

LAWalter views

Torture in South Asian perspective and few words

ODHIKAR AND UBINIG

SINCE the adoption of the Convention against Torture by the UN General Assembly in 1984, the 26th of June is commemorated as the International Day against Torture.

Article 1 of the Convention against Torture sets out an internationally agreed definition of acts that constitute 'torture': 'The term torture means any act by which severe pain or suffering, whether physical or mental, is

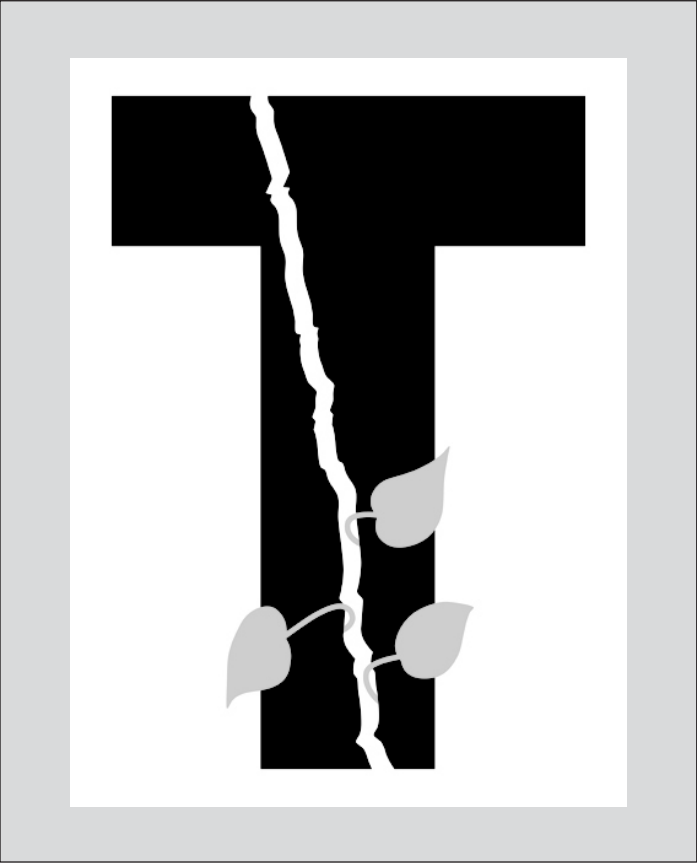


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intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing 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.'

Article 35 (5) of the Constitution of Bangladesh states,' No person shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment.'

New measures adopted

Since the incident commonly remembered as '9/11', a trend has developed towards derogation from the rule of law in the Asian region, particularly in South Asia. The increased call of the governments in the name of speedy and secretive trials on suspects, especially with the precedent led by the US, has led to use of tactics similar to those used by the US. The counter-terrorism measures in the South Asian region have started to include the introduction of new procedures for the purpose of detention of suspected terrorist and the use of military tribunals.

New measures have also included detention based on information, including non-evidentiary information, withheld from the accused, limits on habeas corpus and similar remedies, limits on access to counsel and indefinite detention without trial. Such discrimination based on the communities on the grounds of religious, political and social backgrounds can also be seen in the Asian region in particular in India, Pakistan, Bangladesh, Burma,

Thailand, Malaysia and Indonesia.

Practices in Bangladesh

In Bangladesh, like any other South Asian countries, the trend of torturing and killing people by law enforcement agencies is not an unfamiliar phenomenon, as we are familiar with the Jatiya Rokkhi Bahini (JRB), which came into force from the February 1, 1972 and became infamous for its extra-judicial executions of about 30,000 leftist opponents (as claimed by the victim organisations) till its absorption into the Army by a gazette notification dated 4 October, 1975.

In March 2004 the elite force Rapid Action Battalion (RAB), was created by amending the Armed Police Battalions Ordinance, 1979 and enacting new law the Armed Police Battalions (Amendment) Act, 2003.

