



## HUMAN RIGHTS analysis



### STOP EXTRA JUDICIAL KILLINGS

# Respect and establish an effective judiciary

ARAFAT HOSEN KHAN

ON 17th November 2009, a Division Bench of the High Court of Bangladesh passed a *suo moto* Rule to show cause as to why appropriate action shall not be taken against Major Kazi Wahiduzzaman and Lieutenant Hasan and their companion for the liability of killing Lutfor Khalashi and Khalilur Khalashi of Shirkhara union under Madaripur Sadar Upzila, within 48 hours from date, along with an explanation by D. G. of Rapid Action Battalion (RAB) as to such heinous activity now continuing in his Battalion. For many, this was a long awaited and much needed reassertion of the rule of law and an important call for accountability with respect to our criminal justice system. However, this sense of hope came to a halt as 11 more "crossfires" were reported in the subsequent 27 days. Once again, it was back to square one.

Nevertheless, on 15 December 2009, the High Court briefly heard representatives of the state and two human rights groups acting as interveners in a *suo moto* petition regarding 'crossfires' by the Rapid Action Battalion (RAB), a paramilitary force. On the Attorney General's request, the matter was adjourned for hearing until 9th January 2010.

Unfortunately, however, the matter has not been taken up for hearing as yet as several Benches, including the one which had issued the initial show cause on the Government and which had scheduled a hearing of the matter, were reconstituted by the Chief Justice with effect from 10 January 2010. The matter went out of the daily cause list following the reconstitution of the Bench. It is not clear if the Bench, which had heard this matter, would be specially reconstituted for a specified date in order to conclude the hearing. Meanwhile the incidents of so-called 'crossfires' continue as the nation waits for reinstatement of justice and fundamental rights.

Ironically, on 22 March 2010 the police closed down an exhibition aimed at raising public awareness about extra judicial killings at the Drik Gallery in Dhaka. Police were deployed in front of the Drik

Gallery Premises thereby restricting entry of visitors, including the famous writer Mahasweta Devi and other well known media personalities, who had been scheduled to formally open the photography exhibition entitled 'Crossfire', without any prior notice or notification of any kind to the organizer. Isn't it now evident and blatantly obvious that the concerned law enforcement agencies have no respect for rule of law and fundamental rights enshrined under the constitution in particular freedom of expression?

The newspaper report, which triggered the *suo moto* rule, had alleged that, two men, Lutfor Rahman and his younger brother Khairul Haque, were arrested by the RAB on November 13, 2009 and later, after they had been taken into custody, killed in a 'shootout' with RAB in Shirkhara village under Sadar Upazila, in Madaripur District on November 16, 2009. Lutfor's wife Jharna Begum and son Bablu Khalasi, following the arrest, spoke at a press conference, where they claimed that the 2 arrestees had not been handed over to the police and the authorities did not give them any information about their whereabouts. They had apprehended that the arrestees may be taken to Madaripur on the false plea of recovering illegal arms and made victims of encounter killing and chillingly their fears were materialized in the following few days.

We live in a democracy where our constitution protects and ensures fundamental rights for every individual in our country. Extra-judicial killings in the name of "crossfire", "gunfights" or "encounters" constitute blatant violation of fundamental rights that are enshrined in Articles 27, 31, 32 and 35 of the constitution.

According to Article 27 of our constitution, all citizens are equal before law and are entitled to equal protection of law; that is they are entitled to be treated in accordance with the law of the land administered by the ordinary law courts. However, by such acts of arbitrary and illegal killing, the victims are deprived of the opportunities of ever facing justice. It is a fundamental principle of law that every person is innocent before the law until proven guilty. Hence, until it is proved in court with all the safeguards



provided by our criminal justice system, that a person is guilty, he or she should not be branded a "criminal" and in no event should he be subject to the process of extra-judicial execution practiced by our law enforcers.

Our constitution also provides in Article 31 that: "To enjoy the protection of law, and to be treated in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law." In reality however, the authorities can and do get away with murder and function as if they are above the law and even the supreme law, the constitution. The sys-

tematic protection of members of the law enforcement agencies by the State has meant that not a single case of extra-judicial killing has yet been investigated by any competent authority and therefore no prosecutions or punishments of the alleged perpetrators have taken place.

According to Article 32 of the constitution of Bangladesh, "Everyone has the right to life, liberty and security of person." During 2004 to 2008 alone, there have been at least 1051 extra-judicial killings perpetrated by Bangladesh's law-enforcement agencies, notably the Rapid Action Battalion, the police and the armed forces. However, in not a single one of these cases is there any information available about the specific legal proceedings undertaken. According to the data compiled by *Ain O Salish Kendra's*

documentation unit, in 2008 175 extra-judicial killings took place, compared to 180 in 2007. An important point to be noticed here is that the numbers of killings without arrest in 2007 were 81 and in 2008 it was 127. The new statistic suggests that in 2009 there have been 229 killings by the law enforcing agencies of the state.

