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# The Legitimacy of Preventive Detention Laws in Bangladesh: What for Future?

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***Abstract:*** *Under the state of emergency, the Caretaker Government carried out arbitrary arrests and detentions, imposed restrictions on judicial processes and on the rights to freedom of expression, assembly, and association, and continued to detain dozens of politicians to bar them from political activity in the run-up to the general elections in December 2008. In this, the Caretaker Government used the state of emergency to suppress civil liberty. The persistent and widespread use of preventive detention without charge or trial by successive governments has marred Bangladesh's human rights record. The Caretaker Government previously used preventive detention laws to deny large numbers of individuals their freedom in violation of the established human rights jurisprudence in line with the Bangladeshi Constitution and international law.*

## I. Introduction

Much ink has been split in discussing the evils of preventive detention laws like Special Powers Act associated with other repressive penal provisions of criminal law and emergency law. Making of preventive detention laws like Special Powers Act, 1974 was allowed by bringing 2 amendment to the original constitution in Article 33 [1]. It is submitted that this amendment has gone against the true spirit of the constitution. Because this has curved out the inalienable fundamental rights of the citizens enshrined in the constitution its self. In Jibendra Kishore vs. Province of East Pakistan. PLD 1957 SC 9 it was established that "The very conception of a fundamental right is that it being a right guaranteed by the constitution cannot be taken away by the law, and it is not only technically inartistic but a fraud on the citizens for the makers of a constitution to say that a right is fundamental but it may be taken away by the law." Resort may also be had to Golaknath vs. State of Punjab, AIR 1967 SC 1643 case [2]. In this famous case the Indian Supreme Court while speaking on the question of abridgment of fundamental rights emphatically propounded: "The declaration of the fundamental rights of the citizens is inalienable rights of the people.....The constitution enables an individual to oppose successfully the whole community and the state to claim his right." Presence of black law like Special Powers Act is suffice to foil all sorts of principles of democracy, rule of law, human rights. Even, judicial conscience sometimes becomes useless for such type of worthy-abusive law provisions providing preventive detention. In Malik Ghulam Jilani vs. Government of West Pakistan, 19 DLR (SC) 1968, 249 "The judicial power is reduced to a nullity if laws are so worded or interpreted that the executive authorities may make that statutory rules they please there-under, and may use this freedom to make themselves the final judges of their own satisfaction for imposing restraints on the enjoyment of fundamental rights of citizens." While 'rule of law`, establishment of 'human rights, democracy' with emphasis on "worth for human person' is the desired dimension of our constitution, time has come to overthrow all the authoritarian laws which have the tendency of wide abuse to suppress the political opponents [3]. This essay makes a thorough study of the abuse of preventive detention laws in particular in the immediate past interregnum of Caretaker Government (CTG) and urges their immediate repeal to the present elected democratic government.

### The Draconian Laws: The Way they Infringe Human Rights

Preventive detention laws include the Special Powers Act (SPA) 1974, Section 54 of the Code of Criminal Procedure, and the immediate past annuled Emergency Power Rules (EPR) 2007. These provide for the detention of individuals alleged to have committed acts which are "prejudicial" to the state. Offences under these laws are broadly formulated and open to political manipulation by the government to detain its critics and opponents, as well as to abuse by police and other security forces. The right not to be subjected to arbitrary detention is guaranteed in international law. Including in Art. 9 of the International Covenant on Civil and Political Rights (ICCPR) to which Bangladesh is a state party, providing inter alia that individuals detained should be charged with a recognizable criminal offence and brought promptly before an independent court or be

released [4]. Detainees should have the right to be informed of the reasons for their arrest and to have prompt access to counsel and to a court to challenge the legality of their detention.

