Chapter 1

INTRODUCTION

1.1 Introduction

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[1] 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. 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 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.

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

[2] 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) [1]

[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): 49-62, June 2006

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 detainees is increasing gradually.[3] 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 cach and every government as a brutal weapon to suppress anti-government movement, sometimes democratic movement and to perpetuate rule.

1.2 Background of the Research

Arbitrary arrest and detention which is understood in other words as preventive detention derived from the misuse of Special Powers Act- 1974 causes a great violation of human rights and protection thereof. Arbitrary detention by law enforcing agencies have remained a persistent feature of our criminal justice system. These practices have been widespread in Bangladesh irrespective of the forms of government, and successive governments have failed to stop this endemic problem. Torture while detention is typically committed by different state agencies-law enforcing, intelligence and security agencies, which include police army, paramilitary forces, coast guard, navy forces, prison officers and security agencies such as

the National Security Intelligence (NSI) and Director General of Foreign Intelligence (DGFI). Usually, the venue of custody is the police station. But arrested persons are also frequently taken to the cantonment, or to unknown locations for interrogation by police-army joint cells, which is clear violation of law. Arbitrary detention is unacceptable in any form of government that is committed to democracy and the rule of law.

Though preventive detention was introduced to face the grim and grave situation to deal with the problem, it has some lacunas. This study reveals that with whatever saintly motive the Special Powers Act may have been enacted, it has been used invariably to repress people whom the administration do not like. Though our Constitution has inserted the provision regarding the safeguards of preventive detention, these are not sufficient and the law enforcing agencies as well as the court administration are not interested to the provisions and the common people have little knowledge about these safeguards.

1.3 Objectives of the Study

The objectives of the study are as follows

1. To find out the problems faced in the preventive detention process in

Bangladesh.

2. To highlight some leading cases regarding preventive detention.

3. To highlight the constitutional as well as the judicial safeguards of preventive detention in Bangladesh.

4. To make recommendations to improve the current preventive detention

process in Bangladesh.

5. To point out suggestions to reform the laws related to preventive detention.

1.4 Importance of the Study

This study will consider the validity of preventive detention law and discover to what extent the rights are infringed due to misapplication of preventive detention laws and will finally put necessary recommendations to stop the misuse of the law. The aim of this study is to analyses the past decisions of higher judiciary in the field of arrest, detention and torture. So in future, it will be helpful for the policy makers, legislators, teachers, students and researcher to know about problems and prospects of the preventive detention system in our country. As in Bangladesh there are inadequate rules on safeguards of implement the provisions related to safeguards of preventive detention in Bangladesh.

1.5 Methodology of the Study

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 laws, published books, and journal articles and online resources. Research Method of documentary analysis or content analysis has used which has helped me to focus the Concept of preventive detention in existing laws and to seek out the demerits of this preventive detention system in Bangladesh. Side by side the analytical research method has helped to search out the aim of the study, relevant judicial decisions are collected from various sources and analysis to spot the most trends on the problems.

1.6 Collection of Data

Data has been collected for this study from both primary similarly as secondary sources. This can Be a critical study on the difficulty of preventive detention statute, case law and existing research Report as primary source. I've also used text books, journals and knowledge from internet as secondary sources so as to grant complete shape to the study.

1.7 Scope of the Study

The present study projects specialize in preventive detention and violation of human rights in criminal justice system in Bangladesh. In doing so, this study

> Firstly makes an effort to substantiate the right knowledge about preventive detention, arbitrary arrest by law enforcing Agency and violation of human rights.

Secondly, the current study makes an analysis on laws Associated with preventive detention. Thirdly, the current study gives an overview and makes a Critical evolution of the prevailing law regarding preventive detention in criminal justice system in Bangladesh.

Finally, the study makes a humble effort to draw some suggestions, acquired the Conclusion of the current study.

1.8 Limitation of the study

Though there are huge information in text books, journals and in internet it's not sufficient. I've got to also give concern about time and price. Furthermore, the current study is undertaken as a part of fulfillment of the wants of LLB degree. The researcher gets only 1 month to complete the Research. Moreover, the research is directed to be within prescribed word limit. Therefore, there Not much scope for doing a comprehensive study. Yet, I try my best to satisfy the objectives Launched within the present study.

Chapter 2

GENERAL CONCEPTIONS

2.1 Definition of Preventive Detention

Though the concept of preventive detention is acknowledged all over the world, the term is not defied universally. The term preventive detention means a detention the aim of which is to prevent a person from doing something which is likely to endanger the public peace or safety or causing public disorder. Preventive detention is fundamentally and qualitatively different from imprisonment after trial and conviction in a criminal court. Preventive detention and prosecution for an offence are not synonymous.[4] In justification of preventive detention it is usually claimed that where preventive justice is put in force, some evitable suffering and inconvenience may be caused to the suspected person but the suffering is inflicted for something much more important than his liberty or convenience, namely for securing the public safety and the defence of the realm. No doubt, the interest of the realm, state or society is more important than that of the individual. But history gives us altogether different lesson. It inherently bears and almost always exposes the risk of abuse the arbitrary exercise of power in the in the interest of the government.

The term preventive detention is used in contradistinction to the term punitive detention'. In other words, it may be said that detention may be of two types-punitive detention and preventive detention. Preventive detention means detention of a person without trial and conviction by a court, but merely on suspicion in the minds of the executive authority. Preventive detention is an abnormal measure whereby the executive is authorized to impose restraints upon the liberty of a man who may not have committed a crime but who, it is apprehended, is about to commit acts that are prejudicial to public safety etc". [5]Punitive detention on the other hand, means the detention of a person only after trial for committing a crime and after his guilt has been established in a competent court of justice. According to Vinan Bose J., preventive detention has three special features. The first is that it is detention and not imprisonment; the second is that it is detention by the executive without trial or inquiry by a court; and third is that the object is preventive and not punitive. [6]According to Chief Justice Badrul Haider Chowdhury, preventive detention means detention the aim of which is to prevent a person from doing something which is likely to endanger the public peace or safety or causing public disorder[7].

According to Web Stars World Law Dictionary, preventive detention is a confinement of an accused person pending trial, under terms of statute authorizing denial of bail to defendants

[4] A.K. Brohi, Fundamental Law of Pakistan, 2nd ed. (Karachi: Din Muhammad Press, 1990)

[5] S.Sharifuddin Pirjada, Fundamental Rights and Constitutional Remedies in Pakistan, 2 p.424. nd ed. (Lahore: All Pakistan Legal Decisions, 1996), p.191.

