awami League government amended the Constitution three times and the 2nd amendment amended the provisions in Article 33 of the Constitution by restricting the safeguards available to those under arrest and detention. The right of any person in custody to be informed “as soon as may be” of the grounds of arrest, to consult and be defended by a lawyer of one’s choice and to be produced before a magistrate within 24 hours of arrest or detention is denied to enemy aliens and those in preventive detention.

Article 33 further limits the rights of any person in preventive detention. It is specified that detainees must be informed of the grounds of their preventive detention as soon as possible and given the “earliest opportunity” to make a representation against the order. However, this is qualified by a further provision which enables the enforcing authority to refuse to disclose such facts as it considers being

against the public interest. Effectively then detainees will be unable to discover the grounds for their detention.

### **The Special Powers Act of 1974**

Constitutional limitations on the right to liberty have been supplemented by specific legislation - the Special Powers Act of 1974 (SPA) - which provides for preventive detention. The use and abuse of the SPA in the name of protecting security interests has resulted in a steady pattern of human rights violations.

The SPA was enacted to “take special measures” for the “prevention of prejudicial activities, for more speedy trials and effective punishment of grave offences.” It defines a “prejudicial act” as “any act which is intended or likely” to have the following consequences:

- To prejudice the sovereignty or defence of Bangladesh;
- To prejudice the maintenance of friendly relations with Bangladesh;
- To prejudice the security of Bangladesh or to endanger public safety or the maintenance of public order;
- To create or excite feelings of enmity or hatred between different communities, classes or sections of people;
- To interfere with or encourage or incite interference with the administration of law or the maintenance of law and order;
- To prejudice the maintenance of supplies and services essential to the community;
- To cause fear or alarm to the public or to any section of the public;
- To prejudice the economic or financial interests of the State.

These expansive definitions of “prejudicial acts” allow considerable scope for their abuse by the authorities.

The SPA allows the authorities to detain any person on the above grounds. Such detention can extend to six months and may extend beyond this period if so sanctioned by the Advisory Board. The authorities must supply the detainee with the grounds of detention “at the time of his detention or as soon thereafter as is reasonably practicable” but within a maximum period of 15 days. Pursuant to Article 33(4) of the Constitution, the detainee must be produced before the Advisory Board within 120 days from the date of the order, and the board shall, after due investigation, including affording a hearing to the detainee, submit its report to the government within a period of 170 days from the date of detention. There is no right to

legal representation before the Advisory Board though. In practice, the detainee is rarely even brought before the Advisory Board.

The SPA has been widely used to detain opposition activists, especially the members of Jatiyo Shomajtantirik Dol and the Shorbohara Party (two radical left-wing parties) under the first Awami League and BAKSAL regimes of Sheikh Mujibur Rahman. It has also been disproportionately deployed against the hill people of the Chittagong Hill Tracts. The judiciary though has in innumerable cases acted as a “bulwark against illegal detention.” Detainees have been released by orders of the High Court Division following the filing of writs of habeas corpus or the initiation of proceedings under Section 491 of the Criminal Procedure Code of 1898. In the vast majority of such cases, the court has found the grounds of detention to be vague, indefinite and lacking in material particulars. In other cases, orders of release have been given for the following reasons:

- Failure to inform the detainee of her or his right to representation;
- Failure to state the grounds for detention within the statutory period of 15 days;
- Lack of a nexus between the order of detention and the grounds of detention, e.g., the order states that a person has been detained “to prevent him from acting in a manner against the protection of public safety and law and order” while the grounds specify “preventing him from acting against the economic or financial interests of the State”;
- Failure to produce the detainees before the Advisory Board within a specified time; and
- Retrospective issuance of orders.

### **Anti-Terrorism Act of 2009**

The military backed ‘caretaker government’ promulgated the Anti Terrorism Ordinance on June 11, 2008. On January 6, 2009, the present Government assumed power, and approved the Anti-Terrorism Bill to be made into law, in its first parliamentary session. The definition of ‘terrorist activities’ is wide and there is scope for human rights violations in the name of anti terrorism. There is no internationally recognised definition of torture in the Act either. On July 11, 2011, the Cabinet approved, in principle, the draft amendment of the Anti-Terrorism (Amendment) Bill 2011 after making some changes in the sections and incorporating provisions of strict punishment. Apart from Banks, other financial institutions have also been included in this new

amendment in order to prevent ‘terrorism’. The punishment for being involved in ‘terrorism’ and engaging in its financial help was amplified in the amendment. The term of punishment has been increased to four years instead of three years and additional fine imposed. In the amendment, the proposed fine is twice the value of relevant property or 10 hundred thousand Taka. Under this amendment, any property belong to a person involved in ‘crime’ can be seized in accordance with the request of any foreign country or organisation or international, regional or bilateral treaty, UN Conventions or decisions taken in the Security Council of the UN.

The Public Relations Department of the banned political organisation Hizb-ut Tahrir Bangladesh forwarded written allegations to the human rights organisations that the members of Hizb-ut Tahrir had been arrested by law enforcement agencies for putting up anti government posters, organising secret meetings and bringing out processions. Later they were shown as arrested under the Anti Terrorism Act of 2009.<sup>2</sup> Furthermore, Mahmudur Rahman, the Acting Editor of the daily Amar Desh, was shown arrested in a pending case under the Anti Terrorism Act, 2009.

## **Criminal Laws**

### *(i) Section 505A of the Penal Code*

In 1991, the SPA provisions relating to restrictions on the freedom of the press (namely, Sections 2d, 3g, 16, 17 and 18) were repealed. Within months, a new section, 505A, was added to the Penal Code. This stated that any person who “by words, written or spoken, or by sign or by visible representation or otherwise does anything or makes, publishes or circulates any statement, remark or report” which threatens national security, public order or friendly relations with foreign nations or the maintenance of essential supplies and services is punishable by seven years of imprisonment.

### *(ii) Section 99A of the Code of Criminal Procedure*

If the administration considers any publication to be prejudicial to the security of the State, it may take action under Section 99A of the Code

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<sup>2</sup> Public Relations Department, Hizb-ut Tahrir.

of Criminal Procedure to ban and seize all copies of that publication. In recent years, the government has banned several publications, including Radar and Satellite, which contained reports on human rights violations in the Chittagong Hill Tracts.

## **THE RIGHT TO INFORMATION ACT 2009**

### **Necessitating Factors**

Information is the cardinal source of power. Those who possess information are powerful. Those who do not have access to information are powerless. By enforcing people's right to information the powerful and can be brought closer to powerless, through sharing and disclosing information. It can turn out to be the most effective catalyst for institutionalization of democracy, promotion of good governance and control of corruption. It is about empowerment of citizens and about building responsiveness of the state and its organs, the political parties and leaderships, administration and other institutions to the citizens.

The Right to Information Ordinance 2008 was promulgated on 20 October 2008. It established an Information Commission with a Chief Information Commissioner at its helm. A Right to information legislation has long been demanded by many for transparent administration and good governance. It is also a right of the people who are sovereign. However, it was promulgated by such a regime that took away fundamental rights of the people, imposed Emergency and installed an unelected government.

The Government of Bangladesh adopted the Right to Information Act 2009 (RTI Act) in the first session of the 9th Parliament on March 29, 2009, marking a significant step forward in fulfilling the constitutional pledge of the state of Bangladesh.

The precondition of RTI Act was to ensure people's right to know and good governance; since RTI goes hand in hand with freedom of expression. Civil society, through citizens and the media, can legitimately claim access to information. Governments should facilitate this access by maintaining adequate records as a base of evidence and by providing an infrastructure for giving information

### **Restrictions and Lapses**

Section 8 of the Right to Information Act 2009, deals with procedures to obtain information. The person seeking information has to provide



his personal details, description of information sought and other information to clarify what is being sought. A pre-fixed amount has to be paid to get information. This provision has generated widespread discontent. We feel, by using this option, getting information would be costly and constitute a major obstacle to receive information. For journalists and others, who would need lots of information it would effectively be a prohibition from obtaining information because of costs.

Under Section 7, information that could threaten security, integrity and sovereignty of Bangladesh could be denied. Also if it affects relations with foreign countries or organisations it could be refused. It provides other circumstances when information can be denied. Some of these restrictions are logical but the way the Act has been framed, broad remit of issues on the denial list including an imprecise definition of national security.<sup>3</sup>

Section 8 deals with procedures to obtain information. The person seeking information has to provide his personal details, description of information sought and other information to clarify what is being sought. A pre-fixed amount has to be paid to get information. This provision has generated widespread discontent. It is to be mentioned that, by using this option, getting information has been costly and constitute a major obstacle to receive information. For journalists and others, who would need lots of information it would effectively be a prohibition from obtaining information because of costs. The other concern is independence and autonomy of the Information Commission. Section 24 provides rights to appeal if information is not provided within a stipulated time.

The exclusion of eight security and intelligence agencies from purview of this law - the National Security Intelligence Agency (NSI); Directorate of Forces Intelligence (DGFI); Defence Intelligence Units; Criminal Investigation Department of Bangladesh Police (CID); Special Security Forces (SSF); National Revenue Board's Intelligence Cell; Special Branch of Bangladesh Police; and Rapid Action Battalion's (RAB) Intelligence Cells- has provided them impunity and unaccountability. Most of these agencies are accused of involvement in violations of human rights and they often exceed their jurisdictions. Also there are questions about discipline, financial propriety and their alleged involvements in political affairs, also evidenced during the

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3 See Human Rights Report 2008 / Odhikar.

Caretaker government, would certainly negate any benefit for having a law on right to information.<sup>4</sup> There is no definition of ‘national security’ as per Bangladesh policy and the restrictions in the Right to Information Act 2009 cannot be justified.

The Act has been criticized as it happens in case of any law like this, especially with respect to the list of exemptions which many including this author considers to be too long.<sup>5</sup> Instead of going into a discussion of the merits and demerits of the law as such, we proceed with the assumption that the Act has opened up an unprecedented opportunity to make progress towards ensuring citizen’s right to information.

## **OTHER FACTORS SUPPORTING THE LIMITATION OF RIGHT TO INFORMATION**

### **The Information Commission**

The Government established an Information Commission on July 1, 2009 to provide information to the people. The Commission has made no significant in road to secure the ‘right to information’ of the people. The law of 2009 envisages a three-member ‘independent’ Information Commission to preside over the information dissemination process of the State. That the government intends to have control over the Information Commission, in the first place, is evident in the composition of a five- member ‘selection panel’ designed to choose the members of the commission. With the government having direct control on three of the five-member selection panel, the law, then, says that the presence of three of the members will make a quorum and that the decisions will be made at the meeting/s of the selection committee on the basis of the opinion of the majority of the members. Moreover, the law stipulates that the Commission will require the government’s approval for the set of rules that it will formulate for its functioning. There is, therefore, hardly any scope for any politically/intellectually independent person to be a member of the so-called independent Information Commission.

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4 See Human Rights Report 2008 / Odhikar.

5 There are criticisms of the Act including those who consider some provisions of the Act to counterproductive the notion of right to information as such. See for example, Nurul Kabir, “Hypocrisy, thy Name is Government”, a 5-part article published in The New Age, May 3-7, 2009.

The government's intention to keep the Information Commission a 'toothless' body is also evident in the very little jurisdiction that the law has granted it to punish the errant public authorities responsible for providing information to the public. True, the Commission has been given the power to take action against an authority or an official concerned, in case the latter are found guilty, upon an investigation into the allegation of a citizen, of denying the citizen any information without valid reason, or of providing the citizen with inadequate or false or misleading information. But the kind of punishment that the Commission could award an errant official is absolutely insignificant: a fine of Tk. 50 per day for a certain period, which will not be exceeding Tk. 5,000. Besides, the Commission would 'recommend' to the [higher] authorities concerned 'departmental action' against the errant authority or the official, and could 'request' the [higher] authorities concerned to inform the Commission as to what action the former has taken against the errant authority/official. Notably, the law is completely silent over as to what would happen if the higher authorities concerned refuse to honour the Commission's 'recommendation' to take departmental action against the authority/official violating the right to information law and/or refuse to entertain the Commission's 'request' to inform the body about the actions taken.

### **Public Officials**

Many government officials do not know about the information law. Lack of citizens' understanding about the Right to Information (RTI) Act and non-cooperation from authorities in providing information are holding back the Act's successful implementation. The first step required to implement the law is to make government officials aware about the law. It is the government employees who harass information seekers the most. According to the Information Commission, the Commission has received 65 complaints of RTI violation since 2009. Of the cases, 34 have been solved so far.<sup>6</sup>

### **Intelligence Services**

The following intelligence agencies operate to protect internal or national security: National Security Intelligence (NSI), Directorate of

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<sup>6</sup> The Daily Star Monday, September 19, 2011.

General Forces Intelligence (DGFI), Special Branch (SB) and, more recently, the Special Security Force (SSF). The NSI, DGFI and SSF are directly accountable only to the Prime Minister. The NSI was created by a cabinet decision in 1972; there is no statutory basis to its creation. The SB, however, is a part of the police and reports to the Home Ministry.

These agencies are intimately involved in the application of national security legislation. In many cases, detainees have been illegally kept in the custody of the intelligence services for interrogation purposes. Moreover, many cases have been reported of custodial violence against political activists by members of the intelligence services. The surveillance of political, socio-cultural, development and human rights organisations is also conducted by such agencies. Non-governmental organisations (NGOs) require prior clearance by the NSI and SB to initiate projects or appoint staff. These agencies have placed themselves in a position beyond the reach of the law; and there is no scope to discuss their activities in the national Parliament.

## **THE MEDIA AND 'RIGHT TO INFORMATION'**

### **How Independent is the Media in Bangladesh**

Media in Bangladesh is mostly run by corporate houses. It is generally independent, if it does not affect their corporate interests. However, there are censorship from time to time by the government and the owners practice a self censorship policy too.

Media – both print and electronic – that are critical of the government often have to face the wrath of government agencies in the form of threats, violence on journalists and even lawsuits. Two examples of this is the persecution of Mahmudur Rahman, the acting Editor of the daily Amar Desh, and the harassment of Nurul Kabir, Editor of the daily New Age. Cases were filed against Mahmudur Rahman under several laws, including the Anti Terrorism Act 2009, for publishing news that the Government believed was anti-State; while Nurul Kabir was held in contempt of court for criticizing the work of the International Crimes Tribunal. It must be noted here that the Constitution of Bangladesh allows for freedom of speech and expression – within universally recognized limits – and criticizing a individual or an institution in how it carries out its professional, public duties, does not amount to the crime of defamation in Bangladesh criminal law.

## LAWS GOVERNING RESTRICTIONS ON THE MEDIA

### Contempt of Court Act 1926 and 505A of the Penal Code Restricts Media

The Contempt of Court Act 1926 (CCA) with only three sections is still effective in Bangladesh, even though a new Bill on this matter is currently under scrutiny. However, the CCA does not define what is or amounts to a ‘contempt of court’. Actually the matter has been left on the discretion of the courts. So, any act which a judge thinks to be disgraceful for the court is contempt of court. This power is endowed with court so that justice is not hampered by the disrespect and contumacy of people. It does not protect the judge as a person rather safeguards the seat of justice.

Section 2 of CCB Provides that “any willful act, statement or expression by words or visible sign that may be considered as a violation of any verdict, decree, order, writ or warrant issued by a court, or undermine any court, or may obstruct the process of justice, will constitute an offence of contempt of court; the slander or libel of a court and personal criticism of a judge while performing judicial functions will also constitute an offence of contempt”.

No court of the lower judiciary can punish the person who has perpetrated the contempt. Section 2 of this Act provides that if a court subordinate to the High court Division (HCD) finds any act of any person to be contemptuous, it shall refer the same to the High Court Division for punishment. However, the general trend is that before sending the matter to the HCD, the accused is asked to show cause.

Section 505A of the Penal Code focuses on prejudicial act by words. It says whoever-

- (a) by words, either spoken or written, or by signs or by visible representation or otherwise does anything, or
- (b) makes, publishes or circulates any statement, rumour or report,

which is, or which is likely to be prejudicial to the interests of the security of Bangladesh or public order, or to the maintenance of friendly relations of Bangladesh with foreign states or to the maintenance of supplies and services essential to the community, shall be punished with imprisonment for a term which may extend to seven years, or with fine, or with both.

## **Policies and Practices of Restriction on the Media**

Successive governments practiced the policy to control media from the beginning of the independent Bangladesh. One of the opposition newspapers Daily Gonokontho office was burned down and the Editor was arrested in 1974 by the then Awami League activists. This news paper was stopped from publishing for reporting against the government. In January 25, 1975 when a single party government system was introduced all newspapers were banned except only four newspapers. General Ershad banned several newspapers for publishing reports against his regime. After the downfall of General Ershad there have been a space created for the time being, but it did not last for long. The governments of Bangladesh Nationalist Party (BNP) and Awami League which came to power after General Ershad failed to improve the situation, rather they were also repressive on the media activists ignoring their electoral pledges for free media. During the State of Emergency media went again under the strict supervision of the intelligence agencies, except a few which withstood that pressure. In June 1, 2010 Daily Amar Desh was stopped from publishing by the present government and the Acting Editor was detained for publishing reports against the government.

## **Case Studies and Incidents of Censorship of Media**

On July 31, 2011, a draft regulation for broadcasting private TV channels was sent to the Parliamentary Standing Committee on the Ministry of Information. It highlighted that no inconsistent or contradictory information would be aired in any talk show and discussion programmes. In this regard, the Director of Television and Radio or Director of the responsible programme would be accountable to the relevant authority.<sup>7</sup>

Odhikar believes that such kind of regulation is contrary to freedom of speech and expression. If this becomes law, then the government will interfere even more in programmes, including the news and talk shows of the private television channels.

Odhikar expresses serious concern over the drafting of such a forceful regulation, which will obstruct the freedom of the media and it also urges the government to refrain from imposing pressure on the media by implementing such regulation. It must be noted that such

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7 The daily Manabzamin, 11/09/2011.

interference in the free flow of information was practiced during the martial law and the army backed caretaker government regimes. Talk shows were barred and journalists threatened, warned, harassed and even tortured. Does this democratically elected government want to revert to such repressive activities that are more in line with martial rule?

According to information gathered by Odhikar, from January to July 2012, a total of four journalists were killed, 111 were injured, 49 received threats, 40 journalists were assaulted.

### **THE THREAT OF ‘TERRORISM’: ENHANCING RESTRICTION OF INFORMATION**

As a developing country of South Asia, and largely Muslim, Bangladesh could not remain out of the bounds of terrorism issues. However, being an economically vulnerable country, economic development has always been its prime concern and issues of international significance have been of less priority to it. The internal law and order situation of the country is not commendable and much remains to be done in this regard.

Bangladesh, unlike the United States, initially did not consider terrorism a major concern, but soon it was compelled to reconfigure its internal legal regime to address internal law and order situations. Bangladesh enacted a Speedy Trial Tribunal Act in the year 2002 to facilitate the quick trial of some serious crimes by establishing special courts, to bring back people’s confidence in the government machinery in maintaining law and order. To ensure control over money transfer to and from Bangladesh for use in probable terrorist activities, the Money Laundering Prevention Act was also enacted in 2002 (Act No. VII of 2002). After a country wide bomb campaign allegedly initiated by the Jama’atul Mujahideen Bangladesh (JMB) on 17 August 2005, all the six leaders of the JMB were arrested, tried in the Speedy Tribunals and sentenced to death during the regime of the four party alliance led by the BNP. During the military backed caretaker government of 2007, all were executed on 30 March 2007.

The Parliament enacted the Anti-Terrorism Act (also known as ATA) on 24 February 2009.<sup>8</sup> Earlier, on February 19, 2009, the Government, at a Cabinet meeting, approved the Anti-Terrorism Bill

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8 FIDH/Odhikar report on Bangladesh: Criminal Justice through the Prism of Capital Punishment and the Fight against Terrorism. April 2010. See [www.odhikar.org](http://www.odhikar.org).

to be made into law, without any public consultation. The definition of a 'terrorist act' is too wide and the law has been used against a cross section of people including opposition activists, teachers, journalists and human rights defenders.

## CONCLUSION

In the face of all these odds and the impulse to use national security laws to curb anti-government activities, it is a critical duty of human rights defenders to unpack the actual reality. If the socio-political disparity is removed and the rights of the people are protected 'extremist' outbreaks of grievances will die down. We should have the courage and patience to go to lengths to diagnose our own problems. Readily using internationally induced military methods to push back the surfacing phenomenon will further complicate the whole situation. Without addressing the root causes properly there will always be the danger of backlash. A solution has to be derived from national strategic dialog, where all pros and cons will be discussed.

The Right to Information Act, 2009, as analysed in the preceding paragraphs of the article, will restrict the flow of public information more than it would provide the public with it. This is not acceptable. Because, for the sake of transparent and accountable governance to take root in the country, the public need information of vital public importance, such as the contents of cabinet decisions, proceedings of the financial deals struck with national and multinational companies, details of the political, economic and military policies a government pursues with foreign states and international organisations, development paradigms and economic policies that a government adopts and implements for different sections of society. If these have been enacted for the betterment of a country and its people, why should they not be made public information?



## *Chapter 6*

# THE NEED TO CRIMINALIZE TORTURE IN BANGLADESH

*Saira Rahman Khan*

## INTRODUCTION

The use of torture to extract information is not a new trend. Ancient civilizations practiced torture and the law of 'lex talionis' was prevalent. Methods of torture included stoning, whipping, and 'desert sun death'. Later on came more 'sophisticated' torture devices such as the 'iron maiden', dunking chairs and the rack. All these acts of torture were considered necessary or good – either to deter others or to punish the immoral. In medieval and early modern European courts, torture was used as a means to extract confessions or to obtain other information about a crime.

Given the modern age of technology and sharing of information and news, it is common knowledge that several states today use torture, or silently consent to the practice. However, with the world-wide increase of human rights awareness, few wish to be labeled, either by their own citizens or international bodies, as doing so. As a result, a variety of strategies to circumvent around legal and humanitarian obligations, are used by such states, including flat-out denial, 'police duty', 'need to know', 'for interrogation purposes' and denial that certain treatments constitute torture.

Bangladesh is a country where torture is a constant method used by law enforcement agencies to extract confessional statements from arrestees, or just to demoralize them and break their will. Despite the fact that Bangladesh is a party to the Convention against Torture (CAT), the term 'torture' has yet to be criminalized. Nevertheless, as we will see later in this paper, there are provisions within existing criminal laws in Bangladesh that can still be used to punish the offence. However, since the term 'torture' is not mentioned in the Penal Code, a void remains and it is thus difficult to prosecute a person for this offence.

The torture techniques employed in Bangladesh, whether of long standing practice or of more recent origin, are brutal. Methods documented by Human Rights Watch and other human rights organisations include burning with acid, hammering nails into toes, drilling holes in legs with electric drills, electric shocks, beating on legs with iron rods, beating with batons on backs after sprinkling sand on them, ice torture, finger piercing and mock executions<sup>1</sup>.

This paper provides a brief overview of the legal framework and the practice of torture in Bangladesh and seeks to highlight the need to criminalize torture in Bangladesh.

## **AN ENABLING ATMOSPHERE FOR TORTURE IN BANGLADESH**

There are well-documented allegations of wide-spread torture by law enforcement personnel as part of an established routine in Bangladesh. In addition, there is a fundamental lack of separation of powers; and political interference from the Executive has led to politically motivated decisions and lack of accountability for human rights violations, including torture.

