REVIEW ARTICLE

EXTRAJUDICIAL KILLINGS: AN OPPOSITE IDEA OF PROTECTION UNDER ARTICLE 35(5) OF THE CONSTITUTION OF BANGLADESH

Shadika Haque Monia*

School of Law, Britannia University, Comilla, Bangladesh

*Corresponding Author Email: moniahaque86@gmail.com

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ABSTRACT

Extrajudicial killings indicate a poor as well as a paralyzed criminal justice system. It is also opposite to the protection mentioned under Article 35 (Protection in respect of trial and punishment) of the constitution of Bangladesh. Although as a supreme law of the country the constitution provides some distinct protections, in the context of criminal justice system the idea of extrajudicial killings explains different scenario which are absolutely contradictory to the legal protection ensured by the constitution. The fundamental purpose of a criminal justice system is not to punish an innocent, rather control crime for maintaining peace in the society. This article will endeavour to critically analyse the extra-judicial killings in the light of Article 35(5) of the constitution of Bangladesh, will critically evaluate the differences between theory and practice as well as contradictory ideas regarding extrajudicial killings and the enforcement of Article 35(5) of the constitution from different perspectives.

KEYWORDS

Due Process of law, Criminal Justice, Killing, Protection, Bangladesh.

1. INTRODUCTION

Human being is the best creature of God. Although criminal justice system refers to penalize a criminal in different ways, at the same time the system also follows some normative principles as well. Punishing an innocent person is not the aim of criminal justice as well as natural justice system anymore. To ensure adequate punishment of a criminal, Criminology provides several factors or causations of crime which assist in determining criminal behaviours.

Usually, the law enforcement authorities of Bangladesh have the record to torture innocent people which may cause death in different circumstances. And it has been common that, after every killing the statements made and presented by law enforcement authorities provide that the persons were really criminals and there was no way rather killing them. And this process of extrajudicial killing or punishment is unlawful by nature since it bypasses the due process of law. Generally, it seems that, only after the formation of RAB the extrajudicial killing has emerged, although it has been occurring since long and has been changing gradually and steadily. Therefore, the individuals of a country or sovereign state lose confidence in the justice system even the judicial institutes lose their confidence as the consequence of extrajudicial killing. Moreover, most of the people of the country cannot feel safe and secure even they impair their faith in democratic government (Ahmed and Zahib, 2020). To establish good governance, judicial transparency should be the first priority. Indeed, extrajudicial killing is trying to sit in a permanent place although it's an illegal act (Momtaz, 2013).

Some crucial incidents of extrajudicial killing creates concern over the

country although within few days new incident replace the oldest one. Bangladesh has witnessed various incidents regarding extrajudicial killings (Kamruzzaman et al., 2016). Despite of being an illegal act, the law enforcement authorities of Bangladesh has been practicing such activities for a long time. Surely and absolutely it is an opposite to the idea of protection provided under Article 35(5) of the Constitution of Bangladesh (Asian Human Right Com, 2010).

2. RELEVANCE AND SIGNIFICANCE OF THE STUDY

Extrajudicial killings indicate a poor judicial system and a paralyzed criminal justice system too. It is also opposed to the protection mentioned in Article 35 of the constitution of Bangladesh (Protection in respect of trial and punishment). As a supreme law of a country, the constitution has provided some protection, although, in the context of the criminal justice system, the idea of extrajudicial killings explains different scenario, which is absolutely contradictory to the legal protection ensured by the constitution. Apart from this, forced disappearance, crossfire, or any other forms of extrajudicial killings threatened constitutional values too. The extrajudicial killings are not recognized by law. The word 'death in the crossfire' is also a common word to present Bangladesh. Similar statements are made from law enforcement agencies after the so-called crossfire. Such deaths are called extrajudicial killings, and for any civilized and democratic country, such killings are beyond justice and unconstitutional. The idea of a fair trial is also included in the pre-trial and post-trial procedures, which are absent in the phenomena of extrajudicial killings. The constitutional values are also threatened by forced disappearance, crossfire, or any other forms of extrajudicial killings.

