Sonargaon University

Research Monograph

On

‘‘PREVENTIVE DETENTION IN BANGLADESH PERSPECTIVE: WHETHER VIOLATION OF FUNDAMENTAL RIGHTS OR SAFEGUARD TO OUR SOVEREIGNTY’’

This Research paper is submitted in partial fulfilment of the requirements of the degree of LLB (Honours) under Sonargaon University.

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DECLARATION

This is, **Md. Samsul Islam jony** a student of LL. B program of Department of Law of Sonargaon University, **ID No: LLB-1803015011** do hereby declare that the Research Monograph Titled, "**Preventive Detention in Bangladesh Perspective: Whether Violation of Fundamental Rights or Safeguard to our Sovereignty''** is an original work.

The assigned work has done by me for partial requirement of my LLB degree, as a part of academic curriculum. I certify that this thesis does not incorporate without acknowledgment any material previously submitted for a degree or diploma in any university; and that to the best of my knowledge and belief it does not contain any material previously published or written by another person except where dereference is made in the text.

I also declare that the presented work does not breach any existing copyright and no portion of this research monograph has been copied entirely from any work done earlier for a degree or otherwise.

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PREFACE

At first, thanks to almighty, who has been kind enough to let me complete this Research Monograph in right time.

I would like to acknowledge my gratitude to my honourable teacher Md. Abdul Alim for permitting me to undertake this research. Thanks to him for his most constructive suggestion. And informative guidance through his lectures.

From beginning of my research, I am personally indebted to some book writers for their kind And valuable writings. Thanks to all from the bottom of my heart.

Signature

Dedicated To: My Beloved Parents

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List of Abbreviation

AD- Appellate Division

BAL- Bangladesh Awami League

BNP- Bangladesh Nationalist Party

CRPC- Code of Criminal Procedure

COFEPOSA- Foreign Exchange and Preventive of Smuggling Activities Act

DLR- Dhaka Law Report

EU- European Union

FR- Fundamental Rights

HCD- High Court Division

ICCPR- International Covenant on Civil and Political Rights

ILR- Indian Law Report

MISA- Maintenance of Internal Security Act

PLR- Pakistan Law Report

SPA- Special Powers Act

UDHR- Universal Declaration of Human Rights

UK- United Kingdom

USA- United States of America

Preventive Detention as Safeguards or Barrier to the Spirit of Fundamental Rights in Bangladesh: A Critical Analysis

Abstract

The word ‘arrest’ generally we used in its ordinary and general sense means the apprehension or restraint or the deprivation of one’s personal liberty to go where he or she satisfy. On the other hand, ‘preventive detention’ means detention of a person only on suspicion in the mind of the executive authority without trial and without conviction by the court. Preventive detention is not to punish an individual person for any offence done by him but to prevent him from acting in a manner prejudicial state. The original constitution of Bangladesh had no provisions of correlated with preventive detention. The reiterating abuse of the powers of preventive detention by the governments of Pakistan Between 1947 to 1971, during the days when Bangladesh was a province of Pakistan, discouraged the constitution framers of the Constitution from including in its powers. Preventive detention has been introduced on the constitution by the second amendment of the constitution in 1973. Only four months and twelve days after the amendment of Article 33 of the 1972 Constitution, which 5 February 1974 enabled the parliament to pass laws concerning preventive detention the Special Powers Act 1974 was passed. This Act describes that any person can be arrested and detained by the executive authority if there is apprehension in the mind of the authorities that he may commit ‘prejudicial act’. This research paper scrutinizes preventive detention related laws in the light of Part- III of the Constitution of Bangladesh, Natural Justice and Rule of Law. This paper advocates that the present preventive detention related laws should be amended in some cases and the researcher of this paper also recommend some suggestion to establish fundamental rights thoroughly.

Keywords: Preventive Detention, Remand, Arbitrary Arrest, Human Rights, Fundamental Rights, Violation.

Chapter- One

Introduction

1.1 Background of the Study

Preventive detention is the most debatable topics of law in recent time. Preventive detention, or internment without trial, of those deemed a threat to the security of society or the state has been the subject of increasing attention from jurists and others in recent years. There is no exact definition of preventive detention. In the case A.K. Gopalan v. State of Madras[1] it was held that, 'there is no authoritative definition of preventive detention.' The violation of human rights has started from very beginning of our civilization. Human being always battled for their rights against the government or authority since the commencement of the state, though the state is in fact the formation of the peoples themselves. Even before the emersion of modern state, there was always a percussion between the common people and the persons who were in position of the leaders.[2] Violation of human rights through preventive detention and arbitrary arrest has become a part of culture, each and every corner of the world especially in third world country like Bangladesh, where political stability is low seized. For example, According to *Banglapedia,* in the time frame of 1971 to 1998, the number of the filed writ petitions, under the Article 102 of the constitution of Bangladesh and section 491 of the Code of Criminal Procedure, 1898, were 20, 572.

The State has emerged to establish and maintain an ordered society wherein life and liberty of the individuals would be secure, and the peoples of the society would live with dignity and honor and would have opportunity to attain their best selves. These are basic which cannot be denied. Fundamental rights, legally speaking, are the rights that are recognized by the constitution and are awarded with better protection mechanisms in comparison with other rights.[3] The Fundamental Rights, guaranteed by part three of the Constitution of Bangladesh, are not 'natural' rights but such rights will be enforceable by Courts; in fact, this part of the

[1] Gopalan v. State of Madras, AIR 1950 SC 27.

[2] Muhammad Ekramul Haque, Protecting Fundamental Rights Through Restricted Legislative Competence: Application of the Doctrine of Eclipse and Severability (The Dhaka University Studies, Part- F Vol.XVII (1): 4962, June 2006

[3] Muhammad Ekramul Haque, Protecting Fundamental Rights Through Restricted Legislative Competence: Application of the Doctrine of Eclipse and Severability (The Dhaka University Studies, Part- F Vol.XVII (1): 4962, June 2006

Constitution of Bangladesh is a positive law of the land. The insertion of these rights in the Constitution and the guarantee of their enforcement implies judicial review and control of the legislative and executive acts and organs of the State.

It is sometimes said that the power of preventive detention like that of emergency carries with it the risk of abuse of power. This is true particularly in most developing countries where these special laws like preventive detention used as necessary and ready weapon to crash down the opposition and to perpetuate rule rather than to meet real emergencies. The abuse of preventive detention law in Bangladesh is well enough to conclude that this power carries with it the risk of abuse of power. Hundreds and thousands of political leaders and activists have been and are being detained under the Special Powers Act, 1974, for years together without any trial. According to a statistic of Ministry of Home Affairs, the number of detainees is increasing gradually.[4] Golden Jubilee have passed since we achieved our independence. Since then, there arrive no situation of war or external aggression; nor has any civil war or internal disturbance threatening the security of the state ever occurred. But the Special Powers Act, 1974 has, since its enactment, been used by each and every government as a brutal weapon to suppress antigovernment movement, sometimes democratic movement and to perpetuate rule.

