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Judicial Enforcement of Constitutional Conventions: Examining the Misleading *Idrisur Rahman*

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Abstract: *The provision that the President is required to "consult" with the CJ to appoint the Judges of the SC was a constitutional convention for the most part during the period between 1975-2011. This convention of "consultation" was enforced by the SC in Bangladesh v Idrisur Rahman in the backdrop of non-confirmation by the Executive of some Judges as permanent Judges of the HCD even after the CJ's positive recommendation to that effect. To enforce the convention, the Court measured laws of the Constitution in the same parlance as the conventions of the Constitution; that is, it did not find any distinction between laws of the Constitution and established conventions. The Court thus adopted a historical approach to conventions. But, to this author's view, the Constitution of Bangladesh indicates a positivist approach to conventions. The paper also submits that in deciding the issue of enforcement of conventions, two aspects are particularly significant, which the Idrisur Rahman Court completely omitted in its analysis: first, the effect of the operation of conventions on laws of the Constitution; second, whether conventions are per se law or simply a material and non-binding source of law under the Constitution. Failure to address these issues has both rendered the judgment less convincing and has weakened its authority as a precedent. This paper aims to provide for these omissions of the Court. The attempt may be of guidance for the Court in any future litigation dealing with conventions in general or judicial enforcement of conventions.*

Keywords: Constitution of Bangladesh, laws of the Constitution, conventions of the Constitution, enforcement of conventions, custom and convention.

1. Introduction

This paper aims to examine *Idrisur Rahman*,[1] a leading Bangladesh Supreme Court decision on issues relating to conventions of the Constitution.[2] In this case, the Supreme Court enforced a constitutional convention against the executive. The Court identified the recognition criteria of the convention and enforced an

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1 *Idrisur Rahman v Bangladesh* (2009) 61 DLR 523 (HCD) (hereafter *Idrisur Rahman (HCD)*); *Bangladesh v Idrisur Rahman* (2010) 15 BLC 49 (AD) (hereafter *Idrisur Rahman (AD)*). For details of the Bangladesh Supreme Court's *Idrisur Rahman* verdict, see, *infra*, section 2 of the paper.

2 In doing so, the paper, however, does not address preliminary matters, such as the meaning, nature and growth of constitutional conventions. For these preliminary considerations of constitutional conventions particularly with reference to the Constitution of Bangladesh and to know generally the two sets of constitutional rules, that is, *laws of the Constitution* and *conventions of the Constitution*, see M Waheduzzaman, 'Judicial Recognition of Constitutional Conventions: The Elements Revisited' (2020) 31 Dhaka University Law Journal 121–31; The paper also does not enumerate specific conventions of the Constitution of Bangladesh grown out of the necessity of actual working of the written laws of the Constitution. To know about some specific conventions of the Constitution of Bangladesh, see M Waheduzzaman, 'Measuring Constitutional "Laws" and "Conventions" in Same Parlance: Critiquing the *Idrisur Rahman*' (2020) 8 Jahangirnagar University Journal of Law 47–48.

established convention in its jurisdiction. But, to this author's view, merely focusing on the recognition criteria of convention and finding a particular convention of its jurisdiction satisfying those criteria and henceforth judicially enforcing it couldn't sufficiently justify the Court's judgment. To this author's view, two crucial aspects were involved to determine the case which the Court fully omitted in its judgment.

First, since the Court was enforcing a constitutional convention, it was essential to consider the question of whether, in the Bangladeshi jurisdiction/under the Constitution of Bangladesh, conventions are *per se* law or simply a material source of law. *Second*, a convention is often found to interact dynamically with law/s of the Constitution. Hence, an analysis of the effect of the operation of the convention on the law of the Constitution was very pertinent but strikingly lacking in the Court's judgment. Broadly speaking, the first omitted aspect is an inquiry as to *law* and *sources of law* in the background of conventions under the Bangladesh Constitution, and the second one is an inquiry as to the *interactive effect* between law and convention of the Constitution.

This paper is an attempt to provide for the above omissions of the Supreme Court's *Idrisur Rahman* verdict. It is supposed to bear significance for any future judgment of the Court on constitutional conventions. The paper would identify the effects of the operation of the convention on the law of the Constitution. Knowing the different forms of effects, the Court can always deal more efficiently with the conventions or determine its relationship with the law of the Constitution. The paper would also show whether constitutional conventions are *per se* law or a material source of law in Bangladesh. This may be of direct use and guidance for the Court to decide any issue of judicial enforcement of constitutional conventions in the Bangladeshi jurisdiction.

The paper is composed of *six* broad sections. This introductory section briefly states the background of the paper and justifies its necessity. Section 2 analyses *Idrisur Rahman* as a leading Supreme Court decision on judicial enforcement of constitutional conventions in Bangladesh. Section 3 identifies three principal effects of the operation of convention on the law of the Constitution: making law *inoperative*; *transferring* legal power; and *supplementing* law. Section 4 examines which of these effects are particularly involved in the convention of *consultation*. Section 5 argues and justifies why *Idrisur Rahman* is a misleading decision on the issue of judicial enforcement of constitutional conventions and establishes the author's view and understanding of the relationship between law and convention and the question of judicial enforcement of conventions in Bangladesh. Section 6 summarises the arguments of the paper and concludes.

However, before beginning, one practical concern needs to be addressed. One might wonder about the utility of paper since *consultation* is no longer a *convention* but part of the *law* of the Constitution after the 15th Amendment in 2011. But one is supposed to write in the background of the convention of

consultation since it is the only convention which has been enforced by the Supreme Court. So, it is against the background of the convention of *consultation* in *Idrisur Rahaman* that it is possible to know the Supreme Court's view of conventions. Therefore, though the paper is written in the said background, its findings/arguments would generally hold good to determine the relationship between law and convention and to decide the issue of judicial enforcement of conventions. And this may be of guidance for the Court in any future litigation concerning constitutional conventions in its jurisdiction.

2. The Enforcement of a Constitutional Convention in *Idrisur Rahman*

In *Idrisur Rahman*, the Supreme Court enforced against the executive the convention of *consultation* with the Chief Justice (CJ) in appointing the Judges of the Supreme Court. Under Article 95 (1) of the original Constitution, the President was required to consult with the CJ before appointing any Judge of the Supreme Court. But this provision of *consultation* was omitted by the Constitution (Fourth Amendment) Act, 1975.[3] However, the Constitution (Fifteenth Amendment) Act, 2011,[4] has again revived the provision of *consultation* in the Constitution.[5] During the period between the 4th and 15th amendments, the executive *conventionally* followed the requirement of *consultation,* though the requirement was no longer there in the law of the Constitution. The executive departed from this convention only once in 1994.[6]

In 1994, the then government appointed Judges of the High Court Division (HCD) without any sort of prior consultation with the CJ. But the facts of *Idrisur Rahman* are slightly different from the 1994 incident. In *Idrisur Rahman*, the executive appointed some Additional Judges of the HCD for two years after due consultation with the CJ under Article 98 of the Constitution. After the expiry of two years, the CJ recommended all of them to be appointed as permanent Judges of the HCD under Article 95 of the Constitution. But the executive did not confirm all of them, disregarding the CJ's positive recommendation for that effect.

