LAW & our rights

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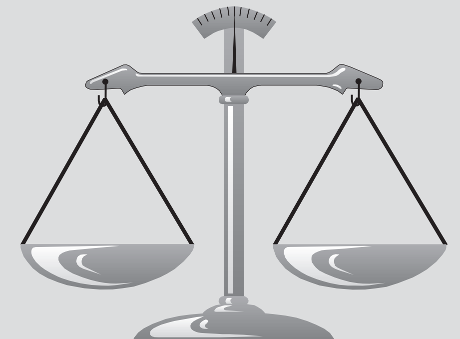
"ALL CITIZENS ARE EQUAL BEFORE LAW AND ARE ENTITLED TO EQUAL PROTECTION OF LAW" - *Article 27 of the Constitution of the People's Republic of Bangladesh*



LAW *in-depth*

Infringement of legal norms in arrest and detention

MD. ANISUR RAHMAN

ARREST by police under section 54 of the Code of Criminal Procedure and remand or detention is an old phenomenon in our country. Successive governments had used these legal weapons to stop opposition's voice. The present government also arrested some opposition political leaders and writer-columnists under section 54 of the Cr.PC and detained them under Special Powers Act 1974. In most of the cases, the higher court declared them (detentions) illegal. Moreover, a high court division bench declared about 198 detention orders as illegal in a day. Such declaration shows the dissatisfaction of the higher court over the pattern and substance of executive order. In all the cases, the detained people accused the government for violation of legal procedures to arrest and detain them. They also accused lower courts of not complying with the order of the higher court showing some procedural lacking.

Section 54 of Cr.PC

Section 54 of Cr.P.C. empowers police officer to arrest any person without order of the magistrate or without any arrest warrant. The power of the police officer is discretionary. He may arrest any person against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his being concerned in any cognisable offence. The provision in its totality is not balance less. However, the word "reasonable suspicion" has made the section vague and leaves wide scope of misuse.

Reasonable means a bona fide belief of the police officer that an offence has been committed or about to be committed. The question arises whether arrest order of the police officer is subjective order only. Subjective order means the order given under any law, which has no judicial justification. Suspicion of the police officer under section 54 must be reasonable suspicion, which requires some reasonable grounds. The burden of proof lies on the concerned police officer. We usually speak of the cautiousness of the police officer in arresting under section 54. However, the court has to be even more careful. It has been seen that the court frequently granted remand of the arrested person after producing him before the court. The court asked the arresting authority the grounds of remand. It often asked the police officer the grounds of his arrest.

Preventive detention - a necessary evil

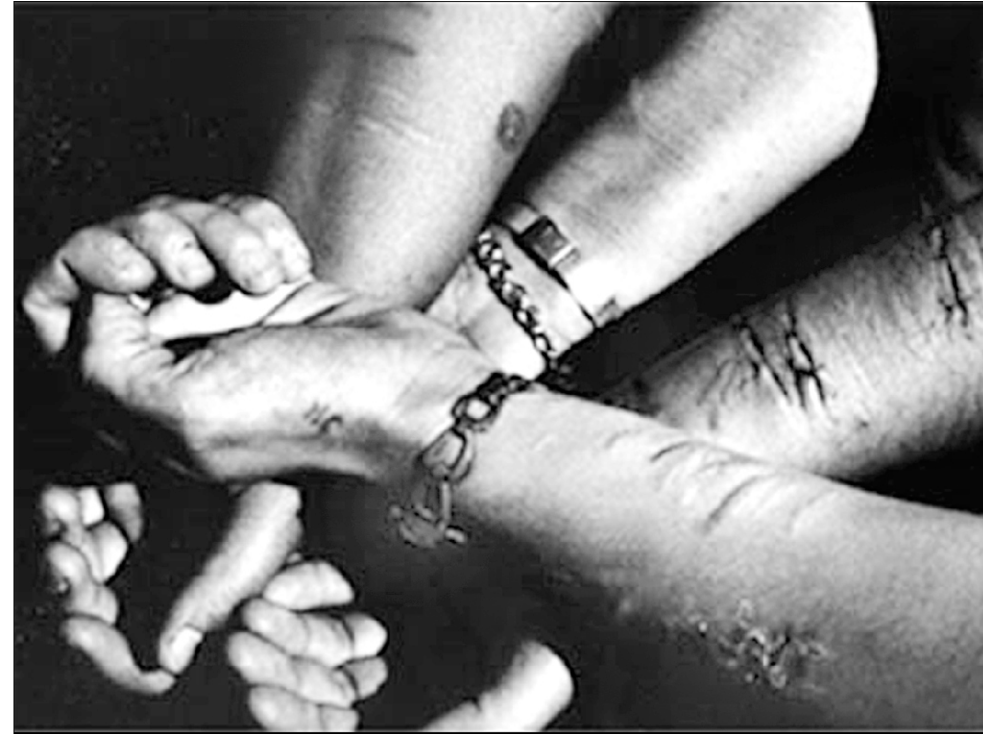
Preventive detention means detention of some one in order to restrain him from doing some prejudicial act. The framers of our constitution did not incorporate the provision for preventive detention in the Constitution as they experienced violation of fundamental rights under this law. The provision for preventive detention was incorporated in the Constitution amending Article 33 by the Constitution (Second Amendment) Act 1973. Article 33 speaks of right to know the ground of arrest immediately, right to consult and be defended by a legal practitioner and right to produce before the court within 24 hours after arrest excluding the time necessary for the journey from the place of arrest to the court. However, these rights are not invokable in relation to any law providing for preventive detention. There are three distinguishing features of the preventive detention- it is detention and not imprisonment, it curtails liberty of a person by an executive order without any preceding trial or inquiry and it is preventive and not punitive (Constitutional Law, Mahmudul Islam). There are two safeguards provided in Article 33- approval of detention by the advisory board and communication of the grounds of detention to detune. Under preventive detention law, one may be detained six months by the executive order and it may be extended if the advisory board approves it.