1.2 Research Questions

The following research questions are the basis of this particular research. The main research questions of this paper are as follow:

1. Are the current laws relating to preventive detention contradict with the spirit of the fundamental rights of the Constitution of Bangladesh?
2. Do the existing laws of preventive detention allow executive authority of misusing it?

[4] MD. Abdul Halim, Constitution, Constitutional Law and Politics: *Bangladesh Perspective* (Tenth Edition, CCB Foundation: Lighting the Dark,2017)

1.3 Objectives of the Research

The title of the research paper carries the purpose. The purpose of this thesis paper is to find out whether preventive detention is necessary, or it is contradictory with the spirit of the fundamental rights of the Constitution of Bangladesh.

Specifically, this research paper has the following objectives:

1. To find out the loopholes of our current laws and current legal system in case of preventive detention.
2. To find out the possible alternatives of preventive detention.

1.4 Literature Review

Preventive Detention and Section 54 of the Code of Criminal Procedure: The Violation of Human Rights in Bangladesh[5] is a research publication. This paper discusses various aspect of preventive detention, rationality of section 54 of the Code of Criminal Procedure, 1898 and compensation for wrongful arrest as well. The research also finds that history of preventive detention in Bangladesh and judicial guidelines on prevention of arbitrary arrest by section 54 of the Code of Criminal Procedure, 1898 as well. But this paper could not find out loopholes of our current legal system and could not suggest remedies for detainees.

Preventive Detention and Violation of Human Rights: Bangladesh Perspective[6][7] is a research paper. This paper shows us annual basis number of detunes under the Special Powers Act, 1974. This paper discusses preventive detention in the light of Bangladesh Constitution and constitutional safeguards as well.

Preventive detention laws in Bangladesh and their increased use during emergencies: a proposal for reform[7] is a research publication. This paper discusses uses of preventive

[5] Shashi Kanto Das, Md. Bashir Uddin Khan, Md. Kamruzzaman Preventive Detention and Section 54 of the Code of Criminal Procedure: The Violation of Human Rights in Bangladesh (American Journal of Business and Society January 2016)

[6] Md. Nazir Ahmed, Senior Lecturer, Department of Law, Prime University, Dhaka, & M. Phil fellow

[7] M. Ehtesamul Bari (2017): Preventive detention laws in Bangladesh and their increased use during emergencies: a proposal for reform, Oxford University Commonwealth Law Journal, DOI: 10.1080/14729342.2017.1306943

detention laws in the time of emergencies. This paper also shows us loopholes of Special Power Act, 1974 and abuse of the following Act and Emergency Power Act as well. Though this paper title indicates about a reform on preventive detention laws but proper reflection of title we cannot see in this paper this is the limitation of this paper.

Bangladesh Legal Aid and Services Trust (BLAST) and others Vs. Bangladesh and others **[2003] High Court Division, [2003] 55 DLR 363**[8] is a historical ageless judgment from Supreme Court of Bangladesh on section 54 and 167 of the Code of Criminal Procedure,1898. Md. Hamidul Haque, J and Salma Masud Chowdhury, JJ was the judge of this case. It was held that section 54 and section 167 of the following Act is contradictory with fundamental rights of the Constitution of Bangladesh and court gives some recommendations of the existing sections.

Prohibition of Torture: Laws and Practice in Bangladesh[9] is a research publication. This paper is a doctrinal and qualitative research. This paper discusses about principles of detention and reasons of occurring torture in BD and what are the laws behind this reason. But this paper does not show any way to get remedies.

Arbitrary Arrest and Detention in Bangladesh[10] is a journal article. This article has identified the significant framework for preventive of arrest and detention in police custody in Bangladesh. The researchers of this study find out role of court in monitoring and allowing arrest and remand. Finally, this paper describes prevention of Arrest, detention and torture on the basis of some significant and vital judgment of the Supreme Court of Bangladesh.

1.5 Methodology of the Research

This research has been based on secondary doctrinal sources and primary legislative sources and qualitative in nature. This is a critical study based on article, journal report, case laws and relevant books. This paper mostly relies on national legislations, constitutions, statutes, case

[8] *Bangladesh Legal Aid and Services Trust (BLAST) and others Vs. Bangladesh and others,* High Court Division, [2003] 55 DLR 363

[9] S.M. Shahidullah Mamun, "Prohibition of Torture: Laws and Practice in Bangladesh'', (2019) XII Society & Change 53

[10] Abdullah Al Faruque and Hussain Mohmmad Fazlul Bari (2019), Arbitrary Arrest and Detention in Bangladesh, Australian Journal Law. Vol 19

laws, published books, and journal articles and online resources. No empirical method other than doctrinal methods has been used for the purpose of this research.

1.6 Scope and Limitations of the Study

The paper mostly includes the legal regime of Bangladesh, any laws, rules and orders relevant in fundamental rights, preventive detention and remand of the country. The relevant International instruments are also perused in some cases to have been an understanding of the standards of fundamental rights.

As preventive detention is a common practice in our country and every corner of the world that is why different kinds of report and articles by human rights organization is easy to get.

For epidemic there are different sorts of problem have been faced to do this research. It was impossible to interview experts and victims on this issue. The information in this research may needs to be updated after a while as it is an ongoing matter. These are the limitation of this research.

Chapter- Two

History of Preventive Detention

"Never, never and never again shall it be that this beautiful land will again experience the oppression of one by another."

Nelson Mandela

2.1 Preventive Detention in Indian Subcontinent

In Rex v. Halliday: *Ex parte Zadig* the indication, the word Preventive detention was used in Britain first time.[11] Preventive detention was first introduced in our sub- continent through Bengal State Prisoners' Regulation III of 1818. With this Act the authority detains persons without trial came to be first exercised in British India.[12] In 1819 the Madras State Prisoners' Regulation II of 1819, and after a decade the Bombay State Prisoners' Regulation XXV of 1827 preventive detention has been introduced. In the case of the Bengal Regulation the Governor- General and in the other two cases the Governors of the provinces were authorized to order detention and for this purpose they were invested with wide discretion.[13] In 1935 Government of India Act, provided for scope of preventive detention and under the Defense of India ordinance was promulgated.[14] It continued during the period of Second World War and it was in force till six months after the hostilities ended. After the partition in 1947 and establishment of Pakistan, the Security of Pakistan Act, 1952 made provisions for communicating grounds of detention to the detained person. Under the Defense of Pakistan Rules, 1965 conferred extensive powers of detention on the Central Government and gave

[11] Md. Bashir Uddin Khan, Md. Kamruzzaman Preventive Detention and Section 54 of the Code of Criminal Procedure: The Violation of Human Rights in Bangladesh (American Journal of Business and Society January 2016)

[12] F.K.M.A.Munim, *Rights of The Citizen Under The Constitution and Law* (The Bangladesh Institute of Law and International Affairs, Dacca Publishers 1975) 110

[13] F.K.M.A.Munim, *Rights of The Citizen Under The Constitution and Law* (The Bangladesh Institute of Law and International Affairs, Dacca Publishers 1975) 111

wide powers of arrest and detention to the police officer or any other officer. The constitution of

Pakistan of 1956 and 1962 empowered and constitution of 1973 empowered parliament of Pakistan to enact Preventive detention laws. In independent India, the Preventive detention was [14]first introduced in 1950 through "Preventive Detention Act, 1950." After that they amended and replaced by "Maintenance of Internal Security Act, (MISA) 1971." Preventive detention also enacted by "Foreign Exchange and Preventive of Smuggling Activities Act (COFEPOSA) 1974."

