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The Extra-Judicial Killing by the Law Enforcement Agencies in Bangladesh: the Role of Judiciary and the National Human Rights Commission

by
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I. INTRODUCTION

At the dawn of democratization process, countries around the world emphasize on institutionalization of human rights as an important indicator to assert their commitment to ensuring good governance and rule of law. Good governance cannot be achieved without vigilant institutions coming from outside of the government, having requisite mandates and independent powers and jurisdictions to question the suspect activities of the government and conduct investigations in fit cases. Good governance is not only a prerequisite of flourishing democracy, it also combats corruption and ensures human rights. Thus, the notions of democracy, human rights and good governance are integrally linked with each other, and neither of these can function effectively if other components are missing¹. Therefore, each society needs to develop a holistic culture of respect, promotion and protection of all of these institutions.

The enforcement of law is an important function of the government that keeps the society in order. But in maintaining such order, the government cannot adopt excessive measures, violating the norms of society in general, and that of the human rights in particular. The mandate endowed upon the government to use force as a means of ensuring rule of law is not unlimited. It is limited by law and the constitution. While ensuring rule of law one cannot violate human rights of the people. Therefore, the law enforcing


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agencies must figure out a fine line that will inform them where to start and stop.

Unfortunately, Bangladesh has clearly failed to ensure human rights in the course of law enforcement because law enforcement agencies, which are composed of mostly the police as well as the Rapid Action Battalion (RAB), have committed scores of human rights violations and that also with impunity. In spite of having regular police forces, Bangladesh introduced RAB as an elite anti-crime and anti-terrorism force on 14 April 2004. The purpose was good; officially, it aimed at remedying the wide-spread corruption and impunity of police forces but unfortunately this elite force itself also started contributing to the records of human rights violation. Among their recorded activities, we find torture, illegal detention, and extra-judicial killing². And the government legitimized these activities by providing them with immunity.

The enactment of the Joint Drive Indemnity Act, 2003 legitimized and indemnified the police for arrests, searches and interrogations made by the joint forces during the so-called "Operation Clean Heart", violating norms of human rights and good governance in the way of torture in army custody and police custody following death³. When army personnel were employed to control rampant crimes, with the hidden agenda of taking instant measures, initially it got huge public support for tough policing though the initiative in itself was detrimental to the due process of law. The indemnity from prosecution enabled the whole police community to adopt several illegal means and techniques and to involve in lawless behaviors such as bribery, cruel and inhuman torture, and illegal detention. Even the regular criminal procedure code, namely, the Code of Criminal Procedure (Cr.P.C.) 1898 left a little scope for the public to initiate a criminal process against police officers⁴.

On 2012, as against a writ petition, High Court declared this Act illegal, void *ab initio* and unconstitutional⁵. The HC also ruled on and recognized

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the *locus standi* of the victims and their relatives to seek compensation against Law Enforcement Agencies. This attempt will open a new horizon to bring the elite force under the purview of trial and punishment and it has a positive implication to abide by the constitutional as well as basic norms of international human rights mechanism.

So far, the law-enforcing agencies applied various techniques of torture leading to death and sometimes they directly shot the suspects to death. These killings are indicative of massive human rights infringements, absence of rule of law and accountability of law enforcement officials. In absence of internal checks of the law-enforcing agencies, the role of external institutions like judiciary, parliament, NHRC etc. becomes highly important.

The fact that Bangladeshi police forces including RAB acts as political tool of the government and involves itself with corrupt practices is remarkable in understanding demands for the reform of existing Police Act, 1861 in order to reduce corruption and will eventually guard the officers from political manipulation⁶. The creation of Police Internal Oversight (PIO) contributes to the surveillance of all forces under the supervision of Inspector General of Police (IGP), especially in terms of investigating police malpractice but still PIO does not exert as an efficient internal mechanism⁷. The public may complain to the AIG (Departmental Head) under PIO organization who will subsequently report the case to IGP⁸. The power of IGP to dismiss subordinate police officers on the ground of negligence and physical or mental incapacity as well as give punishment seems to be inadequate and archaic to address recent gross police misconduct⁹. Another provision with regard to PIO is relevant. According to Regulations 24, 25 of Bengal Police Regulations 1943, the District Magistrate is empowered to investigate the misconducts of LEAs regarding discharge of official duties and at times he may refer it back for trial. Thus, the overall internal mechanism of LEAs is not sufficient as there are rare incident reported to execute PIO as an effective internal mechanism. On the contrary, as an external accountability paradigm, although judiciary is entitled to *suo motu* initiate investigation or puts into operation binding decisions, it is really cynical to what extent it will fulfill its obligations with huge backlogs of cases and politicization of existing system.




This paper specially examines the role of the National Human Rights Commission (NHRC) of Bangladesh to mark an impact upon the government to comply with human rights norms while implementing laws. Set up in 2009, NHRC is endowed with considerable mandate to oversee human rights situation of the country, including the role of LEAs in the maintenance of law and order situation. Although NHRC is not an alternative to independent judicial system or responsible accountable government, it can set off traditional institutions in positive ways to protect and promote human rights¹⁰. The objective of this research paper is to analyze the underlying causes of extra-judicial killing by law enforcement agencies in Bangladesh and find out why human rights are undermined in the process of law enforcement. Most importantly, this paper seeks to evaluate the role of NHRC in addressing the issue of extra-judicial killing at the hands of law enforcers.

