ARREST AND REMAND: TOWARDS A RIGHTS PARADIGM

Shahdeen Maik*

1. INTRODUCTION

> … we made an endeavour to refer to some decisions from our own jurisdiction, but there was hardly any reported decision on the subject.[1]

The above comment, in a writ petition alleging police excesses and non-compliance of Police Rules and Regulations, clearly indicates the paucity and dearth of case on judicial restraining of police of power of arrest, search and seizure. The abuses of power remain unreported for fear of reprisal by police as the court observed in this case: ". ordinary citizens neither have the resources nor the ability to stand up against police excess and bring such incidents to the Court's notice for redress."[2]

The first major case to question the abuse of police power of arrest under section 54 of the Code of Criminal Procedure, 1898 – *Bangladesh Legal Aid and Services Trust (BLAST) vs Bangladesh and others*[3] -- was possible precisely because it was taken up and pursued not by a victim or his family but by a nationally prominent legal aid organisation. Secondly, the death of the victim Rubel (a young undergraduate student of a private university), in this particular case, as a result of being beaten up by police in clear view of many was widely reported by the media, evoking public sympathy and the resultant pressure on police establishment to desist from harrassing harassment of the petitioner's family.

Practically, all instances of abuse of power by police in arresting citizens and torturing them on police remand (in police custody) go unchallenged precisely because victims lack the resources as well as confidence in the efficacy of the judicial system. The very few cases in which the abuse of police power was challenged were litigated either in "public interest" by national organisations or by rich and powerful persons who were subjected to such abuse by police.[4]

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* Shahdeen Malik, LL.M. (Moscow), LL.M. (Philadephia), Ph.D. (London(, is an Advocate of the Supreme Court of Bangladesh and the Director, School of Law, BRAC University.

1 Justice Zubayer Rahman Chowdhury in *Brigadier (Retd) A.H.M. Abdullah vs Government of Bangladesh and others*, 25 (2005) BLD (HCD) 384, at p. 387.

2 Id.

3 55 (2003) DLR (HCD) 363, hereinafter the *BLAST* .

4 See discussion on *Afzalul Abedin and others vs Bangladesh*, 8 (2003) BLC (HCD) 601.

In recent years, a small number of such cases has elicited critical comments and observations of the judiciary on the abuses of power by police.[5] At the same time, it needs to be mentioned, that the judiciary seems to have embarked on a path of "conservative interpretation"[6] of many of the provisions of substantive and procedural laws for imposing long term prison sentence on the convict.[7] This, in turn, was fuelled by a host of draconian penal laws enacted in recent years which provided for a spate of sentence of death and life imprisonment for a wide range of loosely defined crimes.

The jurisprudence of liberty, as a result, is shrouded, if not in mystery then, in fuzziness. The fuzziness stems, primarily, from the lack of a rigorous scrutiny by the judiciary of the parameters of right to liberty, which, in turn, has been brought about by the absence of challenges against the power of arrest and remand by the police. In many ways, it is a typical "Catch 22" situation in which the power of police is not challenged and, hence, the judiciary do not scrutinise it to put checks and balance on the police power.[8] And since hardly any checks and balances are in place, the power continues to be abused, which, in turn, discourages challenges.[9]

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5 See *Saifuzzaman vs State,* 56 (2004) DLR (HCD) 324 below.

6 We use the expression "conservative interpretation" in tune with the conventional use of such charaterisation which posits a dichotomy between "conservative" and "liberal" interpretation where "liberal" is taken to be more individual-right-sensitive and "conservative" adheres more to the collective interest of the society and polity.

7 *State vs Billal Hossain Gazi,* 56 (2004) DLR (HCD) 355 is a good recent example. In this case the accused was charged under section 10(1) of the Nari O Shishu Nirjaton Domon (Bishwesh Bidhan) Ain, 1995 for murder of his wife on account of demand for dowry. He was convicted by the Nari O Shisu Nirjaton Domon Adalat and sentenced to death. In appeal, the High Court Division found that the charge of demanding dowry was not proved and hence the offence alleged should have been one of murder and not of murder on account of demand for dowry. Thus, the crime should have been tried by Sessions Judge under section 302 (murder) of the Penal Code and not by the Nari O Shisu Nirjaton Domon Adalat. Hence, the HCD sent the case for re-trial by a Sessions Judge under section 302 of the Penal Code.

It is clear that such a re-trial could be barred under Article 35(2) of the Constitution prohibiting "prosecution and punishment for the same offence more than once", but see section 403 of Cr.P.C (explain).

8 "It is also a sad reality that although police excesses occur regularly, such incidents are rarely challenged." *Brigadier (Retd) A.H.M. Abdullah vs Government of Bangladesh and others,* ibid, at p. 391

9 "…. most people are either reluctant to initiate any actions against the police or are very skeptical about any disciplinary action that may be taken against errant officers." Id.