2.2 Preventive Detention in Independent Bangladesh

In Independent Bangladesh, in the original Constitution there was no provision introducing for preventive detention. Article 33 as originally adopted did not leave any scope for preventive detention, by the Constitution (Second Amendment) Act, 1973 the previous Article 33 was replaced by the present one[15] and through 4th amendment by "The Special Powers Act 1974" enacted Preventive detention act as well which one is closely modelled on the provisions contained in the constitutions of India and Pakistan.[16] After enacting the provision by this anti- people black law, Sheikh Mujibur Rahman used Preventive detention against the tribal people of Chittagong Hill Tracts, and against the suspected members of Jatio Shomajtantirick Dol and Shorbohara Party[17].

2.3 History of Preventive Detention in Martial Law Regime

Khandaker Mostaque Ahmed, who had assumed the office of the President following the proclamation of martial law on 20 August 1975, proclaimed in an address to the nation on 3 October 1975 the regime's decision to release those who had been kept in preventive custody by the previous regime. Furthermore, he announced the formation of a review board

[14] The Constitution of India 1950; the Constitution of the Islamic Republic of Pakistan 1973

[15] Mahmudul Islam, *Constitutional Law of Bangladesh* (Third Edition, Mullick Brothers Pulishers 2017) 280

[16] The Constitution of India 1950; the Constitution of the Islamic Republic of Pakistan 1973

[17] Md. Bashir Uddin Khan, Md. Kamruzzaman Preventive Detention and Section 54 of the Code of Criminal Procedure: The Violation of Human Rights in Bangladesh (American Journal of Business and Society January 2016)

consisting of three former judges of the Supreme Court (the highest court of law in Bangladesh), consisting two divisions, namely, the High Court Division and the Appellate Division to examine charges attained against political detainees. In the same vein, Justice AM Sayem, within one day of succeeding Khandaker Moshtaque Ahmed as the President of Bangladesh, on 7 November 1975, proclaimed that the detainees who had been kept in preventive custody for political reasons would be released forthwith. Despite these commitments from the two Presidents, the martial law regime used the power of preventive detention as a tool for political oppression to strengthen its grip on power. In 1977, 1057 persons were taken into preventive custody of whom 17 were activists belonging to the left-wing East Pakistan Communist Party.[18]

[18] M. Ehtesamul Bari (2017): Preventive detention laws in Bangladesh and their increased use during emergencies: a proposal for reform, Oxford University Commonwealth Law Journal, DOI: 10.1080/14729342.2017.1306943

Chapter- Three

Nature of Preventive Detention Related Laws in Bangladesh

3.1 Origin of Preventive Detention in Bangladesh

The word 'arrest' generally we used in its ordinary and general sense means the apprehension or restraint or the deprivation of one's personal liberty to go where he or she satisfy. On the other hand, 'preventive detention' means detention of a person only on suspicion in the mind of the executive authority without trial and without conviction by the court. Preventive detention is not to punish an individual person for any offence done by him but to prevent him from acting in a manner prejudicial state.

In Bangladesh preventive detention is a permanent securitization, even in the normal situation, the law of preventive detention can be applied against any person living in Bangladesh, regardless of whether he is a citizen or non-citizen. In addition to the constitution, the Special Powers Act of 1974 contains provisions on preventive detention. (Arif Khan, Constitution of Bangladesh)

3.2 Preventive Detention in the Constitution of Bangladesh

The original constitution of Bangladesh had no provisions of correlated with preventive detention. The reiterating abuse of the powers of preventive detention by the governments of Pakistan Between 1947 to 1971, during the days when Bangladesh was a province of Pakistan, discouraged the constitution framers of the Constitution from including in its powers.[19] Preventive detention has been introduced on the constitution by the second amendment of the constitution in 1973 through Kazi Mukhlesur Rahman vs Bangladesh and another, 26 DLR (AD) (1974) 44. After that preventive detention has been legitimated in independent

[19] M Eheshamul Bari, 'Suspension of the Fundamental Rights and Unrestrained Exercise of the Power of Preventive Detention during the Successive Proclamations of Emergency in Bangladesh: A Legal Study' (PhD thesis, Macquarie University 2015) 200-05

Bangladesh through the article 33 of the Constitution of Bangladesh.[20] It has been stated in article 33 of the Constitution, which contained safeguards in cases of arrest and detention, originally stated:

(1) A person who is arrested shall not be detained in custody unless he has been informed of the grounds of his arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be brought before a court within twenty-four hours of his arrest (excluding the time required to transport him to the court) and shall not be further detained save by order of the court.

(3) Nothing in the foregoing clauses shall apply to an enemy alien.

Afterwards, on 22 September 1973, due to the vast deterioration in the economic, and law and order situations, the Constitution (Second Amendment) Act 1973, which inserted provisions concerning the proclamation of emergency and suspension of the enforcement of fundamental rights during the continuance of emergency, replaced the original text of Article 33 by adding new clauses. These newly inserted clauses, which are contained in the part of the Constitution entitled 'Fundamental Rights', enable the parliament to pass laws concerning preventive detention.[21] It seems that the lawmakers in Bangladesh had been influenced by the makers of the constitutions of India and Pakistan as they had also installed the provisions concerning preventive detention in their respective constitution on fundamental rights.[22] Sumanta Bannerji remarked in his famous book called 'Colonial Laws- Continuity and Innovations' that these provisions (in the Indian Constitution) were not fundamental rights, but 'fundamental dangers to the citizens of India'.[23] Ridwanul Haque, Professor, Faculty of Law, Dhaka University also thinks that preventive detention in our Constitution is also a symbol of colonization.[24]

[20] Md. Nazir Ahmed, Senior Lecturer, Department of Law, Prime University, Dhaka, & M. Phil fellow
[21] Constitution (Second Amendment) Act 19733, S 3.
[22] Constitution of India, article 22(3); Constitution of Pakistan, article 10(4).
[23] Quoted in Sumanta bannerji, 'Colonial Laws- Continuity and Innovations' in AR Desai (ed), Expanding Governmental Lawlessness and Organized Struggles, Volume 3 (Popular Prakashan 1991) 233.
[24] Lecture on Bangladesh Law Alliance (BLA) about Prasanta Bhusan Case, 8th January 2021

However, in addition to permitting the enactment of laws concerning preventive detention, the newly inserted clauses in Article 33 offer certain safeguards to a detainee. The inserted clauses (4) and (5) state:

(4) No law providing for preventive detention shall authorize the detention of a person for a period exceeding six months unless an Advisory Board consisting of three persons, of whom two shall be persons who are, or have been, or are qualified to be appointed as, Judges of the Supreme Court and the other shall be a person who is a senior officer in the service of the Republic, has, after affording him an opportunity of being heard in person, reported before the expiration of the said period of six months that there is, in its opinion, sufficient cause for such detention.