II. LAWENFORCEMENT AGENCIES IN BANGLADESH AND THEIR INVOLVEMENT IN EXTRA-JUDICIAL KILLINGS

The formation of the Rapid Action Battalion (RAB) as a special branch of police including army, border security, naval and air force personnel having special task force was a scheme to debilitate crimes by arresting high profile criminals¹¹. The method of arrest and subsequent execution without fair trial has to do with numerous drawbacks of the judicial system. Whatever be the reason, the design in itself ignores international standards as well as domestic laws governing use of lethal force during law enforcement.

The main function of RAB is to maintain internal security and assist the police force to apprehend criminals and members of armed outlaws, and trigger judicial process afterwards¹².


They are empowered to arrest criminals on suspicion that the suspects committed substantial crimes but have no power of custodial detention. This demonstrates that this unique branch of police does not require any warrant for arrest or demonstration of cause. Therefore, the authority of RAB is broad although their focus is very limited and succinct.

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The constitution of Bangladesh guarantees protection regarding arrest, detention and fair trial. But the practice does not always conform to those guarantees. Not introducing the arrestees before the nearest magistrate in time i.e. twenty-four hours and torture in the name of remand for extracting information are common violations of those guarantees. Some discriminatory provisions still haunt general people to become victim of arrest, detention and execution. As power of arrest is exercised by police without warrant and they also detains the suspected persons in custody up to 24 hours without producing them before magistrate, this power is very much abused as the power itself depends on the own sweet will of the police officer¹³. Again, the power of remand with the permission of magistrate initiate the culture of torture in various repressive ways which is initially limited to 15 days¹⁴ but can be extended to further periods if the concerned police officer makes magistrate satisfied that the information is well founded and they need more time to get more important information. Where such broad discretionary powers is provided to the law enforcement agencies must be balanced through appropriate rights such as inform the suspect the ground of arrest, legal representation and reasonable justification in support of possible investigation time-limit. According to principles of criminal justice, a suspected person is entitled to enjoy fundamental rights unless and until her/his crime has been proved. The practice in Bangladesh is diametrically opposite.

In Bangladesh, the practice of using police force can be traced back to its colonial history where police used indiscriminate force against the colonized population, and such measures were backed by supportive laws. But in a free country, the use of lethal force is supportable only on the ground of self-defense¹⁵. The general norm is that the law-enforcing agencies should maintain "proportionality and necessity" tests in using force as a means of self-defense¹⁶. Taking away life without trial is a serious measure and can hardly be justified¹⁷. Therefore, use of lethal force ought to be applied as a means of last resort¹⁸.

The following statistics presented by human rights NGO demonstrates how rule of law and human rights have been totally ignored while killing arrestees in the name of 'encounter', 'cross-fire'¹⁹.

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Total Extra-judicial killing from 2005- June 2016											
Year	RAB	Police	RAB-Police	Joint Force	Army	BGB	DB Police	Jail Authorities	Coast Guard	Navy	Grand Total
2016	24	45	69	00	00	02	08				79
2015	53	108	01	02	06	05	16		01		192
2014	37	91	01	07	01	05	09		03		154
2013	29	123	15	14		027					208
Total	143	367	86	23	07	39	33		04		633

Source: ASK Report (2014-16)

The above figures demonstrate an increasing trend of extra-judicial killing by LEAs. There is no single instance where they are investigated and punished accordingly due to their active participation in extra judicial killing. It is alleged that many victims were politically targeted and

later shoot dead²⁰. It is also alleged that the victims were empty-handed or had minimum weapons. The techniques they used for torture and killing includes beating with batons, boring holes with electric drills and applied electric shock etc²¹. Even if we believe the approach and few killing of LEAs to be true, it essentially contravened victims' fundamental right to life and freedom, safeguards as to arrest and detention and right to fair trial²². Moreover, the political analysts consider another strategy whereby now LEAs are taking resort to forced disappearance than direct killing to evade criminal liability. A research of Human Rights Watch "Democracy in the Crossfire" in 2014 revealed that ten individuals were arrested by RAB and seven of them were found dead often by the roadside. There were several instances of disappearances where the witnesses claimed that the victims were arrested by LEAs without official dress and consequently, they disappeared and their family members knew nothing about their whereabouts although the LEAs refuted those incidents²³. Human rights activists pinpoint the question of proper application of the 'proportionality' and the 'necessity' tests.

The legal provisions of justification to use firearms complying with proportionality arguments encompass between the degree of danger and the

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degree of force applied²⁴. So far the nature of danger of the suspect does not produce life-threatening fear e.g. by carrying arms and gives an impression of immediate grievous harm, the employment of lethal force in order to take away life is not a reasonable ground for validation²⁵. Again, the immediate concrete, real danger to life proportionate with use of force may not be applied to a particular situation unless and until the circumstances necessitate the use of force within the principle of necessity as to prevent the flight of a suspect²⁶. The tests set in international law put forward a high standard relevant to the 'protection of life' principle which government must take into account in order to frame details rules and regulations to use firearms and to avoid unwanted killing. As the purpose of arrest such as preventing the obstruction of justice or perpetration of an offence that will cause harm is very crucial to use lethal force, this signifies that mere arrest cannot be the justification for death of the suspect rather its underlying principle is to bring the suspect before law or justice²⁷. Also the deterrence to public by way of using lethal force sometimes give the message of not to escape arrest and strengthen public faith in the effectiveness of law²⁸. In fact, the whole purpose, application of force, justification test revolve round the philosophy of protection of life of suspects unless and until there is a real danger of death or serious bodily harm of the police officers or other civilians and less extreme measure is not sufficient to protect them²⁹.

