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Research Monograph on

"The Thin Line between Security and Oppression: The Human Rights Implications of Preventive Detention from Bangladesh Perspective."

This research paper is submitted in partial fulfillment of the requirements for the degree of LL. B. (Honors) at Sonargaon University.

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Declaration

I, Tania Akter (ID: LLB1902017011), a student of LLB, hereby declare that this research monograph, entitled "The Thin Line between Security and Oppression: The Human Rights Implications of Preventive Detention from Bangladesh Perspective," represents my own work that has been done after selecting the topic. I declare that the thesis has been composed by myself and that the work has not been submitted for any other degree or professional qualification. My contribution and those of the other authors to this work have been explicitly indicated. I confirm that appropriate credit has been given within this thesis where reference has been made to the work of others.

Signature:

Date:

Approval by the Research Advisor

This is to certify that the Research Monograph Titled "The Thin Line Between Security and Oppression: The Human Rights Implications of Preventive Detention from Bangladesh Perspective" Submitted by Tania Akter (ID: LLB1902017011), in fulfillment of the requirements for the award of the graduate degree in Law from Sonargaon University, under my active supervision and guidance, and that no part of this paper has been submitted anywhere earlier, as far as I know.

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Abstract

Preventive detention is a legal measure that allows the government to detain individuals without trial or formal charges for the purpose of preventing potential threats to national security, public order, or the maintenance of essential services. In Bangladesh, preventive detention is governed by the Special Powers Act, 1974, and the Constitution of Bangladesh.

Bangladesh is one of the few countries in the world that allows preventive detention even during non-emergency periods. Since Independence, preventive detention has been the most commonly used tool in cases of violations of Human Rights. Irrespective of any form of government that has been in power in Bangladesh, this has been used as a means of political exploitation. Each of them has failed miserably to stop the endemic problem of 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 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 while emphasizing 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.

Index of cases

1. Abdul Latif Mirza vs. Government of Bangladesh (1979) 31 DLR (AD) 1.
2. Sayedur Rahman Khalifa vs. Secretary of Home Affairs, (1986) 6 BLD (DB) 272
3. Aruna Sen vs. Government of Bangladesh (1975) 27 DLR (HCD) 122.
4. BLAST vs. Bangladesh (2003) 55 DLR 363.
5. Farzana Haq vs. Government of Bangladesh (1991) writ petition No. 271
6. Giasuddin vs. Dhaka Municipal Corporation & others (1997) 49 DLR 199.
7. Habibullah Khan vs. S.A. Ahmed (1983) 35 DLR (AD) 72.
8. Madan Mohan vs. Government (1977) Writ Petition No. 879.
9. Md. Sekandar Ali vs. Bangladesh (1990) 42 DLR (HCD) 346.
10. Mrs. Samirannesa vs. Government of Bangladesh (1994) 14 BLD 206.
11. Nazir Ali vs. Secretary of Home Affairs (1990) 10 BLD (HCD) 258.
12. Aruna Sen vs. Government of Bangladesh (1975) 27 DLR (HCD) 122.

List of Abbreviations

1. **AD**- Appellate Division
2. **AIR**- All India Reporter
3. **BELA**- Bangladesh Environmental Lawyers Association
4. **DGICCP**- Declaration on the Granting of Independence to Colonial Countries and Peoples
5. **DLR**- Dhaka Law Reports
6. **FPSP**- Fundamental Principles of State Policy
7. **HRC**- Human Rights Council
8. **ICCPR**- International Covenant on Civil and Political Rights
9. **ICESCR**- International Covenant on Economic, Social and Cultural Rights
10. **UDHR**- Universal Declaration of Human Rights
11. **BAL-** Bangladesh Awami League
12. **BNP**- Bangladesh Nationalist Party
13. **JP**- Jatiya Party
14. **Cr.P.C.-** Code of Criminal Procedure
15. **FR-** Fundamental Rights
16. **HCD-** High Court Division
17. **SPA-** Special Powers Act
18. **CJ-** Chief Justice

Table of Contents

Chapters	Pages
Acknowledgement ……	**I**
Declaration ……	**II**
Approval by the Research Advisor ……	**III**
Abstract ……...…….	**I**
Index of cases ……...……	**V**
List of Abbreviations……	**VI**

CHAPTER-1

ELEMENTARY ISSUES

1.1 Starting Point 02

1.2 Rational of The Study 02

1.3 Research Objective 03

1.4 Research Methodology 03

1.5 Limitation Of This Paper 04

1.6 Chapter Outline 04

CHAPTER 2

CONCEPT OF PREVENTIVE DETENTION

2.1 Introduction 06

2.2 Definition of Preventive Detention 06

2.3 What is Human Rights 07

2.4 History of Preventive Detention Law in The Sub-Continent and Bangladesh ..... 07 - 09

2.5 Rule of Law and Preventive detention ..... 09 - 10

2.6 Preventive Detention and Human Rights ..... 10 - 11

2.7 Preventive Detention and Punitive Detention ..... 11 - 12

CHAPTER -3

LAWS OF PREVENTIVE DETENTION IN BANGLADESH AND CONSTITUTIONAL SAFEGUARDS FOR IT

3.1 Preventive Detention under the Constitution of Bangladesh ..... 14 - 15

3.1.1 Review by an Advisory Board

3.1.2 Right to communication of grounds of detention, and

3.1.3 Right of representation against the order of detention

3.2 Preventive Detention under the Special Powers Act, 1974 ..... 16 - 18

3.3 Emergency Power Rule, 2007 18

3.4 Section 54 of Cr.P.C and misuse of power by police ..... 19 - 20

3.5 Digital Security Act and misuse of power ..... 20 - 21

3.6 Conclusion 21

CHAPTER -4
VIOLATION OF HUMAN RIGHTS BY PREVENTIVE DETENTION

4.1 Preventive Detention in Positions in Our Country 23
4.2 Preventive Detention in Bangladesh and Violation of Human Rights 24
4.3 Rationality of Preventive Detention: Violation of Human Rights ..... 25 - 26
4.4 Rationality of Section 54 of Cr.P.C: Violation of Human Rights ..... 26 - 27

CHAPTER -5
CASES RELATING TO PREVENTIVE DETENTION

5.1 Introduction 29
5.2 Abdul Latif Mirza vs. Bangladesh 29
5.3 Farzana Haq vs. Government of Bangladesh 30
5.4 Bilkis Akter Hossain vs. Government 30
5.5 Habiba Mahmud vs. Bangladesh and Others 31
5.6 Tahera Nargis Sayed vs. DIG Prison, Dhaka 32

CHAPTER -6

Judicial Control of Preventive detention in Bangladesh

6.1 Introduction 34
6.2 Writ of Habeas Corpus 34
6.3 Judicial Review 34
6.4 Bail Application 34
6.5 Constitutional Challenges 35
6.6 Compensation for Wrongful Arrest 35

CHAPTER -7

Ending Portion

7.1 Findings 37
7.2 Recommendations ..... 37 - 38
7.3 Conclusion 39

CHAPTER 1
ELEMENTARY ISSUES

1.1 Starting Point

Preventive detention is the most controversial legal topic in our country. There were no clauses relating to preventative detention in the Constitution of 1972.Article 33 was amended just four months and twelve days later of 1972 constitution made. After that Special Powers Act, 1974 was passed on 5th February 1974. By doing this, Bangladesh has joined the select group of nations that permit preventative detention even when there is no emergency. According to this Act, the executive authority may arrest and detain any individual if they have reason to believe that they would commit a "prejudicial act." Since that time, preventive detention has been the most popular technique utilized in cases of human rights violations. This has been utilized as a tool for political exploitation in Bangladesh regardless of the type of government that has been in power , however this goes against the letter and spirit of our democracy, the constitution, and the rule of law. This research scrutinizes preventive detention-related laws in light of Part- III of the Constitution of Bangladesh and the role of the Supreme Court against it.[1]

1.2 Rational of the study

This research will look into the Constitutionality of preventive detention laws, determine the amount to which people's rights have been violated as a result of these laws' improper use, and then make the required recommendations for ending of this abuse. The purpose of this research is to examine prior judicial rulings pertaining to arrest, detention, and torture. Knowing the challenges and potential solutions facing our country's preventative detention system will be useful for policymakers, legislators, educators, students, and researchers in the future. Similar to the United States, Bangladesh lacks effective guidelines on safeguards of executing the provisions pertaining to safeguards of preventive detention.

