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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 Submitted for the Partial Fulfillment of the award of the degree in LL.B (Hon's) Department of Law, Sonargaon University (SU), Dhaka.

Prepared For:
Department of Law
Sonargaon University (SU), Dhaka

Supervised By:
Md. Deedarul Islam Bhuiyan
Asst. Professor & Department Head
Department of Law
Sonargaon University (SU), Dhaka

Submitted By:
Mohammad Abu Zafar Siddiqui
ID: LL.B 1902017016
Program: LL.B (Hon's)
Batch: 17th
Department of Law,
Sonargaon University (SU), Dhaka.

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Dedication

This Research is dedicated to my Father & Mother

LETTER OF TRANSMITTAL

To
Md. Deedarul Islam Bhuiyan
Asst. Professor & Department Head
Department of Law
Sonargaon University (SU), Dhaka.

Subject: Submission of research paper on **"The Thin Line Between Security and Oppression: The Human Rights Implications of Preventive Detention From Bangladesh Perspective"**

Dear Sir,

It is a great pleasure for me to submit the thesis on **"The Thin Line Between Security and Oppression: The Human Rights Implications of Preventive Detention From Bangladesh Perspective"** While I doing this thesis, I have tried my level best to make this project paper to the latest standard. I think that thesis paper will fulfill your requirement and pleased you. I, therefore, hope that you would be kind enough to go through this thesis paper for evaluation.

I am always be ready for clearance of any part of my thesis.

Thanking you

Mohammad Abu Zafar Siddiqui
ID: LL.B 1902017016
Program: LL.B (Hon's)
Batch: 17th
Department of Law
Sonargaon University (SU), Dhaka.

CERTIFICATION

This is to certify that the thesis on "**The Thin Line Between Security and Oppression: The Human Rights Implications of Preventive Detention From Bangladesh Perspective**" is done by Mohammad Abu Zafar Siddiqui in partial fulfillment of the requirements for the degree of LL.B. (Honours) from Sonargaon University, Dhaka. The thesis has been carried out under my guidance and is a record of the bonafide work carried out successfully.

……

Md. Deedarul Islam Bhuiyan
Asst. Professor & Department Head
Department of Law
Sonargaon University (SU), Dhaka

DECLARATION

I do hereby that this Research Monograph on **The Thin Line Between Security and Oppression: The Human Rights Implications of Preventive Detention From Bangladesh Perspective** have been done by me and this Research is free from all plagiarism and without help of other. I further declare that this monograph is prepared with my own effort and it was not and never submit to any institute for any academic reason.

_____

Mohammad Abu Zafar Siddiqui
ID: LL.B 1902017016
Program: LL.B (Hon's)
Batch: 17th
Department of Law
Sonargaon University (SU), Dhaka.

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Mohammad Abu Zafar Siddiqui
ID: LL.B 1902017016
Program: LL.B (Hon's)
Batch: 17th
Department of Law
Sonargaon University (SU), Dhaka.

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.

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Chapter 1

INTRODUCTION

The term 'preventive detention' is used in contradiction to the term 'punitive detention. In other words, it may be said that 'detention' may be of two types-punitive detention and preventive detention. Preventive detention means detention of a person without trial and conviction by a court, but merely on suspicion in the minds of the executive authority. "Preventive detention is an abnormal measure whereby the executive is authorized to impose restraints upon the liberty of a man who may not have committed a crime but who, it is apprehended, is about to commit acts that are prejudicial to public safety etc'.[1] Punitive detention on the other hand, means the detention of a person only after trial for committing a crime and after his guilt has been established in a competent court of justice. According to justice Vinan Bose, preventive detention has three special features. The first is that it is detention and not imprisonment; the second is that it is detention by the executive without trial or inquiry by a court; and the third is that the object is preventive and not punitive[2]. According to Chief Justice Badrul Haider Chowdhury, preventive detention means detention the aim of which is to prevent a person from doing something which is likely to endanger the public peace or safety or causing public disorder[3]. Preventive detention is a system in which the citizens of a country can be arrested without being told the grounds for the arrest. This sort of system is followed in Bangladesh. No one can be arrested without being told the grounds for such an arrest. If arrested the person has the right to defend himself by a lawyer of his choice. Also an arrested citizen has to be brought before the nearest magistrate within 24 hours. However, there is an exception to this general provision. Under preventive detention, the government can imprison a person for some time. It means that if the government feels that a person being at liberty can be a threat to the law and order or to the unity and integrity of the nation, it can detain or arrest that person to prevent him from doing this possible harm. But preventive detention can be extended only for three months.

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1 A. K. Brohi, *Fundamental Law of Pakistan*, 1st ed. (Karachi: Din Muhammadi Press, 1958), p. 424.

2 S.Pirzada Sharifuddin, *Fundamental Rights and Constitutional Remedies in Pakistan*, 1st ed. (Lahor: All Pakistan Legal Decisions, 1966), p.193.

3 Badrul Haider Chowdhury, *The Long Ecoes*, 1st ed. (Dhaka: Khan Brother Co., 1990), p.26.

After three months such a case is brought before an advisory board for review. Laws authorizing the detention of a person without trial were considered necessary by the British Indian Government to suppress subversive political activities of the people in the subcontinent but after achieving independence the Governments of India and Pakistan continued these laws. The framers of the Constitutions of both India and Pakistan, however, provided certain limitations of the powers of the legislature as well as the executive in their attempt to detain a person without trial. In Bangladesh, these limitations have been provided in the Constitution by amending Article 33. Clauses (4), (5) and (6) which have been inserted by this Amendment contain the limitations. Before examining the nature of the Constitutional protection of the restrictive laws, the origin of such laws may be considered.

Article 33 as originally adopted did not leave any scope for preventive detention. Preventive detention, though an evil, is a necessity for State security and by the Constitution (Second Amendment), 1973 the old Article 33 was replaced by the present one providing that the above rights will not be available in the case of persons arrested or detained under any law providing for preventive detention. Preventive detention has three distinguishing features - (i) it is detention and not imprisonment, (ii) it curtails the liberty of a person by executive order without any preceding trial or inquiry and (iii) its object is preventive and not punitive. Under Article 32 a law providing for preventive detention must both substantively and procedurally be free from arbitrariness and unreasonableness and must not be vague or disproportionate to the mischief sought to be remedied. In order to protect the individuals from arbitrary or high-handed arrest and detention by the executive, clauses (4) and (5) of Article 33 provide two important safeguards - (i) approval by Advisory Board and (ii) communication of the grounds of detention. Both these safeguards are to be observed by the detaining authority. It is immaterial whether the constitutional safeguards are incorporated in the law as even if not so incorporated, it would be deemed to be incorporated in the law as superimposed by the Constitution[4].

[4] *Vimal v. Prodhan,* AIR (1979) SC 1501; *Rawshan Bijaya Shakat Ali Khan v. East Pakistan*, 17 DLR 1.

1.2 Objectives

The objectives of the study are:

01. To know about the basic concept regarding preventive detention.
02. To know about the historical background relating preventive detention.
03. To cite the existing provisions relating to preventive detention in Bangladesh.
04. To analyze the safeguards regarding the protection of rights of a detenu.
05. To find out the lacking prevalent in existing provisions in respect of preventive detention in Bangladesh
06. To recommend some important points which are needed to reduce the precut problems as existing in provisions preventive detention in Bangladesh.

1.3 Research Methodology

This work of this research includes both primary and secondary sources. In fact the research would otherwise be impossible without resorting internet. I had relied heavily on internet to get some very important information. In preparing this study, I have talked to some lawyers, media specialists, teachers of journalism of the University which immensely aided me. Secondary sources were various relevant articles, journals and books.

1.4 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 have remained a persistent feature of our criminal justice system. These practices have been widespread in Bangladesh irrespective of the forms of government, and successive governments have failed to stop this endemic problem. Torture while detention is typically committed by different state agencies-law enforcing, intelligence and security agencies, which include police army, 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.

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

1.5 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. 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, The Code of Criminal Procedure -1898, The Emergency Power Rule -2007 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.

1.6 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.

