"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*

**REVIEWING THE VIEWS**

## THE SOVEREIGNTY DEBATE

# Whose sovereignty is it any way?

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IN the recent past, we experienced a healthy debate over the issue of sovereignty of parliament. While the Chief Justice did not claim that the judiciary was sovereign, he significantly made a point that parliament was not sovereign. The Chief Justice further asserted that the judiciary was not answerable to parliament. These sparking remarks were made and the attendant debates and talk-show-discussions emerged when the relevant parliamentary committee asked the Registrar of the Supreme Court to speak up on a questionable appointment in the subordinate judiciary. The judiciary reacted promptly against this invitation, although they reportedly responded positively to an earlier call from the parliamentary committee that wanted to have the judiciary's view about the judges' privileges.

Neither the parliamtray committee nor the Chief Justice wanted to mean what they actually told: the Committee did not intend to hold the judges accountable for what they do, and the Chief Justice was not meaning that the judges were beyond accountability and parliament was under their control. Who is sovereign in a democracy - parliament or the judiciary (Supreme Court)? In Bangladesh, by applying legal language, we often say that parliament is non-sovereign. While this is perhaps not a good way of expression, this refers to the fact that parliament's constitutional power to legislate has its own limitations; it can not breach the Constitution while legislating. In the famous Anwar Hossain Chowdhury Case (1989), we had the doctrine of basic structure entrenched to the effect that parliament cannot even amend the Constitution by destroying one or more of it basic premises. Critics may view this decision as a judicial usurpation of parliament's power or as an illegitimate exercise of constitution-making by the judiciary. This can, however, be viewed as the discovery of a protective wall against political maneuver and onslaughts on the constitution or the 'identity' of the nation. Here, we can recall the reasoning forwarded by Justice Shahabuddin Ahmed in the above case. The judge poignantly observed that people's sovereignty is susceptible to assailment and denial under many devices by the holders of power. Aware of the political realities prevalent in society, Justice Ahmed rightly thought that such a limitation on parliament's amending power is "an effective guarantee against frequent amendments of the Constitution in sectarian and party interest".

The Diceyan doctrine of absolute parliamentary sovereignty has faced its demise in the UK, the motherland of the doctrine, because of, among others, its enactment of the Human Rights Act 1998. The world over, the myth of unqualified parliamentary sovereignty has now been largely exploded by the growing concept of the rule of law or constitutional supremacy. The claim of parliamentary supremacy is an affront to the modern concept of constitutionalism in that it precludes any effective judicial control on an encroaching parliament. The legal, social and moral foundations of the rule of law require and entitle judges to enforce the Constitution. This does not however mean that the judiciary is absolutely supreme. The Supreme Court is of course supreme in its sphere, but it is never infallible, let alone being without any control.

In any democracy, it is actually the people who are sovereign, not any organ of the state. This spectacularly superior constitutional norm is ingrained the Constitution of Bangladesh in the form of constitutional sovereignty (supremacy) in

article 7. Each organ, be it the judiciary or parliament, has its role defined in the Constitution, although there are gray areas or fields of cooperation commonly occupied. Admittedly, from these perspectives the Chief Justice commented that judges are not accountable to parliament. Former Chief Justices (e.g., Justice Latifur Rahman) also made similar extra-curial remarks, stressing that judges are accountable only to the Constitution and the laws of the country and to none else. This kind of 'unaccountability' is indeed the strengths of the judges. Nevertheless, despite its 'legal' correctness, the current Chief Justice's remark that Parliament is non-sovereign and the judiciary is not accountable to parliament is un-pragmatic, questionable and susceptible to misunderstanding, which may ultimately lead to chasm and mistrust between the judiciary and parliament.