[1] https://www.researchgate.net/publication/367114802_Protection_against_Preventive_Detention

1.3 Research Objective

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.

1.4 Research Methodology

This research paper is a combination of both qualitative and quantitative research[2] taking resort to empirical tools. 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.

[2] Faruqui, Dr. Abdullah Al ,(2009) Essentials of Legal Research, Palal Prokashoni, Dhaka

1.5 Limitation of this paper

The limitations of this research paper are many but the main limit how was the time limited so I had only 2 months for preparing this research paper.

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 (Hon`s) 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 study.

1.6 Chapter Outline

The research is under the following heading — The Thin Line Between Security and Oppression: The Human Rights Implications of Preventive Detention from Bangladesh Perspective. The research will be divided into Seven different chapters. The chapters are as follows:

1. Introduction
2. Concept of Preventive Detention
3. Laws of Preventive Detention in Bangladesh and Constitutional Safeguard for it
4. Violation of Human Rights by Preventive Detention
5. Case Relating to Preventive detention
6. Judicial Control of Preventive detention in Bangladesh
7. Ending Portion

CHAPTER 2
CONCEPT OF PREVENTIVE DETENTION

2.1 Introduction

Our criminal justice system has long been troubled by the recurring problems of arbitrary arrest, incarceration, and custodial torture at the hands of law enforcement. There is no universally recognized definition of "Preventive Detention," despite the fact that the notion is understood everywhere. To prevent someone from doing something that could threaten public peace or safety or cause public disorder is the goal of preventative detention[3]. The core argument of this chapter will focus on the concept and origin of preventive detention.

2.2 Definition of preventive detention

Preventive means “restrain from something” and Detention means “holding something back”, Preventive Detention means the kind of imprisonment by the law implementation authority which implies on mere suspicion of them without any kind of trial or conviction by the court.

According to "Black's Law Dictionary," the definition of preventive detention is "confinement imposed upon a criminal defendant who has threatened to escape, possesses a risk of violence, or has otherwise broken the law while awaiting trial or on a mentally sick person who may cause harm.[4]

Basically it means any executive authority can give detention to an individual based on mere suspicion. The executive authority does not need any trial or confirmation from court to exercise this power. It is an aberrant tool by which the authority can inflict restrictions upon freedom of any citizen who is about to commit an offence but have not done anything yet.

[3]AH and Hossen A, ―Preventive Detention and Violation of Human Rights: Bangladesh Perspective‖ (Bangladesh Journal of Legal Studies July 7, 2019

[4] Heimatundrecht.de‖<https://heimatundrecht.de/sites/default/files/dokumente/Black%27sLaw4th/> accessed on November 9, 2022.p.10.

2.3 What is Human Rights

The definition of human rights is a debating issue, but it has been discussed as a burning issue from time immemorial. Human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, color, religion, language or any other status. We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible. On December 10, 1948, the General Assembly of the United Nations adopted and proclaimed the "Universal Declaration of Human Rights" (UDHR) in its preamble recognized that the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.[5]

According to UDHR,

''All human being are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood (Article 1). Everyone is entitle to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent trust, non-self-governing or under any other limitation of sovereignty (Article 2)."

2.4 History of Preventive Detention Law in The Sub-Continent and Bangladesh

Preventive detention in terms of peace is repugnant to civilized society. Nevertheless, preventive detention was first introduced in this sub-continent in 1818 by The Bengal State

[5] file:///C:/Users/mahbu/OneDrive/Desktop/IJLMA-07-2013-00291%20human%20rights.pdf

Prisoners Regulation III of 1818.[6] In R. vs. Halliday[7] was the case in which the concept and the word "preventive detention" were first used in Britain.

According to this rule, the Governor-General was granted the authority to order detention, and for this reason, he was given broad discretion; the competence of a court of law to review the legitimacy of the imprisonment was banned. In 1819 and 1827, respectively, the Presidency of Madras and the Presidency of Bombay both enacted identical restrictions. In subsequent years, several emergency Power Ordinances were enacted with the authority granted by the Government of India Act, 1919. Additionally, the Anarchical and Revolutionary Crimes Act, 1919 often known as the Rowlett Act, were enacted into law. The Government of India Act, 1935 established for the scope of preventive detention, and the Defense of India Ordinance was promulgated the same year. After that, it was incorporated into the Defense India Act, 1939 and remained in effect for the duration of World War Two. In fact, it continued to be in effect for another six months after the war ended in 1945.

In addition to the two instruments that dealt with preventive detention during wartime namely, the Defense of India Act,1915 and the Defense of India Act,1939 during the First and Second World Wars, a number of ordinances that dealt with preventive detention were promulgated both under the Government of India Act,1919 and 1935. It should come as no surprise that these preventive laws in peacetime, which are foreign to the systems used by the British, were enacted and utilized by the British authority with the intention of maintaining their colonial interests and domination. These regulations had resulted in the imprisonment or other punishment of hundreds of thousands of Indians, both Muslims and Hindus, as well as virtually all of their leaders. During the campaign for Indian independence, the practice of detaining people without giving them a trial was universally condemned as a crime against humanity. But the reality remained, despite the fact that it was terrible, after the split and independence both Pakistan and India kept these laws in place even while they were at peace. The Indian Constitution grants the Indian Parliament the authority to enact preventative legislation, although Article 2217 Constitution of India for places certain restrictions on this power. Following Bangladesh's achievement of independence, the country's present Constitution was adopted on November 4, 1972 ratified on December 16, 1972. The framers

6 Abdul, Md Halim,"Constitutional Law and Politics: Bangladesh Perspective, 5th Ed", CCB Foundation, at p. 296

7 Rex vs Halliday [1917] Exparte Zolding, Online available at <https://www.casemine.com/judgement/uk/5a8ff8de60d03e7f57ecec10 >, accessed on 17 August,2022.p.7.

of the Constitution of Pakistan did not want to leave any room for the possibility of preventive detention because of the painful history of arbitrary arrest and imprisonment carried out in accordance with a variety of preventive laws during the 23-year history of Pakistan.[8]

In Bangladesh Constitution of 1972, there was no provision that allowed for the practice of preventive detention. Preventive Detention Act, which was an anti-people black statute that is still in effect, was passed by the 4th amendment by "The Special Powers Act, 1974," which took effect on February 9th. Preventive Detention employed against the tribal people of Chittagong Hill Tracts, as well as against the suspected members of Jatio Shomajtantirik Dol and Shorbohara Party, after the provision was enacted by the Special Powers Act,1974. This occurred after the Act's enactment. During military government rule, administration targeted the Awami League and the BNP with this form of preventive detention (1982-90). [9]Unfortuitously, however, two elected parties—the BNP Government (1991–1995) and the Awami League Government (1996–2001)—used it to harshly oppress the other party.

