

Law and Our Rights

"All citizens are equal before law and are entitled to equal protection of law"-Article 27 of the Constitution of the People's Republic of Bangladesh

Accountability of Press and Judiciary

A Constitutional Interpretation

by Mansoor Mamoon

When the press is to be made accountable to the government it will instantly lose its credibility and thus turn into a propaganda sheet. Likewise it should also not submit itself to cause of the opposition blindly. In that case it will be regarded as one sided.

THE Prime Minister, on her return from a recent trip to Australia, reiterated her call for the need for evolving what she said modalities for ensuring accountability of the press and the judiciary. Within the span of less than six months or so the very same call was issued by her for the second time in a row. This indicated her seriousness about the matter. In raising the demand for accountability of the press and judiciary the Prime Minister admitted that it (this call of her) might probably generate controversies and debates in the newspapers as well as in the political circle.

But in a non-chalant and defiant mood she said that she would continue to do so for creating necessary public awareness on the issue. In demanding accountability and transparency of the judiciary the Prime Minister alleged that her government's anti-terrorism and anti-corruption drive has bogged down due to lengthy legal process on the one hand and granting of bail by the courts on the other. In the same breath she also suggested for similar process of accountability for the press as well. She wanted to know that if the executive organ and the country's parliament were required to be accountable and transparent then why the judiciary should be exempted and the press go scot-free? Probably the Prime Minister could not properly comprehend the essence of accountability and transparency as provided for by the country's constitution in respect of the three organs of the government viz — the executive, the Parliament and the judiciary as well as the press called the fourth estate.

When the first time the Prime Minister called for accountability of the judiciary the learned Chief Justice of the Supreme Court of Bangladesh forcefully affirmed that the judges are accountable first to their conscience and second to the constitution and not to anybody else. Article 94 of the Constitution stipulates that the Chief Justice and other judges are independent in the exercise of their judicial functions and are not accountable to any authority.

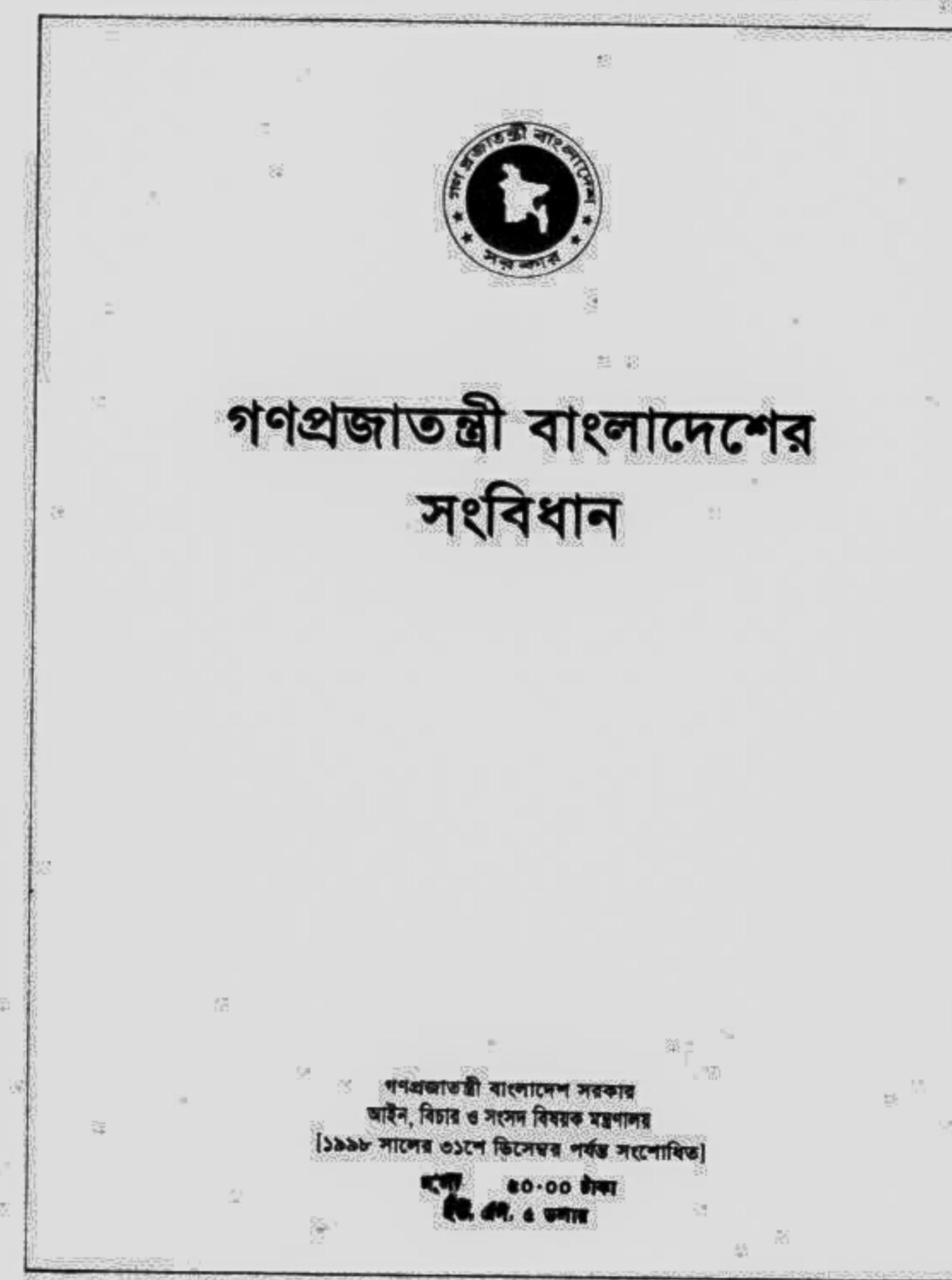
There is already a strong demand for separating the judiciary from the executive and the Constitution also strongly pleaded for the same for ensuring fair justice. It was the election pledge of both the mainstream opposition — the Bangladesh Nationalist Party in 1991 and the ruling Awami League in 1996. But none of these parties cared to redeem its election pledge in this regard for reasons best known to them.