1.7 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 LLM degree. The researcher gets only one month to complete the research. Moreover, the research is directed to be within prescribed word limit. Therefore, there is not much scope for doing a comprehensive study. Yet, I try my best to fulfill the objectives set out in the present study.

Chapter 2

GENERAL CONCEPT AND HISTORICAL BACKGROUND OF PREVENTIVE DETENTION

2.1 Definition of preventive detention

Preventive detention means detention the aim of which is to prevent a person from doing something which is likely to endanger public peace or safety or causing public disorder[5].“Detention of a person without trial and conviction by a court on suspicion in the minds of executive authority” it is the general meaning of preventive detention. The aim of preventive detentions to prevent a person from doing something, which is likely to endanger the public peace or safety, or causing public disorder. it is abnormal measure whereby the executive authority is authorized to impose restrains upon the liberty of a man who may not committed a crime but who it is apprehended is about to commits acts that are prejudicial to public safety. The detention is made on the basis of suspicion. So it may also be defined as:

Preventive detention is a detention of a person under specific provisions of a statute within the ambit of respective constitution, or otherwise under the provision of an extra-constitutional authority with a view to prevent an individual from doing any anticipated act, or acts, by the Executive authority of the State without any charge or recourse to trial.

2.2 Preventive Detention and Punitive Detention

Detention is of two types under Constitutional law, (i) punitive detention and (ii) preventive detention. Punitive detention is imposed by a Court of law while the preventive detention is imposed by executive authority, and by District Magistrate (DM) or Additional District Magistrate (ADM). Punitive detention is given to a person for committing a crime or wrong but preventive detention is awarded for preventing the accused from committing prejudicial acts. Suspicion or reasonable possibility of the impending commission of prejudicial acts is sufficient for preventive detention.

“ A person is punitive detained only after a trial for committing a crime and after his guilty has been established in a competent court of justice. Preventive

[5] B.H.Chowdhury, *ibid.,* p.3

detention, on the other hand, is not a punitive but a precautionary measure. The object is not to punish a man for having done something but to intercept him before he does it and to prevent him from doing it. No offence is proved, nor any charge formulated and the justification is suspicion or reasonable probability not criminal conviction which only can be warranted by legal evidence.

2.3 Distinctions between Preventive and Punitive Detention

Preventive detention is a detention by the executive authority whereas punitive detention is a detention by a court.

The object of punitive detention is to punish a man for having committed a crime. The object of preventive detention is to prevent a man from doing injurious activities in future by him.

Preventive detention is a precautionary measure adopted by the executive authority in time of emergency for the greater interest of the nation and State whereas punitive detention is an ordinary measure.

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

In case of punitive detention specific charge is brought against the detune and through a formal judicial procedure the charge has to be proved by legal evidence. But in case of preventive detention no specific charge is formulated, no evidence is present, no offence is proved and the justification of such detention is suspicion or reasonable probability of the impending commission of the prejudicial acts.

2.4 Need for Preventive Detention

From the above discussion it is clear that preventive detention is an abnormal measure of curtailing personal liberty of a person. A question is then necessarily obvious- what is the justification or philosophy behind preventive detention? The philosophy lying behind the preventive detention is the interest and security of the state and nation. National security and interest are more important than the personal liberty of citizens, for the enjoyment of personal liberty itself is dependent on the safe security of the state. This is why in times of grave emergency threatening to the security of the state

preventive detention is authorized by law in all democratic countries including England and USA. Justifying the measure Lord Atkinson in R v. Halliday said :

"Where preventive justice is put in force some sufferings ad 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"[6]. "However precious the personal liberty of the subject may be, there is something for which it may well be, to some extent, sacrificed by legal enactment, namely national success in the war, or escape from national plunder or enslavement"[7].

In the same case Lord Finlay 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".

As already mentioned in the earlier chapter, all international and regional documents of human rights recognize and make provision for derogation of rights in case of emergency and of national crisis. During the First and the Second World War the British Government was given extensive power by parliament to pass order for preventive detention. The US Congress has also given the executive power to make preventive detention. But this power can be exercised only in times of grave emergency like war or external aggression. Preventive detention is recognized as a war-time measure and not a peace-time measure. In times of peace preventive detention is not at all known in democratic countries.

2.5 Historical Backgrounds

A brief history of the preventive detention laws will throw some sidelight on the significance of such laws as have been enacted in the Indian Sub- Continent.

With the Bengal State Prisoners "Regulation HI of 1818 the authority to detain persons without trial came to be first exercised on British India. In the next year the Madras State Prisoners' Regulation II of 1819 and a few years after the Bombay State Prisoners' Regulation XXV of 1827 were promulgated. In the case of the Bengal Regulation the

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[6] A. K. Brohi, *ibid.*, p.416.

[7] A.B.M. Mafizul Islam Patwary, *Liberty of the People*, 1st ed. Dhaka: (Dhaka Institute of Human Rights and Legal Affairs, 1987), p.29.

Governor General and in the other two cases the Governors of the provinces were authorized to order detention and for this purpose they were invested with wide discretion. Provided the action taken was within the scope of the Regulation, the jurisdiction of a court of law to question the legality was barred.

However, the grounds on which detention could be imposed were limited. The Bengal Regulation provided for detention for "reasons of state, embracing the due maintenance of the alliances formed by the British Government with foreign powers, the preservation of tranquility in the territories of native princes entitled to its 'protection and the security of the British dominions from foreign hostility and from internal commotion." Under the other two Regulations detention could be ordered only on grounds connected with the maintenance of public order. Neither of these Regulations, however, fixed any period for detention, that is, a person could be detained without trial for unlimited time.

These Regulations, no doubt, were motivated by the principle "no detention without statutory authority'. Though there were no provisions made for any advisory council and the detained person was given no right to be heard or informed of the grounds of detention, any representation made by him was to be submitted to the authority concerned.

We need not pause to consider the extension of the Bengal Regulation to the other provinces of British India and their contents and history. But the Defense of India Acts passed during the two world wars require mentioning. The Defense of India Act, 1915 was to remain in force during the continuation of the war and six months after the cessation of hostilities. Under the provisions of the Act, rules could be made empowering the civil as well as military authorities to direct any person to reside or remain in any specified area if they considered that reasonable grounds existed for suspecting any person to have acted or was about to act prejudicially to the public safety. Between this enactment and the Defense of India Act, 1939, the Anarchical and Revolutionary Crimes Act, 1919, popularly known as the Rowlatt Act and several Emergency Powers Ordinances under the Government of India Act, 1919, were promulgated. The Defense of India Act, which authorized preventive detention without trial in British India was enacted under the provisions of the Government of India Act, 1935. It continued during the period of World War II and was in force till six months after the hostilities ended.

After the establishment of Pakistan the Central Statutes that were passed were Pakistan Public Safety Ordinance XIV of 1949, the Pakistan Public Safety (Amendment) Act XXXVI of 1950, the Pakistan Public Safety Ordinance VI of 1952 and lastly the (Security of Pakistan Act XXXV of 1952. Besides these Central Acts the Provinces enacted Public Safety Acts and Ordinances whose number exceeded more than a dozen.

The Security of Pakistan Act, 1952 made provisions for communicating grounds of detention to the detained person, enabling him to make representation and setting up an Advisory Board. The life of this Act was extended several times by Acts and Ordinances, and this Act was amended on several occasions, the last being Security of Pakistan (Amendment) Act, 1965. On September 6, 1965 when hostility started between India and Pakistan, the President of Pakistan promulgated the Defense of Pakistan Ordinance XXIII of 1965 in exercise the Powers conferred by Clause (4) of Article 30 read with Clause (2) of Article 131 of the Constitution. Section 3(1) and (2) empowered the Central Government to make rules which among other matters could provide for –

"The apprehension and detention in custody of any person whom the authority empowered by the rules to apprehend or detain as the case may be, suspects, on grounds appearing to such authority to be reasonable, of being hostile origin, or of having acted, acting, being about to act, or of being likely to act in a manner prejudicial to the external affairs, the security, the public safety or interest, or the defense of Pakistan or any part thereof, including the maintenance of supplies and services essential to the life of the community, and the maintenance to the maintenance of public order, or the efficient prosecution of war, or with respect to whom such authority is satisfied that his apprehension and detention are necessary for the purpose of preventing him from acting in any such prejudicial manner, the prohibition of such person from entering or remaining in any area, and the compelling of such person to reside and remain in any area, or to do or abstain from doing anything."