2.5 Rule of Law and Preventive Detention

The Act provides for indefinite periods of detention ranging on different intervals without effective safeguards. This arbitrary and malicious exercise of discretion of the government is grossly against the doctrine of rule of law. District Magistrate or Additional District Magistrate can initially issue detention order for 30 days. Later, it can be extended by the approval of the Government. In this respect, the Ministry of Home Affairs plays a vital role. Under this Act, the detainee is not produced in a Court and he/she is deprived to defend him/herself by any legal practitioner. This is a denial of the Constitutional safeguards of arrested and detained person who is not produced, as per the provision of this Act, to the nearest Magistrate within 24 hours from the time of his arrest. So this Act has been described by Gazi Muhammad Shahjahan MP of Bangladesh Nationalist Party (BMP) as “a jungle law framed by the previous Awami League Government in 1974. [10]

[8] Ibid.
[9] Ahmed M " Preventive Detention Bangladesh Violation of Human Rights " (https://www.academia.edu/43520060/TitlePreventiveDetentioninBangladeshViolationofHumanRightsUsingPreventiveDetentionandTheirIncreasedUseDaybyDay > accessed on 3 September 2022.p.5.
[10] https://www.lawyersnjurists.com/article/preventive-detention/

In case of detention beyond the period of 6 months, the approval of the Advisory Board comprising of three persons – two persons qualified to be appointed as Supreme Court Judge and one Senior Government Officer is necessary. The detainee can only submit a representation to the Advisory Board against his detention. But it is a very lengthy process and .as such the detainee cannot receive any relief. Under this Act, the detainee may be kept inside the jail for years together subject to the satisfaction of the Advisory Board, because there is no provision in the law for legal representation by the detainee to the Advisory Board and as such he remains in the prison for indefinite period without trial, without Court proceedings. This Act does not provide any compensation in favor of the detainee in case of his Wrongful detention. That is why this Act was regarded by Justice Abdur Rahman Chowdhury as the "blackest law of the black laws.

2.6 Preventive Detention and Human Rights

Preventive detention refers to the practice of detaining individuals without trial or formal charges based on the belief that they pose a threat to public safety or national security. This measure is often taken as a precautionary measure to prevent potential harm or criminal activity. However, preventive detention can raise significant concerns regarding human rights.

Human rights are the fundamental rights and freedoms to which all individuals are entitled, regardless of their race, nationality, gender, or any other characteristic. These rights are enshrined in international human rights instruments, such as the Universal Declaration of Human Rights, and are protected by various legal frameworks at the national and international levels.

When it comes to preventive detention, there are several human rights concerns that arise:

Right to Liberty: Preventive detention deprives individuals of their right to liberty and the presumption of innocence until proven guilty. It allows the state to detain individuals without proper due process and without presenting evidence of their guilt.

Right to a Fair Trial: Pretrial detention is typically used when there is a reasonable belief that an individual may abscond or interfere with the trial process. However, prolonged or indefinite preventive detention can infringe upon the right to a fair trial, as it denies

individuals the opportunity to present their case before an independent and impartial tribunal within a reasonable time.

Freedom of Expression and Association: Preventive detention can restrict an individual's freedom of expression and association. It may be used to silence dissenting voices or curb political activism, thereby undermining democratic principles.

Protection against Torture and Cruel, Inhuman, or Degrading Treatment: Individuals subjected to preventive detention may face harsh conditions, including prolonged isolation, lack of access to legal representation, or mistreatment by authorities. Such treatment can violate their rights to be free from torture and cruel, inhuman, or degrading treatment.

Right to Privacy: Preventive detention often involves intrusive surveillance measures and monitoring of individuals' private lives. This can infringe upon the right to privacy and can have a chilling effect on individuals' freedom of expression and association.

While there may be exceptional circumstances where preventive detention is necessary to protect public safety or national security, it is crucial to ensure that such measures comply with human rights standards. Safeguards must be in place to prevent abuses, including regular judicial review, access to legal representation, clear time limits on detention, and respect for due process rights.[11]

International human rights law provides guidance on striking a balance between security concerns and the protection of individual rights. Governments should strive to adopt measures that are necessary, proportionate, and subject to regular review to avoid unnecessary infringements on human rights.

2.7 Preventive Detention and Punitive Detention

In Bangladesh, both preventive detention and punitive detention are practices employed within the legal system, albeit with different objectives and legal frameworks. Here's an explanation of each:

[11]https://en.wikipedia.org/wiki/Right_to_privacy#:~:text=Legally%2C%20the%20right%20of%20privacy,without%20a%20legitimate%20public%20concern

1. Preventive Detention: Preventive detention is a legal provision that allows the government or law enforcement agencies to detain individuals without trial or formal charges to prevent potential threats to public safety, national security, or the maintenance of essential services. This measure is often taken when there is reasonable suspicion of an individual's involvement in activities that may pose a threat to society.

In Bangladesh, preventive detention is authorized under the Special Powers Act of 1974, which grants the government the power to detain individuals without trial for a specified period. The act allows for preventive detention when the government deems it necessary for public order, security, or the economic well-being of Bangladesh.

The Special Powers Act has faced criticism for its potential misuse and violation of civil liberties. It has been used in the past to detain individuals without proper justification or accountability. However, the government has also made efforts to address these concerns and ensure that preventive detention is used judiciously and within the bounds of the law.

2. Punitive Detention: Punitive detention, on the other hand, refers to the detention of individuals after they have been charged and convicted of a criminal offense. It is a form of punishment imposed by the court as part of the criminal justice process. The duration of punitive detention is typically determined by the severity of the offense committed and is governed by the applicable criminal laws and sentencing guidelines.

Punitive detention in Bangladesh is governed by the Code of Criminal Procedure (CrPC) and various penal laws. Individuals convicted of crimes can be sentenced to imprisonment for different periods, depending on the offense. The judicial system in Bangladesh aims to ensure that punitive detention is carried out in accordance with due process and the principles of justice.[12]

It's important to note that the legal framework surrounding preventive and punitive detention in Bangladesh may have evolved or changed since my knowledge cutoff in September 2021. Therefore, it's advisable to refer to the most up-to-date legal sources and consult legal professionals or official government websites for the latest information on this topic.

[12] https://chat.openai.com/?model=text-davinci-002-render-sha

CHAPTER 3

LAWS OF PREVENTIVE DETENTION IN BANGLADESH AND CONSTITUTIONAL SAFEGUARDS FOR IT

3.1 Preventive Detention Under the Constitution of Bangladesh

According to Article 33 of our Constitution:

(1) No person who is arrested shall be detained in custody without being informed, as soon as may 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 (1) and (2) 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 the expiration of the said period of six months that there is, in its opinion, sufficient cause for such detention.

