



HUMAN RIGHTadvocacy



## SC Barjoins CJ's court boycotts get together programme

Supreme Court Bar Association (SCBA) started joining the Chief Justice's (CJ) court but boycotted a post-vacation get together of judges and lawyers in protest against the presence of 19 newly appointed judges at the function. Pro-government lawyers however joined the get together held at the Judges' Lounge in the Supreme Court building.

The SCBA earlier postponed its court boycott programme until Eid vacation following the CJ's assurance of settling the debated issue of the judges appointment but decided to abstain from joining the get together if the new judges were present there. SCBA President Rokanuddin Mahmud said the new judges should not be given any task at the moment. Since question has been raised about their efficiency and ability. *The Daily Star, October 25.* 

## Barisal ward commissioner killed by RAB

A city corporation ward commissioner named Mehedi, also an alleged criminal, was killed in a gunfight with the Rapid Action Battalion in the Barisal city. Two Rab members were also injured in the encounter with the group led by Mehedi, also secretary of the Barisal city unit of the ruling BNP-backed Juba Dal. The battalion also seized four firearms - a sub-machine gun, a shotgun, a pipe-gun and a pistol and a large cache of ammunition from the house of Mehedi after the fight.

Sources in Rab said the gunfight took place when they raided the Alekanda house of Mehedi, ringleader of Mehedi Bahini. Mehedi and his associates opened fire from inside. The death of Mehedi was the 38th in the custody of Rab or in encounter since the force began its formal operation in June. The daily Ittefaq, October 26.

## Writ petition challenging RAB activities

A writ petition was filed in the High Court challenging the formation of the elite anti-crime Rapid Action Battalion (Rab) and seeking an injunction against the activities of the force. Two senior Supreme Court lawyers filed the petition terming the law leading to the formation of the force contradictory to the constitution. The petition, filed after six months of the launch of Rab, is likely to be heard on October 30, at a High Court Division bench.

The writ petition was filed in the wake of criticism against the activities of RAB. Different human rights groups have accused the force of violations of the constitution, laws to deal with crimes and human rights through extrajudicial killings in custody and 'crossfire.' The main opposition Awami League has also demanded disbandment of the force, terming it a 'killing force'. The petition claimed that the formation of Rab by amending the Armed Police Battalion Ordinance, 1979 is contradictory to the constitution and so, all activities of the force are illegal. Prothom Alo, October 26.

## HC orders govt to give list on mass arrest

The High Court has asked the government to submit a report by November 23 detailing names and particulars of the people arrested between September 22 and October 3 this year under section 86 of the Dhaka Metropolitan Police Ordinance. A High Court bench of Justice MA Matin and Justice AFM Abdur Rahman also fixed November 24 for further hearing of the writ petition that challenged the mass arrests in April and September, following which the court issued an injunction on the arrests. The injunction order, issued by the High Court Division and modified by the Appellate Division, however, will continue til the disposal of the petition, the court said. A vacation bench of the High Court on September 29 issued the injunction on the mass arrest drive in the capital that began on September 22. Bhorer Kagaj, OCtober 28.

## Hazari jailed for 7 years

A court sentenced former Awami League (AL) lawmaker Joynal Abedin Hazari of Feni to seven years jail for illegally possessing a foreign-made pistol. Judge of the Speedy Trial Tribunal Hasan Imam handed down the verdict in a crowded courtroom amid tight security. Hazari has been absconding since a joint team of police and BDR (Bangladesh Rifles) recovered arms and ammunition from his residence at Mastarpara in Feni on August 17, 2001. According to the prosecution, Hazari possessed a Spanish pistol despite cancelling its licence and the firearm was recovered by the law enforcers from his residence during the drive. BSS, October 28.

## False LLB certificate of HC Justice

A High Court Justice's LLB certificate has been discovered as false sources said. The mentioned justice is one of the 19 controversial justices of the High Court Division who were appointed on 23rd August by the Government. According to an investigation it is found that Justice Faisal Mahmud

Fayejee took part in the preliminary and final exam of LLB from Chittagong Law College that was held in 1989 under Chittagong University. His actua number in Muslim Law paper had been changed in tabulation sheet. In 1996 an inquiry committee was formed to investigate the malpractice of some corrupted officials of controller office of Chittagong University. The investiga-tion report allegedly charged the Roll no. 3652 for counterfeiting the mark sheet of 1989 LLB exam and that roll no. belongs to justice Fayejee.