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Therefore, the activities in the name of 'Hercules' by any stranger or any group of people can be called as the latest version of extrajudicial killing. To persecute any offender, the act must be proved before the court. Before or without proving any offense, nobody can be punished.

The paper will critically analyze the contemporary state practice regarding extrajudicial killings in the country to evaluate the difference between theory and practice as well as contradictory ideas regarding extrajudicial killings and the enforcement of Article 35(5) of the constitution. Apart from that, the fundamental purpose of criminal law and the criminal justice system is to control crime, punish the offenders, prevent crimes, protect innocents, and to maintain a fair degree of cohesion and stability in society. The idea of a fair trial is also included pre-trial and post-trial procedure, which is absent in extrajudicial killings. In cases of violations, there are provisions for the lodging of complaints with the police under Section 154 of the Crpc1898, states about information in cognizable cases. Not only as of the domestic legislation, as a member of the UN, Bangladesh is also a signatory to a number of international human rights instruments such as the UDHR and ICCPR. Article 3 of the UDHR states about the right to life, liberty, and security of person. But the law enforcement authorities of Bangladesh and the criminal justice system are showing a different image of protection in respect of trial and punishment. The limitation of the study will only be limited to the state practice of Bangladesh.

3. RESEARCH QUESTIONS

This research will seek to find out the answer of following questions: -

1. What are the present state practice and the ongoing situation of Extrajudicial Killings in Bangladesh?
2. Why is Extrajudicial Killing the opposite idea of Protection under the Constitution of Bangladesh?

4. RESEARCH METHODOLOGY

The research will be a doctrinal based analytical study of the respective subject area. It would be a discussion based work with the available sources of law relating to the subject matter. It would be based on both primary and secondary sources. The primary sources include the legal instruments concerned with the issue, reports of the organizations, including the critical examination of the decision of different courts and tribunals of Bangladesh. The secondary sources include books, articles, and review of case laws on this subject matter. Journals and Digital sources will be explored and utilized for this purpose too.

5. EXTRAJUDICIAL KILLING: A THEORITICAL APPROACH

Generally, the word extrajudicial killing refers to the killing without following the rule of criminal justice system of the state or without following the due process of law. Moreover, it is also known as extrajudicial execution or secret killings. There is no unified or legal definition of extrajudicial killing, although all over the world the existence of extrajudicial killing is found. In the context of Bangladesh, controversy arises when law enforcement authorities use to make a different statement after every killing which creates the questions. Generally, a killing by law enforcement authority without following the due process of law and the rule of the criminal justice system can be called extrajudicial killing. This killing is occurred by the government authority or individuals without the sanction of any judicial process. A number of human rights organizations such as Amnesty International, Human Rights Watch and the UN have been campaigning strongly against extrajudicial killing. In the sense of humanity, extrajudicial killing is inhuman. As, there is a huge debate regarding capital punishment all over the world, in that sense extrajudicial killing is obviously brutal and inhuman. Extrajudicial killing includes the killing in the premise of court or jail but without the command of the court (Van Den Haag, 1980). It's also a kind of unlawful killing that is mostly political, commercial, social, or criminal. Generally, these acts are committed by the law enforcement authorities like police or RAB. The incidents are not limited to 'Extrajudicial Killing', apart from this, several term is also used. According to the report of the UN Special Rapporteur on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Execution, published in 1991 (Committee Against Torture Approach, 2018),

Extra-judicial killing includes

- Political Assassinations
- Death as a result of torture or ill-treatment in prison or detention
- Deaths resulting from enforced disappearance
- Deaths caused by excessive use of force by law enforcer
- Execution without due process

Therefore, in the case of *Sinaltrainal vs Coca-Cola Co*, extrajudicial killing is defined as a wilful killing which is not authorized by previous judgment announced by a constituted court granting all the judicial guarantees which are recognized as essential by civilized people (Gill, 2009). An Extrajudicial Killing is a killing by governmental authorities without following any judicial proceeding (Chowdhury and Mahfouz, 2003). By their nature, extrajudicial execution is unlawful, as the law enforcement agencies disparage the legal process of the criminal justice system (Abu, 2006). It may target leading political, sectarian, leader of a trade union, religious personalities. The killing occurred without the judicial process by or with the consent of law enforcement officials. (Rodle, 2009). Apart from this, another report of the UN Special Rapporteur on Extrajudicial summary or arbitrary executions published in September, 2016, extrajudicial killing is also defined as arbitrary deprivation of life, which may occurred in several ways, such as, intentional use of force by law enforcement authority which does not meet the threshold, proportionality and necessity and the situation when the state fails to address the constitutional norm of violence through precautionary measures as along to the particulars with the journalist and human rights defenders.