The Defense of Pakistan Rules, 1965 which were framed under the Ordinance conferred extensive powers of detention on the Central Government and also gave wide powers of arrest and detention to the police officer or any other officer empowered in this behalf by general or special order of the Central Government.21 In Bangladesh, laws relating to preventive detention were enacted subsequent to the amendment of

Article 33 of the Constitution. The Special Powers Act, 1974 which came into force on February 9,1974 has incorporated the requirements laid down in this Article. After independence the Constitution of Bangladesh was adopted on 4 November 1972 and it come to force on 16 December 1972. As mentioned in the preceding chapter, 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 didn't want to leave any scope for preventive detention. As a result, in the original Constitution of Bangladesh on provision was embodied allowing preventive detention. But only after 9 months of its life by the Constitution (Second Amendment) Act Article 33 dealing with safeguards as to arrest or detention was substituted in the line with Article 22 of the Indian Constitution so as to allow for laws to be made on preventive detention. Under the authority of this amended provision of Article 33 the parliament in February 1974 enacted the most hated and democracy destroying draconian law - the Special Powers Act, 1974 providing for preventive detention for all times[8].

The Constitution 0f 1972 originally did not provide for proclamation of emergency and suspension of fundamental rights. The Constitution (Second Amendment),1973 which made provision for preventive detention also incorporated a new "part IXA" in the Constitution empowering the President to proclaim emergency and suspension enforcement of fundamental rights[9].

2.6 Some Common Feature of Preventive Detention

It is made to prevent on the assumption of a future prejudicial act.

There is no charge against the detainee, so there is no trial, thus prima facie there is no process for testing the grounds under which the person is being detained.

The State may withhold any ground under the disguise of "public interest" The detention orders are prima facie made for a months and extended by the Executive authority depending on circumstances that may extend the order to months and years.

The detention orders may be challenged through writ of habeas corpus depending on the nature of the concerned statute.

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[8] Rules 32 (b), 202 and 204. After the Proclamation of Emergency on December 28, 1974 Emergency Rules framed in pursuance of *the Emergency Powers Ordinance,* 1974 contain similar provisions.

[9] Badrul Haider Chowdhury, *ibid*., p.67.

In almost all occasions, the orders are subjective, meaning satisfaction of the authority, so it is stipulated that it can not be challenged in any Court of Law.
The concerned authority is made immune, under the disguise of “good faith”.

2.7 Nature of Preventive Detention

As has been observed in Gopalan's case “there is no authoritative definition of the term ‘Preventive Detention’". In England, while explaining the nature of detention under Regulation 14B, framed under the Defense of die Realm (Consolidation) Act, 1914, the Judges referred to such expression. Lord Finally characterized it as not a punitive but a precautionary measure. "One of die obvious means of taking precautions against dangers such as are enumerated is to impose some restriction on the freedom of movement of persons whom there may be any reason to suspect of being disposed to help the enemy[10]. When a person on preventively detained, such detention is not punitive.

‘No offence is proved, nor any charge formulated; the justification of such detention is suspicion or reasonable probability and not criminal conviction which can only be warranted by legal evidence'.

The object of such detention is, however, not to inflict punishment for any act done by him but to prevent him from doing it. After observing how precious the personal liberty of the subject is, Lord Atkinson in Halliday's case found a justification for preventive detention during war, "there is something for which it may well be, to some extent, sacrificed by legal enactment, namely, national success in the war, or escape from national plunder or enslavement. In the same case his lordship defined preventive justice "which consists in restraining a man from committing a crime he may commit but has not yet committed, or doing some act injurious to members of the community which he may do but has not yet done....." And such preventive justice proceed “upon the principle that a person should be restrained from doing something which, if free and unfettered, it is reasonably proceed in all cases, to some extent, on suspicion or anticipation as distinct from proof”.

Clause (4) and (5) of Article 33 indicate that the preventive detention referred to therein is detention otherwise than by order of Court. There is no scope of judicial review. This kind of preventive detention is quite distinct from the ordered under the

[10] *Rex v. Halliday,* (1917) AC 269.

provisions of the Criminal Procedure Code. Like the detention pending trial dealt within Clauses (1) and (2) of Article 33, the detention referred to in Clauses (4) and (5) is not punitive detention. The first two clauses, we have seen, lay down the minimum conditions which the legislative sanctioning the arrest and detention of a person not convicted of a crime must comply with and the safeguards provided therein were largely covered by the provisions in the Criminal Procedure Code.

Clause (3) specifically lays down that these safeguards will not be applicable in cases of persons who are for the time being enemy aliens or who are arrested and detained under any law providing for preventive detention. The preventive detention contemplated in Clauses (4) and (5) has reference only to detention made by an order of an executive authority purporting to act under an enactment authorizing such detention.

Chapter VIII of the Criminal Procedure Code contains such provisions as, (a) Taking security for keeping the peace -Section 106; (b) Taking security for keeping the peace even in cases where there has been no conviction - Section 107; (c) Taking security for good behavior - Section 108. The Court may order detention in prison under Sections 107,117 and 123 of the Code, but though this kind of detention is resorted to as a sort 107,117 and 123 of the Code, but though this kind of detention is resorted to as a sort of precautionary measure, it is not a punitive detention. The fact that imprisonment follows as the result of a failure or refusal to give security does not make it a punishment inflicted for a crime.

An order for detention under the provisions of the Criminal Procedure Code is made by a magistrate for sufficient reasons established by the evidence and after full judicial enquiry. Here the detention can be avoided by giving security, while in preventive detention under an Executive order there is no choice. Preventive detention deprives a person of his right to liberty without the advantages that a person detained under the above provisions of the Code enjoys or to his right of moving the Supreme Court in appropriate cases, and also his right to defense by counsel of his own choice. A detenue under a Preventive Detention law is not required to be produced before any Court. Chapter VI deals with (1) persons disseminating seditious matter; (2) vagrants and suspected person and (3) habitual offenders.

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" In *Sasti 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 detent 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.

Chapter 3

LAW RELATING TO PREVENTIVE DETENTION

3.1 Preventive Detention in the Constitution of the Peoples Republic of Bangladesh

"Notwithstanding anything in the foregoing provisions of this part, Parliament may by law make provision for indemnifying any person in the service of Republic or any other person in respect of any act done by him in connection with the national liberation struggle or the maintenance or restoration of order in any area in Bangladesh or validate any sentence passed, punishment inflicted, forfeiture ordered, or other act done in any such area".

The first preventive detention legislation which was applied in Bangladesh was the Public Safety Ordinance, 1958, which in fact was a Pakistani legislation and came into force prior to the commencement of the Constitution of Bangladesh. On the commencement of Proclamation of Independence, 1971[11] the government in exile passed the Laws Continuance Enforcement Order, 1973[12] which turned the East Pakistan Public Safety Ordinance, 1958, into the said Bangladeshi legislation and acted as the first piece of legislation containing provisions for preventive detention[13]. Constitution provides the initial period of detention is 6 months.

3.2 Preventive Detention under the Special Powers Act, 1974

In the original Constitution of Bangladesh, which was enacted in 1972, there was no provision relating to special powers for preventive detention, proclamation of emergency and suspension of fundamental rights. Rather, rights to protection from arrest and rights against detention were guaranteed under articles 31 and 32 of the Constitution. Though there were laws in different countries of the Indian subcontinent regarding preventive detention, the frames of the Constitution of Bangladesh carefully avoided such type of oppressive provision[14]. Originally Article 33 did not leave any scope for preventive detention. But in 1973, this Article was replaced by the Second

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11 Bangladesh Statutes, 24 DLR 1, (1971-72).

12 *Ibid.*,p.3.