What is implicit in Articles 31 and 32 is the right to access to justice, and it cannot be said that this right has been dealt with in accordance with the law unless a person has a reasonable opportunity to approach the court in vindication of their right or grievance. Even a fugitive is entitled to a legal defense when the death penalty is involved.

Since 2004, extra judicial killings by law enforcing agencies, custodial deaths and torture, and lack of any public reports of investigation and prosecution of those responsible demonstrate the vulnerability of the right to life of Bangladeshi citizens. In the vast majority of instances, the state failed to publish any information regarding actions taken to investigate, prosecute or punish those responsible for such.

Bangladesh has ratified all the core human rights treaties (ICCPR, ICESCR, CERD, CEDAW, CAT, CRC) and is subject to the Universal Declaration of Human Rights (UDHR). However, Government, RAB and law enforcing agencies have breached their obligations under all these provisions of international law. Extra-judicial Killings in the name of "crossfire", "gunfights" or "encounters" constitute flagrant violations of basic human rights enshrined UDHR where Article 5 of the UDHR ensured right to life for all.

Moreover, according to Article 2 and 6 of the ICCPR (International Covenant of Civil and Political Rights), the Bangladeshi authorities have the obligation to ensure the right to life of the country's people and must provide prompt and effective remedies in cases where any violations takes place. Bangladesh also has the obligation to introduce legislation that is in conformity with the ICCPR, but continues to fail in this regard.

The concept of democracy needs to be clearly understood before we can appreciate the role of judiciary in its sustenance. Democracy is a system of government under which the people exercise the

governing power either directly or through representatives periodically elected by them. In modern times, the main features of democracy are free and fair elections, judicial independence, free press, majority rule and protection of minority rights. The activities of political parties are critical for effective democratic governance. The principle of rule of law is the basic substance of democracy and it includes supremacy of constitution, equality before the law and civil liberties.

For effective administration of justice in a democracy; courts have a definite and decisive role to play. A state which declares itself a legal state has to accept the role of the judiciary to maintain checks and balances on the execution of power by the legislative and executive branches. To control the latter, the judiciary is responsible for deliberating on the legality of any administrative action, and to control the former, to consider the constitutionality of any legislation passed by parliament. The judiciary in modern legal states thus plays very important roles. Apart from ensuring legality, it is obliged to protect against the infringement on the rights and liberties of people by abuse of power by the state and to uphold democracy. Hence, it is high time to ensure the law and order through our judiciary to get the best out of democracy.

Criminal activities are not accepted; not by any one. It may be the case that some of those killed by RAB were involved in criminal activities at some point of their life. If so they would be liable to punishment according to the law of the land but not by the way of killing in the name of crossfire. Even recognizing rising insecurity, how can we accept killing them without any legal justification by the state's law enforcing agencies?

The social and economic progress achieved by the flourish of democracy in many societies has been shaped by their efforts to successfully protect the rule of law. But in Bangladesh instead of showing respect to the judiciary and the law enforcing agencies of the state has shown disrespect to the directions given by the highest court of the state by continuing with the practice of extra judicial killing.

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## LAW alter views

# Article 95(2) of the Constitution revisited

MOHAMMAD RAYHAN UDDIN

JUDICIARY is considered to be the least dangerous organ of a society. It is vested with the task of dispensation of justice according to law. People resort to the judiciary to get legal and equitable remedy to redress their grievances. But a doubt is cast upon the efficacy of this least dangerous organ of the state if appointment procedure of the judges is saddled with extraneous considerations rather than qualification.

We know that in case of appointment of judges in the higher judiciary, the requirements envisaged in Article 95(2) of our Constitution have to be fulfilled. Article 95(2) of our Constitution stipulates that "A person shall not be qualified for appointment as a judge unless he is a citizen of Bangladesh and (a) has, for not less than ten years, been an advocate of the supreme court; or, (b) has, for not less than ten years, held judicial office in the territory of Bangladesh; or (c) has such other qualifications as may be prescribed by law for appointment as a judge of the supreme court."

Moreover, if the President is satisfied that the number of the judges of a Division of the Supreme Court should be increased for the time being, the president may appoint one or more duly qualified persons to be additional judges of that Division for such a period not exceeding two years as he may specify.