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

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

(6) Parliament may by law prescribe the procedure to be followed by an Advisory Board in an inquiry under clause (4).][13]

Article 33 provides for 3 constitutional safeguards for a detention under preventive detention law-

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

3.1.1 Review by an Advisory Board.

An arrested person under the preventive detention law shall have the right, if the government wants to detain him more than 6 months, to be produced before the advisory board which shall consist of 3 members- two from acting judges of the supreme court or qualified to be judges and one from senior civil servants. A person cannot be detained under the preventive detention law more than 6 months except under the authority of the advisory Board. if the board before the conclusion of the said period of 6 months reports that in its opinion there is sufficient cause for such detention only then government can detain him more than 6 months.

3.1.2 Right to communication of grounds of detention

Article 33(5) says that the detaining authority must communicate as soon as may be to the detenu the grounds on which the detention order has been made.

3.1.3 Right to representation against the order of detention.

Article 33(5) again provides that the detaining authority must afford the detenu the curliest opportunity of making a representation against his detention order.

It is important to mention here that the third right to make an effective representation depends on the second right, right to communication of grounds. Because without getting grounds

[13] Article 33 of the Bangladesh Constitution

information and particular sufficient to make an effective representation against the detention order it is not possible for the detenu to make a representation. [14]

3.2 Preventive Detention under the Special Powers Act, 1974

Section 2(f) of the Special Powers Act, 1974 states that in case of "Prejudicial Act" disturbing the peace of the State, the Government may issue a restraining order to any person for a specified period to desist from the said prejudicial act.[15] Detention orders issued by the government under Section 3 of this Act are preventive detention. According to Section 2(f) of the Special Powers Act, "malicious act" means any act which—

(1) may prejudice the sovereignty or defense of Bangladesh;
(2) will damage Bangladesh's friendly relations with foreign states;
(3) will harm the security or public order of Bangladesh;
(4) creates or incites communal hostility;
(5) interferes with the administration of law;
(6) creates fear or terror among the public;
(7) damages the economic interests of the State;
(8) Prejudice the economic or financial interests of the State.

Section 3 of the Special Powers Act, 1974 states that "the Government may order the detention of any person for the purpose of restraining him from doing any injurious act and the said detention shall be for a period of 30 (thirty) days until further order by the Government. will not remain in force".[16]

According to Section 8(2) of this Act, the detained person shall be informed of the grounds and reasons for his detention within a maximum period of 15 days so that he may file his written complaint against the order. But Section 8(1) again states that if the authorities feel that the disclosure of any information would harm the public interest, then they are not bound to disclose that information.[17] That means whether the detained person will know the reason for his detention is also dependent on the consent of the government. By using this law, the

[14] Abdul, Md Halim, "Constitutional Law and Politics: Bangladesh Perspective, 5th Ed", CCB Foundation, at p. 302

[15] Section 2(f) of the Special Powers Act, 1974
[16] Ibid
[17] Ibid

government can detain any citizen it wants, if the government is satisfied that the person is likely to do something harmful. Countless people are being detained without charge under the Special Powers Act of all governments.

Section 10 of the Act states that within 120 days of detention, the detention order shall be placed before a 3-member Advisory Board. Two of the members of this board shall be citizens qualified to be judges of the High Court and the other shall be a senior public officer appointed by the Government. The detainee will not be able to present his statement through a lawyer in the hearing held by the board.
The board will submit a report to the government within 170 days of detention. If the report gives an opinion in favor of detention, the government can detain the person for as long as it likes, but the board will review the detention order once in 6 months. If an opinion is given in favor of detention in these reviews, it is possible to detain a person without trial for life. Under Article 13, the government can withdraw the detention order at any time.

Some of the decisions given by the High Court in some cases of detention under the Detention Act i.e. Special Powers Act are mentioned below:

40 DLR 193- Case decision held that, "The Special Powers Act authorizes the detention of a person only for acts of sabotage or mischief. Detention for public safety is not legal.
31 DLR(AD) 1 Abdul Latif Mirza Vs. In the Bangladesh-case decision, it was stated that, "The Special Powers Act empowers the detaining officer to detain any person for subversive acts. The Constitution empowers the High Court to examine whether the detention of a person is within lawful jurisdiction."
55 DLR 224 -Case decision held that when a person is pending trial in a criminal court where it appears appropriate to detain him under the Special Powers Act, the authorities may order the detention of that person under this Act."[18]

[18] https://lawyersclubbangladesh.com/perspactive preventive law

Year basis number of detenus under The Special Powers Act, 1974:[19]

Year	Total Number of Detenus	Number of Released Person Through Writ of Habeas 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	872	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 Up to July	2539	1393

[19] Abdul, Md Halim,"Constitutional Law and Politics: Bangladesh Perspective, 5th Ed", CCB Foundation, at p. 299

3.3 Emergency Power Rule,2007

The Emergency Power Rule, 2007 was enacted on 12 January 2007 under authority granted by Section 3 of the Emergency Power Ordinance, 2007.[20] Preventive detention is addressed under Rules 14, 15, 16, and 21, which grant broad discretion to the executive branch to hold someone in custody on the basis of a reasonable suspicion that they are engaging in criminal activity.

3.4 Section 54 of Cr.P.C. and misuse of power by police

Section 54 of Code of Criminal Procedure 1898 gives Police to arrest any individual without any kind of order from Magistrate or a warrant in the give circumstances-
Any police-officer may, without an order from a Magistrate and without a warrant, arrest[21]-

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

Secondly, any person having in his possession without lawful excuse, the burden of proving which excuse shall lie on such person, any implement of house breaking;

Thirdly, any person who has been proclaimed as an offender either under this Code or by order of the Government;

Fourthly, any person in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing;

Fifthly, any person who obstructs a police-officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody;

Sixthly, any person reasonably suspected of being a deserter from the armed forces of Bangladesh.

[20] Ordinance No. 1 of 2007.

[21] Section 54 of the Code of Criminal Procedure 1898.

Seventhly , any person who has been concerned in, or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been concerned in, any act committed at any place out of Bangladesh, which, if committed in Bangladesh, would have been punishable as an offence, and for which he is, under any law relating to extradition or under the Fugitive Offenders Act, 1881, or otherwise, liable to be apprehended or detained in custody in Bangladesh;
Eighthly, any released convict committing a breach of any rule made under section 565, sub-section (3);

Ninthly, any person for whose arrest a requisition has been received from another police-officer, provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made and it appears therefrom that the person might lawfully be arrested without a warrant by the officer who issued the requisition.

The reason of giving this kind of power to the police is to prevent heinous crimes before occurring, which is also a form of Preventive Detention as it goes with the definition of the preventive detention. Giving Police the power of arresting someone without warrant is giving them consent to use the supreme power and showing them the loopholes of abusing this power and already the police-officers are using this power to arrest anyone they like with the help of Special Power Act.

3.5 Digital security Act and misuse of power

The Digital Security Act (DSA) was enacted in 2018 to provide cyber security to citizens, but its wide scope and vague provisions are being exploited for more nefarious purposes.
Human rights defenders have repeatedly highlighted that the act can be used as a weapon to muzzle contrarian voices from exercising their freedom of expression, particularly the press, but this is only the tip of the iceberg of problems that it poses. The act can be abused to harass anybody from any profession, not just journalists.