The three organs of the government are for ensuring their respective check and balances so that they do not transgress their limits and infringe upon the rights of the people. Transparency and accountability of these bodies vary according to the nature of their formation and operation.

Both the executive branch and the parliament are elected by the electorates. The executive branch is jointly accountable to the parliament while the latter is accountable to the electorates. In order to avoid any possible clash between the judiciary and parliament, the latter's authority to remove the chief justice or judges have been revoked through effecting an amendment in the constitution by two-thirds majority.

The judges are appointed and not elected like the executive and the parliament. The accountability of the executive branch and parliament hence can not be equated with that of the judiciary. If one confuses the two different types of accountability it will tantamount to bad analogy. The third schedule of the constitution under article 148 sub-clause 6 under sub-heading oath of "the chief justice or judges" states, inter alia, that the chief justice or judges take the oath of preserving, protecting and defending the constitution and the laws of Bangladesh. In the oaths of other constitutional positions there is no such mention of the word LAWS. Existing laws of the land and the constitution of the Republic are the guide for the judiciary coupled with the dictates of a judge's conscience. Higher seat of judiciary is the custodian of the constitution.

At every step of the judiciary there is ample provision for accountability. Article 109 of the constitution clearly states "The High Court Division shall have superintendence and control over all courts and tribunals subordinate to it. And article 103 provides for jurisdiction of the Appellate Division over judgements, orders, decrees, sentences of the High Court Division. For inquiry into the capacity or conduct of a judge there is the provision for the supreme judicial council comprising the Chief Justice and two next senior judges. The proceedings of the court are held in public with legal arguments for and against a particular case along with the deposition by the witnesses. These are very much kept on record and can be scrutinised. Hence the judiciary is already transparent. If a corrupt person or terrorist gets bail it may be because the particular case against him or her has not been properly framed and the



Constitution of Bangladesh has Guaranteed Independence of Judiciary and Freedom of Press.

prosecutor might have failed in efficiently holding his brief for the case in question.

Moreover the government can appeal against such bail or appoint able and efficient legal experts so that the accused person is prevented from getting bail not by dictat but by taking advantage of the lacuna in the legal process. The judiciary, however, can not remain indifferent when a person's fundamental rights are trampled

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upon by the executive or in the event of violation of the constitution. A person can not be held guilty unless proved so by a properly constituted court of law. Guilty or not, an individual has every right to dispensation of justice. Article 27 of the constitution states "All citizens are equal before law and are entitled to equal protection of law." For what has described as the lengthy process, the judges can not be blamed. It is the paucity of judges that mainly results in piling up of pending cases.