III. JUSTIFICATION FOR THE USE OF LETHAL FORCE BY LAW ENFORCEMENT AGENCY

As said earlier, a two-prong test is applicable to justify the serious use of force by the law enforcement forces, lacking any of the two components will render the killing illegal. The two tests are:

A. The Proportionality Test

Proportionality as a general principle of law denotes *sui generis* concepts. In statutory interpretative process, it is considered as a *sine qua non* of justice and fairness. The notion indeed delineates a logical method which works as an equilibrium between constraints of therapeutic measures and

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severity of the nature of debarred actions. Within the purview of criminal law, the concept conveys the idea that the penalty of a delinquent should commensurate with the offense. In case of assessing military necessity within international humanitarian law identifying the legal use of force in armed conflict, this doctrine serves as a guiding principle.

The justification to use firearms should be based on proportionality, which demands a balance between the deegree of danger and the deegree of force applied³⁰. If the suspect does not produce

life-threatening terror e.g. by carrying arms and giving threat of immediate grievous harm, the employment of lethal force in order to take away life is unjustified³¹.

In contradistinction to Wednesbury principle or the principle of reasonableness, proportionality as a legal test has been identified in several jurisdictions as 'least injurious means' to ensure a fair balance between individual rights and public interest. Three tests are noteworthy in case of application of proportionality:³²

1. The means adopted by the authority in exercising its power should rationally fit the legislative purpose.
2. The authority should adopt such means that do not injure the individual more than necessary.
3. The injury caused to the individual by the exercise of the power should not be disproportional to the benefit which accrues to the general public.

B. The Necessity Test

Again, the immediate concrete, real danger to life proportionate with use of force may not be applied unless and until the circumstances necessitate the use of force³³. It is difficult to define necessity, since it will vary from case to case, and what is a necessity for one is not a necessity for other. Still the true connotation of necessity is being economic and using force only in defense, not for offense pre-emptorily. The Latin maxim appropriately expressed '*Id Quod Alias Non Est Licitum Facit*' meaning 'that which otherwise is not lawful, necessity makes lawful.'³⁴



The tests set up internationally revolve round the 'protection of life' principle which the government must take into account in order to frame detailed rules and regulations in case of use of firearms and to avoid unwanted killing³⁵. Life-threatening force can be used only when there is a real danger of death or serious bodily harm of the police officers or other civilians and a less extreme measure is not sufficient to protect them³⁶.

The correlation between necessity and proportionality are also manifested in the famous 'Caroline Test' which provides the justification of use of force in case of self-defence that is instant, overwhelming and leaving no choice of means and no moment for deliberation³⁷.

C. A Case Study: Testing the Two-prong Test

Although power of investigation of EJK vests with police officers, their inability or unwillingness is very obvious to carry out independent investigation³⁸. Since other limitations such as lack of forensic capacity, unsecured crime place, failure to refer cases contribute to malfunction of police officers, still corruption at every level of police administration continue to be a big challenge for ensuring political accountability and rule of law. Although the rule of arrest, detention and sometimes filing false case are regulated by pervasive corruption, there is no checks and balance and legal system is delicate to protect the victims and witnesses. That is why the detection rate of actual level of crime is low and hence most of the serious cases go unpunished with express or implied sanction of LEA.

D. Extra-judicial Killing: the Contributing Factors

The indemnity guaranteed to the police creates a vicious cycle encouraging the lawlessness of the law enforcers³⁹. Absence of government initiatives to investigate aggravates the condition even further. Paradoxically, the power of investigation of EJK vested in police officers, and their inability or unwillingness is very obvious here⁴⁰. Corruption at every level of police administration continues to be a big challenge.




Politicization of LEAs has created a big mess in Bangladesh where real criminals and political opponents cannot be differentiated. As the police force is widely utilized by the ruling party to sustain their political control, the responsibility to protect civilians becomes unimportant⁴¹. As the whole chain of LEAs including RAB is engaged with high volume of corruption, no internal accountability mechanism works in practice and this warrants the role of external transparency safeguards more acute and demanding⁴².

IV. THE ROLE OF JUDICIARY IN EXTRA-JUDICIAL KILLING CASES

At present, the traditional mode of enforcement of human rights through judiciary has been considered insufficient⁴³. Our judiciary is designed with many procedural complexities and hence overburdened with millions of litigations. As we follow the adversarial system of trial instead of inquisitorial system, it lacks scope of judicial activism by the judicial officers since in most of the cases he or she has to play the intermediary function. In many jurisdictions it has been realized a pressing need to supplement the role of judiciary by other mechanisms. The weaknesses of Bangladeshi judiciary are as follows:

A. Institutional Weakness

Although separation of judiciary was ensured by Act No. xxxii of 2009 (with effect from 1st November 2007), absence of an independent secretariat to deal with all kinds of privileges, and the authority of government on transfer, promotion and posting of judges curbs the independence of judicial system⁴⁴. In spite of setting several deadlines for the establishment of a self-governing secretariat, the government did not comply with the requirement. It is noticeable in the Global Competitiveness Report 2012-13 that the country ranked 104th out of 144 countries as regards judicial independence⁴⁵. Lack of proper training for the judicial officers debars them from discharging their judicial functions efficiently and thus the litigants are deprived of getting proper justice from the judiciary. Moreover, there are

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insufficient court staffs (bench assistants, serestader, nazir, record-keepers, nokol-nobish) who do not have enough knowledge in their official works. Furthermore, the lower subordinate staffs are also lacking. In addition, as the judges have to share the court rooms and offices, they do not utilize their time effectively.