On the contrary, the term does not include

- Execution by following a due process of law
- killing through the valid exercise of legal procedure by law enforcement authority
- Killing conforming to the law of armed conflict.

In the present context of Bangladesh, the term "extrajudicial killing" has not yet been recognized by the law enforcement agencies rather they try to justify such killing in the press statement under various legal garbs after every such killing (Aziz, 2015). Crossfire, encounter and gunfight are some common words inflicted by the law enforcement authorities of Bangladesh (Aziz, 2015). In light of the previous discussion, these words can be analysed through their dictionary meaning in such a way as follows:

Encounter refers unexpectedly be faced with or experience something hostile,

The *gunfight* is a fight involving an exchange of fire with guns,

Crossfire means gunfire from two or more directions passing through the same area and secret killing.

In opposite to the above words the human rights workers, NGOs and victim's family use the words "secret killing" and "target killing". After detaching above word and situations it can be determined that whatever the word or the descriptions of the incidents the ultimate result is death or killing of a person without following the judicial proceedings (Perelman, 1982).

6. HISTORICAL EVOLUTION: AN OVERVIEW

The idea of extrajudicial killing is not new, rather has been introduced since the dawn of the history of Bangladesh. The *Jatiya Rokkhi Bahini* which was established in 1972 and it has some dark history of extrajudicial killing in the name of maintaining peace and security (Jatiya, 1972). Just after the independence of Bangladesh, they did some crucial activities to ensure peace in the society, but after a while, they involve in rape and other inhuman behaviours such as torturing someone to collect arms or to take confession and so on. A number of members from *Purbo Bangla Shorbohara* party and *JSD* had been killed by *Jatiya Rokkhi Bahini* (Jatiya, 1972).

Four national leaders who played momentous role in the independence

and nation-building of Bangladesh, were killed inside the Dhaka Central Jail on 3rd of November in 1975, although jail is considered as the most sacrosanct and safe custody of a man (Hossain, 2014). The four heroic sons of the nation, *Syed Nazrul Islam, Tajuddin Ahmed, A.H.M Qamaruzzaman* and Captain *Monsur Ali* were killed brutally by following repeated bayonet, immediately after three months of 15th August massacre (Momen, 2009). Some legal scholars claim that, killing in police custody like 3 November, 1097 police custody must be considered as extrajudicial killing; as this incident occurred inside the jail without following the court proceedings (Human Rights Watch (Organization), 2013).

Operation clean Heart which was an anti-crime operation and ran nationwide, was launched from October 2002 to January 2003, to curtail overgrowing murder cases, kidnap, rape and any other forms of crime against citizen (Datta, 2005); the government of Bangladesh issued an executive order which aimed at to arrest most wanted criminals along with seizure of illegal arms (Human Rights Watch, 2009). Almost 40,000 members of armed forces were involved in this operation and this operation is considered one of the most controversial anti-crime operations among the South Asian countries (Anderson, 1990). Within two weeks of operation, almost 200 people were dead. The operation was not only limited to arrest criminals, recover illegal arms and seizing property but also harassed a number of innocent people.