The Supreme Court had to consider some significant issues. *First*, what should be the effect or import of the requirement of *consultation*? In other words, should the opinion of the CJ get primacy over the opinion of the executive in case any conflict arises between them in the matter of appointment of Judges of the Supreme Court? This is a crucial question and a distinct and separate issue from

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3 Act No II of 1975.

4 Act No XIV of 2011.

5 For a detailed history of the law of *consultation* in the Constitution of Bangladesh, see M Waheduzzaman, 'Appointment of Supreme Court Judges in Bangladesh: An Alternative Interpretation of "Consultation"' (2023) 34 (1) Dhaka University Law Journal 79–80.

6 For details, see *State v Chief Editor, Manabjamin* (2005) 57 DLR 450 (HCD) (hereafter *Manabjamin*).

issues relating to constitutional conventions. This question's inquiry falls beyond the scope of the paper.[7]

Second, issues relating to constitutional conventions. Obviously, the most important of them is the issue of judicial enforcement of conventions within the framework of the Constitution of Bangladesh. In deciding this question, the Supreme Court stressed whether a particular constitutional practice of political actors has become an *established conventional rule* in the course of time.

Dealing with the same question of judicial enforcement of conventions, Kuldip Singh J of the Indian Supreme Court held as follows:

> We are of the view that there is no distinction between the "constitutional law" and an established "constitutional convention", and both are binding in the field of their operation. Once it is established to the satisfaction of the court that a particular convention exists and is operating, then the convention becomes a part of the "constitutional law" of the land and can be enforced in the like manner.[8]

The Supreme Court of Bangladesh, both in *Idrisur Rahman (HCD)*[9] and *Idrisur Rahman (AD)*[10] cited with approval the above-quoted Indian view. Even before *Idrisur Rahman*, the Supreme Court in *State v Chief Editor, Manabjamin*[11]

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7 This question has already been addressed in our jurisdiction. See Waheduzzaman (n 5) (providing an alternative interpretation of the term "consultation" and advocating against the Court's view that the opinion of the CJ is entitled to have primacy over the opinion of the executive). Although the current paper is not on *primacy* issue, a few words may nonetheless be stated in brief on the issue of primacy of opinion. *Idrisur Rahman (HCD)* imparted total primacy of the opinion of the CJ in the matter of appointment of Judges of the Supreme Court. On appeal, *Idrisur Rahman (AD)* modified the judgment of the HCD and held that the executive's opinion is entitled to have primacy regarding antecedents of the candidate whereas the opinion of the CJ will get primacy regarding professional suitability of the candidate. Recently, the AD has at least slightly departed from its earlier holding in *Idrisur Rahman* on the issue of *primacy*: see *ABM Altaf Hossain and Others v Bangladesh and Others* (2024) 19 SCOB 21 (AD). In this case, the AD has held that the opinion of the CJ will be considered to determine legal acumen and professional suitability of the candidate, while the opinion of the executive will be considered regarding antecedents of the candidate. The opinion of no functionary will get primacy in case of divergence of opinion. If divergence of opinion occurs, the President is not empowered to appoint that person as Judge. See also, the Supreme Court Judges Appointment Ordinance, 2025. The Ordinance deals with the mode and procedure of appointment of Judges of the Supreme Court. The Ordinance establishes a Supreme Judicial Appointment Council to be composed of Judges and other experts on law and to be headed by the CJ. The Ordinance mandates the President to appoint Judges within 15 days of receiving recommendations from the CJ.

8 *SC Advocates-on-Record Association v India* [1994] AIR 268, 404 (SC).

9 *Idrisur Rahman (HCD)* (n 1) 542, 579.

10 *Idrisur Rahman (AD)* (n 1) 90.

11 *Manabjamin* (n 6) 453, 455.

approved, in *obiter dicta*, the above Indian view as to the question of judicial enforcement of constitutional conventions in its jurisdiction.

However, the above view/stand of the Supreme Court on constitutional conventions has been criticised. Waheduzzaman makes these critical remarks: *first*, the Court failed to appreciate the distinction between *recognition* and *enforcement* of conventions; *second*, the Court could not appreciate well the distinction between the expressions *unconstitutional* and *unlawful* as maintained in English jurisdiction; *third*, in the Court's view, there is no distinction between *laws of the Constitution* and an *established constitutional convention*. In other words, the Court measured *laws* and *conventions* of the Constitution in the same parlance. Waheduzzaman regards this view to be erroneous.[12]

Besides acknowledging the above critical remarks, this paper identifies two other significant drawbacks of *Idrisur Rahman*: a lack of analysis of the *interactive effect* between law and convention, and the status of conventions as *per se* law or material source of law in dealing with the question of judicial enforcement of conventions. A total omission of these two aspects has both made the judgment overall less convincing and weakened its worth as a precedent on the subject. But, to this author's view, these aspects are very vital to determine the relationship between law and convention and also to determine any question relating to the enforcement of conventions.

To provide for the Court's omissions, the paper first begins to analyse the effect of the operation of conventions on the laws of the Constitution.

3. The Interactive Effect of the Operation of Conventions

The operation of conventions is seen to entail important practical consequences. That's why it is necessary to learn the effect of the operation of conventions on laws to fully apprehend their status. Wheare identifies three principal ways in which conventions show their effects on laws in actual functioning of the Constitution of a country.[13] Their operation, Wheare says, sometimes makes a law in practice "a dead letter",[14] sometimes determines the way in which a constitutional power in practice will be exercised,[15] and sometimes simply supplements the law of the Constitution.[16] These three ways of interaction may, therefore, be termed as: (1) making law *inoperative*; (2)

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12 See generally, Waheduzzaman, 'Measuring Constitutional "Laws" and "Conventions" in Same Parlance: Critiquing the *Idrisur Rahman*' (n 2).

13 See generally, KC Wheare, *Modern Constitutions* (2nd edn, OUP 1966) ch 8 121–136.

14 See for details, ibid 123–126.

15 See for details, ibid 127–129.

16 See for details, ibid 130–132.

transferring legal power; and (3) *supplementing* law. They are elaborated below in some detail.

3.1 Making Law *Inoperative*

The operation of conventions may make legal provisions of the Constitution *inoperative* in practice. As Wheare very succinctly puts it: "The first way in which usage and convention show their effects is in *nullifying* a provision of a Constitution."[17] A convenient and well-known example of this effect is to be found in the veto power of the President (or the King or Queen in a monarchical state) against laws passed by the legislature. Constitutions of states confer legal power on the head of the state to veto or refuse his assent to laws passed by the legislature. But, by convention, he may not exercise the power in practice. Wheare cites the example of Denmark, Norway, Sweden, Holland and Belgium, where the power of the monarch to veto legislation has been *nullified* by the convention.[18] The cited example of the veto power of the head of the state, however, should be taken to be only illustrative and not exhaustive of the fact of a legal provision becoming *nullified* by operation of a convention of the Constitution.[19]

In an attempt to analyse the nature of constitutional conventions, Dicey found them to possess one common quality or property.[20] In this 'common quality' analysis of Dicey, conventions "are all, or at any rate most of them, rules for determining the mode in which the discretionary powers of the crown (or of the Ministers as servants of the Crown) ought to be exercised."[21] Dicey thus in effect asserts that the quality of a convention's regulating 'discretionary authority'[22] of the Crown is common by far to the "greater part (though not quite to the whole) of the conventions of the Constitution."[23] This particular analysis of Dicey of the nature of conventional rules may also well fit in Wheare's *nullifying* effect analysis of conventions.

