





Is torture ever justified? Citizen's realisation of the Joint Drive **BASIL FERNANDO**

For people of most countries in Asia, the prospective use of torture by state agents long ceased to be a matter for conjecture. It is no theoretical idea at all, but a widely practised one. There is no Asian country known to us where its use, once admitted, has been limited. In fact, the very concept of limited torture is dangerously naive.

When torture is no longer absolutely prohibited, law enforcement attitudes change. Over time, the mentality that torture is acceptable comes to infect the entire system, and even persons accused of normal crimes get the same treatment as suspected terrorists. Years of great effort



spent in training effective law enforcement officers are undermined. Habits of transparency diminish; falsification increases. Terrorists do not suffer in such an environment: rather, they thrive in it. As the system of law enforcement collapses, they obtain many practical advantages, and are also prepared for any consequences.

Some twenty years ago in my country, Sri Lanka, the use of torture by law enforcement agencies became accepted. Terrorists expected to be tortured if captured, and each carried a cyanide capsule to take as a last resort. The real targets of the practice evaded it, but meantime it has so permeated and decayed the law enforcement system that today children have been tortured by police officers on suspicion of theft from a school canteen. While easy to begin, the routine practice of torture has not been easy to stop. Those who advocate 'limited' torture would do well to study the consequences in countries such as my own, that advocated this view

The absolute prohibition of torture is the very core of all rational forms of criminal investigation. Today, many countries are trying hard to improve their law enforcement systems accordingly. If the West waivers on this principle the message will be devastating, not only for itself but also for the entire world. When the progress of the rule of law is set back, the result is not further security, but rather new breeding grounds for terrorism. The use of torture by state agencies reduces criminal investigation to mere farce, and society to sheer barbarism. From the standpoint of one who knows from personal experience, I urge the West to utterly reject the proposition that limited torture is ever possible: its consequences are vast and uncontrollable.

Basil Fernando is Executive Director, Asian Human Rights Commission (AHRC). Source: Internet.



India: Uncovering sexual abuse of children

NITIN JUGRAN BAHUGUNA

The recent arrest of a male teacher of a reputed South Delhi school for repeated sexual abuse of a four-and-a-half-year-old boy within the school premises has forced Delhi to face up to an issue it has evaded time and again. That sexual abuse of children continues often unhindered, in all spheres of

Sadly, both the family and the school, the two institutions responsible for the safe upbringing of children react to child sexual abuse with disbelief. What compounds this chilling social malaise is that abusers are more often than not members of the child's family or a person the child knows and trusts and one who has power over the child. A child sexual abuser could be a family friend, a teacher, a neighbour and a servant or driver. Children trust adults to protect them and give them a safe environment to live in. But in reality, children are not safe in our society.

The accused trainee teacher at the prestigious school run by the Aurobindo Ashram in Malviya Nagar has been charged with sodomy (unnatural act) under sections 377 and 511 of the Indian Penal Code. The chargesheet states that the child was abused repeatedly by the teacher near the slide in the junior park and in the library at the school. On 23rd October 2002, the victim complained of acute pain in his private parts and developed a high fever. The Delhi police's chargesheet states: "The victim has explicitly and clearly narrated how the accused has been sexually harassing him." The accused teacher has been remanded to police custody but the psychological scars inflicted on the child will take a very long time to cure. Tragically, procedural delays and non-co-operation of local police authorities coupled with inadequate counselling services and judgmental social institutions serve to traumatise victims of sexual assault months and maybe years after

A survey conducted by the Delhi Commission for Women has found that over 50 per cent of rape victims in the capital are below 15 years of age. An ongoing survey by Interventions For Support Healing and Awareness (IFSHA) indicates that of 650 girls interviewed, 60 per cent had experienced some form of child abuse. Of these, 20 per cent occurred within the family.

