

Sonargaon University

Research Monograph

On

"Preventive Detention: Whether Violation of Fundamental Rights or Safe Guard to Our State: Bangladesh Perspective"

This research paper is submitted in partial fulfillment of the requirement of the degree of LL.B (Honors) under Department of Law of Sonargaon University.

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LETTER OF TRANSMITTAL

To

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Subject; Prayer for Submission of Research Monograph on “Preventive Detention : Whether a Violation of Fundamental Rights or Safe guard to Our State: Bangladesh perspective.

Dear Sir,

It is a matter of pleasure for me to submit the research monograph on “Preventive Detention : Whether a Violation of Fundamental Rights or Safe guard to Our State: Bangladesh perspective .

During the period of conducting the research work I have tried my level best to maintain necessary requirements. I earnestly hope that it with fulfill your expectation, and accordingly you would be kind enough this research monograph for evaluation .

I am always available for any clarification of any part of this research monograph at your convenience.

Sincerely Yours,

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DECLARATION

This is**, khademul**, a student of LL.B program of Department of Law of Sonargaon University**, ID No: LLB-1901016035**, do hereby declare that the Research Monograph Titled, **"Preventive Detention : Whether a Violation of Fundamental Rights or Safe guard to Our State: Bangladesh perspective** is an original work.

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

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

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Date:

CERTIFICATION BY RESEARCH SUPERVISOR

This is hereby certified that the research Monograph on the topic ‘‘Preventive Detention: Whether Violation of Fundamental Rights or Safeguard to Our State :Bangladesh Perspective’’ submitted by **Khademul (Id No:- LLB-1901016035)** in fulfillment of the requirements for LLB (hones from Sonargaon University, under my active supervision and guidance and that no part of this paper has been submitted any place earlier, as far as I know.

Md. Abdul Alim
Lecturer, Department of Law
Sonargaon University, Dhaka-1215.

PREFACE

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

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

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

Signature

ACKNOWLEDGEMENT

I would like to thank at first my research supervisor **Md. Abdul Alim,** Lecturer, Department of Law, Sonargaon University for providing necessary guidance throughout composing this research monograph. This paper would not have been possible without the support of other department teachers of Department of Law of Sonargaon University. Many thanks to those people who supported my effort on composing this research monograph, to whom my debt is irredeemable.

LIST OF ABBREVIATION

AD- Appellate Division

CRPC - Code of Criminal Procedure

COFEPOSA- Foreign Exchange and Preventive of Smuggling Activities Act

DLR - Dhaka Law Report

EU- European Union

FR- Fundamental Rights

HCD- High Court Division

ICCPR- International Covenant on Civil and Political Rights

ILR- Indian Law Report

MISA- Maintenance of Internal Security Act

PLR- Pakistan Law Report

SPA - Special Powers Act

UDHR- Universal Declaration of Human Rights

ABSTRACT

Bangladesh is one of the few countries in the world which allows preventive detention even during non-emergency periods. Since Independence preventive detention has been the most used tool in case of violation of Human Rights. Irrespective of any forms of government which has been in power in Bangladesh, has used this as a mean of political exploitation. Each of them have failed miserably to stop the endemic problem regarding preventive detention. However, this is against the spirit of our constitution, democracy and the rule of law. Despite various legal safeguards against preventive detention, the practice of malicious preventive detention is rampant in Bangladesh.

The study aims to show how the rights are violated through preventive detention and how the legal authorities are abusing their powers. In my research I want to highlight the definition and scope of preventive detention, its historical development, its nature and our constitutional safeguards for it. I will also highlight why preventive detention is a necessary evil for our country. I will cite the leading cases relating to preventive detention in Bangladesh and while emphasizing on the recommendations given by the Supreme Court. And lastly I will also give my recommendation on how we can put chains on this blackest of the black laws.

Keywords: Preventive detention, wrongful arrest, Human rights, fundamental rights, violation.

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CHAPTER ONE
INTRODUCTION TO PREVENTIVE DETENTION

1. Introduction

Preventive detention means detention of a person without any trial or conviction by a court, but merely based on suspicion in the minds of the executive authority that one might be a threat to peace and security. 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, especially in the third world countries. Arbitrary arrest, detention and custodial torture 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[1]. Arbitrary arrest, detention and infliction of torture are unacceptable in any form of government that is committed to democracy and the rule of law. Despite the legal and constitutional provisions against arbitrary detention, the practice is rampant in Bangladesh. Against this background, the higher judiciary in Bangladesh has taken a proactive stand in prevention of arbitrary arrest and detention and delivered a number of guidelines in some Public Interest Litigation (PIL) cases for initiating legal reform by the government. This research aims to examine the negative impact of preventive detention on our society by scrutinizing various leading decisions by the Supreme Court[2]. It also tries to examine the need for amendment of the preventive detention laws of Bangladesh. Overall, this research provides insight into how the structure of political institutions interacts with legal frameworks during emergencies to contribute to the formulation of preventive detention systems. The findings of this investigation are instructive for answering a number of questions regarding the relationship between decision-making and the protection of human rights.

[1] https://www.academia.edu/45107613/Preventive

[2] Muhammad Ekramul Haque, Protecting Fundamental Rights Through Restricted Legislative Competence: Application of the Doctrine of Eclipse and Severability (The Dhaka University Studies, Part- F Vol.XVII (1): 4962, 29 December 2022

1.2 Context 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 has 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, Para-military 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[3]. 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 is not interested to the provisions and the common people have little knowledge about these safeguards[4].

1.3 Review of Literature

This study is based on an analytical approach and critical appraisal of judicial decisions of the Supreme Court of Bangladesh. For the purpose of the study, relevant judicial decisions have been collected from various sources and analyzed to identify the main trends on the issue. The study has also reviewed the existing legal framework on arrest, detention and torture under both national and international law.

[3] D. R. Krathwohl, How to prepare a research proposal: Guidelines for funding and dissertations in the social and behavioral sciences. Syracuse, NY: Syracuse University Press, (1988), p. 11.
[4] Ch. Perelman, 'The Safeguarding and Foundation of Human Rights', Journal of Law and Philosophy, Vol. 1 (1982), pp. 119-129

My research monograph is totally based on the books, articles, and journals, newspaper reports, reports by many Human Right Organizations and internet survey. In my research monograph I will take help from national statutory provisions, case laws, website, international journals and the help from my supervisor. The legislation governing the administration and management of the preventive detention in Bangladesh is enumerated as **The Special Powers Act -1974[5], The Code of Criminal Procedure -1898, The Emergency Power Rule -2007[6] and Article-33 of the Constitution of Bangladesh.** The Special Powers Act provides provision regarding preventive detention, article-33 of Constitution of Bangladesh provides safeguards against preventive detention and section 54 of CrPC says about the general Power of Arrest by Police.

Besides these, Constitution of India, The Penal Code of 1860, The Security Act-1952, The East Pakistan Public Safety Ordinance-1958, Arms Act-1878, the Explosive Substances Act-1908 and the Emergency Powers Act, 1975 have also been scrutinized by the researcher for additional information to enrich the study.

1.4 Justification 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 the 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.

[5] The Special Powers Act -1974

[6] The Emergency Power Rule -2007

1.5 Methodology of the Study

The methodology of the present research work include- Review of related literature and examination of important principle document, law Book and Based, Journals, law ripcord DLR, ILR, Periodicals and Judicial precedence concern with preventive detention in Criminal Justice System. 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 find out the demerits of the present preventive detention system in Bangladesh. Side by side the analytical research method has helped to find out the purpose of the study, relevant judicial decisions have been collected from various sources and analysis to identify the main trends on the issues[7].

1.6 Collection of Data

Data has been collected for this study from both primary as well as secondary sources. This is a critical study on the issue of preventive detention statute, case law and existing research report as primary source. I have also used text books, journals and information from internet as secondary sources in order to give complete shape to the study[8].

1.7 Scope of the Study

The present study projects focus on preventive detention and violation of human rights in criminal justice system in Bangladesh. In doing so, the present study firstly makes an endeavor to substantiate the proper knowledge about preventive detention, arbitrary arrest by law enforcing agency and violation of human rights. Secondly, the present study makes an analysis on laws related to preventive detention. Thirdly, the present study gives an outline and makes a critical evolution of the existing law regarding preventive detention in criminal justice system in Bangladesh. Finally, the study makes a humble effort to draw some suggestions, arrived at the conclusion of the present study.

