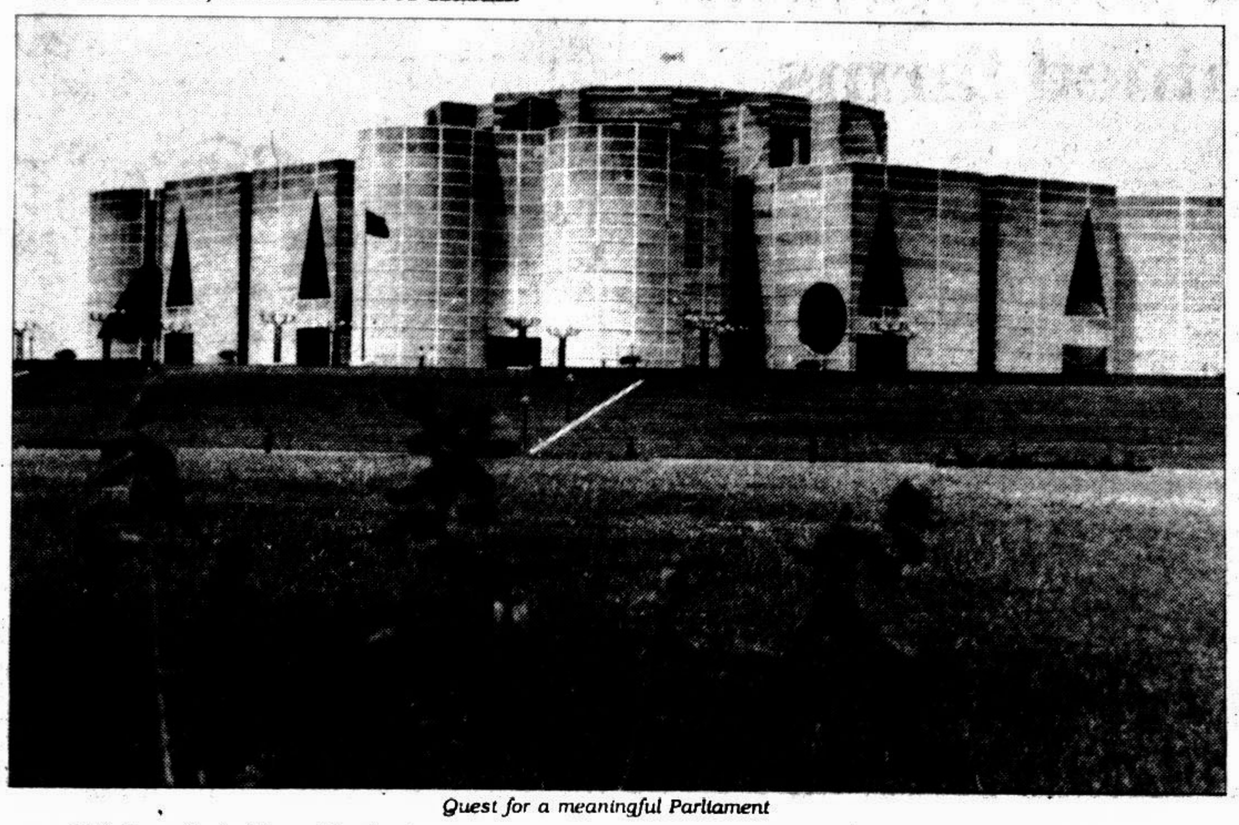
Law and Our Rights

Constitutional Conundrum and Conventions

Constitutional conventions can either develop over a period of time through body politic or much more quickly through a political agreement. They can provide the much needed flexibility and change when the formal mechanism of Constitutional amendments is not possible in the short term, writes Manzoor Hasan.



Quest for a meaningful Parliament

The country seems to have reached an impasse: politically and constitutionally. But there may still be a solution to this deadlock. Let me propose a constitutional paradigm which would take into account the aspirations of the main parties. Essentially, the present impasse has to be resolved within the framework of the present Constitution but by employing a mechanism which is not catered for by the latter. The demand for the caretaker neutral administration to oversee the forthcoming general elections has come about over the recent years but due to various reasons the political parties have not been able to resolve either prior to the resignation of the Members of Parliament or since their resignation. One of the main impediments has been the lack of provision in the Constitution to allow the formation of a caretaker neutral administration.