Case studies show that few legal safeguards are upheld in practice, including the right of information as to the reasons for arrest, the right to legal representation, the 24 hour time-limit for a judicial hearing after arrest. There are also cases of intimidation of the victims and witnesses and there are extreme time delays in forwarding indictments and during trial. The lack of these basic safeguards is a contributing factor to torture.

Apart from the police force in Bangladesh, an increase in specialized law enforcement agencies – the police, the Rapid Action Battalion or ‘RAB’, ‘joint forces’, etc – to assist the civilian force, has also resulted in an increased level of torture and other cruel and inhuman treatment and lack of accountability. The lack of disciplinary action against law enforcement personnel remains one of the main attributing factors to torture. There is no functioning independent administrative system dealing with complaints of torture committed

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1 Human Rights Watch. *The Torture of Tasneem Khalil*. February 2008. [thinkweb.hrw.org/en/reports/2008/02/13/torture-tasneem-khalil](http://thinkweb.hrw.org/en/reports/2008/02/13/torture-tasneem-khalil).

by law enforcement officials, resulting in impunity and lack of accountability.

Throughout the public sector there is a fundamental lack of resources, including lack of infrastructure, personnel and proper investigative equipment. Sub-standard conditions in places of detention, including severe overcrowding, lack of sanitation, food and drinking water as well as medical treatment amounts to cruel, degrading and inhuman treatment or even torture. Furthermore, law enforcement in Bangladesh is not an independently functioning entity. The police have been used time and again by various political regimes to quell the Opposition and opposition activists. A historical study of Bangladesh politics shows that national security laws like the Special Powers Act of 1974 and the Anti-Terrorism Act 2009, which provide for extreme punishments and preventive detention, have also been abused in this regard and illegal detentions and physical abuse are common methods of harassment used against opponents of the government.

According to the Asian Legal Resource Centre, “The constitutional provision regarding the strict prohibition of torture as a fundamental right seems hollow in Bangladesh as torture is rampant and there are no effective and available legal remedies in reality. The use of torture as a tool of extortion and a routine method of interrogating of persons suspected of having committed criminal offences has been documented by the ALRC in numerous cases. Torture is not the exception or the result of a few rogue elements in Bangladesh, but is near-systematic in its use and systematically accompanied by impunity for the perpetrators. Those who attempt to register a complaint of torture not only fail but then face reprisals. The system of impunity further propagates the practice of torture.”<sup>2</sup>

## **WHO ARE THE VICTIMS? WHAT HAPPENS TO THEM LATER?**

In 2010, a reported 22 persons were killed because of torture in the hands of RAB and police. In 2011, the number was 17. In 2011, a

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2 Written statement submitted by the Asian Legal Resource Centre (ALRC) to the Tenth Session of the Human Rights Council February 16, 2008. Ref: ALRC-CWS-10-02-2009.

reported number of 38 persons were tortured in the hands of the police, of which 14 later died<sup>3</sup>. Between January and June 2012, a reported number of 45 persons have allegedly been tortured by either RAB, the police or jail authorities. Of this number, 5 later died<sup>4</sup>. These figures, however, do not represent the many others who were tortured and later released or those who were tortured and later killed in so-called ‘cross-fire’<sup>5</sup>.

The one with the most power and the confidence that is created by impunity is the one who perpetrates the torture. This power is a combination of political clout, money, government indifference and social status. We say that it is the law enforcement agencies that perpetrate the torture – but in some cases, it needs to be seen who actually pulls the strings and orders the torture. This is especially true in the case of the torture of political opponents and journalists. In the case of the remand of Amar Desh acting Editor, Mahmudur Rahman, when the police were physically assaulting him in custody, their excuse was that it had been ordered from ‘higher up’<sup>6</sup>.

According to Odhikar fact finding reports on cases of torture spanning the last 10 years, victims of torture can be divided into the following categories:

1. The poor and marginalized groups, which include pavement hawkers, small shop owners or shop workers. Such groups cannot afford legal representation and can be tortured into giving a confession and then implicated in a pending investigation, regardless of whether they are guilty or innocent of the offence;
2. Activists belonging to the opposition political parties, which includes not only the official Opposition party in government, but also all other groups that oppose the government party. This

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3 This is out of a total reported number of 46 persons tortured in the hands of RAB, police and jail authorities in 2011. Information from the data compiled by the human rights organisation Odhikar. See [www.odhikar.org](http://www.odhikar.org).

4 All figures taken from the documentation of the human rights organisation Odhikar. See [www.odhikar.org](http://www.odhikar.org).

5 Odhikar documentation. See Odhikar Annual Reports for 2010 and 2011 at [www.odhikar.org](http://www.odhikar.org).

6 Interview with Mahmudur Rahman, Acting Editor of the Bangla language daily, Amar Desh on 12 August 2011. Mahmuder Rahman was picked up from his newspaper office in June 2010 over the publication of several stories that the government found offensive and was convicted under several charges, including ‘terrorism’. He was taken into remand several times.

- category also includes ‘banned’ organizations such as the Hizb-ut-Tahrir;
3. People belonging to ‘underground’ or ‘outlawed’ political parties;
  4. Members of ‘civil society’ who are vocal about human rights issues, including journalists, human rights defenders, lawyers, social workers and teachers.

After being tortured into admitting the commission of an offence or otherwise, what happens to the victim? If he belongs to a political party and is well-known or socially recognized, he is given a jail sentence and sent to prison. If he is poor and unrepresented, in many cases the ultimate fate is death due to excessive physical torture or due to extrajudicial killing, passed off by the law enforcement as an ‘encounter killing’. This is also the case for political activists. Such persons also ‘disappear’, the law enforcement agencies in total denial of any arrest. It is difficult to ascertain whether a person who has disappeared after police or RAB arrest has been tortured, but statements from those who have been released by RAB after several days of incarceration, show that such persons are tortured almost every day of their captivity. Furthermore, bodies recovered from open spaces, fields, etc of persons earlier claimed to have been picked up by police or RAB personnel, bear marks of torture and abuse, including extensive bruising, loss of nails, wounds, and broken bones<sup>7</sup>. As a result, it is, I think, fair to state that persons who disappear initially suffer some physical abuse and torture.

## **THE PRACTICE OF TORTURE BY LAW ENFORCEMENT AGENCIES**

A large amount of the torture meted out by law enforcement agencies on accused persons is in order to get a ‘confessional statement’ out of him. Article 35 (4) of the Constitution talks about self-incrimination. The Article states: ‘no person accused of any offence shall be compelled to be a witness against himself’. The main objective of Article 35(4) is to protect an accused person from any compulsion to make self-incriminating statements, including confession. Here, Self-incrimination must mean conveying information based upon the

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7 See fact finding reports on torture cases, carried out and reported by Odhikar, at [www.odhikar.org](http://www.odhikar.org).

personal knowledge of the person giving the information<sup>8</sup>. According to the law, no one can be forced to do this. Thus, the laws make it mandatory that the confessional statement must be freely given without any duress or threat or compulsion. According to Mahmudul Islam, “The protection [under Article 35 (4) of the Constitution] being against any compulsion, Art. 35 (4) is not attracted in the case of a confession which must be voluntary and without any inducement. But the number of confessions has increased manifold in criminal prosecution creating doubt as to whether those confessions are at all voluntary”.<sup>9</sup>

There is a basic pattern leading to the torture of an accused person. He is first arrested by the police and may receive a few slaps or kicks during that time, including a fair amount of verbal abuse. He has to be presented before a Magistrate within 24 hours of his arrest. In court, the police may ask for anywhere between 3 to 15 days remand in order to ‘question’ the arrestee. Remand is what all detainees fear. It is during that time that they are beaten, intimidated, given electric shocks, kicked and verbally abused in order to extract a statement that may lead to a confession and a quick solution of the crime. Family members often bribe or offer money to arresting officers as a way to prevent the physical and verbal abuse that comes with being taken into remand.

Again, there is always the fear of the police seeking a further period of remand if the accused does not confess the first time round, and this also encourages the accused to make a statement. In the case of *Nazrul Islam Vs. The State*<sup>10</sup>, it was held that ‘When an accused is under threat of being sent back to police remand he is likely to make a confession out of fear. His statement in such position should not be considered as voluntary.’<sup>11</sup> Confessions that are made to the police after the arrest of the accused are extra-judicial confessions. Such confessions lead to discovery of vital evidence and it is only that part of the statement made by the accused that can be used in Court. Even though extra judicial confessions are not admissible in Court and can be used only in terms of proving the presence of discovered evidence<sup>12</sup>, there have been instances where such a confession is enough to convict its maker. In the

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8 *Bombay Vs. Kathi Kalu*. AIR 1961 SC 1808.

9 Islam. Mahmudul. Constitutional Law of Bangladesh (second edition) (Dhaka. Mullick Brothers. February 2002). Para 2.153, at 220.

10 45 (1993) DLR (HCD) 142.

11 45 (1993) DLR (HCD) 142.

12 In Bangladeshi law, sections 25 and 27 of the Evidence Act, 1872.

matter of *Nausher Ali Sardar and Others Vs. The State*<sup>13</sup> it was held that ‘an extra judicial confession can form a basis for conviction if found to be voluntary and true’. Thus, even in this case, it is paramount that the confessional statement was given voluntarily and without any kind of intimidation or coercion. In the case of *State Vs. Badsha Molla*<sup>14</sup>, it was held: ‘Evidence of an extra judicial confession depends on the veracity of witnesses to whom it was made and it requires material corroboration by evidence of impeachable character’<sup>15</sup>.

Cruel and inhuman treatment and torture are also used by law enforcement to demoralise, scare and stop the activities of specific groups of individuals, such as journalists, political activists (belonging to the Opposition) and even human rights defenders. There have been times, especially during the State of Emergency, when newspaper offices have been monitored and their reports closely censored and journalists threatened and tortured for exposing flaws in law enforcement or for criticising government actions.

On April 7, 2007 at around 9:15 pm, Noor Ahmed, the Editor of the daily newspaper Doinik Sylhet Protidin was taken away from his office, by RAB-9 officers, Captain Mustafiz and Captain Al Amin, (both of whom he knew) to an unknown destination, handcuffed and blindfolded. There, Noor was beaten with a stick from the bottom of his feet up to his knees for 15/20 minutes and was asked to admit that he was involved in extortion. When Noor denied the fact, he was beaten. At one point Noor was suspended by a ring and beaten. Noor’s legs had swollen and he could not walk. His blindfold was taken off for two to three minutes when Captain Mustafiz and Commanding Officer Ferdous questioned him about several extortion cases and asked Noor about his involvement. Since Noor failed to give any information, he was again blindfolded and beaten and at one point during the beatings, his toes got broken. On April 8, 2007, at around 8.00 am he was interrogated again by Captain Mustafiz and Captain Al Amin. Blindfolded, Noor was taken to another room at around 10.00 am. At around 2.00 pm he was told to give his signature on a typed piece of paper, and he did so, too traumatised to read what was written there. Noor believes he had been arrested for

13 39 (1987) DLR (AD) 194.

14 9 (1989) BLD (HCD) 257.

15 Ibid at para 21 pp 264.

reporting on illegal activities by RAB and the bribe-collecting activities of Deputy Inspector General (DIG<sup>16</sup>) of police of Sylhet, Shahidullah.<sup>17</sup>

Another reason why police freely resort to acts amounting to torture is the law itself. There are checks to the process of filing a case against a public official for crimes amounting to torture. Section 197 of the Code of Criminal Procedure of 1898 states that the prosecution of a Judge, Magistrate or a public servant who ‘cannot be removed from office without government sanction’ – for any offence committed during course of official duties- needs prior government sanction<sup>18</sup>. Needless to say, this is the reason why so few police officers are taken to task. Another problem is the investigation procedure. It is usual for the police officers of the same police station to investigate an allegation of torture against a colleague. As a result, the report is usually biased. All this boost the confidence to deny flat out that incidents akin to torture ever happen in police stations and other places of detention<sup>19</sup>.

## NATIONAL LEGAL FRAMEWORK: NO DEFINITION OF TORTURE

Apart from the Constitution of Bangladesh, no criminal law in the country has specifically mentioned, defined or condemned ‘torture’, which is why it is so easy to get away with, backed up with corruption,

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16 Deputy Inspector General of police (DIG) is the head police administration of a Division in Bangladesh, who has jurisdiction over all the Districts under the concerned Division.

17 Odhikar fact finding report: Journalist Noor Ahmed Tortured and Forced to Stay Away from Profession by RAB in Sylhet. For more information visit [www.odhikar.org](http://www.odhikar.org).

18 Section 197 of the Code of Criminal Procedure states: ‘(1) When any person who is a Judge within the meaning of section 19 of the Penal Code, or when any Magistrate, or when any public servant who is not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act, in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction of the Government; (2) The Government may determine the person by whom, the manner in which, the offence or offences for which, the prosecution of such Judge, Magistrate or public servant is to be conducted, and may specify the Court before which the trial is to be held’.

19 See Odhikar fact finding reports on torture in its website: [www.odhikar.org](http://www.odhikar.org).



lack of political will and excuses such as ‘part of law enforcement’ or down right denial that such incident took place.

The Constitution of the People’s Republic of Bangladesh has a powerful chapter on Fundamental Rights, largely borrowed from the Universal Declaration of Human Rights. According to Article 35 of this chapter, “No person shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment.” If this is the case, then acts of cruel, degrading and inhuman treatment by law enforcement agencies can be taken to court as being in contravention with Constitutional guarantees.

Apart from the Constitution, the only source that can provide a legal framework to criminalize torture is the Penal Code, 1860. This Code already provides punishments for crimes such as assault, grievous hurt, intimidation and wrongful confinement.<sup>20</sup> ‘Grievous hurt’, according to the Penal Code 1860, include the following acts:

- Emasculation
- Permanent blindness of one or both eyes
- Permanent loss of hearing of one or both ears
- Privation of any member or joint
- Destruction or permanent privation of the power of any member or joint
- Permanent disfiguration of head or face
- Fracture or dislocation of bone or tooth
- Any hurt that endangers life/causes the sufferer to be in severe bodily pain for 20 days or more.<sup>21</sup>

All of the above may also be caused as a result of torture or acts of cruel or inhuman punishment and fall well within the international definition of torture. In fact, many of the abovementioned ‘grievous hurts’ – permanent loss of hearing, fracture or dislocation of bone or tooth, destruction or permanent privation of the power of any member or joint and any hurt that causes the sufferer to be in severe bodily pain for 20 days or more – are common complaints by victims of police abuse.

Penal law in Bangladesh does not allow for compensation to be payable to a victim of acts amounting to torture or to the family members. There are, however, laws penalising acts of violence against women that require compensation to be paid to the victim and/or

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20 See sections 319, 320, 324, 330, 339 and 340 of the Penal Code 1860.

21 Section 320 of the Penal Code 1860.

her family members. Furthermore, the Penal Code 1860 states that it is a criminal offence to cause hurt or grievous hurt in order to extort a confession or information leading to the detection of an offence or the restoration of any property or valuable security or to extract information which may lead to such restoration<sup>22</sup>. The maximum penalty provided for such act is ten years, but there is no minimum penalty, the law merely states ‘...shall be punished with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine’<sup>23</sup>. Despite this, law enforcement officers in Bangladesh find it easier to cause grievous hurt to a suspect or an accused person in order to extract a confession or information leading to the ‘detection of an offence’ or the ‘restoration of property or valuable security’ in order to solve their cases quickly. Therefore, even though the term ‘torture’ is not mentioned in the Penal Code 1860, it is very much implied therein

However, the UN definition of torture not only mentions physical harm, but also the deliberate infliction of mental pain and suffering. Mental stress or pain is not recognized as a cruel or degrading form of punishment or ill treatment in the criminal laws of Bangladesh. Psychological torture is hardly ever documented in Bangladesh and is less well known. Psychological torture can be described as the use of non-physical means to cause suffering to a victim and the effects are not as immediately apparent until and unless the behavior of the victim is changed. As a result, it is easier to conceal. Examples of psychological torture in Bangladesh are mock executions, extended solitary confinement, violation of social norms (stripping the victim, mocking), etc.

After pouring hot water up my nostrils, forcing 2 hot hard boiled eggs into my anus, breaking my legs, pulling my toe nails out and cracking my finger nails with pliers, all over 3 days of incarceration in a windowless room, I was continuously in and out of pain and losing consciousness. I had not confessed because I had done nothing wrong. They did not know what to do with me. I heard one of them say ‘We will have to kill him now,’ and they took me to the bathroom, washed the blood off me and told me to say my last prayers. They asked me if there was anyone I wanted to see for

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22 In Bangladeshi law, sections 330 and 331 of the Penal Code 1860.

23 Section 331 of the Penal Code.

the last time. I told them I wanted my mother. They asked me if I wanted to have a final meal. I could not eat a thing. They kept telling me to repeat God's name and ask for his mercy<sup>24</sup>.

Published reports on incidents of torture by law enforcement agencies in Bangladesh show that both psychological and physical methods of torture are used. The criminalisation of torture would make both physical and psychological torture criminal offences.

## SAFEGUARDS

If there is no definition of 'torture' in the criminal laws of Bangladesh, then how can the perpetrators be held accountable and punished? In this sections, the role of the Judiciary, judicial decisions and the existing laws that can be used to hold perpetrators accountable have been discussed.

### The Role of the Judiciary

The first 'judge' an accused person sees, is the Magistrate. The Magistrate is the person who orders remands, decides the number of days the accused person is kept in remand and it is he/she who records confessional statements. The Magistrate has the power to ensure that the arrested person is not tortured, or, if there is evidence of torture, to be the first person to accuse the police and investigate the matter. Unfortunately, this is one power that the magistrate fails to utilise.

Section 164 of the Code of Criminal Procedure, 1898 lays down the following ground rules/ requirements for taking a confession: (1) Any Metropolitan Magistrate, any Magistrate of the first class and any Magistrate of the second class empowered by the Government to do so, may record any statement or confession made to him in the course of an investigation or at any time afterwards before the commencement of the inquiry or trial. (2) The statements are recorded and signed in the manner provided in Section 364 of the Code of Criminal Procedure, 1898, and such statements or confessions shall then be forwarded to the Magistrate by whom the case is to be inquired or tried. (3)

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<sup>24</sup> Testimony of S.M. Akhtar Farook Mintoo, former Union Parishod Chairman, Mohorompur, under Monirampur Upazilla, Jessore, at a Tribunal against Torture, organised by the human rights organisation, Odhikar on 27 June 2009.

Before recording the confession, a Magistrate has to explain to the person making it that he is not bound to make a confession and that if he does so it may be used as evidence against him. Furthermore, he must question the person making it and determine whether it was made voluntarily before he records it. At the end of the record, the Magistrate makes a memorandum at its end stating *inter alia*: 'I have explained to (name) that he is not bound to make a confession and that if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him. (Signed:...)'

Section 364 of the Code of Criminal Procedure, 1898 deals with the ways in which the statements made by the accused person must be recorded by the Magistrate or Judge. The section makes it obligatory that the Judge or Magistrate read out the statement made by the accused in his hearing and make sure that he confirms it to be true. The confession also has to be signed by the accused. The section is only applicable when the person examined is the accused. In the matter of *Mosammat Amena Khatun Vs. State*<sup>25</sup>, it was held that: When a confessional statement has been recorded by a Magistrate after complying with the provisions of section 164 and 364 Cr.P.C. the said confessional statement can be admitted into evidence by the trial court under section 80 of the Evidence Act even without examining the recording Magistrate<sup>26</sup>. The Code of Criminal Procedure 1898 provides that a confession 'shall not be made to a police officer' and that 'it must be made to a Magistrate.' It also lays down that 'the Magistrate must record it in the prescribed format and only when so recorded does it become relevant and admissible in evidence'<sup>27</sup>.

There are case laws to prove that the Magistrate did not follow the abovementioned guidelines, even after the accused person claimed that he had been tortured by the police. Odhikar fact finding reports also show this, especially when the accused person has links or is affiliated to a political party that opposes the government, and also in the case of the former Bangladesh Rifles (BDR) lower ranking officers, who

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25 14 (1994) BLD (HCD) 332.

26 Ibid. Para 9 pp 333.

27 Huq, Zahirul. Law and Practice of Criminal Procedure. Tenth Edition. Bangladesh Law Book Company 2006. Pg. 258.

retracted statements in Court, claiming that they had been beaten and tortured into making such statements<sup>28</sup>.

Twelve Bangladesh Rifles (BDR) members appealed to a Dhaka court to retract their confessional statements given earlier in the BDR mutiny case. The carnage took place at the BDR headquarters on February 25-26 leaving a number of BDR high officials, including its director general (DG), dead. Metropolitan Magistrate Rashed Kabir put the petitions in the file of the carnage case. In the petitions, the BDR jawans told the court that they were tortured mercilessly to give the confessional statements. Meanwhile, 16 BDR jawans were shown arrested in the case yesterday and taken on a five-day remand each<sup>29</sup>.

Twenty-two BDR members appealed to a Dhaka court to let them retract their confessional statements given earlier in connection with the BDR mutiny case. In the petitions, the BDR jawans mentioned that they were forced to give confessional statements due to inhuman torture inflicted on them when they were taken on remands. Earlier, 77 more BDR members filed appeals before separate Dhaka courts to let them give permission to retract their confessional statements<sup>30</sup>.

Twenty Bangladesh Rifles (BDR) members appealed to a Dhaka court to let them retract their confessional statements in the BDR mutiny case. Metropolitan Magistrate Muminul Hassan asked the authorities concerned to put the petitions in the file of the carnage case. In the petitions, the arrestees told the court they were tortured inhumanly during remand to give the confessional statements. Earlier, twenty other BDR jawans had submitted their appeals to the same court to let them retract their confessional statements<sup>31</sup>.

28 A mutiny and the massacre of high ranking army officers took place in the Bangladesh Rifles Headquarters at Peelkhana in Dhaka city, from 25 - 16 February 2009. The trial of the several thousand suspects and accused persons are still going on in special Tribunals. Odhikar is documenting the proceedings, which can be found in the Organisation's monthly reports. Several of the accused persons have also died in custody, allegedly after being tortured.

29 The Daily Star. '12 BDR men appeal to retract confessional statements'. 28 October 2009.

30 The Daily Star. '22 BRD Men Appeal to Have Confessional Statement Retracted'. 08 December 2009.

31 The Daily Star. '20 BDR men seek to retract confessions'. 06 November 2009.

64 BDR members have retracted the confessional statements in court in the Peelkhana murder case. Dhaka Metropolitan Magistrate Muminul Hasan heard the withdrawal appeals on Wednesday. The border guards were present at Dhaka Chief Metropolitan Magistrate's Court at the hearing. At the same time, 13 of those BDR members appealed for bail<sup>32</sup>.

In the case of *Hafizuddin v State*<sup>33</sup> the Magistrate did not give warnings before recording the confession and time for reflection. The Magistrate also failed to inform the accused that they would not be sent to police custody after making the confessional statements. It was held that 'the confessional statements, in such facts and circumstances, are neither voluntary nor true'.<sup>34</sup>

The form used to record the confessional statement by the Magistrate is itself a small law booklet. The left margin of the form contains the rules that should be followed. The form states *inter alia*: 'Magistrates should clearly understand the great importance of giving their closest attention to the procedures to be followed, from first to last, in the recording of confessions. This procedure should be followed without haste, with care and deliberation, it being understood that this duty is not a distasteful and minor appendage or addition to their normal functions, but one which is of consequence to the confessing accused, his co-accused and court responsible for the administration of criminal justice. A confession which is recorded perfunctorily and hastily is a source of embarrassment to the trial court, the prosecution and the defence.'<sup>35</sup>

Unfortunately, the Magistracy in Bangladesh is known for its corruption and political partisanship. As in all public sectors in Bangladesh a lot of the appointments and promotions are based on political favouritism. In order to save their jobs, it is 'safer' to send opponents of the government to remand and let them be tortured. This has been the case during the army-backed caretaker government in 2007, and during all the elected and non-elected regimes in Bangladesh. Furthermore, in 2010, Transparency International, Bangladesh released

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32 Bdnews24.com. '64 more BDR men retract confessions'. 20 January 2010.

