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Research Monograph

On

"Preventive detention:- Whether Violation Of The Constitutional Mandate Or Safeguard To State"

Research Paper submitted in partial fulfillment of the requirements of the degree of LLB (4 years) under Sonargaon University.

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To

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Subject: Submission of Research Monograph.

Dear Sir,

It is indeed, a great pleasure for me to be able to submit my research monograph "Preventive Detention:- Whether Violation Of The Constitutional Mandate Or Safeguard To State" I have given best effort and caliber in preparing this research and top make it a worthy one. In order to prepare this research I have gathered some practical knowledge about the research matter. This will assist me to incorporate for professional life and will enrich my real knowledge. I would therefore be very happy if the research report helps to understanding the mentioned topic. Any shortcoming in this report is absolutely my fault.

Sincerely yours

.....

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Declaration

I do solemnly declare that the work presented in this research monograph entitled "Preventive Detention:- Whether Violation Of The Constitutional Mandate Or Safeguard To State" has been carried out by me and has not been previously submitted to any other University/ College/ Organization for any academic qualification/certificate/Diploma or degree.

The work I have presented does not breach any existing copyright. I further undertake to indemnity against any loss or damage arising from breach of the foregoing obligation.

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Certificate of the thesis supervisor

This is to certify that the dissertation on **" Preventive Detention :** Whether Violation Of The Constitutional Mandate Or Safeguard To State" is done by Afra Anjum Ayesha, Id: LLB 1903018031, in partial fulfillment of the requirements for the degree of LLB from Sonargaon University (SU). The research monograph has been carried out under my guidance and is a record of the bonafide work carried out successfully.

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Thank You.

Gratitude respect of honours

.....

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Abstract

The method of preventive detention has been allowed in many countries in the world. It is the most debatable issues of law in our country. After liberation, it has been the most applicable procedure in matter of infringement of civil privileges of the citizens. No matter which political party is in power in our country, they always used it as a tool to dominate opposition parties. The Government authority was unsuccessful and has failed abjectly to prevent the aboriginal issue in relation with it. Nonetheless, after become opposed to the spirit of our founding instruments, equalitarianism, and rule of law. Despite variant judicial protection and directions in defiance of preventive detention, application of these malevolent practices is uncontrolled in our country. The research is focus to demonstrate how the privileges are contravened by preventive detention and the means of legal officials for misusing their powers. I want to highlight it's definition, history, it's nature, and justification, our constitutional safeguards and to put some recommendations to protect the human rights violation through preventive detention. I'll also talk about why it is an unavoidable menace in Bangladesh. I will quote the vital instances regarding preventive detention in our country and India. In collusion, I will also give my suggestions on how gruesomeness of these laws can be mitigated.

List of abbreviation :

ADM = Additional District Magistrate

Art = Article

DM = District Magistrate

HR = Human Rights

PD = Preventive Detention

PIL = Public Interest Litigation

SC = Supreme Court

Sec = Section

SPA = Special Powers Act

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Chapter One

INTRODUCTION

1.1 Introduction

Preventive detention denote incarceration of an individual except hearing or punishment from a judicature but solely based upon the intuition in the thought of the detaining authority that an individual might be a peril to tranquility, security and law and order. Infringement of HR has commenced since our nation's inception. It had become a practice that, contravention of HR by Preventive detention throughout the country.

Whimsical capture, incarceration and custodial torture in the hand of lawful authorities alarmingly become a constant aspect of our judicial system. These habits have been extensive in our country in any forms of authority in power and sequential authorities were unsuccessful to prevent endemic issue like this. Whimsical capture, incarceration and imposition of torment are objectionable in any kinds of administration when it is dedicated to freedom of justice and the rulings of law. The higher judiciary of our country has initiated a dynamic stand in precluding of whimsical arrest and detention and recommended some instructions in PIL matter for taking steps for licit improvement by the proper authorities.

This research tried to scrutinize detrimental aftermath of Preventive detention in our community by exploring several judgments by the SC. It also made an endeavor to investigate the necessity for reformation of the Preventive detention laws of our country.

Though Preventive detention was put in place to control the terrible and grievous condition, there exists several hiatus. This research expressed that having whatsoever pious intention the SPA came into force, it has been applied consistently to suppress individual whom the administration do not like. In spite of protection against preventive detention included in the constitution, those are not adequate. Sadly, the law enforcing authorities are uninterested to develop the laws, Furthermore, these precautions are mostly unknown to the general public.

1.2 Research Methodology :

This study aimed at an analytical perspective and assessment of variant precedents of the SC of our country. This thesis is a qualitative thesis that requires relevant laws and some critical analysis. Information and data has been collected from the secondary sources like facts, figures, data, books, journals, reports, opinion, internet and so on. Relevant judicial decision has been collected from various sources. I have also gathered data from different statutes to complete this work.

1.3 Objectives of the Research:

Following objectives can defined so to find out the answer to the said research query :

1) To find out what kinds of problems an individual faced due to preventive detention.

2) To point out some judicial decision about preventive detention.

3) To analyze the constitutional protection of preventive detainee in our country.

4) To show how human rights are violated by abuse of preventive detention in Bangladesh.

5)To assemble suggestions to ameliorate the existing Preventive detention system in our country.

1.4 Scope of the Study:

Current research concentrates on Preventive detention and contravention of HR in criminal justice system in our country. For this purpose, the existing research in beginning made an attempt to gather conventional knowledge regarding Preventive detention, whimsical capture by judicial enforcing delegation and infringement of HR. Secondly, current study constructs an anatomy on provisions in case of Preventive detention. Thirdly, current research provides a synopsis and made an analysis of the subsisting laws related to Preventive detention in system of criminal justice of our country. In the end, the research tries to endeavor a modest attempt by pointing our little recommendations, at the conclusion of the existing study.