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made, and shall afford him the earliest opportunity of making a representation against the order.

Provided that the authority making any such order may refuse to disclose facts which such authority considers to be against the public interest to disclose.

(6) Parliament may by law prescribe the procedure to be followed by an advisory board in an inquiry under clause (4).

3.3 Preventive Detention in the Special Powers Act, 1974

"Bad laws are the worst sort of tyranny."

Edmund Burke

Only four months and twelve days after the amendment of Article 33 of the 1972 Constitution, which 5 February 1974 enabled the parliament to pass laws concerning preventive detention the Special Powers Act 1974 was passed.

The Parliament on February 9, 1974 enacted the black law[25] called "Special Powers Act, 1974" containing the provisions of preventive detention and punitive detention as well. This Act describes that any person can be arrested and detained by the executive authority if there is apprehension in the mind of the authorities that he may commit 'prejudicial act' which means:

1. To prejudice the sovereignty or defense of Bangladesh.
2. To prejudice the maintenance of friendly relations of Bangladesh with foreign States.
3. To prejudice the security of Bangladesh or to endanger public safety or the maintenance of public order.
4. To create or excite feelings of enmity or hatred between different communities, classes, or sections of people.
5. To interfere with or encourage or incite interference with the administration of law or the maintenance of law and order.
6. To prejudice the maintenance of supplies and services essential to the community.
7. To cause fear or alarm to the public or to any section of the people.
8. To prejudice the economic and financial interests of the state.

The vagueness of these grounds ensures that the executive has major scope for bringing any situation within their purview and, consequently, room to misuse the extraordinary power of preventive detention for purposes other than that of protecting the legitimate interests of the State[26]. It should be remembering that the Special Powers Act, 1974 was enacted at a time when there was no grave emergency threating the life of the nation. Now it can be argued that if preventive detention was indeed necessary for dealing with the deteriorating law and order situation, then the Special Powers Act, 1974 could have been enacted as temporary legislation, whose continuation would then be subject to periodic review by the Parliament.[27] In most democratic countries, this kind of law can be used only in emergencies. In United States of America and England preventive detention only can be used in emergency time. On

[25] Md. Nazir Ahmed, Senior Lecturer, Department of Law, Prime University, Dhaka, & M. Phil fellow

[26] M. Ehtesamul Bari (2017): Preventive detention laws in Bangladesh and their increased use during emergencies: a proposal for reform, Oxford University Commonwealth Law Journal, DOI: 10.1080/14729342.2017.1306943 [27] M. Ehtesamul Bari (2017): Preventive detention laws in Bangladesh and their increased use during emergencies: a proposal for reform, Oxford University Commonwealth Law Journal, DOI: 10.1080/14729342.2017.1306943

the other hand, in Bangladesh without trial six months detention can conferred to the detainee, such long detention period is not found anywhere else in the world. Section 8(2) of the Special Powers Act, 1974 provides that:

In the case of a detention order, the authority making the order shall inform the person detained under that order of the grounds of his detention at the time he is detained or as soon thereafter as is practicable, but not later than fifteen days from the date of detention.

It is evident that, although Article 33 (5) of the Constitution, by virtue of its use of the expression ‘as soon as may be’, as mentioned above in Section 2, does not prescribe the time frame for furnishing the grounds of detention to the detainee, section 8 (2) of the Special Powers Act, 1974 specifies a maximum period of 15 days for communicating grounds.

Chapter- Four

Rationality of Preventive Detention in the Light of Fundamental Rights

4.1 Justification of Preventive Detention

Though preventive is a serious foray of fundamental right like personal liberty, but many countries contain or enact preventive detention related laws either in emergency or normal peacetime. What is the philosophy behind introducing such kind of law?

Preventive detention in case of emergency of war time is well recognized because national security and interest are more important than personal liberty of a citizen. The ruling government justifies then practice of preventive detention by saying without this law country could not be administered and this law is a must to run the government and to suppress terrorism, it is essential to control anti-social activities.[27] The former general secretary of Bangladesh Awami League has said, The Special Power Act, 1974 was introduced to combat looting of police station, setting fire on jute go downs, slogan Muslim Bengal, Noxalite activities and above all to combat the nefarious tendency to destroy the sovereignty of the state (Sufian, Md. A.A, 2008). The greatest constitutional expertise of India has explained one of the reasons of incorporation of preventive detention in India as "there may be many parties and persons who may not be patient enough to follow constitutional methods but are impatient in reaching their objective and for that purpose they resort to unconstitutional methods, and then there may be a large number of people who have to be detained by the executive."

It is to be noted that section 54 of the Code of Criminal Procedure, 1898 gives wide powers to the executive authority (Police) to make an arrest without warrant in certain moments. Under the above section a police officer may arrest a person without an order from a Magistrate and without a warrant in the following grounds:

1. Any person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received, or a reasonable suspicion exists of his having been so concerned.

[27] Md. Nazir Ahmed, Preventive Detention and Violation of Human Rights: Bangladesh Perspective

2. Any person having in his possession without lawful excuse, the burden of proving which excuse shall lie on such person, any implement of house breaking.
3. Any person who has been proclaimed as an offender either under this Code or by order of the Government.
4. Any person in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing.
5. Any person who obstructs a police-officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody.
6. Any person reasonably suspected of being a deserter from the armed forces of Bangladesh.
7. Any person who has been concerned in, or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been concerned in, any act committed at any place out of Bangladesh, which, if committed in Bangladesh, would have been punishable as an offence, and for which he is, under any law relating to extradition or under the Fugitive Offenders Act, 1881, or otherwise, liable to be apprehended or detained in custody in Bangladesh;
8. Any released convict committing a breach of any rule made under section 565, subsection (3)
9. Any person for whose arrest a requisition has been received from another policeofficer, provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made and it appears therefrom that the person might lawfully be arrested without a warrant by the officer who issued the requisition.

The philosophy behind the power of arrest without warrant is that prevention is the most effective approach to control crime.[28] By famous Rubel killing case the Supreme Court of Bangladesh announced that section 54 of CrPC is contradictory with Part- III of the Constitution of Bangladesh but unfortunately Parliament did not amend this section yet.

[28] Sarker Ali Akkas (June & December 2011) Constitutional Rights against Arbitrary Arrest and Detention: The Case of Bangladesh, Bangladesh Journal of law, (BILIA)

4.2 Preventive Detention in the light of Natural Justice

"Natural justice is a compact resulting from expediency by which men seek to prevent one man from injuring others and to protect him from being injured by them."