[7] http://www.askbd.org/ RAB/RAB_eng.htm
[8] http://books.google.com.bd

1.8 Limitation of the Study

Though there are huge information in text books, journals and in internet it's not sufficient. I have to also give concern about time and cost. Furthermore, the present study is undertaken as part of fulfillment of the requirements of LLB degree. The researcher gets only Two month to complete the research. Moreover, the research is directed to be within prescribed word limit. Therefore, there is not much scope for doing a comprehensive study. Yet, I try my best to fulfill the objectives set out in the present[9].

[9]https://www.academia.edu/45107613/Preventive_Detention_as_Safeguards_or_Barrier_to_the_Spirit_of_Fundamental_Rights_in_Bangladesh_A_Critical_Analysis

CHAPTER TWO
CONCEPT OF PREVENTIVE DETENTION

2.1 Definition

Arbitrary arrest, detention and custodial torture by law enforcing agencies have remained a persistent feature of our 4 criminal justice system. Though the concept of Preventive Detention is acknowledged all over the world, no universal definition exists. 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 a special from of imprisonment that is putatively justified for non-punitive purposes. According to **"Black's law dictionary**" preventive detention means confinement imposed upon a criminal defendant who has threatened to escape, possesses a risk of harm, or has otherwise violated the law while awaiting trial or on a mentally ill person who may cause harm". Preventive detention means detention of a person without trial and without conviction by a court, but merely on suspicion in the minds of the executive authority. **In *A.K. Gopalan vs. State of Madras***[10], it was held that 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 detention on ground of his past activities[11]. "Detention" means keeping back[12]. Preventive detention means detention of a person only on suspicion in the mind of the executive authority without trail, without conviction by the court[13]. The aim Preventive detention is to prevent a person from doing something which is likely to endanger the public peace or safety or causing public disorder.[14] Preventive detention is an abnormal measure whereby the executive is authorized to impose restrain upon the liberally of a man who may not have committed a crime but who it is apprehended, is about to commit acts that are prejudicial to the public safety[15].

[10] AIR 1950 SC 27
[11] *Sunil Kumar Sammaddar vs. Superintendent of Hoagly Jail* 75 Cal WN 151
[12] *Alamgir vs. The State* AIR 1957 at p-285.
[13] Patel, T; "*Personal liberty under the constitution of India*" Jain Publisher, Delhi (1993) at p-48.
[14] Chowdhury, Badrul Haider; "*The long Echocs*," Publisher: Naima Haider (Dhaka, 1990) p.3
[15] Brohi, A.K.; "*Fundamental law of Pakistan*" Din Muhammadi Publisher, Karachi (1958) at p-424.

As David H. Bayley said "A law of Preventive detention sanctions confinement of individuals in order to prevent them from engaging in forms of activity considered injurious to the community and the like hood of which is indicated by their past action"[16]

According to Article 3 of the Special Powers Act-1974[17], if the concern executive authority is personally satisfied that there is sufficient cause of suspicion against any person of committing any of the acts prohibited by the Special Powers Act, he can give order for punitive detention. So preventive detention means the confinement in a secure facility of a person who has not been found guilty of a crime. We can also say that preventive detention is holding of an accused in the custody of a law enforcement agency, to prevent the accuser's escape or risk of harm to others.

2.2 History of Preventive Detention

2.2.1 Bangladesh:

The first constitution of Bangladesh had no provision of preventive detention. It has been added on the constitution by the 2nd amendment of the constitution in 1973. Preventive detention has been legalized in Bangladesh by the article 26 and 33 of the Constitution of Bangladesh. It has been stated in article 33 that "Safeguards as to arrest and detention-

(1) No person who is arrested shall be detained in custody without being informed, as soon as may not be of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty four hours of such arrest, excluding the time necessary for the journey from the place of arrest to the court of the magistrate, and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

(3) Nothing in clauses and shall apply to any person- (a) who for the time being is an enemy alien; or (b) who is arrested or detained under any law providing for preventive detention.

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

[16] Balyley, David H, "*Public liberties in the New states*" Cambridge University Press (1964) at p-23.

[17] Act no. (xiv) of 1974

the expiration of the said period of six months that there is, in its opinion, sufficient cause for such detention.

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

(6) Parliament may be law prescribes the procedure to be followed by an Advisory Board in an inquiry under clause."

The Special Power Act 1974 of Bangladesh has also described the provision of preventive detention.

The Parliament on February 9, 1974 enacted the black law, "Special Powers Act, 1974" containing the provisions of preventive detention. The Act says that any person can be arrested and detained by the executive authority if there is apprehension in the mind of the authorities that he may commit "prejudicial act" which means-

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

So, it is clear that though the first constitution of Bangladesh didn't have the provision regarding the preventive detention, it has been made as law for some unlawful opportunities taken by the political parties by the 2nd amendment of constitution and Special power act 1974[18].

[18]https://www.linkedin.com/pulse/preventive-detention-bdlex-manupatra

2.2.2 Britain

In ***R.vs. Halliday***[19], the expression, the word Preventive detention was used in Britain first time. Preventive detention was first introduced in our sub-continent in1818 by the Bengal State Prisoners Regulation iii. Under this regulation the Governor-General was authorized to order detention and for this purpose he was invested with wide discretion; the jurisdiction of a court of law to question the legality was barred . Under this regulation detention order could be made only on grounds connected with the maintenance of public order and a person could be detained without trial for an unlimited period. The Presidencies of Madras and Bombay made similar regulations in 1819 and 1827. Later on under the authority of the Government of India Act, 1919 several emergency Power Ordinance were promulgated. Also the Anarchical and Revolutionary Crimes Act, 1919 popularly known as the Rowaltt Act was passed. In 1935 through Government of India Act, provided for scope of Preventive detention and under the Defense of India Ordinance was promulgated. Afterward it was transferred into the Defense India Act 1939 and continued during the period of the World War ii and was in force till 6 months after the war ended in 1945. Besides the two instruments .e. the Defense of India Act, 1915 and of 1939 of First and Second World War dealing with preventive detention in in war time several ordinances dealing with Preventive detention were promulgated both k2under the Government of India Act of 1919 and of 1935[20]. Needless to say that these preventive laws in peace time which are alien to the British systems, were made and used by the British rules with a view to perpetuating their colonial interests and rule. "Hundreds and thousands of Indians both Muslims and Hindus and almosk2t all their leaders had suffered imprisonment or regours f these laws in some way or other. Particularly a detention without trial was considered by all during the Indian Independence movement as a crime against humanity"[21]. But it was the fact though it was unfortunate that after partition and independence both the Pakistan and India retained these laws in peace time. The Indian Constitution empowers the parliament to legislate on preventive subject to limitation laid down by Article 22[22].

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[19] (1971) AC 260

[20] Hoque, Ridwanul and Naser, Mostafa Mahmud. 2006. 'The Judicial Invocation of International Human Rights Law in angladesh: Questing a Better Approach', Indian Journal of International Law, Vol. 46, No.2 (pp. 151-186;

[21] Ahmed, Moudud, Bangladesh: Era of Sheikh Mujibur Rahman, University Publiscation, P. 100

[22] Abdul, Md Halim, *Constitution, Constitutional Law and Policies: Bangladesh Perspective, 5th Ed, CCB Foundation, a*t P. 297.

2.2.3 India

In India, preventive detention is for a maximum period of three months, a limit which can be changed by the Parliament. According to Preventive Detention Act 1950, it can be extended beyond three months up to a total of twelve months, only on the favorable recommendation of an advisory board, made up of High Court judges or persons eligible to be appointed High Court judges.[23] Preventive detention in India dates from British rule in the early 1800s, and continued with such laws as the Defense of India Act, 1939 and the Preventive Detention Act 1950.[24] The controversial Maintenance of Internal Security Act was originally enacted by the Indian parliament early during Indira Gandhi's prime minister-ship in 1971. However it was amended several times during "The Emergency" (1975–1977), leading to human rights violations. It was subsequently repealed after Indira Gandhi lost the election in 1977, and the new government took over[25].

