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From Big 'C' to Small 'c': How Comparative Constitutional Law Transformed Preventive Detention in Bangladesh

ISTIAK KAMAL TONMOY¹

ABSTRACT

This article talks about how the preventive detention law in Bangladesh was transformed though the impact of comparative constitutional law by relying on the principle of Small 'c' constitution. The unlimited and unfettered power of the Government by virtue of article 33 of the Constitution of Bangladesh and the Special Powers Act, 1974 was limited though the landmark case of Mrs. Aruna Sen vs Government of Bangladesh 27 DLR (HCD) 122. Throughout this article the impact of various judicial decisions of foreign countries which allowed the Court to establish that the authority of the Government to exercise the power of preventive detention must be reasonable and subject to judicial scrutiny has been highlighted. The impact of such foreign judgement is the said impact of Small 'c' constitution which transformed the law of preventive detention in Bangladesh.

I. INTRODUCTION

A. What is preventive detention?

Preventive detention is the practice of detaining a person with the purpose of preventing that person from engaging in any unlawful activity which poses danger to public peace or safety or is likely to cause public disorder.² Under this practice, the executive authority holds the power to bypass the authority of the judiciary and detain a person on the basis on suspicion only. Moreover, the authority also has the option to hold the detainee for uncertain time without giving any explanation. This is opposite from the usual practice. It has been widely criticized due to the unlimited power exercisable by the executive body and some even categorized it as a 'black law'. Such criticisms are understandable since it bypasses the usual legal practice and puts the detainee in a position where his future is entirely dependent on the executive authority and his right to defend himself is also limited. Moreover, preventive detention can be lengthy and most of the time is dependent upon the executive authority. This practice which is almost unfettered and arbitrary raises many questions and issues which have been

¹ Author is a Junior Associate at Haque and Associates, Bangladesh.

² M. Jashim Ali Chowdhury, An Introduction to the Constitutional Law of Bangladesh, 4th Ed, Book Zone Publications, 2022.

answered in many ways. That being said the debate surrounding this practice which goes against the usual flow of legal justice is still ongoing.

B. Big ‘C’ Constitution and Small ‘c’ Constitution

According to empirical research there are two types of constitution and these are: Big ‘C’ Constitution and Small ‘c’ Constitution.³ Big ‘C’ Constitution means constitution which is written, codified or formal. On the other hand, Small ‘C’ Constitution refers to unwritten, informal constitutions which are usually derived from judicial decisions, treaties, conventions etc.⁴ As a result, Small ‘C’ Constitution has a broader range compared to the Big ‘C’ Constitution and is often used to overcome the interpretive barrier of Big ‘C’ Constitution.

II. PREVENTIVE DETENTION IN THE CONSTITUTION OF BANGLADESH

In 1973 through the 2nd amendment the preventive detention became part of the Constitution. The goal was to ensure the validity of laws which included provisions for preventative detention. Otherwise, laws such as the Special Powers Act would be void due to being contradictory to the Constitution.

In article 33 of the Constitution the law of preventive detention has been enshrined. According to art.33(1) any person arrested has the right to be informed as to why he has been arrested and also the right to be represented by a lawyer. Art.33(2) prescribes that person arrested and detained to be presented before the nearest Magistrate within 24 hours. However, these rights are negated as provided by art.33(3)(b) which states that any person arrested or detained are not protected under art.33(1) and art.33(2). While art.33(4) provides Advisory Board mechanism to consider the continuance of detention along with the right to be heard in person such is done so in a period of 6 months which is a very long time. Moreover, art.33(5) states that the detainee to be communicated the grounds of his/her detention and also the earliest opportunity to make a representation against such order. However, even this right is negated by the proviso of art.33(5) which mentions that for the sake of public interest the authority has the right to refuse disclosure of grounds of detention. It is this specific part which provides the authority with abusive and arbitrary power in its own interest.

³ David S. Law, Constitutions in Peter Cane & Herbert Kritzer, eds., *The Oxford Handbook of Empirical Legal Research* (Washington U. School of Law Working Paper No. 10-02-05, 2010), available at SSRN: <https://ssrn.com/abstract=1555382>.

⁴ Adam Chilton, Mila Versteeg, (2022) ‘Small-C constitutional rights’, *International Journal of Constitutional Law*, 20(1), pp. 141–176. doi:10.1093/icon/moac004.

III. THE ROLE OF SMALL ‘C’ CONSTITUTION IN OVERCOMING THE TEXTUAL INTERPRETATION OF PREVENTIVE DETENTION IN THE CONSTITUTION OF BANGLADESH

A. The influence of Comparative Constitutional Law in changing the interpretation of art.33(4) and art.33(5) of the Constitution

From the textual interpretation of the **art.33(4)** of the Constitution of Bangladesh it can be understood that the goal of that provision is to detain a person, bypass the judiciary and establish executive authority. On top of that the proviso of **art.33(5)** mentions that the authority is not required to disclose facts regarding such detention. Due to these elements preventive detention under **art.33(4)** and **art.33(5)** can be considered as black law. Especially considering the fact that from the textual interpretation it seems that the authority can detain a person as long as they want without allowing them to present themselves before judiciary. However, that has changed through the influence of comparative constitutional law which played role in transformation of preventive detention from Big ‘C’ to Small ‘c’.