33 42 (1990) DLR (HCD) (DB) 397.

34 Ibid at para 15b pp 402.

35 Form No. (M) 84: Form for recording confessions or statements under Section 164 of the Code of Criminal Procedure, 1898.

a report of a household survey of 6,000 homes, conducted between June 2009 and May 2010. The Organisation found that a total of 88% of the households had been subject to judicial corruption and 58.9% had to pay bribes to the Magistrates Court<sup>36</sup>.

### **The Matter of Blast Vs. Bangladesh: the Leading Case for Safeguards against Acts Amounting to Torture**

In order to reduce the occurrences of torture and other degrading treatment, on 7 April 2003, the High Court Division of the Supreme Court of Bangladesh ordered the Government to amend the law relating to interrogation of people remanded in custody. The court also directed that glass-partitioned rooms in jails be constructed for interrogation purposes and until such rooms are constructed, arrestees are to be interrogated at the jail gate in the presence of relatives and lawyers. To date, seven years since the judgment, no such glass-partitioned rooms have yet been constructed and torture and other degrading forms of treatment are still meted out to an accused in remand. The Government is yet to amend Section 167 of the Code of Criminal Procedure<sup>37</sup> despite this High Court Order to reform the law.

The decision came in the case of the *Bangladesh Legal Aid and Services Trust (BLAST) and Others Vs. Bangladesh and Others*,<sup>38</sup> where several human rights and legal aid, non government organisations filed a writ petition in the High Court challenging the abuse of police powers to arrest without warrant under Section 54 of the Code of Criminal Procedure, 1898 and the abuse of powers regarding taking the accused into remand (police custody) under Section 167 of the Code. The petitioners referred to recent incidents of gross abuse of power, including allegations of custodial death, torture and inhuman treatment, in remand after arrest under Section 54 of the Code of 1898.

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36 Transparency International Bangladesh: Corruption in the Service Sectors: National Household Survey 2010, at p 10. [http://www.ti.bangladesh.org/research/Executive%20Summary\\_23122010%20FINAL.pdf](http://www.ti.bangladesh.org/research/Executive%20Summary_23122010%20FINAL.pdf).

37 Section 167 of the CrPC states that if an investigation cannot be completed within 24 hours of arrest, and there are grounds to believe that the accusations are well-founded, the Magistrate can grant remand of the accused for not more than 15 days. The term 'remand' is, however, not mentioned in the section, but rather implied.

38 BLAST and Others Vs. Bangladesh and Others. 55 DLR (2003)363.

The petitioners argued that law enforcing agencies routinely abuse the powers granted under Sections 54 and 167 of the Code of Criminal Procedure, 1898 and that these provisions allowed for arbitrary exercise of power. The petitioners argued that the Court should enunciate safeguards to prevent or curtail police abuse of powers and arbitrary actions by Magistrates, which constitute violations to several fundamental rights guaranteed under Articles 27, 31, 32, 33 and 35 of the Constitution of the People's Republic of Bangladesh<sup>39</sup>.

The High Court initially issued a Rule Nisi, and upon full hearing delivered judgment on 07 April 2003, observing that Sections 54 and 167 of the Code of Criminal Procedure, 1898 are not fully consistent with constitutionally guaranteed freedoms and safeguards<sup>40</sup>. The Court laid down a comprehensive set of recommendations regarding necessary amendments to both sections of the Code of Criminal Procedure, 1898 along with the Penal Code, 1890 and the laws pertaining to 'evidence' and the police, and directed that these should be acted upon within six months. It also laid down a set of fifteen guidelines with regard to exercise of powers of arrest and remand:

- No Police officer shall arrest anyone under Section 54 [of the Code of Criminal Procedure 1898] for the purpose of detention under Section 3 of the Special Powers Act, 1974
- A police officer shall disclose his/her identity and show his/her ID Card on demand to the person arrested or those present at the time of arrest
- A record of reasons of arrest and other particulars shall be maintained in a separate register till a special diary is prescribed
- The concerned officer shall record reasons for marks of injury, if any, on the person arrested and take him/her to nearest hospital or government doctor

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39 Article 27 of the Constitution of the People's Republic of Bangladesh states that all citizens are equal before the law and are entitled to equal protection of law, while Article 31 deals with right to protection of the law; Article 32 with protection of right to life and personal liberty; Article 33 with 'Safeguards as to arrest and detention'; and Article 35 guarantees 'Protection in respect of trial and punishment'.

40 Section 54 of the Code of Criminal Procedure, 1898 allows the police to arrest any person without a warrant or Magistrates permission under several circumstances – one being 'reasonable suspicion'. Section 167 deals with the procedures a Magistrate will take when the accused is brought before him/her, the issuance of bail and orders for investigation, etc. It is the section of the law that allows the practice of 'remand'.



- The person arrested shall be furnished with reasons of arrest within three hours of bringing him/her to the Police Station
- If the person is not arrested from his/her residence or place of business, the relatives should be informed over the phone or through messenger within one hour of bringing him/her to Police Station
- The person concerned must be allowed to consult a lawyer of choice or meet nearest relations
- While producing the detained person before the Magistrate under Section 61 of the Code of Criminal Procedure, 1898, the police officer must forward reasons in a forwarding letter under Section 167 (1) of the Code of Criminal Procedure as to why the investigation could not be completed within twenty four hours and why s/he considers the accusation and information to be well founded
- On perusal of the forwarding letter, if the Magistrate satisfies him/herself that the accusation and information are well founded and materials in the case diary are sufficient for detaining the person in custody, the Magistrate shall pass an order of detention and if not, release him/her forthwith
- Where a person is released on the aforesaid grounds, the Magistrate shall proceed under 190(1)(c) of the Code of 1898 against the Officer concerned under Section 220 of the Penal Code, 1890.
- Where the Magistrate orders detention of the person, the Officer shall interrogate the accused in a room in a jail until a room with glass wall or grille on one side within sight of lawyer or relations is constructed
- In any application for taking accused in custody for interrogation, reasons should be mentioned as recommended
- The Magistrate while authorising detention in police custody shall follow the recommendations laid down in the judgment
- The police officer arresting under Section 54, or the Investigating Officer taking a person to custody or the jailor must inform the nearest Magistrate about the death of any person in custody in compliance with these recommendations
- The Magistrate shall inquire into the death of any person in police custody or jail as per the recommendations.

To date, there is no separate interrogation room for accused and detained persons, and no lawyer or family member is present when an accused is 'questioned' in remand. According to fact finding reports

carried out by Odhikar, in several cases the police make the arrest in plain clothes and when the victim asks the reason for his arrest, he is rewarded with kicks, slaps, pushes and verbal abuse. Family members are not allowed to accompany the accused/arrested person to the police station either.

### **Private Member's Bill**

On 5 March 2009, a draft 'Torture and Custodial Death (Prohibition) Bill 2009', introduced by Member of Parliament Saber Hossain Chowdhury, was tabled in the Parliament as a Private Member's Bill. The Bill defines 'torture' as defined in the Convention against Torture, and also has a specific definition for 'custodial death', 'victim' and 'law enforcement agencies'. The Bill, in section 6, allows for accusations by third parties and directs the Court to 'take appropriate measures to ensure the safety of the person making the allegation'<sup>41</sup>. The Bill, in section 15, punishes torture with a minimum of five years of rigorous imprisonment and a monetary penalty of a minimum of Tk. twenty five thousand, with an additional minimum compensation of the same amount to be paid to the victim or aggrieved person/s<sup>42</sup>.

In the Fourth Report of the Committee on Private Members' Bill and Resolutions, it was stated that the Bill was reviewed by the Committee, with some recommendations; and 'all the Honourable Members ... expressed their consensus on the Bill titled "Torture and Custodial Death (Prohibition) Bill 2009"; and opined for the passage of this Bill with amendments'<sup>43</sup>. The report further states 'The Committee is recommending the House to pass the Bill with amendments.'<sup>44</sup> The present government has a three-fourth majority in Parliament and should therefore be able to pass such a Bill. However, the government has yet to clarify its position concerning the criminalization of torture, despite its public declaration of 'zero tolerance' against torture at the Universal Periodic Review of the UN Human Rights Council in 2009.

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41 Bangladesh National Parliament. Fourth Report of the Committee on Private Members' Bill and Resolutions. March 2011, Law Division-2. The Bill is annexed to the report. Retrieved from <http://www.humanrights.asia/countries/bangladesh/laws/legislation/CommitteeReportOnBillCriminalizingTorture10Mar2011-English.pdf>.

42 Ibid.

43 Ibid. Paragraphs 5 to 5.3 of the report.

44 Ibid at para 5.3.

## International Obligations

Bangladesh became a member of the Human Rights Council in 2006. Despite pledges in 2006 to “Strengthen its efforts to meet its obligations under the treaty bodies to which she is a party,” Bangladesh’s record in this regard remains poor. Bangladesh was re-elected as a member of the Human Rights Council on 12 May 2009. As a member of the Human Rights Council for a second term, the government of Bangladesh has an opportunity to break from the practices of the past and make substantial progress concerning the protection of human rights and its cooperation with the UN human rights system. However, this is not a question of development or resources only, but one of political will as well. Bangladesh must recognise the urgent necessity to transcend beyond simple ratification of instruments, and face-saving, ineffective measures at the national level. It must commit to tangible cooperation with the Human Rights Council and its mechanisms and the implementation of its obligations under international law at the national level.

Bangladesh ratified the UNCAT with reservations to Article 14, Para (1) which states, “Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.” The reasons given for the reservation was: “The Government of the People’s Republic of Bangladesh will apply article 14 para 1 in consonance with the existing laws and legislation in the country.”<sup>45</sup> This brought about severe criticism from other State Parties, including France, Spain, Sweden and The Netherlands, who all questioned the commitment of Bangladesh under the treaty obligations.<sup>46</sup>

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45 See [www.bayefsky.com/pdf/bangladesh\\_t2\\_cat.pdf](http://www.bayefsky.com/pdf/bangladesh_t2_cat.pdf)

46 The Government of Sweden is of the view that this declaration raises doubts as to the commitment of Bangladesh to the object and purpose of the Convention and would recall that, according to well-established international law, a reservation incompatible with the object and purpose of a treaty shall not be permitted. (Sweden, 14 December 1999); Moreover, in referring in a general way to the domestic laws of Bangladesh, without specifying their content, the reservation raises doubts among the other States parties as to the extent to which the People’s Republic of Bangladesh is committed to ratifying the Convention. (Spain, 13 December 1999); See [www.bayefsky.com/pdf/bangladesh\\_t2\\_cat.pdf](http://www.bayefsky.com/pdf/bangladesh_t2_cat.pdf).

In its election bid for membership to the UN Human Rights Council in 2006, Bangladesh made voluntary pledges on the promotion and protection of human rights, in which it promised to “continue to cooperate with the special procedures and mechanisms of the Council with a view to further improve its human rights situations<sup>47</sup>.” The pledges made on March 3, 2009 as part of the country’s election bid for a second term on the Council, state that “Bangladesh has so far hosted several special rapporteurs demonstrating its willingness to cooperate with the UN human rights machinery.”<sup>48</sup> However, Bangladesh has failed to invite any special procedures to visit the country since it became a member of the Council in 2006, despite requests made by several key mandates, including the Special Rapporteurs covering extra-judicial, summary or arbitrary executions; the independence of judges and lawyers; adequate housing; contemporary forms of slavery; as well as a request by the Independent Expert on minority issues and a joint request by the Independent Experts on water and sanitation and on extreme poverty.<sup>49</sup>

The nation also acceded to the International Covenant on Civil and Political Rights (ICCPR) on 6 September 2000. The country has international obligations under these to eradicate torture, to criminalize torture under its national legislation and to provide adequate remedies to victims of torture while bringing perpetrators to justice.

For human rights to be protected and enjoyed in reality, the government must go beyond seeing ratification as an end in itself and ensure the implementation of the rights and provisions contained in the human rights instruments to which it is party. For example, the country has still not criminalized the practice of torture. Torture remains endemic in Bangladesh, in part due to the fact that there is no legal prohibition and therefore no credible deterrent to halt the use of this grave abuse.

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47 Asian Human Rights Commission. BANGLADESH: Re-election to the Human Rights Council must be accompanied by significant improvement in human rights situation. May 11, 2009. Para 3. <http://www.ahrchk.net/statements/mainfile.php/2009statements/2018/ALRC-STM-003-2009>.

48 Ibid.

49 The last visit was by the Special Rapporteur on the Right to Food in 2004. See Asian Legal Resource Centre press release at [http://www.alrc.net/doc/mainfile.php/alrc\\_st2009/554/?print=yes](http://www.alrc.net/doc/mainfile.php/alrc_st2009/554/?print=yes).

## The National Human Rights Commission

Bangladesh appeared to fulfil its 2006 pledge as a member of the UN Human Rights Council, when it established a National Human Rights Committee in September 2008. However, the NHRC was established more as a “face-saving exercise by the military-controlled government during the State of Emergency”<sup>50</sup>, to appease the international community and human rights organisations. A Chairman and two Commissioners were only appointed two months later, to begin their official duties in December 2008, coinciding with the end of the Emergency. At present, the NHRC remains in a state of uncertainty, confusion and Government control and the Chairperson, Dr. Mizanur Rahman, who has, in the past, been very vocal about torture and abuses perpetrated by law enforcement agencies, has not made any public comments regarding the human rights situation in the country for the past few months. According to Section 14 of the National Human Rights Commission Act 2009, the NHRC has the power to mediate or hold an arbitration to resolve a human rights violation. However, if this fails, it can only ‘recommend the appropriate authority to file a

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50 Asian Human Rights Commission – Statement. *BANGLADESH: Re-election to the Human Rights Council must be accompanied by significant improvement in human rights situation*. May 11, 2009. Para 3. <http://www.ahrchk.net/statements/mainfile.php/2009statements/2018/ALRC-STM-003-2009>.

case or take any proceedings against the human rights violator'. It does not have the power to represent the victim in a court of Law<sup>51</sup>.

## ACCOUNTABILITY

Government inaction and indifference play a great part in encouraging impunity and torture by law enforcement agencies. In rare cases, the police or the Ministry of Home Affairs may start an investigation into an alleged instance of torture, usually as a result of pressure from human right organisations, lawyers, international human rights groups or members of strong civil society groups, but these investigations do not result in prosecutions or punishments that are in line with international standards concerning torture. Corruption – which is rife throughout the police force in Bangladesh – combined with influences from inside and outside the police and judiciary, plays a key role in ensuring impunity for the perpetrators<sup>52</sup>. On the other hand, the victims lose physical and psychological capabilities, employment, financial solvency and social dignity.

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- 51 Section 14 states as follows: Steps to be taken in case of revelation of Human Rights violation: (1) If any human rights violation is revealed from the enquiry of the Commission, the Commission may take steps to resolve it through mediation and arbitration. (2) If the mediation and arbitration under sub-section (1) does not succeed, the Commission shall- (a) Recommend to the appropriate authority to file case or take any proceedings against the human rights violator. (b) Recommend to the appropriate authority or person to prevent and treat human rights violation. (3) The Commission shall not make any recommendation under this section without giving opportunity of hearing to the person who has violated human rights or who is about to violate human rights. (4) The Commission shall send a copy of the recommendation of the Commission under this section to the complainant. (5) The Commission may require the person or authority, to which the recommendation is sent for action, to send a follow up report on the measures taken according to the recommendation and it shall be the duty of the person or authority to send the report required. (6) If any person or authority to whom recommendation was sent under this section from the Commission, fails to submit the report required, or if the Commission considers the action taken or proposed to be taken as insufficient, the Commission shall, if it considers appropriate, send the full description of the issue to the President and the President shall take necessary measures to lay a copy of that report to the Parliament.
- 52 See annual reports on Bangladesh published by Transparency International, Bangladesh for studies and statistics on corruption in the Judiciary and law enforcement.

Nine years are passing now since Bangladesh ratified the CAT, but still reservation is imposed on the article 14 para 1 of the Convention; meaning that the government does not want to ensure the right to compensation and adequate medical treatment for the victims of torture. The authorities never want to punish the perpetrators of torture; they have not yet made any legislation criminalising torture in compliance with the CAT although the government promised to do so a long time back. Instead, the culture of impunity to the perpetrators has been well established by a number of laws and the practice as well; the Indemnity Act-2003, which was made to ensure impunity to the armed forces and the police for killing, torture, arbitrary arrests and detention during the Operation Clean Heart in the late 2002 and early 2003, is still in effect despite the existing barriers of section 197 and 132 of the Code of Criminal Procedure for trying the perpetrators.<sup>53</sup>

## REDRESS AND REPARATIONS

The penal law of Bangladesh does not provide compensation for the victim of acts amounting to torture. Punishments include only prison sentences, the death penalty and fines – payable to the court. However, the special laws on acts of violence against women and children, promulgated in the year 2000 and later, do have provisions for direct compensation to the victim and/or family members<sup>54</sup>.

Neither does Bangladesh have a law protecting victims and witnesses of crimes. A law criminalizing torture could make it mandatory that victims of torture and/or their families be judiciously and rightfully compensated, the victim be given rehabilitation and state-covered medical treatment and that witnesses be protected before, during and after the trial and sentencing.

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53 Asia human Rights Commission: BANGLADESH: State urged to make torture a punishable crime in compliance with the UN Convention against Torture. June 25, 2007. At paragraph 9. <http://www.ahrchk.net/statements/mainfile.php/2007statements/1087/>

54 Two of such laws are the Prevention of Repression against Women and Children Act 2000 and the Acid Crime Control Act 2002.

## CONCLUSION

Given the circumstances that have made the practice of torture and impunity an almost permanent fixture in the practice of criminal investigation, criminalization of 'torture' would provide for stronger sanctions against the perpetration of torture, in comparison to what is contained in the criminal laws of Bangladesh to date. It would also strengthen the prosecution of perpetrators of torture, since the international definition of 'torture' covers both physical and mental aspects. Without an absolute prohibition on torture, situations like those discussed above, where torture is being used as an instrument of interrogation in the name of preventing crime and terrorism will prevail. The concept and definition of torture and its prohibition is noticeably absent from regulations and operating procedures of many places of detention in Bangladesh, where torture is most likely to occur – prisons, mental institutions, juvenile detention centers, schools and the like. In such places, physical and mental suffering and pain, that amount to torture are written off as forms of punishment, discipline and behavioral correction.

The recognition that torture is an unnecessary, cruel and harmful practice is not recent. The Italian thinker, Cesare Beccaria, in his 1764 "An Essay on Crimes and Punishments", argued that torture unjustly punished the innocent and should be unnecessary in proving guilt. He marks the practice as not just immoral but inefficient too. He writes: 'I believe it is a wilful confusion of the proper procedure, to require a man to be at once accuser and accused, in such a way that physical suffering comes to be the crucible in which truth is assayed, as if such a test could be carried out in the sufferer's muscles and sinews. This is sure route for the acquittal of robust ruffians and the conviction of weak innocents.'<sup>55</sup>

In countries where the use of 'torture' by law enforcement agencies is common knowledge, it has been seen that whenever local human rights groups attempt to raise the issue of torture and other grave human rights abuses, the authorities protect the perpetrators and use suppressive laws and dysfunctional institutions of the rule of law to punish the human rights defenders. Bangladesh is such a country, where torture, impunity and deaths in custody are common occurrences. There are very few civil society or human rights

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55 C. Beccaria, *On Crimes and Punishments and Other Writings*, p. 39.



organizations that openly condemn the government for turning a blind eye to such practices. The few that do are threatened, monitored and their members psychologically and physically harassed and abused by members of the law enforcement agencies.

Even if Bangladesh did finally decide to criminalise torture, mechanisms and institutions are still dysfunctional. Police stations, places of detention and correction facilities are manned by personnel who are, for the whole, indifferent to the human rights issues of the detained and there is a serious lack of implementation of the laws. When the law enforcement machinery breaks down due to lack of discipline, corruption and manipulation, it can be said that torture, degrading treatment and impunity get life membership passes into the cells and rooms of the police stations and other places of detention. According to Sir Nigel Rodley, UN Special Rapporteur of the Commission on Human Rights. “Impunity continues to be the principal cause of the perpetuation and encouragement of human rights violations and, in particular, torture.”<sup>56</sup> In order to stop practices amounting to torture, the Government must consent to enacting a law criminalising torture in all its forms and manifestations, in line with international laws and standards and strengthen complaint and investigation mechanisms, including the National Human Rights Commission. The government must also ensure the effective and proper implementation of laws, in order to thoroughly and fairly investigate all allegations of arbitrary arrests and detention, torture and extra-judicial killings and pave the way for the prosecution of those alleged to be responsible in fair trials.

## **SOME INCIDENTS OF TORTURE** <sup>57</sup>

### **1. Monoyar Hossain Monir**

Monoyar Hossain Monir (30), the secretary of Sylhet branch of Jatio Jubo Shonhoti (JP) is the son of Abdus Sattar and Monowara Begum of Gilatola village of Jointapur Upazilla of Sylhet. At around 2.30 pm on 14 December 2011, RAB-9 arrested Monoyar Hossain Monir.

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56 Rodley, Nigel. “Report on torture and other cruel, inhuman or degrading treatment or punishment,” UN Document A/54/426, October 1, 1999.

57 All reports have been taken from the documentary archives of Odhikar. The fact finding missions were carried out by Odhikar staff.

On 13 December, Monir appeared at the home of Parvin Begum, in Shunamgonj as a false RAB officer and accused her of being involved in the drug trade. He then promised her he could get her out of a court case if she paid him 3,00,000 taka. In light of this incidence, Parvin Begum filed a case Monir accusing Monir of fraud. On that case, officers of RAB-9 arrested Monir from the Unique Bus counter at Mendibag, Bisshoroad, at Sobhani Ghat in Sylhet. On 24 September 2011, Monir died while under treatment in Sylhet MAG Osmani Medical Hospital.

Abdus Sattar, Monir's father, said that at around 1 in the afternoon on 14 September 2011, Monir went out, and that was the last he saw of him till 17 September. On that day, he found out about Monir's arrest from Sobhani Ghat and that he was at the Chatok Police Station of Shunamgonj; and at around 11 of the morning on 17 September 2011, he went there to look for Monir. He was informed that Monir was in Shunamgonj District Jail. There, Monir told his father about the torture by RAB, the kicks, slaps and punches. Monir told him that he went to Sobhani Ghat to solve the dispute between Parvin and her husband, Kaiyum. Nevertheless, Parvin filed a false case against him and RAB arrested him on the basis of the case. Abdus Sattar claimed that his son was innocent and Parvin's complain is groundless. RAB officers tortured Monir when they failed to make him confess, he added.