1.5 Limitation of the Study:

Though there are huge information in text books, journals and in internet it's not sufficient. I have to also give concern about time and cost. Furthermore, the present study is undertaken as part of fulfillment of the requirements of LLB degree. The researcher gets only one month to complete the research. Moreover, the research is directed to be within prescribed word limit. Therefore, there is not much scope for doing a comprehensive study. Yet, I try my best to fulfill the objectives set out in the present study.

1.6 Literature Review:

Comprehensive exploratory study on several topic of constitutional law is common. Particularly academic research that focuses on the subject of preventive detention is not obtainable extensively. Yet, few relevant conversations can be reviewed that is inevitable for the discussion.

MD. Abdul Halim explores that, though there is absence of exact definition of PD. It is something atypical measures by which the authority is empowered to inflict limitation upon the liberty of an individual who may or may not be vicious an offence but who is believed that is detrimental acts to the community can be committed by him.

Mahmudul Islam narrated that: Preventive detention is a major infringement on a person's personal individual liberty since, unlike regular capture or incarceration, preventive custody occurs without a trial.

1.7 Research Question:

A multitude of questions about this topic can be posed. However, this research was limited to the following question. To achieve the study's goal, the following issue will be addressed:

1) Whether the laws of our country provide adequate safeguards to protect the rights of an individual against preventive detention laws?

Chapter Two

BASIC CONCEPT REGARDING PREVENTIVE DETENTION

2.1 Definition:

Preventive detention means the incarceration of an individual afore trial with the motive of averting him from engaging of any prejudicial behavior[1]. A proper definition of the term is given by Lord Atkinson in Rex vs. Halliday[2] which is as follows: Preventive detention means, the incarceration of an individual afore trial in court of law, by an command of the dominant authorities with the intention of averting him from engaging in operation which is detrimental for revival and state's safety[3]. Preventive detention may be identified as an unusual process; for under the process the suspect is detained simply on doubt of his indulgence in any act disadvantageous to the welfare and development of our country, without any evidence thereof and also without an allegation of the commission of offence[4].

The analysis of the definition of preventive detention shows clearly the following:

a) Preventive detention is no imprisonment or solitary confinement in legal terminology; it's simply a detention. It's right that both detention and imprisonment are more or less the same thing, in both cases the detenu has the confined to the four walls of jail, but the distinction is that preventive detention takes place before judicial proceedings but imprisonment takes place after judicial decision.

b) Preventive detention follows the command of an administrative officer, not of a judicial one[5].

c) The order for preventive detention given without any formal investigation into the fact as whether or not an offence of the kind mentioned has actually been committed. It takes place based merely upon the police officer's report, even report being unexamined as to it's credibility.

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[1]The Special Powers Act, s.2(f)

[2][1917]UKHL I

[3]Mahmudul Islam, *"Constitutional Law of Bangladesh" (2nd edn, Mullick Brothers 2008) 255*

[4]*Md Abdul Halim, " Constitution, Constitutional Law and Politics: Bangladesh Perspective " (first published 1998, 15th edn, CCB Foundation 2020)293*

[5]*ibid, 294*

d) An order for preventive detention is given with a deterrent purpose, for the purpose of preventing a person from doing some act against the security of the state. No punitive purpose remains there. No punishment is inflicted under such order[6].

e) Preventive detention is a precautionary measure whereas punitive detention is an ordinary measure[7].

2.2 Historical Background of Preventive Detention :

Absence of provisions for Preventive detention can be seen in the original constitution of 1972. [8]Potential civil and criminal protection, together with the right not to be whimsically incarcerated was provided in part 3 of the original constitution in 1972. In Art.26 (2)[9], It apportioned that any law incompatible with Part 3 (fundamental rights) become void. Art. 32[10] ensured right to exist, autonomy and protection of a person. Furthermore, Art.33, Part 3 proceeded to fabricate some shield for the detainee's right. Those are:

1) He cannot be incarcerated in prison without knowing, of the causes of his capture.
2) Consultation right and represented by a pleader of the detained person own desire.
3) Not more than twenty four hours a person can be incarcerated without producing him afore the magistrate's court.
4) He cannot be incarcerated in prison beyond the period of twenty four hours except a command from a magistrate's court. [11] The Constitution of 1972 introduced the national basic goal of determining a society based on the principles of different judicature, fundamental HR and emancipation, parity and justice .

The essence of 1972 did not survive very long. In nine month1973, only 9 months following the enactment of the constitution, government authority legislate Act no. 24, (2nd Amendment Bill). After that, the complete shield imposed by Art.26 of ' 'fundamental rights ' was no longer subsists, authorized them to be entangled by various ways. Furthermore, Constitutional armor for capture and incarceration were exempted by inclusion of Article -33(3) that introduced Preventive detention.

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[6]ibid, 294

[7]ibid, 294

[8]Adopted on 4 December, and entered into force on 16 December, 1972. To gather a useful knowledge on the history of Bangladesh's Constitution making, see Abul Fazal Huq. Constitution making in Bangladesh (Pacific Affairs 1973)59-76.