In English jurisdiction, the Crown has the legal power, *inter alia*, to dismiss servants (Ministers as servants) at its will, to make peace and war, to conclude

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17 ibid 123 (emphasis added).

18 ibid 123–24.

19 For other example(s), see ibid 125–26; To establish his point, Wheare cites another convenient example in the context of the Constitutions of the Third French Republic and the United States. Wheare mentions from those Constitutions a convention that imposes limitation upon re-election to the office of the President. The convention, in Wheare's view, appears to nullify "legal powers conferred, or at any rate not denied, in the Constitution." ibid 125.

20 AV Dicey, *Introduction to the Study of the Law of the Constitution* (10th edn, MacMillan Press Ltd 1959) 422.

21 ibid 422–23.

22 For 'discretionary powers' and 'remaining discretionary powers' of the Crown in English jurisdiction, see generally, ibid 423–426.

23 ibid 423.

treaties with foreign nations without the authority of an Act of Parliament, and to call the two Houses of Parliament at its pleasure. On all these matters, there exist conventions, and they effectively regulate the discretionary legal power of the Crown. Dicey shows the effect of the operation of conventions on the legal power of the Crown in the specified matters in these words:

> Thus, to say that a Cabinet when outvoted on any vital question are bound in general to retire from office, is equivalent to the assertion, that the prerogative of the Crown to dismiss its servants at the will of the Queen must be exercised in accordance with the wish of the Houses of Parliament; the statement that Ministers ought not to make any treaty which will not command the approbation of the Houses of Parliament, means that the prerogative of the Crown in regard to the making of treaties . . . ought not to be exercised in opposition to the will of Parliament. So, again, the rule that Parliament must meet at least once a year is, in fact, the rule that the Crown's legal right or prerogative to call Parliament together at the Queen's pleasure must be so exercised that Parliament meets once a year.[24]

It may not be out of place to mention that Dicey's aim *at bottom* was to define or ascertain the relation between legal and conventional elements of the English Constitution.[25] To ascertain the relation, he preferred to begin by asking a question: What is the nature of the conventions or understandings of the Constitution?[26] And he found the essential nature in their 'common quality' in regulating the mode in which the discretionary powers of the Crown (prerogative) and the Parliament (privilege) ought to be (or are in fact) exercised.[27] The above-quoted passage of Dicey reflects nothing but this role of conventions in the actual working of the Constitution in the English jurisdiction. However, a close look, at the same time, reveals that what seems to be merely regulating the mode of exercising discretionary legal power in Dicey's analysis is, in actual effect, *nullifying* the law of the Constitution in Wheare's analysis.

However, the effect of the operation of conventions may not always go so far as *nullifying* the laws of the Constitution. Wheare rightly observes: "Though convention sometimes nullifies the law of the Constitution and renders it

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24 ibid 426–27.

25 ibid 418.

26 ibid.

27 For a discussion on the discretionary authority of the Crown (prerogative) and the Parliament (privilege) in English jurisdiction, see generally, ibid 428–29. Dicey, however, did this by drawing analogy between discretionary powers of the two institutions: the Crown and the Parliament.

impossible for powers granted therein to be exercised at all, it does not always go so far as this."[28]

The paper now moves on to explain another effect of the operation of convention, which may be regarded as less than *nullifying* but more than merely *supplementing* the law of the Constitution.

3.2 *Transferring* Legal Power

In Wheare's scheme, the second way in which conventions show their effects of operation is by *transferring* the authority of exercising legal power from one person to another. It may be that the powers are granted by the law (of the Constitution) to one person, but by convention they are in practice exercised by some other person or body of persons. In countries which have a system of cabinet government, most notable obviously of them is England, many important powers, such as, the power to appoint ministers, to summon and dissolve the legislature, to declare peace and war, to conclude treaties, to conduct foreign relations and so on of the same kind and magnitude are possessed in law by the head of the state, the President or the Crown as the case may be. But by convention, the powers are exercised by the head of the state only upon the advice and initiative of some other person or body of persons, mainly the Cabinet or the Prime Minister. And more importantly, it is not the head of the state (the President or the Crown as the case may be) but those others (the Cabinet or the Prime Minister) who are responsible to the electorate for the propriety of exercise of such constitutional powers.

The above analysis, though enough to show that conventions have the effect of *transferring* the authority of exercising legal power from one person to another, there is no reason, however, to hold that the effect is true only of English jurisdiction or of countries having the cabinet system of government. Wheare cites two illuminating instances to show this *transferring* effect of conventions from the US jurisdiction. The first illustration relates to the election of the US President and the Vice-President. The law of the US Constitution confers upon some dignitaries the legal power to elect the highest executive offices of the state.[29] But by operation of convention, the power and authority to elect these offices has in practice been transferred to some other person or body of persons of the state. The relevant US law in this regard and the *transferring* effect of the operation of the convention on such law is apparent from this passage of Wheare:

> The legal power to elect is in the hands of Colleges of Electors chosen in each State by such methods as the legislature of the State determines. By convention, however, these electors exercise no discretion. Their power to choose has, in fact, passed

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[28] Wheare (n 13) 126–27.

[29] For the law regarding the election of the US President and Vice-President, see the US Constitution, art II s 1 cl (2), (3).

> to the party organizations which decide who the candidates are to be and to the voters who determine, within the procedure laid down by the law, which of these candidates is to be chosen. The Colleges of Electors are no more than a statistical record of the voters' choice. It is true that this result has not been brought about by convention alone; there is a considerable element of legal sanction behind it, varying in extent from State to State. But convention, sanctioned by the whole strength of the party organization, plays a most important part.[30]

Another illustration Wheare provides is the appointment powers of the US President. The US Constitution has conferred upon the President considerable powers of appointment.[31] Wheare distinguishes the appointment powers of the US President from that of the powers of the head of state where there is functioning a cabinet system: "He exercises this power himself in regard to the highest appointments, unlike the head of a state in which a system of cabinet government obtains."[32] "But in regard to most other appointments", Wheare goes on to elaborate, "his power is practically *transferred* by the operation of a convention which is usually called 'senatorial courtesy'."[33] How does that happen in practice? Wheare provides the following answer:

> There is an understanding that the senators of the President's own party have the right to advise him upon appointments to posts under the United States which fall vacant in their respective States, and that the President will usually accept their nominations. Should there be no senators of the same party as the President from a particular State, the President will usually accept the nominations of his party's officials and leaders in that State. By this means the presidential power of appointment to a wide range of offices is *transferred* from the President himself to party leaders and particularly to senators.[34]

The above shows that conventions have the *transferring* effect not merely in Constitutions where the President or the Crown is only the titular head of the state, but also in Constitutions where the President, as head of the state, exercises the real executive power. However, in its practical operation, the Constitutions of states might differ in the extent to which they should allow this kind of transfer of the authority to exercise constitutional powers from one person to another. But even if it is granted that they do operate to varying degrees in different countries,

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30 Wheare (n 13) 129.

