Law and Our Rights

Living in an Era of 'Executive Whim and Caprice'

by Isaac Robinson

Two incidents of recent time are well enough to depict the present state of legal and constitutional rights of the people of Bangladesh

Incident I : Pankaj Basu, a tailor from village Kasheani, district Gopalganj was taken away from the Jagannath Hall during the police raid of the hall on 31.1.96. Ninety-six students from a single building of Jagannath Hall were arrested on the raid.

Pankaj was primarily detained for one month under the Special Powers Act. Later his period of detention was enhanced for three more months.

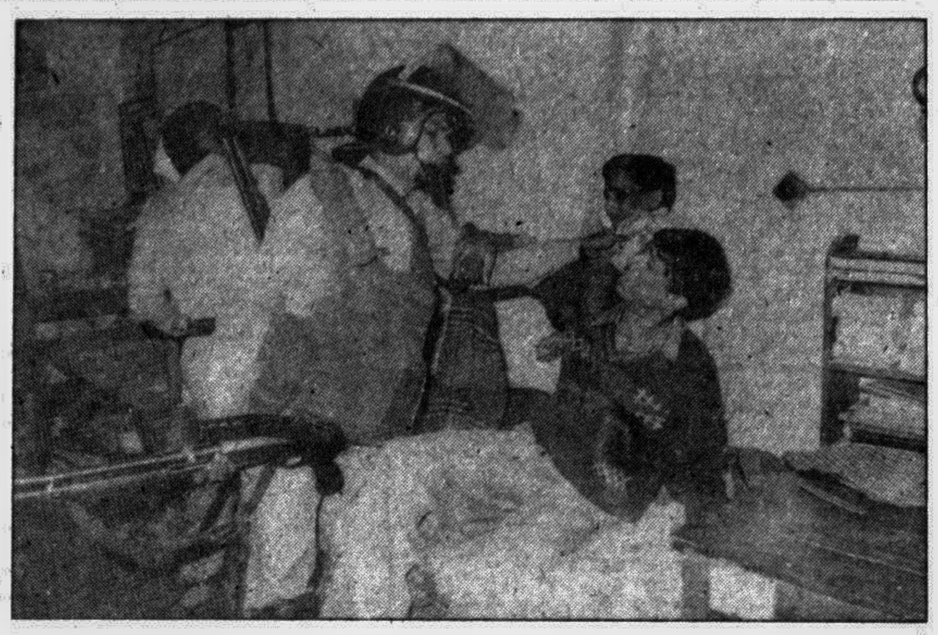
Pankaj was not a resident of the hall, nor was he a member of the group which protested the Prime Minister's visit to Bangla Academy. The reason he entered the hall was to visit two neighbours and childhood friends who were hall residents. Pankaj visits them every few months when he comes to Dhaka and brings money or news from their families. But this time he couldn't even see his childhood friends before he was inhumanly beaten, dragged and picked up into the police van.

Incident II — Md. Rezaul Karim, a Final year student of MSC in Physics of University of Dhaka was taken into custody in the morning on 9.2.1996 from Fazlul Huq Hall, along with other, during a joint military/BDR/police search carried out in the Hall. Rezaul was given detention for thirty days in the Dhaka Central Jail.

It appears from a certificate given by a House Tutor of Fazlul Huq Hall that Rezaul was taken away only because a mattress made of cloth from which military uniforms are made was found in his room. The said mattress was given to him by a friend and he did not have any knowledge of the said material from which it was made.

Interestingly, the detention order of Rezaul contained "it was necessary to detain the detenu in order to safeguard law and order." One should be astonished to find any nexus between using a particular mattress and safeguarding law and order.

The detention order of Rezaul was challenged before the High Court Division of the Supreme Court and the Court on 4.4.96 has declared the detention order "to have been made without lawful authority." But before that two months had already elapsed during which an innocent student of University of Dhaka spent two months of his life inside the four walls of Dhaka Central Jail solely at the whim and caprice of some servants of the Republic.



The way they arrested Pankaj

Preventive detention: Theory and practice

Preventive detention is a very extra-ordinary measure. Contrary to the principle of criminal justice, the law relating to preventive detention empowers the government to detain any person without any charge of specific breach of law against the person. For such a repressive character of the law, this law has not be accepted by many states. Even in Bangladesh, this law could not been applied prior to the Second Amendment of the Constitution. In many states this 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.