[9]The Constitution of the People's Republic of Bangladesh, Article-26(2)

[10]ibid, Article 32

[11]Md Nazir Ahmed, ' Preventive Detention, Violation of Individual Human Rights.An Overview from Bangladesh Perspective '(2015)<http://miurs.Manarat. ac.bd/download / Issue. 05 /08.pdf>accessed 15th April, 2022

Parliament was in a hurry to apply of its freshly authorized jurisdiction. On ninth day of February in 1974, it legislate the SPA, 1974. The Act was intentionally planned to subdue black marketers and smugglers, allegedly liable for the food deficit in the whole country. [12] As leftwing insurgents strengthened their political dissent, PM Mujibur retaliated with a variety of measurement : a printing and press ordinance, an embargo on hartal for three month, an embargo on open assembly, proclamation of a state of emergency use of which variant civil rights were ceased and at last the formation of one authoritative party govern in 1975. The SPA substantiated to be an effective measure for aforementioned procedure[13].

2.3 Nature and justification of preventive detention :

Nature and justification may be found in each condition. The characteristic of Preventive detention is several from the characteristics of incarceration under punitive laws. Preventive detention is used in fully different sense than punitive detention. Both actions were described as an obstacle of individuals emancipation also personal liberty by few people. [14]

The theory behind supporting of Preventive detention is the national protection also safety of the state's citizens.[15] When the authority has conception that a person is about to occur detrimental acts, he may be incarcerated by Preventive detention to avert hum from doing that act. In A P Gopalan v. State of Madraz. [16] SC of India elaborated the character of Preventive detention is defined as the incarceration of a person except framing of charge or trial in situation where the evidence, documents and witnesses in the hands of the authority is not adequate to frame a offence or connect the detainee's punishment by legal proof. Necessity for the process "where deterrent measures is put in place, material hardships and difficulties might be occurred to the incarcerated parties," Lord Atkinson remarked in R. vs Halliday that. This is inescapable, whatsoever the torment is inflicted for a cause generally vital than his freedom or advantage: to insure the citizen's safety and the realm's defense." "Any preventive action, even if it involves some obstruct or suffering on individuals, the

[12] 27 DLR (HCD)122

[13]ibid.

[14]Arif Hussain, ' Preventive Detention and Violation of Human Rights ' (2016) <https ://bdjls.org/research, monograph preventive detention and violation of human rights bangladesh perspective /3/>accessed 15 April2022

[15]Halim(n 4)295

[16]AIR 1951 HCD 27

characteristics of punishments cannot be administered, but is implemented as a precaution to avert injury upon the state and its people, " Lord Finlay observed in aforementioned case. [17]

Same opinion also manifested by Lord named Alfred Dening. He said, " At the existence of betrayer in our midst, authority are unable to delay till we capture then in the offence of demolition our culvert or providing state's military covert information to the opponent, we are unable to put in danger the people's living. So, we must detention then suspicion".

Preventive detention has been introduced in the Constitution of Bangladesh in 1973 by the 2nd amendment through Kazi Mukhlesur Rahman v. Bangladesh and another [18] by saying that, "The constitutions acknowledged tie requirement of Preventive detention on unusual occasion while command over public order, discipline and security of the country, etc. in the verge of risk of disruption. But while admitting the essentially of Preventive detention without following to the general process according to law, it observed at the similar time assured limitations on the authority of incarceration, both legislative as well as executive, by envisaging as least protection to insure that the authority of such incarceration cannot be applied illegitimately and arbitrary.

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[17] ibid,(n 2)

[18] 26 DLR (AD) (1974) (44)

Chapter Three

BANGLADESH LAWS REGARDING PREVENTIVE DETENTION

3.1 Introduction:

Personal liberty always remains a great demand of a liberal society. Many civilized nations have constitutionally secured their people from the excess of compulsory state institutions.[19]Our country is not a different.

Among all three state organs, the legislature or parliament always takes in the first stage to provide safeguard of the rights of a person against whimsical arrest and detention. [20] Since an arrested and detained person always remain innocent until their guilt is proved beyond reasonable doubt[21] for the protection of their human rights some strict laws should be enact. It is one of the main functions of the legislature. The legal provisions for preventive detention are described below.

3.2 Provisions under Special Powers Act,1974

The primary subject matter of this law resides in Sec.3[22], that offer the administration to capture any individual in prison in guise of Preventive detention. On 1974 in 9thFebruary, this draconian law.SPA 1974 including the provisions of Preventive detention was legislated by parliament[23].

Several salient provisions of the SPA, 1974 which is connected to the Preventive detention, are described below:

3.2.1 Order regarding detention or removal of individual

Sec. 3 of the SPA discuss about ability and circumstances of an order of Preventive detention. Sec. 3[24] of this SPA entitled the govt. authority to pass an order of incarceration of any person with the goal of restraining him from doing any prejudicial act.[25]

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[19]ibid.(n14)

[20]ibid.

[21]Article 11 of UDHR

[22]ibid.(n 1) S(3)

[23]ibid.

[24]ibid. S(3) (1)

[25]ibid (n2)S (f)

Section 3. sub section 2 authorizes a DM or an ADM to order incarceration of an individual after appearing at identical contentment to that of authority for the equivalent motive.

3.2.2 Carrying on detention commands:

Sec.4[26] of the Act means that the command of incarceration passed under sec. 3 of shall be performed as mentioned in section 80[27] of the CrPC. By reading both sections simultaneously, it becomes abundantly obvious that a command of incarceration passed under sec.3 of the Act, should be made while detaining an individual.