[7] MD.Abdul Halim, Constitution, Constitutional Law and Politics: Bangladesh Perspective, 2 nd ed. (Dhaka: CCB foundation, 2009) p.293

charged with having committed certain offence and or are considered to be danger to themselves or to public at stage. According to American heritage dictionary, preventive detention is the pretrial imprisonment without the right to bail of a person accused of a felony and judged dangerous to society[8]. Preventive detention is the most arguable topics of law in recent time, thats why a lot of people tried to give exact definition of it. But there is no authoritative definition of preventive detention. The word preventive means that restrain whose object is to prevent probable or possible activity, which is apprehended from a would be detent on ground of his past activities. Detention means keeping back. Preventive detention means detention of a person only on suspicious in the mind the executive authority without trail without conviction by the court .Preventive are taken under detention why they commit any crime or they are taken under tried for their criminal activities. That means detention is the result of committing any crime by an individual of a nation. But preventive detention means dissimilar to it. In general law, no people can be arrested without knowing him the reason of arresting and there is a specific time of 24 hours to take him in front of magistrate. But in preventive detention a people can be arrested any time without telling him any reason and can be taken in custody for 6 months.[9]

2.2 Distinctions between Preventive Detention and Punitive Detention

The distinction between preventive detention and punitive detention has beautifully been described by Mukharjee J. in the following word. A person is punitively detained only after a trail for committing a crime and after his guilt has been established in a competent but a precautionary measure. The object is not to punish a man for having done something but to intercept him before he does it and to prevent him from doing it. No offence is Proved, or any charge formulated and the justification is suspicion or reasonable probability and not criminal conviction which only can be warranted by legal evidence. [10]

There are following distinctions between preventive detention and punitive detention

First, preventive detention is a detention by the executive authority whereas punitive detention is a detention by court. Second, the object of punitive detention is to punish a man for having committed a crime. The object of preventive detention, on the other hand, is not to punish anyone for any wrong done by him but to prevent him from doing any injurious activities in future by him.

Third, preventive detention is a precautionary measure adopted by the executive in time of emergency for the greater interest of the nation and state whereas punitive detention is an ordinary measure. Fourth, in case of punitive detention the person under detention has committed a

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[8] [http://jurist.law.pitt.edu/world/bangladesh.htm, last visited on 18 September, 2023.]

[9] Ibid

[10] S.Sharifuddin Pirjada, ibid., p.191.

crime whereas in case of preventive detention the person under detention has not committed any crime. Punitive detention, therefore, comes after the illegal act is actually committed but preventive detention has reference to apprehension of wrong doing.

Fifth, in case of punitive detention specific charge is brought against the detention and through a formal judicial procedure the charge has to be proved by legal evidence. But in case of preventive detention no specific charge is formulated, no offence is proved; nor is any evidence present and the justification of such detention is suspicion or reasonable probability of the impending commission of the prejudicial acts.

2.3 Necessity for Preventive Detention

The philosophy lying behind the preventive detention is the interest and security of the state and nation. National security and interest are more important than the personal liberty of citizens, for the enjoyment of personal liberty itself is dependent on the safe security of the state .This is why in times of grave emergency threatening to the security of the state preventive detention is authorized by law in all democratic countries including England and USA. Justifying the measure Lord Atkinin R v.Halliday[11] said:

1) Where preventive detention justice is put in force some sufferings and inconveniences may be caused to the suspected persons. This is inevitable. But the suffering is inflicted for something much more important than his liberty or convenience, namely for securing the public safety and the defence of the realm.

2) However precious the personal liberty of the subject may be, there is something for which it may well be, to some extent, sacrificed by legal enactment, namely national success in the war, or escape from national plunder or enslavement.

3) Any preventive measure even if they involve some restraint or hardship upon individuals, do not partake in any way of the nature of the punishment, but are taken by way of precaution to prevent mischief to the state.

All international and regional documents of human right recognize and make provision for derogation of rights in case of emergency and of national crisis. During the first and second world war the British government was given extensive power by parliament to pass order for preventive detention. The US congress has also given the executive power to make preventive detention. But this power can be exercised only in times of grave emergency like war-time.

[11] 1917 AC 260

2.4 Preventive Detention and Fundamental Rights

The fundamental rights of the people of Bangladesh have been enshrined in the consistent with these rights were made nay law inconsistent with these rights certain right may, however remain an emergency arising out of a threat to the country's economic life.

Fundamental rights give the citizens dignity of life is an atmosphere of freedom and justice beyond the man made fetters that have constricted their physical and mental horizons modern judiciary is regarded as an excellent product of civilization to put the concept of justice to work in the midst of divergent forces with conflicting class on individual interests such conflicts make it difficult to origin about equilibrium in the society for a peaceful and orderly association of citizens for their common good. An independent judiciary and strong democratic institution are the best guarantee against assault on the rights of the citizens. The fundamental rights in Bangladesh are listed under articles 27 to 44 to of part III and the jurisdiction of the High Court Division of the Supreme Court to enforce the rights is defined in article 102 of part VI of the constitution of 1972.

Articles 27 and 28 of the constitution provide that all citizens are equal before law and are entitled f'to equal protection of law and the state shall not discriminate against any citizen on grounds only of religion, race costs sex or place of birth article 31 and 32 provide that to enjoy the protection of the law and to be treated in accordance with law, is the inalienable right of every citizens and no action detrimental to the life personal liberty body reputation or property of any person shall be taken except in accordance with law. Article 29 provide that there shall be equality of opportunity for all citizen in respect of employment of office in the service of the republic irrespective of religion race early sex or place of birth, nothing in this article shall prevent the state from making special provision in favor of any backward section of citizens for the purpose of securing their adequate representation is the service of the republic[12]

Article-133 provides that no person who is arrested shall be detained in custody without being informed on the grounds of such arrest, non shall be denied the right to consult and be defended by legal practitioner of his choice, every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty four hours of such arrest and no such person shall be detained in custody beyond the said period without the authority of a magistrate except in the case of any person who for the time being is an enemy alien, or who is arrested on detained under any law providing for preventive detention. Article 34 guarantees that all forms of forced labor are prohibited and any contravention of this provision shall be offence publishable in accordance with law, nothing in this article shall apply to compulsory labor by persons under going law full punishment for a criminal offence, or required by any law for public purpose.

[12] Dr. Quazi Rezaul Haque, Ibid, p.65.

Chapter 3

PREVENTIVE DETENTION UNDER THE CONSTITUTION OF BANGLADESH AND OTHER STATUTORY LAWS

3.1 Introduction

The claim of personal liberty being the essence of a free society, almost all every civilized country has constitutionally protected its citizens from the excesses of the coercive apparatus of state. Bangladesh is not an exception. Among the national institutions, the legislature always comes in the forefront of the national systems for the protection of the rights of a person arbitrary arrested and detained. One of the main function of the legislature is to enact laws in protecting human rights of the arbitrary arrested persons because arrested and detained persons are considered as innocent until proved their guilt beyond reasonable doubt. [13]

The statutory provisions regarding preventive detention are discussed below.