The then Chancellor of Chittagong University Professor Abdul Mannan said that all result had been cancelled based on the investigation report who were related on counterfeiting the mark sheet. Apparently Anti-Corruption Department filed 2 cases against those corrupted officials, that are pending in Chittagong court. *Prothom Alo, October 30.* 

# Creativity needed to address torture in Bangladesh

A Statement of Asian Human Rights Commission

HE obstacles to eliminating torture in Bangladesh were foremost in the discussion at a recent meeting in Dhaka organised by Odhikar, a well-known national human rights organisation. There was consensus that grave torture exists throughout the country and that its causes are systemic, these include the following

### Torture is not a crime under national law

Although the government of Bangladesh ratified the UN Convention against Torture in November 1998, no enabling legislation has been passed to make torture a crime under national law. Old British laws prevail--made when the colonial regime tortured supporters of national independence. The lack of a domestic law is an obstacle to developing local jurisprudence to eliminate torture, into which the rich international jurisprudence can be assimilated. There is also no immediate plan to introduce such a law

## No means exist to compensate and rehabilitate torture victims

No legal provisions exist to enable victims of torture to make claims for compensation or rehabilitation. The state does not provide medical facilities for physical and psychological injuries suffered due to torture. Again, there is no immediate plan to introduce such legal provisions.

## Criminal justice remains very primitive

The criminal justice system has hardly changed since from British colonial times. Many laws go back over a hundred years. At no stage has there been a serious attempt to modernise the criminal justice system and take advantage of the great developments happening elsewhere. The system for implementation of laws is even worse, moving so slowly as to be completely out of touch with the rapid developments in communications, transportation and sense of time among people in other parts of the world.

#### No specialised police officers exist for criminal investigations

Police officers have a range of day-to-day duties on top of criminal investigations. For every 13,000 citizens there is one badly paid and poorly trained police officer. The very idea of specialised police officers for criminal investigations does not yet exist. One of the most needed reforms is for a separate criminal investigation branch with the necessary training and equipment to fulfil its duties

#### Public prosecutors are politically controlled

All public prosecutors are changed every time when a new government comes to power. As a result, they do not accumulate experience, nor build an institutional legacy to pass from generation to generation. The skills needed for proper prosecuting do not develop, and instead political bias is the determining factor in prosecution cases

#### No link exists between the prosecuting and investigating branches

The prosecuting and investigating branches are completely detached. If the police do not investigate a crime, the prosecutor has no responsibility. The prosecuting branch needs to be informed when serious crimes are being investigated, so as to advise the investigators on basic legal issues. This would reduce the opportunities for police to fabricate cases against innocent persons. By collaborating while preserving the independence of each branch it is possible to avoid prosecutions that lack sufficient evidence and also ensure successful cases, which at present are few.



# **Constitutionalism in Bangladesh:** Is it on the right path!

It is open said that the constitution of Bangladesh is one of the best constitution of the world. However all the jurists and political scientists do not express the same opinion, the critics always emphasize on the amendments which are brought in our constitution, have destroyed its greatness.

After the enforcement of the constitution of Bangladesh on 16" December1972, 14th amendments are brought during 33 years. It is very unfortunate that while adopting our constitution it contained every kind of fundamental rights, but subsequently different Govt. brought brutal changes in it. The first, second and third amendments were not so criticized, though preventive detention and emergency provisions were introduced by the second amendment. Preventive detention is now popularly known as the black law in our country, but the lawyers and other political scientists can not ignore it's importance, as it is inevitable for every country even it carries with itself the risk of abuse of power. Some opinion says that there should be proper guard for upholding the right of the people. So preventive detention is permissible for our country. But the bold step that was taken by fourth amendment played most devastating role in the development of the constitution. It substituted many articles and changed them enormously. Some of those were recovered by subsequent governments. Among the changes which were not recovered, the most disputed one is the appointment procedure of the judges in High Court Division. As to the appointment procedure it was provided in the original constitution that the Chief Justice would be appointed by the president and other udges would be appointed by the president after consulting with Chief Justice (article 95). But by the forth amendment, the provision of "consultation with Chief Justice" was withdrawn which was just like a huge slam to the separation of judiciary. The amendment also omitted the words "at its first meeting in each session" from the original provision which says "at its first meeting in each session parliament shall appoint from among its members the ... standing committees...(article 76)", which gave the government an arbitrary power to form the parliamentary committees at any time when it thinks fit. It should be noted that till date no Govt, took any step to abolish them and often misused the constitution for their own interest, which violated the accountability of the governments.