The police power is abused under two sections of the Code of Criminal Procedure, 1898 (hereinafter CrPC) – section 54 which empowers police to arrest on "suspicion", and section 167 under which police can take an accused on remand to police custody where, it is generally accepted, the accused is subjected to torture for eliciting confession and information about his accomplices and other crimes. The recent judgement in *BLAST vs Bangladesh*, as indicated earlier, was the first major scrutiny of the police power under these sections. The judgement also offered guidelines for the police to follow and these were intended to reduce the scope and possibility of the misuse and abuse of police-power.

The guidelines, in line with the American *Miranada*[10] dictates[11], have virtually been ignored by the police, one justification being that it has been appealed against in the Appellate Division of the Supreme Court and, hence, not final yet.

The *BLAST* judgment is clearly an important judicial pronouncement for restraining police power, though, as indicated, this judgment was pronounced in the backdrop of (i) a conservative trend in judicial pronouncement, (ii) frequent enactments of draconian penal laws and a general lack of sympathy for rights of accused in criminal cases.

The paper, in such a backdrop,

- undertakes a detailed analysis of the normative provisions regarding arrest and remand in the light of the relevant constitutional mandate;
- explores the situations in which police usually abuses its powers;
- offers, from secondary sources, some recent empirical evidence regarding application of the police power of arrest;
- delves into interpretative frameworks which may facilitate further expansion of right to liberty for curtailing the scope of abuse of such power; and lastly
- advocates for further judicial intervention to reduce the abuse of police power.

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10 Miranda vs Arizona, 384 U.S. 436 (1966)

11 "The waring of the right to remain silent must be accompanied by the explanation that anything said can and will beused against the individual in court.", Miranda, ibid, at p. 469, as quoted in William J. Stuntz, "Miranda's Mistake", 99:5 (2001) Michigan Law Review, 975, at p. 979, fn. 13, or as the TV shows put it, "anything you say can and will be used against you in a court of law." Id.

2. NORMATIVE PROVISIONS

Freedom from arbitrary arrests is usually grounded in constitutional provisions. Article 32 of the Constitution of the People's Republic of Bangladesh encapsulates this freedom in the following words:

> ***32. Protection of right to life and personal liberty***: No person shall be deprived of life or personal liberty save in accordance with law.

The conventional right to liberty was understood to have restricted the power of the state to arrest a citizen only to the following situations or instances:

> where there were reasons to believe that a citizen has committed a serious crime; and continued denial of the right to personal liberty was possible only upon conviction, through a fair and open trial, on a charge of having committed a crime which was punishable by imprisonment and, hence, the resultant denial of liberty upon conviction.

The origin of this right to personal liberty and the implicit protection against arbitrary arrest is conventionally traced to the French Declaration of Rights of Man and the Citizen, 1789[12] as well as the first Ten Amendments of the American Constitution of the same era (1791)[13], though seeds of this freedom can also be found in earlier legal documents such as the Bill of Rights, 1689 of England.[14]

In modern times, both state constitutions and international human rights instruments, have explicitly provided that arrest can only be made in accordance with law. While no exceptions to the freedom from arbitrary

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[12] Article 7: — "No man can be accused, arrested or detained except in the cases determined by the law, and according to the methods that the law has stipulated. Those who pursue, distribute, enforce, or cause to be enforced, arbitrary orders must be punished; but any citizen summoned, or apprehended in accordance with the law, must obey immediately: otherwise he makes himself guilty by resisting." (underline added for emphasis)

[13] 5th Amendment of the US Constitution: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."

[14] "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted".

arrest is provided in international legal instruments[15], national constitutions have often inserted restrictions on right to liberty (primarily) on grounds of national security and public order. In other words, state constitutions often contain proviso to the right to personal liberty to the effect that certain types of arrest and/or detention are legal and justified, even though these arrests and/or detentions derogate from the right to liberty. Such exemptions to the right to liberty are phrased in the following words in our Constitution:

> Article 33: ***Safeguards as to arrest and detention***: (1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice.
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> (2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest, excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.
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> (3) Nothing in clauses (1) and (2) shall apply to any person –
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> (a) who is an enemy alien; or
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> (b) who is arrested or detained under any law providing for preventive detention.

The language used to curve out the above exception in our Constitution is almost identical[16] with Article 22 of the Indian Constitution, while the language of the Constitution of Pakistan does not include an "enemy alien".[17]

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15 For example, Article 3 of the Universal Declaration of Human Rights provides: "Everyone has the right to life, liberty and security of person" while Article 9 proclaims: "No one shall be subjected to arbitrary arrest, detention or exile". Similarly, Article 9 of the International Covenant on Civil and Political Rights, 1966 provides, also in Article 9: "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

16 Article 22(3) of the Indian Constitution:

"Nothing in clauses (1) and (2) shall apply –

to any person who for the time being is an enemy alien; or

to any person who is arrested or detained under any law for preventive detention"

17 Article 10(3) of the Pakistani Constitution:

Arrests and detentions under these "preventive detention" laws are, almost by definition, arbitrary as the person arrested and then detained has neither committed nor been convicted of any offence. [18]

These exceptions to the conventional right to liberty are legislated by "preventive detention" laws. Given the *prima facie* negation of right to liberty by the preventive detention laws, the courts have, over the years, struggled to limit the exercise of the power by the executive to preventively detain citizens on the plea of deterring prejudicial acts, i.e., acts for which a person can be detained by the order of the executive. However, both in cases of detention under preventive detention laws and arrests on suspicion by police under the power given to them in the criminal procedural law, the denials of liberty are exercised in terms of prevailing laws of the country and, hence, are "in accordance with law".