India's National Security Act of 1980 empowers the Central Government and State Governments to detain a person to prevent him/her from acting in any manner prejudicial to the security of India, the relations of India with foreign countries, the maintenance of public order, or the maintenance of supplies and services essential to the community it is necessary so to do. The act also gives power to the governments to detain a foreigner in a view to regulate his presence or expel from the country. The act was passed in 1980 during the Indira Gandhi Government.[26] The order can also be made by the District Magistrate or a Commissioner of Police under their respective jurisdictions, but the detention should be reported to the State Government along with the grounds on which the order has been made.[27]The National Security Act along with other laws allowing preventive detention come

[23] "Preventive Detention Act 1950 Complete Act - Citation 134080 - Bare Act | LegalCrystal". www.legalcrystal.com. Retrieved 2020-06-25.

[24] A. Faizur Rahman, "Preventive detention an anachronism", The Hindu, 22 December2022.

[25] Saxena, Priti (1 January 2007), Preventive Detention and Human Rights, Deep & Deep Publications. P. 99–. ISBN 978-81-7629-992-3.

[26] "Dour farm leader of 76 named as India's fifth PM". Montreal Gazette. 22 December 2022

[27] "NSA, 1980" (PDF). Home Ministry, Govt of India. Archived from the original (PDF) on 22 December 2022. Retrieved 22 December 2022.

under wide criticism for their alleged misuse. The act's constitutional validity even during peacetime has been described by some sections as an anachronism.[28]

In India the Preventive detention was enacted in 1950 as named "Preventive Detention Act, 1950". Afterward it was amended and replaced by Maintenance of Internal Security Act, (MISA) 1971. Preventive detention also introduced by Foreign Exchange and Prevention of Smuggling Activities Act 1974, National Security Act 1980, The Essential Services Maintenance Act (EMS) 1981, and lastly by the Terrorist and Disruptive Activities (Prevention) Act 1985.

2.2.4 Pakistan

In Pakistan through Public Safety Ordinance Act 1949[29], Public Safety Act (Amendment) 1950[30], Public Safety Ordinance 1952 and lastly The Security of Pakistan Act 1952 were provided Preventive detention in various ways. The constitution of Pakistan of 1956 and 1962 empowered and also constitution of1973 empowered parliament of Pakistan to enact Preventive detention laws. Immediately after independence the constitution of Bangladesh was adopted on 4th November, 1972 and it came into force on 16th December, 1972. Taking the bitter experience of arbitrary arrest and detention under various preventive laws during the 23-year history of Pakistan into serious consideration the Constitution makers did not want to leave any scope for preventive detention.

2.3 Need for Preventive Detention

For every matter, there is nature and justification behind it. The nature of Preventive detention is different from the nature of punitive detention. The word Preventive detention is used in contradiction to the word punitive detention[31]. Few people have described both actions as restraint of individual's freedom and personal liberty[32]. When a person comes within the satisfaction of the government authority that a person is going to commit

[28] "Preventive detention an anachronism". The Hindu. 2004-09-07. Archived from the original on 12 December 2022. Retrieved 15 December 2022

[29] Ordinance (xiv) of 1949

[30] ACT (xxxvi) of 1950

[31] Supra f. note 1. 14 Feldman, D. "Civil Liberties and Human rights in England and Wales", Oxford Publications (1993) P. 169

[32] Section 2(f) of the Special Powers Act, 1974.

prejudicial acts[33], he may be detained by Preventive detention to defend him from doing that act. In Sasti vs. State of West Bengal[34], Indian Supreme Court elucidated the nature of Preventive detention as a detention of a person without trial in such circumstances that the evidence in possession of the authority is not sufficient to make a legal charge or to secure the conviction of the detenu by legal proof but may still be sufficient to justify his detention. On the other hand, the philosophy lying behind the preventive detention is the greater interest and security of the state and nation because National Security is more important than the personal liberally of citizen. Justifying the measure Lord Atkinson in R. vs. Halliday said,

> ***"…..where preventive 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 defense of the realm[35].In the same case Lord Finlay has said, "Any preventive measure even if they involve some restraint or hardship upon individuals, do not partake in any way of the nature of punishment, but are taken by way of precaution to prevent mischief to the state"[36].***

Regarding preventive detention the Indian Supreme Court observed,

> ***"That appears to have been done because the constitutions recognize the necessity of preventive detention on extraordinary occasion when control over public order, security of the country, etc., are in danger of breakdown. But while recognizing the need of preventive detention without recourse to the normal procedure according to law, it provided at the same time certain restrictions on the power of detention, both legislative and executive, which it considers as minimum safeguards to ensure that the power of such detention is not illegitimately or arbitrary used"[37].***

[33] Section 2(f) of the Special Powers Act, 1974

[34] (1973) ISCR P. 468

[35] Quoted by Brohi A. K. Ibid P.424. [(1917) AC 260]

[36] Quoted by Munim-FKMA P.107

[37] Pankaj Kumar vs. State of West Bengal, AIR (1970) SC 97.

2.4 Preventive Detention and Human Rights

Right against arbitrary arrest and detention is one of the important elements of Human Rights emphasized by numerous international human rights instrument. Preventive detention, though an evil, is sometimes a necessity for state security. 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 forefront of the national systems for the protection of human rights. One of the main functions of the judiciary is to protect human rights guaranteed in constitutions and laws. In protecting human rights, the function of the judiciary is to oversee the way in which the diverse powers of government are exercised within the framework of laws and a set of values, and to protect individuals from arbitrary governmental action[38]. Preventive detention is a serious encroachment upon the personal liberty of a person, for the simple reason that, unlike ordinary arrest or imprisonment, preventive detention is affected without trial. But in guise of preventive detention law, most of the times the executive authority exercise discretionary power regarding arrest and detention and violates human rights[39].

2.5 Preventive Detention and Punitive Detention

Punitive detention is the detention as a punishment for the crime committed by an individual. It takes place after the actual commission of an offence or at least after an attempt has been made. The time taken from actual offence to detention can vary in length. It is a punishment imparted to the wrongdoer and involves strict measures. The duration of such a detention depends on what the law stipulates for the particular offence. Preventive detention is the detention made as a precautionary measure. This kind of detention can be made by the authorities even on a slight apprehension that the person can commit a crime. It is generally made for protecting the society from any future happening. It is not a punishment but a precaution. This detention comes to an end the moment the apprehension. This detention comes to an end the moment the apprehension of danger.

[38] Ch. Perelman, '*The Safeguarding and Foundation of Human Rights',* Journal of Law and Philosophy, Vol. 1 (1982), p. 119-129

[39] http://www.bdresearchpublications.com/…080..

CHAPTER-THREE
CONSTITUTIONAL SAFEGUARDS AGAINST PREVENTIVE DETENTION

3.1 Preventive Detention under the Constitution of Bangladesh

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[40].

The statutory provisions regarding preventive detention are discussed below:

In Constitution of Bangladesh (1972), Article 33 did not leave any scope for preventive detention. But by the second amendment of the Constitution, Article 33 was replaced by the present one[41]. Preventive detention, though an evil, in a necessity for State security and by the Constitution Act, 1973 the rights under Article 33 of the Constitution were curtailed under specific circumstances. Art. 33(1) & (2) guarantee four rights to a person arrested. Any law or action not in conformity with those rights will be void and the arrest made will be unlawful. The four rights under Article 33 are:

1. A person arrested must be informed as soon as possible of the grounds of arrest,
2. He must be allowed to consult 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 detained for a period longer than then twenty-four hours plus the time of journey without the authority of the magistrate.

[40] Alam, M. Shah. 2004. 'Enforcement of International Human Rights Law by Domestic Courts in the United States', Golden Gate University School of Law. Vol. 10, pp. 27-52
[41] Constitution of Bangladesh Article 33

But these four rights are not available to a person arrested or detained under a law providing for preventive detention.[42] Although, Article 33(3), (5) & (6) provide three important safeguards in the case of preventive detention.

3.1.1 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.