3.2.3 Informing the causes of command and representation :

The detaining authority will inform the causes of incarceration to the detainee within 15 days since the occasion of incarceration. He must be made it in writing. Also provide him reasonable amenities of submitting the representation as soon as possible.[28]

3.2.4 Formation of advisory board:

The Government authority can form an advisory board comprising of 3 members. Among them, 2 members are those persons who are in present, were or have the abilities to be appointed as a judge of SC. And the other individual should be a high officer in the republic's service. Again in this section mentioned further that, the authority to assign 1 member as a chairman of the board among the judges of SC.[29]

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[26]ibid. (n1) S (4)

[27]Section 80 of Code of Criminal Procedure, 1898

[28]ibid. (n 1) S (8)

[29]ibid.(n22)S(9)

3.2.5 Reference to advisory board:

Section 10[30] of the Act state that, the authority will settle the causes of incarceration and the representation, presented on behalf of detainee afore the advisory board within 120 days since the period of incarceration.

3.2.6 Method of advisory board:

The Advisory Board should take into account the causes of incarceration, the representation presented by the detainee, any other communication which it may seem essential and after providing the detention an advantage to present his side and to put forward a report to the government authority as to the accuracy or otherwise of the incarceration within 170 days from the date of incarceration.[31]

3.2.7 Action upon the report of advisory board:

The incarceration will be lifted by the government if somehow the Advisory Board cannot find enough grounds to extent the incarceration order.

3.3 Preventive Detention under Constitution of Bangladesh:

Second segment of Art. 33 of our constitution comprising of sub-articles (3), (4), (5), and (6) relates with the law regarding preventive detention and interests or constitutional protections of a person restrained under preventive detention law. Three constitutional assurances: 1. Review by advisory board 2) to inform the causes of incarceration 3) Right to representation in opposed to the order of incarceration.

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[30]ibid, S(10)

[31]ibid, S(11)

3.4 Violation of fundamental rights under preventive detention law:

An individual's independence from dictatorial arrest and detention is constitutionally guaranteed by Constitution.[32] On the other hand, abridgment of this right is permitted on the ground of national security and public order by arresting and detaining a person under SPA.[33] In Krishna Gopal v. Govt. of Bangladesh [1979] Being right to life and liberty a sacred right, shortening of these rights cannot be relied only the subjective satisfaction[34] of the government and executive authority. It requires the objective satisfaction[35] of judiciary to examine the reasonableness of such detention order.[36]

Furthermore, four constitutional safeguards were provided to the detainee under article-33[37] of Constitution. They are- 1) the causes of capture must be informed to the detainee as early as possible. In Vimal v. UP [1956] full disclosure is not necessary but insufficient information would make the arrest unlawful.38 2) The accused must be produced afore magistrate's court within 24 hours after preclude the time requisite for the travel from incarceration of person to the magistrate's court.[39] 3) He can consult and make defense by a lawyer of his choice.[40] 4) Accused cannot be detained more than 24 hours without magistrate authorization.[41] But these rights will be ineffective for a person detained under preventive detention law and to an enemy alien.[42]

Though a person cannot be detained more than six month without the approval of advisory board, but there remains a possibility of partiality, biasness and influence of government.[43] Trial in independent and impartial court will be violated.

Under the constitution[44] the authority will inform the causes "as soon as" possible but nowhere in the constitution is the term defined. But Section- 8(2)[45] barred the time limitation of 15 days

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[32]Constitution of the People's Republic of Bangladesh, Art. 32

[33]Special Powers Act, 1974

[34]Subjective satisfaction: when legal basis of an action or decision taken by an authority is the sole personal satisfaction of that authority and no other authority or body has any jurisdiction to examine the reasonability of the satisfaction or to question whether such satisfaction has any foundation on facts. It is called subjective satisfaction

[35]Objective satisfaction: when legal basis of an action or decision by an authority is determinable by any third party or court, it is called objective satisfaction

[36]31 DLR 145 (AD)

[37]ibid. (n 32) Art. 33(1)

[38]AIR 56, 1952

[39]ibid. (n 32) Art. 33(2)

[40]ibid. Art. 33(1)

[41]ibid. Art. 33(1)

[42]ibid. Art. 33(3)

[43]Halim (n 4) 304

since the date of detention. On the other hand, under Article-33 the detaining authority can refuse to reveal the grounds of arrest if it finds that it goes against public interest.[46] In this sense, the second & third right becomes actually pointless. Many people opine that, as it is a preventive detention law it is not mandatory to inform the detainee the grounds as soon as possible. In fact, it is not a violation of constitutional rights rather violation of international human rights instruments.[47] In ICCPR has expressly stated that, grounds of arrest and charges shall be informed to the arrestee at the time of arrest.[48]

Curtailment of personal liberty also hampered constitutionally guaranteed and universally recognized right to freedom of movement.[49] It cannot be deny that, liberty right and safeguard from arbitrary detention invaded by the SPA. Eight prejudicial acts mentioned in section 2(f) of the SPA, empowered the government to include almost any deducible and suspicious acts. Arrestee at first arrested under S. 54[50] of the CrPC, 1898 may be later detained and charged under SPA. Moreover, such preventive detention laws always use as a tool to subjugate, crash the opposition and maintain authority.[51]

The initial period of detention without trial is six month[52], no other country in the world subsist such long period.[53] If the advisory board expresses affirmative view then arrestee can be detained for uncertain period.[54] In addition, Zulfikar Mahmud v. National University [2008] the High Court Division adjudicates that mental trouble caused to the detainee for a period of 22 month without comprising any charge is violation of principle of natural justice.[55]

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[44]Art. 33 (5)

[45]ibid. (n 1), 1974

[46]ibid. (n 32) Proviso to Art.33(5)

[47]Md. Shahjahan Mondol, 'Repealing the Special Powers Act, Law and our rights' Daily Star (Dhaka, 31 March 2007) accessed 15th April, 2022

48Article 9 (2) of ICCPR

[49]Article 36 of the Bangladesh Constitution. Also see, Art. 13 of UDHR. Art. 12 of the ICCPR, Art. 15 of the American Convention on Human Rights, 1969 and Art. 10 of the African Charter on Human & Peoples' Rights, 1981 talk about the right to freedom of movement.