B. Lack of Confidence on Judiciary

In most of the cases, it is the lower court that primarily deals with arrestees and detainees. The interpretation of the High Court Division to the notion of 'reasonable suspicion' as meaning 'actual knowledge of underlying facts that lead to the suspicion' has been overlooked in lower courts⁴⁶. The court staffs in most of the cases are corrupt in dealing with the litigants. If they do not get their due share in bribery, they harass the litigants. They determine many issues considering their monetary benefits. In a case filed by that Bangladesh Legal Aid and Services Trust (BLAST) in 2003, the High Court Division of the Bangladesh Supreme Court condemned the systematic police practice of torture by the police and directed for the amendment of the arrest provision of the CrPC⁴⁷. As per Transparency International Report 2011, 75% of the respondents had to bribe to this institution⁴⁸. As bribery determines the outcome in a substantial number of cases both in rural as well as urban areas⁴⁹, the judiciary, in particular, the lower court loses its ultimate public image and confidence. Even the promotion and appointments made in higher judiciary on the basis of political nepotism contribute to the loss of judicial independence as well as accountability and impinge on the effectiveness of laws and decisions.

C. Need for further Reforms

Exercising of power *suo motu*, the High Court Division issued a Rule Nisi on 29.06.2009 calling upon two RAB members to respond in a four-week time limit to answer the alleged arrest and subsequent killing in a shootout based on newspaper report⁵⁰. The response and reaction of government not to name them and try them expose the *mala fide* intention of the government. Although the case argued that EJK in the name of crossfire, encounter and gunfight constitute a gross violation of right to life, equal protection of law and safeguards as to arrest and fair trial guaranteed in

Article 31, 32, 33 and 35 of the Bangladesh Constitution, still it is pending before the Court and has already lost its track amidst huge backlog of cases⁵¹. The achievement of this case lies in pronouncing 15 point guidelines issued within six months of filing case as applicable to arrest and detention of suspects which among other rules pinpoints the principle of natural justice such as informing the grounds of arrest to the suspect and to the family, legal representation, and transparency of place of interrogation⁵². These guidelines could operate as checks for the LEA, if they wanted to act upon good faith.

Additionally, considering the increasing number of cases in custody of the LEAs, government has enacted "Nirzaton ebong Hefazote Mritto Nibarone Ain 2013" [Torture and Death in Safe Custody Act, 2013]. This Act if implemented will bring the members of LEAs under trial. Court *suo motu* may order to sue against the suspected members, if they fail to provide safe custody to detainee⁵³. The detained person if thinks fit may complain to the session judge for receiving security in police custody⁵⁴. The 2013 Act is the first of its kind to address custodial torture and death. Here the role of judiciary is very acute to implement the Act against LEAs.

V. THE ROLE OF NATIONAL HUMAN RIGHTS COMMISSION(NHRC) IN EXTRA-JUDICIAL KILLING (EJK)

Although NHRC is not a court, it stands in a unique position for its essential function to hold the government accountable⁵⁵. Anne Smith expresses that this institution stands at the crossroads between the government and civil society⁵⁶. So, the performance of NHRC is judged on the basis of how they act and react being free from government interference. Again the efficacy of this function as a promoter and protector of human rights rests on a number of legal, political, financial and social factors affecting the institution⁵⁷. The effectiveness of NHRI in a democratic country depends on independence, defined jurisdiction, adequate powers,

accessibility, cooperation, operational efficiency and accountability as enshrined in the Paris Principles⁵⁸. The establishment and quasi-judicial nature of function of NHRC in Bangladesh in 2009 is a welcome development mainly because of the incapacity of the existing weak, corrupt and politicized judicial system to protect human rights.


A. The Mandate of NHRC

Acclaimed as B status institution⁵⁹ recognized by International Coordinating Committee of NHRIs and an associate member of the Asia-Pacific Forum, NHRC has been provided with power of investigation *suo motu* or upon complaint by individuals, groups, institutions and government agencies⁶⁰. In particular, the power given to this Commission to inquire *suo motu* or in a petition alleging persistent human rights violations by public servant is indeed a critical power which, if exercised appropriately, complements the judiciary to address EJK of LEAs⁶¹. Since government is ready to condone LEA's activities, the role of NHRC as a watchdog institution comes to the fore and is very critical. But NHRC does not exercise this important power in case of disciplined forces. Here NHRC limits itself in seeking report from the concerned Ministry⁶², which is bare fruit.

At the preliminary stage, NHRC has managed to develop Standard Operating Procedures (SOP) and online complaint mechanism system to handle the complaints in an effective manner⁶³. Out of nineteen complaints relating to EJK, Commission disposed of three cases, and sixteen cases are pending before it⁶⁴. How the Commission resolves these cases, what initiatives they adopt, whether they seek information from government or compel LEAs to answer are to be seen⁶⁵. Simply forwarding the complaint to relevant government authority without taking any further steps to investigate will not bear any fruit; rather this may escalate the risk for the complainants and their family⁶⁶.

Although NHRC does not have any binding power to enforce gross human rights violations, it

is empowered to make recommendations for


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departmental actions against the violators or seeking compensation rather than just claiming reports from the disciplined forces⁶⁷. The Commission's power can be manifested from the fact that it is vested with the power to send show cause notice to the concerned Ministry or Disciplined Force for gross human rights violations. As per Article 18 of NHRC Act, the term 'if the Commission is satisfied' connotes compulsory legal effect. When the disciplined force will not send report asked for by NHRC, it is assumed that they are not satisfied. Hence, NHRC under such circumstances issue show cause notice in order to make the force accountable. Eight years have been elapsed since the inception of NHRC, but it could not institutionalize its mandates and statutory obligations. The Commission was silent in seeking compensation for gross human rights violations on Lemon, Rana Plaza catastrophe, tragic death of child Zihad and so on. In fact, the Commission was unable to exercise its power properly. It is not true that Commission is feeble rather it is empowered to demonstrate its real activism.