It can investigate and work for all security purposes, especially as an elite law and order enforcement agency, which is to have a special focus on curbing organised crime and eliminating top criminals. Since its formation, a trend of 'death in crossfire' has been created. However, there are also an alarming number of deaths in RAB custody and a few of these can be interpreted as being political. People also got killed in the hand of police in the name of 'crossfire'. According to Odhikar's documentation, in the year 2004, 169 people were killed in 'crossfire'. From January to May 2005, 168 people were killed in 'crossfire' by both RAB and the Police.

After the formation of RAB and other auxiliary forces like, Cheetah and Cobra of the police, according to some, the law and order situation has improved and the general population are apparently happy with it. But from a humanitarian and legal point of view, one cannot justify this type of killing. Every person has the right to fair trial and before any trial no one can be killed by law enforcers extra-judicially.

Trends in South Asia

Torture and extra-judicial killings are also common in other neighbouring South-Asian countries. In India, the definition of unlawful activity is vague and has been misused by the state and state authorities, especially in the case of the minority community as in the case of Gujarat and also in the case of Delhi University Arabic lecturer Syed Abdul Rahman Geelan.

Arbitrary and unlawful deprivation of life by government forces (including deaths in custody and staged encounter killings) is still continuing in India. The highest incidences were in Uttar Pradesh, Andhra Pradesh, Bihar, Chhattisgarh, as well as states with ongoing conflict in States such as Jammu and Kashmir, Manipur, and Assam.

Security forces offered bounties for wanted militants. Police and prison officers also committed extra-judicial killings of criminals and suspected criminals in a number of states. Human rights groups alleged that security forces killed numerous captured non-Kashmiri militants from Pakistan or other countries, often after torturing them, and staged many encounters, summarily executing suspected militants and civilians believed to be assisting them.

In Jammu and Kashmir, the State Human Rights Commission reportedly received 15 complaints relating to custodial deaths in 2003 and 27 complaints relating to disappearances. Human rights organisations sought to clarify these cases by submitting numerous requests to Jammu and Kashmir authorities in recent years, but received inadequate and unsatisfactory responses. According to human rights activists, press reports, and anecdotal accounts, the bodies of persons detained by security forces in Jammu and Kashmir were often returned to relatives or otherwise discovered with multiple bullet wounds and/or marks of torture. In February 2004 in the Bandipora area of north Kashmir, five civilian porters were killed after security forces allegedly used them as human shields in a gunfight with militants. The incident led to widespread demonstrations and rioting. Following the incident, Army Chief of Staff General N.C. Vij announced that the Army would no longer use civilian porters in combat operations. On March 31, 2004, State Finance Minister Muzaffar Beig and Northern Commander Lt. General Hari Prasad reported that those responsible for the incident had been punished, but gave no details.

In June 2004, Gujarat police killed three men and a woman, alleged to have been on a mission to kill Gujarat Chief Minister Narendra Modi. The National Human Rights Commission (NHRC) asked the Director General of Police and Senior Superintendent of Police in Ahmedabad to investigate. Human Rights activists challenged police allegations that these persons were linked to this plot, but the case was never fully resolved. A Gujarat court later dismissed charges against 13 other persons implicated in this case due to lack of evidence. The family members of those killed did not file petitions claiming the killings were extra judicial, and no action was taken against

police involved in the killing.

On July 11, 2004, Manorama Devi, an alleged member of the People's Liberation Army (PLA) in the north-eastern state of Manipur, died while in the custody of the Assam Rifles, a paramilitary unit in the state. Officials initially denied that Devi was killed, tortured, or raped, but the post mortem found that she died of multiple gunshot wounds, was bleeding from the vagina, and had a perforated liver and gall bladder, among other injuries, and forensic tests detected semen stains on her clothes. The case prompted demonstrations and riots, and led to a serious deterioration of the security situation in Manipur. The National Commission for Women (NCW) publicised the case, and the Army ordered an investigation; however, by year's end, culpability for her death had not been established.