[50]Section 54 of Code of Criminal Procedure 1898

[51]Halim (n 4) 293-298.

[52]ibid. (n 32) Provison to Art. 33 (4)

[53]Halim (n 4) 305.

[54]ibid. (n 3) 255

[55]60 DLR 40 (HCD).

The principle of natural justice also distorted under Section 11[56] of SPA. In the case of Abdul Hannan v. State[57] [2009] right of an alleged person to be secured by a lawyer is inseparable right committed by the constitution. So, legal representation through a pleader is an unavoidable part of the principle of natural justice and fair trial. Under Article 35(3) every arrested person has right to fair trial as same as Article 14 of the ICCPR.[58] In BLAST v Bangladesh [2005] Detention for a longer period pending the trials always remains a concern about procedural fairness and also right to speedy trial.[59] Nevertheless, offences under SPA made cognizable and non-bailable[60] and without producing the accused before magistrate court the detaining authority can detain the accused for 120 days.[61]

Article 35(5) of the Constitution inhibited torment and brutal, monstrous or degrading punishment.[62] In spite of this, law enforcing officials often apply physical or mental anguish to extract confession or other purposes.

Bangladesh Constitution guarantees freedom of thought and conscience[63] and ensures the right of every citizen to liberty of speech and expression; and liberty of the press contingent on certain rational restrictions[64] In spite of that, human right activist, professional, political opponents and media members are regularly being enclosed and persecuted by law enforcing authority.[65] As an example, an instructor in the Law Department of the Northern University Bangladesh in Rangpur was taken into custody and confined under the SPA in July 2015 under alleged grounds of condemning the President, PM and erstwhile president of our country in his class but he was

exempted from jail on bail a week after his arrest because the investigating police officer failed to procure evidence in support of the allegations. These kinds of examples are infringement to liberty of thought, conscience and speech[66]

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[56]Section 11(4) of the Special Powers Act 1974

[57]61 DLR 713 (HCD)

[58]Article 14 of the ICCPR

[59]57 DLR 11 (HCD).

[60]ibid. (n 1) S. 32.

[61]ibid, S. 3.

[62]Article 35(5)

[63]Article 39(1)

[64]ibid, Art. 39(2)

[65]International Federation of Human Rights, 'Bangladesh: Criminal justice through the prism of capital punishment and the fight against terrorism' (2010)

[66]Ashek Elahi, 'NUB Teacher Accused of Defamation Gets Bail' Dhaka Tribune (10 July2014).

Also in our country, there is absence explicit period when Preventive detention laws can be enforced. No matter whether it is peace period or emergency period preventive detention law can be enforced.[67]Generally in most of the democratic countries Preventive detention is a method effective in exigency like battle or internal disturbances.[68]

Moreover, in our country the authority in power again and again apply the police force for shrewd motive and granted exemption to the member of security forces. There are extensive corruption accusations and an exquisite deficiency of assets, guiding, and regulations amongst the detaining authorities exist.[69] A huge quantity of factional workers and leaders in our country incarcerated except trial through PD, which is a massive infringement of fundamental rights and human rights. On 8 August, 2001, Sub-committee of four presented a 30 page report on SPA to the parliament. About 69,000 prisoners were detained under preventive detention law in the last 26 years and about 68,000 were exempted by command of the High Court Division.[70]

3.5 Conclusion:

From the very beginning preventive detention violates the constitutional rights and international human rights. It has become the greatest menace for rising of appropriate and sound environment for democratic society. These laws continuously applied to repress the anti-ruler motion and occasionally democratic motion also. Such unreasonableness, arbitrariness, unjustness, incompatibility and draconian characteristics of the Act should be rethinking or abrogated.

[67]Halim (n 4) 296

[68]ibid.

[69]ibid. (298-299)

[70]ibid. (n 14)

Chapter Four

Preventive Detention in India; Comparison with Bangladesh

4.1 Introduction:

Preventive Detention is one of the most dubious concerns in a democratic country like India. Indian constitution is the largest constitution in the world. The Art-22 (3) of the Indian constitution states like this, whenever an individual captured or incarcerated under Preventive detention laws, then "Safeguard of life and personal liberty" [71] and "safeguards in opposed to capture and incarceration in certain matter"[72] won't be obtainable by those detainees. Likewise, the Constitution of Bangladesh, Constitution of India also included PD segment in part of fundamental rights. In fact, these were the fundamental menace for the people of India for whom the constitution was actually framed. On 26th February 1950, parliament legislate the primary Preventive Detention Act, 1950. But from the very beginning, general miscreant of public tranquility was not arrested, but an opponent political worker A.K. Gopalnan was captured. It was obvious that, this Act was aimed to subdue political dissent, and to some extent this custom has been and still being repeated.[73]

In spite of several disagreements were made in the parliament, founding father of the Indian constitution, included provisions for preventive detention, on the grounds of a protection against anti-social and anti-state activities. Ambedkar advocated this by saying, "this is the necessity of present situation. It can be essential for the executive who is ruining either the defense service or public order of our country. Under such a situation, the freedom of a person cannot be more important above the security of the state.[74]