Even in established democracies, parliament has its due role in overseeing the integrity of the judiciary and judges, of course not as a master but as constitutional coordinator. Many judiciaries around the world are required to publish 'good governance' reports annually, which are discussed in parliaments. While judicial efficiency or wisdom is not a matter for control, judicial integrity certainly is. Say, for example, expenses by lower courts are subject to routine inspection from the audit department of the government - a process which invariably involves interactions between the judges/magistrates and the executive officials. In a plain assessment, this may seem to be an area of interference. This is indeed accountability to the legal processes. Mention may also be made of the system of parliamentary approval of judicial appointments and of parliamentary impeachment of 'unqualified' or 'corrupt' judges. It would be not out of place to mention that there is currently a move to reinstall in the Constitution the system of parliamentary removal of defaulted judges, a move which some former judges have refused to endorse.

Having said all this, it must also be acknowledged that, although the three branches of the state are coordinate branches, standing not in the rank of hierarchy, the judiciary enjoys a unique position to enforce the Constitution when other branches are found beyond constitutional bounds. This uniqueness of the judges' stand comes from the fact that they are unelected, that is, free from electoral accountability. Brennan, J. of the USA once famously observed: "Insulated as they are from political pressures, and charged with the duty to enforce the Constitution, courts are in the strongest position to insist that unconstitutional conditions be remedied, even at significant financial cost" [Rhodes v Chapman 452 (1981) US 337, 359]. However, it is undeniable that other two branches of the state have wider democratic credentials, and there has to be judicial deference to them when the deference is 'due'. Also, in order to increase democratic-and-constitutional legitimacy for their constitution-enforcing role, judges have to live with the people's expectation that they should act responsibly and judiciously and without frustrating the constitutional balance and the essential legal certainty.

For the greater sake of constitutionalism, judges should both speak and act strategically and pragmatically. Silence may sometimes prove more creative that buzz words. When Alexander Hamilton wrote his Federalists Paper in order to convince those delegates in the American constitutional convention who were potentially against judicial review power, he described the Supreme Court as the weakest of the state organs with a role to pronounce merely "judgment" on a dispute, having no power to take any "active resolution whatever." This was a strategy, as this constitutionalist knew that there ought to be a judiciary effectively to control the executive vis-à-vis the liberty of the people. The American Supreme Court has since enjoyed a robust judicial review power and resolved many issues actively.

To conclude, it is interesting that the sovereignty-debate between parliamentary committee and the current Chief Justice ensued from the issue whether the parliamentary committee could inquire into non-adjudicative judicial affairs. As it often happens, the debate could well be on the issue of the extent the judiciary can go in a democracy, that is, on whether the judges can reverse democratically made and enacted decisions and laws of elected branches. Either way, such a debate or tension is inevitable in a democratic society. This helps every organ of the state to pause and reflect on its own territory of agency, functions and responsibility, yielding at the end of the day wider accountability of all under the constitution.

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**LAW VISION**

# Reflections on Torture: Actions and the Law

SAIRA RAHMAN KHAN

**(...from previous issue)**

A February 2008 report released by Human Rights Watch states: "The torture techniques employed in Bangladesh, whether of long standing practice or of more recent origin, are brutal. Methods documented by Human Rights Watch and other human rights organisations include burning with acid, hammering nails into toes, drilling holes in legs with electric drills, electric shocks, beating on legs with iron rods, beating with batons on backs after sprinkling sand on them, ice torture, finger piercing and mock executions."


The main reasons why the police will torture a person in remand can be summarised as follows:

1.to get a confession out of the suspect, regardless of whether he has or has not actually been involved in the particular crime the police apprehended him for;

2.to extort money from the accused or his family members;

3.as a way to 'teach a lesson' to political opponents; opposition student activists; newspaper Editor; or any other person who members of the political or law enforcement elite consider a 'threat' to the 'stability of the country'.