Moreover the Fifth Amendment curtailed the parliament's power over the financial matter which deceived the concept of democracy. In the preamble the words "historic struggle for national liberation" were replaced by words 'historic war for national independence". Thus the spirit of the struggle which continued for long 24 years and also the contribution of the people of all classes were ignored and undermined. It also omitted one of the major fundamental principles-secularism and in its place principle of absolute trust and faith in the almighty Allah was inserted. This change was only done to get the support from the large section of religious but politically unconscious people. Nevertheless this cheap popularity trick made discrimination among the different religions and frustrated the objects of our liberation war.

Another a new article 2(A), announcing Islam as the state religion was added to the constitution. Also article 100 and 107 amended and inserted provisions for setting up six permanent benches of High Court Division outside Dhaka. The changes was contrary to the unitary character of the republic and by the famous case of Anwar Hossain vs Bangladesh the court decided that the parliament can not amend the basic structure of the constitution. Thus it was a milestone judgment to give restriction over the power of the parliament which secured the constitution from other kind of changes.

At last by the Thirteenth amendment non party caretaker government were introduced which does not go with our constitution and which is a very undemocratic and a confusing one. Our constitution emphasized on election of the representatives and denied any kind of selected body. As the caretaker government is not an elected body, it is a great question before our

# Is Article 49 Unconstitutional?

Article 49 (Prerogative of mercy) of the Constitution of Bangladesh gives the President the power to grant pardons, reprieves and respites and to remit, suspend or commute any sentence passed by any court, tribunal or other authority. How democratic could that be?

Article 22 states that the State shall ensure the separation of the judiciary from the executive organs. But allowing the President to pardon, suspend or commute any sentence passed by any court we are not only going against the core value of the independence of the judiciary but also we are questioning the integrity of our judicial system.

Article 35 (3) of the Constitution ensures that every person accused of a criminal offence shall have the right to a speedy and public trial by an independent and impartial court or tribunal established by law. If we have enough trust and believe on the judicial system, why do we have to delegate

such authority on the President? We have seen before many known criminals have asked pardon from the

গণপ্রজাতন্ত্রী বাংলাদেশ সরকার আইন, বিচার ও সংসদ বিষয়ক মন্ত্রণালয়

court whether it is contradictory to the concept of basic structure of the constitution. Concept of caretaker government is the sequel to the mistrust among the political parties of the country. But this mistrust could be minimized by separating the Election Commission.

About the objective of amendment Churchill uttered a marvelous comment 'To change is to improve, to change often is to improve often and to change continuously is human endeavor for perfection". But Churchill's comment is not properly applicable in the constitutional history of our country. In the preamble of our constitution it is said that "... it is our sacred duty to safeguard, protect and defend this constitution and to maintain its supremacy as the embodiment of the will of the people of Bangladesh ... ". But the violation of constitutional supremacy is an often practice of our governments. Only the Supreme Court can defend and guard it from unreasonable changes and keep the government on the way of development of constitution and not on the way of destruction because constitutionalism constitutional development not destruction. Maruf Ahmed. 3rd year LLB

Dhaka University.

is another addition to the list of torments that a citizen has to go through every day in their lives. Also there is no clause for appealing against the order passed by the President. In a democratic society vesting such arbitrary power on the President alone is against the fundamental principles of a democratic society

Even if we look at India's Constitution article 72 gives power to the President to grant pardons, etc., and to suspend, remit or commute sentences in certain cases. Article 45 of the Pakistan constitution also gives the power to the President to grant pardon, reprieve and respite, and to remit, suspend or commute any sentence passed by any court, tribunal or other authority.

The judiciary is a major means for the protection of rights. It has the power to receive complaints of the violation of rights, to hear evidence, and to provide redress for violations, including punishment for violators. The judiciary can only perform this function if the legal system is strong and well organized. The members of the judiciary should be competent, experienced and have a commitment to human rights, dignity and justice. They should be independent from the legislature and the executive. Otherwise there is no way Bangladesh as a democratic country can fully blossom. Advocate Farzana Chowdhury Toronto, Canada



গণপ্রজাতন্ত্রী বাংলাদেশের সংবিধান



## No independent branch exists to investigate police officers over gross violations of human rights

At the moment, police investigate all crimes. Naturally, when police officers investigate their colleagues over alleged torture, extra-judicial killings and other grave violations, there is undue influence on the outcome. As the public lacks confidence in these investigations, many people may not even complain when suffering abuse at the hands of the police

### No witness protection programme exists

People do not want to complain or give evidence--especially in the growing number of serious crimes as they fear serious repercussions and lack any form of protection from the perpetrators. This also applies to the victims of human rights violations complaining about law-enforcement officers, who hold great power locally and can cause serious harm to the victims, their families and their property. This issue must be seriously addressed if the justice system is to obtain popular co-operation.