The most dangerous aspect of the DSA is the wide range of offences it considers cognizable and non-bailable. Such offences allow police to conduct an investigation and carry out an

arrest without an order of the court or warrant, and the accused has no choice but to languish in jail until he is tried. Human Rights Watch, in its World Report 2022, said authorities use the Digital Security Act (DSA) to "harass and indefinitely detain" journalists, activists, and others critical of the government, resulting in a chilling effect on expression of dissent.[22]

In some cases, provisions within the Digital Security Act may empower authorities to detain individuals for preventive purposes if they are suspected of engaging in digital crimes or posing a threat to cybersecurity. These provisions might grant authorities the power to detain individuals without formal charges or trial for a specified period to gather evidence, prevent further harm, or conduct investigations related to digital offenses.[23]

3.6 Conclusion

In Bangladesh, most of the developing countries, the laws regarding Preventive Detention have been used as a weapon to dominate, crash the opposition and to perpetuate rule. After achieving our independence, there are no situations of war or internal aggression or internal disturbance which are threatening our security but Art. 33, The Special Powers Act, 1974, Section 54 of the Code of Criminal Procedure and Emergency Power Rule-2007 are still being used to suppress anti-government movement and sometimes democratic movement also .

[22] https://www.dhakatribune.com/bangladesh/2022/07/19/digital-security-act-a-tool-for-harassment

[23] https://chat.openai.com/?model=text-davinci-002-render-sha

CHAPTER 4

VIOLATION OF HUMAN RIGHTS BY PREVENTIVE DETENTION



4.1 Preventive Detention in Position in our Country

Preventive detention is a controversial practice that involves the detention of individuals without trial or formal charges, based on the belief that they pose a threat to national security, public order, or the maintenance of essential services. While it is intended to safeguard society from potential harm, there are concerns that it can be misused and lead to human rights abuses. In the case of Bangladesh, preventive detention has been a subject of critical analysis regarding its impact on the spirit of human rights. Proponents of preventive detention argue that it is necessary to maintain law and order, especially in countries facing security threats. They contend that detaining individuals who may pose a risk can prevent potential acts of terrorism, insurgency, or other forms of violence. From their perspective, the practice is seen as a proactive measure to protect citizens and preserve public safety.

However, critics raise several concerns about the use of preventive detention in Bangladesh. One major criticism is the potential for abuse of power by authorities. Without proper checks and balances, there is a risk that preventive detention can be misused to suppress political dissent, silence opposition voices, or target certain individuals or groups. This can infringe upon the fundamental rights of individuals, such as the right to liberty, due process, and freedom of expression.

Furthermore, the lack of judicial oversight and the prolonged duration of preventive detention can undermine the principles of justice and fairness. In some cases, individuals may be detained for an indefinite period without being formally charged or given an opportunity to defend themselves in a court of law. This violates the presumption of innocence and the right to a fair trial, which are essential aspects of human rights.[24]

Another concern is the potential for torture, mistreatment, or other forms of abuse during preventive detention. Detainees may be subjected to physical or psychological harm, leading to violations of their dignity and well-being. Reports of torture and custodial deaths have raised serious questions about the treatment of individuals in preventive detention in Bangladesh.

[24] https://chat.openai.com/?model=text-davinci-002-render-sha

4.2 Preventive Detention in Bangladesh and Violation of Human Rights.

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

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

Even though three different governments were in office during the year, there was little change in the nature of police excesses and there was no decrease in arbitrary arrests and detention during the terms of the two elected governments. The administration functioned somewhat neutrally only during the three-month Caretaker regime. In its last year, the AL rule was marked by numerous incidents of arrest, detention and persecution of political opponents. Soon after the Caretaker Government took office, police arrested hundreds of armed cadres associated with the major political parties for the purpose of confiscation of illegal firearms. Under the BNP led Four- Party Alliance, which took office on 10 October, the number of arms cadres were arrested.[25]

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

4.3 Rationality of Preventive Detention: Violation of Human Rights

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. Few people have described both actions as restraint of individual's freedom and personal liberty. The Preventive detention laws allow many false and unlimited powers to the government authorities to detain a person. When a person comes within the satisfaction of the government authority that a person is going to commit prejudicial acts, he may be detained by Preventive detention to defend him from doing that act. The court presumed that many times detaining authority violate fundamental rights to satisfy the government. In Sasthi vs. State of West Bengal, 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.[26]

In this way preventive detention in the name of crime control process violates the following Human Rights;

Article-32: No person shall be deprived of life or personal liberty saves in accordance with law that means everyone has the right to life, liberty and security of person (BDC, 1972, UDHR, 1948 Article -3 and ICCPR, 1966 Article-3).

[26]https://www.researchgate.net/publication/318848696_Preventive_Detention_and_Section_54_of_the_Code_of_Criminal_Procedure_The_Violation_of_Human_Rights

Article 35 (5): No person Shall be subject to torture o to cruel, inhuman or degrading punishment or treatment (BDC, 1972, UDHR, 1948 Article -5 and ICCPR, 1966 Article-5). Article- 33(1). (2). (3): No one shall be subjected to arbitrary arrest, detention or exile ((BDC, 1972, UDHR, 1948 Article - 9 and ICCPR, 1966 Article-9).

Article- 35(3): Right to a fair trial (BDC, 1972, UDHR, 1948 Article -10 and ICCPR, 1966 Article-10).

Because preventive detention unrecognized the above Human Rights of the detainee in the following way;

It is true that most of the developing countries used the Preventive detention as a weapon to dominate, crash the opposition and to perpetuate rule. After achieving our independence, there are no situations of war or internal aggression or internal disturbance which are threatening our security but this The Special Powers Act, 1974 are using still to suppress anti-government movement and sometimes democratic movement also.

4.4 Rationality of Section 54 of Cr.P.C: Violation of Human Rights

Section 54 Cr PC gives wide powers to the police to make an arrest without warrant in certain circumstances. It provides that a police officer may arrest a person without an order from a Magistrate and without a warrant some consequence which we mentioned that previous discussion.

The philosophy behind the powers of arrest without warrant is that prevention is the most effective approach to control crime. The object of s 54 Cr PC is to give widest powers to the police in cognizable cases subject to the limitation that the powers must be used reasonably and cautiously. The words ‘may arrest’ signify that the powers of arrest is discretionary. However, it was not t all the intention of the lawmakers that the police officer may arrest any citizen of the country by abusing their power. Despite this, there is always an allegation that the powers of arrest without warrant is frequently misused by the police and therefore arrest