3.1.1.1 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[43]. 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 detention 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[44]. The Advisory Board is to be constituted with three persons, two of whom must be person who are, have been, or are qualified to be appointed as judges of the Supreme Court and the other must be a senior officer in the Service of the Republic. The Advisory Board stands perhaps midway between the court and the executive. It has the power of going through the records of a case but it will not be bound to hear any arguments addressed by a counsel on behalf of a detained person. If it reports against detaining a person any further he will be at once set free. And no law can be passed for detention pay for a writ of habeas corpus unless his case is referred to the Advisory Board is not tenable clause (4) of Article 33

[42] Art. 33(3)(Bangladesh constitution)
[43] Monwara Begum v. Syce,. Ministry of Home , (1989) 41 DLR 35
[44] . Habibullah v. Secy., Ministry of Home, 41 DLR 160

contemplates detention for a specific period[45].of a person exceeding six months unless the Board reports before the end of such a period that he may be detained for a longer period. If the order, of detention is only for two months there is no scope for the Advisory Board to determine the 'Sufficiency of cause for his detention' and so the argument that a detainee is not entitled to

3.1.1.2 Communication of Grounds of Detention

Article 33 (5) says that the detained person right to know immediately 'the grounds on which the order has been made". The reason for the expression as soon as may be for furnishing grounds and the earliest opportunity for making a representation[46], indicates the extreme anxiety of the makers of the constitution to see that no person is detained contrary to the law enabling preventive detention or contrary to the safeguards provided by the constitution. Again the grounds served must be in a language that the detenu understands[47]. There is a proviso to Article 33(5) which permits the detenu authority to refuse to disclose the facts if it considers to be against the public interest.

3.1.1.3 Right to Representation against the orders of Detention

The detention authority has to inform the detention that he has a right of opportunity to make representation and failure to inform may render the continued detention illegal.[48] Article 33 (5) again provides that the detaining authority must afford the detention the earliest opportunity of making a representation against his detention order. It is important to mention here that the third right, Right to make an effective representation depends on the second right, Right to communication of grounds. Article 33(5) provides that the detaining authority may refuse to disclose facts which such authority considers to be against the public interest to disclose. Because grounds are reasons on conclusions drawn by the authorities from the facts or particulars on which the detention order is made. If all the relevant facts and particulars of the grounds, therefore are not supplied to the detention it is not at all possible for him to make an effective representation and the right to make a representation becomes illusory. It is therefore for this provides of Article 33(5) that the second and third constitutional rights of a detention have become quite meaningless.

[45] Deb Sadhan Roy v. W. B. AIR 1972 AC 1924 ;Satya DEO Prasad v.Bihar ,AIR 1975 AC 367
[46] Ghulam Azam v. Bangladesh, 46 DLR 29
[47] Hari Kisna v. Maharashtra, AIR 1962 SC 911
[48] *Jayendra Thakur v. India*, AIR 1999 SC 3517

3.2 Preventive Detention under the Special Powers Act, 1974

The basic content of the Act lies in section 3, which enables the government to detain any person in custody under the disguise of preventive detention. The parliament on February 9, 1974 enacted this black law, Special powers Act, 1974 containing the provisions of preventive detention. Some important sections of the Special Powers Act 1974, which is related 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**

In any case where the Advisory Board has reported that there is, in its opinion, no sufficient cause for the detention of the person concerned, the Government shall revoke the detention order and cause the person to be released forthwith[49] In the case, Board's opinion regarding detention-opinion of the Advisory Board is given under section 12 and section 12 says that Government may confirm the detention order but if the Advisory Board gives the opinion that there is no case for detention then the Government shall revoke the detention[50]. In another case of the detention not placed before the Advisory Board within 120 days from the date of detention Government failed to show that in accordance with provision of section 12(1) of the Act the Advisory Board reported that there was sufficient cause for detention of the detention held illegal[51].

[49] Nirmal Chandra Paul, The Special Powers Act, 1974, 1st ed. (Dhaka: Shams Publications, 2008), p. 105-6.
[50] Md .Anwar Hossain v. State 54 (1991) BLD15
[51] *Md.Golam Hossain v. State,* 54(1991) BLD 37.

3.3 Emergency Power Rule-2007

The government formulates the Emergency Power Rule-2007[52] as per the power given under section 3 of the Emergency Power Ordinance, 2007[53] and it came into operation from 12 January 2007. Rule 14, 15, 16 and 21 deals with the provision of preventive detention and it gives a wide range of powers to the executive authority to detain a person merely on suspicion on their mind.

3.4. Provision related to preventive arrest warrant of warrant

As per rule 21 of the Emergency Power Rule-2007[54], under the state of emergency, if it appears satisfactory or believable 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 against that person. As per rule 14 of the Emergency power Rule-2007, to safeguard the security and interest of the state and the people and to maintain discipline and peace, the law and order forces will play an active role in applying the Penal Code-1860, Arms act-1878[55], Explosive Substances Act-1908[56], Foreign Exchange Regulation Act-1947[57], Special Powers Act-1974[58], Narcotics Control Act-1990[59] 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 economic life of the state and the people.

[52] S. Ordinance No. 1 of 2007
[53] R. O. No. 15. – Ain/2007
[54] Rule 21 Emergency Power Rule 2007
[55] Act no xi of 1878
[56] Act No. vi of 1908
[57] Act No. vii of 1974
[58] Act No. xiv of 1974
[59] Act No. xx of 1990

CHAPTER FOUR
VIOLATION OF FUNDAMENTAL HUMAN RIGHTS PREVENTIVE DETENTION

4.1 Preventive Detention and Violation of Fundamental Human Rights

Right against arbitrary arrest and detention is one of the important elements of Human Rights emphasized by numerous international human rights instrument. Preventive detention, though an evil, is sometimes a necessity for state security. Although, this detention has to be only under special circumstances and 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 forefront of the national systems for the protection of human rights. One of the main functions of the judiciary is to protect human rights guaranteed in constitutions and laws. In protecting human rights, the function of the judiciary is to oversee the way in which the diverse powers of government are exercised within the framework of laws and a set of values, and to protect individuals from arbitrary governmental action.[60] Preventive detention is a serious encroachment upon the personal liberty of a person, for the simple reason that, unlike ordinary arrest or imprisonment, preventive detention is affected without trial. But in guise of preventive detention law, most of the times the executive authority exercise discretionary power regarding arrest and detention and violates human rights[61].As a member Bangladesh becomes obliged to, respect, protect, fulfil and upload the 'Human Rights'. Human right are moral norms of principle which are generally means an inalienable fundamental right to which all human being are inherently entitled since birth; irrespective their nation, location, language, origin or any other status simply for the very reason that they are human beings. This rights are protected as legal right in international and domestic law. According to different 'Humans Rights organisation' 'The preventive detention' theory as stated by 'Special powers Act 1974' are not complied with fundamental, Mandatory and normative constitutional principle of justice, equity and fairness.

[60] Ch. Perelman, 'The Safeguarding and Foundation of Human Rights', *Journal of Law and Philosophy*, Vol. 1 (1982), pp. 119-129
[61] http://books.google.com.bd

This obnoxious Act often violates the fundamental Humans Right and it contrary to Rule of law. Many innocents become victim of this denunciative provision we just mentioned a single case reference; State vs DC satkhira 45 DLR(1993) a suo moto rule was issued on the basis of report. The suo moto rule called upon the DC of Satkhira to show the cause under what authority. a person named 'Nazrul islam' was implicated for different crimes even dacoity from the age of 5 to 11; it was not just incredible but hearing the story Satan may feel shy to believe. however, he got release from all the case but the court Didn't sign any formal release order hence he was kept in jail with chain of his two legs for 12 years.

Now open question is that what is the remedy in favour of innocent detenu? Now we can go to the article of 102 of Bangladesh constitution. "It assert that, in case of preventive detention the court must be satisfied the person in detention not being held either without lawful authority or unlawful manner". The word lawful authority include the competence and all question of their intention and vindictive mind. We see in section 9(5) of 'the international covenant on civil and political right 1966' lay down that, "anyone who has been victim of unlawful arrest or detention shall have an enforceable right to get compensation". This rule was reflected in the case of : Bilkis Akter vs State, here the court ordered to pay compensation among the innocent detenu[62].