The killing of civilians continued during operations in Jammu and Kashmir. Human rights activists stated that accurate numbers were not available due to limited access to the region. In 2003, the Home Ministry reported 28 civilians killed, between April and June, and Amnesty International (AI) alleged that over 340 were killed during the year. The Armed Forces Special Powers Act (AFSPA) and the Disturbed Areas Act remained in effect in Jammu and Kashmir, Nagaland, Manipur, Assam, and parts of Tripura, where active secessionist movements existed. The Disturbed Areas Act gives police extraordinary powers of arrest and detention, and the AFSPA provides search and arrest powers without warrants. Human rights groups alleged that security forces operated with virtual impunity in areas under the Act.

The Unlawful Activities Prevention (Amendment) Ordinance 2004 (UAPAO), which was promulgated on September 21, 2004 has encompassed the provisions of POTA and has the inevitable problem of defining 'terrorism'. The amendments of the 1967 Act include several sections taken verbatim from POTA. As a result, the government retains the power it gained under POTA to designate organisations as 'unlawful' with only a limited pro forma judicial review. The list of 32 organisations banned under POTA has been included in the amended 1967 law. The amended 1967 Act also includes, with only a light modification, Section 21 of POTA, which created a new crime of supporting a terrorist organisation. Furthermore, the government has refused to drop cases registered under POTA against more than 1,600 individuals, many of whom have been denied bail and have been languishing in jail for more than two years, for demanding equality, social justice and raising concerns on the political situation either by women, minority communities, dalits, adivasis (tribals) and opposition groups, especially in the states of Jharkhand, Gujarat, Uttar Pradesh and Tamil Nadu.

The Indian Border Security Force (BSF) has also been instrumental in killing approximately 326 Bangladeshi citizens at the border areas during the last 5 years and 5 months (since January 2000 to May 2005).

In Pakistan, the Anti Terrorism Act (amended) 2001 provides the legal framework to deal with terrorism in all aspects. This Act contains detailed provisions for the suppression of terrorism. Along with this Act, the Frontier Crimes Regulations (FCRs) of 1901 is still in force in the Federally Administered Tribal Areas (FATA). Promulgated first by the British in 1872, the FCRs have been amended a number of times, mostly before independence, but their provisions remain cruel and inhuman and are wholly inconsistent with the norms of civil society. The FCRs, as they exist today, defy all principals of justice, fair play, human and civil rights. As the recent military operations in South Waziristan have shown, entire communities have been economically blockaded or forced out of their homes and hearths for the action of few foreign Taliban members whom some of their kinsmen chose to provide shelter to. The military operation also caused the imprisonment of a number of allegedly innocent civilians, among them women and children, who belong to the families or tribes of the proclaimed offenders and fugitives wanted by the Pakistan government.

In Nepal the use of force by the Nepali armed forces against innocent civilians and students, peacefully exercising their democratic rights to assembly, association and expression, has begun since the dissolution of Parliament and King Gyanendra's takeover of the executive power by dissolving the cabinet through royal proclamation on February 1 2005; and forming a government under his chairmanship. A large number of political activists, human rights activists, journalists and students have been arrested and allegedly tortured on the grounds that they either have links with the Maoist guerrillas or are simply opposed to the King Gyanendra's regime.

In Sri Lanka the peace process is yet to see any political solution and the Muslim internally displaced persons from the LTTE held north are yet to get back to their homes or to a permanent address.



Trends in the rest of the world

The rise of xenophobia in the post cold war era has gained momentum after the 9/11 situation. This has added to the definition of 'terror' and 'terrorism' and the margin between the self-determination of the communities and nations as well as communities and individuals fighting to realise universal goal of human rights could often termed as 'terrorist' by their political opponents. In the global context racism, castes, religious hatred, increased militarisation and rampant state terror has given rise to torture.

The torture and killing in the detention centres of Abu Gareb and Guantanamo Bay are not the only examples. There are many more secret prisons in the different parts of the world to torture, to dehumanise and even to kill more victims, either because they fought against foreign occupation, expressed the intention to exercise their right to self determination or just because of their cultural or religious beliefs.

It must be noted that the small states are also facing pressure and threats to deliver economic privileges to corporations and hegemonic states, which results in the increased external vulnerability.