## Torture is politically motivated

Often torture results from deliberate attempts to harm political opponents The party in power typically harasses the opposition in this manner. Despite torture and law enforcement being used for the purposes of political repression, no serious attempts have been made to address the probler

#### Torture victims are disregarded because most of them are poor

. The poor are badly treated in all areas of life, and this does not attract interest. Bad treatment of the poor at police stations is therefore no exception. The poor have little access to the law, and therefore, most torture cases do not come to the public attention. Constant reporting on all cases of torture is not yet being practised

## No human rights institution exists to monitor lawenforcement agencies

Despite years of discussion and some drafting of legislation towards establishing a national human rights commission, no practical steps have been taken to this end. No reason has been given for the delay; no timetable has been set for its establishment. The government has not even committed to establish it, and neither have the opposition or civil society groups taken up the issue with the urgency it requires

## Violence is prevalent across the society but the state remains inert

Throughout Bangladesh, violence is daily committed in a wide range of social, political and religious institutions, particularly against women. It is often defended on ideological grounds, and a general ethos of intolerance permits daily acts of brutality to continue unabated. Such violence may constitute torture in cases where the state is cognisant of what is happening and does nothing to stop it.

All these obstacles are commonly acknowledged, including by all the major political parties; nonetheless, no strong lobby exists to call for action. There is agreement that something is wrong, but no sense of the need to do anything about it. Civil society organisations must take a lead role in building public opinion capable of changing this situation. To do this requires imagi nation and creativity. By effective lobbying with specific demands for action, steps can be taken to see victims make complaints, police investigate tor ture, prosecutors win cases, and other people besides act to eliminate torture.

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President after being sentenced to death from the High Court under article 49. If the President did or does grant pardon to these known criminals they will be walking on the roads as a free person. We already are living in a society where there is so much economical, financial and political imbal-



# In spite of appropriate laws domestic violence continues.

Domestic violence, most of it related to dowry, rape, acid attacks for rejection of marriage proposals from men, teasing and extra-marital affairs, is common in Bangladesh. The country has witnessed the deaths of many promising women such as Selina, Simi, Rumi, Fahima and Indrani. Some of them were so harassed or teased by wayward youths that they were forced to commit suicide

Laws relating to prevention of violence against women and children have been made more stringent, a new law has been enacted and then amended in the context of the rising attacks on women. The steps have resulted in some good results. Three policemen have recently been hanged to death for rape and murder of Yasmin Akhtar in Dinajpur. The attackers of Trisha, who died in her bid to escape her teasers in Gaibandha, have been sentenced to death in speedy trial under the new law. Trials have been completed in several other cases related to



rape or attacks on women and children. Yet violence against women continues.

Says Dr. A.S.M. Atiqur Rahman, Director at Institute of Social Welfare and Research, Dhaka University: "Women and children in Bangladesh face various types of violence. The main actors are inequality, social unrest and deprivation. Besides those who are supposed to benefit from the law is not aware of it."

He continues: amendments or changes in the law do not make much difference. Because the vested interests groups are often protected. "It is true the government makes laws, but there are always questions about the implementation of the laws.'

The sad tale of Asia Begum, 34, in Tangail district is an example of how many victims do not get justice. Asia started working as maid in the houses of ner in-laws because her poor husband was unable to run the family. She was subjected to torture, including lashings on her naked body by her uncle-in-law as she refused his sexual advances. Says Khushee Kabir, a women rights activist, "We find that cases in which influential people or organizations are involved often got to court and victims get justice. Media campaign also play a vital role in this regard." "This is a male-dominated society and male muscle power plays a big role in deciding things," she says.

Many believe that women must be able to stand on their own feet and become economically self-reliant as a bulwark against violence if appropriate law enacted and support them to fight against all odds.