The Constitution of Bangladesh is a written one but not unlike most countries Bangladesh is not just governed by the written legal rules of the Constitution. The broader definition of Constitution is a collection of the legal rules and the non-legal rules. This definition of Constitution is applicable to both written and unwritten Constitutions. But the incontrovertible fact is that the legal rules, either within a written Constitution or an unwritten one, cannot operate in isolation. The Constitution, the Acts of Parliament, the Rules and Regulations and the decisions of Judges are only the legal components of any government. They form the "visible" parts of the government but then they are supplemented, modified or even nullified by the constitutional conventions. These conventions, I would describe, as the "invisible" parts of the government. These constitutional conventions can either develop over a period of time through body politic or much more quickly through a political agreement. It is the latter that I would like to concentrate on in the context of the present constitutional impasse.

Constitutional historians will be able to put forward examples of many agreements arrived at by the politicians to work in a particular way. These agreements are immediately binding, morally and politically. At a later stage these agreements can be, if felt necessary, enacted by the Parliament to become the law of the land. The effect of such conventions is to supplement, modify or nullify a provision of the Constitution. A medical analogy can be drawn by stating that such a constitutional convention paralyses the arm of the law but does not amputate the limb; it merely makes its use impossible. There are many examples of this effect of constitutional conventions.

In many Constitutions the head of state is given the legal power to veto or refuse his assent to laws passed by the legislature. This power has been nullified by constitutional conventions. Nowadays, the head of the state of the United Kingdom by constitutional convention does not refuse her assent to Bills or disallow an Act which has been duly passed by the Parliament of a member of the Commonwealth and assented by the Governor-General.

The Third French Republic and the United States provide a convention against the re-election of their respective Presidents for a second and a third term, respectively. Constitutional conventions can also transfer powers granted in a Constitution from one person to another. The Canadian Constitution gives a clear power to the Queen's representative, the Governor-General, to appoint whom he pleases to aid and advise him in the government of Canada. In practice, by constitutional convention, the Governor-General appoints ministers on the advice of the Prime Minister. Similarly, the power of the head of state is transferred to others in the exercise of, among other things, the dissolution of the Parliament.

In a similar manner and in order to extricate ourselves from the present political and constitutional impasse an agreement can be reached by the political parties to transfer the executive power either to the President or to an agreed third person to form a neutral care-taker administration. Furthermore, the agreement can set down a new set of timetable for all the formalities in relation to a nationwide general election. In other words, such an agreement can bring into play factors which will become binding, morally and politically, and remove the present "constraints" of the Constitution. Such an agreement will have the effect of supplementing the existing constitutional provision. It will then be a matter of constitutional convention or, if felt necessary, turned into law by necessary amendments in the Constitution or by judicial recognition.

In conclusion it has to be stated that the constitutional conventions must not be seen in isolation from the body politic and the law of the Constitution. The constitutional conventions can provide the much needed flexibility and change when the formal mechanism of constitutional amendments is not possible in the short term or will become politically and financially extremely expensive in the medium to long term. Above all, in the words of Dicey, constitutional conventions were "intended to secure the ultimate supremacy of the electorate as the true political sovereign of the State." The onus has always been on the politicians to find a resolution and at this eleventh hour it is even more important for common and constitutional sense to prevail to save us all from a prolonged period of unrest which can only be against our national interest.

Manzoor Hasan — Brrister-at-Law

Preventive Detention: The Ultimate Choice of the Government

by Isaac Robinson

15 students of the Jagannath Hall are detained under the Special Powers Act 1974. They are among the 96 who were arrested during the police raid on 31 January. Their detentions constitute the second phase of abuse of law by the government. Earlier they were arrested without warrant under section 54 of the Code of Criminal Procedure.

The preventive detention law, as enumerated in the Special Powers Act 1974, authorizes the government to detain any person with a view to preventing him from doing acts subversive to the safety and security of the state. Contrary to the principle of criminal justice, this law empowers the government to detain any person without any charge of specific breach of law against the person.