The launching of the Rapid Action Battalion (RAB) 'Elite Force' in Bangladesh started its activities in 2004 (Kamruzzaman, 2016). According to the information published on the website of the force, "the government plans to form an elite force to make the activities of the police force more dynamic and effective." RAB was formed with the members of Bangladesh Police, Army, Navy and Air Force. Significant activities of this force include prevention of terrorism, drug smuggling, management of quick operations and security in important national events. Initially, the performance was quite appreciated (Roland, 2005). In particular, in 2005 and 2006, RAB played a special role in combating extremist militancy in Bangladesh. At present, RAB is a highly criticized force both nationally and internationally for their continued activities which abuse basic human rights of people (Phillip, 2006). In the name of crossfire, this force has been killing a number of innocent people even in the custody. It is a matter of great regret that, crossfire, encounter, force-disappearance, and torture are the regular activities of RAB which convulse the world community (Human Rights Watch, 2006). After every killing through press-briefing RAB claims that the victims were killed by crossfire while exercising the right of self-defence by RAB which is ensured by the Penal code of Bangladesh but criticism arises when they make the same statement and when they abuse the right of self-defence.

7. PRESENT SCENARIO OF EXTRAJUDICIAL KILLING IN BANGLADESH: AN ANALYSIS

Although it is quite difficult to recapitulate the present scenario of extrajudicial killing in Bangladesh, some incidents of extrajudicial killing will be discussed in this part which create anxiety among people every day.

On May 3 of 2018, at the establishment anniversary of RAB, 'War on Drug' was declared and anti-narcotic campaign started all over the country. After inaugurating the operation of RAB, a number of people were harassed and had been killed in the name of gunfights in a short time (Safi et al., 2018). In the name of 'War on Drug', many alleged drug dealers were killed by the elite force of Bangladesh.

From the very beginning of this kind of murder or extrajudicial killing, various human rights organization was opposing although it has not yet stopped (Bangladesh, 2020). One of the brutal incidents of extrajudicial killing was Ekramul Haque killing, who was the ward councillor of Teknaf municipality and local Awami League leader (The Daily Star, 2018). The incident raised a number of questions regarding the activities of law enforcement authority of Bangladesh (Death of Ekram, 2018). In 2009, RAB arrested two brothers named Lutfur and Khairul Khalashi and RAB declared that both had been killed in crossfire with a RAB petrol team in 15th of November (Death of Ekram, 2018), although when the high court division of Bangladesh issued a ruling and directed the authority in the next day to explain the deaths, from RAB headquarters the law officer denied that any shoot-out had taken place at all which was absolutely contradictory to the previous announcement.

From the first week of January 2019, Bangladesh has faced a new situation of Hercules which is not done by the divine hero of Greek mythology or by any Bangladeshi hero rather the incident created a number of questions all over the country (The daily Star, Dhaka, 2019). It started from the first week of January and existed until last February. On January 17, police rescued a dead body of 39 years old man named Ripon, in the neck of the dead body a short-note was found containing the confession of gang rape and murder of woman garment worker near Savar. Within the next two weeks, police recovered at least three dead bodies, they were accused of rape and short notes were tied in the neck of the dead bodies. Similar words like, "I am rapist Rakib and this is the result of rapists, guardians beware – Hercules' were found in every short-note (Faysal, 2019). Various Human rights organizations have expressed their concerns regarding such killing although the victims were accused of rape. As there is procedure to conduct a fair investigation and forward the case for trial, for this reason secret killing with short notes violate the rights of an accused person and it cannot be a good practice at all (Asia Pacific, 2020).

Therefore, NHRC asserted that almost ten complains were recorded for killing in police custody in the year of 2017, more than one complains were taken against the law enforcement authority regarding torture in 2016. Six complains were accepted by the NHRC; among these five were taken *suo moto* and another was filed directly by the victim in the year of 2015. NHRC received four complaints regarding extrajudicial killing in 2014. Comparatively, NHRC has provided a very few numbers than the numbers provided by the Non-governmental organization such as ASK and Odhikar, the reason behind this might be, in 2009 the NHRC was given a very limited power to publish any report. Thus, to comply with the present human rights situation and fulfil the demand the National Human Rights Commission (NHRC) Act should be amended. Hence, in the meeting at Geneva on 14th May 2018 UN Human Rights Council discussed the situation of human rights in Bangladesh for its Universal periodic review and more than 250 recommendations were received from 105 countries to improve the human rights situation in Bangladesh (Bangladesh's human, 2019).