If some verdicts of the higher courts go against the executive branch there is no plausible reason to clamour for the accountability of the judiciary and blame its transparency but to accept the same in good grace. In a democracy the judiciary is not supposed to serve the purpose and interest of the executive but to defend, protect and preserve the constitutional and legal rights of all citizens without any discrimination whatsoever. Now about the transparency and accountability of the press. Freedom of press is the sine qua non of democratic polity and the both go hand in hand. Democracy will invariably remain a utopia without freedom of press. The First Amendment to the Constitution of the United States of America prohibits enactment of any law abridging the freedom of the press. An aggressive unfettered press is the best safeguard of a vigorous democratic process. By playing a watchdog role the press ensures the accountability and transparency of the executive branch and the parliament.

The country's constitution guaranteed the freedom of press, albeit under certain conditions. Article 39 of the constitution says: "(1) Freedom of thought and conscience is guaranteed. (2) Subject to any reasonable restrictions imposed by law in the interests of the security of the State, friendly relations with foreign states, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence: (a) the right of every citizen to freedom of speech and expression; and (b) freedom of

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press are guaranteed."

In the final analysis the press is accountable to its readership and in its course it undergoes regular scrutiny and accountability. If the news provided by the press is accurate, fair and objective the readers find no fault with it, otherwise, they reject the same. So the readers are the only judges of accountability and transparency of the press. It will inevitably portend danger for democracy if the readers are prescribed what to read and what not to read by any authority. When the press is to be made accountable to the government it will instantly lose its credibility and thus turn into a propaganda sheet. Likewise it should also not submit itself to the cause of the opposition blindly. In that case it will be regarded as one sided.

A free speech is, therefore, a platform of opposing views. Back in 1787 Thomas Jefferson, the American statesman, wrote these memorable lines: "Were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I would not hesitate to prefer the latter." The Prime Minister's suggestion for accountability of the press might have stemmed from the current ever increasing trend of exposure and criticism of the failures of her government by the press. Without tolerance democracy can not gain ground. Being democratically elected the Prime Minister should have the courage to face criticism by the press or by the opposition. This will provide her with an opportunity to view the real picture and the public mood obtaining in the country. The right to information is universally recognised as a basic human right and any curtailment of this right is bound to hinder the flourishing of the democratic culture.

From this, we now live in an age of information revolution which has already turned the world into a global village. In the name of accountability one can not prevent the free flow of information. It will just be a wishful thinking and boil down to a futile exercise. Hence without calling for accountability and transparency of the judiciary and the press the country's leadership should better concentrate on the urgent task of combating endemic poverty and lawlessness.

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law watch

Constitution of Bangladesh Evolution and Amendments

ON 12th October 1972, Dr. Kamal Hossain, the Chairman of the Constituent Assembly, introduced the Draft Constitution of Bangladesh as a bill for adopting in the House. After necessary amendments, the same was adopted on the 4th November 1972 as the Constitution of Bangladesh, retrospectively, effective from the 16th December 1972. The salient features of the Constitution of Bangladesh, 1972 are: There is a preamble at the outset of the Constitution of Bangladesh, which gives a broad guideline of the Constitution. It outlines the aim and objectives of the state and encompasses the legal & moral facets of the Constitution. Unlike Constitution of certain civilized countries, the Constitution of Bangladesh is a formally drafted, meticulously vetted, signed & sealed written document having 153 articles, 1 preamble, and 4 schedules. It is rigid in nature, as no provision of the Constitution, whatsoever, can be amended unless by a vote of two third majority of the total strength of the members of the House.

Constitutional supremacy has been enshrined in the Article 7(2). "The Constitution is the supreme law of the Republic and if any other law is inconsistent with this Constitution that other law shall to the extent of inconsistency be void." Bangladesh as per Article-1 of the Constitution is a unitary People's Republic unlike a Federal Republic. The Constitution has not included any division of power in the government as done in a Federal system of government. There is only one Assembly, or House of the Nation. There is no Upper or Lower House as existed in the Constitution of other nations. The bill passed in the House is applicable for entire country.

The followings are the fundamental principles of state policy in the Constitution of Bangladesh, 1972 Nationalism, Democracy, Socialism, and Secularism. The Constitution provides for 18 fundamental rights in its Part III. The Supreme Court has been invested with the task to protect these rights.