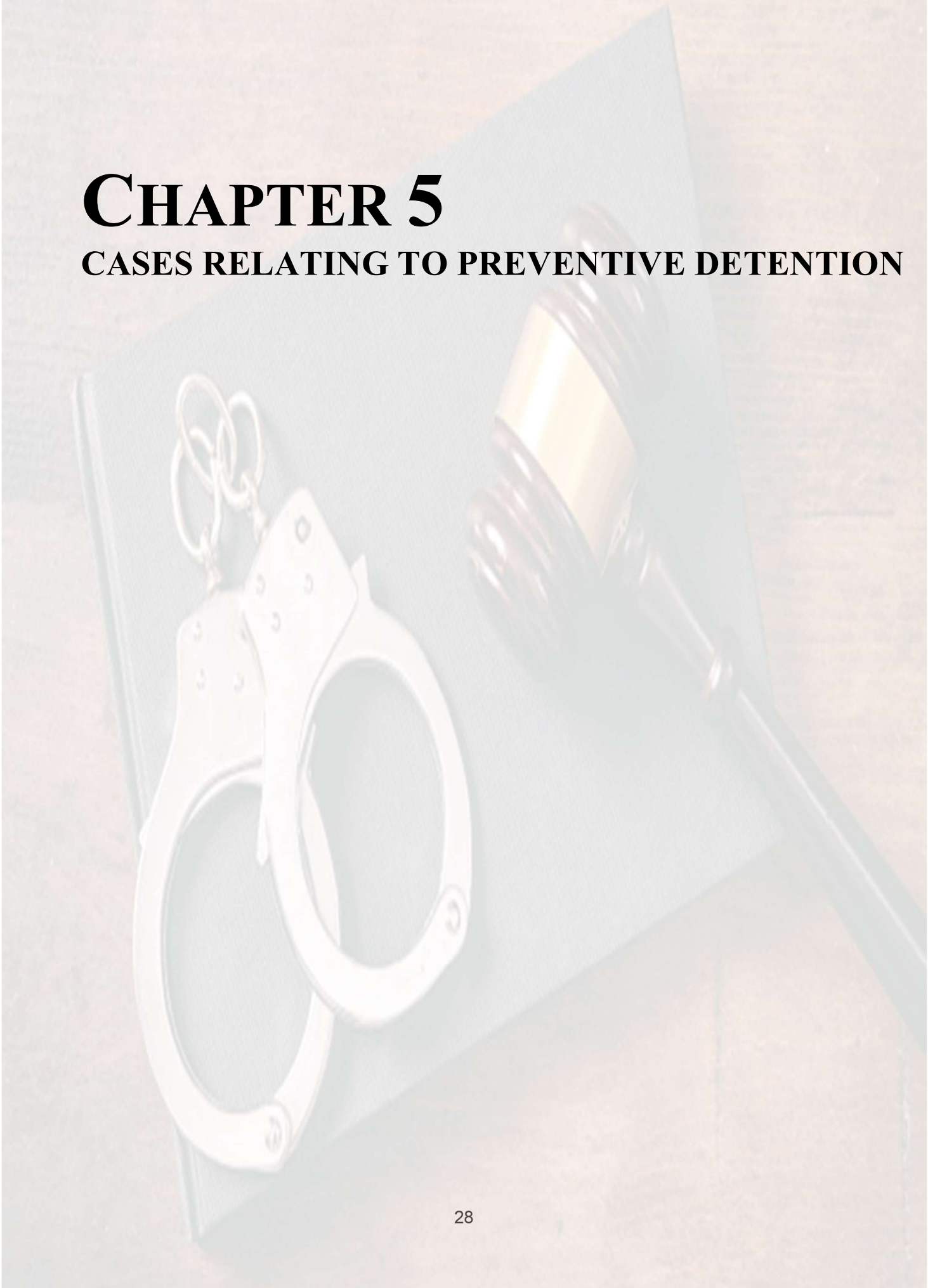
under s 54 is a burning issue in Bangladesh. Recently this issue has become an important subject of judicial interpretation.

In this context the case of BLAST v Bangladesh (2003) is worth mentioning. The fact of the case disclose that a writ petition was filed in the High Court Division jointly by the Bangladesh Legal Aid and Services Trust (BLAST), Ain 0- Salish Kendra (ASK), Shammilito Shamajik Andolon and some other individuals with the allegation that the police, by abusing the powers given under s 54 Cr PC have been curtailing the liberty of the citizens. The writ petitioners narrated several instances of such abusive exercise powers and violation of Fundamental Rights [52-60]. From the language used in s 54 Cr PC, the High Court Division found that the police can abuse the power abusively. This is because there is nothing in this section which provides that the person arrested be furnished with the grounds for his or her arrest though it has the basic human right that wherever a person for his or her arrest. [27]

The Court observe that as s 54 Cr PC now stands, a police officer is not required to discloses the reason for the arrest to the person whom he has arrested, but under Art 33 (1) of the Constitution of Bangladesh the person who is arrested must be informed, as soon as may be, of the grounds for such arrest. The Court Further observed that unfortunately, the provision Art 33 (1) of the Constitution is not followed by the police officers.

[27] file:///OneDrive/Desktop/70590018research.pdf

CHAPTER 5
CASES RELATING TO PREVENTIVE DETENTION



5.1 Introduction

A person who has been detained in accordance with a preventive detention law may challenge the legality of his detention by filing a writ petition with the High Court Division. As a rule, the Supreme Court will overturn any detention order that has been issued. Time to exercise this Constitutional right to seek remedy at the highest court has arrived for some leading cases regarding preventive detention. Important precedents in the field of preventive detention include.

Some leading cases regarding preventive detention are given bellow:

5.2 Abdul Latif Mirza v. Bangladesh[28]

Facts of the case:

In accordance with the Special Powers Act, 1974, Abdul Latif Mirza was taken into custody on the grounds that he had strongly criticized the fundamental values of the government. Additionally, it was said that he was attempting to overthrow the government through the use of violent methods.

Judgment:

The court decided that the reasons for the person's detention are not clear, which means that they are improper. It is unclear where he got the idea that he should criticize the core values of the government while speaking at public forums. In addition, the court ruled that it does not constitute an act that is detrimental in the sense that the Special Powers Act, 1974 requires.

[28] 31 DLR(AD) 1979.

5.3 Farzana Haq vs. Government of Bangladesh (Writ petition No. 271 of 1990)[29]

Facts of the case:

On September 13, 1987, Sanaul Huq Niru was the first person to be detained after being arrested under the Special Powers Act,1974. After hearing arguments regarding his detention, the Court ruled that the detention was unlawful and released the detainee. Instead of being released, a new detention order was issued against him under Section 3 of the Special Powers Act,1974. There were several reruns of the same play before his detention was brought up before a Division Bench of the High Court Division.

Judgment:

The detaining authority was told to take the court's order into consideration. The court found that the detainee's confinement was unjustified and ordered his immediate release. As a result, the detaining authority followed the order this time.

5.4 Bilkis Akter Hossain vs. Government[30]

Facts of the Case:

Dr. Khandakar Musharraf Hossain was taken into custody after making a speech that was considered to be inflammatory.

Judgement:

The court decided that the detention was unlawful and also decided that the person who issued the order for the detention did not apply their thinking properly. And in this case, in addition to three other petitions with very identical arguments, the arrest of four political leaders was found to be in violation of the law. The detenues were each given a compensation of one lakh taka by the court, which was a first-time occurrence.

[29] Abdul, Md Halim,"Constitutional Law and Politics: Bangladesh Perspective, 5th Ed", CCB Foundation, at p. 313

[30] 2 MLR 1997 113.

5.5 Habiba Mahmud vs. Bangladesh and Others[31]

Facts of the case:

Kazi Mohamood Hossain, the appellant's husband, was taken into custody on August 20, 1991 after an order of detention with a date of August 18, 1991 had been issued against him in accordance with section (3) (1) (a) of the Special Powers Act, 1974.

It is mentioned in the grounds of detention that the detenu had been engaged in a variety of illegal and legitimate actions, and as a result, there was animosity and hostility towards him in the minds of the people. This is because of the reasons indicated in the grounds of custody. The detenu had previously been detained on two separate occasions, the first time between April 1982 and April 1983 and the second time between November 1984 and March 1985. In November of 1988, a new order for the detenu's imprisonment was passed; however, the detenu managed to avoid arrest by fleeing to India. Because of the harsh and terroristic conduct that he engaged in, the position of chairman of Kotwali para upazilla was removed from the detenu. The detenu created an armed illegal bahini known as the Special Army with the intention of ensuring that no one would dare to make any kind of objection against him. This bahini is still active today.