In comparison with the Indian NHRC, our NHRC has been empowered with more powers in regard to protection of human rights; but they rarely exercise it. In this regard, we may exemplify that Indian NHRC recently awarded two lakhs rupees against BSF due to murder of two people⁶⁸. In addition, in case of mostly discussed Felani murder case, it awarded five lakhs rupees to the victims' family members. The Commission has already exercised their jurisdiction to issue process against the high government officials to take part in the hearing before it in case of violations of human rights by their respective departments or agencies. But in Bangladesh our NHRC do not have any such examples of achievement into its hands.

B. NHRC and Limon's Case: A Test of its Strength and Weakness

The recent high-profile case of Limon Hossain is an exemplar of what NHRC can and cannot do in Bangladesh. In Limon's case, the Commission has employed its full strength and played a proactive role to save Limon and bring to light the excesses of law enforcing agencies. Notably, Limon—a college student—was shot at his leg by RAB accusing him of a crime and claiming that he was shot during a gun fight. Later on, it was revealed that he was unarmed, and the event of shooting on his leg was a deliberate and cool-headed action of RAB. NHRC *suo motu* took up the case and asked the government to investigate the matter but still there have been no substantial progress in inquiry⁶⁹. Due to persuasion and active involvement of NHRC, one case against him was dropped. NHRC further took up the

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task of providing legal assistance and other supports to Limon along with another human rights NGO, named Ain O Shalish Kendra (ASK). In spite of vigorous initiative of NHRC to fight for Limon and considerable amount of media coverage, Government has not relented; moreover it firmly supported the impunity of the law-enforcing agencies, and even filed further cases against Limon.

The strategy of NHRC was composition of high profile committee which sought investigation-reports from government. The vapid role of government in response to report was substantial. But the Commission could ask for judicial enquiry directly without involving government as per the authority provided by section 18 of NHRC Act, 2009. Moreover, NHRC was enervated to support Lemon's mother in the continuation of her case against RAB officials. The Commission if any case is filed may help out to get compensation, become a party to the suit and it could support victims and witnesses via legal aid⁷⁰.

In another complaint where a complainant claimed that his son Nur Alam Babu was killed by RAB, NHRC requested the concerned Ministry to set up an investigation committee in order to send a report to the Commission⁷¹. After several follow-up to form the committee and send the report, the Committee ultimately found RAB accountable and ordered the police headquarters to

file case and take disciplinary actions. Despite having developed a positive sign of response, the government is not willing to punish the perpetrators. The complaint of Asian Human Rights Commission (AHRC) in Hong Kong is handled by the Commission cautiously and government remains silent in spite of much influence⁷².

In a child rape case in Prevention of Repression of Women and Child Tribunal, it granted bail of the rapist on the ground that he will marry the victim. One private organization named CCB Foundation in order to support the victim complained to NHRC and filed a writ in HCD challenging its activities. But the Commission did not pay heed to the repeated requests of CCB Foundation. Rather, it pointed out that the area is out of the jurisdiction of the Commission as per section 12(2)(a) of the said Act. The HCD issued rule nisi against the Commission as to why silence of the commission shall not be declared invalid. In two Indian cases, the court expressed that the offence of rape is a serious human rights violation and hence will fall within the jurisdiction of NHRC. It also opined that the concept of



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human rights cannot be straitjacketed within narrow confines as it is wide enough to admit certain degree of fluidity⁷³.

C. Evaluating NHRC's Activism

No doubt, the attempt of the commission to pressurize the government to respect human rights norms works as a check on the government and promotes accountability. Added with the role of NGOs and civil society to act as pressure groups, the step of NHRC is considerable. But if we take into account the history of interrupted democracy and crude partisan politics including political user of government machineries, one cannot overestimate the token activities of NHRC. Independence of NHRC is imperative if it is to leave any mark of its activities ensuring government's accountability.

In a situation of police brutality to vandalize the houses of villagers in 2002, Asian Indigenous and Tribal People's Network (AITPN) complained to NHRC in India to investigate the matter⁷⁴. The referral of the Commission to State Government of Assam regarding investigation and government's issue of show cause letter to the Superintendent of Police (SP) and also SP's imposition of liability to the villagers demonstrate that government's reliance on SP without further investigation is clearly against the principle of natural justice. The comment of AITPN is worth mentioning which noted as regards investigation process that: "Such a bizarre procedure where the accused can act as judge and jury of his own conduct is unfair, unreasonable, unjust and unacceptable...Such travesty of justice will continue unless the NHRC is able to conduct independent investigation and it completely relies on the report of the alleged perpetrators"⁷⁵.

What factors are important to become independent is a fundamental question. The method of appointment of its members, their tenure and financial independence are vital concerns in this respect. That the Select Committee is tremendously dominated by the government officials in the appointment procedure means that an independent outsider such as human rights activists and experts is a must⁷⁶. The newly appointed Chairman, Mr. Kazi Rezaul Hoque, Former Secretary as well as ex-member of the Commission (two terms) took charge on 2nd August, 2016. As per section 6(3) of the 2009 Act, no chairman or member of such Commission could



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function more than two terms. In that case, the provision of law with regard to appointment of member or chairman has not been followed accordingly. Since the appointment was challenged on this ground via legal notice, it's a matter of time to see how long he can perform his function as a Chairman. Assurance of funding to NHRC is another yardstick which, if not guaranteed, works as a barrier to their pro-active powers⁷⁷. In response to critic for EJK, government has directly warned NHRC not to go beyond its limit which exhibits a significant constraint of the commission⁷⁸.