**The Special Powers Act (SPA), 1974**

The Special Powers Act (SPA), 1974, 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. Section 3 of the Special Powers Act provides that if a District Magistrate or an Additional District Magistrate becomes satisfied as to any person's intent to do a prejudicial act he may order for arrest of the person. Mere satisfaction of the Magistrate has been made enough for the order of detention. But article 9 of the UDHR has unequivocally declared that no one shall be subjected to arbitrary arrest, detention or exile. Simultaneously article 9 of the ICCPR (ratified on 6 September 2000) provides that everyone has the right to liberty and security of his/her person. No one shall be subjected to arbitrary arrest or detention [5]. Section 8 of the Special Powers Act provides that the arresting and detaining authority may inform the detenu the cause of his arrest within 15 days from the arrest. And even for public safety he may not be so informed. We may follow article 33(1) of the Constitution, which provides that the rights to be given to a person arrested under a general law are not to be allowed for a person arrested under a law providing for preventive detention. These rights not allowed for a person arrested under a law providing for preventive detention like the Special Powers Act, are: (a) right to be informed of the cause of arrest as soon as possible after the arrest and (b) right not be detained if no cause is informed as soon as possible after the arrest. But 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." 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. It is proved and undisputed that the Special Powers Act of 1974 is ultra vires to human rights norms and instruments [6]. Different governments of Bangladesh have manipulated it. Almost all the parties in power have harassed the opponent through the Act. In the regime of Awami League government during 1974-'75, of Ziaur Rahman government during 1975-'81 and of Ershad government during 1982-'90 a number of more than two lakh people were arrested and detained under this Act. During 1992 only in the month of July a number of 4,500 persons were detained under this Act. According to a report of the US State Department in 1997 a number of 3.498 persons were detained under this Act [7]. It continued during the immediate past CTG Regime with all of its evils. During CTG regime detainees were denied the right to legal representation before the non-judicial Advisory Board which the government is required to convene within 120 days of arrest under the SPA, and which is the only review mechanism available to an SPA detainee. The Advisory Board can recommend withdrawal of an SPA detention order or extend detention indefinitely for successive six-month periods. Detainees who successfully challenge their detention under the SPA before the High Court (on procedural grounds) are often not released, as the authorities subsequently bring criminal charges against them. In a number of cases such criminal charges was not withstood scrutiny in court and had been dropped after a hearing, raising concern that they were filed as a pretext to secure the continued custody of the individual. The exact number of people detained under the SPA is not known and no independent source in Bangladesh is systematically monitoring SPA detentions. The latest figure available from the government, from 2007, quotes the figure of 944 persons detained under the SPA [8]. International community like Amnesty International has repeatedly called for the repeal of the SPA.

**Section 54 of the Code of Criminal Procedure**

The vaguely formulated Section 54 of the Code of Criminal Procedure has been used to arrest people without warrant on suspicion of engaging in criminal activity and to detain them incommunicado for up to 24 hours [9]. During the period of incommunicado detention. Many detainees allege having been subjected to torture and other ill-treatment. According to newspaper estimates, the police have invoked Section 54 and Emergency Power Rules to arrest about half of the hundreds of thousands of people arrested since the imposition of the state of emergency.

**Emergency Power Rules, 2007**

Restrictions imposed through the Emergency Power Rules (EPRS) 2007 exceeded what is permissible under norms of international law. The Caretaker Government extended the scope for arbitrary detention even further under the EPRS to detain individuals for exercising their rights to freedom of assembly and expression, as well as individuals alleged to have committed offences such as corruption, drugs offences and trading on the black market. Detainees charged under the EPRS are deprived of a number of legal remedies, including the

possibility of release on bail. Under international law, it must not be the general rule that persons awaiting trial shall be detained in custody; EPR provision 19D, which barred all people detained under the EPRS from being released on bail, violated this provision. The exact number of people detained without charge at any one time under preventive detention laws remains unclear. There are reports of hundreds of thousands of people being detained throughout 2007 on various grounds, and of tens of thousands of political activists detained in late May and early June 2008 for gathering in public believing that the ban on public gatherings had been uplifted. The majority of those detained were reported to have been released after relatively short periods, but as of August 2008, some were still being held without charge or trial. Among those detained during the state of emergency were prisoners of conscience. including Tasneem Khalil, detained in Dhaka in May 2007 for about 24 hours and tortured for having disseminated information about human rights violations; Jahangir Alam Akash, detained in October 2007 for over a month and tortured by agents of the Rapid Action Battalion (RAB) in the north-western city of Rajshahi following his report on television in May that year about the shooting of an unarmed man by RAB agents. Six Rajshahi University lecturers were detained between August and December 2007 and four Dhaka University intellectual teachers were detained between August 2007 and January 2008 for peacefully protesting the abuse of power by law enforcement agencies at these universities [10]. The cartoonist, Arifur Rahman, was detained between September 2007 and March 2008 following protests by Islamist groups over one of his cartoons that used the name of the prophet Muhammad (sm) presumably from a bonafide perspective.

**No Due Process of Law**

A state of emergency can never be invoked as grounds for arbitrary deprivation of liberty or to disregard the fundamental principles of fair trial. Amnesty International believes that several provisions of the emergency regulations had either been framed too broadly or are being implemented in a manner which violates due process rights of detainees. Of the more than 170 politicians and businesspeople detained under the state of emergency accused of corruption while in office, dozens had been detained for over a year without charge or trial in breach of Articles 9(1) and 14(1)(c) of the ICCPR 11]. They had also been barred from release on bail under the emergency regulations. About 120 of them had challenged their continued detention on procedural grounds, for instance the lapse of specified time for charges to be brought against them under the Emergency Power Rules; however, they were not released. Many of them had been taken to the gate of the prison and then re-arrested on new charges. In some cases, the courts had directed the authorities not to re-arrest them without due process. Consequently, over a dozen prisoners had been released on bail, but remained at risk of being re-arrested. Over 50 defendants accused of corruption had been sentenced to various terms of imprisonment by Special Courts where they had restricted access to lawyers and to documentary evidence, for instance their office files, to prepare their defence.