Judgment:

In light of the information presented above, Courts opinion that the detainee, Kazi Mahmood Hossain Montoo Kazi, is being held against his will and without proper legal authorization. The verdicts as well as the order that was issued by the High Court Division have been overturned. The appeal has been granted, however there will be no ruling made about the expenses of the appeal. In the event that the detainee is not needed in connection with any other case, they should be freed immediately.

[31] 045 DLR (AD) (1993).

5.6 Tahera Nargis Sayed vs. DIG Prison, Dhaka[32]

Facts of the case:

In this particular instance, in order to disobey an order from the HCD that declared a preventative detention to be invalid, a new order of detention was served. As a result, the petitioner's husband was deprived of his freedom in defiance of the judgment from the Highest Court. Even before the detenue was served with the order to release them, they were issued with a new order to keep them detained. It was alleged that the DIG prison had delayed the release while at the same time telling the government about the release order. This allowed the government to issue a new order of imprisonment.

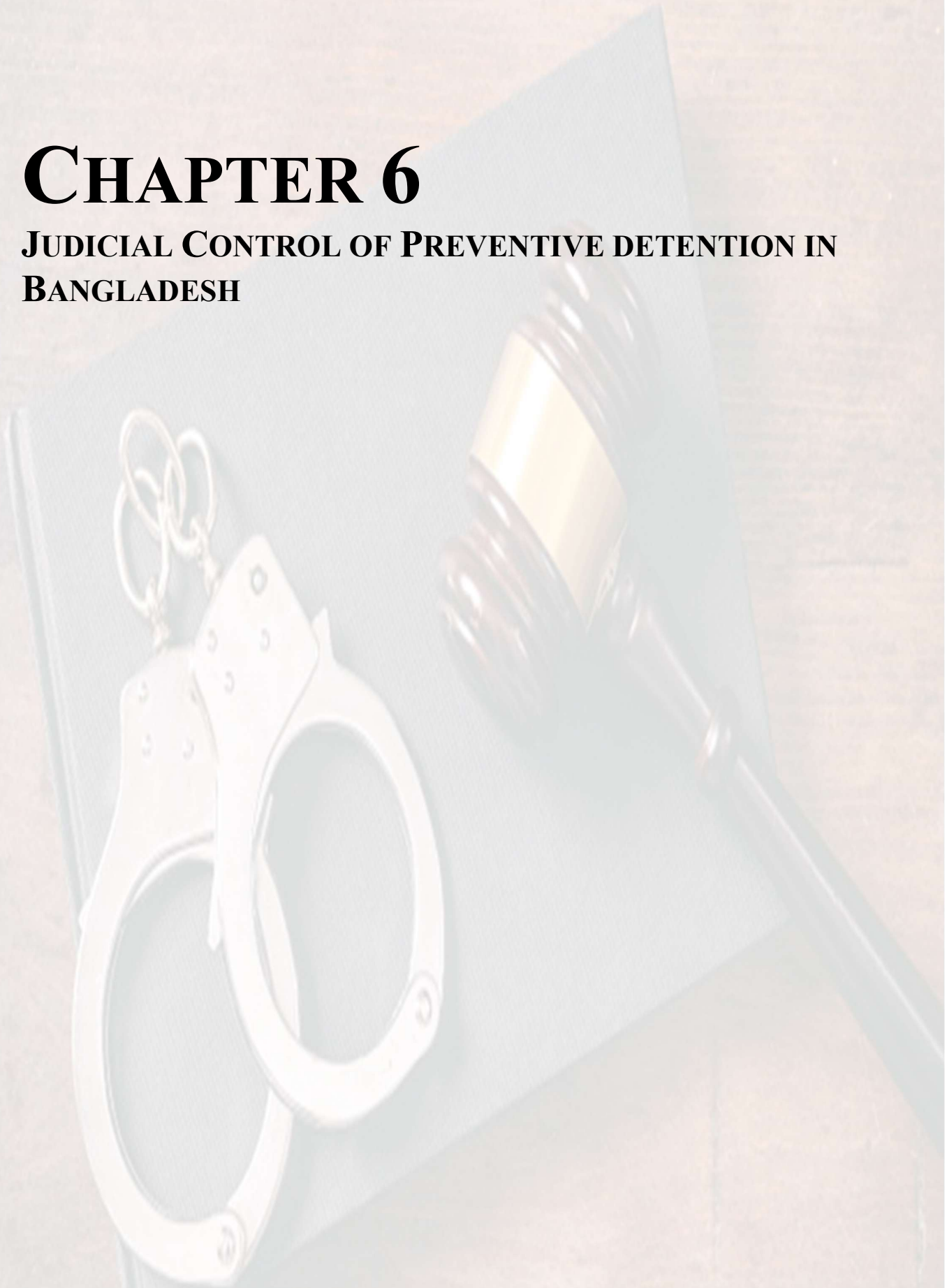
Judgment:

The authority over the jail is not the same as the authority that is detaining the detenue; rather, they are the custodians of the detenue's body. As such, they were unable to permit the detaining authority to serve a new order within the jail premises, which had the effect of going against the order of this court. They have a duty to recommend to the official of the Special Branch that they leave the detention facility and carry out the activities that they had planned after the detenue has been released from all responsibility for the care of the jail authorities.

[32]41 DLR 508.

CHAPTER 6

JUDICIAL CONTROL OF PREVENTIVE DETENTION IN BANGLADESH



6.1 Introduction

In Bangladesh, preventive detention refers to the detention of individuals without trial or formal charges in order to prevent them from committing certain offenses. The practice of preventive detention is governed by the law and subject to judicial review. If a person is subjected to preventive detention, there are judicial remedies available to challenge the detention and seek relief. Here are some of the judicial remedies against preventive detention in Bangladesh:

6.2 Writ of Habeas Corpus:

The most common and effective remedy against preventive detention is the writ of habeas corpus.[33] A person detained under preventive detention can file a writ petition under **Article 102(b) (1) of our Constitution** before the High Court Division of the Supreme Court of Bangladesh, seeking the production of the detained person in court and challenging the legality of the detention. The court will examine the grounds of detention and may order the release of the detained person if the detention is found to be illegal or unconstitutional.

6.3 Judicial Review:

The High Court Division of the Supreme Court of Bangladesh has the power of judicial review to examine the legality and validity of preventive detention orders. A person detained under preventive detention can file a writ petition challenging the detention on various grounds, such as violation of constitutional rights, lack of sufficient grounds for detention, procedural irregularities, or abuse of power. The court can declare the detention order null and void if it finds it to be unlawful.

6.4 Bail Application:

A person detained under preventive detention can also file a bail application before the appropriate court. The court will consider factors such as the nature of the offense, the likelihood of the person committing the offense if released, and other relevant circumstances before granting or denying bail. If the court finds that the detention is unjustified or there are no reasonable grounds to believe that the person would commit the offense if released, it may grant bail.