Although the good personal image of the ex-Chairman to the Commission⁷⁹ as a renowned human rights activist and his urge for fairness and independence stimulated the institution to a great extent, the public image of the NHRC is diminishing because of its dismal success in the face of the government's arrogance and culture of impunity. To address the corruption and the government's tacit support for EJK, NHRC has to face a tough time with huge hurdles. It is only recently that NHRC has started raising its voice directly on the occasion of a visible contravention of human rights.

The data from various sources demonstrates that EJK of LEAs has been declining gradually. The Chairman of NHRC and that of the Law Commission of Bangladesh believe that credit must be given to NHRC for such decline⁸⁰. But the public perception on such decline is different. One reason of such decline may be the present political culture and its adverse and invisible impact on independent institutions such as NHRC. Apart from that, the continuous persuasion of international communities and the human rights organizations might have played a crucial role in such decline. Still, given the history of two coup-d'états interrupting our democracy, raw political culture of enjoying and employing power etc. the recent activities of NHRC succeeded to draw considerable public attention. Since even under the Paris Principles, NHRC are not to have prosecutorial power, bringing transparency to the problem is an achievement, though formal finding would strengthen this achievement. The government's respectful reply to its claims is also considerable. While this is not enough, it is the NHRC that has played as the primary force criticizing extra-judicial killing in Bangladesh. If NHRC were equipped with all the armories of such a commission on par with developed countries, it could contribute even further in stopping extra-judicial killing in Bangladesh.

VI. CONCLUSION AND RECOMMENDATION

Being at its nascent stage, NHRC in Bangladesh started its journey with colossal challenges and inspirations as well. Besides the specific challenges facing NHRC, it is a matter of bigger political culture that debars institutionalization of human rights organizations. Unless accountability is taken as the inextricable part of the governance process, watchdog institutions controlled by government cannot go very far.

Allocation of budget from public funds must be unconditional⁸¹. The internal independent audit is the best mechanism to ensure financial independence since government audit might dilute the autonomy and capacity of the Commission⁸².

The inclusion of independent civil society members, in particular human rights activists and experts, in the Select Committee of NHRC is a precondition to the effective functioning of the Commission as a whole⁸³. Specifically, apart from political and financial independence, lack of adequate manpower and other logistic supports are big hurdles. Some capable and inspiring volunteers may help contributing to efficient staffs in NHRC whose functions will be to collect information regarding violation of human rights from various sources. Since government sees NHRC as a means to placate international and domestic critics, accessibility of the aggrieved person to the Commission by way of dissemination of information and knowledge regarding availability of the Commission must be visible⁸⁴.

NHRC should be vested with investigative power *suo motu* over disciplined forces as well⁸⁵. Providing wide investigative power to NHRC will help combat the culture of impunity and will promote accountability of public institutions. Duly empowered, the Commission can gradually bring about qualitative changes in the law enforcement process of the country. Of course, the actual implementation of the outcome of investigation will depend on the sanctions of the government⁸⁶.

Formation of NHRC in a transitional democracy can be a catalyst of limited government⁸⁷. As Bangladesh falls into this category, NHRC along with other NGOs can play a vital role in ensuring human rights for the vulnerable masses⁸⁸. If NHRC can compel government to come over the culture of impunity, it will be a great achievement⁸⁹. Reforming the existing Police Acts and Regulations is a need of the hour⁹⁰. Presumably, political willingness, commitment of government to respect democratic values is a prerequisite for NHRC to become independent. The presence of a sensitive, strong and pro-active Commission is not only conducive to the protection and promotion of human rights but also for the strength and stability of the government. The more government realizes the urgency, the better for Bangladesh's democracy.

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¹ David Beetham, "Democracy and Human Rights: Civil, Political and Economic, Social and Cultural", in: Janusz (ed.), Human Rights: New Dimensions and Challenges, Ashgate, Dartmouth, (1998), p. 74.

² See Odhikar Reports on Extra-judicial killings from 2001 —June 2016, reports on Crossfire/Gunfight from 2001-June 2013, reports on Torture to death by LEA from 2001-June 2013, <http://odhikar.org/extrajudicial-killings/>. See also Human Rights Watch Report on Bangladesh: End Spate of Extrajudicial Killings, <http://www.hrw.org/news/2014/01/27/bangladesh-end-spate-extrajudicial-killings>.

³ See Article 3 of Joint Drive Indemnity Act, 2003, see generally, Swati Mehta, feudal Forces: Democratic Nations, Police accountability in Commonwealth South Asia, 2007, p. 29.

⁴ See sections 69 and 72 of the Code of Criminal Procedure, 1898 where the service of summons involves the head of the office which facilitates the process. The social and political structure of state is a stumbling block to sue against police officials. In most of the cases, peoples' sufferings know no bounds due to the noncooperation of the police officers.

⁵ See <http://www.thedailystar.net/frontpage/indemnity-law-illegal-hc-142792>.

⁶ *Ibid.*

⁷ See sections 7, 29 of Police Act, 1861. See also Way Forward: Bangladesh Police, Commonwealth Human Rights Initiative, see http://www.nipsa.in/resources/bangladesh_police_policy_note.pdf.

⁸ See <http://www.pio.gov.bd/Organization>. So far, police received 124 complaints against police. But none of them are resolved.

⁹ See section 7 of Police Act, 1861.

¹⁰ C Raj Kumar, Institutionalization of Human Rights in Asia: Developmentalizing Rights to Promote Good Governance, 12 Asia Pac. L. Rev. 143 2004, pp. 145-46, see www.heinonline.org.