3.2.1 Preventive Detention under the Constitution of Bangladesh

In Constitution of Bangladesh (1972), Article 33 did not leave any scope for preventive detention(5). But by the second amendment of the Constitution, Article 33 was change by the present one. Preventive detention, though a wrong in a certainty for State security and by the Constitution Act, 1973 the rights under Article 33 of the Constitution were reduce under specific circumstances. Art. 33(1) & (2) guarantee four rights to a person arrested(6). The four rights under Art. 33 are:

1. A person arrested must be well informed as soon as possible of the grounds of arrest,

2. He must be allowed to confer and be defended by a lawyer of his choice,

3. He must be produced before the magistrate within twenty-four hours of arrest, excluding the time necessary for journey,

4. He must not be delay for a period longer than then twenty-four hours plus the time of journey without the authority of the magistrate. But these four rights are not present to a person arrested or detained under a law providing for preventive detention. [14] Although Art 33(3), (5) & (6) give three major Safeguards in the case of preventive detention.

[13] 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)

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

3.2.1 Constitutional Safeguards against Preventive Detention

After the second amendment of the Constitution any person arrested or detained under any law regarding preventive detention will not have the rights conferred by Art. 33(1) & (2) of the Constitution. But the Constitution has itself put some restrictions in the exercise of those laws proving for preventive detention. In order to protect individuals from arbitrary arrest and detention the Constitution provided some safeguards against such laws and against the exercise of powers by the executive authority. Clause (4) and (5) provide three important safeguards for this purpose.

3.2.1.1 Approval by Advisory Board:

The constitution of an Advisory Board for the purpose of reporting to the government its opinion whether a person should be detained for more than Six months may be said to have been introduced for the very reason that review by the Law Courts was excluded. This is no doubt, a special procedure but this shows that the person detained has not been left without any safeguard. 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. Article 33 (4) provides that no law shall authorize detention for a period of more than six months and the period of six months can be extended only if an Advisory Board, before the expiry of six months, opinions that there is sufficient cause for detention. If no such affirmative opinion is given by the Advisory Board, the detenu has to be released on the expiry of Six months. In a writ of habeas corpus, the court is not required to wait for the opinion of the Advisory Board and should dispose of the petition if it is otherwise ready for hearing, [15]

3.2.2 Preventive Detention under the Special Powers Act, 1974

The primary content of the Act lies in section 3, which permit the government to delay any person in custody under the impersonate of preventive detention. The parliament on February 9, 1974 enacted this black law, Special powers Act, 1974 containing the provisions of preventive detention. Some major sections of the Special Powers Act 1974, which is connected to the prevention detention, these sections are following bellow:

- **Section-3: Power to make orders detaining or removing certain person**
- **Section- 4: Execution of Detention orders**
- **Section-8: Communication of grounds of order**
- **Section-9: Constitution of Advisory Board**
- **Section-10: Reference to Advisory Board**
- **Section-11: Procedure of Advisory Board**
- **Section-12: Action upon the Report of Advisory Board**

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

3.2.3 Emergency Power Rule-2007

The government draw up the Emergency Power Rule-2007 as per the power specify under section 3 of the Emergency Power Ordinance, 2007 and it appear into operation from 12 January 2007. Rule 14, 15, 16 and 21 deals with the provision of preventive detention and it gives a spacious of powers to the executive authority to detain a person purely on suspicion on their mind.

3.2.4 Provision Related to Preventive Arrest Warrant of Warrant:

As per rule 21 of the Emergency Power Rule-2007, under the state of emergency, if it appears satisfactory or likely that a person has committed or may commit an offence under any act mentioned in this rule or rules 14 and 15, provisions related to the preventive warrant of arrest under Special Power Act, 1974 may be applied as opposed to that person. As per rule 14 of the Emergency power Rule-2007, to safeguard the security and attentiveness of the state and the people and to maintain regulation and peace, the law and order passion will play an energetic role in applying the Penal Code-1860, Arms act-1878, Explosive Substances Act-1908, Foreign Exchange Regulation Act-1947, Special Powers Act-1974, Narcotics Control Act-1990 and special other acts in restraining illegal arms, explosive substances, sabotage, hoarding, adulteration in drugs and food stuff, counterfeiting money and government stamps, black marketing, smuggling, narcotics and other crimes subversive of the security and pecuniary life of the state and the people.

In Bangladesh, most of the developing countries, the laws regarding Preventive Detention has been used as a weapon to dominate, crash the opposition and to perpetuate rule. After achieving our independence, there are no situations of war or central hostility or internal interference which are threatening our security but Art. 33, The Special Powers Act, 1974 and Emergency Power Rule2007 are still being used to conquer anti-government movement and sometimes democratic movement also.

CHAPTER 4

4.1 Preventive Detention Legislation in Bangladesh, India, and Pakistan

4.1.1 In Bangladesh:

After the liberation of Bangladesh, the Bangladesh Scheduled Offences (Special Tribunal) Order, 1972, popularly known as P.O. 50/1972 was approve with a view to control the market of necessary object and some marked criminal offences. The provisions of preventive detention were severe and as such popular discontent began to increase every day. Awami League, the then ruling party repealed the P.O. 50/1972 along with the Security of Pakistan Act, 1952 and Bangladesh Public Safety Ordinance, 1958 in the teeth of significant public criticism. Soon after the people got relief from the pangs of the authoritarian laws, the Parliament on February 9, 1974 enacted the antipeople black law, "Special Powers Act, 1974" authoritarian the provisions of preventive detention. The Act says that any person can be arrested and detained by the executive authority if there is "satisfaction" in the mind of the authorities that he may perform.

4.1.2 In India:

In India, the early preventive detention law was enacted in 1950 which was named "Preventive Detention Act, 1950." Subsequently it was amended and exchange by the Maintenance of Internal Security Act (MISA), 1971. MISA, which was repealed on and from 3 rd. August, 1978, had been, in every sphere, very harsh in application and it was as opposed to democracy.

Other Preventive detention laws are -

- the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974
- Smugglers and Foreign Exchange Manipulators Act (SAFEMA), 1976,
- Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Ordinance, 1979.

Replaced by

- ✓ Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1980, the National Security Act, 1980,
- ✓ The Essential Services Maintenance Act (EMS), 1981 and the Terrorist and Disruptive Activities (Prevention) Act, 1985.