Epicuras

Professor H.W.R Wade defines natural justice as "the name given to certain fundamental rules which projected from the judicial to the administrative sphere."[29] In Bangladesh, though natural justice enjoys no express constitutional status but the Appellate Division of the Supreme Court in Abdul Latif Mirza vs Government of Bangladesh[30] observed:

"It is now well-recognized that the principle of natural justice is a part of the law of our country."

But the application of the principles of natural justice is confined only to the cases, where there is no express provision of procedural law. This position has been clarified by Justice Badrul Haider Chawdhury thus:

"When the matter is regulated by express provisions of procedural rules there is no scope for introducing a supposed rule grounded on vague principles of natural justice. To do so is to introduce fancied notions in a procedural law which the Legislature did not provide."[31]

In legal arena, the concept of natural justice generally covers two rules. They are as follows:

1. *Nemo judex in causa sua* which means no one should be made a judge in his own cause, or the rule against bias.
2. *Audi alteram partem* means hear the other party, or the rule of fair hearing, or the rule that no one should condemned unheard. The expression "Audi alteram partem" simply implies that a person must be given an opportunity to defend himself. Rule of fear hearing is the-second-long arm of natural justice which protects the 'little man'

[29] H.W.R Wade, Administrative Law, p.154 (2nd edn.)
[30] Abdul Latif Mirza vs Government of Bangladesh (1982) 34 DLR (AD) 173.
[31] Abdur Rahman and Other vs Sultan and Others, 35 DLR (AD) 51, 53

from arbitrary administrative actions whenever his right to person or property is jeopardized.[32]

Section 3 of the Special Powers Act, 1974 describes that:

(1) The Government may, if satisfied with respect to any person that with a view to preventing him from doing any prejudicial act it is necessary so to do, make an order-
(a) Directing that such person be detained.
(b) directing him to remove himself from Bangladesh in such manner, before such time and by such route as may be specified in the order:
Provided that no order of removal shall be made in respect of any citizen of Bangladesh.

(2) Any District Magistrate or Additional District Magistrate may, if satisfied with respect to any person that with a view to preventing him from doing any prejudicial act within the meaning of section 2(f) (iii), (iv), (v), (vi), (vii) or (viii) it is necessary so to do, make an order directing that such person be detained.

(3) When any order is made under sub-section (2), the District Magistrate or the Additional District Magistrate making the order shall forthwith report the fact to the Government together with the grounds on which the order has been made and such other particulars as, in his opinion, have a bearing on the matter, and no such order shall remain in force for more than thirty days after the making thereof unless in the meantime it has been approved by the Government.

(4) If any person fails to remove himself from Bangladesh in accordance with the direction of an order made under sub-section (1) (b), then, without prejudice to the provisions of sub-section (5), he may be so removed by any police officer or by any person authorized by the Government in this behalf.

[32] DR.S.M Hassan Talukder, *Development of Administrative Law in Bangladesh: Outcomes and Prospects* (Third Edition, Bangladesh Law Research Centre, 2015) 141

(5) If any person contravenes any order made under sub-section (1) (b), he shall be punishable with imprisonment for a term which may extend to three years, or with fine, or with both.

Here we can see that there is no right to fair hearing of a detainee because right to fair hearing is a code of procedure and covers the following stages through which an administrative adjudication is properly performed:

I. Right to notice.

II. Right to present case and evidence.

III. Right to rebut adverse evidence.

IV. No evidence should be taken at the back of other party. V. Reasoned decision.

VI. Institutional decision or one who decides must hear and

VII. Rule against dictation for an example the decision must be his who decides.

Here we see that according to Special Powers Act, 1974 authorities are not obliged to send notices which one is clearly violation of natural justice and natural justice is the price of rule of law. The philosophical foundation of fundamental rights according to some is natural law, and the history of rights of man is bound with the history of natural law.[33] Karl Marx said in his famous book called '*Das Kaptital*, "Law is an instrument of oppression." Section 3 of the Special Powers Act, 1974 might be this kind of instrument of oppression.

4.3 Preventive Detention in the Light of Rule of Law

The Rule of Law is based upon the liberty of the individual and has as its object the harmonizing of the opposing notions of individual liberty and public order. The Rule of Law depends not only on the provision of an adequate safeguards against abuse of power by the executive but also on the existence of effective government capable of maintaining law and order and of ensuring economic and social conditions of life for society. These conditions

[33] Muhammad Ekramul Haque, Protecting Fundamental Rights Through Restricted Legislative Competence: Application of the Doctrine of Eclipse and Severability (The Dhaka University Studies, Part- F Vol.XVII (1): 4962, June 2006

include national health scheme, and social security, access to law courts and right to living wage.[34] But in Bangladesh, every government has used preventive detention as a brutal weapon and a huge number of persons are detained every year without trial with the view to suppress political opponents, for purpose and fundamental rights guaranteed by article 31, 32 (A), 33 (1) and (2) of our constitution, namely, right of the protection of law, personal liberty and safeguards are not ensured by the constitution itself for the detainee, detained under preventive detention laws. This arbitrary and wide discretionary power of the detaining authority is contrary to the concept of rule of law. From the above discussion, it can be concluded that preventive detention law is a colonial and draconian law which undermines the rule of law, fundamental rights and fundamental principles of human rights.

4.4 Preventive Detention Stands in Contradictory Position with Part-III of the Constitution

According to European Union (EU) context 'Fundamental rights' expresses the concept of human rights. Traditionally, the term 'fundamental rights' is used in a constitutional context whereas the term 'human rights' is used in international law. The Fundamental Rights guaranteed by Part III of the Constitution of Bangladesh, are not 'natural' rights but such rights as will be enforceable by Courts; they are a part of the positive law of the land. Fundamental rights are, no doubt, paramount to ordinary laws.[35] In more words, the object of fundamental rights is not merely to ensure inviolability of certain essential rights against political changes, but also impress upon the people the fact that they have attained a new level of national existence.[36]

Article 26 applies to laws that infringe or will contravene the fundamental rights guaranteed by the Constitution[37]. It contains two directions:

[34] DR.S.M Hassan Talukder, *Development of Administrative Law in Bangladesh: Outcomes and Prospects* (Third Edition, Bangladesh Law Research Centre, 2015) 125

[35] F.K.M.A.Munim, *Rights of The Citizen Under The Constitution and Law* (The Bangladesh Institute of Law and International Affairs, Dacca Publishers 1975) 14

[36] Tope, T.K, *Constitutional Law of India,* Eastern Book Company, India, 1988, p.32

[37] F.K.M.A.Munim, *Rights of The Citizen Under The Constitution and Law* (The Bangladesh Institute of Law and
International Affairs, Dacca Publishers 1975) 16

1. Clause (1) of the Article lays down that any pre- Constitution law insofar as it is inconsistent with these rights shall be void to the extent of the inconsistency,
2. Clause (2) declares that the 'State' shall not, in the future, make any law repugnant to the fundamental rights, and that any enactment violating this direction shall be void to the context of repugnancy.