¹¹ For more information, please visit World Report, 2013 Human Rights Watch, see <http://www.hrw.org/world-report/2013/country-chapters/bangladesh>.

¹² Section 6 of Armed Police Battalion (Amendment) Act, 2003, see http://bdlaws.minlaw.gov.bd/print_sections_all.php?id=593.

¹³ Sections 54, 61 of the Code of Criminal Procedure 1898.

¹⁴ Section 167 of the Code of Criminal Procedure 1898.

¹⁵ See Section 153 A of Police Regulations Bengal 1943.

¹⁶ See Section 153 B of Police Regulations Bengal 1943.

¹⁷ See section 153 D of Police Regulations Bengal 1943.

¹⁸ See Prothom Alo, 06.04.2013.

¹⁹ Human Rights Watch Report 2013, see <http://www.hrw.org/world-report/2013/country-chapters/bangladesh>.

²⁰ See Human Rights Watch Report 2016, "Bangladesh Events of 2015".

²¹ See Odhikar Report 2013-15.

²² See Article 31, 32, 33, 35 of the Constitution of Bangladesh. Please visit: www.bdlaws.com. See also Human Rights Watch Report 2016.

²³ Human Rights Watch Report 2014, pp. 43-44.

²⁴ See Mordechai Kremnitzer, Doron Menashe and Khalid Ghanayim, 'The Use of Lethal Force by Police', *Criminal Law Quarterly*, 2007-2008, vol. 53, p. 71.

²⁵ In USA, the use of lethal force is justified to prevent realization of a threat as e.g. carrying firearms by the suspect. See Mordechai Kremnitzer, p. 73.

²⁶ See Report of the Special Rapporteur on extra judicial, summary or arbitrary executions, General Assembly, sixty-sixth sessions, 30th August 2011.

²⁷ See Mordechai Kremnitzer, Doron Menashe and Khalid Ghanayim, 'The Use of Lethal Force by Police', *Criminal Law Quarterly*, 2007-2008, vol. 53, pp. 80-82.

²⁸ *Supra* note 26, p. 85.

²⁹ Philip Alston, Special Rapporteur, Handbook on Use of Force.

³⁰ See Mordechai Kremnitzer, Doron Menashe and Khalid Ghanayim, 'The Use of Lethal Force by Police', *Criminal Law Quarterly*, 2007-2008, vol. 53, p. 71.

³¹ In USA the use of lethal force is justified to prevent realization of a threat as e.g. carrying firearms by the suspect. See Mordechai Kremnitzer *et. all, opcit*, p. 73.

³² See *Om Kumar v. Union of India*, (2001) 2 SCC 386.

³³ See Report of the Special Rapporteur on extra judicial, summary or arbitrary executions, General Assembly, sixty-sixth sessions, 30th August 2011.

³⁴ *State v. Dosso*, PLD 1958 SC 553, www.cssforum.com.pk, *Begum Nusrat Bhutto v. Chief of the Army Staff*, PLD 1977 SC 657, www.bhutto.org.

³⁵ See Mordechai Kremnitzer, Doron Menashe and Khalid Ghanayim, 'The Use of Lethal Force by Police', *Criminal Law Quarterly*, 2007-2008, vol. 53, pp. 80-82.

³⁶ Philip Alston, *The UN Special Rapporteur on Extrajudicial Executions Handbook*, Chapter 2, *Use of Force by Law Enforcement Officials*, May 28, 2010, pp. 6-7. Available online address at <http://www.extrajudicialexecutions.org/LegalObservations>.

³⁷ Extra judicial Killing and International Law, <https://politicalstift.wordpress.com/2015/11/14/extra-judicial-killing-international-law/comment-page-1/>.

³⁸ Philip Alston, Special Rapporteur, Handbook on Investigation and Prosecution.

³⁹ Linda C. Reif, Building Democratic Institutions: the Role of NHRI in Good Governance and Human Rights Protection, *Harvard Human Rights Journal* (2000).

⁴⁰ Philip Alston, *The UN Special Rapporteur on Extrajudicial Executions Handbook*, Chapter 5, Investigation and Prosecution of Killing, May 28, 2010, P. 29 Available online address at <http://www.extrajudicialexecutions.org/LegalObservations>.

⁴¹ Transparency International, Corruption Perception Index 2011, see also Nawaz Farzana, 2012, Overview of Corruption in the justice sector of Bangladesh, U4 Expert Answer, Anti-Corruption Resource Centre, p. 6, see also Freedom House, Country at the Cross-roads 2011.

⁴² Human Rights Report, Odhikar, 2012, p. 96.

⁴³ Kamal Hossain, Human Rights and Development, Human Rights Commissions and Ombudsman Offices, National Experiences throughout the World, *Kluwer Law International*, 2000, pp. 61-62.

⁴⁴ Bertelsmann Foundation, Bangladesh Country Report 2012.

⁴⁵ See also Sofia Wickberg, Overview of Corruption and Anti-corruption in Bangladesh, U4 expert Answer, Anti-Corruption Resource Centre, 07.11.2012, p. 7.

⁴⁶ International Federation for Human Rights and Odhikar Report, Bangladesh Criminal Justice through the Prism of Capital Punishment and the Fight against Terrorism, pp. 16-17.

⁴⁷ *Ibid*.

⁴⁸ Sofia Wickberg, Overview of Corruption and Anti-corruption in Bangladesh, U4 expert Answer, Anti-Corruption Resource Centre, 07.11.2012, p. 7.

⁴⁹ Bangladesh National Household Survey, 2007, Transparency International, FIDH and Odhikar Report, 2011, p. 21.