13 Article 13, *The laws Continuance Enforcement Order 1973,*

14 M. Faiz Uddin and M.A. Hannan, 'Protection of Human Rights in Criminal Justice BangladeshPerspective', *Rajshahi University, Journal of Law, Vol: 1. (June, 1998),* P. 75.

Amendment under which a person can be arrested and detained[15]. So according to the above Amendment, the fundamental rights discussed earlier are not available to the persons arrested or detained under preventive detention. The laws relating to preventive detention are enacted subsequent to the Amendment of Article 33 of the Constitution.

The SPA that came into force on February 9, 1974, was the result of the amendment of Article 33 of the Constitution Clause 3 of Article 33 specifically lays down that these safeguards as to arrest and detention under clause (1) and (2) will not be applicable in cases of persons who are enemy aliens or who are arrested and detained under any law providing for preventive detention under the SPA.

The SPA empowers a District Magistrate to order detention of any individual for 30 days to prevent any act likely to prejudice the security of the count. The law also covers other offences which include hoarding or black marketeering and smuggling. The law provides that the magistrate leas to inform die detainee of the grounds for detention within 15days and that the grounds for detention must be approved by the government within 30 days of detention. If these requirements cannot be fulfilled the detainee must be released following 30 days of detention. But in practice these provisions are hardly complied with. In most cases, fresh detention orders are issued before the expiry of 30 days, the detainees are not assigned grounds for the detention. This law is most nakedly used to persecute political opponents. Under the Constitution the detainees can appeal against their detention to the Supreme Court. Cases filed under the SPA can be examined by an Advisory Board composed of two people who have been, or are qualified to be high court judges and one civil servant. The board is to sit every four months, and review SPA cases. However the detainees are not allowed to be represented by a lawyer before the Advisory Board. Relatives can visit detenues. The detainee remains imprisoned if the government can adequately defend its order, but if the contrary is proved, the detainee has to release. In most habeas corpus petitions the High Court Division release the detunes and declare the detention orders made without legal authority. But this is not true in the case of poor citizens. In several cases, detunes who were either too poor or unable to consult legal counsel had to serve prolonged detention.

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[15] *Ibid.,*

As to magistrates are subordinate to administrative control of the executive they are reluctant to dismiss let alone quash a case under the SPA since most cases are political in nature and the government itself becomes the complainant.

3.3 Common Feature of the Special Powers Act, 1974

The Special Powers Act, 1974[16] has been used to detain people without charging them with a criminal offence. It provides for the detention of individuals who might commit "prejudicial acts" against the state and gives sweeping powers to the executive to detain people arbitrarily without having to justify its action before a court of law. The SPA provides no guidance on the burden of proof necessary for the government to conclude that an individual is likely to commit a "prejudicial act". It specifies that no orders, under the SPA, "shall be called in question in any Court, and no suit, prosecution or other legal proceeding shall lie against the Government or any person for anything in good faith done or intended to be done under this Act[17]." Detention under the SPA can only be challenged before the High Court on procedural grounds, for instance inconsistency in filling out forms; however, detainees cannot challenge the grounds for their detention.

In a number of cases such criminal charges have not withstood scrutiny in court and have been dropped after a hearing, raising concern that they were filed as a pretext to secure the continued custody of the individual[18].

This is the only at present in force in Bangladesh which allows the government to detain any person initially for one month and thereafter may prolong it by six months with the approval of the Advisory Board, and thereafter in the same manner for further period, which in fact could be prolonged indefinitely. The basic feature of the Act lies in Section 3, which enables the government to detain any person in custody under the disguise of preventive detention. According to Section 3 of the Act, the Government has power to make an order to detain any person. The "prejudicial acts" commission of which are to be the grounds for preventive detention as stipulated in section 3, are defined in Section 2(f). the aims and objectives of the law are very conspicuous, at least in the sense that the government wanted to put some restraint upon other legislation that

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16 *Act XIV of 1974.*

17 *The Special Powers Act*, 1974, *Section 34*.

18 [http://www.goolge.com/ search/ Report Amnesty International Bangladesh (Publish on 1 September 2008), last Visited 25 March, 2012].

allows provisions of bail and on most occasion sets the person free finding no evidence to prove his guilt to put him behind the bars[19]. The said provisions are in contrast to the right to freedom of thought, conscience and speech, enunciated in the Article 39, of the Constitution[20].

3.4 Judicial Relief Under the Special Powers Act, 1974

Under the SPA, an aggrieved person, on account of his/her preventive detention, can file an application (writ of habeas corpus) under Article 102 of the Constitution in the High Court Division and 95% of such cases are declared by the High Court Division as illegal and framed unlawfully.

The Article 32 of the Constitution clearly indicates that deprivation of life or personal liberty is permissible on the ground of reasonableness. In the case of Anisul Islam mahmood v. Bangladesh H.M.habibur Rahman, J. held that the detaining authority must have some jurisdiction facts for the detaining an individua, since the detaining authority is curtailing the liberty of a citize by detaining him on preventive detention,it is exercising a non- judicial authority.

The judiciary has, in innumerable cases, acted as a "bulwark against illegal detention". Detainees have been released by orders of the High Court Division following the filing of writ of habeas corpus or the initiation of proceedings under Section 491 of the CrPC of 1898. In the vast majority of such cases, the Court has found the grounds of detention to be vague, indefinite and lacking in material particulars. But after release of the detainee on High Court Division order, in most of the cases he is detained again and so on and so forth. In this way, the numbers of detainees always remain higher than the numbers of released persons. Besides, in many cases, the poor detainees cannot bear the expenses of the cost of writ petition So they remain inside the jail for years and in some cases some detainees die during detention without knowing the 'offence' on account of which they were arrested and detained. So there is no doubt, a repressive and anti-humanitarian law from which the nation is striving hard to be freed.

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[19] Quazi Reza-ul Hoque, *Preventive Detention Legislation and Judicial Intervention In Bangladesh,* 1st ed., p.189.

[20] *Ibid.,* p.202.

3.5 Some remarkable cases under the Special Powers Act, 1974

In the case *Habiba Mahmud v. Bangladesh*[21] is involving the detention under Section 8 of the SPA. It was held that 'grounds' of detention must include facts as well. It was also held that under the provision to Article 33 (5) of the Constitution, the Appellate Division against the order of the High Court Division, but it was rejected. In the case *Habiba Mahmud v. Bangladesh* is involving the detention under Section 8 of the SPA. It was held that 'grounds' of detention must include facts as well. It was also held that under the provision to Article 33 (5) of the Constitution, the Government has the Constitutional protection not to disclose anything in public interest. In such a case, the High Court Division will decide on the question of public interest privilege. The Court is to hold a balance between the state's need to prevent prejudicial activities and the citizen's right to personal liberty.

In the case *Nasima Begum v.* Bangladeshheld[22] if it is manifest from the petition for judicial review that the cause or manner of detention stands adequately explained and justified, then the respondent need not file an affidavit in opposition to it and may support the detention orally on the petition itself. But if the petition contains allegations of fact, which if unrefuted supports the petitioner's case for illegality of detention then the order will be invalid.

In the case *Nasrin KaderSiddiqui v. Bangladesh*[23] held that where a prisoner is in custody on the basis of an order of conviction, the onus of the respondent is discharged as soon as the return relating to the appellant's custody shows that there is an order of conviction justifying the custody. However the warrant of commitment issued by someone not authorized by law can hardly prove the conviction.

In *Farzana Huq v. Bangladeh*[24] (writ petition No 271 of 1990) Sanaul Huq Niru was arrested and detained first on 13 September 1987 under the SPA. His detention was, challenged in writ petition no. 187 of 1988 and the court declared the detention illegal and directed the release of detainee on l0 May 1988. But Niru was not released. Another fresh order of detention was served against him on 29 September 1988. Niru was not placed before the Advisory Board within the statutory period of 120 days. The High Court Division again declared the detention order illegal and directed his release.

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[21] 45 (1993) DLR (AD) 89.
[22] 49 (1997) DLR (AD) 102.
[23] 44 (1992) DLR (AD) 16.
[24] 44 (1992) DLR (AD) 16.