The first part of the clause (2) imposes a prohibition to make a law contrary to fundamental rights, the second part of the clause which is merely consequential mentions the effect of the breach.[38] If there is inconsistency between an existing law and any fundamental right, the prospective offenders before the crimes are committed

[38] Mahendra Lal vs State of U.P. AIR 1963 Supreme Court 1019.
[40] Madhu Limaye vs S.D.M, AIR 1971 Supreme Court 2486.

CHAPTER 5

5.1 Preventive Detention as Safeguard to our Country

At first glance, there seem to be many advantages to the pre-trial detention framework of preventive detention. Terrorist acts almost invariably involve violations of the criminal's law, so treating terrorist in a manner similar to the way others who violate the law are treated is not obviously illogical. Using the criminal justice system to try suspected terrorist enables experienced and qualified individuals to investigate, prosecute, and convict suspected terrorists trials within the regular court system, and granting members of the judiciary oversight of pre-trial preventive detention also confers considerable legitimacy on the process. in all of the pre-trial detention framework countries, as in the United states, the judiciary is dependant the executives same is India.[39] the independence and impartiality of the judge ordering the initial period of preventive detention combined with a detainees right or appeal to a higher tribunal of independent jurist guarantees a certain degree of fairness in proceeding exists and, compares favourably to the

criticisms of illegitimacy that have been levelled against the opaque, executive controlled U.S. national security detention regime in operation on Guantanamo . The final argument in favour of the pretrial detention framework is that it appears to work. It appears to have worked in France where the 1995 Paris metro bombers were brought to trial in 1999.[40] It also appears that to have worked in Spain, where the authorizes have arrested, integrated, and brought to trial a number of individual involved in the Madrid train bombings.[65] Critics of the pre-trial detention framework of 'preventive detention' argue however, that there are difficulties in using the criminal law as an anti- terrorism tool, and the criminal law system to determine who should be preventively detained such critics suggest that effective counter – terrorism measures prevent to torments act from taking place at all, a and this prospective orientation fundamentally at odds with the criminal laws primarily retrospective focus son punishing individuals past acts. This may be an accurate description of the primary focus of the criminal justice system generally. But is far from the whole story in the whole story in the terrorism

[39] Constitution of India Art.50

[40] http://soholarlycommons-law.northwesten.edu/jcic (accessed on 25-11-16)

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context. Some critics of the pre-trial detention framework also argue that it would be foolhardy to rely entirely Upon a pre-trial detention scheme because of the evidentiary and procedural challenges.

According to **the Special Powers Act, 1974**, preventive detention has its strong basis on any threat or violation of sovereignty of our state. Section 2 (F) defines prejudicial acts & in its (i) & (iii) recognizes acts that are prejudicial to our sovereignty.

"prejudicial act" means any act which is intended or likely-

(i) to prejudice the sovereignty or defence of Bangladesh;

(iii) to prejudice the security of Bangladesh or to endanger public safety or the maintenance of public order;

Moreover, Section 2 (F) (ii) recognizes acts that are harmful to the relation between international communities as-

(ii) to prejudice the maintenance of friendly relations of Bangladesh with foreign states;

5.2Preventive Detention in Maintaining Order

The term "pre-crime" was coined by Philip K. Dick in his 1956 science-fiction short story "Minority Report"[41], in which he writes of a society which has eradicated crime by predicting crimes through the use of "precogs" – humans who have precognition ability – and then detaining the prospective offenders before the crimes are committed. The reorientation of the criminal justice system from a retrospective system, which investigates, tries, and punishes, to a prospective system of anticipating crime, assessing risk, and reducing opportunities for offending is a logical consequence of the adoption of the security-based analysis of crime. If crime is a rational choice, the state can only hope to reduce it by intervening before an offence is even conceived, reducing temptation, and increasing the costs to be entered into the cost-benefit analysis. Increasing the severity of punishment will only deter those who are the most risk-averse, given the low chances of being caught. Therefore, the state should engage in profiling of risky populations, and target them with surveillance and other control measures, with the intention that the profiled group will commit less crime because they have been made

[41] Philip K Dick, Minority Report (Gollancz, 2000).

aware of their profile and the concomitant increase in the likelihood of detection.[42] From the amoral standpoint of security analysis, taking pre-emptive measures is straightforward. However, if one steps away from this view, several distinct but interconnected difficulties with this approach become apparent. First, there is a danger that identifying populations which pose a higher risk of committing crime the state further stigmatises the most disadvantaged groups in society, as these are the groups which are more likely to make a rational choice to commit crime, given that they have the least to lose. Furthermore, as disincentives are less effective on those with the least to lose, preemptive incapacitation becomes the most attractive method of dealing with such groups. Secondly, the act of profiling the most disadvantaged has an inherent risk of entrenching social exclusion and deprivation, which in turn may increase the perceived risk, leading to a perpetual ratcheting up of pre-emptive coercive measures against the targeted groups. Thirdly, the act of profiling can be politicised, with popular demands for unpopular minorities to be profiled and subjected to ever-more stringent controls.

Indeed, the ancillary effects of profiling of the targeted groups may increase their risk because their labelling as a high-risk group leads to their further social exclusion and embedding of their pariah status, leaving them with few options but crime, and almost no disincentives. When an individual is already treated like a criminal, to be convicted of and punished for a criminal offence may be of trivial significance. There is also the intractable problem of the potential for profiling to become a self-fulfilling prophecy in that those who are the subject of increased surveillance and other pre-emptive actions will almost inevitably become the groups with the highest crime rates, because of the increase in detection amongst this group vis-à-vis the general population.[43] As McCulloch and Pickering argue, "[p]re-crime laws and the coercive measures that travel with them mobilize prejudice around identity and lead to intensified politicization of policing and law."[44]

[42] Criminal Justice (n 70) 290.

[43] Equality, Human Rights and Good Relations in 2010 The First Triennial Review, (2010) that black people are, on average, five times more likely to be imprisoned than white people in England and Wales. Equality and Human Rights Commission, Stop and think - A critical review of the use of stop and search powers in England and Wales (2010) found that black people were at least six times more likely to be stopped and searched than white people.

[44] Jude McCulloch and Sharon Pickering, 'Pre-crime and Counter-Terrorism – Imagining Future Crime in the "War on Terror"' (2009) 49 British Journal of Criminology 628, 635.