Source: News Network

ance. The thought that today of a known criminal walking free on the roads

# Article-67 needs amendment

In 1991 we have regained parliamentary democracy after a long battle with the then autocratic government. It is very unfortunate that even after fourteen years of resuming parliamentary democracy, it appears from the activities of our political parties that they could not yet adapt with this system. During last decade, in many cases, the opposition lawmakers have been remaining absent in the parliament, on some trifle issues. The situation is the same in case of lawmakers from the ruling party. So quorum problem has become a daily affair. The lawmakers are taking all the benefits attached to their office without discharging their duties. In most of the cases such decision to boycott parliament is taken by the high ups of the political parties and the lawmakers are bound by such decisions. Otherwise, in accordance with article-70 of the constitution, their parliament membership will be lost. This is what happened to Major(rtd) M. Aktaruzzaman, a lawmaker from BNP in 7th parliament who joined the parliament session defying the party decision to boycott parliament. After being absent for eighty consecutive days, the lawmakers appear at the house only for one day to save their membership and again remain absent for another eighty days. They adopt such tactics

because the constitution of Bangladesh has provided, in article-67.1(b), that any member of parliament remaining absent from parliament, without the leave of the parliament for 90 (ninety)consecutive sitting days, shall be ceased to be a member of parliament. Article -67.1(b) of the constitution should be amended to the effect that this stipulated period of ninety days is reduced to 20 (twenty) days. In that case the lawmakers will not remain absent in the parliament more than twenty days at a stretch. This seems to be the best possible solution because many steps have been taken to put an end to such malpractice. So, this is high time we put constitutional obligation to end such malpractice because only such provision can restrict the political parties from taking such an undemocratic decision. The present Government, having two-third majority in the parliament, is very much able to amend the constitution and they have already amended some provisions thereof. But now the question is whether they will do it? Whether they have such good wishes for democracy in its true sense.

**Aminul Hoaue** LL.M. Dhaka University

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READER'Squeries

# Your Advocate

Q. Dear lawyer, I want to know about the stand of Bangladesh's law and order system on "Homosexuality". It is important to know if Bangladesh still has laws that go against homosexuals. I hope you would give me a detailed answer to this question. I mean can homosexuals be prosecuted n Bangladesh solely on grounds of their sexuality? Tanveer

## On E-mail.

Your Advocate: The stand of Bangladesh on homosexuality is very clear. This is considered to be a serious offence affecting private morality of persons and is strictly prohibited by law. Section 377 of the Penal Code says- "Whoever voluntarily has carnal intercourse against the order of nature with any man, woman, or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall be liable to fine. Explanation: Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section."

Once you go through the law quoted above, I hope, you will get the answers of your queries. Law is so clear on this point that a plain reading will at once lay bare its spirit, nature and intent. This being a penal clause providing punishment it would not be difficult for you to understand that there cannot be any punishment/penalty without prosecution. Therefore, prosecution, being necessary corollary, will follow the charge of unnatural offence of any kind including homosexuality.

It follows, therefore, that in Bangladesh there is law that goes heavily against homosexuals and that homosexuals are liable to prosecution on

# ground of their sexuality alone.

The answers to the queries patent in your words are sought to be so far given. But in view of the overtone of your query, which is suggestive of oddly curious position of Bangladesh in this regard, I feel like adding a few more words. As I understand, you have indicated the legal position touching upon the question of private morality of consenting adults. You are not unaware of the nature and kind of our society, which is, essentially tradition-bound, conservative and non-permissive. The conservative and traditional attitude towards sex-.morality is not only true of Bangladesh it is true of the overwhelming majority of the countries of the world. In the advanced societies of the West conservative sentiments and values are still found to influence decisions at all levels. Therefore, there must be reflection of the society in its laws. Where sexual behaviour offending against natural order is an offence, consent is immaterial. In case of sexual behaviour contemplated in Section 377 of the Penal Code question of 'consenting adults', to my mind, is of no avail. There is no, at least have not come across any, decision of the Supreme Court on this point.

In many western countries homosexuality is no more an offence. But gay rights, same-sex civil marriage, rights of the same-sex couple's etc. are concepts that are currently gaining ground in those countries not yet widely sanctioned by the society or law. With the peculiar background of homosexuality in the most advanced societies you can easily guess, instead of being bemused the position of homosexuality in a society where sex is by and large, a taboo.

Your Advocate M. Moazzam Husain is a lawyer of the Supreme Court of Bangladesh. His professional interests include civil law, criminal law and constitutional law