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[71]Constitution of India, Art. 21

[72]ibid., Art. 22

[73]SHAH ISHFAQ "Preventive etention"(2018)<https://www.legalserviceindia.com/legal/article-751-preventive-detention.html> accessed 16th April, 2022 [74]Alok Prasanna Kumar, "Time to Revisit Article 22 (2020)" < https://www.deccanherald.com/opinion/time-to-revisit-article-22-890125.html> accessed 16th April, 2022

4.2 The Grounds of preventive detention in India

PD should be diligently differentiated from punitive detention. In "Mariappan vs The District Collector & others (2014)"[75] Court opines that, the motive of the Preventive detention is not to castigate but to restrain the detainee from performing anything which is detrimental to the country. There is only possibility to commit a detrimental act. Punitive detention is penalty for detrimental acts done.

An individual can be restrained under preventive detention law on the basis of 4 conditions. The conditions for Preventive detention are[76]

➢ Safety of country,

➢ Protection of public order,

➢ Protection of supplies and necessary services and defense,

➢ Foreign affairs or security of India

On any or all of the above grounds, an individual maybe apprehended except for trial. If an individual got arrested under any of the grounds, then freedom of speech and expression[77] and protection of life and personal liberty become unavailable to them.[78] Under Sec. 151 of CrPC of India also creates a scope for preventive detention.[79]

Unlike India, the grounds of preventive detention in Bangladesh are not restricted to some specific grounds. Conditions mentioned in the SPA and constitution almost made every suspicious act to includes as a grounds of preventive detention.

4.3 Rights Ensured to the Detained Person:

To impede imprudent exercise of Preventive detention, particular protections are given in the Indian constitution:

• Firstly, a detainee can be incarcerated under preventive detention law only for 3 months at the very beginning.80 In Bangladesh, the initial period is six month. Then the individual

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[75]AIR 1980, SC 157

[76] Shreya Malhotra & Oishika Banerji "Preventive Detention Laws in India"(2016)

<https://blog.ipleaders.in/preventive-detention-laws-india/> accessed 16th April, 2022

[77]ibid. (n 71) Art. 19

[78]ibid. (n 3)

[79]Section 151 of CrPC

[80]ibid. (n 71) Art. (22) (4)

must be presented to the advisory board. After the advisory board comprising of three

members who is, have been or qualified to be appointed as the judges of the High Court Division[81] support that, the detention period more than 3 month is justified only then, extension of detention period is possible. In India, the members of advisory board are completely judicial members. On the other hand, a senior officer of the republic can be the member of advisory board in our country. So, there remains the possibility of biasness and partiality while considering the grounds of detention.

• Secondly, the detainee has the right to have knowledge about the causes of his detention. Though under PDA, 1950 the authority is bound to reveal the causes within five days from the date of incarceration,[82] in our country, the authority is bound to reveal the grounds within 15 days. But under the constitution the government can deny to reveal the causes of detention if it is opposed to the public interest. The authority however may deny divulging the cause of incarceration if it is against the public interest to do so.[83] Generally, this advantage provided for the authority an opportunity for dictatorial activities.

• Thirdly, the captured man shall remain the right to present a representation in opposed

the detention command. The authority will provide him the opportunity as soon as

possible. These protections are envisaged to decrease the abuse of preventive detention law.

Preventive detention is overtly anti-democratic. Afore freedom, the British government apply it to subdue nationalist movements. The first PD Act at the time of British regime was Bengal

81Preventive Detention Act, 1950, S (8) (1)

82ibid. S (7) (1)

83ibid. (n 71) Art. (22) (6)

Regulation III of 1918. Though, the constitution makers of India were harmed by this dictatorial law, they still included it.[84]

4.4 Some Important Case decision regarding Preventive Detention in India:

In "Kharak Singh V. State of UP"85 the SC opines that, freedom of personal liberty was not only restricted to corporal refrain or obstruction. After detention, Kharaksingh got exemption because of lack of evidence. After that, police officials are observing his movement and daily actions even at midnight. The court remarked that, an unwarranted encroachment into an individual's abode and trouble happened to him thereby infringed his right to personal liberty mentioned in Art. 21.

The court in "Maneka Gandhi v. Union of India" [86] notably amplified the essence of the expression "personal liberty" and illustrated it in its widest extent. The court opines that, Art. 22 do not exclude art. 19 and that any law separating an individual's personal liberty will have to pass the test of reasonability under the scrutiny of Article 21 and 19.

In 2017, Justice Chandrachud in "Justice K. A. Puttaswami (Retd.) v Union Of India And Ors"[87]introduced 3 grounds in the case of a infringement of personal right to privacy of a citizen.

1. Validity, this presupposes the existence of a legal system.

2. Need, recognized as a legitimate motive for the state's protection

3. Proportionality, this ensured a balanced relationship between the objects of preventive detention and the method used to obtain them.

In another case decision "Shibbani Lak Sena v. State of Uttar Prades"[88] the SC of India described that it is the duty of a police officer to investigate the causes of detention properly. The

[84]Apoorva Agarwal & Digvijaya Singh, "Unlocking the Reality of Preventive Detention Laws in India (2021)" < https://thedailyguardian.com/unlocking-the-reality-of-preventive-detention-laws-in-india/> accessed 16th April, 2022

[85]AIR 1963, SC 1295

[86]AIR 1978, SC 597

[87](2017) 10 SCC 1

[88]AIR 179, 1954 SC 418

courtroom is not suitable enough to enquire the true incident or facts of the case which are referred as causes of detention.