4.1.3 In Pakistan:

The Indian Independence Act, 1947, which received the royal assent on the 18th July 1947, and came into force on the 15th August 1947, divided British India into two independent dominions, India and Pakistan. All successive governments of Pakistan considered "preventive powers indispensable in view of the volatile nature of the population and the existence of elements against whom the normal punitive law would be ineffective". So, the central statutes that were passed were-

- Pakistan Public Safety Ordinance, 1949, Pakistan Public Safety (Amendment) Act, 1950;
- Pakistan Public Safety Ordinance, 1952; &
- The Security of Pakistan Act, 1952.

Besides these Central Acts and Ordinances, the Besides these Central Acts and Ordinances, the outlying Government of East Bengal approve a number of Public Safety Acts and Ordinances relating to preventive detention.

CHAPTER 5

5.1 Violation of Human Rights by Preventive Detention in Bangladesh

The violation of Human rights has started from very beginning of our civilization. It is being made in culture of violation of human rights through preventive detention all over the world, mostly in the third world countries. It is sorry to say that Bangladesh is one of them. Human rights violation in case of preventive detention is a familiar feature in Bangladesh.

5.2 Preventive Detention and Violation of Human Rights

Right against arbitrary arrest and detention is one of the prime portion of Human Rights the best part of numerous international human rights instrument. Preventive detention, though an evil, is sometimes a necessity for state reliability. Although this detention has to be only under special circumstances and with accordance with the due procedure of law. Unlawful detention affects several other rights guaranteed by the Constitution consequently it violates Human Rights of a person. Amongst the national institutions, the judiciary always comes in the front line of the national systems for the protection of human rights.

One of the major functions of the judiciary is to safeguard human rights guaranteed in constitutions and laws. In protecting human rights, the function of the judiciary is to supervise the way in which the various powers of government are used within the framework of laws and a set of values, and to protect person from arbitrary governmental movement. Preventive detention is a serious encroachment upon the personal liberty of a person, for the easy motive that, unlike common arrest or imprisonment, preventive detention is attained without trial. But in appearance of preventive detention law, most of the times the executive authority exertion discretionary power concerning arrest and detention and violates human rights.

5.2.1 Violation of Rights to Life by Preventive Detention

'Life' within the meaning of Art.31[16] means something more than mere animal existence. It includes the right to live consistently with human dignity and decency, right to the bare necessities

of life such as adequate nutrition, clothing and shelter and the facilities for reading, writing and expressing oneself its diverse forms, freely moving about and mixing and commingling with fellow human beings and all that which gives meaning and content to a man's life including tradition, culture and heritage.

According to a leading news daily of Bangladesh, country's 68 jails, which are designed to detain 34,147 inmates but currently they are holding 71,606. Preventive detention is not for punitive

[16] Article 31 of the Constitution of the People's Republic of Bangladesh, 1972.

purpose, but the condition in which a person is detained is more than what punishment can be meant. So by detaining a person under preventive detention in jails, which are degrading for any human being to live in, is a gross violation to right to life of the detenu person.

5.2.2 Violation of Right to Liberty and Freedom of Movement:

Article 32 of the Bangladesh Constitution[17] ensures personal liberty to every person and Art. 36 ensures freedom of movement, which means every citizen shall have the right to move freely. But by detaining any person under colorful exercise of the laws regarding preventive detention, the detaining authority violates these fundamental human rights. Again the laws regarding preventive detention it has many lacunas which the executive authority often takes advantage of. In Bangladesh without trial six months' detention can conferred to the detainee. This is a bad process because nowhere in the world such a long period is not found. In India and Pakistan, the initial period of detention is three months.

No maximum period of detention has been fixed by the Constitution or the Special Powers Act[18] .So a person can be detained for indefinite period where the advisory board thinks it fit. Whereas the maximum period in India is 2 years and 8 months in a year in Pakistan.

Also in Bangladesh there is no specific time when preventive detention law can be applied. It can be applied in both peace time and emergency time. However, in most democratic countries Preventive detention is a method resorted to in emergencies like war. The western developed countries like USA, UK, and Singapore, it is specifically mentioned that only in time of emergency, Preventive detention is applied for and also for specific purposes, but there is no specification in our constitution and can be restored to in times of both peace and emergency.

Moreover, in Bangladesh the Government frequently uses the police for political purposes and provided immunity to members of security forces. There are wide spread corruption allegations and a severe lack of resources, training, and discipline amongst the detaining authorities present. Bangladesh has a large number of political workers and leaders detained without trail through preventive detention under the Special Powers Act 1974[19] , which is a great violation of right to liberty and freedom of movements. On 7 September 2000 a three-member Sub-committee of the

[17] Article 32 of the Constitution of the People's Republic of Bangladesh, 1972.

[18] Constitution or the Special Powers Act, 1974.

[19] Special Powers Act, 1974

Parliamentary Standing Committee submitted a 31-page report on SPA to the Parliament, in which it mentioned that 69,010 people were detained under SPA of 1974 in the last 24 years and 68,195 persons were released by order of the High Court Division.

Special Powers Act has become a draconian law because of its unconstitutional provisions and also its unlawful use by detaining authority. Special Powers Act is a draconian law because under this Act,

- Firstly, a detainee has not given any right to know the grounds for which he is detained through the judicial body.
- Secondly, the Govt, can arrest and detain any person at any time.
- Thirdly, the Govt. can detain a person for an indefinite period of time if wishes.
- It is against the commitment and spirit of the Constitution and human rights.

5.2.3 Violation of Right to Freedom from Torture and Cruel, Inhumane or Degrading Treatment

Under the Special Powers Act Govt. can use the police officers to arrest any person. And it is a common practice amongst the police to inflict bodily and mental torture or cruel treatment of the persons detained. In spite of constitutional guarantees and protection under International Bill of Rights, such as UDHR and ICCPR the police often in the name of state security detain any person they wish and use torture and cruel treatments in the name of getting information from them.

An example of the scale of the problem is the four-week crackdown on May 28, 2008 resulting in the arbitrary arrest and detention of more than 50,000 Bangladeshis. Media reports indicated that most persons arrested were subjected to same from of ill-treatment, including beating and that torture was also used on a significant number of detainees, during which the police extracted money or confessions.

5.2.4 Violation of Right to Fair Trail:

When a police officer arrests a person under sec. 54 of the CrPC[20], then the arrested person must be produced before the magistrate within 24 hours of such arrest. But if the Govt. wants to detain any person under sec. 3 of the SPA [21] and makes an order for such detention, the police can put him into prison for 6 months without producing him to any Judicial or Executive authority.