Glimpses of Special Powers Act 1974

The Special Powers Act (SPA) was enacted in 1974 to give effect the law of preventive detention. Under section 3 of the Act any person may be detained by an executive order of the government for prejudicial activities. Section 2(f) of the Act defined the prejudicial act. Section 3 of the Act empowers the Government to make an order of arrest and detention through the Ministry of Home Affairs. District Magistrate and the Additional District Magistrate are also empowered to make an order for arrest and detention provided that they will make report to the government and will communicate the grounds of the detention to the detune within 15 days.

Violation of rights under preventive detention

Preventive detention violates the rights guaranteed under Article 31 of the Constitution. Article 31 speaks of the protection of person from arbitrary arrest and detention. One must be arrested under due process of law that is in accordance with law mentioned in Article 31. But if the words in accordance with law mean any law passed by the parliament Art 31 ceases to be as fundamental rights. The concept of rule of law required that the law must be reasonable and not arbitrary. The procedure of the law must be reasonable and not arbitrary (Maneka Gandhi Vs India, AIR 1978, SC, 597). Article 31 also protects the citizens from arbitrary treatment of the



government detrimental to life, liberty, body or property. This is synonymous to the American concept of "due process". The procedural aspect of the concept denotes that one must be given notice and reasonable opportunity to defend him by legal representative before depriving him of enjoyment of any right or liberty. The contents of notice and nature of hearing must be such that the individual know the allegation against him and have reasonable and meaningful opportunities to defend him. But the preventive detention law like SPA has denied all the rights guaranteed by Art 31. Under this law, the detune has no opportunity at all to know the allegation against him before his arrest and defend him thereafter. The law permits him to know the grounds of arrest after the detention order and he can submit a written statement against the order. During this time, he has no option to consult with legal representatives. It was seen earlier that High Court Division directed the government to allow the legal representatives to meet with Shahriar Kabir when he was detained in jail (Kalandier Kabir Vs Bangladesh and others, published in Daily Star on July 14, 2002). Moreover, the SPA is a vague one as its preamble says, "It is an Act to provide… and effective punishment of certain grave offences." But the object of the preventive detention law is not punitive but preventive. The definition of prejudicial act is also vague and contains wide scope of being misused.

Right to speedy and public trial

Preventive detention is also against Article 35(3) of the Constitution, which provides for right to speedy and public trial by an independent and impartial court or tribunal. The right encompasses all the stages namely, investigation, inquiry, trial, appeal, revision and retrial (A.R.Antulay Vs R.S. Nayak, AIR, 1992, SC, 1701). The preamble of the SPA also provides that it is "an Act to provide… for more speedy trial….. of certain grave offences". But the nature of the preventive detention requires the detention of a person without trial. The detaining authority need not justify their grounds of arrest and detention of a person as earliest time by producing the detune before the court. The advisory board set up by the SPA is empowered to inquire the necessity of the detention but not the grounds of arrest or detention. With the approval of the advisory board government may detained a person for an indefinite period. Impartiality and neutrality of the advisory board is also questionable.