There is a basic pattern leading to the torture of an accused person. He is first arrested by the police and may receive a few slaps or kicks during that time, including a fair amount of verbal abuse. He has to be presented before a Magistrate within 24 hours of his arrest. In court, the police may ask for anywhere between 3 to 15 days remand in order to 'question' the arrestee. Remand is what all detainees fear. It is during that time that they are beaten, intimidated, given electric shocks, kicked and verbally abused in order to extract a statement that may lead to a confession and a quick solution of the crime. Family members often bribe or offer money to arresting officers as a way to prevent the physical and verbal abuse that comes with being taken into remand. Again, there is always the fear of the police seeking a further period of remand if the accused does not confess the first time round, and this also encourages the accused to make a statement. In the eyes of law enforcement it seems to be vital that an overworked, under-resourced, badly paid police force, resort to torture and degrading treatment in order to hasten their investigation.

Cruel and inhuman treatment and torture are also used by law enforcement to demoralise, scare and stop the activities of specific groups of individuals, such as journalists, political activists (belonging to the Opposition) and even human rights defenders. There have been times, especially during the State of Emergency, when newspaper offices have been monitored and their reports closely censored and journalists threatened and tortured for exposing flaws in law enforcement or for criticising government actions.

### National legal framework: No definition of 'Torture'

Apart from the Constitution of Bangladesh, no criminal law in the country has specifically mentioned, defined or condemned 'torture', which is why it is so easy to get away with, backed up with corruption, lack of political will and excuses such as 'part of law enforcement' or downright denial that such incident took place.

According to Article 35 of the Constitution, "No person shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment." If this is the case, then acts of cruel, degrading and inhuman treatment by law enforcement agencies can be taken to court as being in contravention with Constitutional guarantees.

Apart from the Constitution, the only source that can provide a legal framework to criminalize torture in Bangladesh is the Penal Code, 1860. This Code already provides punishments for crimes such as assault, grievous hurt, intimidation and wrongful confinement. 'Grievous hurt', according to section 320 of the Penal Code 1840, include the following acts:

- Emasculation
- Permanent blindness of one or both eyes
- Permanent loss of hearing of one or both ears
- Privation of any member or joint
- Destruction or permanent privation of the power of any member or joint
- Permanent disfiguration of head or face
- Fracture or dislocation of bone or tooth
- Any hurt that endangers life/causes the sufferer to be in severe bodily pain for 20 days or more.

All of the above may also be caused as a result of torture or acts of cruel or inhuman punishment and fall well within the international definition of torture. In fact, many of the abovementioned 'grievous hurts' permanent loss of hearing, fracture or dislocation of bone or tooth, destruction or permanent privation of the power of any member or joint and any hurt that causes the sufferer to be in severe bodily pain for 20 days or more are common complaints by victims of police abuse.

Furthermore, the Penal Code 1860 states that it is a criminal offence to cause hurt or grievous hurt in order to extort a confession or information leading to the detection of an offence or the restoration of any property or valuable security or to extract information which may lead to such restoration. However, law enforcement officers in Bangladesh find it easier to cause grievous hurt to a suspect or an accused person in order to extract a confession or information leading to the 'detection of an offence' or the 'restoration of property or valuable security' in order to solve their cases quickly. Therefore, even though the term 'torture' is not mentioned in the Penal Code 1860, it is very much implied therein.

Very few legal safeguards are upheld in practice, including the right of information as to the reasons for arrest, the right to legal representation, the 24 hour time-limit for a judicial hearing after arrest. There are also cases of intimidation of the victims and witnesses and there are extreme time delays in forwarding indictments and during trial. The lack of these basic safeguards is a contributing factor to torture.

There is another catch to catching a police officer for perpetrating acts amounting to 'torture'; or for that matter for prosecuting a magistrate who allows remand knowing full well what the result will be. According to section 197 of the Code of Criminal Procedure, in order to prosecute a Judge, Magistrate or a public servant who 'cannot be removed from office without government sanction' for any offence committed during course of official duties-needs prior government sanction. We all know how difficult obtaining that will be!

**(To be continued...)**

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**Notice**

From next issue we will have 'Your Advocate' column weekly and Barrister Tajib-ul-Alam, Advocate, Supreme Court of Bangladesh has joined us to response your query in this regard.