Moreover, many suspected people are detained under wrong information. And most of them don't possess the means to go to the judicial body to seek remedy. Only the rich can go to the High Court Division and get remedy by instituting the writ of Habeas Corpus[22]

Art. 33(5) [23] requires that the grounds of detention must, as soon as may be, be communicated to the detenu and the detaining authority must afford him the earliest opportunity of making a representation against the order of detention. It is very important because it not only enables the detenu to make the representation, but also enables him to file a proper application for a writ of Habeas corpus. But there is a proviso to Art. 33(5) and also Section 8(1) of the SPA, 1974 permits the detaining authority to refuse to disclose the facts which it considers against the public interest. However, the ambit of public interest has not been defined, so this proviso is often used as an exploitation tool and in denying right to fair trial. Again Section 11(4) of the SPA states that, the detainee against whom a detention order has been made cannot appear by any legal practitioner in any matter connected with the reference to the Advisory Board, and the proceedings of the Advisory Board and its report, excepting that part of the report in which the opinion of the Advisory Board is specified, shall be confidential. And as the report of the Advisory Board is binding on the executive authority and the Govt., it is always influenced by the authority.

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[20] sec. 54 of the Code of Criminal Procedure, 1898.

[21] sec. 3 of the Special Powers Act, 1974

[22] writ of Habeas Corpus Art. 102 of the Constitution of the People's Republic of Bangladesh, 1972.

[23] Art. 33(5) the Constitution of the People's Republic of Bangladesh, 1972.

5.2.5 Freedom of Speech and Expression:

Human rights defenders and professionals, including from media, were regularly being monitored, threatened and intimidated by the personal of the country's armed forces and various intelligence agencies. The democratically elected government do not always have the scope to utilize the emergency provisions for doing the above misdeeds.

However, in the name of SPA and anti-terrorism Act, it has arrests various persons, inflicts torture on some of them and threatens everyone who wish to speak against the govt. of order of preventive detention against them.

Recent cases of Preventive Detention in Bangladesh and Violation of Human Rights[24]:

Article 33 of the Constitution[25] guarantees that a person arrested be informed of the grounds for detention; provided access to a legal practitioner of her/his choice; and brought before a court of competent jurisdiction within 24 hours of arrest. Throughout the year, how-ever, law enforcement agencies arrested and detained persons arbitrarily under section 54 of the Criminal Procedure Code (Cr PC) 1898[26] the Special Powers Act, 1974[27] and the Public Safety Act, 2000.[28]

Section 54 of the CrPC empowers the police to detain any individual on nine grounds of reasonable suspicion of criminal activity without any order from a magistrate or a warrant. The Code however provides of specific legal safeguards. Under section 162, forced confessions are in admissible in evidence unless admitted by the accused before a magistrate, who accepts it as being given voluntarily. Section 163 of the Code prohibits the police from making any inducement, threat or promise during investigation, while section 164 protects the detainee's right to remain silent in case s/he wishes not to confess.

Even though three different governments were in office during the year, there was little change in the nature of police excesses and there was no decrease in arbitrary arrests and detention during the terms of the two elected governments. The administration functioned somewhat neutrally only during the three-month Caretaker regime. In its last year, the AL rule was marked by numerous incidents of arrest, detention and persecution of political opponents. Soon after the Caretaker

[24] https://www.lawyersnjurists.com/article/preventive-detention

[25] Article 33 of the Constitution of Bangladesh

[26] section 54 of the Criminal Procedure Code (Cr PC) 1898

[27] the Special Powers Act, 1974

[28] The Public Safety Act, 2000

Government took office, police arrested hundreds of armed cadres associated with the major political parties for the purpose of confiscation of illegal firearms. Under the BNP led Four- Party Alliance, which took office on 10 October, the number of arms cadres were arrested.

5.3 Arbitrary Arrest under Repressive Laws

Notwithstanding the safeguards given in the laws, section 54 Cr. PC[29] is frequently misused by the law-enforcement agencies. In many incidents person initially detained under section 54 of the Cr PC were subsequently given prolonged detention under other repressive laws such as the SPA or the PSA. Newspaper reports have quoted numerous instances of persons languishing in prison without trial for years, on grounds of reasonable doubt.

5.3.1 Arrests under Section 54

The police sometimes use Section 54 to harass and intimidate members of the political opposition and their families. Or detain opposition activists prior to and during general strikes, without citing any legal authority and hold them until after the event. Newspapers have reported instances of police detaining persons to extract money or for personal vendetta.

On 1 July 2001 a report published by the office of the Chief Metropolitan Magistrate, Dhaka revealed that in 11 out eleven police stations of Dhaka city, 17,338 persons were detained, all of whom had been arrested under section 54 of the Cr PC. Police sought remand for all the detainees but the court accepted their plea for 6,503 persons only. Only 113 of remanded detainees confessed their guilt to the police. The report also held that punitive actions had been taken against as many as 85,000 police personnel for abuse of power and alleged implication in criminal activities.

Quoting sources in the Ministry of Home Affairs, another news item reported that over the last twelve months, Dhaka Police lodged 3,917 GED (general diary) and arrested 6,178 persons under section 54 of the Cr PC. In most cases, the detainees had been identified as 'wanted criminals', 'extortionists', 'muggers', drug addicts' and 'persons dangerous for peace and tranquility'. Of those arrested, 619 were detained under the SPA. Cases were proved only against four detainees and the court ordered release of the remaining 6,174 detainees. In May 2001, Mr. Shoilendro Kumar Adhikari, the learned Chief Metropolitan Magistrate of Dhaka, held a meeting with all the magistrates under his jurisdiction and directed them to grant immediate bail to detainees under section 54 Cr. PC unless specific charges were brought under any other law. A month after this directive was circulated to the police departments; the metropolitan police stations in Dhaka showed a decrease in arrests. However, the scenario remained unchanged across other parts of the country.

[29] section 54 The Code of Criminal Procedure, 1898.

5.3.2 Incidences of Arrest / Detention under Section 54:

⇒ 5 February 1992, the Daily Star[30] reported that a Nigerian citizen was arrested in March 1992 and, after a three year trial, was sentenced to two months of imprisonment. On

pletion of the prison terms, he remained a prisoner in Dhaka Central Jail. Nineteenyear-old Nigerian citizen Goddyu Ochendo was arrested in connection with drug smuggling along with an American, Elicda MacCord, in 1992 in June 1993, Goddyu was acquitted of drug smuggling. But on 13 July 1993, he was charged with using an'invalid' passport. He completed a two-year prison term on 31 May 1995 in the passport case. He then complained to the CMM Court that he could not go home as his lawyer defrauded him of his money. He had deposited USS1, 421 with his lawyer during the trial, but he alleged that the lawyer did not return the dollars. The lawyer then filed a revision case denying the allegation. In a recent prayer to the Home Ministry, Goddyu gave up his claim to the dollars and begged for release..... even after five months. Goddyu was one of the 27 foreigners who were detained for years at the Dhaka Central Jail even often completing prison terms. of them, thirteen were from India, one from Pakistan, ten from Myanmar and three from Africa.