So, in conclusion my opinion is that such subversiveness as 'The Special power Act' should be amended since it is against the main sprit of constitution and fundamental human right. otherwise we should wait for an inhuman and downbeat society.

4.1.1 Violation of Rights to Life by Preventive Detention

'Life' within the meaning of Art.31 Constitution of Bangladesh[63], means something more than mere animal existence.[64] It includes the right to live consistently with human dignity and decency,[65] 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[66] and all that which gives

[62] http://lawyersclubbangladesh.com/en/2021/01/04/preventive-detention-is-an-imprisonment-that-putatively-justified/
[63] Article 31 Constitution of Bangladesh
[64] *Munn v People of Illinois*, 94 US 113 (per field J) as cited in Mahmudul Islam, Constitutional Law of Bangladesh", ibid, p. 187
[65] *Vikram v. Bihar*, AIR 1988 SC 1782. ibid
[66] *Francis Caralie v Union Territory*, AIR 1981. ibid.

meaning and content to a man's life[67] including tradition, culture and heritage[68]. 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.[69] Preventive detention is not for punitive 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 detention person.

4.1.2 Violation of Right to Liberty and Freedom of Movement

Article 32 of the Bangladesh Constitution 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 itself 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.

Secondly, no maximum period of detention has been fixed by the Constitution or the Special Powers Act. 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

[67] *H.P v. Uned Ram*, AIR 1987. ibid

[68] Ramsharan v. India, AIR 1989. as cited in Mahmudul Islam, ibid

[69] Dhaka Tribune, (Bangladesh) 'Arrest spree punishes prisons' [http://www.dhakatribune.com/bangladesh/2015/feb/08/arrestspreepunishesprisons#sthash.hdF1Fswe.dpuf, last visited Decembar 20, 20120]

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, which is a great violation of right to liberty and freedom of movements. On 7 September 2000 a three-member Sub-committee of the 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.[70] 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,

- 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

4.1.3 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**[71] 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 Bangladesh. 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.

[70] The Bangladesh Today, Dhaka(Bangladesh), 19th February 2005

[71] Article 5

4.1.4 Violation of Right to Fair Trail

When a police officer arrests a person under sec. 54 of the CrPC[72], 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 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[73], Art. 33(5) requires that the grounds of detention must, as soon as may be, be communicated to the detaining authority must afford him the earliest opportunity of making a representation against the order of detention.[74] It is very important because it not only enables the detention 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.

4.1.5 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 does 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.

[72] Crpc 1898
[73] Article 102 (2)(b) Constitution of Bangladesh
[74] *Golam Azom v. Bnagladesh*, 46 DLR 29

CHAPTER- FIVE
SAFEGUARD TO OUR STATE

5.1 Preventive Detention in Maintaining Order

The term "pre-crime" was coined by Philip K. Dick in his 1956 science-fiction short story "Minority Report"[75], in which he writes of a society which has eradicated crime by predicting crimes through the use of "precogs"-humans who have precognition ability- and then detaining the prospective offenders before the crimes are committed. The reorientation of the criminal justice system from a retrospective system, which investigates, tries, and punishes, to a prospective system of anticipating crime, assessing risk, and reducing opportunities for offending is a logical consequence of the adoption of the security-based analysis of crime If crime is a rational choice, the state can only hope to reduce it by intervening before an offense 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[76]. From the amoral standpoint of security analysis, taking 60 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 the that they have the least to lose. Furthermore, as disincentives are less effective on those with the least to lose, preemptive incapacitation becomes the most attractive method of dealing with such groups. Secondly, the act of profiling the most disadvantaged has an inherent risk of entrenching social exclusion and deprivation, which in turn may increase the perceived risk, leading to a perpetual ratcheting up of pre-emptive coercive measures against the targeted groups. Thirdly, the act of profiling can be politicised, with popular demands for unpopular minorities to be profiled and subjected to ever-more stringent controls. Indeed, the ancillary

[75] "Philip K. Dick, Minority Report (Gollancz, 2000)
[76] Criminaj Justice (n 70) 290

effects of profiling of the targeted groups may increase their risk because their labelling as a high-risk group leads to their further social exclusion and embedding of their pariah status, leaving them with few options but crime, and almost no disincentives. When an individual is already treated like a criminal, to be convicted of and punished for a criminal offence may be of trivial significance. There is also the intractable problem of the potential for profiling to become a self-fulfilling prophecy in that those who are the subject of increased surveillance and other pre-emptive actions will almost inevitably become the groups with the highest crime rates, because of the increase in detection amongst this group vis-à-vis the general population[77]. 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[78].

5.2 Reason of adoption of Preventive Detention

After the independence in 1971, our country was not politically stable. Many of our freedom fighters did not submit their arms. Many of them were divided into small groups like 'Lal-Bahini'. These small groups were devoted in earning assets illegally, robbing & threatening others. To maintain order in the country, the rulers of Bangladesh felt the need of provision of preventive detention during that period. In 1973, under the 2nd Amendment of the Constitution, the provision of preventive detention was added. Thus, the persons who tried to shake the policy of our country were checked by this provision at that period.

Though, the martial law administration issued several orders containing provisions for detention, while the East Pakistan Public Safety Ordinance 1958 was also promulgated with the same provisions for detention. This statute had been carried through to Bangladesh arena though the Constitution of the People's Republic of Bangladesh, 1972 (through 2nd amendment) in Article 33. It was supposed to become obsolete automatically by virtue of

[77] 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.

[78] 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

article 26(1) of the Constitution. But it remained effective till it was replaced by the Special Powers Act 1974.

5.3 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[79]. 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 favorably to the criticisms of illegitimacy that have been leveled against the opaque, executive controlled U.S. national security detention regime in operation on Guantanamo. The final argument in favor 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 1999.64 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. 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, it is far from the whole story in the whole story in the terrorism context. Some critics of the pre-

[79] Constitution of India Art.50

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[80].

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 defense 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.

5.4 The Maintenance of Public Safety of Public Order

The prejudicial activity defined by the Act in Section 2 (f)(iii), are acts prejudicial to the security of Bangladesh, or to endanger public safety or the maintenance of public safety of public order .The three basic features of this sub – Section are – security of Bangladesh; maintenance of publics and maintenance of public order. The security of the State is one of the most precious things that every State and its individuals seek to be protected by every means ailing within the ambit of law. However, sometimes unforeseeable and emergency situation makes a mandatory for the State to curtail the personal liberty of the citizens to protect the security of the State. Such in reality exists only in vary rare situations as happened in may States during wars .The grave situation prevailing in the First and Second World Wars in Britain forced the legislators to pass laws that enable them to intern suspects in custody who they th0ugh were potentially threats to the State[81]. The to challenge the State was never curtailed in Britain. However, in Liversidgevs. Anderson, the majority decision upholding the discretionary authority of the Executive became the forerunner of preventive detention in subsequent legislation in the Indian sub-continent even during peacetime. In many cases where this provision of law is invoked, it is found to have been used purely as a measure to detain an individual in custody without having real authority to do so, and without any

[80] Alam, M. Shah. 2004. 'Enforcement of International Human Rights Law by Domestic Courts in the United States', Golden Gate University School of Law. Vol. 10, pp. 27-52

[81] In Britain during the First World War , the government framed Defence of the Realm (Consolidation) Regulations,1914, in which Regulation 14B contained provisions for preventive detention. Similarly during the Second World War, they framed the Defence (General) Regulations, 1939, in which Regulation 18B entailed provisions for preventive detention. Both the laws were made at the wake of two World Wars with view to secure the security of the State. 1942 AC 206

application of mind and fact by the detaining authority. In Nazir Ali vs. Secretary, Ministry of Home Affairs and Others[82], the authority invoked Section 2(1)(iii), stating that the Md. Ismail Hossain, is a threat to the security of the State. The reality can very conspicuously be found from the judgement:

> **"The grounds that he is a habitual offender and hijacker and that due to his anti-social activities he is said to be known as terror in the Dakkhin Surma area and that he used to collect tolls from the Feriwalas and he is a member of an organised gang of criminals all these are vague and indefinite and set out in a manner without giving out the exact nature of offence as to time, place and manner. This lack in material particulars as specific nature of the offence and as to time, manner and place and that these do not conform to or correlate with the order of detention passed upon him. Because of the infirmities set out in these grounds, they could not to be co-related with either security of Bangladesh or endangering the public safety and the maintenance of public order or interference with the administration of law and order, act such as theft, dacoity or hijacking or the Further it is now well settled that for individual isolated collection of tolls, the preventive detention law cannot be put into operation to the deprivation of valuable right to liberty of the citizen as guaranteed by the Constitution"[83]**

Such is the usual manner of invoking the law of preventive detention in Bangladesh by the Executive and the government. Habitual thieves, dacoits, and terrorists are frequently interned under the disguise of preventive detention statute branding them as threat to the security of the State and to the public safety or maintenance of public order. There hardly exists any real case when provision is found to containing a 'threat to the security of the State' have been properly applied[84]. Despite having provisions in the Penal Code[85] to prevent and curb the situations that are injurious to the security of Bangladesh, public safety, and

[82] 10 BLD (1990) 258; Also see Abdul Hakim Miah vs. The Secretary, Ministry of Home Affairs and Others, 42 DLR (1990) 219; Mallik Tarikul Islam vs. Secretary, ministry of Home Affairs, 14 BLD (1994) 156.

[83] per Syed Misbahuddin Hossain and Qazi Shafiuddin JJ., at pp. 264-265

[84] Mansur (Md) vs. The Secretary, Ministry of Home Affairs and Others, 42 DLR (1990) 272.

[85] Sections 121-123A and 124A deals with offences against the State; Sections 141-160 deals with offences against the public tranquility; Sections 279-291 deals with the public safety; For the text see, the Penal Code.

tranquility, the present legislation entailed one of the severest measures of detaining any public person in custody for inclusion without any empowered the preventive detention. Such an explanation and limitation has widely Executive to place any person under detention[86]. In the recent past it has been observed in many situations that, the political leaders of the previous regime were not even custody under this provision. It is a matter of great concern allowed to hold political meetings and were detained in that, usually police arrest persons without any charge invoking their authority under Section 54 of the CrPC and thereafter in collaboration with the Magistrate pass the detention order. In most cases, the document presented to the Magistrate when the arrested persons are produced before the court contains suggestions to pass an order of detention, which is absolutely unconstitutional, because it detain the person, but the police officer who deems it is not the Executive authority who deem it necessary to necessary to detain the person under preventive detention, and such is usually abided by the Magistrates[87]. However, it may be argued that, police are part of the authority and it only suggests for the order and the Magistrates are passing the ultimate order. Police makes the suggestion and thereby almost in all the cases the Magistrates making his own opinion following the said suggestions usually call for investigation into the matter. As they solely depend on police suggestions, the concerned authority in most of the cases passes orders without even going in-depth into the matters and thus most of their orders are found by the Court as mala fide and illegal. The three sub-criteria falling within the ambit of this sub-Section is in most cases are fused in the grounds. In recent cases the decisions are also echoed with the past. In Pranajit Barua vs. State, the learned judge Kazi Ebadul Hoque observed very carefully inter alia: Let us now examine the materials produced by the we find that the State in support of the detention file contains the following documents (1) A type written statement signed by the Deputy Commissioner of Metropolitan Police, Special Branch, Chittagong on 12.5.98 (2) Order dated 4.5.98 issued by the District Magistrate detaining the detenu Suranjit Barua (Labu) for 30 days under section 3(2) of the Special Powers Act, 1974 (3) Grounds of detention served on the detenu on 10.5.98 (4) An order of the Government dated 31.5.98 extending the detention of the detenu for 3 months with effect from 3.6.98. From the aforesaid statement dated 12.5.98 it appears that detenu was arrested on the basis of General Diary No. 508 dated 9.4.98 under section 54 of the Code of Criminal Procedure and he is locally known as a terrorist but in the grounds dated 10.5.98 detenu has been termed as a

[86] Ranabir Das vs. Secretary, Ministry of Home Affairs and Others, 2 DLR (1976) 48

notorious terrorist, anti-social or anti-Stateelement and a donation monger. He has also been termed as a member of gang of smuggler
and kidnappers. It has also been stated that he was a dangerous and terrible person and for fear of
Members of his gang nobody dared to give evidence in court against him. In support of the allegations noticed above there is no report by any police personnel either working in the local police station or in the Intelligence Branch or CID. In such circumstance in the absence of any supporting materials merely because petitioner has been termed as a dangerous and terrible terrorist he cannot be detained in custody as there were no materials to justify the District Magistrate or the Government that his detention is required under the provision of section 3 of the Special Powers Act. We are satisfied that Government has failed to justify the detention of the detenu Suranjit Barua (Lablu). So we are of the view that the said detenu is being detained illegally or improperly and not in accordance with the requirement of section 3 of the Special Powers Act[88]... So it may very conveniently be summarised from the are still holding the same view that unless grounds are substantially supported by documents the order of detention are liable to be declared as done either illegally, or without any lawful authority depriving a citizen of his freedom and personal liberty as guaranteed by the Constitution .

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

According to European Union (EU) context 'Fundamental rights' expresses the concept of human rights. Traditionally, the term 'fundamental-rights' are used in a constitutional context whereas the term 'human rights' is used in international law. The Fundamental Rights guaranteed by Part III of the Constitution of Bangladesh, are not 'natural' rights but such rights as will be enforceable by Courts; they are a part of the positive law of the land.

Fundamental rights are, no doubt, paramount to ordinary laws. In more words, the object of fundamental rights is not merely to ensure inviolability of certain essential rights against political changes, but also impress upon the people the fact that they have attained a new level of national existence.

[88] Ibid, at pp. 400-401.

Article-26 applies to laws that infringe or will contravene the fundamental rights guaranteed by the Constitution.

It contains two directions:

1. Clause (1) of the Article lays down that any pre- Constitution law insofar as it is inconsistent with these rights shall be void to the extent of the inconsistency,

2. Clause (2) declares that the 'State' shall not, in the future, make any law repugnant to the fundamental rights, and that any enactment violating this direction shall be void to the context of repugnancy.

5.6 Conclusion

Right to personal liberty is an important right of an individual without which one cannot enjoy other Human Rights meaningfully. Considering its important the constitution of Bangladesh has mentioned the rights of life and liberty in two of its Articles namely Article 31 and Article 32 respectively. Article 31 clearly declares that "no person shall be deprived of life and personal liberty saves in accordance with law. The Combined Meaning of Articles 31 and 32 is that the constitution has guaranteed right to life and liberty to citizen of Bangladesh and no police officer or government agency do anything determine to Life, Liberty and Reputation of any citizen. A Police officer can curtail the liberty of a person by the name of powerful detention and abusive power of Section 54 of CrPC if this police officer has the authority to do that compartment has provided fresh some to the constitution to a person who is proscribed of his/her tight to personal liberty in limiting people's liberty. The police officers must follow the lawful procedure and respect the constitutionally guaranteed human rights of the arrested person[89]. No compliance with the procedure and disaster to the human night off accused will make the arrest and detention unlawful.

[89] https://www.academia.edu/45107613/Preventive

CHAPTER – SIX
CASE STUDIED ON PREVENTIVE DETENTION

6.1 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 Article 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:

6.1.1 Farzana Haq vs Government of Bangladesh[90]

Facts: 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. 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 detainee should be set at liberty forthwith. And this time the order war complied with by the detaining authority.

6.1.2 Bilkis Akter Hossain v. Governmen[91]

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

[90] *Farzana Haq vs Government of Bangladesh* (1991)11 BLD 553
[91] 2 MLR 1997 113

Judgement: The court held that the detention was illegal and also held that there was a non-application 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.

6.1.3 Abdul Latif Mirza v. Bangladesh[92]

Fact: 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 court denied that it amounts to a prejudicial act under the meaning of the Special Powers Act 1974.addressed public meetings criticizing fundamental principles of the government is not clear. Also the

6.1.4 Habiba Mahmud v. Bangladesh and Others[93]

Fact: 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 kotwaliparaupozila. So that nobody dares raise any objection against him, the detenu organized an armed illegal bahini known as the Special Army and that bahiniis still existing.