Monowara Begum, Monir's mother, said that on 16 September 2011 she learnt that her son was in the Osmani Medical College Hospital. Being informed of Monir's illness, at around 10 in the night on 19 September 2011, she along with her son, Altaf and former Union Parishad (UP) member, Shiraj went to Osmani Medical College Hospital. She saw Monir wearing a different t-shirt from the one he was wearing on the 14th and he was laid on the floor, as there were no free beds in the hospital. Monir was vomiting frequently. **The vomit had blood in it and he was shouting in agony. The Jail Police present there did not let her talk to Monir and asked her to keep her distance from her son. When she went close to Monir, the police scolded her and turned her out. Police only allowed her to go close to Monir while taking him to the toilet. At that time, Monir told her about the torture he suffered.**

**She said that Monir told her that RAB hit him on his chest, stomach and back and they also kicked different parts of his body with boots. She saw fresh scars around his waist and all around his chest and stomach. Monir looked very ill and he was vomiting**

**frequently and there was also blood in his urine.** At around 3 in the morning of on 25 September 2011, the oxygen and saline was removed. Then police told that her son was dead and asked her to call her home.

Mithun Ahmed, who had been arrested with Monir, said that at around 3 to 3.30 in the afternoon on 14 September 2011, RAB arrested him from the area of the radio station. He is now under treatment in bed 17 of ward no. 2 of the fourth floor of Sylhet MAG Osmani Medical College Hospital as a victim of torture by RAB. RAB officers beat him and Monir together. He also said that he became ill after the torture.

Mahbubur Rahman Sales Executive of Unique Bus transportation and eye-witness said that at around 2 to 2.30 in the afternoon on 14 September 2011, a white microbus was parked in front of the Unique Bus counter. 4/5 people with arms got out and called Monir. He saw them talking with Monir and just after few minutes they took Monir away in the microbus. Md. Mobarak Hossain, owner of a tea stall and eye-witness, said that at around 2 in the afternoon on 14 September 2011 a white microbus was parked in front of the Unique Bus counter almost next to his tea stall. He was in the stall and observed the whole incident. He said that the men identified themselves as RAB officers and began asking Monir about his profession and residence. Monir gave his identity. One of the men told Monir that they needed some information from him and suggested he get into the microbus with them. Monir got into the microbus without any protest.

Parvin Begum, Plaintiff of the case against Monir recalled that at around 12 in the afternoon on 12 September 2011 Monir went to her home. Monir identified himself as a RAB officer and accused her of being involved with drug dealing. Monir also said that he would help in the case filed against her. In exchange, he demanded 3,00,000 taka. Monir told her to come alone to Sobhani Ghat with the money. Parvin filed a case of fraud against Monir.

Shorbottom Deoan, Deputy Jailer of Sylhet Jail, said that at 6.30 in the evening on 19 September 2011 Monir was sent to MAG Osmani Medical College hospital from the Shunamgonj jail. From the hospital he was sent to Sylhet Jail. Sylhet Jail surgeon, Dr, Mizanur Rahman was not present to examine Monir. Pharmacist Abul Kalam Ajad and Nurse Shofiul Azam examined his condition and they suggested sending him back to Sylhet M A G Osmani Medical Hospital immediately. He said that the condition of Monir was critical because of all the beating. He said that he clearly saw the injuries on Monir's body. In Shunamgonj Jail Monir's prisoner number was 2334/11 and in Sylhet jail it was 5829/11.

Sub Inspector (SI) Kamal Uddin, Chatok Police Station, Shunamgonj recalled that at around 8.30 in the night on 15 September RAB-9 officers handed Monir over to the Chatok Police Station. The authority received Monir and the GD no is 605. The next day, he was sent to the Court. In Chatok Police Station the case filed against Monir was numbered 22 and dated: 15 September 2011. It was recorded at 8.30 in the night. The plaintiff was Parvin Begum, father late Shamsul Islam, of Shang Lokkhi Baur of Chatok in Shunamgonj; who complained that Monir frightened her by identifying himself as a RAB officer and demanded 300,000 taka. The case number was 170/385. SI Mashuk Mia of Chatok Police Station was given charge of this case as the Investigating Officer.

Md. Fazle Shaheen Hoque, Squadron leader, RAB-9, Sylhet confirmed that at around 2 in the afternoon on 14 September 2011, Monir was arrested from Sobhani Ghat area. On the next day, he was sent to Police Station. He denied that Monir was tortured and said that he was sent to the Police Station in a perfectly normal state. He said that Monir frightened a woman named Parvin and asked her to give him 300,000 taka. Moreover, Monir sent a message to Parvin's mobile to ask for the money. Parvin informed RAB. Monir asked Parvin to bring the money to Sobhani Ghat on 14 September. There the RAB officers arrested him. He said that at the time of arrest Monir might have been injured because there had been a scuffle. Moreover, he said that if RAB had tortured him then the police would not have put him in jail. If the Magistrate saw him injured then he would send him to the hospital. He was fine and he was sent to the Court from Police Station and then to the jail. From 19 to 24 September 2011, he was under the observation of the physicians. He was fine for 4/5 days there.

## **2. Rabiul Islam Khokon**

Rabiul Islam Khokon (23), a Mechanic in Majjatpara village in Chatkhila, Noakhali, was taken into remand on the 12th of May, 2010 at 1.00 am in the morning. His parents Md. Shahjahan and Rawshan Akhter accused Sub-Inspector Abdul Mannan of having tortured their son in remand. Khokon was brought to Dhaka Medical College Hospital on the morning of the 13th of May where he died while under medical care. The accused, Sub-Inspector Abdul Mannan was at the Noakhali district jail at the time of preparing this report.

Mariam Akhter Mukta, Khokon's wife, said that her husband was a mechanic. On the 21st of December, 2009, her husband boarded

the bus 'Econo Exclusive Paribahan' from Noakhali. He was travelling to his uncle, Kabir Hossain's house in Dhaka in order to rent a shop at Jatrabari. At around 5.00 pm that day, Kabir called Khokon on his mobile phone which was answered by someone who identified himself as Md. Shafiqul Islam, a member of the Rapid Action Battalion (RAB). Shafiqul then informed Kabir Hossain that his nephew had been arrested, being found armed on board the 'Econo Exclusive Paribahan'. Kabir was then asked to contact the office of Adamjinagar Crime Prevention Company (CPC)-1, of Narayanganj RAB- 11.

Mukta said that she was informed about the arrest by Kabir Hossain. That night she accompanied Kabir to the Adamjinagar RAB camp. There she was informed that the bus was stopped and searched by RAB-11 when it arrived in front of the Roads and Highways office under Shidhirganj station in Narayanganj district on the Chittagong highway. During the search, RAB found two weapons in the overhead compartment of the bus, after which, Khokon and a man named Yusuf Ali, who was sitting next to him, were arrested.

Mukta further said that she then contacted Romzan Ali, a member of RAB. Romjan told Mukta that he would let Khokon go and asked her to contact an agent named 'Rhidoy'. A few minutes later, a man called Rhidoy arrived and told them that RAB would let Khokon go if they pay them BDT 200,000. Within approximately one hour, they arranged a sum of BDT 140,000 and promised to pay the rest by 8:00 pm the following day; that is on the 22nd of December, 2009. Rhidoy accepted the money. However, the RAB members refused to release Khokon, and furthermore, the Sub-Inspector of RAB-11 Narayanganj CPC-1, Md. Shafiqul Islam, placed Khokon and Yusuf in Shidhirganj Prison and filed a case against them at the station [File number- 30, date- 22/12/2009, under section 19, subsections (Ka) and (Cha) of the 'Astra Ayin' (Arms Act) 1876]. They were charged with the offence of 'illegally keeping in possession firearms and ammunition'. On this charge Khokon was locked up in Narayanganj prison.

A man named Md. Ruhul Amin Master, of Parapur village of Chatkhil sub-district, Noakhali District, had filed a case of robbery on 28/10/2010 against 20/25 anonymous people (File number- 8. Section 395/397 of Penal Code). The investigator of the case was Sub-Inspector Abdul Mannan. On the 9th of April, 2010, Sub-Inspector Abdul Mannan prayed for permission to bring Khokon into remand at the Judicial Magistrates Ministerial Court, by presenting Khokon as a suspect for the case filed by Md. Ruhul Amin Master. On this request,

the judicial magistrate granted permission for Khokon to be taken into remand for two days- the 11th and 12th of May, 2010.

Mukta said that, on the 10th of May, Sub-Inspector Abdul Mannan transferred Khokon from Narayganj District Jail to Noakhali Chatkhil Police Station and received him at the station at 5:20pm. Mukta further said that, at 11.00am on the 12th of May, she received news from an acquaintance that her husband was ill and that he was under treatment at Noakhali's 250-bed General Hospital. On the morning of the 13th of May, Mukta's father-in-law informed her that her husband had died in Dhaka Medical College. She has been informed that her husband had been tortured to death by Sub-Inspector Abdul Mannan. She demanded justice for the murder of her husband.

Md. Shahjahan, Khokon's father said that, since his son was taken into remand on the 10th of May, he had been keeping track of what was going on at the police station. As he was told that his son would be taken to the Noakhali Court on the 12th of May, he went there that morning. At around 2.00pm in the afternoon he came to know that his son was very ill. The police took Khokon to the Noakhali 250-bed General Hospital instead of bringing him to court. He reached the hospital to find his son rolling on the floor of cabin no- 3. He found that due to being subject to unwarranted physical abuse, Khokon was unable to speak but communicated to him through signals that he had been tortured. **His face and cheeks had swollen from being repeatedly struck with metal rods. There were marks and scars from beatings across his abdomen. On the tip of his fingers and toes were needle marks. Khokon pointed out to his father that his genitals had been burnt with cigarettes. Both his arms were fractured at the elbows and the wrists. His knees had been stomped on by heavy boots and had fractured. There were bruises across his thighs. His ankles had been hit with hockey sticks.** Seeing Khokon in such a state, he immediately talked to police constable Golam Mostofa. The constable informed him that Khokon would be taken to Dhaka Medical College for treatment right away. Md. Shahjahan then returned home and on the 13th of May, at around 8:00am in the morning he arrived at the hospital in Dhaka. At his arrival he found out that Khokon had died. He made a call to his wife on his mobile phone and informed her that their son had died. He then contacted the hospital morgue and received Khokon's body. The postmortem was not carried out that day. On the following day, 20th May 2010, the postmortem was conducted and at 2.00pm in the afternoon

and Md. Shajahan left Dhaka for Noakhali with Khokon's body. He arrived at their home town, Majjatpur, with the body, at 8.00pm in the evening. At 8.30 pm that evening, the burial was completed at Majjatpur.

Md. Humayan Kabir, Police Chief, Officer in charge, Chatkhil station, Noakhali said that, Khokon was shown an arrest warrant for being one of the suspects of a Chatkhil Police Station robbery case number-8, 28/10/2009. In accordance with the court order, on the 10th of May, 2010, 5.10pm, Sub-Inspector Abdul Mannan brought Khokon from the Narayanganj District Jail to the Chatkhil Police Station lock up. Since then, Sub-Inspector Abdul Mannan questioned the defendant, at different times, on different issues.

Md. Humayan Kabir told Odhikar that, at 11.50pm on the 11th of May, 2010, he left the police station to retire for the night. He left the duty officer, the sentry and Sub-Inspector Abdul Mannan at the station. Before he left, he went to check on Khokon in his cell. **On the morning of 12th of May, at 1.55am, the sentry from the station arrived at his door and informed him that Sub-Inspector Abdul Mannan had beaten up the prisoner named Khokon and stomped on him with his boots.** He then went to the station to find Khokon in poor health, and immediately sent him to the Chatkhil sub-district hospital. In the morning he found out that Khokon's condition had become worse. He then gave Sub-Inspector Abdul Mannan, Constable Galam Mostofa and Constable Shahid Ullah a command certificate (CC) and ordered them to take Khokon to the Noakhali General Hospital. He also gave them permission to transfer him to Dhaka Medical College Hospital, if the situation worsened. At 2:00pm on that day, Khokon was transferred from the 250- bed Noakhali hospital to Dhaka Medical College. There Khokon was admitted to bed number X-2 of ward number- 32. Khokon died at 7.00am on the 13th of May, 2010, while under treatment. On 14th May, 2010, at 4:35pm Khokon's mother, Rawshan Akther, came to Chatkhil Police Station and filed a murder case against Sub-Inspector Abdul Mannan under section 302 of the Penal Code, Case number-4. Date- 14/05/2010. Sub-Inspector Mizanur Rahman was put in charge of the case.

In accordance with the legal provisions and under the orders of the police super, Assistant Sub-Inspector (ASI) Tafayel Ahmed prepared for the arrest of Sub-Inspector Abdul Mannan, on the 14th of May, 2010. That evening at 5.00pm, Sub-Inspector Abdul Mannan, who was returning from Dhaka Medical College towards Chatkhil, was arrested by ASI Tafayel Ahmed and accompanying police officers.



Assistant Sub-Inspector Minu Barua, Shudharam Station, Noakhali stated that, at 7.55pm, on the night of 14th May, Assistant Sub-Inspector Tafayel arrived at Shudharam Police Station with the Sub-Inspector of Chatkhil Station, Abdul Mannan. According to the General Diary (GD) number-775, the police officers received Sub-Inspector Abdul Mannan as an accused, for case number- 4 at Chatkhil Station. At 12.20 pm on the afternoon of 15th May, 2010, according to GD number- 807, the accused, Sub-Inspector Abdul Mannan was produced at the Noakhali court. The court sent Sub-Inspector Abdul Mannan to jail.

Constable Golam Mostofa, Chatkhil Station, Noakhali, One of the officers assigned to Khokon's treatment recalled, that on the morning of 12th May, 2010 at 1.00am, he found out from the station barrack that, Sub-Inspector Abdul Mannan, brought a prisoner named Khokon into remand and tortured him. He was ordered by the officer in-charge, to take Khokon to the hospital after he got ill. On that order, later at 2.45 am that morning, he, accompanied by Constable Shahid Ullah and Sub-Inspector Abdul Mannan, took Khokon to the Sub-district Health Complex. **There, Dr Asfarujjaman, provided the primary health care and at 3.00am he referred the patient to Noakhali General Hospital for emergency medical attention. However, the police officers did not take Khokon to the hospital as advised but delayed the transfer till 7:00am.** With no improvement in the patient's condition, the attending doctor referred Khokon to Dhaka Medical College hospital. Khokon was taken there at 11.00pm that night and admitted into bed number X-2 in ward number 32.

MLSS Hamid Patawari of Dhaka Medical College Hospital, as complainant filed a charge of wrongful murder at Shahbagh Police station (Case number- 31. Date: 13/05/2010). The Investigation Officer to the case is Sub-Inspector Zalilur Rahman of Shahbagh Station. At 5.00pm in the evening, the assistant district commissioner for Dhaka and magistrate Muhammad Kamruzzaman came to the morgue and prepared a report after investigation of the deceased's body. The postmortem was completed at 2.00 pm in the afternoon on the 14th of May, 2010. Khokon's body was then handed over to his family members.

Muhammad Kamruzzaman, Assistant Commissioner and Magistrate, Dhaka said that, on the 13th of May, 2010, on the orders of the Deputy Commissioner, at 5.00pm in the afternoon, he went to the Dhaka Medical College hospital morgue and prepared a report after investigation of Khokon's body. In his report he stated that, the victim's



left shoulder was swollen, both legs were swollen and the wounds on them had gone black. **He also mentioned that Khokon was shackled.** His primary conclusion was that torture was the probable cause of death, but the main operative reason for it could only be found in the postmortem reports.

Sub-Inspector Zalilur Rahman, Shahbagh Police Station, Dhaka recalled that, on the 13th of May, 2010 he went to the DMC morgue to investigate the wrongful death case (case number-31), filed by MLSS Hamid Patawari. **He found Khokon in handcuffs and manacles.** He said, that after he received the postmortem report he sent it to the Sub-Inspector Mizanur of Chatkhil Police station. He said that it is mentioned in the report that the cause of death was the injuries inflicted upon Khokon. Harun-Ur-Rashid Hajari Police Super, Noakhali said that, on the 13th of May, 2010, as soon as Sub-Inspector Abdul Mannan of Chatkhil station was charged with murdering prisoner Khokon, he formed the 3-member investigation committee. Sub-Inspector Abdul Mannan was arrested and has been presented in front of the court. On this matter, he said, whatever judgment the court provides, will be effective. He refused to say anything more.

Dr Md. Khalil Ullah, Resident Medical Officer, Sub-district Health Complex, Chatkhil, Noakhali said that, at 2.45am in the morning of 12th May, 2010, Sub-Inspector Abdul Mannan, accompanied by two police Constables, admitted an unwell accused person named Khokon into the emergency ward (Registration number 288/2, attending Medical officer- Dr Asfaruzzaman). He said that, the patient was covered in fresh bruises from neck to toe. His blood circulation was on the verge of stopping due to the injuries he suffered. The patient's condition was critical and **at 3.00am on the morning of 12th of May, 2010, Khokon was referred to the 250-bed Noakhali General Hospital for advanced medical care. However, the police officers left the patient there instead carrying out the immediate transfer.** When the patient's condition further deteriorated, he was transferred to Noakhali hospital at 9:00am on 12th May, 2010.

Dr. Farid Uddin Chowdhury, Resident Medical Officer, 250-bed Hospital, Noakhali recalled that, at 12:10pm on 12th May, 2010, two police constables from Chatkhil Police station, named Golam Mostofa and Shahid Ullah arrived with the sick criminal and admitted him to the Emergency ward (Registration number- 2293/13, attending doctors- Dr. Suvrata and Dr. Faridul Alam). On the same day, at 12:30pm the patient was referred to Dhaka Medical College Hospital due to his worsening condition. At around 2:00pm, the police constables took the patient and left.

### 3. Md. Zakir Hossain

On March 4, 2010 at around 12.05 pm, Senior Assistant Police Commissioner of the Detective Branch, Mohammad Mokhlesur Rahman arrested Md. Zakir Hossain (42) from his rented house at Shahidnagar residential area in Fatulla under Narayanganj district. Zakir Hossain was taken on 2 days remand by DB<sup>58</sup> police. He was sent to Court on March 8, 2010 after his remand period. When he was produced before the court, police of the Ramna Model Police Station appealed for remand by claiming he was arrested as accused as part of a car stealing case. The court granted 1-day remand. The family of the victim alleged that Zakir had been tortured to death on March 09, 2010 at around 6.00 a.m. while under police custody. The police stated the Zakir had died in the hospital at around 2.15 pm on March 09, 2010.

Mosammat Shilpi Begum wife of Zakir Hossain said that her husband's village home is Alampur Maddapara under the Titas Police Station in the Comilla district. Shilpi Begum was living in a rented house 'Akhi Lipir Godhuli' at Shahid Nagar residential area in Fatulla, Narayanganj with her husband and three children. Zakir was a trader and used to sell goods at the kitchen market. Zakir had hired a room from his landlord and rented it (sub-let) to Billal Hossain for keeping his vehicles. She said that Touhidur Rahman, a resident of Khanka Sharif road in Rayer Bazaar came to their house at 11.30 pm on March 3, 2010. A few minutes later 7/8 men in civilian clothes and 2/3 men in police uniform entered their house with arms and said they were Detective Branch (DB) police. They handcuffed her brother-in-law Md. Joynal Abedin (24). They handcuffed Zakir and asked him why Touhidur Rahman was at their house so late at night. Police also handcuffed Touhid. In the meantime, one of the policemen allegedly took Taka 15,000/- and two cell phones from the house. The police accused Zakir of stealing a car and keeping it in his garage. They asked Zakir to bring out the car from his garage and one police officer punched him on his neck. She alleged that the police hit and pushed her son Siyam Hossain (9) onto the bricks when he came too close to his father, injuring him. Zakir told the police that the car belonged to his neighbour, Billal Hossain who lived at Shah Alam's house. Police went to Shah Alam's house to look for Billal Hossain taking Zakir,

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58 Detective Branch of Police.

Joynal and Touhid with them. In Billal's absence, the police arrested his driver Md. Badal (30). She stated that according to Badal's statement, police had recovered many vehicle spare parts from there. At around 2.00 am the police left with the recovered goods and four arrestees. Shilpi Begum went to the office of the DB police on March 4, 2010. At around 10.00 am, the police released Joynal and Touhid but not Zakir and Badal. Later she came to know that Zakir was sent to Court by the DB police for remand and the Court granted him 2-day remand. After the remand period, Zakir was produced again before the Court on March 8, 2010. She along with her relative Gazi Molla went to the Court and got a chance to talk to Zakir in the Court.

Shilpi Begum stated that Zakir told her that the police might take him into remand again. He asked her to arrange his bail at any cost with the help of their relatives. The same day the police of the Ramna Model Police Station showed him as arrested as an accused of a pending case (No. 58(10)2010) and took him in remand for another day. Shilpi Begum told Odhikar that the Officer-in-Charge Shibli Noman and Sub Inspector M A Aziz of the Ramna Model Police Station had communicated with her over cell phone. **She alleged that SI M A Aziz demanded Taka 50,000/- from her. SI M A Aziz told her that her husband would be released if she could pay him Taka 50,000/-, she told them that she was unable to pay up.**

On March 9, 2010, she saw the news bulletin regarding the death of her husband on television. She informed her relatives and saw her husband's body in the Dhaka Medical College Hospital morgue at 9 pm. **She told Odhikar that she saw bruises on his feet, marks of beating on his both arms and that his face had also become black.** She alleged that police tortured Zakir to death in remand because she could not provide bribes to the police. On March 14, 2010 she filed a petition case (No. 963/2010) in the Chief Metropolitan Magistrate Court under sections 302 and 34 of the Penal Code accusing the Officer-in-Charge S M Shibli Noman and Sub Inspector M A Aziz. At present the case is under investigation by the Criminal Investigation Department.

Md. Joynal Abedin, Zakir's brother said that he came to know on March 9, 2010 at 8.00 am through the television news that his brother had died in police custody at Ramna Model Police Station. They were informed that the body of Zakir was in the hospital morgue. He went to the Dhaka Medical College Hospital morgue that night and identified the body. He came back home at 11.00 pm. On March 10, 2010 at around 10.00 am, he went to the hospital again and brought

the body to Shahid Nagar at 2.00 pm. They reached Comilla at around 5.30 pm with Zakir's body. He was buried at his village in Alampur Maddapara, Comilla at around 7.00 pm the same day. Joynal claimed that there was no case against him or his brother. He stated that Zakir was allegedly tortured to death by Ramna police as his family had failed to provide the money demanded by SI M A Aziz.

Mohammad Mokhleshur Rahman, Senior Assistant Police Commissioner, Dhaka Metropolitan Detective Police, Dhaka recalled that a car jack prevention team was created under his leadership as per instructions of the Deputy Police Commissioner Md. Monirul Islam. Among the members of the team were Inspector Rafiqul Alam, Inspector Akram Hossain and Sub Inspector Abdul Hakim. On March 4, 2010 at 12.05 am, based on specific information, he along with his team arrested two active members of a carjacking group Md. Badal and Md. Zakir Hossain from Shahid Nagar residential area at Kadamtali. According to a statement given by Zakir, they recovered a private car (Dhaka-Metro-Ga-17-1271) and a motor cycle (Dhaka-Metro-A-01-4288) from the G M Engineering Workshop, which was rented by him. As per his statement, they went to Shah Alam's house to search for Billal. Not finding Billal, the police arrested his driver Badal. They also recovered spare parts of 8 private cars from Billal's room and a microbus 'Noah' from M/S Arefin Workshop at Kazla as per the statements of Badal and Zakir. He informed Odhikar that they reached the DB office at around 9.00 am after the search mission. The accused have been produced before the court on March 5, 2010 with a seizure list of recovered goods. The Court granted a two-day (March 6 and 7) remand.