The problem is the apparent unwillingness of the Delhi administration to include gender sensitisation programmes for teachers in Delhi government schools. In order to dispel misconceptions associated with gender, CSR started a Gender Training Institute (GTI) in 1997.The task of GTI is to inculcate fair gender practices in our everyday life and seek to oversee the transformation of gender issues from strictly women's concern to a societal concern. It conducts training programmes for officials engaged in local governance, for academics, the corporate sector, law-enforcing agencies and NGOs.Narang, however, dismisses existing gender sensitisation programmes in schools as it is not well informed, and with many gaps in intervention which therefore preclude any lasting impact. "Elite schools are doing a lot because it is considered progressive to hold workshops on such

issues, but these are not up to the required standards," she maintains. Activists, however, agree that there is more awareness today about issues of sexuality and sexual abuse and that parents, especially the younger ones, want to talk to their children about these issues but don't know how to go about it. As compared to workshops on career opportunities, those offering life skills development and health education are not considered a priority by parents, they regret. Child rights activists like Joseph Gathia of the Delhibased Centre of Concern for Child Labour (CCFCL) state that sensitisation programmes of this kind have failed in developing countries like India because general governance is very poor. When there is no respect for law and order in our country, how can such programmes succeed, he asks. Nowhere in such programmes have we involved community pressure or

community monitoring of the programmes," he observes. Significantly, Justice Mallimath, former Chief Justice of the Kerala High Court and former member of the National Human Rights Commission, has been appointed by the government to review the Juvenile Justice Act. A major area of this review will be on the issue of child sexual abuse and addressing the current system of justice, which views the victim as the

Indemnity Ordinance

S a peace loving, law abiding common citizen, I want to present some realisations of the Joint Drive Indemnity Ordinance, 2003 as

Equity and the Ordinance

Every indemnity is in the primary sense opposed to equity and justice, as equity does not suffer a wrong to be without remedy and justice always demands that transgressors will not go unpunished. Nonetheless, indemnification of certain activities by law is recognised for the greater interest of the country and its citizens. In our Constitution the provisions of indemnification are embodied to satisfy for the transitional and extra ordinary situations occurred in time between the proclamation of independence and the adoption of the Constitution. This was undoubtedly necessary in that context. Those provisions are still in the Constitution and invokable in required circumstances. Consequently, the govt passed the Joint Drive Indemnity Ordinance claiming that promulgation of such law is expedient and necessary for public interest. It is questionable how the govt is protecting the public interest depriving the citizens of their rights to get justice. It is procedurally okay, but are the present circumstances like that of the time of liberation war, which can justify the Ordinance? The Constitution does not consent to such law at all, which legal ises the killings and tortures.

Rule of law and the Ordinance

Of course, the Ordinance does not offer complete indemnification for the $activities\ of\ joint\ force\ during\ the\ joint\ drive.\ It\ provides\ for\ an\ option\ to\ go$ to the military court or tribunal. Here comes the question why should the common people go to the military court or tribunal? Rule of law, according to Dicey, includes three things- i) absence of arbitrary power i.e. no man is above law and the person in authority do not enjoy wide, arbitrary or discretionary powers, ii) equality before law i.e. every man, whatever his rank or position, is subject to ordinary laws and the jurisdiction of ordinary courts, and iii) individual liberties. Therefore, why will not the forces of the joint drive be tried under the ordinary laws and courts? Where the alleged offences and crimes have been committed against civilians in civil locality and most of the witnesses are also civilians, why should they go to the military courts to get justice?

A necessary element of rule of law is that the law must not be arbitrary or irrational or capricious. It should be fair and reasonable. This Ordinance, which deprives the victims of the right to get justice through transparent and public friendly way, can never be fair or rational. It does not conform to the rule of law.