In contrast, it has become a routine work for the government in Bangladesh to use the law to suppress the constitutional rights of the people. This is evident from the fact that during the last 22 years over 3 lac people were detained under this law.

Legal rights, their inadequacy and the virtual non-access

The legal remedy available in favour of the detenu is to go to the High Court Division of the Supreme Court for a order (called *Habeas Corpus*) for the detention to be declared illegal. But there is always delay in entertaining the petition as the High Court Division is heavily overburdened with the writ of *habeas corpus*. Furthermore, not all the detainu have the opportunity to resort to such kind of constitutional remedy. This is evident from the fact that compared to the 3 lac detention during the last 22 years, very few detentions were challenged before the High Court Division. Lack of opportunity to resort to such a remedy has faded the purpose of the remedy. There are some NGOs and lawyers who give legal assistance free of costs to the helpless detanu. But compare to the huge number of detentions, there efforts are very negligible. Even if the case of a particular detention is successfully entertained by the High Court Division atleast a month is elapsed between the date of actual detention and the date of release. Detention during this period is almost unavoidable.

Persons who could not resort to this remedy should have to wait for the decision of an Advisory Body formed within 120 days of the detention date.

In the second place some people can avoid detention if they save influencial friends and relations who can pursue the government to withdraw the detention. This extra-legal remedy is limited for only some influencial persons and the general citizen has almost no access to this.

Preventive detention which should have been a very extraordinary measure applied only in extreme circumstances, has became a general phenomenon. From the interpretation of the constitution the conclusion to which we can arrive is that the detention of Pankaj and Rezaul violate their fundamental rights guaranteed under Article 31 and 32 of the constitution. Their constitutional right to equal protection of reasonable law and the right to life and personal liberty can't be taken away by the executive authority. But do constitutional provisions actually save the people from arbitrary arrest and detention by the executive? The answer is no, experience shows us.

For all procedural and practical reasons, general people do not have proper access to those constitutional safeguards. If they had access to those letters of the constitution, then why Pankaj along with thousands of undiscovered Pankaj and Rezauls are detained at the evil desire of the executive?

Sovereign immunity versus compensation on violation of fundamental rights

Release from detention by an order of the High Court Division after being unlawfully detained for two or three months is undoubtly not adequate remedy from the victims point of view. Nor is it consistent with the spirit of law that the perpetrators of an evil designed arrest and detention are spared from the hands of justice solely in the name of Sovereign immunity. In many country there are laws which entitle the citizen to compensation for wrong done to the citizen.

Even in England where, prior to 1947, the Crown enjoyed immunity from tortuous liability as per the maxim "King can do no wrong", the Crown is now made vicariously liable to a great extent under in Crown Proceedings Act 1947 for torts committed by its agents.This Act makes the Crown, in principle, liable for torts to the same extent as a private person, subject to certain exceptions such as, defence, maintenance of the armed forces and the postal services.

Apart from legislations containing such a right, there are important judicial precedents which entitle people to such a right in the absence of specific legislation.

For instance, the Indian Supreme Court in *Khatri V State of Bihar*, Raised an important constitutional question whether the Court can grant compensation to a person who has been deprived by the state of his life or liberty in violation of Article 21 of the Indian Constitution. The Court answered in the affirmative saying that if it was not so, then the concerned Article of the constitution would be reduced to a nullity.

Similarly in a famous Indian Supreme Court case, popularly known as the *Rudul Shaha* 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.

Following the examples of civilized nations we must not confine our eyes towards the legislature only to protect citizen's rights. We should expect more from our Supreme Court so that it creates new and real remedies not illusory remedies, which are indispensable to the enforcement of the fundamental rights.

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

Lawscape

Law Review Organizes Consultation Programme on "Violence in the Universities and Killing of Students."

Hundreds of students were killed in violences in the Universities over the last 25 years. Only in Dhaka University 56 students were killed after Independence, while 26 died in Rajshahi University.