Mokhleshur Rahman also stated that the recovered goods matched two stolen private vehicles for which a case had been filed in Ramna Police Station. The accused had confessed all this information during remand. They were sent to Court after the completion of remand on March 8, 2010. Meanwhile, Sub Inspector M A Aziz of Ramna Model Police Station showed them as arrested under a car stealing case and appealed for police remand. The court granted 1-day remand for Ramna Police Station. He said that during this time Zakir was physically fit. On March 9, 2010, he learnt through a police message that Zakir had died. He claimed that Zakir was not tortured during remand under the DB police.

S M Shibli Noman, Officer-in-Charge, Ramna Model Police Station, Dhaka said that as per the statements of Zakir and Badal, who were arrested by DB Police on March 4, 2010 goods worth 78 lac and

50 thousand taka including parts of 8 private cars, 1 car, 1 microbus and 1 motorcycle had been recovered by police. The court granted 2 day remand for them. The spare parts recovered from the arrested persons have also been under 12(1) 10, section 392 Penal Code and 58(01)10, Section 457/380 Penal Code have been identified and these were from the same cars which had been stolen earlier and had cases filed in the Ramna Model Police Station. Due to this, SI M A Aziz showed them as arrested and appealed for remand on March 8, 2010. The Court granted 1-day remand for both of them. They were taken to Ramna Police Station at around 9.00 pm and kept in the lock-up. On March 9 at 1.50 pm Zakir had felt a sharp pain in his chest. He was taken to the Dhaka Medical College Hospital at 2.15 pm by SI Md. Shahidur Rahman. The doctor at the emergency unit declared him dead. He also informed that SI Md. Shahidur Rahman had filed an unnatural death case in this connection on March 9, 2010. He claimed that Zakir was not tortured at all. He also said that the plaintiff of the case mentioned in her statement that Zakir was tortured to death for Taka 50,000 which was not true.

Sub Inspector Mafizur Rahman, Ramna Model Police Station, Dhaka said that Zakir Hossain, who was under remand, felt chest pains at 1.50 pm on the March 9, 2010. He lodged a General Diary (No. 648) mentioning that Zakir had to be taken to the hospital for treatment. He stated that Zakir was brought to the Dhaka Medical College Hospital within 25 minutes. The duty doctor declared him dead after he was taken to the hospital at 2.15 pm. Later Mafizur Rahman went to Shahbagh Police Station and as an applicant, lodged an unnatural death case. The UD case number is 15 dated 09/03/2010. He returned with a police constable leaving the dead body in the hospital morgue.

Sub Inspector Didarul Alam, Shahbagh Police Station, Dhaka recalled that Zakir Hossain, who was in police remand under Ramna Model Police Station, had died on March 9, 2010 at the Dhaka Medical College Hospital. Later, SI Mafizur Rahman of Ramna Police Station filed an UD case in this regard. Getting this report, SI Didarul Alam reached the hospital where a Magistrate prepared the inquest report. He has been assigned for investigation of this case. He said that no marks of torture were reported in the inquest report. According to him, the doctor who performed the postmortem also stated that there was no mark of injury. The doctor mentioned in the primary autopsy report that Zakir had died due to a heart attack. He also informed that the essential parts of Zakir's body had been sent to the laboratory at

Mohakhali for the preparation of a viscera report. The actual cause of death could be known only after getting the viscera report.

It is to be mentioned here that Zakir was arrested under Fotulla Police station of Narayangonj but police said that he was arrested from Kodomtoli police station in Dhaka.

## *Chapter 7*

# **TORTURE DURING POLICE REMAND: LAWS AND PRACTICES**

*Muhammad Sazzad Hossain Siddiqui and Gazi Delwar Hosen*

## **INTRODUCTION**

Remand in Bangladesh is the surname of torture with all its kinds and degrees by the very hand of State machineries for mere power based politics, politicization of fundamental state institutions, wrongful gain<sup>1</sup>, ignorance, lack of right based approach, accountability, transparency, rule of law and good governance wherein human rights have been turned into paper tiger. In the modern welfare state, the denial of justice and due process of law by state machineries through torture during police remand is prohibited by national and international laws as well as good conscience and is neither expected nor desirable. Stakeholders should come forward to prioritize specific programs, proactive and result oriented, to stop any kind of torture during police remand.

## **OUTLINE OF REMAND**

The term ‘remand’ has not been defined in the Criminal Procedure Code (Cr.P.C.), 1898 though it has been used in some other documents.<sup>2</sup> Section 167 of the Cr.P.C, 1898 allows the magistrate to grant police remand in custody beyond 24 hours for a total period of 15 days on request from the police after the magistrate is satisfied that there are grounds for believing that the accusation or information is well founded”.<sup>3</sup> Remanding the accused may be of three types: remand on bail, remand in police custody, and remand in prison custody or jail. Theoretically, remand does not have any relation to torture

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1 S.23 of the Penal Code, 1860.

2 Bangladesh Supreme Court Digest, p. 155

3 Sec. 167.1 of the Cr.P.C,1898.

as remand connotes putting the accused in police custody for the interest of investigation though in practice, remand has been turned into nomenclature of torture and degrading treatment. Intellectual maneuver with various techniques and arts of remand are more fruitful than the bygone practice of inhumane torture at police investigation. To avoid the immediate jeopardy of life and property the remanded person recounts whatever false or fiction the police dictates and by so doing, the remanded person paves the venue to more sufferings in the elongated process of trial.<sup>4</sup>

## ANALYSIS OF LEGAL PROVISION REGARDING REMAND

Section 167 of the Cr.P.C.<sup>5</sup> along with Regulation 324 of the PRB<sup>6</sup> provides the basic outlines of remand power: (i) While asking for remand, the police officer must state the reasons as to why the investigation could not be completed within 24 hours and what the grounds are for believing that the accusation or information received against the accused is well-founded. (ii) The police officer shall also transmit to the Magistrate the copy of the entries in the case diary. (iii) If the magistrate gives order of remand, he must state the reason for such order. (iv) Application for remand should be carefully scrutinized and should only be granted when it is evidenced that the presence of the accused with the police is necessary. (v) While asking for remand the police must also send a copy of the case diary and report the matter to the Superintendent.

In the cases of *BLAST vs. Bangladesh*<sup>7</sup> and *Saifuzzaman vs. State*<sup>8</sup>. It was observed that in view of the provisions of classes (a) and (b) of sub-section (1) of section 167 of the Code, the police officer must state the reasons as to why the investigation could not be completed within 24 hours and what the grounds are for believing that the accusation or the information received against the arrested person is well founded. It has also been observed that the police officer along with the arrested person must also produce the case diary and on consideration of the

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4 Ibid, Chapter XXVI "Of the Judgment" Sections 366-373.

5 The code of Criminal Procedure, 1898.

6 The Police Regulation of Bangladesh, 1943.

7 55. (2003) DLR 363, 23 BLD (HCD) 2003 Bangladesh (Md. Hamidul Haque, J) 115 Bangladesh Legal Aid & Services Trust (BLAST v. Bangladesh (Md. Hamidul Haque, J) 115

8 24 BLD 205 and 56 DLR 324.



entries in the case diary, the Magistrate shall decide whether the person shall be released or shall be detained further. The observations are quoted below: “If the requirements of sub-section (1) are not fulfilled, the Magistrate cannot pass an order under sub-section (2) for detaining a person even in jail not to speak of detention in police custody.

If after arrest of a person it appears that investigation cannot be completed within twenty four hours and if there are grounds for believing that the accusation or information is well-founded, then the officer-in-charge in the police station or the I.O. of the case, shall transmit a copy of the case diary and also forward the accused to the nearest judicial Magistrate. When such accused is forwarded and produced before the Magistrate, the Magistrate may authorize detention of the accused in custody of the police for a term not exceeding fifteen days in the whole. But if such an order of detention is made, the Magistrate shall record the reasons for doing so and also shall forward a copy of his order to the Chief Metropolitan Magistrate or the Chief Judicial Magistrate as the case may be. When such order is passed by the Chief Metropolitan Magistrate or Chief Judicial Magistrate, he shall forward a copy of his order with reasons for making it to the Metropolitan Sessions Judge or to the Sessions Judge to whom he is subordinate. No Magistrate of third class and no Magistrate of the second class, not specially empowered on this behalf by the Government, shall authorize such detention.

The police officer shall also transmit to the Magistrate the copy of the entries in the case diary (B. P. Form No. 38) (B. P. Police Regulation No. 236). After examining information in the case diary and the reasons shown by the police officer, the Magistrate will decide whether the person shall be released at once or detained further. This is the mandatory law which the Magistrates have to follow.

This provision of authorizing detention is known as sending the accused on remand to the police custody. The word remand has not been used in section 167 of the Code of Criminal Procedure, 1898. Only, the power to authorize detention of an accused in such custody as the Magistrate thinks fit has been given under this section. Like all discretionary powers, this is a discretionary power of the Magistrate; a Judge or a Magistrate shall exercise such a power judiciously. It will not be a judicial order if it is passed mechanically on the basis of the prayer of the I.O.<sup>9</sup>

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9 Hamidul Haque, Justice Mohammad “ Trial of Civil Suits And Criminal Cases”, 1st ed. 2010,P.224.

## OUTLINE OF TORTURE DURING POLICE REMAND

Torture, according to the United Nations Convention Against Torture, is any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him, or a third person, information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in, or incidental to, lawful sanctions (UN Convention Against Torture).<sup>10</sup>

Torture at remand is endemic in Bangladesh, that takes place everywhere like in the custody of police, armed forces, paramilitary forces such as the Rapid Action Battalion (RAB), intelligence agencies, special interrogation cells such as Joint Interrogation Cell (JIC) and Task Force for Interrogation (TFI). Torture continues to benefit the powerful persons in the society and fulfill the interest of the ruling political parties irrespective of their color. The Bangladesh Police requires torture to extort bribes and maintain the 'bribe chain' that extends from the lowest ranking constable to the highest officer in the chain of command. Their efficiency lies in maintaining this chain of profit. Crime investigation has long been reduced to forced confessions from anyone whom the police can lay their hands upon.

For many years, torture has been the most widespread and persistent human rights violation in Bangladesh but routinely ignored by successive governments since Bangladesh's independence in 1971.<sup>11</sup> Human rights are infringed with impunity from the moment of suspicious arrest to the end of the remand period.<sup>12</sup> The main reasons why the police would torture a person in remand can be summarized as follows: 1. to get a confession from suspect, regardless of whether he has actually been involved in the particular crime the police apprehended

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10 The text of the Convention was adopted by the United Nations General Assembly on 10 December 1984 and it came into force on 26 June 1987

11 Amnesty International's Report on Bangladesh 2003.

12 Islam, Md. Rafiqul and Solaiman, S. M "Torture under police remand in Bangladesh : a culture of impunity for gross violations of human rights" Asia-Pacific journal on human rights and the law, Vol. 4, Issue 2, p.1-27.

him for; 2. to extort money from the accused or his family members; 3. to 'teach a lesson' to political opponents- opposition student activists, newspaper editor or any other person- whom the members of the political or law enforcement elite consider a 'threat' to the 'stability of the country'.

There is a basic pattern leading to the torture of an accused person. He is first arrested by the police and may receive a few slaps or kicks during that time, including a fair amount of verbal abuse. He has to be presented before a magistrate within 24 hours of his arrest. In the court, the police may ask for anywhere between 3 to 15 days remand in order to 'question' the arrestee. Remand is what all detainees fear. It is the time when they are beaten, intimidated, given electric shocks, kicked and verbally abused in order to extract a statement that may lead to a confession and a quick solution of the crime. Family members often bribe or offer money to arresting officers as a way to prevent the physical and verbal abuse that comes with remand. Again, there is always the fear of the police seeking further periods of remand if the accused does not confess the first round, and this also encourages the accused to make a statement. An overworked, under-resourced, badly paid police force resort to torture and degrading treatment in order to hasten their investigation.

There are multifaceted inhumane and degrading methods of torture including "beating with rifle butts, iron rods, bamboo sticks, or bottles filled with hot water so they do not leave marks on the body, hanging by the hands, rape, "water treatment" in which hose pipes are fixed into each nostril and taps turned on full for two minutes at a time, the use of pliers to crush fingers, and electric shocks."<sup>13</sup>

Cruel and inhuman treatment and torture are also used by law enforcers to demoralize, scare and stop the activities of specific groups of individuals, such as journalists, political activists (belonging to the Opposition) and even human rights defenders. There have been times, especially during the State of Emergency, when newspaper offices have been monitored and their reports closely censored and journalists threatened and tortured for exposing flaws in law enforcement or for criticizing government actions.

The draconian power of police remand is also indiscriminately used by the government to oppress political opponents. It is frequently seen that police arrests political leaders belonging to the opposition

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13 Amnesty International's Report on Bangladesh 2003.

and they are shown arrested in more than one case with the prayer for remand in police custody and the empowering magistrate just grant such remand without almost any exception. It is a guarantee ensured by the Constitution of Bangladesh that every arrested person must be produced before the nearest magistrate within 24 hours and he must not be kept in police custody without an order of a magistrate. Why is this guarantee provided? The avowed aim is to check and control arbitrary executive power exercised by the police. However, to the utter dismay to civil societies in this country we have seen that magistrates have traditionally failed to exercise their so-called judicial power in granting remand. Previously remand power was used to be exercised by the executive magistrate who, it was argued, did not have either experience or education in criminal justice and as a result, they were accustomed to follow a parrot-like order on the forwarding letter of the police officer authorizing detention in the police resulting ultimately in innumerable custodial deaths. The TIB mentioned in its report that about 600 people have been killed in custody by the law enforcing agencies in last two and half years amid inactiveness of the government. In some cases, the government even played a negative role.<sup>14</sup> The crime investigation officer of police feels comfort and convenience<sup>15</sup> to wind up the investigation through forced confession.

“Torture in police custody and extrajudicial killings by law enforcers in Bangladesh is one of our top priority concerns and areas of intervention,” asserts Rahman, “This must be stopped.”<sup>16</sup> Odhikar, a local human rights organization, said at least 10 people had been tortured to death by law enforcement agencies in the first six months of 2011. It documented 67 torture events in 2010 along with 22 reported deaths. There were 68 cases of reported torture in custody in 2009.<sup>17</sup>

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14 The New Nation, 19 August, 2011 Friday.

15 Is laziness, as seen by the senior civil officer and endorsed by Sir James Fitzjames Stephen, Member, Viceregal Council for India, an English legal luminary and the architect of the Indian Evidence Act, 1872, the major factor responsible for torture or is there something more to it?

16 <http://www.unhcr.org/refworld/docid/4e4a66412.html> at 5:40 on 19.08.2011.

17 Ibid, note 16

## FRUSTRATING HUMAN RIGHTS SITUATION DURING POLICE REMAND

Denial of bails, indiscriminate granting of police remand, the alleged torture of person(s) arrested in police custody creates genuine concerns. Bangladeshi security forces have been persistently criticized by Amnesty International and Human Rights Watch due to grave abuses of human rights. Right to life and right to property, the flavor of human survival, are frustrated during police remand in Bangladesh. Gross violation of human rights occurs under the police remand from the very beginning. Fundamental rights to life and liberty, to equal protection of law, to be treated in accordance with law and to be free from cruel, inhuman and degrading treatment and punishment are frequently and colossally violated during police remand. The Constitution of Bangladesh is considered one of the best constitutions in the world which contains almost all the provisions of the Universal Human Rights Declaration.<sup>18</sup> Part III of the Constitution of Bangladesh sets forth the fundamental rights of the citizens, which are enforceable by the courts of law. The present phase of torture during police remand is a violation of human rights in toto as enshrined in the Constitution of Bangladesh.<sup>19</sup> The victims are really 'Forgotten people' and have to fend for themselves, which is highly difficult for majority down trodden citizens in class biased social milieu. Women and children are specifically vulnerable to the brutal behavior of the police.<sup>20</sup> Persons in police custody are routinely subjected to physical and psychological abuse, often from the initial moments of their arrest. The concerned authority often refuses to hold police and security forces accountable for acts of torture, and even tacitly encourages torture. However, when they can elicit a confession from the political prisoners they do not hesitate to publicize it as part of political propaganda.

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18 The Universal Declaration of Human Rights (UDHR) is a declaration adopted by the United Nations General Assembly (10 December 1948 at Palais de Chaillot, Paris.

19 Supra note 20.

20 Hasan, Jesmul and Hussain, Sazzad "BANGLADESH: A Probe into Power Abuse by Dhaka Police" Human rights Solidarity Vol. 14 No. 05 SEP 2004.

## NATIONAL AND INTERNATIONAL LEGAL REGIME AGAINST TORTURE

Torture is prohibited under international laws and the domestic laws of most countries in the 21st century. Apart from the Constitution of Bangladesh, no criminal law (though the term ‘torture’ is not mentioned in the Penal Code 1860, it is very much implied therein) in the country has specifically mentioned, defined or condemned ‘torture’<sup>21</sup>. It may be mentioned here that voluntarily causing hurt to extort confession is an offence under section 330 of the Penal Code, 1860.

In the BLAST case (Md. Hamidul Haque, J 2003)<sup>22</sup> it has been clearly observed that extortion of information from a person accused of an offence cannot be used against that person in view of the provisions of clause (4) of article 35 of the Constitution. Moreover, section 163 of the Code of Criminal Procedure, prevents a police officer from offering any inducement or making any threat. With reference to clause (5) of article 35 of the Constitution, there is no scope of subjecting any person to torture or to cruel or inhuman or degrading punishment or treatment.

Remand at present is a means to extort information from the detainee and is virtually “contrary to the provisions as we find in part III of the Constitution specially Articles 27, 31, 32, 33 and 35. If the purpose of interrogation of an accused is to extort information from him, such interrogation is illegal according to the provisions of Articles 35(4) as they clearly provides that no person accused of an offence shall be compelled to be a witness against himself. Interrogation may be undertaken while the accused is in jail custody if interrogation is necessary.”<sup>23</sup>

If the detention is for the purpose of wrongfully extracting a confession or some property from the accused, the police officer renders himself liable to be punished under sections 347 and 348 of the Penal

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21 Rahman Khan, Saira “Reflections on Torture: Actions and the Law” published in “Law and our Rights”, Issue No: 216, April 30, 2011.

22 55. (2003) DLR 363, 23 BLD (HCD) 2003 Bangladesh (Md. Hamidul Haque, J) 115 Bangladesh Legal Aid & Services Trust (BLAST v. Bangladesh (Md. Hamidul Haque, J) 115.

23 55. (2003) DLR 363, 23 BLD (HCD) 2003 Bangladesh (Md. Hamidul Haque, J) 115 Bangladesh Legal Aid & Services Trust (BLAST v. Bangladesh (Md. Hamidul Haque, J) 115.

code, 1860.<sup>24</sup> The Battalion Police Ordinance, 1979<sup>25</sup> (Ordinance XXV of 1979), provides for the creation of Special Courts for the trial of such offences by police personnel. But they are also tried in criminal courts created under the Code of Criminal Procedure 1898.

Article 5 of Universal Declaration of Human Rights (UDHR)<sup>26</sup>, Article 7 of International Covenant on Civil and Political Rights (ICCPR)<sup>27</sup> and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (known as CAT Convention) prohibit torture.<sup>28</sup> Bangladesh is a Party to both ICCPR and CAT, but it signed CAT with reservations.

Article 14 Para 1 is reproduced here: “Each state party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.”

It has been established that any kind of torture, other cruel, inhuman and degrading treatment is now universally deprecated and our courts should be very much careful in passing orders for remand aiding extortion of information through interrogation by torture. Signatories of the Third Geneva Convention<sup>29</sup> and Fourth Geneva Convention<sup>30</sup> officially agree not to torture prisoners during armed conflicts. The Compelling judicial precedents in different jurisdictions

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24 1886Rat.254(DB).

25 The Battalion Police Ordinance, 1979 (Ordinance XXV of 1979).

26 Supra note 18.

27 International Covenant on Civil and Political Rights (ICCPR),1966.

28 Supra note 11.

29 Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.

30 The Geneva Convention relative to the Protection of Civilian Persons in Time of War, commonly referred to as the Fourth Geneva Convention and abbreviated as GCIV. It was adopted in August 1949.

of the globe unequivocally hold the states' liabilities for said atrocities and torture by police.<sup>31</sup>

## PROBLEMS AND CHALLENGES

In Bangladesh remand is an accepted means of maintaining law and order, investigating and extorting money by the police. According to reports of the human rights organizations the number of death in the custody of the law enforcement agency is about 70 per year.<sup>32</sup> In general, torture is applied to extort information or confessional statements by force or to force the persons in custody to give false statements and sometimes to take revenge on the opponents (*Odhikar*, 2010).<sup>33</sup> 'The torture techniques employed in Bangladesh, whether of long standing practice or of more recent origin, are brutal. Methods documented by Human Rights Watch and other human rights organizations include burning with acid, hammering nails into toes, drilling holes in legs with electric drills, electric shocks, beating on legs with iron rods, beating with batons on backs after sprinkling sand on them, ice torture, finger piercing and mock executions (Human Rights Watch, 2008).'<sup>34</sup> Police are poorly trained about the dangers of interrogation and false confession. Police officers are rarely instructed regarding how to avoid torturous mechanism of eliciting confessions, how to understand what causes false confessions, or how to recognize

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31 The Indian Supreme Court in *D K Basu v. State of West Bengal* held that the state is liable to compensate victims for the breach of public duty to protect; and that the sovereign immunity of state as a defence is unavailable for the tortuous acts of public servants/agents (1997 AIR 624-25). This decision mirrors: *Neelabati Bahera v State of Orissa* (1993 Cri L J 2912); *Rudul Sah v State of Bihar* (1983 AIR SC 1086); *Sebastian M Hongrey v Union of India* (1984 AIR SC 1026); *Bhim Singh v State of Jammu and Kashmir* (1985, 4 SCC 677); *Saheli v Commissioner of Police Delhi* (1990 AIR SC 513); *M P v Shyamsunder Trivedi* (1995, 4 SCC 276). The Irish CJ O'Dalaigh explained the rationale for state liability in *State v Ryan* (1965 IR 70) and *Byrne v Ireland*: 'where the right is once guaranteed by the State, it is against the State that the remedy must be sought' for its failure to discharge the constitutional obligations (1972 IR 262). The decisions of the Privy Council in *Maharaj v Attorney General of Trinidad and Tobago* (1978, 2 All ER 670) and New Zealand Court of Appeal in *Simps v Attorney General* (1994 NZLR 667) may be cited to the same effect.

32 Amader Somoy, 4th July, 2010

33 Odhikar Observes International Day in Support of Victims of Torture 26 June 2010, National Press Club, Dhaka (see. at [http://www.odhikar.org/Torture/Int'l\\_Day\\_in\\_Support\\_of\\_Victims\\_of\\_Torture.pdf](http://www.odhikar.org/Torture/Int'l_Day_in_Support_of_Victims_of_Torture.pdf) p.2).