But Niru was not released; rather another fresh detention order (third time) was served and it was challenged by another writ petition (writ petition No. 989 of 1989). Again the Court declared the detention illegal and directed the detainee's release. But even this time Niru was not released; rather another fresh detention order was issued. The matter came up before a Division Bench of the High Court Division (writ petition No. 270 of 1990).

The Court said:

"The least can be said is that the detaining authority is paying little regard to the order of the court. It is unfortunate that the authority which is obligated under Article 32 of the Constitution to protect the liberty of the citizens and further required under Article 112 thereof to act in aid of the court order should flout the laws by resorting to authoritarian acts. we are satisfied that the detention is illegal and the detainee shall be set at liberty forthwith."

3.6 The Merits and Demerits of Preventive Detention Laws

Till today there exist no system of answerability against the breach of duty and fundamental right of the citizen by the Government. Thousands of innocent persons have been detained without any charge or offense committed. The Courts does not sanction any compensation. The statistics show that every year a large number of political workers and leaders are detained without trial under the Special Power Act. This law has popularly been titled as “Black Law”.

Because,

A detenu under this law has not been given any right, by appointing a lawyer, to know from a judicial body “why has he been detained”?

This is the law by which the Government can arrest and detain any person any time it wishes.

It is the law by which the Government detain a person for an indefinite period, if it wishes.

This is the law which is factually negating all the avowed commitment and spirit of the preamble to the Constitution, particularly, the fundamental rights as guaranteed in the Constitution. As mentioned here, 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.

The provision of the Special Power Act were made draconian. It is also evident from the above discussion that the Special Power Act was made absolutely with a savage dos-motive to put attack on the enjoyment of personal liberty, in a sense, to put attack on the development of constitutionalism in Bangladesh.

According to justice Patanjali Sastri,

"This is a sinister-looking feature, so strongly out of place in a democratic Constitution, which invest personal liberty with sacrosanct of a fundamental right, and so incompatible with the promises of its preamble.[25]" He has also described preventive detention law as a serious invasion over personal liberty[26]. Since the Courts have started to deal with preventive detention cases, they were very strict on the point that a preventive detention statute cannot under any circumstance be used for any collateral purpose. In Abdul Hakim Miah vs Secretary, Ministry of Home Affairs[27], justice F.H.M Habibur Rahman said, under sections 392/34/412 of the Penal Code is pending against the detenu cannot be the ground for detaining him under section 3 of the Special Power Act.

Preventive detention in times of war or emergency is well known. In manynewly independent states subversive movements, abuse of personal liberty and freedom of speech appear to imperil the fabric of society. It is also used to control anti-social activities. Peace and order had not become the normal feature even after the first ebullitions of independence of Bangladesh[28]. In 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[29]. Many suspected people who are not actually criminal, for wrong information they kept inside the jail. Among them who are rich come outside through

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[25] *A.K. Gopalan v. State of Madras,* AIR (1950) SC 27.

[26] *Ram Krisna Bhardwayj v. State of Delhi,* AIR (1954) SC 56.

[27] Quazi Reza-ul Hoque, p.277.

[28] [http://www.bdresearchpublications.com/ journal/ Md. Ashraful Arafat Sufian, *Preventive Detention, Last Visited 25 March, 2012]*

[29] *Ibid.,* p.169.

writ of Habeas Corpus in High Court Division but those who are poor, they have no chance[30].

3.7 A Quantitative Overview of Preventive Detention Cases moved Before the Bangladesh Supreme Court

The number of persons detained by the Executive Authority of the government since its independence is not available. It is presumed that the ministry of Home Affairs destroyed all concerned documents at different times to conceal the misuse of preventive detention legislation. There are following number of cases, which came up before the High Court Division of the Supreme Court of Bangladesh way of writ of *Habeas corpus.* The data appended below are prepared on the basis of the registers of the Writ Bench and Criminal Miscellaneous Benches of the High Court Division of the Supreme Court of Bangladesh. Section 3 of the SPA gives power to the executive authority to arrest and detain someone on the subjective satisfaction of the concerned executive officer. If the concerned officer is personally satisfied that there is sufficient cause of suspicion against any person of committing any of the acts prohibited by the SPA, he can give order for preventive detention. The Executive Officers may quite likely abuses the power and as such he is not free from controversy. He is not accountable to anyone for awarding preventive detention. Political leaders very often exert influence upon the Magistrate or Additional Magistrate and also on the police officers so that they exercise subjective satisfaction for detaining political opponents.

[30] *Ibid*, p.170.

Chapter 4

SAFEGUARDS REGARDING THE PROTECTION OF RIGHT OF A DETENUE

4.1 Constitutional Safeguards for Preventive Detention

Enforcement of fundamental rights through Article 102 of the Constitution in the High Court Division is guaranteed by the provision of Aricle 42 of the Constitution. The Article 42 provides that the power to move the High Court Division is itself a fundamental rights. Clause (2) of this Article provides that enforcement of fundamental rights may be given to any other Court of concurrent jurisdiction, but the High Court Division's of enforcement of fundamental rights can never be taken away[31].

There are some particular provisions in Constitution those are safeguards for preventive detention. Article 33 of our Constitution deals with the rights of an arrested person, in other words, safeguards as to arrest and detention. 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. This Article as it stands now, after the Constitution (Second Amendment) Act has re-enacted it, has two parts:

The first part consisting of Sub-Articles (1) and (2) deals with the Constitutional rights of a person arrested under ordinary law; and

The second part consisting of Sub-Article (3), (4), (5), and (6) deals with the laws relating to preventive detention and rights or constitutional safeguards of a person arrested under preventive detention law.

Article 33 confers four constitutional rights or safeguards upon a person arrested under ordinary law. There are:

He cannot be detained in custody without being informed, as soon as may be, of the ground of his arrest.

He shall have the right to consult and to be represented by a lawyer of own choice.

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[31] Justice Latifur Rahman, *The Constitution of The People's Republic of Bangladesh with Comments & Case-Laws* 2nd ed., (Dhaka: Mullick Brothers, 2005), p.79.

He has the right to be produced before the nearest magistrate within 24 hours of his arrest; and

He cannot be detained in custody beyond the period of 24 hours without the authority of the magistrate.

The Second part of Article 33 provides for the 3 Constitutional Safeguards for a detention under preventive detention law:

Review by an Advisory Board.

Right to communication of grounds of detention; and

Right of representation against the order of detention .

4.2 Review by an Advisory Board

No law providing for preventive detention shall have any authority of detention of a person for a period exceeding six months unless an Advisory Board consisting of three persons, of whom two shall be person who are, or have been or are qualified to be appointed as, judges of the Supreme Court and the other shall be a person who is a senior officer in service of the republic[32]. No person can be detained more than 6 months without authority of the Advisory Board, if the board give their opinion that, there is sufficient grounds for such detention only than the authority can detain the suspect more than 6 months. If the grounds of detention are not placed before the Advisory Board within 120 days from the date of detention, the detention will be illegal[33]. The opinion of the majority of the Advisory Board shall be deemed as an opinion of the board if there is a difference opinion among the members. The constitution of an Advisory Board for the purpose of reporting to the government its opinion whether a person should be detained for more than six months may be said to have been 'introduced for the very reason that review by the law courts was excluded. This is, no doubt, a special procedure but this shows that the person detained has not been left without any safeguard. Further, this elaborate provision for safeguarding the detained person's interests may be regarded as an argument against holding that absolute discretion has been conferred on the government. "The setting up of an

[32] Section 33(4) and 9, *The Special Powers Act*, 1974.

[33] Section 33(4) and 9, *The Special Powers Act*, 1974.

Advisory Board to determine whether such detention is justified is considered as sufficient safeguard against arbitrary detention under any law of preventive detention[34]. 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 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.

4.3 Right to Represent against the Orders of Detention

It is the rights of the arrested person to engage counsel and the consul will help the person to defend him. Article 33(1) of our constitution provides that the detaining authority must afford the detenu the earliest opportunity of making representation against his detention. The person arrested has a right to have purposeful interview with the legal practitioner out of the hearing of the police or jail stuff through it may be within their presence.is going to deprive a man of personal liberty cannot be allowed to be dealt with in a careless manner, and if it is done so, the court will be justified in interfering with such order. The court held the detention order unlawfully.