5.3International Recognition of Preventive Detention

International human rights law is founded on the principle that human rights are universal; and in becoming a party to human rights instruments with enforcement mechanisms, such as the ECHR, or the International Covenant on Civil and Political Rights (ICCPR)[45] a state appears to be voluntarily accepting certain limitations on its sovereignty. However, throughout the case law, both in the UK's domestic courts and at Strasbourg, there is a theme of the concept of territorial sovereignty side-lining human rights obligations in the context of immigration control. In this sphere, a lower standard of human rights protection appears to be permissible, and the state's

"undeniable sovereign right to control aliens' entry into and residence in their territory"[46] allows treatment of non-citizens which would not be permitted in relation to citizens without being characterised as being discriminatory. The alien does not have a right to reside in the territory of the state, and although the ECHR may provide him with a right not to be removed, his remaining in the state can entail some unpleasant consequences for him, from which human rights norms appear to offer little protection. When comparing this area of state activity to other areas impacted by human rights norms, this seems strange. At this stage of the development of human rights jurisprudence, it would be difficult to imagine a state arguing a defence of sovereignty in other human rights cases, an argument which in theory could be attempted in relation to any human rights issue. The state, in becoming a party to the human rights instrument, has agreed to bind itself in a manner which, it could be argued, is a curtailment of its sovereignty but the consent to be bound can itself, as an expression of the will of the democratic polity, be seen as an indication that this is consistent with the sovereignty of the state.[47] The concept of state sovereignty is intimately bound up with territoriality and the idea of the nation state, defining itself through, inter alia, the power to exclude and include, and a monopoly on the legitimate use of violence.[48] Cornelisse

[45] It should be noted that the Human Rights Committee, the supervisor of state parties' obligations under the ICCPR, only has competency to receive individual petition if the state party has ratified the First Optional Protocol to the ICCPR, which recognises the right of individual petition.

[46] Saadi v United Kingdom (n 60) para 64.

[47] For example, see arguments raised in Ryan Goodman, 'Human Rights Treaties, Invalid Reservations, and State Consent' (2002) 96 The American Journal of International Law 531.

[48] Galina Cornelisse, Immigration Detention and Human Rights: Rethinking Territorial Sovereignty: Volume 19 of

tracks the development of the concept of territorial sovereignty from Medieval Europe to the present day, finding that the process of establishing an independent territorial state system, which began with the Peace of Westphalia, coincided with the development of the concept of a sovereign body politic uniting the ruler and the ruled, and that the two concepts fused to create the modern sovereign nation state. Rousseau's conception of popular sovereignty, which according to Cornelisse "cannot be outdone", accepts the absolutist nature of sovereignty which Hobbes' theory entailed, but the absolute power is vested in the people, who only exist if they exist within a community: "The state is the community, but as the people possess exclusive and omnipotent sovereignty that is inalienable, government is merely the executor of the general will of the community." Cornelisse argues that, just as the general will of the community was replaced by Hegel with the national will, nationalism shaped the role of the State, which became associated with the nation: "by the end of the nineteenth century, sovereignty, territory and the identity of the political community became inextricably linked." The influence of these philosophers can be seen in the discourse which justifies indefinite immigration detention for the purpose of preventing crime. The Hobbesian social contract comes into existence because people decide to give up their rights to the Sovereign in order to gain protection to remove them from lives that were "nasty, brutish and short."[49] The security-based analysis of crime, which sees crime as a natural, rational choice, can be viewed as a school of criminology that has its roots in Hobbesian philosophy. It can provide a philosophical underpinning for the use of preventive detention measures against noncitizens. A Hobbesian security-based analysis may determine that aliens residing in the territory of the state are not party to the social contract and therefore are liable to experience the coercive powers of the state in order to prevent crime, but are not beneficiaries of the contract, save for the indirect benefit that they may derive from the state's exercise of power establishing law and order.

Indeed, the ancillary effects of profiling of the targeted groups may increase their risk because their labelling as a high-risk group leads to their further social exclusion and embedding of their pariah status, leaving them with few options but crime, and almost no disincentives.

Immigration and Asylum Law and Policy in Europe (Martinus Nijhoff 2010) pt 1 ch 2 Limiting Sovereign

[49] Thomas Hobbes, Leviathan (Oxford World's Classics 2008) 84.

When an individual is already treated like a criminal, to be convicted of and punished for a criminal offence may be of trivial significance. There is also the intractable problem of the potential for profiling to become a self-fulfilling prophecy in that those who are the subject of increased surveillance and other pre-emptive actions will almost inevitably become the groups with the highest crime rates, because of is not void *ab initio,* but it becomes void with the commencement of the Constitution, and only upon a declaration by the Court.[40]

Article 31 of the Constitution of Bangladesh talks about protection of law which one is an inalienable right. Article 31 further declares that no action detrimental to the life, liberty, body, reputation, or property of any person shall be taken except in accordance with law. An alien who is for time being in Bangladesh is entitled to the protection of law, the expression 'law' obviously meaning of Bangladesh.[50] Preventive detention can be result in loss of individual liberty, dignity, and reputation of a citizen.

Article 32 of the Constitution guarantees that no person shall be deprived of life or personal liberty "save in accordance with law." Because of the seriousness of the deprivation, the framers of the Constitution made this specific provision even though deprivation can be covered by Article 31. No provision of the Constitution can be treated as surplus age and we must find something more in the quality of the protection provided by Article 32 than is provided in Article 31. No right is as basic and fundamental as the right to life and personal liberty and exercise of all other right is dependent on the existence of the right to life and personal liberty. In the American jurisdiction, statutes impairing life and personal liberty are subjected to strict scrutiny by the court. From the scheme of Part III, it may be concluded that in making a separate provision in respect of deprivation of life and personal liberty, the framers of the Constitution intended application of a strict scrutiny of reasonableness. A law providing for deprivation of life or personal liberty must be objectively reasonable and the court will inquire whether in the judgment of an ordinary prudent man the law is reasonable having regard to the compelling, and not merely legitimate, governmental interest. It must be shown that the security of the State or of the organized society necessitates the deprivation of life or personal liberty.[51] According to sections 10, 11 and proviso to section 12 of the Special Powers Act, 1974 government has power to order detention for unlimited power[43]

[50] Jose Gonzalo v State, PLD 1969 Lahore, 129

[51] Mahmudul Islam, *Constitutional Law of Bangladesh* (Third Edition, Mullick Brothers Pulishers 2017) 269 [43] *Yeasmin Akhtar Vs the State,* [1996] 8 MLR 14 HC

Article 33 provides three distinguishing features (i) it is detention and not imprisonment (ii) it curtails the liberty of a person by executive order without any preceding trial or inquiry and (iii) its object is preventive not punitive. Under Article 32 a law providing for preventive detention must both substantively and procedurally be free from arbitrariness and unreasonableness and must not be vague or disproportionate to the mischief sought to be remedied. In order to protect individuals from arbitrary or high-handed arrest and detention by the executive clauses (4) and (5) of art. 33 provide two important safeguards (i) approval by Advisory Board and (ii) communication of the grounds of detention. Both these safeguards are to be observed by the detaining authority.