31 For appointment powers of the US President, see the US Constitution, art II s2 cl (2), (3).

32 Wheare (n 13) 129.

33 ibid (emphasis added).

34 ibid 129–30 (emphasis added).

it may always be asserted that they really do operate in some measure for all or most of the Constitutions to bring about this *transfer* of the "practical exercise of legal power to other hands."[35]

After perusal of the analysis so far made, one should be quite familiar with the *nullifying* and *transferring* effects of the operation of the conventions of the Constitution. No doubt, these are effects of some high magnitude on the laws of the Constitution in the practical working of the system of government of a country. Maybe that Oppenheimer, a writer on the German Constitution of 1919, made this remark viewing effects of a similar nature of the operation of conventions in its own jurisdiction: "conventions, which have already begun to quite a considerable extent, not only to supplement, but also to modify, if not actually to supersede, express provisions."[36]

After considering the *nullifying* and *transferring* effects (effects of high magnitude), the paper now turns to analyse another effect of the operation of conventions regarded as somewhat of less magnitude (apparent also from the above remark of Oppenheimer), that is, their role in *supplementing* laws of the Constitution.

3.3 *Supplementing* Law

The effect of the operation of conventions may be that they *supplement* the laws of the Constitution. In this role of conventions, the powers granted in law to some persons are neither nullified nor transferred to some other person, but, as Wheare precisely observes, "they carry the matter part of the way only".[37] To clarify a convention's 'carrying the matter part of the way only' role, Wheare took recourse to, *inter alia*, constitutional provisions mainly of the UK and the US. The US Constitution authorises the House of Representatives to choose the Speaker without saying anything in express terms about the powers and duties of the Speaker.[38] In the absence of any clear constitutional provision, it is conventions that determine in practice the role of the office of Speaker in the American House. And interestingly, convention has operated to make him the principal leader of the majority party in the House. Wheare comments about the *conventional* role of the Speaker in the American House:

> Convention has operated to make the Speaker of the American House the principal leader of the majority party in the House . . . The American Speaker is an active organizer of his party's

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35 ibid 128.

36 Heinrich Oppenheimer, *The Constitution of the German Republic* (Stevens and sons limited 1923) 9; as quoted in Ivor Jennings, *The Law and the Constitution* (5th edn, University of London Press Ltd 1972) 84.

37 Wheare (n 13) 130.

38 See, the US Constitution (n 29) art I s 2 cl (5).

> legislative programme; he performs indeed many of the functions which a Prime Minister or Leader of the House of Commons would perform in the United Kingdom, in Canada, or in any country which has a system of cabinet government.[39]

The US Constitution also contains no express provision regarding the formation of a cabinet. In practice, however, the US President not only forms a cabinet (of ministers in charge of various departments of state) but his composition of the cabinet is regulated and influenced largely by the convention of the Constitution. Wheare observes the *conventional* rule in this regard as thus:

> When a President of the United States is appointing members to his cabinet he has in law practically unfettered power to appoint whom he will. But by usage, at least, he tries to ensure that all his appointments will not be made from, say, the eastern States alone or the middle-western States alone. He will try to spread the appointments so that the main regions of the United States to which he attaches political importance will get some representation. It is difficult to express this in terms of a rule, yet it is probably true to say that by convention he tries to introduce some element of federation into his cabinet.[40]

Wheare finds another example of the *supplementing* role of conventions in the standing orders of legislatures. Powers of legislation are, by constitutional provisions, conferred upon the Parliament, but the way in which such powers will be exercised may, to some extent, be determined by standing orders.[41] In the UK and the Commonwealth countries, where the system of government is mostly modelled on the parliament of the UK, "standing orders provide that a bill shall not be considered in committee unless it has been approved, on a second reading, by the house."[42] The purpose of the rule is to confine the committee in attempts "to amend the bill in detail, but not in principle, for the principles have already been accepted by the house."[43] Standing orders in this way may operate to *supplement* the legislative powers of the parliament for any state jurisdiction. Wheare observes the nature of the *supplementing* effect of standing orders as thus:

> What is significant for us is that by convention the whole balance of power in the legislative process in a country can be affected. The law of the Constitution is supplemented by conventions which give it a new meaning. The legislative process cannot be

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39 Wheare (n 13) 132.

40 ibid 131.

41 ibid 130.

42 ibid.

43 ibid.

> understood in these countries without taking into account these conventions as well as the law.[44]

An example of the *supplementing* role of conventions may also be given from the Bangladeshi jurisdiction. Article 73 of its Constitution provides that "at the commencement of the first session after a general election of members of Parliament and at the commencement of the first session of each year, the President shall address Parliament." The Constitution, however, is silent about the contents of the address. Islam mentions in this regard the *conventional* rule of the Bangladesh Constitution:

> Without this formality Parliament's session does not start and there is nothing in the Constitution as to who is to write the address and whether it is the choice of the President as regards the contents of the address. It is the conventional rule in the UK that the Queen's address is written by her Ministers outlining the policy of the government. Same is the conventional rule in Bangladesh.[45]

The above conventional rule of the Bangladesh Constitution neither *nullifies* the President's power to address Parliament nor *transfers* the power from the President to any other person but simply *supplements* it, or to use Wheare's phraseology, 'carries the matter part of the way only.'[46] And probably for this kind of *effect* of the operation of conventions, this remark of Jennings fits most: "The short explanation of the constitutional conventions is that they provide the *flesh* which clothes the *dry bones* of law; they make the legal Constitution work; they keep it in touch with the growth of ideas."[47]

The above overall analysis on the *effects* of the operation of conventions throws light on the actual working of the Constitution of a country. Holdsworth, therefore, acknowledging the inevitable nature of conventions in a system of government, rightly appreciates one of their characteristics: "it is at these conventions that we must look if we would discover the manner in which the Constitution *works in practice*."[48]

Having understood the various forms of *effects* of the operation of conventions, the paper now turns to analyse what really the interactive effect of the operation of the convention of *consultation* was on the relevant law of the Constitution of Bangladesh.

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44 ibid 130–31.

45 Mahmudul Islam, *Constitutional Law of Bangladesh* (3rd edn, Mullick Brothers 2012) 4.

46 See (n 37).

47 Jennings (n 36) 81–82 (emphasis added).

48 William Holdsworth, 'The Conventions of the Eighteenth Century Constitution' 71 Iowa Law Review 162; as quoted in Jennings (n 36) 82–83 (emphasis added).

4. The Effect of the Operation of the Convention of "Consultation"

Based on the understanding of the preceding section, we can now draw on the interaction between law and the convention of *consultation* in appointing the Judges of the Supreme Court of Bangladesh. We have seen that the preceding section indicates three principal ways of the effect of the operation of conventions: making law *inoperative*, *transferring* legal power and *supplementing* law. Now the question is: what really happened to the law of the Constitution due to the operation of the convention of *consultation*? Did the law become *inoperative,* or was the power *transferred* from one person to another, or was it simply the case of *supplementing* the law of the Constitution? Which one of these effects was precisely involved in the operation of the convention of *consultation*?