Our Constitution has provided for a Westminster type of parliamentary system. In other words, cabinet form of government means, a cabinet of ministers headed by the Prime Minister runs the government and the cabinet, as a whole, has to be responsible to the Parliament. The cabinet stays in power so long it has the confidence of majority members of the House. Here the President is a titular head and the cabinet exercises all executive powers.

Independence of judiciary has been ensured. Article 95 provides that the President will appoint the Chief Justice and other Justices of the Supreme Court will also be appointed by him, after consultation with the Chief Justice. Subordinate judges and Magistrate's appointment are to be done with the consultation of the Supreme Court. A Judge cannot be removed without an order of President passed with absolute majority of the Parliament and the security of tenure of Subordinate Judges is vested in the Supreme Court. Entire judiciary except some aspects of Magistrate's Courts is made independent. Article 77 provides for establishment for an Ombudsman in Bangladesh. The constitution though structured like Westminster type of parliamentary form of Government, but it could not ensure the accountability of the Cabinet, as there is no provision for ensuring the individual responsibility of the Ministers.

Constitutional Amendments

However, the Constitution reflects the avowed purpose of its makers to establish constitutionalism in Bangladesh. Whereas, our people could not enjoy benefits of such a constitution as, within nine months, one after another amendment were injected in it in an undemocratic way. One of such example is, the tempering of Article 8, relating to the 'Fundamental Principles of State Policies' and by 5th Amendment a drastic change was made in these four major principles, socialism meaning economic and social justice was substituted for the principle 'Socialism' and 'absolute trust and faith on the Almighty Allah' was included replacing the principle 'Secularism'. An elaboration, under articles 9 thru 12, was omitted and new principles have been added in the place.

So far, there have been 13 amendments to the constitution of Bangladesh. Here is a summary of all the amendments.

Summary of the 13 Amendments

Amendments	Date	Summary of Subs tance
1st Amend-ment	15th July, 1973	To make way for prosecution of genocide, crime against humanity and war crimes committed in the liberation war of 1971.
2nd Amend-ment	22nd September, 1973	Inclusion of Emergency provision, suspension of fundamental rights and preventive detention.
3rd Amend-ment	28th November, 1974	To give effect to the boundary-line treaty between Bangladesh and India.
4th Amend-ment	25th January, 1975	One party, dictatorial system was substituted for a responsible parliamentary system.
5th Amend-ment	6th April, 1979	Legalising all acts done by the first Military Authority.
6th Amend-ment	10th July, 1981	To make way for the Vice-President to be a candidate in President election.
7th Amend-ment	10th November, 1986	Legalising all acts done by the 2nd Military Authority.
8th Amend-ment	9th June, 1988	Setting up six permanent Benches of the High Court and making 'Islam' the state religion.
9th Amend-ment	11th July, 1989	Direct election of the President and the Vice-President simultaneously.
10th Amend-ment	23rd June, 1990	Period for reservation of 30 women members' seats in the parliament was extended for 10 years.
11th Amend-ment	10th August, 1991	Legislating the appointment of Shahabuddin Ahmed, Chief Justice of Bangladesh, as Vice-President of Bangladesh and his all activities as the Acting President and then the return to his previous position of the Chief Justice of Bangladesh.
12th Amend-ment	18th September, 1991	Introducing the parliamentary system.
13th Amend-ment	28th March, 1996	Provision for Caretaker Government.

Foregoing facts depict that some major amendments have been incorporated by imminent Government, not in response to genuine needs for modifications, but to perpetuate their position in power.

This article is based on the book Constitution, Constitutional Law and Politics: Bangladesh Perspective written by Md. Abdul Halim.

Further Attack on Freedoms

ODHIKAR a coalition for Human Rights vehemently protests the police attack on journalists during the hartal called by the opposition on 1 November 1999. This is the second such attack on journalists by the law enforcing agents — the first taking place at a meeting organised by an alleged 'Islamic organisation' on a Friday, 21 October. Such actions by the police amount to a gross violation of the freedoms of assembly, movement and the right to knowledge.

The Government is promise-bound to make the electronic and news media independent. Unfortunately, this promise has not been honoured and the media remains in the control of government bodies and any alternative movement or ideas remain curtailed and the citizens of Bangladesh remain unaware.

In countries where some semblance of democracy is practiced, the news media and electronic media publish and air the grievances of the opposition and hold public debates — reducing the necessity for strikes and confrontation. If Bangladesh is of being a 'democratic' country, here, too, the need for hartals and public meetings might lessen.