Recently, the Government has appointed seventeen more additional judges in the High Court Division. It is alleged that out of these seventeen additional judges, two are not competent to become the additional judges under Article 98 of Our Constitution. Though we know that there are no specific requirements prescribed for the appointment of additional judges in the higher judiciary, nevertheless the provisions mentioned in Article 95(2) of our Constitution is applied in case of appointment of additional judges. To become a judge in the higher judiciary, one

has to practice for at least ten years as an advocate of the Supreme Court; but it's a matter of regret that the recent recruitment has not done justice to this requirement in every cases.

Our constitution was adopted on 4th November, 1972 & came into force on 16th December, 1972 and there are almost two



thousand legislations in our country since then, but there is no specific law relating to the appointment of judges and their qualification.

Most of the time, it is noticed that 'appointment of judges' receives political overtones. Because of this reason, the most talented lawyers and judges in the subordinate court hardly get chance to become judge in the Supreme Court of Bangladesh.

In this backdrop, the following points are to be seriously taken into consideration by the policy makers:

- To enact a separate law relating to the appointment of judges and their qualification as indicated in Article 95(2) (c).
- To ensure the selection of at least 50% judges from the sub-ordinate court in case

of appointment of judges in the higher judiciary.

- To amend the provisions mentioned in Article 95(2) of our Constitution. The tenure of an advocate of the Supreme Court & a judge held judicial office in the territory of Bangladesh may be increased with an additional focus on the submission record in their practice life and their contribution to the life of law.

Article 95(2) of our Constitution only provides that 'to become a judge of the Supreme Court, a person has, for not less than ten years, to be an advocate of the Supreme Court.' Though there is a long-constitutional practice that the President shall consult with the Chief Justice, but in fact it doesn't work. It apparently seems that once one becomes an advocate of the higher court, and he doesn't necessarily have to engage in actual practice. After ten years even a non-practicing lawyer may assume the sit of the bench as a judge in the Supreme Court! Precisely for this reason, the provision of Article 95(2) (a) of our Constitution has to be amended slightly by adding a word "practicing" before the word 'advocate' (i.e. practicing advocate).

- To sketch out a constitutional mechanism for ensuring effective consultation in the event of appointment of justice in the higher judiciary.
- At least forty-five years has to be completed to become a judge of the Supreme Court.
- Hold a good academic record/result in his/her educational level (i.e. from S.S.C. to Masters).

There is no better test of excellence of a state than to examine its administration of justice system. Good judges can make the law sing and can even interpret a bad law for the greater interest of the people. Being the watchdog of people's right we should take care that the court remains an arbiter of justice and excellence.

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## FOR YOUR information



# Hung parliament

WHEN a general election does not result in one party commanding a majority of the House of Commons this is known as a situation of no overall control, or a 'hung parliament'.

**What happens in a hung Parliament?**  
The previous government might remain in position whilst there is a period of negotiation to build a coalition, or they might decide to try and govern with a minority of Members of Parliament. If the incumbent government is unable to command a majority and decides to resign, the leader of the largest opposition party may be invited to form a government and may do so either as a minority or in coalition with another party or parties.

**Does the party with the most seats get to form the Government?**  
In order to form a Government, a party must be able to command a majority in the House of Commons on votes of confidence and supply. This majority can include support from other political parties, whether or not there is a formal coalition arrangement. In a situation of no overall control the Government in power before the General Election gets the first chance at creating a government. If they cannot do so, the Prime Minister will resign.

**Does the Prime Minister have to resign?**  
The Prime Minister only has to resign if it is clear that they cannot command a majority of the House of Commons on votes of confidence or supply. This would be the case if the incumbent government fails to make a deal with one or more of the other parties, or if they lose a confidence motion in the House of Commons. The first parliamentary test will be the vote on any amendment to the Queen's Speech.

**Have there been previous occasions where there has been no overall control of the House of Commons?**  
There were a number of times during the twentieth century when no party had a majority of Members of Parliament following a general election. For example, in 1923 the Conservative party lost their majority at the general election and was unable to form a coalition. The party, led by Stanley Baldwin, lost a vote on the King's speech in January 1924. The Labour party under Ramsay MacDonald then took office and governed as a minority administration until October of that year.

In 1974 the incumbent Conservative administration lost its majority. Edward Heath remained as Prime Minister for a few days while he tried to form a coalition. The General Election was held on a Thursday, and it was not until the Monday that Edward Heath resigned as Prime Minister having failed to put together a coalition. In a second general election that year, Labour was returned with an overall majority of three but by 1977-78 the Labour Government had to systematically draw on the support of the Liberals. A Lib-Lab pact was formed, which lasted until May 1978.

Source: www.parliament.uk