⇒7 February 2001, the Daily Ittefaq[31] reported that police sent a motor garage owner to jail under Section 54 of the CrPC, in the Fokirhat area under Bagerhat District. A gang of local hoodlums abducted the ill-fated garage owner, named Keramot Ah. Police rescued him later from the local Polli Mongol Samity (village welfare association), his hands and legs tied with strong ropes. But police later on arrested him and sent him to jail. None of the abductors, however, were arrested by the police.

⇒ 18 February 2001, Jugantor[32] Panama Faruque', a cadre of the Jabo League (youth front of the ruling Awami League), kidnapped Aminul Islam from his residence in Barisal. The Jabo League gang mercilessly beat him with lethal weapons. The police rescued Aminul Islam; instead of arresting the oppressors, they arrested Aminul Islam under Section 54 of the CrPC[33] and applied for his remand from the Court.

⇒14 March 2000, Jugantor[34] reported that a ten to twelve year old boy Noor Hossain was detained in jail. He stayed there for nine months without any charges. Family sources informed that

[30] 5 February 1992, the Daily Star

[31] 7 February 2001, the Daily Ittefaq

[32] 18 February 2001, Jugantor

[33] Section 54 of the CrPC

[34] 14 March 2000, Jugantor

members of Khulna police suddenly entered their home on 1 June 2000 and arrested Noor. Neither Noor nor his parents were told why the boy was kept in prison.

⇒30 March, Jugantor[35] reported that eleven party activists of the Islami Chattro Shibir (student wing of Jamat-Islami) were arrested on March 25 under Section 54 of the CrPC and given one month's detention in Dhaka Central Jail. Their detention was on grounds of suspicion that they had been secretly planning to overthrow the AL Government.

⇒ 3 July 1998, Janakantha[36] reported that Mohammadpur Thana police arrested Jalal along with two other youths, Tanvir and Habib, on 3 December, 1997 under section 54 of the CrPC. They were sent to the court and while the two others had been charged under the Arms Act, Jalal's name did not appear in the charge sheet. Nevertheless, he was detained in the prison for four years, without trail. Recently, the matter was heard by the Fifth Additional Metropolitan Sessions judge Aminul Islam, the learned judge found that Jalal was not an accused in the Arms Act case under Mohammadpur Thana. Jalal arid the two others were granted bail on 22 December 1997 but no date was fixed for his appearance before the Court. As a result, although the two accused were freed, the order for Jalal's release had to await the Court hearing. The Judge ordered his immediate release and termed the prolonged detention as a 'regrettable incident. Even though he committed no offence, Jalal's confinement was prolonged due to police excesses. He received no compensation. 19 July, Janakantha reported that on the order of the Caretaker government police (lid massive operations. On the first day, police in Naogoan, Rajshahi couldn't arrest any terrorist, but twelve people were arrested under section 54.

⇒ On 23 July 1999, Sangbad[37] reported that on 19 July, in chattra league's meeting, Chatra Dal and Shibir jointly caused bomb explosions Chatra Dal District Vice-President Amirul Islam and another leader Khokon was arrested with 38 bore revolver at the time of the incident. For unkown reason, Amirul was shown to be arrested under section 54 and Khokon was arrested under the Arms Act.

⇒ 30 October 2000, Jugantor[38] reported that Ratan Molla a charge sheeted criminal for attempting to murder and keeping explosives (case no 77/463), was arrested by the police. But he was shown

[35] 30 March, Jugantor

[36] 3 July 1998, Janakantha

[37] On 23 July 1999, Sangbad

[38] 30 October 2000, Jugantor

to be arrested under section 54 and the police asked for a detention order. Ratan Mollah and his associate's satbbed a person named Enayet Hossiain Howlader .

⇒ 8 December 2003, Bhorer Kagoj[39] reported that on 4 December despite having specifically complained JCD leader Nasir was arrested under section 54 Nasir along with his gang demanded a toll from a shop in front of Shutrapur thana and lock the shop. Three days after the following incidents police arrested arid detained him. .

5.4 Some remarkable cases under the Special Powers Act, 1974[40]

A very recent case of detention will surely manifest the ugliest application of this Act. Azaduddin, Chairman of Char-Alexander Union Parishad, PS. Ramgati of Laxmipur district and a freedom fighter, was arrested under the Special Powers Act. He was also carlier arrested and detained twice under this Act, in 1996. In the present case, a High Court Division Bench Consisting of Kazi A.T. Monowaruddin, J. and Muhammad Zoinul Abedeen,J. declared the detention of Azaduddin as illegal and without lawful authority ordered his immediate release. He was arrested for political jealousy and rivalry. The High Court Division in the earlier cases also declared his detention as illegal. In each time he has been detained by the order of the DM (Deputy Commissioner of Laxmipur District) on the same grounds. The High Court Division, on l" September 1999, ordered not only release of Azaduddin but also ordered the DM to pay compensation personally to Azaduddin of Tk. 10,000.00 (ten thousand taka) to be deposited in the High Court Division within 30 days from the date of order and as because the said DM repeatedly detained the said Chairman on the same unreasonable grounds, the learned judges treated it as contempt of court, and the victim is allowed.

The condition of overall Human Right condition is not up to the mark in Bangladesh. Even where necessary legal reforms have been made to avoid injustice and protect the fundamental human rights, the unwillingness and incapability of the executive authority had not made the protection a reality. So the horrific use of a draconian law such as SPA 1974 can be easily being presumed. This blackest of the black is the cause of most human right violations in Bangladesh and throughout the world.

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[39] 8 December 2003, Bhorer Kagoj

[40] https://www.lawyersnjurists.com/article/preventive-detention

CHAPTER 6

Case Study

6.1 Case Studied on Preventive Detention

Despite the legal and constitutional provisions against arbitrary arrest and detention, the practice of arbitrary arrest, detention and torture is rampant in Bangladesh. Fortunately, the higher judiciary in Bangladesh has taken a proactive stand in protecting individuals from arbitrary preventive detention orders. The judiciary has set forth various standard regarding the grounds on which preventive detention order can be made. It interpreted the laws regarding preventive detention in a way that the use of this as a tool of exploitation and torture can be curtailed.