4.4 Rule of Law and the Constitution Of Bangladesh

The rule of law is a basic feature of the constitution of Bangladesh. It has been pledged in the preamble to the constitution of Bangladesh that -"It shall be fundamental aim of the state to realized through the democratic process a socialist society, free from exploitation - a society in which the rule of law, fundamental human rights and freedom, equality and justice, political economic and social, will be secured for all citizens." Article 27 guarantees that all citizens are equal before law and are entitled to equal protection of law. Article 31 guarantees that to enjoy the protection of the law, and to be treated in accordance with law, is the inalienable right of every citizen, in Bangladesh. 18 fundamental rights have been guaranteed in the constitutional arrangement for their effective enforcement has been ensured in Articles 44 and 102. Article 7 and 26 impose limitation on the legislature that no law which is inconsistent with any provision of the constitution can be passed. In accordance with Article 7, 26

[34] *Puran Lai v. Union of India*, AIR (1958) SC 163.

and 102(2) of the constitution the Supreme Court exercise the power of judicial review whereby it can examine the extent and legality of the actions of both executive and legislative and con declare any of their actions void if they do anything beyond their constitutional limits. Right to be governed by a representative body answerable to the people has been ensured under Articles 7(1), 11, 55, 56, 57 and 65(2) of the constitution. All these provisions of constitution are effective for ensuring rule of law in Bangladesh. But facts on the ground tell a different story altogether.

4.5 Role of the Supreme Court Regarding Preventive Detention

When a person has been preventively detained under the provision of any preventive detention statute, he moves the Court to restore his liberty. The core contention that rallied through years since the inception of preventive detention statute is subjective satisfaction of the authority. This has been upheld through a very stubborn interpretation by the Courts that questioning objective satisfaction is beyond its jurisdiction.68 The Supreme Court clearly interpreted that the object for which the statute is constituted must be relied on, so that the capricious use of statute can be checked. In *A.K.M.Azizul Haque v. Bangladesh*[35], the Court took very rigid view against the Executive authority and observed: in a case where specific criminal charge has been leveled and specific case is pending the executive authority should not take recourse to preventive detention on account of the same pending criminal cases[36].

There are numerous judicial decisions of of the supreme Court of Bangladesh on the question of preventive detention and the safeguard to be observed in preventive detention have become a highly specialised subject[37]. In the case of *Proffessor Ghulam Azam v. Bangladesh*[38],it was held that, the petitioner having been living in Bangladesh is entitled to the protection under Article 33(5) of the Constitution. In the case of *Habiba Mahmood v. Bangladesh*[39], it was held that, the clear constitutional sanction

[35] AIR (1983) SC 1083.

[36] AIR (1983) SC 1083.

[37] J. Latifur Rahman, p.65.

[38] 46 DLR 29.

[39] 45 DLR (AD) 89.

provided in Article 33(5) a non-disclouser of fact that was consider to the prejudice of the detenu ought to be regarded as violation of basic principle of national justice.

Under this chapter an attempt has been made to reveal the judicial approach regarding the application of preventive detention laws to detenu. Some case study has given below to theoretical analysis.

4.6 Judicial Remedies Regarding Preventive Detention

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

Writ of Habeas Corpus:

If any person illegally detained then any person in favor of him can file a writ of Habeas Corpus under article 102(b) (1) of our constitution. The detenu himself, or his father, or his wife, or his son, or his sister, or his relative[40], or even his friends can apply for this. Most of the cases the court found the weak grounds, vague & not any specific grounds. As a result the high court can relax the detenu for following grounds[41]

Detaining by Governments unlawful authority.

Failure to state the grounds within time.

Failure to give chance to be defend himself.

Lack of nexus with the reason of detention.

Not to produce the detenu before advisory board within specific time.

Mixing good grounds with bad grounds.

Retrospective issuance of orders. and

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

For such grounds when high court is satisfied that the detenu has been detained arbitrarily then court can declare the detention illegal and order to release him immediately. In the time of emergency when writ of Habeas Corpus is withheld then a

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[40] *Charanjit Lal v. Union of India,* AIR (1951) SC 41; *Sundarajan v. Union of India* AIR (1970) Del 29 (FB); *Farzana Hoque v. Bangladesh* (writ petition 170 of 1990); *Hiralal v. East Pakistan,* PLD (1970) SC 399.

[41] [http://www.bdresearchpublications.com/ journal/ Md. Ashraful Arafat Sufian, '*Bangladesh Research Publication Journal'* last visited 25 March, 2012.].

case filed under section 491 of CrPc to get directions or rule of the nature of a Habeas Corpus. Another interesting matter we want to highlight that "though it is stated that special power act there is no chance of filing a Habeas Corpus writ but people can because the Special Powers Act is a general law but article 44 & 102 gives the power to High Court Division to exercise Habeas Corpus writ which is a constitutional law as it is a constitutional law strong than general law[42]".

Suo Motu rule:

The Suo Motu rule is now not very new to us. It is exercised by High Court Division's judges if any illegal or inhuman matters happen and it comes to knowledge of the court through newspaper or report publishing[43].

Compensation for wrongful arrest:

There is no provision for payment of compensation for illegal detention under the preventive detention law. So the detaining authority exercises arbitrary and malicious discretion. High court division declared 198 detentions illegal in a day and such a huge detentions cases being declared illegal in a day in our judicial history[44]. But Bangladesh Supreme Court does not usually give directions of compensation but in same exception cases like in "Bilkis Akter Hossain v.Government[45]". The court directed one lakh to the each detenu as compensation for illegal detention. Section 9(5) of the International Covenant on Civil and Political Rights 1966 days down "Anyone who has been victim of unlawful arrest or detention shall have an enforceable right to get compensation." The Indian Supreme court ordered for compensation in *Rudul Sah vs. State of Bihar* case[46].

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42 Md. Abdul Halim, *ibid.*, p.263.

43 *Ibid.*, p.174.

44 *Daily Prothom Alo*, (8 December, 2002), p.1.

45 *Mainstream Law Reports* , vol. 2, (1997), p.123.

46 AIR (1983) SC 1083.

Review of Advisory council:

We know it well that if the government wants to detain any person more than six months, he or she will be produced before the Advisory Board consisting three members- among two from High Court judges and another one from senior civil servant. A person cannot be detained under preventive detention law more than six months except consent of advisory Board.

So considering the above discussion we forward the following recommendations:

As article 33(2) of Bangladesh constitution stated clearly that every person who is arrested and detained in custody shall be produced before magistrate court within 24 hours. But the detained person has been deprived of this opportunity and as such this provision should be repealed.

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

A judicial review should be held for those who are detained under different preventive detention law.

All reasonable opportunities should be provided to the detenu.

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

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

The relatives of the detenu should be promptly notified of the detention and transfer of the detenu.

Case reference 1

Hasina Karim v. Bangladesh[47]

Fact of the case: The detenu, Begum Momata Wahab, was taken into custody in execution of an order of detention under Section 3(1)(a) of the Special Power Act, 1974. The grounds of detention were detenu was subjected to anger of the people and she stated anti-government activities on the plea of release of Ershad and for that purpose secretly supplied funds to various labour and women's organizations. So that these organizations may damage the image of the democratic lawful Government and thereby you involved in activities contrary to the maintenance of law and discipline.

[47] 44 (1992) DLR 366.

With your financial assistance two organizations namely, Ershad Mukti Parishad and Sangrami Chatra Shamaj have been formed and these two organizations jointly, on the plea of law and fundamental rights preservation committee, brought out a procession and tried to enter into precincts of the High Court and thereby tried to deteriorate the law and order situation.

Case analysis:

It appears that the detenu secretly supplied funds to different labour and women's organizations but it has not been stated what amount, in what manner, on what date and to whom such funds were supplied. No hesitation to hold that this ground is absolutely a vague and unspecified ground in general terms. All the grounds cannot be ascertained by the detaining authority for satisfying itself that the detention of the detenu was necessary with a view to preventing her from committing the "prejudicial act".