In conclusion

South Asian countries are trying their best to attain economic development. All of them are showing good or reasonable success in this area. Nonetheless, all the south Asian countries have bad if not extremely bad - records in the area of human rights. Torture, has unfortunately remained common practice. Large countries like India have more atrocities than their smaller neighbours, but these do not get necessary media attention.

Even though India is a large country with a big population, with various ethnic, caste and religious minorities, the number and focus of the human rights organisations there and their coverage is inadequate. There is also a tendency of not responding to and not reporting to the human rights violations i.e. torture of those areas or states where 'insurgency' exists.

In the post 9/11 scenario, Indian policy makers and the media projected Bangladesh, Nepal, Bhutan and Maldives as 'failed' and 'dysfunctional' states and argued that India should militarily intervene in those countries as and when required in order to ensure her national security.

This situation has seriously jeopardised the human rights activities in the small countries of South Asia, since the reports of torture and other kinds of human rights violations in small countries, has been used by imperial and hegemonic powers for their own gains.

In the aforesaid context we believe that strengthening the solidarity and translating the voices of the oppressed peoples and their organisations of South Asia into actions for justice, can only bring positive changes.

Odhikar and Ubinig are two Bangladeshi organisations committed to defend human rights and have prepared this article to commemorate the International Day Against Torture.

LAWvision

The case for a national law on Refugees

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REFUGEES are a reality of our times. In South Asia refugee situations have been an integral part of state formation processes in 1947-1948 and again in 1971. Over the last few decades, the region has experienced a fair share of religious and ethnic strife. Intolerance of dissenting view and disrespect for rule of law have periodically resulted in serious violations of human rights, creating conditions for refugee flows. South Asian countries have also been recipients of refugees from the adjoining states and regions of Afghanistan, Tibet and Burma. Despite such conditions, none of the South Asian countries have framed laws that deal with refugees, nor have they acceded to the international refugee instruments. This paper strongly argues that both as a refugee producing and receiving country Bangladesh should provide the lead in framing a national law for refugees.

There are several reasons why national law should be framed. The first and foremost among them is that a distinction must be made between people who cross borders for economic opportunities and those who do so for fleeing persecution. In order to make that distinction, necessary structures need to be in place that can only be attained through national legislation.

In most cases, refugees are dealt with on an ad hoc basis. The absence of law contributes to compounding of problems by depending on this type of approach. There is a need for appropriate legal and institutional structures so that refugees and asylum seekers can be dealt with in an organised manner. Structures based on law would mean better management, efficiency, transparency and accountability. A national law will better equip the state to face problems that it may have to face from time to time.

Bangladesh is constitutionally bound to frame such a law. Articles 31, 32, 33, 34 and 44 of the Bangladesh Constitution have given a large number of rights to non-citizens as well. Article 31 states that apart from citizens every other person for the time being within Bangladesh has "the right to enjoy the protection of the law and to be treated in accordance with law, and only in accordance with law...". Despite such explicit declaration Bangladesh is yet to develop a legal framework for refugee protection.

If the present and the immediate past are anything to go by, this region is likely to experience turbulence and social conflict in the foreseeable future. Migration has increasingly been securitised and become a political weapon in some quarters. There are many unresolved problems between states and national minority groups, across the border in north-east India and also in Burma. In that context, it is only appropriate that Bangladesh prepares itself institutionally to face such problems. Framing a law will not only take care of Bangladesh's present problem but will address problems that are likely to be

associated with future influxes.

If Bangladesh has a legal structure in place to deal with asylum seekers and refugees, then its act of considering and granting asylum would be acts in fulfillment of its own national law. This would protect Bangladesh from likelihood of charges of indulging in unfriendly acts by the states of the origin of the person/s concerned. Bangladesh can rightly claim granting asylum is in conformity with its own national legal obligation. If Bangladesh had proper structures, rules and regulations on asylum in place then complications of asylum related cases such as that of Anup Chetia's could be avoided.