6.2 Some Leading Cases Regarding Preventive Detention

When a person is detained under any law regarding preventive detention, he can file a writ petition against such order in the High Court Division under Art. 102 of the Constitution. Generally, most cases of detention order are quashed by the Supreme Court. Some leading cases regarding preventive detention has come to time in exercising this constitutional right to seek remedy from the apex court. Some of the leading cases regarding preventive detention are:

6.2.1 Farzana Haq vs Government of Bangladesh[41]

Facts of the case: Sanaul Huq Niru was arrested and detained first on 13th September 1987 under SPA. His detention order was challenged and the Court directed that the detention order was illegal and ordered the release of the detainee. He was not released rather a fresh detention order was passed against him under section 3 of the Special Powers Act, 1974[42]. The same drama was repeated several times and ultimately his detention came up before a Division Bench of the High

Court Division.

Judgment: The Court ordered the detaining authority to pay regard to the order of the Court It decided that the detention was illegal and the detaince should be set at liberty forthwith. And this time the order war complied with by the detaining authority.

[41] Farzana Haq vs Government of Bangladesh

[42] section 3 of the Special Powers Act, 1974

6.2.2 Bilkis Akter Hossain v. Government[43]

Facts of the Case: Dr. Khandakar Musharraf Hossain was arrested on the ground of delivering provocative speech.

Judgment: The court held that the detention was illegal and also held that there was a nonapplication of mind in giving the detention order. And in this case along with three other similar petitions, detention of four political leaders was held mala fide, and illegal. For the first time, the court awarded compensation of one lakh taka to each detenues.

6.2.3 Abdul Latif Mirza v. Bangladesh[44]

Facts of the case: Abdul Latif Mirza was detained under the SPA 1974 on the ground of vehemently criticizing the fundamental principles of the government and also allegation was made that he is trying to over through the government through violent means.

Judgment: The Court held that the grounds on which the person is detained are vague and hence bad. The ground that he addressed public meetings criticizing fundamental principles of the government is not clear. Also the court denied that it amounts to a prejudicial act under the meaning of the Special Powers Act 1974.

6.2.4 Habiba Mahmud v. Bangladesh and Others[45]

Facts of the case: The appellant's husband, Kazi Mohamood Hossain, was arrested on August 20, 1991 in pursuance of an order of detention date August 18, 1991 under section (3) (1) (a) of the Special Powers Act, 1974. In the grounds of detention it is stated that the detenu had been engaged

in various anti-social and lawful activities, and for that there was resentment and hatred against him in the minds of the public. The detenu was previously detained twice from April 1982 to April, 1983 and from November 1984 to March 1985. In November 1988 another order for his detention was passes, but the detenu evaded arrest by going over to India.

For his oppressive and terrorist activities the detenu was suspended form the post of chairman of kotwali para upozila. So that nobody dares raise any objection against him, the detenu organized an armed illegal bahini known as the Special Army and that bahini is still existing.

[43] Bilkis Akter Hossain v. Government

[44] Abdul Latif Mirza v. Bangladesh

[45] Habiba Mahmud v. Bangladesh and Others

Judgment: In view of the above, I hold that the detenu Kazi Mahmood Hossain Montoo Kazi is being detained without lawful authority. The judgment and order of the High Court Division is set aside. The appeal is allowed, but without any order as to costs. The detenu be released forthwith, if not wanted in connection with any other case.

6.2.5 Tahera Nargis Sayed v. DIG Prison, Dhaka[46]

Facts of the case: In this case, to defy an order of the HCD declaring a preventive detention illegal, a fresh order of detention was served and thereby the petitioner's husband was deprived of his liberty in defiance of the order of the Highest Court. Even before the release order was served, the detenue was served with fresh order of detention. The DIG prison was accused of delaying the release and in the meantime informing the government about the release order so that government can issue fresh order of detention.

Judgment: The jail authority is not the detaining authority rather they are custodian of the body of the detenue and they could not allow the detaining authority to serve fresh order within the jail premises which was effect of thwarting the order of this court. They must advice the Special Branch official to move out of the jail and do what they wanted to do after the detenue is completely emancipated from the custody of the jail authority.

6.2.6 Huidrom Konungjao Singh vs State of Manipur & Others[47]

Facts of the case: The son of the appellant, namely, Huidrom Shantikumar Singh was arrested on 19.6.2011 by the Imphal Police under Section 302 of Indian Penal Code, 1860 read with Section 25(1-C) of the Arms Act, 1959. The District Magistrate, Imphal West passed the detention order dated 30.6.2011 under the Act on various grounds with an apprehension that as in similar cases, the accused involved therein had been enlarged on bail the detenu in this case would also be released on bail and he would indulge in activities prejudicial to public order.

Judgment: Supreme Court of India laid down that a person's liberty is sacrosanct and cannot be taken away by the state without due process of law as it violates fundamental rights. The detaning authority also has to satisfy that it had reliable material on the basis of which it had reasons to believe that there was real possibility of the arrested person's getting bail and that after his release, he would indulge in activities, prejudicial to public order.

The appeal succeeded and detention order dated 30.6.2011 was quashed.

[46] Tahera Nargis Sayed v. DIG Prison, Dhaka

[47] Huidrom Konungjao Singh vs State of Manipur & Others

6.2.7 Md. Sekandar Ali v. Banglades[48]

Facts of the case: In this petition one Md Sekander Ali, was expelled from the Degree Examination hall. The agitating expelled candidates raided the examination center, attacked the Upazilla Nirbahi Officer and his house. Md. Sekander Ali was detained under Section 3 of the Special Powers Act, 1974. The government alleged that Md. Sekander Ali had secret sitting with the others and at his indication all others indulged in unlawful acts.

Judgment: Declaring the detention illegal, the Court held that the law requires the Government, while detaining a person, must serve specific grounds for detention so as to enable the detenue to know what his faults are so that he is in a position to make an effective representation.

6.2.8 BLAST and Others vs. Bangladesh and Others, (CIVIL APPEAL NO: 53 of 2004) [49]

BLAST and Others and Bangladesh and Others, CIVIL APPEAL NO: 53 of 2004, is a landmark case of the Appellate Division of Supreme Court in which the citizens seek for the protection of Section-54, 167 and 176 of CrPC while the government seek for its power of legislature which is free from the all body of administration enshrined by the constitution.

Fact of the case: On 23rd July, 1998, a student named Samim Reza Rubel studied BBA in Independent University, Dhaka got arrested under Section-54 of CrPC and was cruelly beaten up into the police custody. Then the police took him to Dhaka Medical college and the doctor declared him as death. Following the abuse of power of police, his father demanded a judicial inquiry. Afterwards, the government through the Ministry of Home Affairs made a judicial inquiry commission. The commission asked for the execution of a set of recommendation made by them but no action was taken by the government to prevent custodial torture.