Article 95 of the original Constitution of 1972 provided that the Chief Justice shall be appointed by the President and the other Judges shall be appointed by the President after *consultation* with the Chief Justice. As stated earlier, the 4th amendment did away with the requirement of *consultation*. As is obvious, to do away with the requirement of *consultation*, the Constitution will not state that the President is not required to *consult* with the Chief Justice to appoint the Judges of the Supreme Court. To do the same, the Constitution will simply omit the provision of *consultation* from the respective Article(s). And the 4th amendment exactly did this. It stated that "The Chief Justice and other Judges shall be appointed by the President." The effect of this amendment is that the *law of the Constitution* no longer requires the President to *consult* with the Chief Justice in the matter of appointment of Judges of the Supreme Court.

Thus, after the 4th amendment, on the point of *consultation*, the *law* of the Constitution was that it did not require the President to consult with the Chief Justice, but the *conventional rule* of the Constitution required otherwise – the President was required to consult with the Chief Justice. The operation of the convention of *consultation* thus clearly *nullified* the law of the Constitution or made the law *inoperative* as opposed to simply *transferring* legal power or *supplementing* the law. This was an effect of high magnitude because, due to the functioning of the convention, the law of the Constitution had been rendered ineffective or nullified or inoperative.

But although the convention in the instant case made the law *inoperative*, the Court could not enforce it equating an established convention with laws of the Constitution and thereby imparting conventions somewhat a *per se* law status, arguably against the provisions of the Constitution. The *Idrisur Rahman* verdict thus has been misleading on the question of judicial enforcement of constitutional conventions in the Bangladeshi jurisdiction. The following section explains why.

5. Why is *Idrisur Rahman* Misleading?

5.1 Convention Compared with Custom

Before comparing conventions with customs, it is necessary to have a rudimentary knowledge of customs. Customs are studied in jurisprudence as a source of law. The books of jurisprudence divide the sources of law into different classifications. Without delving into that classification and determining customs' position thereof, the paper, keeping in view of its aim, provides a general description of customs.

Customs are commonly viewed as a long and generally observed course of conduct of several people. They are the rules of conduct or practices of people which are generally followed because they are just and beneficial to society. A custom is said to evolve spontaneously by popular mind, and its existence and general acceptance are proved by their customary observance.[49]

In books of jurisprudence, different views are found as to the question of a custom's origin. According to the historical school's view, the common consciousness of the people (*volkgeist*) is the basis of custom. Some say man's nature of imitation is the reason behind the creation of customs in society. Yet, according to another view, due to necessity or convenience, custom has originated in society. In England, it is traditionally believed that the common law is based on the common custom of the realm. Contrary to this traditional belief, Maine, Ihering, and Gray say that judicial decisions (of common law courts) themselves are the basis of custom in English society.[50]

The above rudimentary understanding may be enough to explain why conventions should be compared with customs. We have seen how customs grow or originate in society. Constitutional conventions also similarly come into existence. Conventions, besides the laws of the Constitution, are another set of rules to govern the relationship of the organs of the government. Conventions are usually seen growing up around and upon the principles of the written Constitution of a country.[51] Regarding their growth, Hood Phillips observes as under:

> With passage of time, in working a constitution and running the state affairs, many precedents occur and practices develop. When

[49] Hamiduddin Khan, *Jurisprudence & Comparative Legal Theory* (1st edn, Anupam Gyan Bhandar 1993) 141.

[50] BN Mani, *An Introduction to Jurisprudence* (14th edn, Allahabad Law Agency 1999) 158.

[51] Jennings (n 36) 83.

> such precedents and practices are found to have been consistently followed, they are treated as constitutional conventions.[52]

The precedent which Phillips speaks of is not any authoritative 'precedent' or 'case law' of the Apex Courts. Here, precedent means a certain course of action relating to constitutional questions followed by constitutional or political actors. When such a course of action (practice/precedent), as Phillips says, is followed repeatedly or consistently, that is treated as a convention.

Jennings provides a more illuminating explanation of conventions in the English jurisdiction that should hold good for other jurisdictions, including Bangladesh. According to Jennings, there are three elements of a constitutional convention: precedent, normativity and reason.[53] Waheduzzaman makes a detailed discussion of the three-fold Jennings test to recognise a convention, along with an urge to maintain a distinction between *recognition* and *enforcement* of conventions.[54] Waheduzzaman shows that such a distinction is still maintained in English jurisdiction, but the Supreme Court of Bangladesh failed to maintain that distinction in *Idrisur Rahman*.[55]

Jennings's first test (precedent) has already been clarified. His second test, 'normativity', is like a custom's 'obligatory force', one of the essential elements to recognise a custom by courts. The expression *opinio juris* of customary international law is also akin to Jennings's 'normativity' test or custom's 'obligatory force' element. Akin to all of them is Hart's idea of 'rule' to explain which he sought to distinguish between (i) mere personal habit and social rule; (ii) being obliged and being under an obligation; and (iii) internal and external aspects of rule.[56]

As to 'reason', Jennings's third test, every rule should have a reason behind it, that is, a purpose or objective to further.[57] This is true for all rules, whether rules of ordinary law or constitutional law. And, in constitutional law, it is true both for legal and conventional rules of the Constitution. This test of 'reason' is equally present in custom, for we often say, 'a custom should be reasonable'. A court would be very reluctant to recognise a custom if it is not just, reasonable and beneficial to society. Thus, a customary rule may not be incorporated in a statute

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52 O Hood Phillips, *Constitutional and Administrative Law* (4th edn) 77; For more details, see Waheduzzaman, 'Judicial Recognition of Conventions' (n 2) 121–22.

53 Jennings (n 36) 136.

54 Waheduzzaman, 'Judicial Recognition of Conventions' (n 2) 131–40.

55 ibid 124, 142.

56 See, HLA Hart, *The Concept of Law* (2nd edn, OUP 1994) 57; Ian McLeod, *Legal Theory* (2nd edn, Palgrave Macmillan 2003) 77; Waheduzzaman, 'Judicial Recognition of Conventions' (n 2) 131–33.

57 See Waheduzzaman, 'Judicial Recognition of Conventions' (n 2) 136–40 (analyzing thoroughly Jennings's 'reason' or Dicey's 'purpose' for a conventional rule of the Constitution).

by the legislature or form the basis of a judgment of a court if it is found to be unjust and irrational instead of being reasonable and furthering a good cause for society.

The foregoing analysis shows the similarity between constitutional conventions and social customs. If conventions are practices of constitutional and political actors, then customs are practices of the people. If convention has 'normativity', then custom has 'obligatory force'. Again, there must be a 'reason' for every rule, whether it be a conventional rule (of the Constitution) or a customary rule. Besides these, both rules usually emerge not by any deliberate creation but by gradual evolution. And both may be recognised by the legislature and courts, subject to the fulfilment of essential elements and attending circumstances and conditions.

It will be seen in the later part of this paper that the Constitution of Bangladesh has defined the term 'law' and the definition includes in it 'custom' subject to qualifications. The said definition, however, does not include 'convention' (with or without qualification). This is the reason why the paper compares convention with custom. In the absence of convention's inclusion in the definition, it may attain the same status as that of custom. Such a determination of the status of custom (and convention) would be more credible and convincing to a reader if we also knew when custom becomes law according to the views of the different schools of jurisprudence.