34 February, 2008 report released by Human Rights Watch.



the forms false confessions take or their distinguishing characteristics. Lack of profound training in this regard is also a tremendous problem. Sometimes pressure from vested groups indirectly accelerates the whole process. Colonial degenerated mentality, traditional oppressive mindset, lack of right based approach, soaring ignorance about constitutional rights and human rights are also major problems. Lack of right based approach in the whole gamut of the state machineries is the core aspect of this improper and illegal remand business.<sup>35</sup> The roles of pressure groups are also very feeble in this regard. Voluntarily causing hurt to extort confession is an offence under section 330 of the Penal Code, 1860 but use of the section is rare in our criminal courts.<sup>36</sup> Even the total period of remand is not specifically stated in the Code of Criminal Procedure, 1898 as there is no maximum period fixed by law for order of detention in police custody by the Magistrate. For how many terms not exceeding 15 days can the Magistrate authorize detention?<sup>37</sup> Unfortunately, in absence of any proper guideline, the Magistrates have been accustomed to just ‘parrot’ a reflexive order on the forwarding letter of the police officer authorizing detention either in the police custody or in jail. And this non-application of proper judicial mind from the part of the Magistrates, in contrast to sub-sections (1), (2) and (3) of section 167 of the Code, has ultimately resulted in so many custodial deaths and incidents of torture in police custody.<sup>38</sup> The absence of judicial mindsets among most of the Magistrates and Judges of Bangladesh creates sufficient room for the police, who are arbitrary by practice and training, to abuse power as there has been no mechanism established to hold the police accountable. In Bangladesh, neither the police nor the Magistrates follow the laws and rules regarding arrest and “remand”, which has widened the paths for the police to seek remand for whomever or whichever days they want. The media do not view torture beyond its limited news value, depending upon the identity of the victim. So far there has been no single attempt by the media to generate a debate on torture, viewing

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35 The term “remand business” is popularly used in the legal arena of Bangladesh to mean the maneuver of collecting unlawful gain by the police from the remanded accused in exchange of torture free remand, culminated in, the fact of the investigated matter is hushed up or erroneous and caused justice and rule of law at stake.

36 *Supra*, note 9, P. 221.

37 Abdul Halim, Barrister Md. “Police remand: Concept and procedure” published in “Law and our Rights”, Issue No: 247, July 22, 2006.

38 *Ibid*.

it as a vital issue that needs to be tackled to realize true democracy. There is literally no intellectual discourse about torture in the country for the past one decade. In Bangladesh, the police officers do not submit their applications by filling up the BP Form No. 90 whenever they seek remand for a detainee. Instead, the police send a manuscript petition on plain paper without the BP Form No. 90 by ignoring the guidelines prescribed by the PRB, which is mandatory for the police. The Magistrates, who are not adequately aware of the law and the rules, entertain the plain paper petition, which should not legally be considered an application for remand at all, and grant remand to the police though beyond the purview of the law of the land.

In reality, torture is not a punishable crime in the domestic laws of Bangladesh. The Penal Code of 1860 (Sections 330, 331 and 348) penalizes offences relating to causing hurt or wrongful confinement to extract confession. However, these provisions do not meet the standards of the CAT or define 'torture' as a crime.

In contrast, the provisions of the Code of Criminal Procedure, 1898 (Sections 132 and 197) protects the public servants such as police officers from prosecution unless prior approval from the government is obtained. According to the current interpretation of these provisions, the courts refuse to take cognizance of crimes committed by state agents without the prior approval of the state. This reflects the moral as well as jurisprudential deficit of the judiciary in the country. Since torture is not criminalized, a victim of torture cannot get any compensation in Bangladesh at all. No specific law allowing compensation for the victims of torture exists in the country despite the fact that the right against torture is a fundamental right.<sup>39</sup>

## RECOMMENDATIONS

The guidelines of *BLAST vs. Bangladesh*<sup>40</sup> should be mulled over and materialized on the basis of priority. At remand or just after remand, confession should not be taken. The guideline for remand should be followed without any exception. An independent investing wing of police must be created. Civil society, experts, NGOs working on

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39 <http://notorture.ahrchk.net/profile/bangladesh/> at 2.30 pm on 24.08.2011.

40 55. (2003) DLR 363, 23 BLD (HCD) 2003 Bangladesh (Md. Hamidul Haque, J) 115 Bangladesh Legal Aid & Services Trust (*BLAST v. Bangladesh* (Md. Hamidul Haque, J) 115. See also. Saifuzzaman vs. State reported in 24 BLD 205 and 56 DLR 324.

human rights and other stake holders should come forward with the advocacy to have a resolution regarding this. A separate, full fledged department of police only for investigation under the control of Court of Session or Chief Judicial Magistrate should be set up as the present system substantially depends on fragile and feeble police investigation acquitting real criminals. The recently issued instruction by the Government<sup>41</sup> upon all the Sessions and District Judges, Inspector-General of police, Chief judicial Magistrates and Chief Metropolitan Magistrates to implement the directions<sup>42</sup> given by the High Court Division in the BLAST case<sup>43</sup> should be followed without any kind of derogation. Proper and effective guidelines must be framed by the apex court for the judicial magistrates to follow while granting remand in police custody if any in special circumstances. Appointment of a judicial ombudsman under the leadership of a retired chief justice is long overdue in view of rampant procedural injustice throughout the judiciary. For instance, granting remand or refusing remand is a discretionary power of the magistrate and to check the abuse of this power is almost impossible by the High Court Division. This is because such abuse of power may traditionally be challenged by way of revision application, 561A application or through writ application. However, hearing and dispensation of such a petition takes as long as 8-10 years and to get remedies from the Appellate Division it usually takes another 7-8 years and in the meantime the concerned judge or magistrate might have gone into retirement and as such this type of judicial control is almost meaningless. However, these problems may easily be remedied by creating an office of judicial ombudsman. Bangladesh signed the Convention against Torture (CAT) on 5th October, 1998. However it has not framed any law by declaring 'torture in police custody' as an offence. The sooner the Government makes such law the better for judicial magistrates. This is because once such law is made, police and other law enforcement agencies will be less interested to make application for remand let alone torturing in custody. "Our law enforcers need to be trained up on human rights to stop torture and extrajudicial killings," said Sultana Kamal, a former adviser to the Caretaker Government and head of 'Ain o Shalish Kendra', a legal aid and human rights organization and chairman of Transparency

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41 Vide No. wePvi-4/1 Gg-11/2010 ZvwiL 23-08-2010.

42 15-point directives.

43 Writ Petition No. 3806 of 1998

International Bangladesh. To achieve this goal, “the government’s political will is critical,” she said.<sup>44</sup> “The government should not just keep turning a blind eye to all these killings because they are not fooling anyone with their excuses,” said Phil Robertson, Deputy Director of Human Rights Watch in Asia.<sup>45</sup>

## CONCLUDING REMARKS

National and international legal prohibitions on torture derive from a consensus that torture and similar ill-treatment are immoral, as well as impractical.<sup>46</sup> Torture is practiced as a routine in all of these police stations in Bangladesh. The direct or indirect state sponsorship of torture, violence and ill treatment towards its citizens has grave implications for state-societal relations as well as for individual well being. In fact, the majority of countries where torture is prevalent are facing numerous political and social crises including ineffective rule of law, instability and poor realization of basic human rights. Justice and freedom from any kind of torture is a constitutional right and a promise of freedom fight<sup>47</sup> as also reflected in international human rights regime which should be protected and preserved at any cost as a sine qua non of welfare state.<sup>48</sup> Instituting legal and judicial reform to halt torture and the impunity of state agents regarding torture should be a matter of priority for the government of Bangladesh and for all parties interested in human rights and the security and stability of the region. Bangladesh should immediately end systematic human rights abuses including extrajudicial executions and torture by its security forces.<sup>49</sup> It is crucial

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44 *Supra*, note 15.

45 World Report 2011 by Human Rights Watch.

46 "Torture and Ill-Treatment in the 'War on Terror'". Amnesty International. 2005-11-01. <http://www.amnesty.org/en/library/info/ACT40/014/2005/en>. Retrieved 2008-10-22

47 The People’s Republic of Bangladesh achieved independence through heavy blood shed and chastity of thousands of mothers and sisters finally on 1971 as legacy of historical struggle against injustice, oppression and discrimination from the then west Pakistan’s semi colonial and diabolical policy.

48 Esping-Andersen, Gøsta (1999). *Social Foundations of Postindustrial Economies*. Oxford: Oxford University Press. ISBN 0-19-874200-2. See also Rice, James Mahmud; Robert E. Goodin, Antti Parpo (September–December 2006). "The Temporal Welfare State: A Crossnational Comparison" (PDF). *Journal of Public Policy* 26 (3): 195–228. doi:10.1017/S0143814X06000523. ISSN 0143-814X

49 *Supra*, note 35.

for public authorities, civil society groups, professionals, academics and ordinary citizens to understand the radical nature of the fight against torture if other social ills are to be effectively addressed. To put an end to all types of tortures, especially those at police remand and by the agents of the state, all the stakeholders of human rights should come forward and work collectively.



## *Chapter 8*

# RUMANA MANZUR: A CASE STUDY AND JIGSAW PIECES OF DOMESTIC VIOLENCE IN BANGLADESH

*Tazin Aziz Chaudhury*

The International Day to Protest Violence against Women is observed every year on November 25 but violence against women and girls is becoming increasingly common and widespread across the country. Violence against women covers physical violence, sexual harassment, acid attack, murder, rape, etc.<sup>1</sup> The UNDP Human Development Report of South Asia, 2002, ranked Bangladesh third of the countries in which violence against women is highest and most regular<sup>2</sup>.

## **RUMANA MANZUR: A CASE STUDY**

Rumana Manzur and Sayeed Hassan Sumon were married in August 2000 after a courtship of nearly three years. Rumana's father and Sumon's father were friends for over four decades; they were students and room mates at the Bangladesh University of Engineering Technology (BUET)<sup>3</sup>. Nevertheless Rumana's family strongly opposed the alliance; it was known that Sumon's father was a corrupt Power and Water Development engineer; the women in Sumon's family were illiterate, fashionable, stay-at-home housewives<sup>4</sup>. In the face of Rumana's persistence her parents compromised. Rumana's relatives, friends and acquaintances looked up to her as the girl who always came out either first or second in her class. She came First in her Masters finals from the International Relations department of Dhaka University and had started teaching right away. All that relatives knew

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1 Nasreen, Mahbuba, Women and Society. Women in Context, CSA, (Asian Study Centre) Osaka, 2007. [www.bangladeshsociology.org/BEJS-%20Final%20Issue%203.2.pdf](http://www.bangladeshsociology.org/BEJS-%20Final%20Issue%203.2.pdf).

2 Khan, Md. Asadullah (2011). The Battered Half. The Daily Star Newspaper Saturday 1st October. 2011.

3 Verbal account of Rumana's father, Major (Retd.) Manzur.

4 Verbal account of Rumana's aunt Rokeya Sultana, teacher, Agrani School.

of Sumon was that he was a graduate engineer who was involved in some business<sup>5</sup>. It was after Sumon brutally attacked, blinded and tried to kill Rumana, eleven years after the marriage that everyone including Rumana's parents discovered that Sumon was a BUET drop out who had not completed his studies.

After the marriage Sumon was noticeably, always at home, he rarely went out except to attend social functions or eat at expensive, exotic restaurants<sup>6</sup>. He invested in a poultry farm and some auto rickshaws<sup>7</sup>. Rumana started part-time work at an NGO and marketed women's wear from home. He didn't allow Rumana to visit or contact her close relatives or any of her friends and acquaintances; because their success made him insecure<sup>8</sup>. The couple frequently moved in and out of her parent's home as her in-laws were opposed to and unsupportive of their daughter-in-law studies and work. In late 2005 they permanently moved into Rumana's parents' house when she became pregnant.

It was very upsetting for most of Rumana's family that she had wasted her life by marrying a man who lived at his in-laws home, did nothing and lived off his wife's income<sup>9</sup>. He did not contribute to the household expenses but he interfered in all household matters and filled the balcony with noisy, smelly, messy bird cages<sup>10</sup>. Rumana's relatives avoided parents' home because of Sumon's insulting and offensive "behaviour and attitude"<sup>11</sup>. He would stay in his room when relatives visited.

Frustrated by his son-in-law's unemployment; rude behaviour and his relatives' comments, Rumana's father requested Sumon for his CV so that he could request his employers to employ Sumon<sup>12</sup>. Sumon said that he had eye problems and could not go out alone, and did not want to work anywhere, moreover his educational certificates had been misplaced by his sister when she applied for his immigration to the United States<sup>13</sup>. First he lied that Rumana knew about his problem

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5 Ahmad, Hana Shams (2011). Rumanas, and Why they Stay. The Forum, Volume 5 Issue 7 July 2011. [www.thedailystar.net/forum/2011/July/rumanas.htm](http://www.thedailystar.net/forum/2011/July/rumanas.htm).

6 Verbal account of Rumana's mother Rahima Manzur.

7 Verbal account of Rumana's aunt Rokeya Sultana, teacher, Agrani School.

8 Verbal account of Rumana.

9 Verbal account of Rumana's aunt Minu Rashid.

10 *ibid* 6.

11 Verbal account of Rumana's cousin Dr. Sohela Rahman, Mohakhali Chest Hospital.

12 Verbal account of Rumana's father, Major (Retd.) Manzur.

13 *ibid* 12.



before their marriage but later he admitted that he had not disclosed it. In 2007 Sumon invested in the share market; Rumana with the consent of close relatives opened BO accounts in their names and Sumon managed the accounts<sup>14</sup>. Many expatriate relatives and her parents invested money in order to support Rumana.

In 2007 an incident permanently changed the lives of Rumana, her father and family. Rumana's mother tripped during a morning walk and went into a coma. She regained consciousness after a month and three brain surgeries. But she never fully recovered; she has amnesia; her short term memory is non-functional and she can't cope with routine activities. Sadly Sumon remained unaffected<sup>15</sup>; he would call and annoy relatives and ask them help Rumana's mother look after Anusheh<sup>16</sup>. He complained that he hated her cousins or cousin's husbands affectionately touching Rumana or praising her<sup>17</sup>. At family functions her relatives noticed bruises on Rumana's face and arms but she claimed that she had accidentally fallen down or banged against a door<sup>18</sup>; she never discussed what was going on between Sumon and her, she later on said that she thought that if she compromised and stayed "good" he would eventually become better<sup>19</sup>.

In 2010 Rumana was elated when she won a scholarship to the University of British Columbia. She had been unsure whether to take her four-year-old daughter Anusheh with her. In the end she decided to leave her daughter with her mother<sup>20</sup>. In August 2010 Rumana went to Canada; during her nine months' stay Sumon constantly monitored her via face book, internet and telephone. She added and dropped courses; changed her supervisor as per his orders. She talked to him for three hours every night after classes giving him a detailed account of her day hiding nothing. Critical, possessive and suspicious by nature Sumon minutely questioned her and often repeatedly discussed the same incident to verify facts. He was so controlling and dominating that he

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14 *ibid* 8.

15 *ibid* 7.

16 Verbal account of Rumana's cousin Dr. Tazin Aziz Chaudhury, Associate Professor Dhaka University.

17 *ibid* 6.

18 Verbal account of Rumana's cousin Analisa Rashid, teacher, South Breeze International School.

19 Verbal account of Rumana's aunt Shama Zafor.

20 *ibid* 5.

didn't even let her talk to her parents properly<sup>21</sup>. He was supposed to live at his parents and visit his in-laws while Rumana was away but his parents avoided him and he continued staying at his in-laws. Without Rumana to act as a buffer, things deteriorated with his in-laws; he frequently fought with Rumana's parents and their maids. He verbally abused and threw a pan of hot curry in a fit of rage at a cook and she resigned<sup>22</sup>.

Rumana badly missed her parents and daughter so with her supervisor's permission she returned to Dhaka on 12th May, 2011. Sumon did not let her visit or contact her friends, colleagues and cousins; he didn't even let her spend time with her parents because he was afraid Rumana would find out about his obnoxious behaviour<sup>23</sup>. When she met her relatives at a family dinner on 20th May; Sumon's abuse and anger increased because everyone complimented Rumana on her looks and her almost complete degree; he told her "*Why did you lose weight? Who do you want to impress with your beauty? Why does everyone like you? Etc.*"<sup>24</sup> In a fit of rage he ripped an official group photo of Rumana's UBC batch and cut a laminated group photo, a parting gift from her UBC dorm mates<sup>25</sup>.

On 22nd May he flew into a rage and locked Rumana in her parents' bedroom and beat her senseless with an iron rod that he had hidden in the room earlier; her parents were out. Afraid of the discovery of his physical abuse of his wife he took her to his parent's empty house (his parents were in the United States) in the evening. He made Rumana inform her mother at night that they were on a short trip Bandarban<sup>26</sup>. On their return three days later he tried to explain the bruises with the old she 'hurt herself by accidentally hitting a wardrobe' excuse but this time Rumana couldn't stand it anymore and told her parents the truth<sup>27</sup>. Her father threw him out of the house and informed a few close relatives. At his parent's home Sumon took a mild dose of sedatives but opened several strips of medicine to make it look like he had overdosed; he then rang his daughter, emotionally bid her goodbye informing her he was dying. The poor five year old

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21 ibid 6.

22 ibid 6.

23 ibid 7.

24 ibid 6.

25 ibid 18.

26 ibid 19.

27 ibid 19.

cried hysterically for her father; Rumana and her father took him to the hospital, where they discovered he had taken a mild dose. Sumon fell at Rumana's feet begging for forgiveness; Anusheh wept; Rumana relented and took him back<sup>28</sup>.

It is assumed that an educated, financially independent, 'emancipated' woman being abused, won't care what family, relatives or meddlesome people in society say and have the support mechanism to walk out of an abusive marriage. The sadistic brutality of what happened in Rumana's room on 5th June, 2011 shattered all assumptions<sup>29</sup>.

The pictures are everywhere, everyone is suddenly aware, upset, horrified, shocked. Eyes gouged out; nose bitten off; lip bitten off; dragged by the hair and attempted to be strangled; saved by maids with an extra key to the room<sup>30</sup>. This case is different, suddenly the beast is not in some remote area of Bangladesh; the maid's good for nothing, drinking abusive husband who lives off her salary. He is one of us, English reading, car riding, BUET educated, good family. The question is "*How could an educated man do this?*"<sup>31</sup>

Many people questioned: why didn't Rumana leave the abusive marriage. Why did an educated, financially independent woman stay on? What about Rumana and her family? Why did her family not do anything about the abusive husband earlier? Even after this horrific abuse took place, why did they not want media to cover it? Is the threat of some political stronghold so much more than one's daughter's life? Who was pressing charges against Sumon? Who were helping Sumon hide for almost 10 days?<sup>32</sup>

When the story first broke, the media reported the facts of the attack, the brutality and the family's reaction and her educational and family background. But ten days later after his arrest Sumon 'briefed' the press about 'the torture done on him', how he had been 'wronged'. When media discussions spilled out into the open, it became clear why Rumana had not left her husband<sup>33</sup>.

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28 ibid 19.

29 Siddiqui, Shahana (2011).Back to Black. The Forum, Volume 5 Issue 7 July 2011. [www.thedailystar.net/forum/2011/July /black.htm](http://www.thedailystar.net/forum/2011/July /black.htm).

30 ibid 29.

31 ibid 29.

32 ibid 5.

33 ibid 5.

“He pushed his fingers into my eyes,” a battered Rumana told newsmen, “dragged me by my hair on the floor, at one stage repeatedly gnawed her nose, face and throat<sup>34</sup>. She alleged her husband used to frequently assault her during their 10-year conjugal life. Rumana did not tell her parents as she married him without their consent. “I tolerated all sorts of torture considering the future of my only daughter.” she said. He beat her up several times on her return from Canada on May 12, he was furious when she decided to continue her study in Canada<sup>35</sup>.

Sumon went into hiding after a case was filed against him with Dhanmondi Police Station on June 6. Before fleeing, Sumon threatened Rumana with throwing acid or shooting her if she takes legal action<sup>36</sup>. Rumana’s father perhaps out of sympathy or to keep his “ijjat” intact helped Sumon flee from the scene of the crime! For 10 days after the incident Sumon was sheltered by his cousin Kamal Uddin, a public prosecutor of Chittagong, who with some ministers and secretaries lobbied to protect the accused<sup>37</sup>.

He was arrested 10 days later, after a social and media mass movements demanding his arrest and justice for Rumana, just a few hours after a high court ruling asking the police to explain why he had not been arrested, Sumon denied torturing his wife he claimed he was “almost 80 percent visually impaired, she attacked me my glasses fell down and I couldn’t see anything, I don’t know what happened later,” adding that he was just trying to protect himself. He alleged Rumana had an extra marital affair with Iranian student Navid Taher Dween in Canada, “I took care of our daughter when she was in Canada. I did not have the slightest idea that she had been cheating on me all this time.”<sup>38</sup> He is currently behind bars awaiting trial.

Rumana’s well-meaning UBC friends sent a disturbing ‘character certificate’. They were impressed with Rumana’s way of life in Canada, she prayed five times a day, ate halal food, opened the door with her head covered; the comments were: “Rumana is a pious woman”; “she was surrounded by her female friends all the time” and ‘testified’ on her

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34 Ahmad, Farah Mehreen (2011).The Economics of Our Loins. The Forum, Volume 5 Issue 7 July 2011. [www.thedailystar.net/forum/2011/July/economics.htm](http://www.thedailystar.net/forum/2011/July/economics.htm).

35 Staff Correspondent. It’s all because of scholarship. Daily Star 14th June 2011.

36 Staff Correspondent .Torturer Sumon caught Claims wife Rumana cheated on him. Daily Star. June 16th 2011.

37 ibid 36.

38 ibid 35.

“flawless reputation”<sup>39</sup>. This brings up the question that if she had not been a ‘wonderful person’; or embodiment of “good”, would she then ‘deserve’ to be tortured by her husband? If women deviate from the norm don’t they deserve safety and security as a human being?<sup>40</sup>

Rumana bravely faced the media at a press conference to demand justice for herself and her family. One TV journalist asked about the allegations of extra-marital affair made by her husband. It was more important to write about the gossip to make papers sell than write about a brutal crime that has blinded a woman forever<sup>41</sup>. Legally there were problems Sumon could not be tried under the Women and Children Repression Act as he had not demanded dowry and that Act is related to dowry, similarly the existing Domestic Abuse Acts were also dowry related. Finally an attempt to murder case had to be filed. Rumana initially went to India for treatment but the doctors were unable to treat her. Subsequently UBC arranged for her to go back to Canada for experimental surgeries, there too legal tangles arose regarding her minor daughter’s guardianship. Rumana and her father went for the surgeries which could not be delayed; her mother and daughter joined them 3 weeks later after sorting out the legal tangles. The surgeries failed, Rumana is now permanently blind and attempting to complete her degree at UBC in Canada with the help of a university appointed reader. She and her family are undergoing counseling to deal with the trauma. She is also being trained by an instructor to cope and deal with her permanent blindness.

Rumana stayed because she was afraid of Sumon’s revenge on her, her child and her family. That people would: not believe she was being physically abused; tell her marriage was a ‘holy union’, women had to sacrifice for and maintain<sup>42</sup>. She did not want: to bring ‘shame’ to her family; people to gossip about her they way they do about divorced, single women. Because people would: tell her to compromise and forgive Sumon; label her a ‘bad mother’ for not considering Anusheh’s trauma for belonging to a ‘broken’ home. Sumon would publicly vilify her character thus shaming her as a person and a teacher<sup>43</sup>.

It is not only Sumon, but all of us who are part of her social fabric that are accomplice to this and the thousands of other violence against

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39 ibid 34.

40 ibid 34.

41 ibid 34.

42 ibid 29.

43 ibid 29.

women by their husbands and their families every day<sup>44</sup>. Financial independence doesn't free a woman from social norms and prejudice. We advise our friends, sisters, cousins, and daughters, to stay on in a bad marriage; to compromise for the sake of the children. We have created a society that does not permit women to lead a life of their own choice, women who do, become social pariahs, the subject of gossip<sup>45</sup>. The truth is Rumana didn't leave Sumon because society did not create a space for her to walk out. The case of Rumana Monzur will simply fade out of newspaper headlines and civil society interest, Rumana, and millions of more women will continue to be statistics of different forms of violence and abuse, reported or unreported.