Constitution and the Ordinance

The govt was and is trying to render a constitutional coverage to the ordinance claiming that it has been passed under Article 46. From the through reading of the Article one can guess that there remains no scope in the current context to pass such ordinance. The intention of this Article is to meet the extra ordinary situations, such as the people of any area may conspire or go at war against govt for separation or independence or autonomy, or the mob of certain locality may be riotous, or the law and order situation of any area may deteriorate terrifically. In those cases the govt may take action or step to combat or control the situation. In those respects Article 46 gives the govt the power to enact the law of indemnification. But the disciplined forces were deployed during the joint drive in the whole country, not in any specific area, to help the civil administration. Before engagement of the joint forces there occurred no such situations as are indicated in the Article. The alleged misdeeds were committed by the joint forces in ordinary way of performing their duties. Hence, this ordinance has no constitutional base. And as it clearly violates the fundamental rights of equality before law and equal protection of law guaranteed in the Constitution it is unconstitutional

Here fore, the immediate abrogation of this unconstitutional, inequitable and undemocratic ordinance is being urged.

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LAW letter

Army commits no wrong?



With amidst criticism from different national and international forum the parliament has passed the Joint Drive Indemnity Bill 2003. Earlier the president had issued the ordinance to indemnify all the acts committed by the joint force during the operation clean heart. Though the government claimed that the ordinance was aimed to indemnify the acts of the joint force apparently it is for the army personnel. The army is called out to help the civil administration in order to bring the law and order situation under control. But accusations were made against them for killing of 48 persons during the operation. According to the ordinance no case can be filed against the military personnel for killing of 48 persons during the operation in the ordinary court under ordinary law. They may be tried under the Army Act. By promulgation of the said Act the government deprived the common people to get justice. Right to get justice is the fundamental right guaranteed by the Constitution. Right to justice requires access to justice, which means that the component of justice must be accessible for the common people. It is not possible for an ordinary people to institute a suit in the military court. Moreover why the government keep the army above the law? Barrister Moudud Ahmed, Minister for Law and Parliamentary Affairs said that it is done to keep the army above any controversy. In his interview with the BBC on the very day he said that if it is not done false cases might be instituted against the army by vested groups. Did he want to say that army committed no wrong? He may recall that few army personnel are facing court martial for their involvement of extortion from a businessman of Bangabazar, Dhaka. On the other hand there are some defense laws to take disciplinary action against the breaker. If any army person breaks the discipline of the armed forces he may be punished under the defense law. The abuse of power or the commission of excess is theoretically breaks the discipline of the armed force. The army personnel may be tried under the defense law for indiscipline acts whether any accusation is made by the common people or not. It is the internal part of the defense force. But the concerned authority did not take any commendable initiative to punish, even investigate the allegations made against the army personnel. So how we will believe that the accused army personnel will bring before justice under the defense law?

Dhaka University.

What's about the case?

Thanks to the Honourable High Court Division of Supreme Court for declaring the detention of Mr. Saleem Samad 'illegal'. The day, when the two main 'accused' Ms. Zaiba Naz Malik and Mr. Leopoldo Druno Sorrentino were deported from Bangladesh, it was a moral obligation of the government to release the 'accomplices'. In fact, after granting bail and subsequent release of Ms. Pricilla Raj, it was a matter of time for Mr.

Saleem Samad to get justice. Indeed, those were the best news for Pricilla and Saleem to came out form the jail but I am afraid that this may not be the end of their 'sensational' cases. The court might cancel their 'verdict' -'the bail' anytime for 'any' or 'obvious reason'. What will happen then? Getting bail is a fundamental right for any accused unless there are extraordinary causes not to grant bail. Bail is a temporary 'remedy' for the accused and of course, always there is a possibility to revive the case when the opponent party, here is the govt. (not necessarily the ruling party) feels that the case 'needs' to be revived. I strongly believe that the Govt. would withdraw its 'sedition' charge immediately lodged against Mr. Saleem Samad and Ms. Pricilla Raj as the govt. has freed the main accused of the

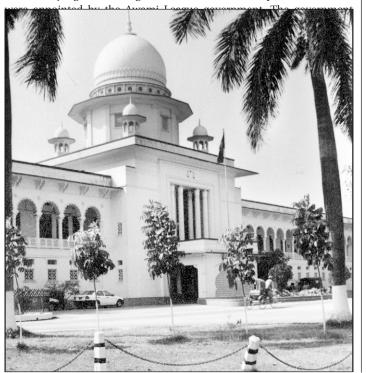
Tanbir ul Islam Siddiqui, Shantinagar, Dhaka.