⁵⁰ See the judgment of Bangladesh Legal Aid and Services Trust (BLAST), see <http://www.blast.org.bd/content/judgement/ejp-judgment-8July2010.pdf>.

- ⁵¹ A Crossfire Case, Writ Petition No. 4152 of 2009, please visit http://www.askbd.org/web/?page_id=1500.
- ⁵² *Supra* note 32.
- ⁵³ See section 11 of Nirzaton ebong Hefazote Mritto Nibarun Ain 2013.
- ⁵⁴ *Ibid*.
- ⁵⁵ Bonolo R Dinokopila, Beyond Paper-based Affiliate Status: NHRI and the African Commission in Human and People's Right, *African Human Rights Law Journal*, Vol. 10, (2010), P. 31.
- ⁵⁶ Anne Smith, The Unique Position of National Human Rights Institutions: A Mixed Blessing? *28 Human Rights Quarterly*, 904 2006, p. 908.
- ⁵⁷ Abul Hasnat Monjurul Kabir, Establishing National Human rights Commission in South Asia: A Critical Analysis of the Process and the Prospects, *Asia Pacific Journal on Human Rights and the Law*, 2001, Vol. 2. Number 1, p. 51
- ⁵⁸ *Ibid*, p. 45.
- ⁵⁹ The reason of acclaiming B status may be attributed to the fact that NHRI in BD does not fully comply with Paris Principles.
- ⁶⁰ Section 12 of National Human Rights Commission Act, 2009.
- ⁶¹ Abdullah Al Faruque, *International Human rights Law*, New Warsi Book Corporation, June 2012, pp. 168-170.
- ⁶² See Section 18 of NHRC Act, 2009.
- ⁶³ NHRC Report 2011, pp. 30-31.
- ⁶⁴ NHRC Annual Reports 2010-15.
- ⁶⁵ NHRC Report 2011, pp. 30-31. NHRC have power to ask information from the relevant government authority, otherwise they can start work on their own initiative. See section 17 of the NHRC Act, 2009.
- ⁶⁶ See generally, *Amnesty International Report 2012*.
- ⁶⁷ See Abdul Halim, Five Years of NHRC Bangladesh and its Challenges, 10th December 2015, Bangladesh Observer.
- ⁶⁸ See Halim, *supra* note 67.
- ⁶⁹ NHRC Report 2011, pp. 35-36.
- ⁷⁰ Barrister Abdul Halim, Jatio Manobadhikar Commission: Shomossa ebong Prottasha, March 2015, pp. 194-197.
- ⁷¹ Annual Report, NHRC, 2010, p. 26.
- ⁷² Annual Report, NHRC, 2010, p. 26.
- ⁷³ *Bodhisattwa Gautam v. Subhra Chakraborty*, (1996) 1 SCC 490 and *Ram Deo Chauhan v. Bani Kanta Das*, (2010) 14 SCC 209, *supra* note 70, pp. 263-66.
- ⁷⁴ Asian Centre for Human Rights, Commissions and Conflicts: Briefing Papers on the Role of NHRIs in Conflict Situations (2004), pp. 15-18.
- ⁷⁵ Asian Centre for Human Rights, Commissions and Conflicts: Briefing Papers on the Role of NHRIs in Conflict Situations (2004), p. 16.
- ⁷⁶ As regards composition of Select Committee, section 7 of NHRC Act says, it is composed of Speaker of the Parliament, Minister of Law, Home Affairs, Chairman of Law Commission, cabinet Secretary and two members of the Parliament.
- ⁷⁷ Section 25 of NHRC Act, 2009.
- ⁷⁸ See The Daily Sun, 05.05.2011.
- ⁷⁹ C. Raj Kumar, Corruption, Development and Good Governance: Challenges for Promoting to Justice in Asia, *Michigan State Journal of International Law*, Vol. 16:475, 2007-2008, pp. 552-556.
- ⁸⁰ In an interview taken on 12 April 2013 over telephone the Ex-chairman of NHRC and Law Commission expressed as such.
- ⁸¹ See section 24 of the NHRC Act where government is the authority to allocate fund.
- ⁸² As per Article 26 of NHRC Act, the Comptroller and Auditor General of Bangladesh shall audit and submit its report to the government.
- ⁸³ Abdullah Al Faruque, *International Human rights Law*, New Warsi Book Corporation, June 2012, pp. 172-173.
- ⁸⁴ Catherine Renshaw, Andrew Byrnes and Andrea Durbach, Human Rights Protection in the Pacific: The Emerging Role of

National Human Rights Institution in the Region, *New Zealand Journal of Public and International Law*, 8 NZJPIIL (2010), p. 123.

⁸⁵ Article 77 of Bangladesh Constitution expresses formation of Ombudsman Office.

⁸⁶ M. Shah Alam, Protecting and Promoting Human Rights in Bangladesh: The Role of National Human Rights Commission, A Conference Paper, Organized by NHRC, Bangladesh, Dhaka, 10/12/2010, pp. 4-5.

⁸⁷ International Council on Human Rights Policy, Performance and Legitimacy: NHRIs, (2004), pp. 63-65.

⁸⁸ *Ibid.*

⁸⁹ Abul Hasnat Monjurul Kabir, *op cit*, pp. 52-53.

⁹⁰ See Bangladesh: Getting Police Reform on Track, 11 December, 2009, report of International Crisis Group(ICG), Asia Report no. 182, see <http://www.crisisgroup.org/en/regions/asia/south-asia/bangladesh/182-bangladesh-getting-police-reform-on-track.aspx>.

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