(i) Approval by an advisory board: no law providing for preventive detention shall have any authority of detention of a person for a period exceeding six months unless an advisory board consisting of three persons, of whom two shall be person who are, or have been or are qualified to be appointed as, judges of the supreme court and other shall be a person who is a senior officer of the republic. The setting up of an advisory board to determine whether such detention is justified is considered as a sufficient safeguard against arbitrary detention under any law of preventive detention.[52]

(ii) Communication of the grounds of detention: Clause (5) gives the detained person right to know immediately "the grounds on which the order has been made." The reason for the expression "as soon as may be" for furnishing grounds and "the earliest opportunity" for making a representation indicates the extreme anxiety of the makers of the Constitution to see that no person is detained contrary to the law enabling preventive detention or contrary to the safeguards provided by the Constitution.[53]

In Bangladesh without trial six months detention can conferred to the detainee. This is a sluggish process because such long-time detention period is no found anywhere else all over the world. In India, this time is three months, and, in Pakistan, the initial period of detention is three months. In domestic countries preventive detention is a method resorted in emergencies like war or domestic war. In democratically developed countries like USA, it is specifically mentioned that only in time of emergency preventive detention law

[52] Puran Lal v Union of India, India 1958 SC 163.
[53] Pankaj Kumar v. State of West Bengal, AIR 1970 SC 97

would be applied. But in our Constitution no such specification is provided for. As a result, preventive detention law has been integral part of our Constitution and every government is using this law as a permanent weapon to crash down opposition and throttle personal liberty guaranteed by the constitution. The Special Powers Act, 1974 has popularly been titled as 'Black Law' or 'Draconian Law'. Because a first detenu under this Act has not been given any right, by appointing a lawyer, to know from a judicial body 'why has he been detained'? This one is such kind of law by which the executive body or government can arrest and detain any person any time it wishes. It is the law by which the government can, if it wishes, detain a person for an indefinite period. Finally, this is the law which is factually negating all the avowed commitment and spirit of the preamble too the Constitution, particularly, the fundamental rights as guaranteed in the Constitution. It is important to mention here that one of the demands of the three alliances during the 1990 movement for democracy was the repeal of the Special Powers Act, 1974.

According to Article 36 of the Constitution right of locomotion is an important part of liberty. The right of a person to move freely, to reside where he will, and to work where he will is connected with his livelihood and pursuit of happiness. Even though this right may be protected by the due process clause of art.3 the framers of the Constitution made special provision to protect the freedom of movement of citizens.[54] In the case of Halima Farzana vs. Government of the Peoples Republic of Bangladesh and others[55] the Supreme Court of Bangladesh held that freedom of expression and movement, the valuable fundamental rights cannot be throttled and curtailed by colourable exercise of the authority under the Special Powers Act in a democratic polity. That is why section 3 subsection 2 of the Special Powers Act, 1974 is completely contradict with the Article 36 of the Constitution of Bangladesh.

[54] Mahmudul Islam, *Constitutional Law of Bangladesh* (Third Edition, Mullick Brothers Pulishers 2017), 327
[55] *Halima vs. Government of the Peoples Republic of Bangladesh* [1999] 4 MLR 255 HC

Chapter- Six

Concluding Analysis

6.1 Findings of the Study

The researcher came up with the below mentioned major findings of the research paper:

1. The philosophy behind the powers of arrest without warrant is that prevention is the most effective approach to control crime, but preventive detention is a peculiar measure in the sense that it imposes restriction on the liberty of a citizen to the extent that a person who has not committed any crime but presumed that he is about to commit any prejudicial act. Government or executive authority have no right to curtail any citizen's fundamental right in the name of state security.

2. The preventive detention laws allow unfettered powers to the government authorities to detain a person. According to section 3 subsection 2 of the Special Powers Act, 1974 even after acquittal in the criminal case a person may be detained. The principle which is followed in respect of granting bail cannot apply in case of preventive detention. Bail may be granted if the court considers that there is no material to show the involvement of the accused. But there can be an order of detention if the authority considers that detention is necessary to prevent the detenu from repeating similar activities which is completely violation of fundamental rights and human rights as well.

3. The phrase 'as soon as may be' in Article 33(4) of our Constitution is an erratic phrase.

   For using such kind of vague phrase, the law enforcement agency can exercise illegitimate powers.

4. Constitution of Bangladesh provides that the initial period of detention in six months without trial which means the detainee can be detained for six months. Nowhere in the world such long period of initial detention is not found except Bangladesh because it

is direct foray of personal liberty, personal dignity, freedom of movement and expression.

5. Neither Article 33(4) nor 33(5) of the Constitution of Bangladesh allows a detainee to communicate with his lawyers and family members. This in turn carries the danger of facilitating the torture of detainees, especially political detainee. To communicate with lawyer and family member is a fundamental right and is a part of fair trial.

6. Any arrested person must bring before magistrate within 24 hours. But under the Special Powers Act, 1974, without bringing before magistrate within twenty-four hours, a suspected detainee can put in detention custody month after month which is completely violation of human rights and natural justice as well.

6.2 Recommendations

Researcher notice the following recommendations which may give relief to the people from the pangs of this repressive law. They are as follows:

1. Preventive detention in case of emergency or in the time of war should exist because national security and interest are more important than the personal liberty of citizen. In more words, personal liberty depends upon the safe and security of the state. Since our Constitution gives the authority of making preventive detention laws, so the constitution must contain provision describing the certain specific period when the law shall be exercised for an example in the time of grave emergency or war.

2. The word ‘satisfied’ in Section 3(2) of the Special Powers Act, 1974 should be clearer to clarify the context. In which circumstances the authority is satisfied and have reason to believe to detain a person is justified must be mentioned in the enactment. The researcher recommends certain grounds which arise the circumstances mentioned here should be mentioned in a written form to inclusive the ambit of preventive detention.

3. As the provision of Article 33(4) is in Part III which bears fundamental rights that is why the erratic phrase ‘as soon as may be’ of this provision should me more specific and clearer. The time limit of ‘as soon as may be’ in Article 33(4) may extend to 10 days.

4. The time limit of detaining a person as prescribed in Article 33(4) must be decreased and it may extend up to 30 days.

5. Exercising power of detaining a person may be given in justified grounds but it should be made obligatory for the concerned authority to make arrangement for the detenu so that the detenu can consult with his/ her lawyer and family members within twenty-four hours after being detained.

6. The detained person should be brought before the judicial authority within twenty-four hours after being detained otherwise fundamental rights and principles of natural justice will remain in danger. Judicial detention will be preferable to executive detention. In order to ensure the proper functioning of democratic environment and to maintain the standard of human rights preventive detention should be restricted.

6.3 Conclusion

Right to personal liberty is an important right of an individual without which s/he cannot enjoy other human rights meaningfully. Article 32 of the Constitution of Bangladesh clearly says that ‘no person shall be deprived of life or personal liberty saves in accordance with law.’ It may be mentioned that a person who has been detained may contend that he has been deprived of his liberty guaranteed under Article 32 of the Constitution inasmuch as his deprivation was either under no law or law that is invalid. The Court may in such cases examine the validity of the impugned law from the point of view of contravention of Article 33. Article 33 supplements Article 32 of the Constitution. The proper way of construction of these two Articles are that to the extent the procedure is prescribed by Article 33 the same is to be observed, if not, Article 32 must be applied. Finally, during the detention of an accused person, he or she must be treated humanely. The human rights and dignity of the detained person must be respected.

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