The recommendation of Chief Justice must be respected

The government has decided not to confirm appointment of six additional judges of the High Court Division of Supreme Court of Bangladesh. These six additional judges were appointed for two years by the previous Awami League government. On the contrary the government last year appointed 11 additional judges for two years. Political motives have been attributed to the non-confirmation or the new appointment of the judges. It is traditional that the government appoints judges in the Supreme Court upon the recommendations made by the Chief Justice. Under no circumstances 'loyalty to the ruling party' should be the criterion for the appointment or confirmation of a judge in the highest court of the country. Lower Judiciary of our country is almost controlled by the government. Higher judiciary remains theoretically independent from government's interference. But decision like this amounts to interfere with the independent functioning of higher court. If a person loyal to the political party is appointed judge in the higher judiciary justice may be denied. This cannot be the feature of a democratic and civilised society. This sort practice should be stooped for the interest rule of law. Appointment of judges must be kept above political consideration and the Chief Justices' recommendation must be respected.

Mirpur, Dhaka.

The four party alliance government is continuing its endeavour to create unnecessary controversies. This time it is about the confirmation of 8 additional judges in the High Court division of the Supreme Court who



LAW week



CPC amended, Travel Tax Act passed

The Jatiya Sangsad passed two bills-Civil Procedure (Amendment) Act 2003 and Travel Tax Act 2003. The Civil Procedure (Amendment) Act will introduce Alternative Dispute Resolution (ADR) to quicken disposal of cases through mediation if contesting parties agrees to it. Introduction of Alternative Dispute Resolution would help ease the huge backlog of the cases in courts. There are about five lakh civil cases pending with courts in the country now. Minister for Law, Justice and Parliamentary Affairs Mr. Moudud Ahmed revealed while piloted the bill hoped that if 20 percent of these cases are resolved through alternative dispute resolution, it will make a great difference in justice delivery system in our country. As per provision of bill, if the parties to a law suit, at any stage of proceeding, apply to the court for withdrawal of the suit on grounds that they will refer the dispute or disputes in the suit to arbitration for settlement, the court shall allow the application and permit the suit to be withdrawn. And the dispute or disputes thereafter, shall be settled in according with Salish Ain 2001. If, for any reason the arbitration proceedings referred to the above do not take place or an arbitral award is not given, the parties shall be entitled to re institute the suit. The other bill- Travel Tax Act 2003 was tabled by Finance Minister Mr. Saifur Rahman. The bill seeks to bring foreign visitor under travel net requiring them to pay travel tax while leaving Bangladesh. The Act allows the authorities to impose and realise travel tax upto Tk 10,000 on any one travelling to any country from Bangladesh by land, air or waterway and the government would determine the rate by making rules in line with the Act. - *Law Desk*.

3 army men face court-martial

A captain and two soldiers will be face court martial on extortion charge. A three-member Field General Court-martial has been formed to try the military personnel. Initially, five were accused of extorting money from an Indian 'hundi' trader on January 29, but two were later found innocent. Captain Atigur Rahman and sepoys Mizanur Rahman and Afzalur Rahman were taken off duty for alleged involvement in extortion. The incident came to light as eighth policemen and a police informant were caught when they went to Bangabazar Hawkers Market in Dhaka on February 6 to kidnap the hundi tarder, Suresh Kumar Dhanuka, to extort money. The informant, Nuruzzaman, later told that the captain and two soldiers extorted three lakh taka from Suresh. Statement of two-arrested businessman also corroborates Nuruzzaman's claim. The businessmen said Captain Atiqur and the soldiers planned abduction of the hundi trader. They went to Shyamoli bus stand in an army vehicle and picked up Suresh in the morning of January 29. They extorted three lakh taka from Suresh and then freed him. -Daily Star, 25 February.