Natural justice

Preventive detention law is also inconsistent with the concept of natural justice. Under this concept, the accused person is always presumed to be innocent before the eye of law unless his guilt is proved. The burden of proof of the guilt lies on the prosecution. This is also similar to the American concept of due process. But the SPA empowers the government to detain any person without any trial and without giving any opportunity to know the allegation against him. The order of the detention lies on the satisfaction of the government only, which is not reasonable satisfaction also. In other words, the satisfaction is subjective not judicial satisfaction. The court could not inquire the grounds of arrest unless the detention is challenged. (Abdul Latif Mirza Vs Bangladesh, 31 DLR, 1979, AD, 1).

Basic structure of Constitution

Incorporation of preventive detention clause amending Article 33 of the Constitution itself is the violation of the basic structure of the Constitution. Article 142 empowers the parliament to amend the Constitution. In eighth amendment case (BLD, special issue, 1989), Justice Shahabuddin Ahmed defined amendment, as "Change or alteration for the purpose of bringing an improvement in the statute to make it more effective and meaningful, but it does not mean its abrogation or destruction or a change resulting in the loss of its original identity and character. In the case of amendment of a constitutional provision amendment should be that which accords with the intention of the makers of the Constitution".

The intention of framers of Constitution was to protect people from arbitrary action of the state as well as tyranny of the government. The amendment violates the Preamble of the Constitution, which speaks for rule of law, fundamental human rights and freedom, equality and justice for all the citizens. It is the basic structure of the constitution also. Amendment to Article 33 has infringed some basic fundamental rights of people, which is against rule of law as well as the intention of the framers of the Constitution. Therefore, amendment to Article 33 is inconsistent with Article 7 of the Constitution. Any amendment inconsistent with basic structure of the constitution is ultra vires of the Constitution (Constitution 8th Amendment case 1989).

Scrap the laws

Both section 54 of CrPC and Special Powers Act denies some basic fundamental rights guaranteed by the Constitution. Moreover, the provision for preventive detention is against the basic structure of the Constitution. Therefore, both these laws should be scrapped. Judiciary can play a vital role in this regard.

Anisur Rahman is LL.M. student of Dhaka University and Law Desk Assistant, the Daily Star.

LAW *watch*

Responsibility and accountability of teachers under Dhaka University Order, 1973

SHEIKH HAFIZUR RAHMAN

DHAKA University opened its door for the students on the first day of July 1921. From that time onwards this university provided students with quality education, facilitated research work and disseminated knowledge. From the very outset it had become the highest seat of learning of this country. Due to complete residential character and the high standard of academic activities from 1921-1947 this university got recognition as Oxford of the East. Teachers having sound academic background, commitment and integrity upgraded the status of this university. Their knowledge, wisdom, writings, research works and devotion were appreciated by all quarters. But in course of time the role of teachers have been put into questions. Though their responsibilities have been properly defined and their accountability is ensured by a number of machineries, but time has come to review whether these have become a mere rhetoric or not.

Responsibilities of teachers:

Section 7(1) of the Dhaka University Order, 1973 provides that, "All recognised teaching in connection with the university courses shall be conducted by the university, and shall include lectures, work in the laboratories or workshops and other teaching conducted by the Professors, Associate Professors, Assistant Professors, Lecturers and other teachers." The recognised teaching shall be supplemented by tutorial instruction. [7(4)] This core provision of the Order related with teaching was elaborated by section 42 of the First Statutes. This section clearly states what will be the duties of the teachers. The duties of the teachers include(a) to teach the students by means of lectures, tutorials, discussion, seminars, demonstrations, etc.; (b) to conduct, guide and supervise research; (c) to maintain personal contract with the students, give them individual guidance and supervise their extra-curriculum activities; (d) to assist the authorities in preparing courses and syllabus, in conducting examinations, in organising libraries, laboratories and other curriculum activities of the university and its departments and other institutions; and (e) to perform such other functions and duties as are assigned to them by the Vice-Chancellor.

From the provisions of law it is clear that teaching is not the only responsibility of teachers. They have been consigned to conduct, guide and supervise research. Moreover, they are obligated to maintain personal contract with the students, guide them personally and supervise their extra-curriculum activities. The provisions of law combined the academic responsibilities of teachers with their social duties to the students, which have long been identified as the unique feature of the teaching of this sub-continent. This combination found its proud place in the Dhaka University Order, 1973. But unfortunately there is difference between theory and practice. Under the Order teachers have been entrusted to dispose of their responsibilities as friend, philosopher and guide of the students. But how many teachers are dispensing their responsibilities as per the provisions of law, that question is mounting over the years in different forums. Obviously some teachers, though they are few in numbers, are doing their academic activities and dispensing their social responsibilities as guardian of the students honestly and sincerely. But they are not sufficiently provided by the University and State. In terms of salary structure of the university teachers we are lagging far behind the South Asian Standard.