Decision: The High Court Division observed that the detention of the detenu is illegal and without lawful authority.

Case Reference 2

Nasima Begum V. Bangladesh[48]

Fact of the case: The detenu has been described as a professional hijacker. The person of his area has hatred and grievance against him. He has been hindering the normal life and security of the City of Dhaka by hijacking on point of illegal arms in association with an organized gang for a long period. It was stated that a fierce hijacker like him is a threat to the overall law and order situation in the country and, as such, his detention under Section 3(1) of the Special Power Act, 1974 is necessary to prevent him from indulging in activities prejudicial to public safety and public order.

Case analysis: The detaining authority failed to satisfy the Court that the further detention of the detenu was legal and lawful. It was further urged that the grounds served on the detenu were vague and lacked in material particulars for which the detenu

[48] 49 (1997) DLR (AD) 102.

could not make any effective representation, a submission to which the High Court division did not avert all.

Decision: The Appellate Division observed that the High Court Division has indeed failed to apply its judicial mind to these aspects of the case and have failed to derive the right conclusion under the circumstances, namely, that the continued detention of the detenu is illegal and unwarranted by law.

Case Reference 3

***Bangladesh V. Dr. Dhiman Chowdhury and Others*[49].**

Fact of the case: The detenu was engaged in Anti-Government and Anti-State activities; he was a member of a secret illegal organization name "Shadhin Bangla-Bhumi Sangshad Parishad" which is financed by some foreign country. In order to destroy the independence and sovereignty and with illegal and dishonest object the detenu had held secret meetings, open meetings and distributed leaflets and also organized terrorist activities among the member of "The Shadhin Bangla-Bhumi Sangshad Parishad" in order to achieve the object of the said organization. In a letter signed by him on 12.12.1992 on a printed pad of Shadhin Bangla-Bhumi Sangshad Parishad the detenu stated that in order to destroy national economy of Bangladesh he had brought Taka 50 luck in forged currency notes of the denomination of Taka 500 and Taka 100 in order to distribute these forged currency notes amongst dishonest, poor and weak people of Bangladesh and actually distributed this currency inside Bangladesh. In order to wage an armed struggle against Bangladesh the detenu purchased ten modern fire-arms from the so-called Shanti Bahini. With the object of furthering the aims of Shadhin Bangla-Bhumi Sangram Parishad he enrolled people as members of this organization and tried to influence various authorities of the Government and by indulging in illegitimate activities tried to destroy the economy of the country and become a threat to law and order.

Case analysis: The High Court division observed that the grounds of detention served on the detenu are too vague, indefinite and unspecified as to render it impossible for

[49] 47 (1995) DLR (AD) 52.

him to submit any effective representation against these grounds and against his detention as provided in Section 8 of the Special Power Act, 1974. But the Appellate Division observed that the order of detention having been passed for a collateral purpose, the High Court Division did not even consider it necessary to dwell with the argument of the writ petitioner in that behalf. In our anxiety however, to see that the detenu has not been made a victim of his troubles with the Islamic Sramik Shagha as a President of the Bandar Sheba Asram.

Decision: The Appellate Division observed that the freedom of a person must be subordinated to the interest of the nation and the duty to protect the said interest lies with the Government. The Court will not interfere with that function unless compelled by law. Our conclusion is that we do not find any such compulsion in the present case. Accordingly, the appeal is allowed and the impugned judgment of the High Court Division set aside.

Case Reference 4

Serajul Islam v. State[50]

Fact of the case: The detenu Shazzad Hossain was arrested by Sadar Police on 9.11.1995 from Jahangirnagar University Campus. The ground appears that the incident of 9.11.1995 in the Jahangirnagar University Campus made the detaining authority, the District Magistrate, Dhaka satisfied that in order to prevent the detenu from committing any further prejudicial act as defined in section 2(f) of the Special Powers Act, 1974. In the instant case it is stated that on 9.11.1995 the detenu along with his companions armed with deadly weapons created a reign of terror in the University Campus, forcibly evicted the boarders of AFM Kamaluddin Hall and took illegal possession of the same and subsequently police recover a large number of firearms and explosive substances from their possession.

Case analysis: The grounds are all vague and indefinite which has prejudiced the detenu in submitting proper and effective representation before the Advisory Board. The grounds for detention must be specific to enable the detenu to make an effective

[50] 49 (1997) DLR 209.

representation before the Advisory Board so that the fact of detention is distinguished from the order of detention is valid and the Court is to consider whether the grounds are vague and indefinite or irrelevant or co-extensive with fact.

Decision: The detention as order by the District Magistrate is illegal. The detenu Sazzad Hossain, now detained in Dhaka Central Jail be set at liberty at once if not wanted in any other matter.

Case Reference 5

Shirin Begum and Others v. District Magistrate and Another[51]

Fact of the case: The detenu, Md. Ofazuddin Dewan was suddenly arrested by the police of Lalmonirhat Police Station on 18.4.1987. Under the Section 3(2) of the Special Power Act, 1974. The District Magistrate, Lalmonirhat directed that the detenu be detained in custody for a period of 30 days on the ground that it was necessary to detaned him with a view to preventing him from doing any prejudicial act within the eaning of Section 2(f) of the Special Powers Act, 1974. On 16.5.1987 the Government extended the period of detention of the detenu for 2(two) months with effect from 23.7.1987 though the validity of the previous order of the detention expired on 20.7.1987 and thus the detenu was illegally detained for 2 (two) days without any order. On 3.8.1987 the Government extended the the detention of detenu for 3 (three) months on the report of District magistrate. The Government extended the detention of the detenu by passing order in different times. On 24.12.1988 the order of the detention was again extended for a period of 3 (three) months with retrospective effect from 24.12.1987 on the expiry of which the detenu did not receive any communication from the detaining authority till 4.8.1988. Again on 4.8.1988 the detenu was served with another order of detention issued by the Ministry Of Home Affairs purporting to have been made under Section 3(1)(a) for 3 (three) months from the date of his arrest.

Case analysis: The reasons assigned in the order of detention are all vague, indefinite, uncertain and evasive. It is claimed that no grounds have been communicated to the detenu along with the order of the detention within the fifteen days from the service of

[51] 41 (1989) DLR 235.

the order as required under Section 8 of the Special Power Act, 1974nor the case has been referred to the Advisory Board as required under Section 10 of the Special Power Act, 1974.

Decision: The High Court observed that the detenu is being held in custody illegally and in an unlawful manner and as such the order of the detention is liable to be declared as illegal and invalid.

4.7 Some Remarkable case's Decision Under the Preventive Detention Laws

sIn the case of "*Khair Ahmed v. Ministry of Home Affairs*"[52]the Court observed if the government nither sends the case before the Board, nor release the detainee; the detention is illegal.

In the case of "*Firoz Ahmed v. Government of Bangladesh*"[53] the court said the detention is being held in custody in an unlawful manner because the order 0f preventive detention was made without lawful authority.

In the case of *"Hasina Karim v. Bangladesh*"[54]the Court opined that appearing in the grounds of the detention cannot be deemed to be of inconsequential nature and are left out of consideration by the detaining authority in forming its opinion. So, the unsustainable grounds appearing in the grounds vitiate the detention of the detenu.

In the case of "*Reita Rahman v. Bangladesh*"[55]the court observed the ground of this case for preventive detention are not applicable to apply preventive detention laws.

In *Madan Mohan v. Government* (writ petition No. 879 of 1977)case, the High Court Division declared detention illegal and ordered his release. But he was again arrested by the serving a fresh order of detention at the jail gate. This was done jusr to frustrate the High Court Division's order.

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[52] 40 (1988) DLR 353.

[53] 40 (1988) DLR 353.

[54] 44 (1992) DLR 366.

[55] 50 (1998) DLR 201.