Indemnity bill passed

"The Jatiya Sangsad passed the controversial 'Joint Drive Indemnity Bill 2003 with effect from January 9, 2003. The bill will give the joint forces immunity to legal proceedings in civil courts for their deeds during the countrywide 'Operation Clean Heart' anti crime drive between October 16 2002 and January 9, 2003. However, it allows the Army Act to take its own course in handing down any punishment to the members of the member of the forces who took part in the drive. The present bill is a bit different from the previously promulgated 'Joint Drive Indemnity Ordinance, 2003' which exempted the members of the joint forces from trial in accordance with the defense forces' laws. Law Minister Mr. Maudud Ahmed said that the indemnity would protect the member of the armed forces from facing the civil justice system, but at the same time, they would remain under the preview of the law. - Daily Star, 24 February.

Six additional judges not confirmed in HC

The government has declined to confirm appointment of 6 additional udges of the High Court Division of the Supreme Court. The Chief Justice nad reportedly recommended confirmation of services of eight judges who were appointed earlier for two years at the fag end of the past Awami League rule. But the government ignored the suggestions and appointed only two of them and they took oath as permanent judge. Earlier 6 other additional judges appointed by the Awami League government lost their job although the Chief Justice had recommended confirmation of services of three of them. Nine more additional judges appointed by the previous government are awaiting confirmation. On the other hand, the present government on July last appointed 11 new additional judges for two years. It may be mentioned that a High Court Division bench last year recommended that the appointment of the judges should be kept above political consideration. - *Daily Star, 23 February.*

Money laundering laws amended

Parliament has passed two bills amending the penalty provisions of the The Foreign Exchange Regulation (Amendment) Bill 2003 provides for increasing two year's penalty to four year's for offences related to foreign exchange dealings, including involvement in illegal Hundi transaction. The period of penalty has been proposed to supplement the objectives of the money laundering laws. The Money Laundering Prevention (Amendment) Bill 2003 provides for maximum punishment of one year instead of minimum punishment of one year for violation of confiscation and seizure orders of the court and leaking information about any investigation in money laundering cases. Finance Minister Mr. Saifur Rahman piloted the two bills and told that money laundering is a heinous crime and the government has brought amendment in the money laundering bill to stop the laundering of hard earn foreign exchange. - Bangladesh Observer, 25 Febru-

Law to discourage smoking

The government is going to enact a law **to** discourage smoking. In the proposed law, cigarettes advertising through print and electronic media or billboard would be banned. This was said by Health and Family Welfare Minister Dr. Khandaker Mosharraf Hussain in a meeting with the leaders of Anti-Tobacco Alliance at Dhaka. He said that many people are not aware of harmful effects of smoking or tobacco taking. He added that availing the advantage tobacco companies were attracting smokers through fancy advertisement. He stressed on building consciousness about harmful effects of smoking among the students. - Bangladesh Observer, 25 February.

EU team for probe into custodial deaths

Visiting seven-member delegation of European Parliament called upon the government to probe the custodial deaths during the Operation Clean Heart. The team raised different issues relating to violation of human rights in Bangladesh in a meeting with the Law Minister Mr. Maudud Ahmed. They told the law minister that on the basis of the allegations available to them the European Parliament adopted a resolution about violation of human rights. They demanded proper investigation into the custodial deaths during the operation clean heart and wanted assurance from the government to stop recurrence of such incidents in future. They also drew attention of the law minister to the harassment of journalists with political motives. - New Today, 25 February.

Proper implementation of WCRP Act demanded

Bangladesh Mohila Parishad demanded proper enforcement of Women and Children Repression Prevention(WCRP) Act 2000 and blamed the administrative failure for the release of the accused claiming that the Act is not being properly enforced. An assessment of the Mohila parishad found that those involved in violence against women and children were released because of administrative failure. Leaders of Mohila Parishad said that faulty investigation; lack of proper evidence and faulty forensic chemical reports led to the release of the accused. Even, most of the Investigation Officers (IO) were not aware of their responsibilities. Moreover, political influence during investigation and unfair attitude of the IO's towards the victims also help accused to go unpunished. They suggested amendment to few clauses of the Act for proper implementation of the act including the definition of rape. They also called on the government to form an independent body to ensure proper and neutral investigation. - The Daily Star, 26

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