## OVERVIEW OF THE STATE OF BANGLADESHI WOMEN

Ain O Salish Kendra, reported 104 cases of domestic violence country-wide, 116 dowry-related attacks, 18 acid attacks, and seven fatwa-related violence, in the period of January to March 2011. In 2010, out of the 397 reported domestic violence cases, 225 women were killed; 224 were killed and 18 committed suicide out of the 395 reported dowry-related violence cases. Bangladesh ranks one of the highest in the world with respect to violence against women and, in terms of domestic violence, 50-70% of women in the country report being abused by their male partners<sup>46</sup>.

### Passive Violence

Because of 'male child preference' of parents and society, 'the arrival of a male child is much more welcomed than a girl child in most families'<sup>47</sup>. Thus Bangladeshi women suffer "passive" violence from birth, as evident from a 2006 study that found: an "unnatural" female/male population ratio: there are 95 women to every 100 men; an unnatural difference in life expectancy: men's life expectancy is 55.3 years, women's 53.3 years; infant mortality rate: for 1,000 live births in 1998,

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44 *ibid* 34.

45 Mohaiemen, Naeem (2011). The poison of male violence. *The Daily Star Newspaper, Thursday, 16th June, 2011*.

46 Rizanuzzaman Laskar and Pankaj Karmaker (November 23rd 2011). Discrimination against the girls has to go from family first. *The Daily Star November 23rd 2011*.

47 See R. Hausmann, L.D. Tyson, S. Zahidi, eds, The Global Gender Gap Report 2006. World Economic Forum. Geneva, 2006, 37. [www.weforum.org/pdf/gendergap/report2006.pdf](http://www.weforum.org/pdf/gendergap/report2006.pdf).

470 girls died as opposed to 370 boys<sup>48</sup>; girls under 5 in rural areas are undernourished and 25 % of adolescent girls are severely to moderately thin.<sup>49</sup> From adolescence young girls are weighed down by social and cultural pressures from society and family.<sup>50</sup>

### **Discriminatory Socialization**

Things go downhill as a girl grows up to be an adolescent and then an adult according to a current UNDP report.<sup>51</sup> The socialization of Bangladeshi women is dictated by patriarchal norms: Empowerment and emancipation are discouraged; the goal is get married and raise a family. Girls are taught to cook and maintain the house. They are trained how to talk, dress and behave according to social appropriacy. Female sexuality is inherently bad, has to be denied and hidden; they are indoctrinated with notions of *purdah*, *lojja* (shame/modesty), *ijjat* and *somman* (honour); the onus of safeguarding family honour is theirs<sup>52</sup>. Thus discrimination is visible in forms such as dropping out of school, not being allowed to leave home unattended etc.<sup>53</sup> They learn to perceive themselves as incomplete human beings of lower nature, only completed through dependence on the father, brother, husband or son and subject to strict control from cradle to grave. Often this control degenerates into violence which a patriarchal society culturally and justifies, tolerates and condones. Most of the violence occurs in the family, first the fathers' family, then the husbands<sup>54</sup>. There is a general lack of respect towards women in patriarchal society.<sup>55</sup> This discrimination within families remains a big issue in a society that prefers boys to girls.

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48 *Shadow Report to the Fifth Periodic Report of the Government of Bangladesh*. Submitted by Ain O Salish Kendra (ask), Bangladesh Mahila Parishad, Steps Towards Development, May 2004, 38. [http://www.iwra-wap.org/resources/pdf/bangladesh\\_sr.pdf](http://www.iwra-wap.org/resources/pdf/bangladesh_sr.pdf).

49 See icddr.b., "Nutritional Status, Knowledge and Practices of Unmarried Adolescent Girls in Rural Bangladesh," *Health and Science Bulletin* 2006 (4/3): 9.

50 Rasheda K. Chowdhury Director CAMPE in Rizanuzzaman Laskar and Pankaj Karmaker (November 23rd 2011). Discrimination against the girls has to go from family first. *The Daily Star November 23rd 2011*.

51 Rizanuzzaman Laskar and Pankaj Karmaker (November 23rd 2011). Discrimination against the girls has to go from family first. *The Daily Star November 23rd 2011*.

52 Nasreen, Mahbuba, *Case Study: Gender Human Security and Climate Change in Bangladesh*. [www.unicef.org/rosa/Unicef\\_Rosa\(Bangladesh\\_case\\_study\).pdf](http://www.unicef.org/rosa/Unicef_Rosa(Bangladesh_case_study).pdf)

53 *ibid* 51.

54 *ibid* 52.

55 *ibid* 51.

## Domestic Abuse

A recent survey showed 53% of women experienced sexual or physical violence from husbands. The most common act was slapping (46%), followed by pushing, shaking and something thrown at them (30%), punching with fists or something that can hurt (17%), kicking, dragging or beating (15%), and choking or burning (5%).<sup>56</sup> Moreover 37 % urban and 50 % rural women reported sexual violence by their husbands.<sup>57</sup> It was established that abused women were twice as likely to attempt suicide (29 %) compared to the never-abused group (14 %).<sup>58</sup> Two thirds of the physically abused wives did nothing to redress the act of violence and the few who did relied on informal networks of relatives and neighbours. Some of the reasons stated by abused wives for keeping silent are:

- Violence not serious enough to report (57 % urban, 52 % rural)
- Stigma of being blamed / fear of not being believed (30 % urban, 40 % rural),
- Fear of disgracing family with disclosure (26 % urban, 34 % rural)
- Belief that seeking help would not bring them any relief (11 % urban, 10% rural).<sup>59</sup>

The answers reflect a low degree of self-awareness and self-esteem and high degree of tolerance induced by discriminatory socialisation practices. Bangladeshi women acquire social identity, visibility and recognition through marriage. Moreover marriage grants them a specific traditional role and psychological fulfilment. Bangladeshi women are disadvantaged in important social domains. The literacy rate for women is 29.9 % while it is 52.3 % for men,<sup>60</sup> this shapes the way they see themselves, build their identities, relate to the world and conceptualise the treatment meted out to them. The vulnerability projected by the above responses is reinforced and caused

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56 See *5th Bangladesh Demographic and Health Survey*, (BDHS) 2007, Chapter 14 (“Domestic Violence”, P 197-214)

57 See icddr., “Domestic Violence against Women in Bangladesh,” *Health and Science Bulletin* 2006 (4/2):3.

58 *ibid* 57.

59 *ibid* 57.

60 See *Shadow Report to the Fifth Periodic Report of the Government of Bangladesh*, *op. cit.*, 33.



by the low economic value of women.<sup>61</sup> Women are not economically empowered to the extent that they can be financially independent. Despite making up a major proportion of the skilled and unskilled workforce their average income is only 57 % of that of their male counterparts<sup>62</sup>.

### **Dowry Related Violence**

According to a police report 3415 cases of dowry-related violence were reported in 2009,<sup>63</sup> this is a glimpse of the truth. Dowry killing is the most vicious and rampant social crime; and the numbers are rising despite efforts of social activists and women's rights organizations to eliminate it. A women's rights group's survey found that 50% women country-wide were physically abused by husbands and in-laws for dowry. This violence cuts across caste and class; and education level has nothing to do with it<sup>64</sup>. "Get-rich-quick" is the new goal in life and dowry is an instrument for upward material mobility. Consumerism, flashy life-styles and in most cases joblessness and drug addiction or alcoholism fuel these crimes. Dowry is now a major trigger for violence against women in their homes.<sup>65</sup>

Surprisingly 90% dowry deaths and 80% dowry harassment occurs in the middle and lower strata and not in the upper classes. Despite passing the "Domestic Violence (Prevention and Protection) Act 2010" which allows abused women to initiate criminal proceedings, few women are bold enough to exercise this right as they don't have the resources to fight the case or are afraid of being thrown out of their husband's house and being abandoned by their own family or parents<sup>66</sup>. Judging from media reports an epidemic appears to be in the making<sup>67</sup>.

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61 icddr., "Domestic Violence against Women in Bangladesh," *op. cit.*, 5.

62 See *Shadow Report to the Fifth Periodic Report of the Government of Bangladesh*, *op. cit.*, 35.

63 Mohaiemen, Naeem (2011). The poison of male violence. *The Daily Star Newspaper*, Thursday, 16th June, 2011.

64 *ibid* 63.

65 See Dina M. Siddiqi, "One Step Forward, Two Steps Back? Women Rights in 2005," Hameeda Hossain, ed., *Human Rights in Bangladesh 2005* (Dhaka: Ain O Salish Kendra - ask, 2006), 209.

66 *ibid* 63.

67 *ibid* 63.

### **Eve Teasing –Stalking-Street Harassment**

Recently there has been a rise in so called “eve teasing” or stalking and sexual harassment; girls have committed suicide and their guardians have been assaulted and murdered because they protested.<sup>68</sup> Street harassment against women has also been addressed in some form or the other, usually categorized in the eve teasing form. Defined as being violated usually verbally in the streets, this form of harassment affects women of all backgrounds in the streets, in all parts of the country, by all “types” of men<sup>69</sup>. This could happen in many ways it could be a cat call from street vendors, stares from or sexual innuendos from passersby, being purposefully touched in the crowd. A male Dhaka University student commented that, “these women are not supposed to be in the streets, so of course they are going to get harassed. If they didn’t want that attention, they should have stayed home, and not dressed inappropriately which is going to get them the attention they claim they don’t want.”<sup>70</sup> Street harassment incidents “are rarely reported, and are culturally accepted as ‘the price you pay’ for being a woman. This type of violence is considered a “gateway crime” which creates a “cultural environment which makes gender-based violence okay,”<sup>71</sup> Since childhood, women have been taught to ignore such harassment in the streets by other women: mothers and other female relatives. Women, are told to avert their eyes, look away, and keep walking, and not say anything when they are verbally violated in public; they are given the impression that they are powerless and must simply ignore being harassed in the streets which is inevitable but avoidable via ignorance<sup>72</sup>. The concern is the public disgrace of the victim, not the aggressor whose action is not confronted but ignored and he avoids humiliation. The government has formed mobile courts to stop this form of sexual

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68 Hemal, Mahmudul Hasan (2011). Educated Beast. *The Star* Volume 14, Issue 740, 12th August, 2011.

69 Hassan, Olinda. Street Harassment is Still Serious: The violation of women in Dhaka’s public realm. *The Forum*, Volume 5 Issue 11| November 2011 [www.thedailystar.net/forum/2011/November/.htm](http://www.thedailystar.net/forum/2011/November/.htm).

70 ibid 69.

71 ibid 69.

72 Choudhury, Ziauddin (2011) Mothers, Daughters and Sisters Are They Our Equals? *The Forum*, Volume 5 Issue 11| November 2011 [www.thedailystar.net/forum/2011/November/mother.htm](http://www.thedailystar.net/forum/2011/November/mother.htm)

harassment and the legal framework to combat violence against women has incorporated the issue of stalking<sup>73</sup>.

### **Acid Throwing**

Acid throwing is form of violence unique to Bangladesh. The press reported an all time high number of 484 cases in 2002. The reasons for acid attacks have diversified: initially the attacks resulted from the refusal of marriage or sexual proposals by women<sup>74</sup> now acid attacks are a means of intimidating or taking revenge on personal and political rivals.<sup>75</sup> Implementation of the Acid Control Act 2002 has reduced the number of cases but has not eradicated it.

### **Social Intercession - Fatwa**

Traditionally elders and religious specialists mediate village arbitrations (*shalish*) in Bangladesh. These informal tribunals mainly deal with extra marital relations, premarital pregnancies, divorces, marriages. When religious leaders are involved, case proceedings end with a *fatwa* or religious edict sanctioning the verdict. *Fatwas* have been declared illegal but only 4 of the 46 *fatwa* cases in 2005 were prosecuted.<sup>76</sup> Judges of these arbitrations are semi-literate, bigoted, influential people who perpetuate the power relations, status quo of class domination in village society as evident from the tragic death by lashing of Hena earlier this year. Women are the defendants in these arbitrations and verdicts go against women's interests and mete out barbaric punishments like caning, lashing, stoning, shaving hair and social boycott of the women<sup>77</sup>.

### **Rape and Legalities**

Rape is one of the most brutal violence against women, which often

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73 *ibid* 69

74 The first acid attack which has been documented goes back to the year 1983.

75 *ibid* 65 *op. cit.*, 212

76 *ibid* 65 *op. cit.*, 210.

77 *ibid* 65 *op. cit.*, 215.

leads to murder<sup>78</sup>. Police reports reported 3,300 people every year in Bangladesh. Victims who seek justice run a medico-legal gauntlet, at the hands of society that stigmatizes the victim, rather than the rapist<sup>79</sup>. Additionally the medical, legal and law enforcement agencies are not supportive or women-friendly. Human Rights Watch found that most forensics departments perform the finger test as normal examination. The test is painful and demeaning; often performed by male doctors and acts as another deterrent for rape survivors to seek medical help or legal recourse<sup>80</sup>. Based on a combination of deeply chauvinistic attitudes towards women's sexuality and flimsy science, test results are used by the defense to disparage the victim's character, blaming the victim for her rape; the focus of the trial shifts from the actions of the accused to the character of the victim establishing that the victim had "loose morals", was promiscuous thus casting public doubt on her moral character and reducing the weight of her evidence<sup>81</sup>.

Exposing sexual violence, can ruin one's family standing this fear of losing *ijjat* prevents women and their families from seeking legal aid. In 2005, 835 rape cases were reported; police complaints were lodged in less than half the cases and 51 cases were resolved through *salish* or informal village arbitration.<sup>82</sup> The archaic, lengthy and expensive criminal justice system prevents women from seeking justice. Shockingly 95 % of the accused in rape cases are acquitted due to faulty investigations or lack of evidence.<sup>11</sup> It is no surprise that though women are victims of sexual assault and harassment every day, only some are reported hundreds never come forward, and tell their stories<sup>83</sup>. There are procedural gaps in the state interventions towards preventing such violence and the incidence of violence against women is rising due to weaknesses in the legal framework, lack of gender sensitivity in the administration and poor law and order situation overall<sup>84</sup>.

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78 Ahmad, Maimuna (2011). The Two-Finger Test: About Character or Consent?. *The Forum*, Volume 5 Issue 11 November 2011 [www.thedailystar.net/forum/2011/November/consent.htm](http://www.thedailystar.net/forum/2011/November/consent.htm).

79 *ibid* 78.

80 *ibid* 78.

81 *ibid* 78.

82 *ibid* 34.

83 *ibid* 34.

84 *ibid* 52.

## Law Enforcement Agencies

The police, directly or indirectly propagates violence. A retired police official commented that: “all are equal in the eyes of the law; but some are less so than others, in particular, if they are women<sup>85</sup>. Even if a woman bravely complains she’s stonewalled by the police, who in alliance with the alleged tormentor or his family tell the victim “why do you want to land your family in jail?” this attitude has become institutionalized<sup>86</sup>. Another police official said that: “policemen ignored or remained unresponsive to complaints of cruelty because they were not assigned any specific duty to protect these women<sup>87</sup>.” The police are a trained force, and are expected to be more understanding, tolerant and kind than the ordinary individual. They are supposed to be friends of the people and stand by them in all situations<sup>88</sup>. The only way to address this situation is that the institution undergoes a radical transformation, the force must be modified to a level that is conforms to the needs of the civil society: a tolerant force, people can look up to as trusted friends, not adversaries who inflict wounds on hapless souls<sup>89</sup>. When we examine violence against women and equality before law, on paper, they are equal, but in reality they are less equal than their male counterparts<sup>90</sup>.

## Legislation and State Intervention

Successive Bangladeshi governments passed legislation to protect women’s rights and close the gender gap. Bangladesh endorsed the “Platform for Action” (1995); ratified the “Convention on the Elimination of All Forms of Discrimination against Women” (CEDAW) with some reservations. By agreeing to revise its legislation and align it to the Convention’s requirements and ensure its implementation nationally, the following steps were taken:

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85 *ibid* 52.

86 *ibid* 45.

87 *ibid* 45.

88 Sattar, Mohammad Ali (2011). What has gone Wrong with our Police? *The Star* Volume 14, Issue 740: p 34-36.

89 *ibid* 88.

90 *ibid* 72.

- National Action Plan for the Advancement of Women
- Repression of Women and Children (Special Enactment) Act (1995)
- National Policy on Women (1997) prioritised government intervention to eradicate violence
- Prevention of Repression of Women and Children Act (2000) increased the punishment for rape with the death penalty and granted special tribunals to adjudicate rape cases and repressive offences
- Acid Attack Crime Repression Act and the Acid Control Act (2002) to counter acid attack cases
- Domestic Violence (Prevention and Protection) Act (2010) to contain domestic violence and other acts of abuse making cruelty against married women a crime

The new legislation was in addition to existing ones like:

- Child Marriage Restraint Act (1983)
- Dowry Prohibition (Amendment) Ordinance of 1982
- Immoral Trafficking Act (1993) – providing punishment for forcing women into prostitution.

But new legislation can not eliminate it. Until and unless the mindset of society in general becomes pro-women, Bangladeshi women will never achieve security. This is a formidable challenge.

## PREVENTIVE STEPS

Bangladeshi women have achieved remarkable development over the past two decades. Women make up 62% of the labor force; one of the highest among Muslim countries<sup>91</sup> and recent statistics give the primary school enrolment of girls 95%<sup>92</sup>. More women are self reliant and more women are entering and participating in politics and governance. A 2004 newspaper, report that 2,500 women divorced their abusive husbands in Dhaka can be interpreted as a sign of women's empowerment.<sup>93</sup> The government had taken good measures and laws to address and raise awareness regarding stalking, sexual harassment

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91 *ibid* 72.

92 See R. Hausmann, L.D. Tyson, S. Zahidi, eds., *The Global Gender Gap Report 2006*, op. cit., 37.

93 M.A. Choudhori, "Talaker pothe eghie nari-nirjaton o joutuker porinoti," *Janakantha* June 16, 2005.

and its consequences. Non-government organizations have also made commendable awareness raising efforts<sup>94</sup>. Bangladeshi women are raising their voices demanding respect for their dignity and rights<sup>95</sup>.

However violence against women has increased drastically. As a result of education, economic solvency and political participation women are not confined to their socially sanctioned traditional roles of mothers and wives, but culturally society remains strongly patriarchal and discriminatory towards women, thus violence is the instrument for society to keep women in check<sup>96</sup>.

It may take several more decades to treat our women equally and give them their rightful place in society<sup>97</sup>. Education is a good beginning, but preparing our legal system to protect their rights and give them power is an important condition of gender equality<sup>98</sup>. Apart from enacting new laws, a programme of sensitization is needed, for the police, the lawmakers, the judiciary, and society as a whole, for the legislation to have significant impact<sup>99</sup>. Attitudes towards women won't change overnight. Respect towards women has to be ingrained in all men from childhood<sup>100</sup>. There is a need for 'community mobilization' to create mass awareness and to build social resistance against violence against women<sup>101</sup>. The following measures may be considered:

- Changes should primarily come from within the family:
  - o Parents have to model respect for women within the household, teaching boys that their sisters and female peers are equal to them in every way<sup>102</sup>
  - o Equal treatment of boys and girls within the family should be ensured

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94 Education Minister Nurul Islam Nahid in Staff Correspondent. Awareness is a must. *Daily Star*. August 5th 2011.

95 *ibid* 94.

96 *ibid* 1.

97 *ibid* 72.

98 *ibid* 94.

99 Shahnaz, Shazia (2011). When will change come? Readers' FORUM. [www.thedailystar.net/forum/2011/July](http://www.thedailystar.net/forum/2011/July).

100 See Rasheda K. Chowdhury Director CAMPE in Rizanuzzaman Laskar and Pankaj Karmaker (November 23rd 2011). Discrimination against the girls has to go from family first. *The Daily Star* November 23rd 2011.

101 See Dr. Shirin Sharmin – State minister for Women and Children Affairs in Rizanuzzaman Laskar and Pankaj Karmaker (November 23rd 2011). Discrimination against the girls has to go from family first. *The Daily Star* November 23rd 2011

102 *ibid* 94.

- o Girls should be given equal opportunity for education, food, security and respect within the family<sup>103</sup>
- o Girls should be educated and financially empowered not married off as soon as possible<sup>104</sup>
- o Families should support abused women and counsel them to oppose abuse and seek justice not continue abusive marriages<sup>105</sup>
- Society should be mobilized so that:
  - o Abused women are not further abused: stigmatized, ostracized or labeled characterless
  - o Women are given the support to escape a bad marriage and rebuild their lives with dignity
  - o Relatives and society should advise abused women to leave the marriage, oppose abuse and seek justice and support them in the process not compromise and continue<sup>106</sup>
  - o Women should be socially reconditioned to leave bad marriages, oppose abuse and consider their lives and dignity as more important than *ijjat*, children or matrimony<sup>107</sup>
- Most importantly the justice system has to be overhauled and accelerated; at present criminals can delay a trial for years and often the penalty is inadequate. These changes can be made:
  - o Trials should be quick and be completed within a stipulated time frame and not go on for years<sup>108</sup>
  - o Penalties should be maximum (death penalty and capital punishment should be implemented) and therefore deterrent
  - o Legal system should not aid criminals by delaying justice or causing mistrial (as happens in most cases)
  - o Cases of abuse must be dealt with harshly favoring the victim and not the abuser in both legal and village arbitrations
  - o The abuser should be on trial and not the victim
  - o Religious distortions or impediments to justice should be avoided

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103 ibid 5.

104 ibid 29.

105 ibid 34.

106 ibid 29.

107 ibid 5.

108 ibid 5.



- Schools can teach about gender equality; respect towards women and opposing stalking, dowry and domestic violence<sup>109</sup>.
- Country wide initiation and operation of Kishore Kishori club (Adolescent club) is a positive step which will increase interaction amongst adolescents and educate them to move against stalking, dowry and domestic violence<sup>110</sup>.
- There should be widespread social opposition and awareness and action against domestic abuse and dowry related abuse<sup>111</sup>.
- Media must play a key role to create the awareness important to change social views and attitude<sup>112</sup>.
- Media can inform people of the legal provisions available for victims and set up a 24 hour a Hot Line where victims can call for assistance.
- More films, plays, songs should be made, promoted and advertised to oppose abuse and create awareness
- Country wide Help Cells should be set up to help and counsel domestic, dowry, and sexual abuse victims and their families
- The State and NGO's should work together to rehabilitate, support and protect victims legally and socially
- The Police should be specially trained to be sympathetic to and assist and support victims and not delay or obstruct the investigative process
- Legal and Medical professionals should be specially trained to be sympathetic and supportive to victims and facilitate and expedite the process
- Alternately every police station and medical facility should have special Help Desk manned by trained professionals (preferably women) to deal with cases of abuse, dowry, and rape and stalking

## CONCLUDING THOUGHTS

Several disturbing questions come to mind: Why do we as a nation try to find fault in battered women? Why can't we accept that a woman can be a victim of domestic violence without having any faults? Why do we ask women to make compromises in marriage? In most domestic violence cases nothing definite, in terms of justice, happens. As a

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109 ibid 34.

110 ibid 101.

111 ibid 69.