Chapter 5

COMPARATIVE STUDY ON PREVENTIVE DETENTION

5.1 Preventive Detention in India

The Indian Constitution in Article 22 empowers the Parliament to legislate on preventive detention subject to limitation laid down by the Article 22. Indian Constitution provides the initial period of detention is 3 months. Specifically, under Article 22, preventive detention may be implemented ad infinitum -- whether in peacetime, non-emergency situations or otherwise. The Constitution expressly allows an individual to be detained-without charge or trial-for up to three months and denies detainees the rights to legal representation, cross-examination, timely or periodic review, access to the courts or compensation for unlawful arrest or detention. In short, preventive detention as enshrined under Article 22 strikes a devastating blow to personal liberties[56].

If preventive detention is to remain a part of India's Constitution, it is imperative that its use be confined to specified, limited circumstances and include adequate safeguards to protect the fundamental rights of detainees. Particular procedural protections are urgently needed (i) to reduce detainees' vulnerability to torture and discriminatory treatment; (ii) to prevent officials' misusing preventive detention to punish dissent from Government or from majority practices; and (iii) to prevent overzealous government prosecutors from subverting the criminal process[57].

That preventive detention could be justified in the interest of national security as identified in Entry 9 of List I of the Constitution, there is still no compelling reason to allow this extraordinary measure in the circumstances identified in Entry 3 of List III.

Under Article 22(2) every arrested person must be produced before a magistrate within 24 hours after arrest. However, Article 22(3)(b) excepts preventive detention detainees from Clause (2) and, as a consequence, it should be repealed in the interest of human rights. At present, detainees held under preventive detention laws may be kept in detention without any form of review for up to three months, an unconscionably long

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[56] S.Pirzada Sharifuddin, *ibid.*, p.193.

[57] [http://www.hrdc.net/sahrdc/topic/ *Preventive Detention in India: Constitutional Tyranny,* (Human Rights Features Published on 25 September 2009), Last visited 20 March, 2012.]

period in custody especially given the real threat of torture. At the very least, the Government should finally bring Section 3 of the Forty-fourth Amendment Act, 1978 into effect, thereby reducing the permitted period of detention to two months. Though still a violation of international human rights law, this step would at least reduce the incidents of torture significantly. The Advisory Board review procedure prescribed by the Constitution involves executive review of executive decision-making. The Constitution provides that the detaining authority must refer to the Advisory Board where detention is intended to continue beyond three months. Detainees must receive detailed and prompt information about the grounds of their arrest. Currently, the detaining authority is required only to communicate the grounds of detention to the detainee "as soon as may be" after the arrest[58].

5.2 Preventative Detention in Pakistan

The Constitution of Pakistan of 1956 and of 1962 and also of 1973 empowers Parliament of Pakistan to enact preventive detention laws. The Constitution of Pakistan provides the initial period of detention is 3 months. In Pakistan under Article 10(7) a person cannot be detained more than 8 months in a year[59].

Article 104 governs preventive detention by

First, explaining under what circumstances preventive detention is permitted;

Secondly, prohibiting the making of laws for preventive detention that fall outside of these circumstances;

Thirdly, limiting the period of preventive detention to three months unless certain conditions for judicial review are met[60].

Chapter XIII of the CrPC, pertaining to security for keeping peace and good behaviour and preventive actions, totally negates the spirit of the Constitution as it allows a person to be locked up for failing to submit a bond. Sections 107–110 empower a magistrate to take cognizance against a person with regards to whom information has been received that this person is likely to commit a breach of the peace, disturb tranquility or do any wrongful act. Action may also be taken against such a

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[58] *Ibid.,*

[59] M.A.Halim, *ibid,* p.305.

[60] [http://www.answers.com/ Ijaz Ahmad, Judicial Magistrate, Pakistan; Repot on Pakistan's law on preventive detention defies the Constitution, (Last visited on 20 March, 2012).

person as conceals his or her presence for the commission of an offense or is an habitual robber, receiver of stolen property or similar. The magistrate then requires this person to show cause as to why he or she should not be ordered under section 112 to execute bonds for keeping the peace for three years in cases under sections 107, 109 & 110 and one year under section 108. The person against whom the information is received is required to submit bonds in two stages:

First, under section 107 a bond must be submitted to keep the peace until the conclusion of an enquiry about the information;

Secondly, under section 118 if the information is proved bonds must be submitted for the periods specified above under sections 107–110[61].

Under section 117, when a magistrate orders a person to furnish bonds but for whatever reasons the order is not met, this person can be kept under preventive detention and is imprisoned until all requirements are satisfied. If the enquiry is not concluded within one year, for instance, the person remains behind bars. On conclusion of the enquiry, if the information is proved correct the magistrate is bound under section 118 to ask for fresh surety. If again the person defaults, under section 123 imprisonment follows for the period for which the surety is to be given under sections 107–10. There is no provision for a person who has already been kept in preventive custody under section 117 to be exempt from imprisonment in default of a bond under section 123[62].

[61] *Ibid.*

[62] *Ibid.*,

Chapter 6

FINDINGS, CONCLUSION AND RECOMMANDATIONS

6.1 FINDINGS

The summary of findings of study is given below:

1. Constitutional safeguard as to preventive detention

Article 33(5) of the Constitution of Bangladesh stipulates that 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, Communicative to such person the grounds on which the order of preventive detention has been made, and shall afford him the earliest opportunity of making a representation against the order. But Besides this provision another provision has been included in Article 33(5) that the authority making any such order may refuse to disclose facts which such authority considers to be against the public to disclose. So, most of the time the Authority refuses to disclose the facts or the grounds for which the order of preventive detention has been made on the grounds of public Interested.

2. Government has the power to constitute Advisory Board

Article 33(4) of the constitution provisory an Advisory Board consisting three members for reviewing the detention order which is constituted by the government . The Board has to perform its functions under supervision of the government.

3. Preventive detention law provides a successful tool to government

The executive authority may issue detention order if any detention order is declared illegal by the High Court Division. Also, the executive authority is not bound to pay any compensation for making such illegal order the detained person. For this, the detained person always deprived of his personal liberty.

4. Detention under the special powers Act, 1974 is oppressive for a detenue

There is no balance between to prevent prejudice activities for the states need and the citizen's right to personal liberty. For this reason a detention under the section 8 of the special powers Act, 1974 is much oppressive for a detained person.

5. Scope for applying judicial review

There is no provision in the constitution empowering the High Court division for applying judicial review before the order passed by the Advisory Board.

6.2 Conclusion

Preventive detention is a successful for preventing pre judicial activities. This law was introduced for the first time by the East India Company in Bengal under the name of the Bengal state prisoners Regulation 1829, form then this law is different titles is existing to secure the state security and peace. In erstwhile Pakistan, the security of Pakistan Act 1952 was enacted for the detention of suspected offenders. After independence, the special powers Act, 1974 was enacted as detention law which replaced the security of Pakistan Act, 1952. Though the detention law was introduced in 1829 but the detention Laws is different names were not modified in accordance with the principles of international human rights law. The provisions of the special powers Act, 1974 are as like as the laws of India and Pakistan. The preventive detention laws as existing in most of the European countries are liberal than Asian countries. But like other sub-continent countries, the exercise of preventive detention law is always questionable to the human right activists on the plea that the preventive detention law is more oppressive for the detenu. So to protect personal liberty, the government must be careful on application of the law relating preventive detention.

6.3 RECOMMENDATIONS

The following recommendations have been suggested:

1. Ground for detention order must be disclosed

The term public interest'' as stated in the second paragraph of Article 33(5) must be defined and ebborated in accordance with the basic principles of International Human Rights Law.

2. Laws relating to the constitution of Advisory Board must be changed

The power to appoint members of the Advisory Board must be placed to the Supreme Court because the functions of an advisory board are quasi-judicial in nature.

3. No fresh order of detention

If any detention order is held illegal, no fresh order of detention should be issued without prior order of the High Court Division.

4. Law relating preventive detention should be modified

Section 8 of the Special Powers Act 1974 should be modified .The order made under section 8 must include specific allegation for making such order. Also, the court should be empowered to examine the order made under section 8 of the Special Power Act 1974.

5. Judicial review for the order passed by the Advisory Board

Specific provisions should be incorporated in the constitution of Bangladesh empowering the High Court Division for the revision of the order passed by the Advisory Board by applying judicial review

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