8. PROTECTION IN RESPECT OF TRIAL AND PUNISHMENT (ARTICLE- 35) A CRITICAL ANALYSIS

Audi Alterem partem is a principle of Natural justice system which refers to hear the other side or no one shall be condemned unheard or both the sides must be heard before passing any order. That means, both the parties have the right to speak and no verdict can be promulgated without hearing both the parties. In the case of *Maneka Gandhi vs. Union of India* it has been adopted that, the law and procedure of trial must be of fair, just and reasonable kind (Maneka Gandhi, 1978). The idea of Due process of Law ensures legal requirements that must respect all legal rights, owed to a person. The process also balances the power of law of the land and ensures protection for the individuals from it, but the concept of extrajudicial killing ignores such process (Bernstein, 2011). Therefore, procedural trial also encourages fair justice which must help to come forward to the meaning of 'Fair Trial'. A number of scholars argue that, by following judicial trial extrajudicial killing can be reduced in most cases.

On the other hand, the constitution of Bangladesh has provided the right to equality before the law, protection of the right to life and personal liberty for the citizen of Bangladesh. Regarding arrest and detention, the most important constitutional safeguard as to arrest and detention are in Article 27, 31, 33 and 35. Apart from this, section 60 of 'The Code of Criminal Procedure 1898' (CrPC) has initiated the same provision which provided that, a police officer who arrests a person must forward him before the magistrate and section 61 stated that police officer cannot detain an arrested person for more than 24 hours and without the order of a magistrate. An accused has the right to consult immediately and be defended through a legal practitioner. Moreover, the provision of Article 35 of the constitution of Bangladesh ensures the right to a speedy trial as a part of a fair trial by an independent and neutral court or tribunal. Similarly, the criminal justice system of Bangladesh refers that a person will not be punished before proven guilty (Panday, 2011). There are provisions for the lodging of complaints with the police under Section 154 of the CrPC1898 (Das et al., 2016), stating about information in cognizable cases. Even before proven guilty any offense nobody can be called a criminal. Although section 54 and 167 of CrPC has provided, the power to police to arrest a person without a warrant on reasonable suspicion, the word "suspicion" doesn't provide the right to misuse the power. Even an

aggrieved person can file a writ petition under Article 102 of the constitution.

Bangladesh has acceded to numerous international instruments regarding human rights including Universal Declaration of Human Rights (UDHR) and International Covenant on Civil and political Rights (ICCPR). These instruments have provided a number of protections such as, to enjoy the right to life, liberty, and security of a person. A state is bound to ensure legal protections under the provision of ICCPR. In this regard, the state must take necessary steps to prevent arbitrary killing or extrajudicial killing. The arrested person has the right to be informed of the reasons for arrest and forming any charge against him. In addition, Torture is also a violation of Human rights and also prohibited under the UDHR, Convention against Torture 1984. Apart from this within the provision of Common Article 3, Geneva Convention has provided that, the state must ensure that victims of torture have the right to file a complaint and the cases must be examined by the competent authority. Therefore, within the provision of Article 10 of UDHR, it is ascertained that everyone is entitled to enjoy full equality to a fair trial and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him. Moreover, ICCPR has a nearly similar provision regarding protection of a person's rights to life and fair trial and to be presumed innocent until proven guilty according to the law under Article 6 and 14.

9. ROLE OF BANGLADESH JUDICIARY

In light of the above discussion it can be said that there are legal and constitutional provisions against arbitrary arrest and detention in Bangladesh. To this extent, there is judicial decision from the High court division of Bangladesh

On July 23, 1998, Shamim Reza Rubel a university student was arrested under Section 54 and from Siddheswari area of Dhaka by Assistant Commissioner (AC) of Detective Branch (DB). Rubel died on June 24 of that year at the Detective Branch office of Minto Road. The court sentenced 13 people, including AC Akram, to life imprisonment in 2002 as a verdict of a case filled by Rubel's father against 14 people including AC Akram in Ramna police station. A judicial investigation committee was formed including justice Habibur Rahman by the government to probe the murder of Rubel and after completing the investigation, the committee recommended some amendments to section 54 and 167.