Accountability of teachers:

There is confusion about the accountability of teachers whether this phenomenon has been ensured by the Dhaka University Order. But the Order provides a number of provisions for ensuring the accountability of teachers of Dhaka University. A commission consisting of the members of the University Grants Commission shall have the right to cause an inspection by such person as it may direct, of the examinations, teaching and other works conducted by the university. [Section 8(1), Dhaka University Order, 1973] The teaching of a department pertains to the responsibility of the Academic Committee (consisting of all the teachers) of the concerned department. [Section 43(3), The First Statutes] The Co-ordination and Development Committee (consisting of one-third of the total number of teachers of a department) shall be responsible for the improvement of the existing teaching and research facilities and for the planning of further development of the department. [Section 43(4), The First Statutes] Moreover the Chairman of the department shall be responsible for the general supervision of the department including teaching. [Section 43(2), The First Statues]

The Dhaka University Order and the First Statutes provide a number of machineries to ensure the accountability of teachers. If any teacher does not dispose of his/her duties as per the provisions of law the Academic Committee can take that matter into their cognizance and make the teacher to do his/her job properly. The Co-ordination and Development Committee has been given the authority to review the existing quality of teaching and take positive measures to enhance the standard of teaching. Moreover, a commission can inspect the teaching and communicate its views to the Syndicate of the university. The legislators provided these machineries to make the teachers accountable and to raise the standard of teaching through internal mechanism of university. But unfortunately we failed to exploit the potentialities of this mechanism.

No question can be raised about the positive intention of drafting the Dhaka University Order as it provides a number of machineries to ensure the accountability of the teachers. The draftsmen had no intention to leave the teachers at their freewill but to minimize the degrading system of Pakistan regime. They incorporated the above mentioned provisions to make the teachers accountable by keeping always in their mind that they were enacting laws for highly educated segment of people having well developed sense of responsibility and self-consciousness. Hence they provided a workable machinery to be practiced by the most brilliant people of this country. They did not incorporate any system by which accountability of teachers could be ensured in a harsh manner. But unfortunately the machineries of accountability did not work as expected. So, time has come to review the existing provisions and introduce internationally recognised mechanism to ensure the accountability of teachers. Here one failure of the draftsmen can be identified, as they did not incorporate any provision for evaluation of teachers by the students. The system of evaluation of teachers by the students in a fair and positive manner certainly will enhance the quality of teaching. This will ensure better academic environment of the university.

Concluding remarks

Teachers can be considered as skeleton of any educational institution. They are instrumental in ensuring quality education in all over the world. The teachers of Dhaka University had high reputation for long time for teaching, research and their commitment to society and state. But now they are not enjoying high-esteem of the people in comparison with the past. By taking that reality into notice appropriate mechanism should be introduced to ensure quality teaching and accountability of teachers.

Sheikh Hafizur Rahman is Lecturer of Law Department, Dhaka University.

LAW *alter views*

Legal, ethical and religious implications of human cloning

MOHAMMAD MONIRUL AZAM

Although the debate over human cloning is a very recent phenomenon, cloning itself is not a new concept. Plants and other asexual organisms have been "cloning" themselves since the beginning of time. The first formal cloning experiments took place in 1952 at the Institute for Cancer Research in Philadelphia. Dr. Robert Briggs and Dr. Thomas J. King were the first to clone frogs, by transferring the nucleus of one cell into a different cell. Subsequently, several researches were conducted on cloning based on mice, cows, monkeys, sheep, goats and rats, the ultimate aim of which was to clone humans.

On December 27, 2002 CLONEAID (a human cloning company founded by Rael) claimed the birth of the world's first clone baby in an undisclosed location and on January 3, 2003 they declared that another three clone babies are due within February. The Raelien cult believes that the human race was begun by extraterrestrials some 25,000 years ago. The CLONEAID Company said that its purpose is to achieve immortality by creating carbon copies of humans, then "uploading" the contents of the original person's brain into the clone. However, most peoples around the world have diverse and strongly held opinions regarding the morality and legality of cloning humans.