As a part of its investigation on legal steps taken in those killings, Law Review is going to publish its preliminary report on the 15th April. The programme will be held at the office of Odhikar, 3/6, Segunbaghicha, Dhaka.

Lawyers, journalists, human rights activists and leaders of student bodies are invited to attend the programme.

BELA Organizes Workshop on 'Incineration Technology: Approaches, Issues & Alternatives'

Disposal of hazardous waste in the third world nations in disguise of technology transfer has been accelerated in an alarming proportion due to stringent enforcement of waste management regulation in western countries. Attempts are still continuing to install such rejected industries in Bangladesh from many of those nations.

It is commonly known that turning the waste into wealth is accomplished through introduction of Incineration Technology, which in theory uses heat to convert complex toxic organic compounds into mostly carbon dioxide and water. However, in practice, by transforming solid and liquid toxic wastes into gaseous emissions, incinerators actually increase the volume of waste by mixing it with air, and dispersing pollutants over land and water and into the atmosphere.

To assess the implication of flagrant development of toxic incinerator technology in Bangladesh and to create awareness regarding its possible impacts on human environment and ecology, with cooperation from BARC, BELA is going to organize a half day workshop on Incineration Technology: Approaches, Issues & Alternatives in association with Greenpeace International, on **15 April 1996, Monday, at 3:00 pm, at BARC Conference Room, Farmgate, Dhaka.**

The theme speaker is Dr Paul Connett, a chemist and one of the world's leading incinerator critic and given over 1000 public presentations on the topic in 47 states in US and in 25 other countries around the globe. He acted as member of the Office of the Technology Assessment, Washington, DC-an arm of the US Congress, for their study of solid waste management in the US. Besides, numerous papers were published on Dioxin, Risk Assessment, Waste Management, Chromium and Nucleic Acids, and also made video tapes on such issues.

International Standards for Migrant Workers

by Saira Rahman

MIGRANT workers are a permanent and global institution. It has been estimated that the number of international migrants in the world, including refugees is in an excess of 125 million. More and more people of diverse family, educational, vocational and technical backgrounds are crossing borders and seas to look for work in a variety of forms — usually in developed countries in the west. They go as both documented migrant workers who are sent abroad by their governments, or as undocumented migrants, who are somehow smuggled out of the country illegally in order to look for work.

Migrant workers are a valuable source of foreign exchange for Bangladesh. Unfortunately, some developing countries, including our own, are doing little to protect the rights of their 'golden geese' abroad. The workers, specially the female migrant workers, are under paid, abused and made to live in appalling conditions. Some languish in jail, and there are true stories of foreign maids being abused and even killed by their masters or mistresses. Thus, it is both the sending and receiving countries which violate the rights of these workers.

Recognising the fact that the phenomenon of migrant workers has not only humanitarian considerations but also international political, economic and social effects, the international community came together and the United Nations General Assembly approved of a new International Convention on the Protection of All Migrant Workers and Members of Their Families on 18 December 1990.

The Convention:

The Convention recognises that the migrant workers and members of their families are an unprotected population whose rights are not addressed by the national legislature of the receiving states — and by their own states of origin. Accordingly, it is the responsibility of the international community, through the United Nations, to afford them measures of protection.

The Convention provides for an international definition of a migrant worker and extends fundamental human rights to both documented and undocumented migrant workers. The Convention also establishes international standards of treatment through the extension of human rights to such workers and their families.

The Preamble of the International Convention has 16 points. Among these points, the Convention declares that the State parties signing and ratifying the Convention must:

— take into account the principles embodied in the basic instruments of the United Nations concerning human rights, in particular, the United Nations Declaration of Human Rights

— take into account also the principles and standards of the International Labour Organisation

— consider the situation and vulnerability of migrant workers and their families and that their rights have not been sufficiently recognised everywhere

— realise the importance and extent of the migration phenomenon, which involves millions of people and affects a large number of states in the international community

— consider that recourse to the employment of migrant workers who are in an irregular situation will also be discouraged if the fundamental human rights of all migrant workers are more widely recognised

— and are convinced therefore of the need to bring about the international protection of the rights of all migrant workers and their families, reaffirming and establishing basic norms in a comprehensive convention which could be applied universally.