**The Judicail Standard of Curtailing Civil Liberty**

Liversidge vs. Anderson 1942 AC 206; is a milestone not simply setting the subjective satisfaction but for the powerful dissenting opinion of Lord Atkin his in later cases in common law jurisdictions establishing objective satisfaction. The majority of the House of Lords thought that the words, 'If the Secretary of the state has reasonable cause to believe were ambiguous, since they might mean either that the Secretary of the State has reasonable cause to believe, or that he thinks he has reasonable cause to believe. Lord Atkin, on the other hand, was of the opinion that there was no ambiguity. And he concluded his powerful dissent speech in these words: "After all this long discussion the question is whether the words "If a man has" can mean "If a man thinks he has". I am of the opinion that they cannot, and that the case should be decided accordingly." Since Atkin's powerful dissenting opinion objective satisfaction is established in case of preventive detention in many common law jurisdictions. So far as the situation in Bangladesh is concerned the test of objective satisfaction was forcefully established in the pioneer habeas corpus case of Abdul Latif Mirza [31 DLR (AD) 1979, 1]. Justice DC Bhattacharya observed for the court, "I have been sadly disappointed to find that the change that has occurred in the judicial view as to the duty of the detaining authority in a proceeding which the legality of detention of a certain person is challenged and also as regards the Court's power to investigate the question of such legality, has not made much impression on them. It seems, there has not been adequate appreciation of their duty, not only to show that the grounds of detention communicated to the prisoner are relevant and not vague, uncertain or illusory, but also to show that there were in fact some materials having some probative values as the basis of the satisfaction of the detaining authority that the detent was likely to do a prejudicial act, if not detained." This standard has been reiterated in later habeas corpus cases though deviation from it is not uncommon. In fact the utmost objective satisfaction and due process of law should be observed before detaining a person and curtailing his civil liberty.

## II. Recommendations

1. The newly elected government should act to end arbitrary arrests and detentions. Repeal or amend all laws allowing such acts, and ensure that all individuals detained are charged with a recognizable criminal offence and brought promptly before a court or released. All people deprived of their liberty should be informed promptly of the reasons for their detention and provided the opportunity to challenge the legality of their detention in court, and should be granted access to a lawyer, their family and to medical assistance;

2. The advantage of 24 hour time to produce the accused before the court of law given to the police has virtually been turned into a short detention, which needs to be stopped. The guideline given by the Supreme Court in case of arrest and detention should strictly be followed under Section 54 and 167 of the Code of Criminal Procedure

3. For effective and careful enforcement of the law of preventive detention the detaining authority is required to comply with the provisions of sections 3 to 14 read with section 2 (f) of the Special Powers Act, 1974, strictly in letter and sprit.

4. For speedy disposal of trials of offences under the Special Powers Act, 1974, the Special Tribunals constituted under the Act are required to follow the procedures of trial laid down in section 27 of the Special Powers Act, 1974, both in letter and spirit and the superintending authorities of these tribunals the Supreme Court and the Special Tribunal consisting of the Sessions Judges in a district in the respect of the other Special Tribunal in the district) may monitor the work of the Special Tribunals.

5. Proceedings drawn under the provisions 19D of the Emergency Powers Rules, which denies bail to detainees charged under the Emergency Powers Rules should be immediately stopped. All detainees should have the opportunity to apply for pre-trial release on bail. Bail orders granted by courts should be respected and detainees should be released without undue delay.

## III. Conclusion

The governments are presently concerned with exercise of power in many forms. The exercise of power by an unelected government for considerable period of time deserves attention as well as receives apprehension. Power has two connotations. One is physical force, but this, however great, is inert in itself. It can only be dangerous only when exercised and juridical its exercise is often a matter of liberty to do so or not. Power has the other connotation of legal capacity to alter jural relations and this is the sense in which the problem of power can be considered in using the draconian law like SPA. Perhaps there is a fine shade of distinction between 'rule of law' and 'rule by law. Excessive exercise and reliance on emergency law, tyrannical laws by the CTG government reduced the government's status as adopting 'rule by law' not 'rule of law. Abuse and excessive use of power by government may be designated 'rule by law where the laws are used as instruments of government policy. Rule of law, by contrast, is the use of law. Among other things, to curb the misuse of law making power by the government. The abuse of rule by law manifests itself in the passing of and reliance on unjust laws. Hence it is argued that the anti-constitutional law like the SPA and other provisions of law allowing preventive detention should be repealed and this is the urge to the existing government.

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