Judgments:

The High Court Division: The High Court Division pronounced its judgment on 7th April, 2003 in which it determined that Section-54 and 167 of CrPC seek for the amendment on the ground of police arrest without warrant and take persons to the custody (remand) and found it inconsistent with the constitution.

The Appellate Division: To the formation of a fair judgment, the respected judges of the Appellate Division had taken a close look into judgment of the High Court Division. They formulate that it cannot be said that the High Court Division directed the government to amend the existing sections

[48] Md. Sekandar Ali v. Bangladesh

[49] BLAST and Others vs. Bangladesh and Others, (CIVIL APPEAL NO: 53 of 2004)

54,167,176,202 of the Code of Criminal Procedure and some other provisions of the penal code. Rather, it noticed infringement of power and performance of police officers, law enforcement agencies, magistrates and tribunals due to false interpretation of relevant clause or misleading of those grounds. For example, the police officers taking advantages of the language used in section54 and arresting innocent citizens in a gradual manner without any compliant be filed or making any investigations of those complaints. The High Court also observed that no person shall be subjected to torture in inhuman dignity or degrading punishment and treatment. If an offender is taken to the police custody for the purpose of interrogation, the law does not give the law enforcement agencies to any right to torture him.

Finally, the Appellate Division comes to the part of 15 recommendations given by the High Court Division. The Appellate Division preferred that most of the recommendations given by the High Court Division have harmonious interpretation regarding the Part-III of the constitution. But some of the recommendations are excessively, some of them are viable and some of them are exaggerate.

Chapter 7

SAFEGUARDS FOR PREVENTIVE DETENTION

7.1. 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 in formed 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 for 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

7.1.1 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 from High Court Judges and another one from 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 month. [50]

If the grounds of detention are not placed before the 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.

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

7.1.2 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.

7.1.3 Right to Representation against the order of detention

It is the rights of the arrested person to engage counsel and the consul 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[51]

7.2. 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

7.2.1.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 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 to state the grounds within time.

3.Lack 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.Restrospective issuance of orders and

7. Failure to submit essential documents before court or not in proper time.

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

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 419 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. [52]

7.2.2. Suo Motu Rule

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

7.2.3. 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 court division declared 198 detentions illegal in a day and such a huge detentions cases being declared 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". 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. [53]

7.3 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, a reasonable suspicion exists of his having been so

concerned.

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[52] Dr. Quazi Reza-Ul-Hoque, ibid. pp. 176-79.

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

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, 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 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.[54] 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.

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

CHAPTER 8

8.1 Preventive Detention in Maintaining Order

The term "pre-crime" was coined by Philip K. Dick in his 1956 science-fiction short story Minority Report ; [55] in which hewrites 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 aware of their profile and the concomitant increase in the likelihood of detection. [56] 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 theasures 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

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

[56] Criminal Justice (n 70) 290.

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. [57] 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[58]

8.2 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, [59] 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. [60] 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. [61] 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

[57] 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.

[58] 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.

[59] Constitution of India Art.50

[60] http://scholarlyconmons-law.northwesten.cdu/jcic (accessed on 25-11-16)

[61]

story in the whole story in the terrorism 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;

8.3 International 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) [62] 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[63] 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

[62] 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.

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

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[64] 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. [65] Cornelisse 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. [66] 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.

[64] 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.

[65] Galina Cornelisse, Immigration Detention and Human Rights: Rethinking Territorial Sovereignty: Volume 19 of Immigration and Asylum Law and Policy in Europe (Martinus Nijhoff 2010) pt 1 ch 2 Limiting Sovereign

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

CHAPTER 9

9.1 Recommendation

The above discussion reveals the truth that preventive detention is an abnormal measure to detain a person which is serious violation of personal liberty of a citizen. Under this law the detaining authority upon its discretion, may detain any body and the law provides all immunities to the detaining authority. As a result, the detaining authority misuses their power e.g. they exercise arbitrary and malicious discretion in order to perpetuate rule. Considering the above discussion, I notice the following recommendations which may give relief to the people from the pangs of this repressive law.

I. Government should take initiative to stop arbitrary arrest and detention by repeal or amending all provision providing for preventive detention.

II. An option of judicial review should be given to those who are arrested under such laws.

III. 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 i.e. only in time of grave emergency or war.

IV. Article 33 (3) (b) of the constitution deprived the detainee from the fundamental rights ensure by article 33(2) which provides that every person who is arrested and detained in custody shall be produced before the magistrate within 24 hours and right to counsel under article 33 (1) of the constitution and these are fundamental human rights guaranteed by constitution itself. So such a provision should be repealed and it is the clear violation of these rights.

V. The detenu shall be informed immediately about the grounds of his detention with facts and particular's which enable him to make effective representation.

VI. The opportunity to challenge the legality of their detention order before a court of justice should provide towards all detenu who are detained under preventive detention laws.

VII. The detenu shall not be subject to torture and other ill treatment in detention.

VIII. All allegations of oppressions should be quickly and immediately investigated.

IX. The government should bring a provision in the constitution ensuring the right to get compensation at least the person who is detained unlawfully in peace time as article 9 (5) of the international Convention of civil and political rights.

X. The orders and directions should be obeyed totally, immediately and strictly.

XI. Judicial detention is better to executive detention. In order to ensure the proper functioning of democratic environment and to continue the standard of human rights preventive detention should be restricted.

XII. There must be constitutional provisions describing sure limited period when the powers of preventive detention exercised.

XIII. All rational legal and human opportunities should be provided to the detenu.

XIV. The detenu must not be maintain with those who are regular convicts.

XV. He/she will be well informed as early as possible about the reasons behind his/her arrest.

XVI. The detenu must be permitted immediate and regular access to lawyer, family members and unbiased medical board.

XVII. Police should not be used for political reason

XVIII. Judiciary and administration require to be free from corruption.

XIX. Establishing a legal aid clinic in few police stations on pilot basis.

The above recommendations should be practiced and ensured thereby.

9.2 Concluding Analysis

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

- The reasoning behind the powers of arrest without warrant is that prevention is the most effective approach to control crime, but preventive detention is a peculiar determine 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.
- The preventive detention laws allow unrestricted 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 step of granting bail cannot apply in case of preventive detention. Bail may be granted if the court examines that there is no material to show the action of the accused. But there can be an order of detention if the authority considers that detention is necessary to prevent the detenue from repeating similar activities which is completely violation of fundamental rights and human rights as well.

- The phrase 'as soon as may be' in Article 33(4) of our Constitution is an unpredictable phrase. For using such kind of unclear phrase, the law enforcement agency can exercise illegal powers.

- 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 extensive period of opening detention is not found except Bangladesh since it is direct foray of personal liberty, personal dignity, freedom of movement and expression.

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

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

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