Therefore, regardless of whether a cloned human being was actually born as claimed, our society should evaluate legal and ethical dimensions of human cloning. Because, if the Raelien cult's claim is false, it's only a matter of time before it happens. After all, the Raeliens are not the only ones engaged in this horrifying enterprise. A fertility clinic in Italy and an embryology laboratory in Kentucky and several others around the world also claim to be close.

That is why, at present, legality of human cloning has been at the forefront of discussion among government bodies around the world. Nineteen European nations signed a ban on human cloning on January 12, 1998. Denmark, Estonia, Finland, France, Greece, Iceland, Italy, Latvia, Luxembourg, Moldova, Norway, Portugal, Romania, San Marino, Slovenia, Spain, Sweden, Macedonia and Turkey all signed the agreement. The German government did not sign it, because its current laws, created in response to Nazi genetic engineering experiments, were stricter than the signed ban. The European ban prohibited any sort of intervention seeking to create human beings genetically identical to another human being, whether living or dead. But it will still allow for all other cloning for research purpose. On the other hand, although U.K didn't sign the agreement, under the national legal system it allows for a ban on cloned embryos being implanted into wombs. But it does not ban therapeutic cloning using cell nuclear replacement for research -- the technique used by the American firm and to produce Dolly the sheep.

At present, in USA, five states out of fifty prohibit the cloning of human beings. In most American states, specific exceptions are provided for the purpose of scientific research and cell-based therapies. With the exception of Missouri, all states with human cloning laws set

forth civil penalties for violations, as high as ten million dollars in Louisiana and Michigan. Criminal sanctions for the cloning of human beings exist only in the state of Michigan, where human cloning is a felony punishable by imprisonment for up to 10 years.

In Australia, the proposed law would impose a maximum 10-year jail term and $66,000 fine on anybody who sold human sperm, human eggs or embryos. Researchers would face the same stiff penalty if they tinkered with human cells in an attempt to change the offspring's physical characteristics, including eye colour, or internal characteristics.

Most of the states around the world are yet to enact legislation on this because the potential for human cloning is so great; scientists that it would be premature to stop research now, especially seeing as the world is just beginning to understand the possible applications of the technology.

However, the matter of cloning cannot be settled as a mere legal matters, ethical, social and religious dimensions should also be considered. And perhaps the prohibition on cloning around the world is sought based on ethical and religious viewpoints.

The official opinion of the Roman Catholic Church is that every possible act of cloning humans is intrinsically evil and could never be justified. The Church even argues that just ends do not justify immoral means. On the other hand, some Jewish scholars do not believe that potential violations of human dignity are reason enough to prohibit human cloning. They believe that the likely benefits of developing cloning technology outweigh the potential costs, provided man fulfils his obligation to minimise violations of human dignity. But Some Jewish thinkers fear that cloning humans might harm the family by changing the roles and relationships between family members that define their responsibilities to one another as well as patterns of inheritance.

Islamic attitudes regarding human cloning stem from Muslim beliefs and interpretations of the Holy Koran. Most of the Islamic thinkers emphasise human cloning could affect kinship, which is a key concept in Islamic law. As cloning would result in a loss of kinship because it creates children who lack either a mother or a father, this would be inimical to Islamic society; many of its laws, such as those affecting inheritance and marriage. Islam regards spousal relationship through marriage to be the cornerstone of the prime social institution for the creation of a divinely ordained order. Consequently, Muslim focus in the debate on genetic replication is concerned with moral issues related to the possibility of technologically created incidental relationships without requiring spiritual and moral connection between a man and a woman. Therefore, from an Islamic standpoint it is morally and religiously wrong to employ cloning technology for purposes other than therapeutic.

There are many questions that need to be settled before the legitimisation of the cloning process. Preamble of the Universal Declaration on the Human Genome and Human Rights adopted unanimously by the UNESCO on November 11, 1997 provides that research on the human genome and the resulting applications should fully respect human dignity, freedom and human rights, as well as the prohibition of all forms of discrimination based on genetic characteristics. Article 11 of the declaration states that practices that are contrary to human dignity, such as reproductive cloning of human beings, shall not be permitted. States and competent international organisations are invited to co-operate in identifying such practices and in taking, at national or international level, the measures necessary to ensure that the principles set out in this Declaration are respected.

To conclude, strong regulatory regime to control the implementation of human cloning should be developed at the both national and international level. It is expected that world community and state parties will take the leadership role, before the big corporations decides to proceed with it to meet their own needs and greed's and makes it a beautiful 'commodity' to do business.

Mohammad Monirul Azam is an Advocate and human rights activist.