The Convention also provides for freedom of thought, consciousness and religion (Article 12), requires states party to ensure respect for cultural identity (Article 31) and upholds the right to transfer earnings and savings (Article 47).

Overall, the International Convention seeks to eliminate the exploitation of all migrant workers and members of their families, including an end to their illegal or clandestine movements and to irregular and undocumented situations. It seeks also to establish minimum standards of protection for the workers and their families that are universally acknowledged. Thus, states lacking national standards will, under international pressure, ultimately bring their legislation closer in harmony with these recognised universal standards.

Ratification:

Twenty states must ratify this Convention in order for it to enter into force. However, even then it will only be binding on those states which ratify it. Obtaining approval of this convention is going to be quite an uphill task since the global public debate over migrant workers is intensifying and already officials of three major western countries have indicated that their Governments do not intend to ratify.

It is hoped that sending countries, which will gain from the dictates of the Convention, will lead in the ratification process so that they can pressurise receiving countries to do so as well. However, even if states do not consider ratification, provisions of the Convention can be included in the national legislations.

Conclusion:

The new International Convention on the Protection of All Migrant Workers and Members of Their Families is a necessary extension of global efforts to expand human rights and its implementation will go a long way towards upholding the humanitarian treatment of all kinds of migrant workers.

It is impossible to ascertain the timeframe in which the Convention will come into force. It took four years for the Convention on the Elimination of All Forms of Racial Discrimination and two years for the CEDAW convention to come into force. It took ten years for the two Covenants on civil, political, social, cultural and economical rights to come into force. However, it is hoped that both sending and receiving countries understand the urgent necessity of the new Convention and loose no time in ratifying it, or incorporating its Articles into their own statues and obeying its contents. Regional and global campaigning for the necessity of the Convention and to promote its ratification will highlight the plight of migrant workers and may thus help speed up the procedure.

Saira Rahman — Advocate, member of Odhikar: A Coalition for Human Rights.

Crusading Judges Step on Politicians' Toes

By D K Joshi

THE judiciary has suddenly taken a central role on India's political stage. There is a growing public perception that the courts are the only hope for reversing the trend of political corruption and administrative ineptitude. A series of recent decisions affecting issues from bribery to sewage treatment supports this view.

The most sensational was a Supreme Court ruling that investigations into a 656 million rupee corruption case must be pursued against everyone concerned "irrespective of his position and status."

This is political dynamite. The court was referring to 67 leading politicians and 11 civil servants named in a businessman's diaries, which allegedly show huge payments made to people helping him by acting as intermediaries with foreign companies.

The diaries and statements connected with them lay collecting dust for four years in the offices of the Central Bureau of Investigation (CBI) until mid-January, when the court insisted on action.

The court reminded the CBI of the tenet: "Be you ever so high, the law is above you." As a result, three cabinet ministers resigned, as did the president of the main opposition party and several other politicians.

During interrogation, the businessman, Surendra Kumar Jain, has claimed that large payments were made to the present Prime Minister, Narasimha Rao (Rs 35 million), and his late predecessor, Rajiv Gandhi (Rs 125 million).

"Judicial activism" was initiated by Chief Justice Bhagwati in the 1980s when he encouraged people to use "public interest litigation" as a way of securing justice for the marginalised and underprivileged.

But it caught the public imagination only in the past two years when the approach was used in support of human rights and environmental cases against the state.

The court has also given relief to people held in prison pending trial, some of whom have been behind bars for decades, and has ordered the closure of factories polluting the "world's most beautiful building," The Taj Mahal.

It has forced the government to provide better conditions and pay for child workers in match factories in Tamil Nadu state; directed the government to set up 16 sewage-treatment plants in Delhi; and ordered the prosecution of 27 Punjab policemen for allegedly gunning down four alleged Sikh militants in cold blood.

In recent months, however, the court has targeted the more sensitive and popular issue of political corruption and has pulled up the executive for failing to discharge its duties.

In the words of Justice Verma in the Jain corruption case: "It was unfortunate that the court had to step in to make investigating agencies do their duty."

Developments in India are echoed by the situation in Britain, where there has been an increase in the use of "judicial review" of actions taken by the executive arm of government. Several ministers have been told by judges that their actions were unlawful or contravened principles of fairness, prompting the retort that the judiciary is exceeding its powers and that Parliament is supreme.