When the recommendation was not implemented, BLAST filed a writ petition in the High court and after the final hearing of the writ petition a verdict with few points was given by the High court division on 7 of April 2003 (BLAST and others).

The order made to amend Section 54 of CrPC regarding arrest and remand within six months. The prosecutor filed an appeal against this decision and it was claimed that the two sections are sufficient and correct and there is no need to amend or to enact new legislation. The leave to appeal from the government was granted by the Appellate Division in 2004 but did not postpone the decision of High court Division. After a few years, the case appeared for hearing to the Appellate Division on 11 August of 2010. At that time the court wanted to know from the government about the progress of implementation of those instructions of High court, but it is a matter of sorrow that after years the government could not implement those instructions and even no steps have been taken so far. The instruction was such as (A) Police shall not arrest anyone under section 54 for giving detention. (B) While arresting someone, the police officer must show his identity card. (C) The arrested person must be informed the reason of arrest within three hours of the arrest. D) The relative of an arrested person must be informed about the matter through telephone or the special message within an hour of the arrest. E) The arrested person should consult with a lawyer and close relative by his own choice. F) When the arrested person is required to be remanded the order of Magistrate will be followed and will be conducted in a special cell inside the prison and his lawyer and close relatives can stay in the outside room. G) When an accused is found to be tortured in police custody, a medical board will be formed by the Magistrate and if the Magistrate finds the authenticity of torture after proper inquiry and examination, he/she will take action against the police officer. The person can be charged under section 303 of the Penal Code. Before and after the interrogation, the person has to undergo a health check.

In the name of crossfire, encounter and gunfights a number of innocent people have been killed by the law enforcement agency. There are plentiful records of cases of extrajudicial killing or extrajudicial execution allegedly committed by the law enforcement authorities as well, which constitutes violations of basic human rights. In the case named 'Crossfire Case' between ASK, BLAST and Kormojibi Nari Vs Bangladesh and others (Crossfire case, 2019), calling upon the respondents to show cause why the killing in the name of Crossfire, encounter by the law enforcement agency should not be declared as illegal and without lawful authority and why the respondents should not be driven to take judicial and criminal action against persons responsible for such killing, the court issued a rule nisi *rule* returnable within the four weeks on 29 of June of 2009.

Not only Article 35 of the constitution of People's Republic of Bangladesh stated, but a number of domestic and international legislation ensure protections for an accused person. Therefore, the judiciary has been playing an active role although the implementation of the verdict is a lengthy process.

10. CONCLUSIONS

Article 35 of the constitution of Bangladesh provides a set of protection for the accused person. The constitution is the supreme law of the country and there exists constitutional supremacy. In this way, the law enforcement agencies should be more diligent in the legal safeguard and protection of human rights of an accused person. The government should provide immediate order to the law enforcement agencies to treat all the persons in and outside of the custody by following domestic laws and international standards in respect of the due process of law. The instructions provided in the 'Guideline case' need prompt implementation. Amnesty International has provided a fourteen point program to prevent extrajudicial executions, the government should implement to prevent extrajudicial execution (Amnesty International). The judiciary of Bangladesh should be more responsible to establish rule of law. It is a matter of great regret that, the reliability on judiciary has been decreasing among the individuals of Bangladesh. Access to justice has become a rare bird to them; the government should move forward to overcome this situation. Procedural trial should be introduced and implemented properly in the criminal justice system. The reasons behind such overgrowing extrajudicial killing may be for the lack of knowledge of law enforcement agencies to protect basic human rights. In this regard, when the law enforcement agencies may be held accountable towards the people, their respect on providing rights to people may increase in many ways. Apart from these, the judiciary of the country could play a vital role to control and mitigate extrajudicial killing. When a fair trial is easy to access by the people, there will be more reliance on the criminal justice system and only then the constitutional supremacy as well as protection in respect of trial and punishment would be ensured.

To prevent extrajudicial killing permanently, proper implementation of procedure, appreciating human rights, addressing rules of guidelines of National Human Rights Commission and active participation of law commission in procedural matters needs to be more transparent and accountable.

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