It is a very extra-ordinary measure which empowers the government to detain a person only when the government is reasonably satisfied that such a person is a real threat to the safety and security of the state. Since it is against the spirit of the constitution to grant to the government the discretionary power to detain a person, modern constitutions do not entrust the government with this power in a unfettered term. Thus in many states preventive detention law can only be applied during Wars and Emergencies. In some states there are important safeguards against government's use of this power coupled with the right to compensation for wrongful detention. Some of the states do not even recognize such power of the government. The Bangladesh Constitution of 1972 didn't contain any provision of preventive detention. Prior to the second Amendment of the Constitution, the government had no power to issue order of detention.

Thus a republican Constitution doesn't, except in extra-ordinary circumstances, grant this power to the government as since that would amount to violation of the principle of rule of law and the constitutional right to life and personal liberty. As we know, the foremost principle of rule of law, as said by Dicey, is that no man is punishable or can be lawfully made to suffer except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land.

But what we see in Bangladesh is a completely different picture. Government use the law to suppress opposition political movements. In addition to the government's power, District Magistrates and Additional District Magistrates are also given the power to issue detention orders. This has caused increase of the magnitude of detention orders. According to Amnesty International Reports 35,000 people were detained under the Special Powers Act during the period up to August 1975, 1,00,000 during 1975-1981 and 1,50,000 during 1982-1990.

Preventive detention is no longer an extra-ordinary measure now in Bangladesh. It has become a routine work for the government. Thus, when 96 students were arrested from the Jagannath Hall, it was not difficult to understand that many of them would be detained under the Special Powers Act. That was something like a "regulation shot" by the government.

Why detaining under the Special Powers Act? There are penal laws and procedures for every possible kind of offence. Should we believe that all the three *lac* people who were detained in the last 20 years were actually threat to the safety and security of the state? Obviously not.

Unfortunately our governments do not make any distinction between the government and the state. The Special Powers Act is meant to preserve the safety and security of the state and not of the government. In the name of preserving the safety and security of the state, government use the law for its own political purposes.

The law has lost it's necessity as since in 95 per cent cases the detention orders, while challenged before the High Court Division, are declared to be illegal by the High Court Division. This make it evident, how indiscriminately the law is being used.

This is the way how constitutional rights to life and personal liberty are sidetracked by the technical use of a law. From the constitutional point of view it assumes that many safeguards are made in the constitution concerning arbitrary arrest and detention by the government. But the people have to decide whether they want to be happy with mere mentioning of the rights in the constitution.

In fact the constitutional safeguards against the arbitrary arrest and detention are either ineffective or insufficient. They are ineffective inasmuch as the bulk of the detained persons has no means to resort to legal remedies. It is true that some lawyers and human rights organizations are extending their hands to them. But compare to the large number of detenu, the efforts are very negligible. A detenu who is not luckly enough to have legal assistance, shall have to wait for four months (120 days) before he is placed before an Advisory Board which would verify the propriety of the detention. If the person is unlucky to get favourable result from the Advisory Board, his detention would continue for a indefinite period.

The constitutional safeguards are proved to be insufficient even if one can afford legal assistance. Order of detention can be challenged in the form of a writ of *habeas corpus* (not mentioning section 491 of CrPC which is much more time consuming). For filing a *habeas corpus* petition, the detenu must have his grounds of detention, communicated to him by the government. Under the law, the government can take maximum of 15 days time to communicate the grounds. Thus, 15 day are normally elapsed before the petition of *habeas corpus* is filed. And then there would be obvious delay in entertaining the petition as the High Court Division is heavily overburdened with the writ of *habeas corpus*. Sometimes the arbitrariness of the government goes to such extent that the government issues new order of detention after a previous detention order has been declared illegal by the High Court Division.

Now even if the detention is declared illegal and the person is released from the jail, will you say that the person has received adequate relief? What about the loss of liberty which he suffered at the whim of the government?

Unfortunately, neither the law has provided for any adequate relief nor the Court has laid down any precedent.

It is not out of place to mention that in many countries, there are provisions in law for providing monetary compensation to a person who has been illegally detained by the government. Even in India, where there is no such provision in law, there are examples where the supreme court has awarded exemplary costs to the legal representatives of the detenu for the government's failure to produce the detenu.

In a famous Indian Supreme Court case, popularly known as the *Rudul Shah* case, the Court has indicated that the purpose of granting compensation in such cases is two-fold : Firstly to penalize the state for failing to heed the mandates of the Fundamental Rights. Secondly, as mere release from illegal detention is inadequate, the detenu requires additional help by way of monetary damages.