B. The Landmark Case: *Aruna Sen vs Government of Bangladesh (1975) 27 DLR (HCD) 122*

The land mark case through which the comparative constitution law influenced the change in interpretation of art.33(4) and art.33(5) of the Constitution and transformation of preventive detention from Big ‘C’ to Small ‘c’ is *Mrs. Aruna Sen vs Govt. of the People’s Republic of Bangladesh and others*⁵. This case was brought by Mrs. Aruna Sen challenging the validity of arrest and detention of her son Chanchal Sen.

On that case questions raised as to whether this issue of preventive detention which expressly bypassed the judiciary was even subject to judicial scrutiny along with the main issue being whether the satisfaction of the Court was necessary or not to detain the detained person. As per the textual interpretation of the Constitution the answer was no for both questions. However, the Court in this case overcame this bad law through the use of Comparative Constitution.

Justice Debesh Chandra Bhattacharya stated that the detaining authority was required to satisfy the Court for determining that there was reasonable basis for the satisfaction of the detaining authority as required under the law. So, in order to justify the detention, the detaining authority had to satisfy the Court that they had fulfilled all the constitutional

⁵ 27 DLR (HCD) 122.

requirements and presented all the materials through which a reasonable man may be satisfied that the detention was justified.

Then Justice Debesh Chandra Bhattacharya quoted the case of *Liversage vs Anderson*⁶ through the case of *Government of West Pakistan and another vs begum Agha Abdul Karim Shorish Kashmiri*⁷ where Hamoodur Rahman, J. mentioned the *Liversage vs Anderson*⁸ case. In the *Liversage vs Anderson*⁹ case Lord Atkin stated “Every imprisonment without trial and conviction is prima facie unlawful and the onus is upon the detaining authority to justify the detention by establishing the legality of its action according to the principles of English Law”. This was the first instance where the Court used comparative constitution law to support that the burden of proof to satisfy the Court that the satisfaction of the authority was of such that a reasonable man would agree with the detention was on the authority themselves. So, the principle from the *Liversage vs Anderson*¹⁰ principle is that the satisfaction of the authority has to be reasonable and the authority must satisfy the Court of such reasonable satisfaction claimed by them. The Court relied mainly on the principle set by *the Liversage vs Anderson*¹¹ case in this case.

Justice Debesh Chandra Bhattacharya also mentioned the case of *Shearer vs Shields*¹² where the House of Lords construed a provision in the Glasgow Police Act authorizing constables to arrest on the basis of reasonable grounds for suspicion and the House held that the burden of proving that such suspicion was reasonable was on the concerned constables. Also, the case of *Keshab Talpade vs Emperor*¹³ was quoted which was the earliest case to consider the *Liversage vs Anderson*¹⁴ case regarding the issue of legality of detention. On that case the Court struck down order of detention on the ground that it did not provide for reasonable satisfaction. Moreover, The Court mentioned the case of *Emperor vs Vimlabai Deshpand*¹⁵ where the Privy Council stated that the burden lay upon the authority to satisfy the Court that the authority had reasonable suspicion to arrest a person for having acted in the manner prejudicial to the public safety or the efficient prosecution of the war. Here, the authority was a police officer who could exercise such right under the Defence of India Rules. Furthermore,

⁶ 1942 AC 206.

⁷ PLD 1969 (SC) 14.

⁸ 1942 AC 206.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid.

¹² (1913) SLR 794.

¹³ (1944) F.C.R 57.

¹⁴ 1942 AC 206.

¹⁵ (1946) UKPC 18.

Then *the Government of East Pakistan vs Mrs. Roushan Bejoya Shaukat Ali Khan*¹⁶ case was quoted by the Court where the Supreme Court of Pakistan held that the arresting officer to justify the arrest by revealing reasonable grounds such as could satisfy the judicial conscience. By quoting these cases the Court established that the suspicion on which the authority arrests or detains a person has to be reasonable suspicion.

Another case which the Court mentioned is the case of *Gholam Jilani vs Govt. of West Pakistan*¹⁷ where it was held that the power of detaining authority was not immune to judicial review. Through this case the Court moved to establish that the satisfaction of the authority which the authority claimed to be reasonable was subject to judicial review.

After mentioning the aforesaid cases the Court held that there was no material before the Court on the basis for which a reasonable man may be satisfied that the detention of Chanchal Sen was justified and declared the detention illegal. The Court was able to overcome the barrier of textual interpretation of art.33(4) and art.33(5). The influence of comparative constitutional law is clear from the mentioned foreign judgements. Through the influence and interpretation of comparative constitutional law the Big 'C' has been frustrated by Small 'c' constitution.

IV. CONCLUSION

The law of preventive detention continues to be part of Constitution and the Special Powers Act, 1974 despite being a law which imposes significant risk to human rights violations and gives the authority arbitrary and unfettered power. However, with the *Aruna Sen case*¹⁸ Justice Debesh Chandra Bhattacharya was able to limit such arbitrary and unfettered power through the use of comparative constitutional law. This landmark case laid the foundation for the judiciary to chip away at the unlimited power of preventive detention. It also showed that the Executive Authority cannot completely shut down the power of judiciary to intervene especially in cases involved human rights violation. The influence of Small 'c' constitution paved the way for human rights to be protected by limiting the Big 'C' Constitution which is art.33(4) and art.33(5) of the Constitution of Bangladesh.

¹⁶ 18 DLR (SC) 214.

¹⁷ 19 DLR (SC) 403.

¹⁸ 27 DLR (HCD) 122.