In a latest case decision, the Supreme Court opines that, preventive detention cannot be applied over anxiety of law and order problems and held that, an individual can be detained when public order is outright invaded. General infringement of law such as involving in cheating or criminal breach of trust assuredly affects the law and regulation of a country but to term it as an intervention of public order it should affects the society at large. A habitual offender was detained on the causes that, several FIR was filed in the name of offender and he got anticipatory bail in all charges. The advocate presenting the state contended that, the offender raising apprehension in the mind of people and he can involve in similar crime in the future. As ordinary laws had no effect to deter him from committing crime so we should detain the offender. But the court disallowed the application of the state's pleader and said "if an offender is provided anticipatory bail unduly then there are several remedies attainable to the state. An appeal can be submitted before the higher court or can file an application for the cancellation of anticipatory bail. Just because of anticipatory bails are provided to the offender multiple times, a preventive detention order against the offender cannot be permitted.[89]

4.5 Conclusion

As long as the preventive detention law is made within the legislative limitation and does not violate any of the condition or restriction on that power, such law cannot be struck down on unreasonable ground that it was enacted to interfere with people's freedom. Under this respect, a moral assessment must be taken because, at the end, the lives and personal freedom of vast areas of community must be valued and, in addition, the personal liberty and life of the detained should be taken care of.

[89]Amit Anand Choudhary, "Preventive Detention can't be invoked over law and order fears" The Times of India

(Aug 3, 2021)< https://timesofindia.indiatimes.com/india/preventive-detention-cant-be-invoked-over-law-order-

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Chapter-5

SAFEGUARDS FOR PREVENTIVE DETENTION

5.1. Constitutional Safeguards for preventive Detention

Article 33 of the Bangladesh Constitution deals with the right of an arrested person, in other words, safeguards as to arrest and detention. Sub article (1) and (2) deals with he or she cannot detain in custody without being informed as soon as may be of the grounds of his arrest. He or she has the right to be produced before the nearest magistrate within 24 hours and cannot detain in custody beyond the period of 24 hours without authority of the magistrate. He or she has the right to consult and be defendant by a legal practitioner of his choice and sub article (3), (4), (5), (6) deals with three constitutional safeguards or detention. They are

1. Review by an advisory Board
2. Right to communication of grounds of detention
3. Right of representation against the order of detention

5.1.1 Review by Advisory Board

An arrested person under the preventive detention law shall have the right, if the Government wants to detain him more than 6 months, to be produced before the advisory Board which shall consist of 3 members two from acting judges of the Supreme court or qualified to be judges and one from senior civil servants. A person Cannot be detained under the preventive detention law more than 6 months except under the authority of the Advisory Board. If the government wants to detain any person more than six months, he or she will be produced before the Advisory Board consisting three-members among two form High Court Judges and another one form senior civil servant. A person cannot be detained under preventive detention law more than six months except concept of advisory board. If the Board before the conclusion said period of 6 months reports that in its opinion there is sufficient cause for such detention only then government can detain him more than 6 months. [90]

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

If the grounds of detention are not placed before advisory Board within 120 days from the date of detention, the detention will be illegal. The opinion of the Majority of the Advisory Board shall be deemed as an opinion of the board if there is a difference opinion among the members.

5.1.2 Rights to communication of grounds of detention

Article 33(5) of our constitution and also in Indian constitution Article 22(5), in Pakistan constitution Article 33(5) says that the detaining authority must communicate as soon as. According to the Special Powers Act the grounds must be communicated within 5 days from the date of detention, where the person arrested in illiterate, the grounds may be communicated to him verbally where he is literate, they are to be made in the language, which the detune could understands.

5.1.3 Right to Representation against the order of detention

It is the rights of the arrested person to engage counsel and the counsel will help the Person to defend him. Article 33(1) of our constitution provides that the detaining authority must afford the detenu the earliest opportunity of making representation against his detention. The person arrested has a right to have purposeful interview with the legal practitioner out of the hearing of the police or jail stuff through it may be with in there presence.[90]

5.2 Judicial Remedies against Preventive Detention

Through the Government generally used this Preventive detention against the opposition but there are so many steps to get justice against preventive detention in Bangladesh. They are

5.2.1 Writ of Habeas Corpus

If any person illegally detained then any person in favour of him can file a writ of Habeas Corpus under article 102(b) (1) of our constitution. The detenu himself or his father or his wife or his son or his sister or his relatives or even his friends can apply for this. Most of the cases the court found the weak grounds, vague and not any

[91]Md. Abdul Halim, ibid, p. 291.

Specific Grounds, vague and not any specific grounds. As a result the high court can relax the detenu for following grounds-

1. Detaining by Government unlawful authority
2. Failure t state the grounds within time.
3. Lace of nexus with the reason of detention
4. Not to produce the detenu before advisory board within specific time.
5. Mixing good grounds with bad grounds.
6. Retrospective issuance of orders and
7. Failure to submit essential documents before court or not in proper time.
   For such grounds when high court is satisfied that the detune has been

detained arbitrarily then court can declare the detention illegal and order to release him immediately. In the time of emergency when writ of Habeas Corpus is with held then a case field under section 417 of C.R.P.C. to get direction or rule of the nature of a Habeas Corpus.

It is sated that Special Power Act there is no chance of filing a Habeas Corpus Writ but people can because the Special Power Act is a general law but article 44 and 102 give the power to High Court Division to exercise Habeas Corpus writ which is a constitutional law as it is a constitutional law strong than general law.