We do not known how long this repressive law will be used to curtail the constitutional rights of the citizen. The nation will get rid of all the repressive laws only after a truely people's government is established. Until then we can hope that the Court, being the protector of citizen's rights, would explore new dimensions to protect the people from the arbitrary arrest and detention by the government.

Isaac Robinson — General Secretary Law Review, member Ain-O Salish Kendra.

Child Camel-Jockeys

High Court orders Govt to submit report in 3 weeks

A division bench of the High Court Division of the Supreme Court comprising Mr Justice Bimalendu Bikash Roy Chowdhury and Justice Md Abdul Mannan on 7 February, 1996 gave a direction upon the Secretary, Ministry of Home Affairs to submit a Report on kidnapping, abduction and trafficking of Bangladeshi children outside Bangladesh especially regarding their engagement in the Middle East countries as camel jockeys contrary to the provisions of the Constitution and the International Convention on the Rights of the Child and also asked for measures taken by the Government to ensure the safety of the children of Bangladesh within three weeks from the date of receipt of the Court's Notice.

The Court gave the direction after hearing the submission of both the parties in a Writ Petition filed by three children against Bangladesh represented by the Secretaries of Ministry of Foreign Affairs, Ministry of Home Affairs, Ministry of Social Welfare and Ministry of Women and Children Affairs questioning the failure of the Government to prevent camel race using Bangladeshi children as jockeys in United Arab Emirates. The children were (i) Issa Nibras Farooque (aged 7), son of Dr. Mohiuddin Farooque, represented by his father; (ii) Miss Samai Haider (aged 11), daughter of Mirza Hussain Haider, represented by her father; and (iii) Mirza Muntasir Hasan (aged 9), son of Mirza Quamrul Hasan, represented by his father.

The Petition moved by Dr Mohiuddin Farooque, Advocate, and Secretary General of Bangladesh Environmental Lawyers Association (BELA) on behalf of the children pointed out that since 1989 there have been many reports in the national and international media that children and minors of our country were being smuggled out of Bangladesh illegally to some gulf countries specially the United Arab Emirates (UAE) for engaging them as jockeys for camel race which continues for weeks and long distances with the technique of using the panicking screams of the children as the scary force that makes the camels run faster. The children receive brutal behaviour from the organizers of the races who keep them malnourished to ensure their under weight. News report also suggest that a number of children have died during such inhuman sports which are the end results of a chain of heinous criminal activity and are shocking for the nation and is specially frightening to the children of our country.

A number of international media including the BBC also telecasted horrifying visual reports on the Bangladeshi children presenting dreadful scenario which psychologically affects the children. All these have made the future generation panic-ridden who being minors took this attempt of expressing their grievances and those of their generation yet unborn for judicial redress from the adult generation. Through this the petitioners have, in fact, sought for internagenerational justice, responsibility and equity.

Newspaper reports on the recent week long dreadful camel race using the Bangladeshi children held in UAE from 31 December, 1995, titled as Grand Zayed Race has further shocked the common people specially the younger generation. The petition was in protest against such use of the children of Bangladesh as subject of sports of the rich in violation of their fundamental rights as citizens of Bangladesh and the failure of the authorities to protect them and prevent recurrence of such horror. Once some of these kidnapped, abducted and trafficked children have been located in the UAE no effective step has been taken by the authorities including the foreign service officials in Bangladesh diplomatic missions abroad leading extravagant life at the expense of tax-payers. No satisfactory evidence exists to suggest that these children have been brought back or that no children were being smuggled out to UAE for the said purpose although there are penal laws both national and international which is clear manifestation of government inefficiency in discharging statutory duties and obligations under various laws of the country and the Constitution of Bangladesh and also the Convention on the Rights of the Child ratified by Bangladesh on 3 August, 1990.

Mr. Hasan Arif, Deputy Attorney General appeared on behalf of the Government. The Court has fixed 27 March, 1996 for further order on the matter after the Report it placed to it.

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Uncertainty over Farmers' Rights to Seeds

by Alex Diang'a

THE fear of many farmers around the world that may lose the right to save seeds from their crops and exchange them freely with their neighbours continues to overhang international efforts to stem the alarming global loss of crop varieties.