112 ibid 101.

nation, we know men can abuse, rape, eve-tease, throw acid at women and nothing is ever going to happen<sup>113</sup>. We have built a culture of disrespect towards women which has led us to Rumana Manzur today. We know that women can be hurt and abused, and punishment is not a necessary consequence. Women are like commodities, not human beings<sup>114</sup>. We put the blame on women: a woman must be chaste, virginal and proper; or else abusing, teasing, raping and gouging her eyes out is justified. The tag line engrained in our society about women is “act and behave right, be passive, be obedient, be submissive and nothing will happen to you; act out of line, and feel the wrath,”<sup>115</sup>. Society has to speak up against domestic violence. Social awareness and tolerance has to be created so that when a woman leaves her husband, she isn't blamed or abandoned. We have to give back the respect and humanistic concern women deserve as human beings. It is a long road ahead, but we have to start now.

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113 *ibid* 72.

114 *ibid* 99.

115 *ibid* 99.

## *Chapter 9*

# IMPLICATIONS OF THE RATIFICATION OF OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE

*Md. Ashrafuzzaman*

## INTRODUCTION

Constitutionally Bangladesh is a democracy and defined as the ‘People’s Republic of Bangladesh’. The Constitution of the country enshrines all universally recognized fundamental rights, including the right against torture<sup>1</sup>. Bangladesh claims that “all power of the republic belongs to the people”<sup>2</sup>. Bangladesh, since its attainment of membership status in the United Nations on 17 September 1974, has so far ratified six major international treaties including the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)<sup>3</sup>. This chapter focuses on the Optional Protocol to the CAT<sup>4</sup>, which Bangladesh is yet to ratify. The paper begins focusing on the mandate and provisions of the CAT and the Optional Protocol to the CAT (OPCAT). In this context, it is also important to comprehend why the adoption of OPCAT is important for Bangladesh.

CAT recognises that ‘torture’ constitutes a serious violation of the fundamental rights to dignity, physical integrity and security of the person. It prohibits torture in all its forms, irrespective of the purpose for which torture is used, or the situation that a state may face, such as

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- 1 Article 35 (5) of the Constitution of Bangladesh asserts, “No person shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment.” [http://bdlaws.minlaw.gov.bd/sections\\_detail.php?id=367&sections\\_id=24583](http://bdlaws.minlaw.gov.bd/sections_detail.php?id=367&sections_id=24583).
  - 2 Article 7 of the Constitution of Bangladesh reads: “All powers in the Republic belong to the people, and their exercise on behalf of the people shall be effected only under, and by the authority of, this Constitution.” [http://bdlaws.minlaw.gov.bd/sections\\_detail.php?id=367&sections\\_id=24555](http://bdlaws.minlaw.gov.bd/sections_detail.php?id=367&sections_id=24555).
  - 3 UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) <http://www2.ohchr.org/english/law/cat.htm>.
  - 4 Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment <http://www2.ohchr.org/english/law/cat-one.htm>.

war, threats of war, internal instability or public emergency. The use of torture cannot be justified as committed under an order of any superior officer or authority<sup>5</sup>. CAT also establishes a body called the Committee against Torture, which inter alia, is empowered to receive complaints/communications from the State parties to the CAT or from individuals about acts of torture<sup>6</sup>.

People's experiences across the world in terms of implementing the CAT – for the very purpose of protecting every human being of all territories from torture – encouraged the United Nations to adopt the OPCAT aiming at more practical realization of CAT. Many States have continued and are still continuing to use torture although torture is absolutely prohibited by the CAT<sup>7</sup>. It was underlined very distinctively that protection from torture is a non-derogable fundamental right of every person of every jurisdiction. The right against torture has today attained the status of *jus cogens*. Torture today, is also considered a crime against humanity, which attracts universal jurisdiction to prosecute.

One of the most significant matters involves Bangladesh's accession to the CAT on 5 October 1998. As a party to this Convention, Bangladesh has obligation under Article 2 of the CAT to undertake “effective legislative, administrative, judicial or other measures to prevent acts of torture”<sup>8</sup>. It may be argued that this provision mandates Bangladesh the obligation to ratify the OPCAT because, the OPCAT provides the mechanism for preventing torture. It is very significant to concentrate on the mechanisms laid down in the OPCAT and understand how the mechanisms could effectively be utilized for protecting personal liberty and dignity, as have been universally recognized.

## OPCAT IN BRIEF

The OPCAT has 37 Articles laid out in seven parts. The General Assembly adopted the OPCAT on 18 December 2002. It entered into

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5 Article 2.2 and 2.3 of CAT, <http://www2.ohchr.org/english/law/cat.htm>.

6 Article 17 of CAT <http://www2.ohchr.org/english/law/cat.htm>.

7 Paragraph 1, Page 1 of General Comments of the UN Committee Against Torture on Article 2 of the CAT: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/402/62/PDF/G0840262.pdf?OpenElement>.

8 Article 2.1 of CAT enshrines, “Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.” <http://www2.ohchr.org/english/law/cat.htm>.

force on 22 June 2006 and became an international law. Part I (Articles 1 – 4) talks about the general principles of OPCAT while the others focus on how the checks and balances of the State-agents could be ensured by establishing a system of accountability paving way for state and non-state actors to work together in preventing torture. The first provision of the OPCAT clarifies that the objective of this instrument is to “establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment”<sup>9</sup>.

The mandate of establishing a ‘Sub Committee on Prevention of Torture’ is enshrined in Article 2 referring to the UN Charter as one of the basic guidelines for the Sub Committee to carry out its responsibilities maintaining international norms such as “the principles of confidentiality, impartiality, non-selectivity, universality and objectivity”<sup>10</sup>. The same Article asserts that states and the Sub Committee shall “cooperate in the implementation” of the Protocol, which means that both the State and the international community such as the Sub Committee on Prevention of Torture are to, in principle, extend their hands for a common goal.

Article 3, as one of most important provisions, insists that “Each State Party shall set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment” (National Preventive Mechanism or NPM). This Article opens a wider window of opportunities for the government and the civil society of a country to work together for protecting the territory’s citizens from a heinous crime like torture. States parties to the OPCAT, shall have to allow the Sub Committee to visit all the detention centres, prisons and “any place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence” and places “in a public or private custodial setting”, according to Article 4<sup>11</sup>.

In Part II (Articles 5 – 10), the OPCAT specifies the structures of the Sub Committee on Prevention of Torture, internationally and nationally, and the basic criteria of selecting its members ensuring

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9 Article 1 of OPCAT: <http://www2.ohchr.org/english/law/cat-one.htm>.

10 Article 2 of OPCAT: <http://www2.ohchr.org/english/law/cat-one.htm>.

11 Article 4 of OPCAT: <http://www2.ohchr.org/english/law/cat-one.htm>.

balanced gender representation on the basis of the principles of equality and non-discrimination<sup>12</sup>, its process of nomination<sup>13</sup>, election<sup>14</sup>, replacements of members<sup>15</sup>, tenures<sup>16</sup> and re-election<sup>17</sup>.

Part III (Articles 11 – 16) of OPCAT is one of most important components that elucidate the mandate of the Sub Committee on Prevention of Torture. States and the civil society – as National Prevention Mechanism on the ground level within a state’s territory – in every jurisdiction shall share responsibilities to each other following guidelines for, building capacity of the NPM and, working together keeping regular cooperation and communication between each other and with the Sub Committee established internationally. The Sub Committee shall initiate regular visits<sup>18</sup> to detention centres with liberty to choose the places to visit<sup>19</sup>, followed by recommendations and observations<sup>20</sup>.

Here, one significant aspect is: no authority or official of the state is allowed to “order, apply, permit or tolerate any sanction against any person or organization for having communicated to the Sub Committee on Prevention or to its delegates any information, whether true or false, and no such person or organization shall be otherwise prejudiced in any way”<sup>21</sup>. The reports of the Sub Committee shall be published in public, by the states, in failure or with consent, by the Sub Committee itself<sup>22</sup>. State’s refusal to cooperate with procedures can be heard in the Committee against Torture allowing equal opportunities to both the State and Sub Committee to express their views.

The importance of Part IV (Articles 17 – 23) of OPCAT is the most important component from the perspective of the ground level situations in the counties like Bangladesh. This chapter provides a framework and functional directives of the NPM. States’ obligations are to maintain, designate or establish one or several independent

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12 Article 5 of OPCAT: <http://www2.ohchr.org/english/law/cat-one.htm>.

13 Article 6 of OPCAT: <http://www2.ohchr.org/english/law/cat-one.htm>.

14 Article 7 of OPCAT: <http://www2.ohchr.org/english/law/cat-one.htm>.

15 Article 8 of OPCAT: <http://www2.ohchr.org/english/law/cat-one.htm>.

16 Article 9 of OPCAT: <http://www2.ohchr.org/english/law/cat-one.htm>.

17 Article 10 of OPCAT: <http://www2.ohchr.org/english/law/cat-one.htm>.

18 Article 13 of OPCAT: <http://www2.ohchr.org/english/law/cat-one.htm>.

19 Article 14 (e) of OPCAT: <http://www2.ohchr.org/english/law/cat-one.htm>.

20 Article 16 of OPCAT: <http://www2.ohchr.org/english/law/cat-one.htm>.

21 Article 15 of OPCAT: <http://www2.ohchr.org/english/law/cat-one.htm>.

22 Article 16 of OPCAT: <http://www2.ohchr.org/english/law/cat-one.htm>.

NPM(s) for preventing torture at the domestic level. That apart, there is provision of establishing decentralized units of the NPM within the same country<sup>23</sup>. The States have to guarantee the functional independence of the NPM and provide financial supports to the NPM as per requirements.

The NPM should establish: (a) a mechanism for communicating and cooperating with relevant national authorities on the implementation of recommendations, including urgent action procedures, (b) a means for addressing and resolving any operational difficulties encountered during the exercise of its duties, including during visits; (c) a policy for publicising reports, or parts of reports including the main findings and recommendations, and (d) a policy regarding the production and publication of thematic reports. The NPM should establish a strategy for cooperation with other national and international actors, on prevention of torture and on follow-up of cases of suspected or documented torture or ill-treatment.<sup>24</sup>

Part V (Article 24) is very brief, which allows the states to make declaration to postpone the implementation of the provisions of the OPCAT, leaving options for extending the period of postponement. Part VI (Articles 25 – 26) illustrates the responsibility of providing financial resources from the UN Secretary General's capacities. Part VII (Articles 27 – 37) of the Protocol is termed as its 'Final Provisions' which declares the enforcement modalities of the Optional Protocol.

## THE CONTEXT OF BANGLADESH

A pertinent question that we may want to discuss is the environment in Bangladesh for human rights work. If human rights defenders (HRD) are given opportunities to speak out without fear or reservation, a substantial amount of documentation that will not be comfortable for the state would be exposed. Bangladesh is a country where HRDs face physical attacks, threats and intimidations of all kind. Communications of HRDs are regularly monitored by the state. There are instances where HRDs were summoned by state agencies to scary places for them to be taught 'lessons'.

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23 Article 17 of OPCAT: <http://www2.ohchr.org/english/law/cat-one.htm>.

24 *Analytical self-assessment tool for National Prevention Mechanisms (NPM)*, paragraphs 27 – 33, <http://www2.ohchr.org/english/bodies/cat/opcat/mechanisms.htm>.

If one further asks why do the human rights defenders face, or worry about, threats and attacks on various forms, the simple answer is: the HRDs help victims of human rights abuses to speak out and further seek redress. This exposes the state's role in human rights abuses, either by directly committing them, or facilitating such violence.

Again there is a question: if an authority fails to respect the right to be protected from torture and the freedom of expression guaranteed under the constitution, what could be done to remedy it? Is torture widespread or a rare incident? Torture is endemic in Bangladesh and today, it is synonymous with law-enforcement. People resort to extra-legal methods to deal with the police. They expect the police to demand bribes and the police expect the people to pay that. Without the help of a politician or money, police would not do what they are supposed to. Even then, there is no guarantee that the police will follow the law.

In this scenario, one may also want to ask an additional question. This is about institutions created to monitor these issues in Bangladesh, for instance those with the mandate to protect and promote human rights in Bangladesh. Are they performing properly? Are they equipped to undertake their mandate? If not, then perhaps one must ask the question, why? Often people find comfort in blaming colonial legislations for today's faults. Such an accusation is indeed justified, though to a limited extent. However, what is forgotten is that today, Bangladesh is no more under the colonial rule, and we could legislate what we deem fit to guarantee fundamental freedom to the people of Bangladesh.

The Police Regulations of Bengal-1943. In Regulation 19, it authorizes District Magistrates (currently replaced by the Chief Judicial Magistrates) to inspect the police station and check their capacity and action. Regulation 19 reads: "The District Magistrate shall exercise constant supervision over the prevention and detection of crime, for the proper conduct of which he is ultimately responsible. An important part of his duty is to inspect the police-stations of his district at regular intervals. It is not necessary for him to examine the details of the working of the department, but he should give special attention to:

- (i) The general diary and the manner in which it is written up;
- (ii) The recording of vital statistics;
- (iii) The proper working of the Arms Act;
- (iv) The methods of collecting crop statistics;
- (v) The working of the rural police;
- (vi) The general state of crime in the police-station and any reasons for its increase or decrease;



- (vii) Whether the Sub-Inspector appears to have a proper knowledge of this duties, whether he is in touch with the respectable inhabitants of this charge, has acquired local knowledge, and takes an interest in his work;
- (viii) Whether the police-station officials appear to be working properly and have a proper knowledge of their duties and the neighbourhood;
- (ix) Whether the police-station has been regularly and properly inspected.”

The following provision, Regulation 20 (b) reads: “If the Magistrate observes, in any police officer above the rank of Inspector incompetence or unfitness he may communicate with the Inspector-General, who after paying careful attention to the views of the District Magistrate [Chief Judicial Magistrate, under Section 4A (2) (a) of the Code of Criminal Procedure], shall determine what measures should be taken and shall inform the Magistrate of the action which he takes in the matter.”

The Supreme Court of Bangladesh has made a Rule authorizing the Chief Judicial Magistrates to inspect the police stations. According to Rule 85 (3) in Volume 1 of Criminal Rules and Orders-2009, “The Chief Judicial Magistrate in a district or the Chief Metropolitan Magistrate in a Metropolitan area shall have the authority to inspect any Police Station within their respective jurisdictions to verify –

- (a) If the processes are being promptly and duly served;
- (b) If the Magistrate’s orders directed to the Police under the Code [of Criminal Procedure-1989] are being properly carried out; and
- (c) If the Police Officers are discharging their functions satisfactorily under the Code while presenting the Police file before the Magistrate.”

Regular visits to the police stations by the Chief Judicial Magistrates could have surely established a system of checks and balances in the law-enforcement pattern in the country. There are numerous undeniable allegations against the law-enforcement agencies for detaining suspects for more than 24 hours, in violation of Article 33 (2) of the Constitution of Bangladesh and Section 61 of the Code of Criminal Procedure, 1898. Many detainees complain that they had to languish in arbitrary detention for several days without being produced before a Magistrate. The detainees are often tortured in detention.

‘Remand’ is a term to which the country’s law-enforcement agencies and the Magistracy have contributed to make it an integral part of public vocabulary in Bangladesh. There is a common public belief that suspects are taken in remand for extracting ‘confessional statements’ and bribes. The term ‘remand’ or ‘police remand’ does not exist in the Constitution of Bangladesh. This terminology is available in Section 344 of the Code of Criminal Procedure-1898. Although Section 167 of the Code is always being used to take the suspects in police remand, the term ‘remand’ is not mentioned in this particular Section. In fact, the term ‘remand’ is available in the Police Regulations of Bengal-1943, which also has provisions that mandate a Magistrate to hold the police officers accountable for their petitions of police remand. Regulation 324 of Police Regulations of Bengal-1943 reads, “Accused to be forwarded to Magistrate and application for detention in police custody.

- (a) Section 61, read with Section 167 of the Code of Criminal Procedure, requires that an accused shall be sent forth-with to the nearest Magistrate, together with a copy of the entries in the case dairy if the enquiry be not completed within 24 hours of his arrest; but in no case shall be accused remain in police custody longer than under all the circumstances of the case is reasonable.
- (b) The High Court has issued the following orders regarding remands:

“The attention of all Magistrates is invited to the provisions of Section 167 of the Code of Criminal Procedure and to the importance of exercising a sound judicial discretion in the matter of granting or refusing remands there under. Orders under this Section, it is to be observed, should be made in the presence of the prisoner and after hearing any objection he may have to make to the proposed order. When further detention is considered necessary the remand should be for the shortest possible period. Application for remands to police custody should be carefully scrutinized and in general, should be granted only when it is shown that the presence of the accused with the police is necessary for the identification of persons, the discovery or identification of property, or the like special reasons. In particular, the Court is of the opinion that applications, if ever made, for

the remand to police custody of a prisoner who has failed to make an expected confession of statement should not be granted.”

- (c) When the conditions justifying a remand to police custody exist, the station officer shall forward the accused to the nearest Magistrate (whether or not he has jurisdiction to try the case) together with a copy of his case dairy and report the matter to the Superintendent.
  - (d) The grounds upon which the remand is needed shall be distinctly stated in the application to the Magistrate.
  - (e) An application for a remand to police custody shall not be treated as a matter of routine and of little importance. It shall be made to the Sub-divisional [Chief Judicial/Chief Metropolitan] Magistrate through the chief police officer [Currently, District Superintendent of Police, under Section 86 of the Code of Criminal Procedure] present at the district or Sub-divisional Headquarters.
- ...
- (i) The period of remand shall be as short as possible.
  - (j) Whenever an application for the remand of an accused person to police custody is made, he should invariably be produced before the Magistrate. Such an application should be made at the earliest possible moment and subsequent applications for further remands to police custody, where necessary, should be made in continuation of the former. An under-trial prisoner cannot remain in police custody after 15 days have elapsed from the date of his first production before the Magistrate.”

In other words, what is visible in these legislative provisions is the mind of the legislator to ensure that the role of the Magistrate is to reduce, if not the Magistrate is able to absolutely rule out, the possibility of a police officer infringing the freedom of the ‘subject’. In reality today, the Police and the Magistrates often do not follow the above Regulation and allow remand with rhyme or reason. Some provisions of the PRB are commonly used for taking suspects in

remand, with and without a reasonable ground, while the provisions that should hold the police officers accountable before the Courts remain almost useless. It should be mentioned that there have been very comprehensive directives<sup>25</sup> of the High Court Division regarding entertaining the applications for remand in 2003. Very few Magistrates of the country follow Regulation 324 and the directives of the High Court Division.

Reality goes unrecorded to such an extent that nobody can provide credible statistics about the number of remand granted every day in Bangladesh, legally and illegally. This is a matter calling for special attention, of the human rights groups. It would be equally worthy to know how frequently and for what reasons police officers make applications for police custody of suspects and how carefully courts assess these remand-petitions. Bringing the above mentioned provisions of the Police Regulations of Bengal-1943 (Currently, Police Regulation Bangladesh in view of the case reported in 3 ADC (2006), paragraph 27 and 28) and the provisions of the Criminal Rules and Orders-2009 into a routine practice across Bangladesh is an urgent necessity for not only protecting persons from torture but also for strengthening democracy and creating an atmosphere where rule of law can be established.

Regrettably, the Judicial Administration Training Institute (JATI) does not provide training to the judicial officers from the perspective of holding the law-enforcement system accountable in the courts. Reputed public universities of Bangladesh do not have Police Regulations of Bengal-1943 included in the academic curriculum for law students. It is these half-baked minds that later become professionals like lawyers and judges. The ultimate result of this reality is that institutions these 'professionals' manage reduce to just façades of what these institutions are really ought to be.

In a democracy, every citizen shares responsibilities. People choose their representatives expecting them to act for their collective welfare. In Bangladesh, democracy does not carry such a meaning. Instead, the elected representatives mostly turn into 'elected' dictatorial rulers as if they are licenced to do and undo whatever they wish. In this process,

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25 Rule on Remand matters passed by High Court Division as reported in Dhaka Law Report (DLR) 55, Page 363, <http://www.humanrights.asia/countries/bangladesh/countries/bangladesh/cases/Judgment%20with%20Directives%20on%20Police%20Remand-55-DLR-363.pdf>.

pledges are made to blackmail the electors. For example, the election manifesto of the incumbent regime in terms of establishing rule of law and human rights and bringing the perpetrators of extrajudicial killings to book sounds extremely hollow and frustrating.

Ironically, in Bangladesh, the perpetrators of torture are awarded for what they should be made to face prosecution. A parliament, that houses more than fourth fifths lawmakers from the main ruling party alone, fails to legislate to criminalise torture. The Bill, titled “Torture and Custodial Death (Prohibition) Bill-2011”, as reviewed and revised by the Parliamentary Committee on Private Members Bills and Resolutions is still kept in the deep-freezers of the legislature. The Parliamentary Committee “expressed consensus” on the Bill as reported by the Committee’s Chairperson Mr. Abdul Matin Khasru, M.P, while submitting the Fourth Report<sup>26</sup> on 10 March 2011. The Committee recommended the Speaker of the Jatiya Sangsad to enact the Bill. The government however maintains ‘zero commitment’ to provide justice to the victims of torture by ignoring this Bill and also negates the nation’s obligation under the CAT of which it is a party.

## CONCLUSION

Given the realities, what is required is an immediate push to address the deeply rooted systematic wilt. This will provide space to enhance the capacities, efficiency and professionalism of the institutions that are responsible for establishing the rule of law, and will encourage a segment of committed citizens to speak-up for fundamental human rights. This will initiate a struggle for justice and fundamental rights. The dysfunctional character of the basic institutions has created distrust amongst the justice-seekers. Instead of having a system of checks and balances, what we have today are institutions that are least accountable and functions arbitrarily. Our culture today is that of entrenched impunity, denial, and that of corruption. Such a setup will not nurture

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26 An unofficial English version of the Fourth Report Of Committee on Private Members’ Bill and Resolutions can be seen at: <http://www.humanrights.asia/countries/bangladesh/laws/legislation/CommitteeReportOnBillCriminalizingTorture10Mar2011-English.pdf>.

The original Bangla version of the Fourth Report Of Committee on Private Members’ Bill and Resolutions can be read at: <http://www.humanrights.asia/countries/bangladesh/laws/legislation/Committee%20Report%20on%20Bill%20Criminalizing%20Torture%2010Mar2011.pdf>.

democracy or allow the rooting of fundamental freedoms. If we are committed to strengthen democracy, we should initiate reforms to the criminal justice system, and make Bangladesh a true 'People's Republic'. Finally, we must avail the accession to, and implementation of OPCAT.

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So long as democracy is understood in terms of the guarantee of basic human rights, this is crucially important to examine whether space for democracy at all exists within the governance or behavioral pattern of the State. In its search for human rights in governance mechanisms, this edited volume brings under scrutiny existing institutions, laws and procedures of the Bangladesh State. In setting a parameter, three major violations seriously jeopardizing the people's democratic aspirations, corruption, torture and extrajudicial killing, have mostly been taken into consideration. Chapter 1, as introductory chapter of the book, attempts to portray an overall institutional framework of the State machinery and contextualize issues dealt with in the subsequent chapters. Although international human rights regime predominantly addresses violations by the State, corruptions in private sectors and cruelty to women in the private spheres have been analyzed in chapter 4 and 8 respectively. Such issues have been incorporated given the alarming frequency and gravity of the problems and their pertinence to the question of State's responsibility. This is not intended to deal with the theoretical debates pertaining to governance, but rather the behavioral patterns of the State have been examined. This work is an outcome of an ALRC project titled, "Corruption, Torture and Extrajudicial Killing in Bangladesh: Examining the Role of State Institutions" taking place mostly between July 1, 2011 - June 30, 2012. [Extracted from the editor's Prologue]

About the editor

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