5.2.2 Suo Motu Rule

The Suo Moto Rule is now not very new to us. It is exercised by High Court Division Judges if any illegal or in human matters happen and it comes to knowledge of the court through newspaper or report publishing.

5.2.3 Compensation for wrongful arrest

There is no provision for payment of compensation for illegal detention under the preventive detention law. So the detaining authority exercises arbitrary and malicious discretion. High curt division declared 198 detentions illegal in a day and such a huge detentions cases being declare illegal in a day in our judicial history. But Bangladesh Supreme Court does not usually give directions of Compensation but in same exception cases like in “Bilkis Akter Hossain v. Government”.[9]

[91]Dr. Quazi Reza-UI-Hoque, ibid,. pp. 176-79.

The court directed one lakh to the each detenu a compensation for illegal detention. Section 9(5) of the International Covenant on Civil and Political Rights 1966 days down "Anyone who has been victim of unlawful arrest or detention shall have an enforceable right to get compensation." The Indian Supreme court ordered for compensation in Rudul Sah Vs. State of Bihar case. [92]

5.3 Necessity of Safeguards for Preventive Detention

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.
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, form 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:

[92]H.W.R Wade, Administrative Law, p.154 (2nd edn.)

8. Any released convict committing a breach of any rule made under section 565, sub-section (3)
9. Any person for whose arrest a requisition has been received from another police-Officer, provided that the requisition specifies the person to be arrested and the offence of other cause for which the arrest is to be made and it appears there from 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 crim. [93] By famous Rubel killing case the Super me Court of Bangladesh but unfortunately Parliament did not amend this section yet.

93Sarker Ali Akkas (June & December 20141) Constitutional Tights against Arbitrary Arrest and Detention: The Case of Bangladesh, Bangladesh Journal of law, (BILIA)

Chapter-6

FINDINGS AND RECOMMENDATIONS

6.1 Findings:

It cannot be denied in many advancing countries the Preventive Detention used as a medium to subdue, wreck the opposition party and to perpetuate governing over the country. Later attaining our independence, there were absence of circumstances of internal aggression or war or external interference which are intimidating for country's security but The SPA, 1974 are continuously being used to repress anti-government action and also democratic motion.

In our country a detained person can be kept in detention till six month without trial. This is an evil practice because in the world such an extensive detention period cannot be found. In India, this commencing time is 3 months. After the confirmation from the advisory board, highest time of incarceration has not been determined in the constitution or in The SPA 1974. This is also one of the harmful sides of Preventive Detention. In India, highest period of incarceration is 2 years.

In democratic countries Preventive Detention is a process applied in emergency circumstances like external aggression or war. In Indian constitution it is particularly described that only in time of emergency, Preventive Detention laws can be used in specific objectives. In our country a huge numeral of political members and leaders of opponent parties are incarcerated except trial through the Preventive Detention under the SPA 1974 which is also termed as 'black law'. But this scenario of incarceration except trial is not found in India where this Preventive Detention law also subsists.

Police officer after capturing any alleged presents him afore magistrate court and prays for remand. Unfortunately, in most of the cases police obtain remand and detainee becomes subject to cruel, inhumane and degrading punishment including various kinds of corporal and psychological torture which is a contravention of international HR law. Numerous alleged people who are not in reality offender, for mislead information or suspicions they have to remain inside the prison.

6.2 Recommendations:

There are numerous contentions in favour of and against the preventive detention. Several analysts have explained it from their own point of view. In my thought, there are few things our country needs to do and it is high time for our government authority to do so.

I. Preventive detention should be applied merely as an ultimate measure and for exigency time only. So, essential legal amendment must enact to prevent the use of preventive detention in peace time. Furthermore, use of preventive detention must be reduced and the causes on the basis of which it could be applied must be evidently written down by the authority.

II. Safeguards against arrest and detention under Art. 33 should be expanded. A detained person under preventive detention law should also have the right to be presented afore the court within 24 hours of capture.

III. Art. 33(4) of the constitution should be reformed and the primary period of incarceration should be reduced from subsisting six month period to three month period. After confirmation by the advisory board incarceration must not be for uncertain period. A fixed time for incarceration should be included in the constitution.

IV. Only the opinion of advisory board cannot be adequate to determine the reasonableness of the grounds of preventive detention. A proper judicial review procedure should take place to examine the validity of the detention of all the individuals detained under preventive detention laws. In case of unauthorized detention, adequate compensation must be paid to the detainee and the responsible party for such error, except it was bonafide, must be brought under the law.

V. The detained person cannot be stayed with the ordinary convicted person as it is not a form of castigation for any offence. The detainee must be given the opportunity to communicate immediately with his family members, lawyer also impartial medical board.

VI. Any types of cruel, torment or inhumane penalty must be avoided and to achieve these purpose appropriate directions must be made for the detaining authority.

VII. All reasonable opportunities should be provided to the detenu.

VIII. The detenu must not be kept with those who are regular convicts.

IX. Police should not be used for political motives.

X. Judiciary and administration need to be free from corruption.

6.3 Concluding Remarks:

After analyzing the circumstances regarding preventive detention laws of the Bangladesh it can be easily presumed that certainly purposes of enact such laws to avert the anti-social people from occurring impediment in the community which might lead to detrimental effects on lives of people. But these laws must be used with highest control and protection so as to evade any argument. These laws straightly influence the fundamental freedoms and rights of citizens those are affirmed in the constitution and reckless use of these laws can waste a plenty of time in the court and liberty of the person so incarcerated.

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