5.2 When Does Custom Become Law?

5.2.1 Historical School's View

The historical school of jurisprudence, in part, was a result of the surge of nationalism that arose at the end of the 18th century.[58] For this reason, the writers of this period, instead of individual, began to emphasise the spirit of the people (*volkgeist*). Savigny, the founder of the school, enunciated a programme for the school in 1814. The central question Savigny asked was, "How did law come to be?' And, as he perceived, "Law evolved, as did language, by a slow process and, just as language is a peculiar product of a nation's genius, so is the law."[59] The historical school thus considered law in direct relationship to the life of the community.[60] It distrusted any deliberative attempt to make/reform the law and observed, "Legislation can succeed only if it is in harmony with the internal convictions of the race of which it is addressed. If it goes further, it is doomed to failure."[61] It, therefore, placed more importance on custom and, as they say,

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58 G W Paton, *A Textbook of Jurisprudence* (4th edn, OUP 1972) 19.

59 ibid.

60 ibid.

61 ibid.

"custom may be evidence of law, but its real source lies deeper in the minds of man."[62]

So far as the question 'when does custom become law' is particularly concerned, the historical school considers custom as *per se* law. According to their view, customs' validity does not depend upon the recognition or approval by the state. Mani beautifully sums up customs' *per se* law status:

> According to Savigny, the founder of this school, custom is *per se* law. A custom carries its justification in itself. The very existence of custom indicates that it must have arisen due to the strong need and by the approval of the people . . . The customs are based on the opinion of the people and the national character. Therefore, they embody those principles of justice which society recognizes. The state has no discretion or power over them except to accept them. The judges in interpreting or moulding them work as the representatives of the people and no more than that. Thus, the validity of a custom does not depend upon their approval.[63]

Thus, custom is law or, *per se* law according to the view of the historical school. It is law independent of any declaration or recognition by the state, either by legislative authorities in statutes or by judicial authorities in precedents.

5.2.2 Legal Positivist View

Legal positivism emerged in reaction to the teachings of natural law theory. Classical natural law theory postulates two criteria to count a precept or rule as law: (i) the rule or precept is derived from a competent authority; (ii) the rule or precept is furthermore just, reasonable, rational or moral. Thus, classical natural law theory includes the external criteria of *morality* in the definition of law. In contrast to this, legal positivism takes only one factor, that is, the competent authority to determine whether a rule or precept should attain the status of law. If the rule is derived from a competent authority, it is law, irrespective of the question of whether the rule is just or moral. They thus keep two questions separate: what *is* law? And what *ought* to be the law?[64]

The legal positivist school also keeps these questions separate: the question of the validity of law and the question of the duty of obedience to law. And, according to them, the law is valid if it is derived from a competent authority. But

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62 ibid.

63 Mani (n 50) 165–66; In this context, Savigny's disciple, Puchta's observation is also worth noting: "custom is not only self-sufficient and independent of legislative authority but is a condition precedent of all sound legislation." See ibid 166.

64 See for details, R W M Dias, *Jurisprudence* (5th edn, Butterworths 1985) 491–95; 498–501.

there may be no moral obligation to comply with the law if it is found to be unjust or immoral.[65]

Now, coming specifically to the question of 'when does custom become law', it is to be noted that the view of legal positivism runs contrary to the view of the historical school. According to legal positivism, customs are not law or not *per se* law rather a source of law. It is a material and non-binding source of law. Custom as a material and non-binding source of law would be analysed later in a proper context. For now, it would be enough to know that according to the legal positivist view, customs are not law but a source of law, although it may become law (of the land) if incorporated in a statute by the legislature or recognised in a judicial decision by a court.[66]

5.3 Custom, Convention and the Constitution of Bangladesh

We know both customs' status as law/source of law in view of the legal positivist and historical school of jurisprudence, and the similarity between convention and custom. This knowledge can now be used to determine the relationship between law and convention and the question of judicial enforcement of conventions in the backdrop of the Supreme Court's *Idrisur Rahman* decision.

As stated earlier, the Constitution of Bangladesh contains the definition of 'law'. Article 152 defines 'law' to include "any Act, ordinance, order, rule, regulation, bye-law, notification or other legal instrument, and any custom or usage, having the force of law in Bangladesh". Here, the pertinent question is whether the expression "having the force of law in Bangladesh" qualifies all the enumerated forms of law or does it qualify only 'custom or usage'? To this author's view, it qualifies only 'custom or usage'. If this view is true, then, 'Act, ordinance, order, rule, regulation, bye-law, notification or other legal instrument' are *per se* law (law in itself) whereas custom is law when it 'has the force of law in Bangladesh' meaning when it attained the status of law by incorporation in a statute by legislature or forming the basis of a judgment in a precedent.

Now, the question is, why is this author of the above view? To know the answer, one needs to have full knowledge of the sources of law and their kinds. Salmond classifies sources of law as *formal* and *material,* and Keeton classifies them as *binding* and *non-binding*. This paper has earlier stated that custom is a *material* (as opposed to *formal*) and *non-binding* (as opposed to *binding*) source of law.

A formal source of law is that source from which a rule of law derives its force and validity. For Austin, a formal source would be sovereign since he defines law as 'command of the sovereign'. Likewise, for Salmond - state; for

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65 See for details, Mcleod (n 56) 21–24; 58–59; 118–19.

66 Khan (n 49) 142; Mani (n 50) 165.

Hart - rules of recognition; for Kelsen - higher norms; for sociologists - numerous heterogeneous factors; for theologians - God; for natural law school - ideals we have laid down; for historical school - inner sense of right; for Savigny - *volkgeist*.[67]

Leaving aside the above juristic responses and explaining it in practical terms, Constitutions confer the law-making power upon some person or authority. Since they are constitutionally designated authorities, any rule derived from them is regarded as law. If the rule (even if with the same content) is promulgated by any authority other than the constitutionally designated authority, then that will not be regarded as law for the state concerned. Law, therefore, gets its law quality or force and validity as law because of its promulgation by the competent authority.

For example, the Constitution of Bangladesh confers law-making power upon the Parliament (Article 65), subordinate authorities (Article 65) and the President (Articles 93, 115, 133, etc.). The law made by the Parliament is known as 'Act of Parliament'; the law made by subordinate authorities are known as 'rule', 'regulation', 'bye-law', 'notification' etc.; the law made by the President under Article 93 is known as 'ordinance' and the law made by the President under other Articles are known as 'order', 'rule'. So, in Bangladesh, the Parliament, the President and subordinate authorities are the formal sources of law. And when laws, such as 'Act, ordinance, order, rule, etc.' are derived from any formal source, that is called *per se* law. That is, when we speak of them, we cannot say that they are sources of law; rather, they are law promulgated by a formal source like Parliament, the President or any subordinate authority.[68]

A material source is one from which is derived the matter (not the validity) of law. Foreign judicial decisions and statutory provisions, juristic writings, customs, etc., are examples of material sources of law. The courts take recourse to material sources of law when, in deciding disputes, they find no guidance from *per se* law enacted by formal sources like Parliament, the President or subordinate authorities.