[33] Article 102(b) (1) of the Bangladesh Constitution

6.5 Constitutional Challenges:

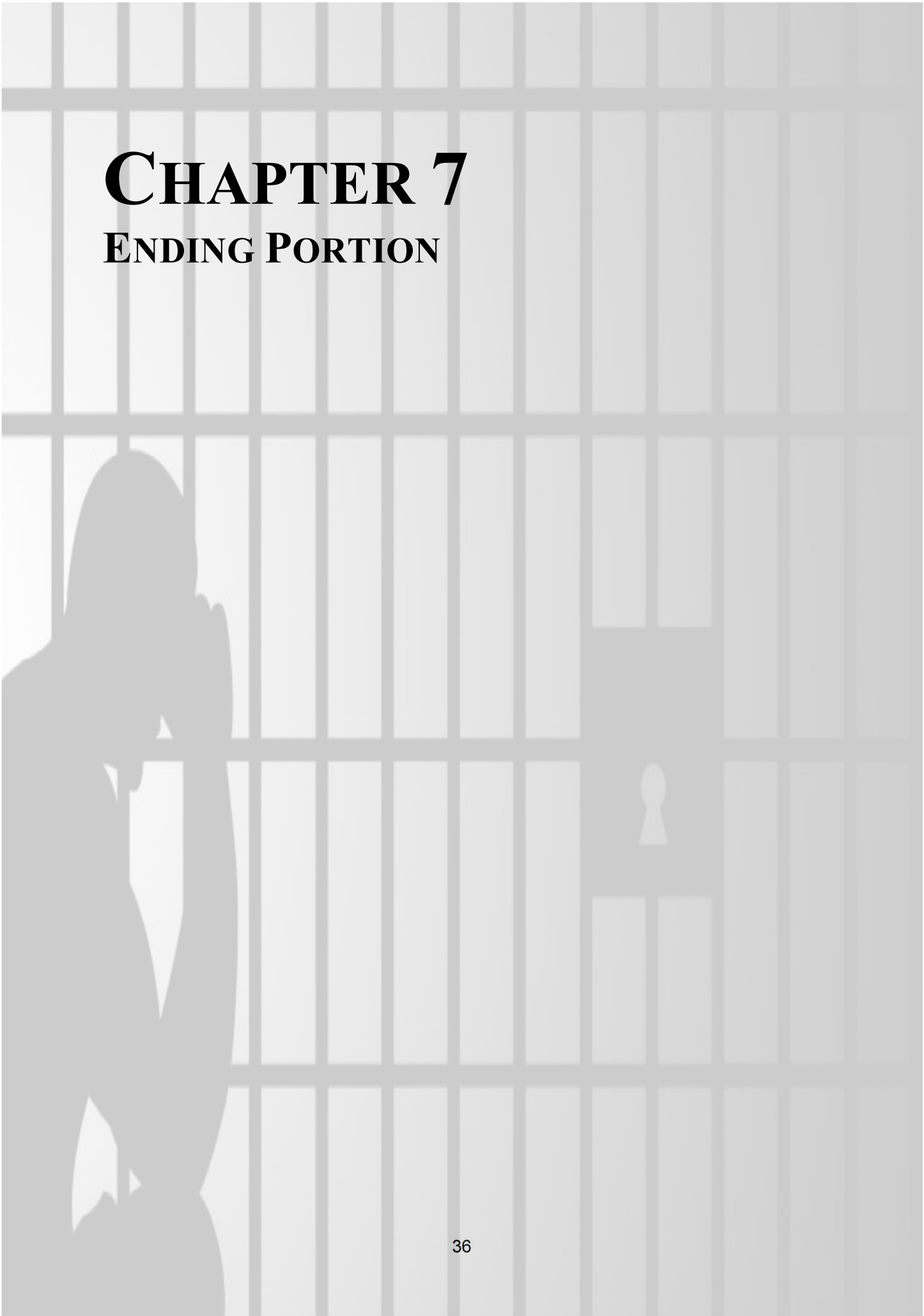
Preventive detention can be challenged on constitutional grounds, such as violations of fundamental rights guaranteed under the Constitution of Bangladesh. A person detained under preventive detention can argue that the detention violates their right to liberty, right to a fair trial, or other fundamental rights enshrined in the Constitution. The court can strike down the preventive detention order if it is found to be inconsistent with the constitutional provisions.

6.6 Compensation for Wrongful Arrest

Legal remedy for unlawful detention is not available under the preventative detention statute. Therefore, the authority responsible for detention is acting maliciously and arbitrarily. There has never been such a large number of detention cases found illegal in a single day by the High Court Division. However, in exceptional circumstances like "Bilkis Akter Hossain vs. Government,"[34] the Bangladesh Supreme Court has issued compensation orders. Each detenu was ordered to get one lakh as compensation for their unlawful detention from the court. Anyone who has been a victim of unlawful arrest or detention will have the enforceable right to obtain compensation, as stated in Article 9(5) of the International Covenant on Civil and Political Rights, which was ratified in 1966. In the case of Rudul Sah v. State of Bihar[35], the Supreme Court of India ruled in favor of compensation.

[34] Bilkis Akter Hossain v. Government of Bangladesh, (1997) 17 BLD (HCD) 344 / 2 MLR 1997.
[35]983 AIR 1086, 1983 SCR (3) 508.

CHAPTER 7
ENDING PORTION



7.1 Findings:

1. Preemptive detention, also known as preventive detention, is practiced in Bangladesh under the Special Powers Act, 1974, which allows for the arrest and detention of individuals without trial or formal charges.
2. The use of preventive detention has been found to be widespread in Bangladesh, particularly in cases related to national security, political unrest, and maintaining law and order.
3. One of the key findings is that preventive detention is often used as a tool to suppress political opposition and dissent. Critics argue that it is frequently employed to target activists, journalists, and members of opposition parties, thereby infringing upon their rights to freedom of expression and assembly.
4. There have been instances where individuals have been subjected to prolonged periods of preventive detention without being formally charged or given the opportunity to defend themselves in a court of law. This raises concerns about due process and the right to a fair trial.
5. The lack of transparency and accountability in the preventive detention process is another significant finding. Detainees are often held in undisclosed locations, and their families and lawyers are not promptly informed about their arrest or detention. This lack of transparency makes it difficult to monitor and ensure the well-being of detainees.

7.2 Recommendations:

1. The government of Bangladesh should review and amend the Special Powers Act, 1974, to ensure that preventive detention is used sparingly and in accordance with international human rights standards. This should include clear criteria and limitations on the use of preventive detention, as well as safeguards to prevent its misuse.
2. There should be a robust oversight mechanism to monitor and review cases of preventive detention. This mechanism should involve independent judicial review and include regular reporting on the number of individuals in preventive detention, the reasons for their detention, and the duration of their detention.

3. Transparency and accountability should be enhanced in the preventive detention process. Detainees should be held in officially recognized and monitored facilities, and their families and legal representatives should be promptly informed about their arrest and detention. Access to legal counsel should be guaranteed, and detainees should have the right to challenge their detention before a competent court.
4. Efforts should be made to promote and protect freedom of expression and assembly in Bangladesh. The government should create an environment where individuals can freely express their opinions and engage in peaceful political activities without fear of reprisals or arbitrary detention.

7.3 Conclusion:

In conclusion, preventive detention in Bangladesh, as practiced under the Special Powers Act, 1974, has been found to raise significant concerns regarding human rights, due process, and the rule of law. While recognizing the importance of maintaining national security and public order, it is crucial for the government to strike a balance between these objectives and safeguarding individual rights and liberties. Reforms should be undertaken to ensure that preventive detention is used judiciously, with clear criteria and limitations, and subject to meaningful oversight and accountability. The government should work towards creating an environment that respects and upholds the fundamental rights of all individuals in Bangladesh.

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