[92] 31 DLR(AD) 1979
[93] 45 DLR (AD) (1993)

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.

6.1.5 Tahera Nargis Sayed v. DIG Prison, Dhaka[94]

Fact: 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.

6.1.6 Huidrom Konungjao Singh vs State of Manipur & Others[95]

Fact: 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.

[94] 41 DLR 508
[95] (2012) 7 SCC 181

Judgment: The appeal succeeded and detention order dated 30.6. 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 detaining 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

6.1.8 Md. Sekandar Ali v. Bangladesh[96]

Fact: In this petition one Md Sekander Ali, was expelled from the Degree Examination hall. The agitating expelled candidates raided the examination centre, 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: The detenue to know what his faults are so that he is in a position to make an 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 effective representation.

[96] 42 DLR (HCD) 346

CHAPTER SEVEN

RISK OF ABUSE OF POWER PREVENTIVE DETENTION AND REMEDIES

7.1: Preventive detention contrary to rule of law

Rule of law specks for the establishment of human rights, democracy which is the desired dimension of our constitution. But in Bangladesh, every government has used Special Powers Act, 1974 as a brutal weapon and a huge number of persons are detained every year without trial with the view to suppress political opponents for purpose and fundamental rights guaranteed by article 31, 32 (A) 33(1) and (2) of our constitution, namely, right of the protection of law, personal liberty and safe guards are not ensured by the constitution itself for the detainee, detained under preventive detention laws. Thus once a person is detained illegally Thus once a person is detained illegally under this law he finds his all fundamental rights except the right to life strangulated in a pincer- like trapping. In our country such law is exercised by all governments during peace time as a permanent law. So, the provisions allowing for preventive detention in peace time is contrary to the concept of rule of law. Moreover, this law empowers the detaining authority to exercise their arbitrary discretion to detain any person upon their satisfaction that such person shall be detained in order to prohibit him from doing any prejudicial act against the state. This arbitrary and wide discretionary power of the detaining authority is contrary to the concept of rule of law. Excessive exercise reliance on preventive detention laws, tyrannical laws by the government reduced the government's status as adopting `rule by law' not rule of law. "Rule of law" is distinct form "Rule by law". Abuse and excessive use of power by the government may be designated as "rule by law" when the laws are used as instruments of government's policy. Rule of law, by contrast, is the use of law making power by the government. The abuse of rule by law manifests itself in the passing of and reliance or unjust laws, it is already mentioned that in our country preventive detention law used as an ultimate and brutal weapon to perpetual rule. Form the aforesaid discussion, it can be concluded that preventive detention law is a draconian and obnoxious law which undermines the rule of law and fundamental principles of human rights[97].

[97] Ch. Perelman, 'The Safeguarding and Foundation of Human Rights', Journal of Law and Philosophy, Vol. 1 (1982), pp. 119-129

7.2: Risk of abuse of power:

The Power of Preventive it the Detention caries with it the Risk of Abuse of Power like that of emergency carries with risk of abuse of power. It is sometimes said that the power of preventive detention used as necessary and ready weapons to crash down the these special laws like emergency and preventive detention are This is true particularly in most developing countries where opposition and to perpetuate rule rather than to meet real is well enough to conclude that this power carries with it the risk emergencies. The abuse of preventive detention law particularly in Bangladesh, India and Pakistan-three neighboring countries independence. Since then there occurred no situation of war or of abuse of power. 32 years have passed since we achieved our threatening the security of the state has ever occurred. But this external aggression; nor any civil war or internal disturbance Special Powers Act, 1974 has, since its enactment, been used by a brutal weapon to suppress anti- every government as government movement, sometimes democratic movement and to perpetuate rule. Hundreds and thousands of political leaders and workers have been and are being detained under this la sometimes, for years together without any trial. The following statistics will necessarily give the idea that the democratic governments are in the competition to abuse of this law.

Year basis number of detenu under the Special Powers Act, 1974

Year	Total Number of Detention	Number of Released Persons Through Writ of Habeus Corpus
1974	513	13
1975	1114	31
1976	1498	46
1977	1057	25
1978	753	30
1979	960	31
1980	710	41
1981	1759	29
1982	1548	54
1983	672	44
1984	643	36
1985	882	48

1986	2194	94
1987	4585	327
1988	4907	741
1989	4482	871
1990	4615	1099
1991	5302	1710
1992	6497	1594
1993	3669	1066
1994	2968	630
1995	4173	1705
1996	5413	3376
1997	2539	1393

Source : Ministry of Home Affairs[98]

7.3: Drawbacks of withdrawing Preventive Detention

Regimes and authority justify Preventive Detention as they explain it to be for the betterment and protection of the nation. As per the authority, national security and interest is far superior to that of individuals as safety of a person wholly depends on the wellbeing of state. That is why Preventive Detention was a tool which was first made with intention for countries which are in grave emergency or in war period. Also there will be people in a state who will not go by constitutional methods and laws to gain their objectives, rather they will choose the methods which are unconstitutional and unethical; for this kind of situations and these kind of people Preventive Detention is a necessary method. Also in the hallmark case of the principle- Rex vs Halliday Lord Atkinson pointed out that: "Where preventive justice is put in force some sufferings and inconveniences maybe be caused to the suspected persons. This is inevitable. But the suffering is…… inflicted by for much more important than this liberty, namely for securing the public safety and the defense of the realm." Besides that, Lord Alfred Denning also analyses that: "If there are traitors in our midst, we can't wait to catch them in the act of blowing up our bridges or giving our military secrets to the enemy. We can't run the risk of leaving them at large. We must detain them on suspicion." Basically the authorities want to implicate Preventive Detention as safety measurement for the country and

[98] Ministry of Home Affairs

for the citizen and many scholars tend to agree on the fact that a country is much safer if it has laws regarding that instead of not having the law.

7.4 Remedies against Preventive Detention

7.4.1 Habeas corpus writ

Government illegally puts the opposition members into detention just for strengthening their power. If the detention is not in conformity with the provisions of the law under which he is purported to be detained, he may secure release by moving the courts of law[99]. If an individual is illegally detained he can invoke Article 102 of the Constitution of Bangladesh in the High Court Division of the Supreme Court by way of writ of "habeas corpus"[100] . The detenues of Pakistan may do so under Article 199 and those of India under Article 226 of their respective Constitutions. The detenu may seek remedy against his arbitrary detention through the writ of habeas corpus. The High Court/High Court Division, when satisfied that the detenu has been put into detention by the detaining authority arbitrary by, may declare that order as illegal and thereby order for immediate release. It is to be mentioned that there is no hard and fast rule for an application under the habeas corpus writ. This petition does not require any special class of people or person, any person can file a petition under this provision[101]. Thus the detenu himself[102] , or his father[103] , his wife[104] , his son[105] , his sister[106] , his relative[107] , or even his friend [108] can apply.

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[99] Mahmood, Sh. Shaukat; A Study of the Constitution of Pakistan, Lahore, 1962, at p. 67.

[100] 43 In Greece vs. Home Secretary, (1941) 3 All ER 388 it was held that the full name of the writ of habeas corpus is habeas corpus ad subjuciendum (you have the body to submit or answer). It is applicable as a remedy in all cases of wrongful deprivation of personal liberty, where there is no legal justification for the detention. 49 Amm. Rep. 505, 19 Am. Rep. 211

[101] See also Dicey, A.V.; Introduction to the Study of the Law of the Constitution, Oxford, 1938, at p. 215

[102] Charanjit Lal vs. Union of India, AIR 1951 SC 41 (paras 43,81)

[103] Thompson, Re (1860) 40 MLJC 19: 9 WR 203; Sundarajan vs. Union of India, AIR 1970 Del 29 (FB).

[104] Begum Nazir Abdul Hamid vs. Pakistan, PLD 1974 Lah 7

[105] Province of East Pakistan vs. Hiralal, PLD 1970 SC 399

[106] Daley, Re (1860) 2 F & F 258.