Keeton, as stated earlier, divides sources of law into *binding* and *non-binding*. A binding source is one which a judge is bound to follow in deciding disputes. The binding source of law is also called the authoritative source of law. For example, in Bangladesh, the binding sources are the Parliament, the President and subordinate authorities. So, laws laid down by these sources (such as Acts, ordinances, rules, orders, etc.) are binding upon judges. Precedents or case laws

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67 Paton (n 58) 188–89.

68 To avoid confusion, they are no doubt *per se* law since competent authorities have promulgated them, if they are not inconsistent with any provision of the Constitution, as the system of constitutional supremacy prevails in Bangladesh. For constitutional supremacy, see, the Constitution of Bangladesh, 1972, preamble, art 7.

are also binding upon the subordinate judiciary by virtue of Article 111 of the Constitution of Bangladesh.[69]

A *non-binding* source of law is one by which a judge may be persuaded, but he is not bound by it. A non-binding source of law is also called a persuasive source of law. Non-binding sources of law are useful when there are no binding sources of law on a particular point. Customs, juristic writings, foreign decisions and statutory provisions, etc., are examples of non-binding sources of law.

Coming to Article 152 of the Constitution again, which defines the term 'law', this author just observed that the expression "having the force of law in Bangladesh" qualifies only 'custom or usage' and not all forms of law mentioned therein. The foregoing discussion on *formal* and *material* and *binding* and *non-binding* sources of law now makes it clear that 'Act, ordinance, rule, regulation, bye-law, order, etc.' mentioned in Article 152 are promulgated by formal sources of law (Parliament, President, subordinate authorities) and as such, *per se* law. To explain further, an Act of Parliament or an ordinance is law. Hence, the expression "having the force of law in Bangladesh" with respect to them is unnecessary. Therefore, to emphasise again, the said expression has been used with respect to 'custom or usage' only.[70]

If it is accepted to have been used with respect to 'custom or usage', then customs are not law *per se,* but may become law if recognised by the legislative or judicial organ of the state. This is what Article 152 meant by using the expression "having the force of law in Bangladesh" with respect to them. The logical implication of this is that the Constitution of Bangladesh has adopted a *legal positivist* approach to custom. The definition of 'law' in Article 152 does not include the term 'convention'. This paper has compared convention with custom and has established similarity between them.[71] Therefore, under the Constitution of Bangladesh, convention should have the same status as that of custom, meaning a *legal positivist* approach to convention and hence not *per se* law, but may become law by judicial or legislative recognition.[72]

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[69] ibid art 111: "The law declared by the Appellate Division shall be binding on the High Court Division and the law declared by either division of the Supreme Court shall be binding on all courts subordinate to it."

[70] That the expression "having the force of law in Bangladesh" qualifies only 'custom or usage' and not all the other forms of law included in the definition becomes clearer if one reads the Bengali text of the definition, which reads: ""আইন" অর্থ কোন আইন, অধ্যাদেশ, আদেশ, বিধি, প্রবিধান, উপ-আইন, বিজ্ঞপ্তি ও অন্যান্য আইনগত দলিল এবং *বাংলাদেশে আইনের ক্ষমতাসম্পন্ন যে কোন প্রথা বা রীতি*।" (emphasis added).

[71] See, *supra*, section 5.1 of the paper.

[72] By this, the paper, however, does not mean that the historical view of custom as *per se* law is wrong. In fact, time is a determinant to ascertain whether custom is, *per se* law or a material and non-binding source of law. The historical school's view is more appropriate for earlier times, while the positivist view is more appropriate for modern times. At the early stages of society, or

But the Bangladesh Supreme Court in *Idrisur Rahman (AD)* adopted somewhat of a *historical* approach to convention when it said: *"Convention when recognized and acted upon is as good as constitutional law and the provisions of the constitution and is binding like any other principles of law."*[73] As a necessary corollary, the Court didn't find any distinction between *laws of the Constitution* and *established conventions*. This view of the Court fully resembles the view of Kuldip Singh J of the Indian Supreme Court, which the Supreme Court approved in *Idrisur Rahman (AD)*, *Idrisur Rahman (HCD)* and *Manabjamin* as shown earlier in this paper.[74]

The necessary implication of the above *historical* approach is that conventions are part of the laws of the Constitution even before they are recognised and approved or enforced by the Supreme Court. On the contrary, under a *legal positivist* approach, they will be part of the laws of the Constitution only after the Court has enforced it in a properly constituted case before it.

And whether the Court would approve and enforce the convention in a case depends upon some considerations. This situation is akin to the question of approval and enforcement of a custom. To enforce the custom, the first thing to be considered is that the court would take recourse to the customary rule only when there is no clear statutory or case law rule before it. At the next level, the court should inquire whether the essential elements of a valid custom are satisfied or not. For example, traditionally, the following are considered essential elements of a valid custom: antiquity, continuance, peaceable enjoyment, obligatory force, certainty, consistency with other established customs, reasonableness, and conformity with statutory law.[75]

A similar scenario should be the scenario in enforcing a constitutional convention. In enforcing the convention of *consultation* in *Idrisur Rahman*, the first inquiry of the Court should have been what the law of the Constitution on this point is. The paper has earlier shown that the law of the Constitution on this point was that the law 'does not require' the President anymore to consult with

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in primitive communities, or before the emergence of the modern states, custom was law itself (and not a mere source of law), spontaneously evolved or gradually developed by the popular mind. And judges or community leaders who administered justice or settled down disputes between parties, considered themselves to be bound by these customary rules in the same way modern judges feel themselves to be bound by statutory rules. But in modern times, custom has been relegated to a secondary status. They are now not law but a material and non-binding source of law which judges would take recourse to in the absence of any guidance from statutes and precedents. The Constitution of Bangladesh, being a modern constituent instrument, has preferred the positivist view of custom which the courts should acknowledge and follow in decisions.

73 *Idrisur Rahman (AD)* (n 1) 106.

74 See (n 8), (n 9), (n 10) and (n 11).

75 Mani (n 50) 163–64.

the Chief Justice.[76] So, when the Court enforced the convention of *consultation*, it simply went against the clear legal mandate of the Constitution. But the Court could not accomplish this feat. The paper has just stated that 'conformity with statutory law' is one of the essential elements of a valid custom. It means, if the custom does not conform to statutory provision, or, to say otherwise, if it contradicts any statutory provision, the court cannot/would not enforce that custom. Similarly, in the case of a constitutional convention, the Supreme Court cannot enforce it when it conflicts with any law of the Constitution because the law of the Constitution is binding upon the Courts, whereas conventions are only a non-binding material source of constitutional law, which the Court can only take recourse to in the absence of the law of the Constitution.