In India, some constitutional expert, such as Nani Palkiwala, are unhappy with the judiciary's increasing foray into executive and legislative matters. Atal Bihari, leader of the Hindu fundamentalist Bharatiya Janata Party, also considers the trend unhealthy.

But Chief Justice Azin Mushabbar Ahmad, under whose leadership the judiciary has been flexing its muscles, contends that when derelictions of constitutional obligations and gross violations of human rights are brought to the notice of the Supreme Court, it cannot be expected to ignore them.

"It must act," he argues, "in a positive manner that will provide relief — which is real and not illusory — to the parties which exercise their fundamental rights in invoking its jurisdiction."

Supreme Court Say No to Political Judges

Shakil Shaikh writes from Islamabad

PAKISTAN'S Supreme Court has shown its teeth with a ruling that seeks to end the appointment of senior judges on the basis of political affiliation.

The first impact of the decision will be felt by 45 high court judges appointed in the past two years by Prime Minister Benazir Bhutto's government.

The Pakistan Bar Council appealed to judges affected by the ruling to stop work until their appointments had been re-considered in accordance with the new directive.

The ground-breaking decision also makes it mandatory for the government to consult national and provincial chief justices before appointing judges for the Supreme Court, Federal Shariat (Islamic) Court and the country's various high courts.

The move represents an important shift of power between the judiciary and the government. Successive governments, both elected and military, have leaned on the judiciary for their own political purposes. The judges have now finally reacted, and there are high hopes that the ruling will serve as the definitive interpretation of the relevant articles of the constitution.

Commented the Islamabad-based newspaper *The Nation*: "The judgement is historic ... and is likely to put a check on unbridled use of the manipulative powers of the executive."

Lawyers' organisations have welcomed the 20 March judgement and urged the government to implement it in letter and spirit.

The Chief Justice of the Supreme Court, Justice Sajjad Ali Shah, head of the five-member bench which handed down the judgement, was himself appointed by the Bhutto government in 1994 over three more senior judges.

However, after he accepted the judges' case for a hearing late last year, the government apparently became annoyed with him. His son-in-law in the Sindh provincial government was suspended, and his daughter's house was allegedly raided by the police, although the government denies complaints of victimisation.

Bhutto is unhappy with the Supreme Court ruling and says that anger is reflected in the judgment — an indirect suggestion that Justice Shah was angry over the harassment of his relatives.

In an effort to dispel the impression that the judgement is against her government, she also commented : "The judiciary has given a verdict about some of its own members."

She says the government may seek a review if its advisers recommend that the judgement is in violation of the constitution.

But the Chief Justice has since insisted that "the Supreme Court has the right to interpret the Constitution and to see as to what a particular provision of the Constitution means or does not mean, even if that particular provision is a provision seeking to oust the jurisdiction of this court."

He noted that "judicial power is inherent in the Supreme Court itself" and that its power as a constitutional court "can only be taken away by abolishing the court itself."

Wahabul Khairi, the Rawalpindi lawyer who instigated the case, said the verdict would strengthen people's confidence in the judiciary.

After years of interference with the judiciary by successive governments in Pakistan, the Supreme Court has put down its collective foot. Gemini News Service reports on a ruling that seeks to keep politics off the bench.

Opposition leader and former Prime Minister Nawaz Sharif described it as "historic and far-reaching."

The judgement bolsters the call for consultation in the appointment of judges by stressing that the procedure should "leave no room for complaint of arbitrariness or unfair play".

Political affiliation is acceptable, provided the candidate is "of an unimpeachable integrity, having sound knowledge in law and is recommended by the Chief Justices of the Supreme Court and the concerned high court."

It also emphasises that Chief Justices' opinions on candidates must be accepted "in the absence of very sound reasons ... by the President", and that ignoring a Chief Justice's veto will invalidate the appointment.

Several other requirements are listed, and the judgement also stipulates an end to the practice of "punishing" judges by transferring them to outlying parts of the country, except in the public interest. *Gemini News*

The writer is senior correspondent with The News *in Islamabad and Rawalpindi. He formerly worked with* The Muslim.