[107] supra 39 at p. 74

[108] 51 Rajdhar, RC, AIR 1948 Bom 334

In the case of a minor, however, the application should be by a person who is entitled to the custody of the minor or to represent the minor legally, and in the absence of such person, by a person interested in the welfare of the minor[109] , and the rule is the same in the case of a lunatic [110] . It may be stated here that most of the cases the court had found the grounds of detention to be vague, indefinite and weak grounds. In other cases, orders of release have been conferred for the

Following reasons:

- government's unlawful authority in ordering detention;
- failure to inform the detenu of his right to representation;
- failure to state the grounds of detention within the statutory period;
- lack of nexus in between some of the reasons shown in the order of detention and the
- facts and reasons for detention as disclosed in the grounds;
- detention for criticism of an ideology, which cannot be a prejudicial act in a society that
- permits political activity failure to produce the detenu before the Advisory Board within a specified time;
- mixing of good grounds with bad ones;
- Retrospective issuance of orders and
- Government's failure to produce essential documents in court.

What happens in practice is that in spite of the order of the court for release of the detenu the detaining authorities pass fresh order of detention[111]. In such a situation the number of

[109] Raj Bahadur vs. Lehal Remembrancer (1953) 47 CWN 507

[110] 53 Ex parte Child (1854) 15 CB 238

[111] Alam Ara Huq vs. Government of Bangladesh, Supra note 85; Farzana Huq vs. Bangladesh, Supra note 87.

detained persons exceeding the number of persons ordered for release. Besides, the detenues have got some difficulties in their access to court**. For example**, the detenu is not aware of this procedures and their relations along with themselves fail to contact with the lawyers and a remedy of this kind cost a big amount of money, say in Bangladesh the legal fees being over Tk. 10,000 (or U$ 160).Moreover the power of the detaining authorities not to disclose the grounds of detention 55 brings much difficulty and the detenu cannot claim any remedy before the court.

7.4.2 Suo-motu Rule

The judge of the High Court Division may, on the basis of a newspaper report/comment, proceed suo motu[112]. Right to Compensation for Wrongful Arrest The International Covenant on Civil and Political Rights, 1966 lays down in Article 9(5): "Anyone who has been victim of unlawful arrest or detention shall have an enforceable right to compensation." The Supreme Court of India in consideration of individual freedom for the first time passed an order for compensation in the famous Rudul Sah vs State of Bihar[113]. The court observed: "The right to compensation is some palliative for the unlawful acts of instrumentalities which act in the name of the public interest and which present for their protection the powers of the State as a shield. Respect for the rights of individuals is the true bastion of democracy. Therefore, the State must repair the damage done by its officers to the petitioner's rights. It may have recourse against those officers." The Supreme Court of Bangladesh does not usually approve compensation but there are certain exceptions. For example, in Bilkis Akhter Hossain vs Government[114], the court directed the state to pay compensation to the detenues. In this writ petition four leaders of BNP were arrested and detained under the Special Powers Act, 1974 in 1997 during the period of Awami League Government. Mrs. Bilkish Akhter Hossain, the wife of one of these four arrested leaders, Dr. Mosharrof Hossain submitted a writ petition before the High Court Division against the detention of her husband. The court declared the detention order illegal, passed order for immediate release of the detenues and to pay taka one lakh to each detenu as compensation. The court observed: In the instant case it appears that the detainee's rights of freedom of movement (Article 36), the right of freedom

[112] State vs. D.C. Satkhira, 45 DLR (1993) 643

[113] AIR 1983 SC 1086. For details see, Rao, N. Right to Compensation for Unlawful Detention in India, Indian Journal of International Law, vol. 26, nos. 1 & 2, Delhi, 1986, at pp. 516-18

[114] MLR Mainstream Law Reports, vol. 2, 1997 (Dhaka)

to assemble (Article 37) and the right to protection of life and personal liberty (Article 32) as guaranteed by the constitution have been invaded by the detaining authority with mala fide intention under the garb of the Special Powers Act. Considering the facts and circumstances of the case and provisions of law as considered above as well as the order and grounds of detention made in this case and also considering the materials on record, we are of the view that the detention of the detainee is absolutely illegal, without lawful authority and is made in an unlawful manner. Since the fundamental rights of the present detainee guaranteed under the Constitutions have been invaded and violated by the detaining authority maliciously as stated above, since the detainee has been depicted as a leader of the terrorists and provocateur and instigator of the saboteurs and thereby the detaining authority caused irreparable damage to his

reputation, name, dignity, honor, prestige, image and social status in the eyes of the public at large, since all these scandalous, derogatory and defamatory news have been circulated through various Government news media, other news agencies, newspapers and journals of this country and abroad, since he was detached from his family members and deprived of his normal avocation of life for being subjected to inhuman mental and physical torture in jail for last 17 days, since such detention is malicious and malafide and made for political victimization and

CHAPTER EIGHT
RECOMMENDATIONS AND CONCLUSION

8.1 Recommendations

From my study on this topic for about 5 months, I, hereby, forward the following recommendations:

1. Preventive detention should be used only as a last resort and for emergency period only. So necessary legal reform must be made to stop the use of preventive detention in peace time.
2. Scope of preventive detention must be curtailed and the grounds on which it could be allowed must be clearly stated down by the legislative authority.
3. The scope of safeguards under Art. 33 should be extended. Detaining persons should also have the right to be produced before the magistrate within 24 hours of arrest.
4. Article 33(4) of the constitution should be amended and the initial period of detention should be lessened from existing 60-day period.
5. Detention must not be for indefinite period. A maximum period for preventive detention should be inserted in the constitution.
6. All the legal statute regarding preventive detention must be scrutinized very carefully and repeal the provisions which violate the spirit of the constitution.
7. The detenu must be communicated the grounds of arrest within a fixed specific time, which must be laid down by law.
8. Preventive detention should be used only as a last resort and for emergency period only. So necessary legal reform must be made to stop the use of preventive detention in peace time.
9. Scope of preventive detention must be curtailed and the grounds on which it could be allowed must be clearly stated down by the legislative authority.
10. The scope of safeguards under Art. 33 should be extended. Detaining persons should also have the right to be produced before the magistrate within 24 hours of arrest.
11. Article 33(4) of the constitution should be amended and the initial period of detention should be lessened from existing 60-day period.
12. Detention must not be for indefinite period. A maximum period for preventive detention should be inserted in the constitution.

13. All the legal statute regarding preventive detention must be scrutinized very carefully and repeal the provisions which violate the spirit of the constitution.
14. All forms of torture or inhume treatment should be avoided and for that strict rules and regulations must be made for the detaining authority.
15. In case of illegal detention, the detenu must be compensated adequately and the responsible party for such mistake, if not bonafide, must be brought under the law.
16. In case of interrogation all the recommendations made by the Supreme Court in various cases must be followed and a comprehensive rules and procedure should be created for the use of interrogating officers.
17. All reasonable opportunities should be provided to the detenu.
18. Direction and orders of any court must be given its due importance.
19. In order to ensure accountability of actions of the police authorities, the directives of the Supreme Court in BLAST vs. Bangladesh and Saifuzzaman vs. State should be implemented as soon as possible.
20. Government should restrict the use of preventive detention as much as government can. To ensure the proper functioning of democratic environment and to maintain human rights, the recommendation state above should be followed.
21. Legislative reform should be initiated in line with all these commendations.

8.2 Conclusion

Preventive detention is a necessary evil. Sometimes in a state of national emergency it can be a useful tool in restoring peace and security. But it is a matter of great surprise that the constitute of Bangladesh allows the Govt. to use various draconian laws regarding preventive detention against its own citizen. Arbitrary arrests and detention or torture has become a norm in Bangladesh. The philosophy behind preventive detention was to ensure safety of the community at large, but in reality it has become the biggest threat for the safety of the community. Individual liberty has fallen into the mercy of the government. But to ensure true democracy in the country all form of arbitrary detention must be avoided and individual liberty must be ensured. And only then the society can flourish and proper environment for democracy will be shaped.

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Case Study

1. Farzana Haq VS Government of Bangladesh
2. Bilkis Akter Hossain vs Government
3. Abdul Latif Mirja vs Bangladesh
4. Habiba Mahmud vs Bangladesh
5. Tahera Nargis Sayed vs DIG Prison Dhaka
6. Huidrom Konugjao vs State of Manipur and Other
7. Md. Sekandae Ali vs Bangladesh