To argue for the above view more firmly, let us again move on to the question of the effects of the operation of conventions on the laws of the Constitution. The *effects* of the operation of conventions (making law *inoperative*, *transferring* legal power and *supplementing* law) analysed earlier reflect on how a constitution *works in practice*.[77] But what really happens to the words of the Constitution under those effects? Is it that the words of the Constitution are changed or abolished because of those effects? The analysis of Wheare is illuminating. Wheare, from a broader perspective, views usages and conventions as means for bringing changes to the meaning of a constitution.[78]

But he contrasts the changes brought about by a formal amendment and judicial interpretation of the Constitution and the changes brought about by usages and conventions of the Constitution. The changes which formal methods (amendment and judicial interpretation) produce in the law of a Constitution are, Wheare says, "recognized and applied by the Courts."[79] They, therefore, in Wheare's analysis, are "changes of the law in the eyes of the law."[80] On the contrary, usage and convention, Wheare observes, though "certainly affects the law of the constitution"[81] but which, nonetheless, "leaves its words *unchanged* and its meaning or interpretation *unchanged* so far as the courts are concerned."[82] If the words are still to be regarded unchanged, what really happens to the laws of the Constitution? Wheare, who proposes the *unchanged* thesis so far as the courts are concerned, provides us with the answer:

> for it must always be remembered that though a convention may *nullify* the exercise of legal powers or *transfer* them or

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76 See, *supra*, section 4 of the paper.

77 See, *supra*, section 3 of the paper.

78 Wheare (n 13) 121.

79 ibid.

80 ibid.

81 ibid.

82 ibid (emphasis added).

> *supplement* them, it can *never* abolish them or amend them. The limb may be *paralyzed* but it cannot be *amputated* except by the process of the law itself.[83]

Wheare's view clearly shows that the operation of convention may certainly affect the law of the Constitution in practice, but so far as the courts are concerned, the words and meaning of the law of the Constitution remain unchanged. They are thus changes (of law) in practice but not in the eyes of the law. In plain words, courts in England will not enforce conventions, or they still maintain a distinction between law and convention of the Constitution on the ground of 'court enforceability'.

But the Supreme Court of Bangladesh in *Idrisur Rahman* simply applied the Jennings test to establish in its jurisdiction the convention of *consultation* and, finding it an established convention, enforced it against the executive. The English courts maintain a distinction between *recognition* and *enforcement* of conventions and between *laws* and *conventions,* and that too on the ground of 'court enforceability'.[84] In the recent case of *R. (Miller) v Secretary of State for Exiting the European Union*, the UK Supreme Court maintained the same distinction.[85]

But the Bangladeshi *Idrisur Rahman* decision failed to appreciate the above distinctions as maintained in the English jurisdiction. As a result, important aspects of analysis were omitted from the Court's judgment. For example, the AD, while equating *laws* with *conventions*, did not at all refer to Article 152, which contains the definition of 'law' under the Constitution of Bangladesh. It did not explain why it adopted a *historical* approach to conventions when the Constitution manifestly prefers a *positivist* approach. It did not inquire what really the law of the Constitution was on the point of *consultation* and whether enforcing the convention of *consultation* was going against the law of the Constitution. It did not analyse the interactive effect between law and convention in general, and the effect of the operation of the convention of *consultation*, in its jurisdiction. But, in the view of this author, without taking into consideration these factors, a judgment cannot be said to be a sound one either on the question of the relationship between law and convention or on judicial enforcement of conventions.

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83 ibid 134.

84 Waheduzzaman thoroughly shows that such distinctions still exit in the English jurisdiction. See, Waheduzzaman, 'Measuring Laws and Conventions' (n 2) 67–74.

85 *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; See, Waheduzzaman, 'Judicial Recognition of Conventions' (n 2) 142; Waheduzzaman, 'Measuring Laws and Conventions' (n 2) 68; For details of the UK *Miller* case, see also Farrah Ahmed, Richard Albert and Adam Perry, 'Judging Constitutional Conventions' (2019) 17(3) International Journal of Constitutional Law 787; Farrah Ahmed, Richard Albert and Adam Perry, 'Enforcing Constitutional Conventions' (2019) 17(4) International Journal of Constitutional Law 1146.

That is why, the Court's *Idrisur Rahman* decision, to this author's view, is a misleading one and should be regarded only as a weak authority on issues concerning constitutional conventions in Bangladesh.

6. Conclusion

The paper aimed to address the deficiencies of *Idrisur Rahman*. The Supreme Court enforced against the executive the convention of *consultation* regarding the appointment of Judges of the Supreme Court. But, in the view of this author, the Court omitted essential aspects of analysis in the judgment. The question of the enforcement of conventions is necessarily intertwined with the relationship between law and convention. And their relationship cannot be claimed to be fully appreciated without understanding the nature of their interaction; how the operation of convention affects the law of the Constitution in practice, and whether these effects should have any recognition in the eyes of law. *Idrisur Rahman* was fully silent on these aspects of analysis.

To provide for the Court's omissions, the paper first analysed *Idrisur Rahman's* decision itself in section 2 and thereafter section 3 reflected on the interactive relationship between law and convention of the Constitution. The operation of conventions, it has been seen, may go to the extent of *nullifying* legal provisions contained in a written Constitution. It is also seen that the operation of conventions, if it cannot go to the extreme extent of *nullifying* any legal provision, sometimes also *transfers* the authority of exercising power to a person that is, in law, conferred to another person. And, at the minimum, one may always find conventions playing the role of *supplementing* the laws of the Constitution for almost all established Constitutions of the world.

After knowing generally, the different forms of effects of the operation of the convention on the law of the Constitution in section 3, section 4 reflected on which of those effects was particularly involved in the Supreme Court's enforcement of the convention of *consultation* in *Idrisur Rahman*. And it has been seen that the convention of *consultation* made the law of the Constitution of Bangladesh on *consultation* inoperative; this is also termed as the *nullifying* effect of the operation of the convention on laws of the Constitution. But having these sorts of effects in practice is one thing, and whether these effects should be enforced by courts is quite another thing.

But as to the question of the enforcement of conventions also, the *Idrisur Rahman* Court omitted essential aspects of analysis. The Court should first address the question of whether conventions are *per se* law or a mere source of law. To know the answer, the Court should have relied on Article 152 of the Constitution, which contains a definition of 'law'. Then, the Court should have interpreted whether Article 152 has adopted a *historical* or *positivist* approach to the convention. But unfortunately, the Court did nothing. As a result, the Court's holding that there should be no distinction between *laws of the Constitution* and

established conventions remains to stand on a nebulous footing and without sound reasoning and jurisprudential justification.

The Court devoted most of its energies to establishing that *consultation* is a firm convention in our constitutional system, applying the three-fold Jennings test. To apply the Jennings test is not irrelevant in deciding whether any convention really exists in a constitutional system. But, in *Idrisur Raman*, the issue principally was not whether the convention of *consultation* exists rather the issue was whether such a convention, which admittedly exists, should be judicially enforced.

But, as to the above issue, *Idrisur Rahman* is clearly deficient. The decision lacks sound reasoning and is also not theoretically well-founded. Hence, overall, it is a misleading decision on issues dealing with constitutional conventions. True, the convention of *consultation* is no longer a convention; it is now part of the law of the Constitution after the 15th Amendment. But one should know both laws and conventions and their interactions to fully comprehend the working of a constitution. Thus, to have sound knowledge of conventions (irrespective of whether *consultation* is now a convention or law) is of continuing vitality. This paper has clarified which aspects are pivotal in determining the relationship between law and convention in general and the issue of judicial enforcement of conventions in particular in the backdrop of the Supreme Court's misleading *Idrisur Rahman* decision. Expectedly, this may be of guidance for the Supreme Court in any future litigation dealing with conventions of the Constitution of Bangladesh.