Odhikar urges the government to fulfill its promise to make the electronic media independent and bring it into the democratic system. It also urges the government to take steps to allow the citizens of the country to enjoy their fundamental rights and freedoms as people of a free land and to take measures to prevent such unconstitutional misuse of authority.

Odhikar further urges the government to immediately probe into the recent attacks on journalists and apprehend the officers responsible for the attacks. It also asks the government to duly compensate the journalists who fell victim to police violence during the incidents of 21 October and 1 November respectively.

Courtesy: Odhikar a coalition for human rights.

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FIVE years ago, the genocide in Rwanda attempted to destroy an entire ethnic group, the Tutsi, together with a section of the Hutu Community. Unarmed men, women and children were hunted down without mercy just because of their ethnic origins, often by people they knew. Approximately one million people died in that genocide and the star actors of the world community stood by and let this horrible thing happen, while some western business houses made their fortunes on this human misery and sold weapons to the perpetrators.

Just over a year ago, in August 1998, a radio announcement was made by a government official of the Democratic Republic of Congo (DRC) that "people must bring a machete, a spear, an arrow, a hoe, spears, rakes, nails, truncheons electric irons, barbed wire, stones in order, dear listeners, to kill the Rwandan Tutsi, who are currently in Ituri district." Another government radio bulletin (of 12 August 1998) of the DRC declared: "The entire population has become a military population from today onwards.... You will detect enemies and massacre them without mercy, victory is assured." The strategy of the Democratic Republic of Congo authorities, led by President Kabila, was to foster popular hatred and fear of the Tutsi ethnic group, whom they linked with the invading forces from Rwanda, Uganda and Burundi.

In July 1997, Zambian police used tear gas to break up a peaceful protest march to Lusaka city centre. A large number of demonstrators, many of them with small children, sought refuge in a building which was again attacked by police, who shot tear gas canisters into the building to force the people out in the streets, where they were beaten by the police with batons. In January 1999 Zimbabwean aircraft were reported to have indiscriminately bombed the city of Kisangani and other towns by using the sophisticated F7 fighter planes and attack helicopters.

In August 1998 the security forces of Togo launched attacks on the residences of the opposition leaders using small arms and rockets. Some of the bullets recovered after these attacks were analysed and found to have been manufactured by a French company. Togo continues to benefit from significant military aid from France. Its former colonial power, France, provides five million francs every year to Togo as direct aid for equipment maintenance. France has also repaired and

chain of repression. Amnesty's mission is to raise concern against some of the gravest human rights violations in the world such as torture, disappearance and indiscriminate and extra-judicial killings. In Africa itself thousands of civilians have been massacred in recent years as all the parties have waged wars against them and many others have disappeared or have been abducted, tortured or raped since the outbreak of the fighting.

Amnesty has evidence that certain transfers of military, security and police goods or services to countries where human rights violations are occurring can contribute to further violations. Therefore, it is campaigning for a strict control on arms and security trade to ensure that such transfers do not occur and eventually it will lead to the future of a better and non-violent world. The availability of weapons has contributed to the climate of violence, paranoia and impunity. The suppliers of these arms have contributed to this situation knowing fully well that these supplies will contribute to gross violations of human rights. In November 1998 the UN Commission of Inquiry reported that "the danger of a repetition of tragedy comparable to the Rwandan genocide of 1994, but on a sub-regional scale, cannot be ruled out".

Although Amnesty opposes the transfer of arms, military equipment, personnel or training to armed forces where it can cause human rights violations and has raised a campaign against such transfer, the major dealers of arms trade mostly belonging to the western 'developed and democratic' countries never paid any heed to that and continued to contribute to such violations.

Apart from India and Pakistan, other countries of this region are not too different from the ones mentioned earlier. Sri Lanka is spending billions of dollars to feed its military budget to fight against the Tamil Tigers. And Bangladesh, which is in fact encircled by India from three sides of its border, is spending millions to help some businessmen by making controversial arms deals — including the purchase of Mig 29 aircraft from Russia — but failed to raise a proper defence system against any possible threat of or attempt of invasion, by empowering the civilians and 'common people' with means to defend the country, like they did during the war of liberation in 1971.

The western influence has only succeeded in generating hatred among the people in many parts of the world. It is generating further conflicts around the globe for their sheer greed and hypocrisy. They have even made the United Nations a kind of circus.

When others have initiated a campaign for a just world addressing the global disparity, Amnesty International has timely raised its voice for a

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