About three-quarters to the world's crop plant varieties have become extinct this century, according to the United Nations Food and Agriculture Organisation (FAO). It estimates that extinctions are now running at 50,000 a year.

Slowing the rate of loss is the aim of the Biodiversity Convention agreed at the 1992 "Earth Summit", but some farmers' representatives and environmental activists feel that the Convention's god intentions are being thwarted by the demand of transnational corporations to be able to patent the new plant varieties they develop.

The fear is that new patent will shift control of crop varieties, their genes and their seeds from farmers to corporations. The argument runs that this would accelerate biodiversity loss because, for reasons for short-term profit and ease of management, corporations tend to rely on a few varieties, whereas farmers traditionally spread the risk from pests and had weather by cultivating many varieties.

In India, concern over the issue runs so high that several massive farmer's demonstrations have taken place.

Michael J Roth of the United State-based Pioneer Hi-Bred International dismisses the protests as politics.

"The concern of Indian farmers has been overstated and the huge demonstrations are nothing but a small fraction of Indian farmers," says Roth, one of the hundreds of participants and lobbyists at the second conference of the signatories to the Biodiversity Convention in Jakarta in November.

"A majority of farmers in India would like to have improved seeds", he adds. "In fact, farmers are ready to pay money to seed companies for research" in order to obtain good quality seeds. (The core of the argument for patenting is that innovation will not occur unless the fruits of research are protected.)

However, fellow conference participant Nelson Alvarez, a researcher with the NGO Genetic Resources Action International (GRAIN), considers the fears of farmers in India and other countries are justified because the recently concluded "Uruguay Round" international trade agreement requires member countries to pass legislation protecting the rights of commercial plant breeders.

Farmers will be the losers, warns Alvarez : "They will no longer be able to save seeds of protected varieties and exchange them freely with their neighbours, as they have previously done."

They will in effect "become renters of germplasm from companies" in the words of Pat Roy Mooney, who heads another campaigning group, Rural Advancement Foundation International. (Germplasm are cells which carry the hereditary material of plants.)

Ironically, most hybrids have been developed from plant varieties in developing countries, whose governments and farmers have never received any payment. in such cases, the Third World has lost out twice : by failing to be paid for the original plant material and now by paying high prices for hybrid seeds, many of which also require large applications of fertilizers and pesticides.

Clearly, the resolution of this issue will lie in the exact wording of national legislation, though given the power of transnationals in an era of free enterprise and global capitalism, it will be hard for Third World governments to resist the demands for laws favourable to the international seed companies.

But in the corridors of the Biodiversity Convention meeting in Jakarta, Professor Anil Gupta, of the Indian Institute of Management, suggested another factor. If companies restrict farmers from using seeds from one season to another, he said, then farmers have the right to boycott the companies' products.

"Consumers have tremendous power," he commented, "and they can win through collective power."

Lawscape

Rule *Nisi* on Government for Detaining 8 During Mop-up

Eight writ petitions were filed at the High Court Division of the Supreme Court on Sunday, January 28, challenging the preventive detentions of eight persons arrested earlier by law enforcing agencies during the on-going sweep against illegal weapons.

The rules asked the concerned officials to show cause if the detained persons were not held in custody without lawful authority or in an unlawful manner.

Advocate Nizamul Islam Nasim filed the petitions for the detenues. Commenting on the issue advocate Nasim said that the arrested persons were not shown any warrant of arrest, nor any order from any authority.

He said that the law enforcing agencies had failed to serve any ground for arrest of those in Dhaka while for those of Habigonj and Dinajpur, the grounds were "vague and unspecified."

Anti Terror Bill Raises Fear in Philippines

The Philippines government says a new anti-terrorism Bill is aimed at foreign Islamic fundamentalists trying to take advantage of the country's free and easy ways. However, many legislators and journalists fear the real targets may be home-grown critics.

The Bill and three similar proposed legislative changes would facilitate arrests without warrants, telephone-tapping and authority to peer into bank accounts.

The government says the legislation is aimed at preventing foreign terrorists from using the Philippines as a base. The country has been on a terrorist alert ever since authorities discovered a plot to kill the Pope during a visit to Manila in 1995.

Our readers, legal bodies and lawyers are invited to send us factual tidbits, information, and dates for any upcoming seminars, for publication in "Lawscape".