In general, Bangladesh's own treatment of refugees has been respectful to international principles. However, the reality is that Bangladesh has yet to accede to the international refugee instruments, the 1951 Convention and 1967 Protocol. There is also the absence of any regional refugee instrument such as the OAU Convention of Africa, and the Cartagena Declaration of Latin America. Ratification of international refugee instruments is not likely to take place in the near future and nor a regional approach is under discussion, and hence the best way to go by is to develop a national law.

In its treatment of refugees Bangladesh's track record of upholding the international customary law has been noteworthy. In that context Bangladesh's enactment of a law would essentially be an act of recognition of the state practice.

Ideally, Bangladesh should actively consider accession to the 1951 Convention and framing a national law for refugees. However, if for some reason consideration of accession is delayed then a national legislation could go ahead. At a consultation on refugee law held recently in Dhaka the Minister for Law stated that Bangladesh can take pride for framing a national legislation on corruption even before its accession to the UN Convention of Corruption. It is in that spirit of the Hon'ble Minister that the concerned ministries of home affairs, disaster management and foreign affairs could initiate the process for a national legislation on refugees and asylum seekers.

Arguments against

Several reasons have been assigned against framing of a national law on refugees. It has been argued that the existence of such a law may open the flood gates for refugees. There is no empirical evidence to validate that a legal structure would create conditions for refugee flows. Past experience in the region and beyond inform us that when conditions of flow of refugees are created in the country of origin they would flee anyway. Refugees do not wait to see if structures and incentives are in place when they flee for their lives and liberty. After all, in 1971 in the wake of the Pakistani military crackdown when millions of Bengalis crossed over to India, no one among them checked to see if India had a refugee law!

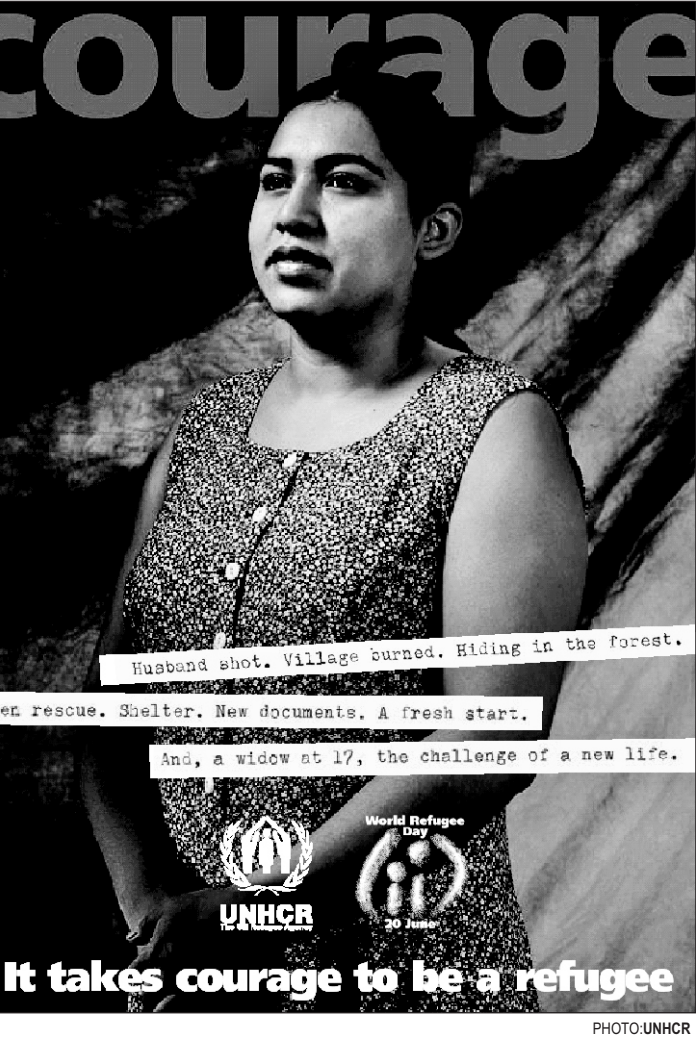


PHOTO: UNHCR

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