"Nothing in clauses (1) and (2) shall apply to any person who is arrested or detained under any law providing for preventive detention."

As for Sri Lanka, while Article 13 of the Constitution enshrines personal liberty in the following words:

"Freedom from arbitrary arrest, detention and punishment, and prohibition of retroactive penal legislation. 13 (1) No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest.

(2) Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to procedure established by law, and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law".

while the exceptions are expressed, in Article 15(7), in following manner:

"(7) The exercise and operation of all the fundamental rights declared and recognized by Articles 12, 13(1), 13(2) and 14 shall be subject to such restrictions as may be prescribed by law in the interests of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society. For the purposes of this paragraph "law" includes regulations made under the law for the time being relating to public security."

[18] Article 35 of the Constitution provides:

"Protection in respect of trial and punishment. (1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged, nor shall be subjected to a penalty greater than, or different from, that which might have been inflicted under the law in force at the time of the commission of the offence."

However, a plain textual reading of "in accordance with law" or under "due process of law", needless to say, does not make all these detentions and arrests legal and proper as the conditions contained for detention and arrest are not always automatically satisfied. In other words, though the law authorises (preventive) detention and arrest (on suspicion), yet such derogation of liberty must also meet other standards carved out by judicial pronouncements. The relevant laws do provide for the power of the state to derogate from the right to personal liberty in general terms, yet the courts, over the years, have read a number of conditions and requirements into the general terms of these enactments and the ambit of these requirements and the fulfilment of the conditions constitute the real parameters of the right to personal liberty.

In general terms, detention is authorised for "prejudicial acts" while arrest can be made on valid "suspicion" of criminal wrong-doing. It follows from these propositions that it is the duty of the court to ensure that the conditions or requirements laid down by law is strictly adhered to and the deprivation of personal liberty satisfies the requirement of "in accordance with law" or under the "due process of law" not only when the deprivation is authorised by law but also when the requirements and conditions embedded in the authorisation have been meticulously followed.

Similar to most other fundamental rights, the right to personal liberty is not an absolute right and needs of the society may dictate derogation from this right in the greater interest of the state and society. Preventive detention and arrest on suspicions are the two most common aberrations of the right to personal liberty, justified by the primacy of societal interest of incarcerating citizens, over the citizen's right to his personal liberty. Needless to say, derogation of right to liberty (imprisonment as punishment) upon conviction is accepted universally as such derogation is clearly necessary to preserve the society against the harm committed by the criminal act of the convicted prisoner. However, conviction and subsequent or resultant punishments are also subject to laws of criminal justice system and any punishment in derogation of the legal framework established by the criminal justice system also makes the deprivation of liberty illegal. Our concern, in this paper, needless to say, primarily, surrounds the derogation of personal liberty in terms of preventive detention and arrest laws, and not the deprivation inflicted upon criminal trial and conviction.

2.2. "In accordance with law" and the "due process of law"

Deprivation of personal liberty is permitted only "in accordance with law", i.e., deprivation can be affected by means and methods authorised by

law. The Constitution mentions this requirement of "in accordance with law" twice – in Articles 31 and 32. As we have seen above, Article 32 permits derogation of personal liberty only in accordance with law. Similarly, Article 31 provides:

> 31: ***Right to protection of law***. To enjoy the protection of law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to life, liberty, body, reputation or property of any person shall be taken except in accordance with law.

A casual reading of these two Articles (31 and 32) may indicate identity and, hence, repetitions, as both the Articles require that actions in derogation of liberty may only be taken in accordance with law. Article 31 protects not only liberty, but also life, body, reputation and property, while Article 32 protects only life and liberty. A seeming repetition of a provision, requirement or norm in a Constitution cannot be taken as superfluous or redundant and must be taken to import two different meanings or requirements.[19] Hence, by providing that deprivation of life and liberty must be affected only in accordance with law, the Constitution sets a higher standard for laws which purport to deprive life and liberty. While laws affecting body, reputation and property have to be reasonable and non-arbitrary, those touching upon life and liberty must, in addition to being reasonable and non-arbitrary, also indicate other compelling state or societal interest.

Other rights and freedoms are not protected as stringently as personal freedom. Thus, though the Constitution recognises right to profession or occupation yet the exercise of this right can reasonably be made conditional upon fulfilment of a host of conditions of varying degrees of qualification, experience, suitableness, and such other terms which are not discriminatory or injurious to public policy. More importantly, almost any regulatory body or even a private organisation may impose conditions and, thereby, restrict the exercise of these rights. Furthermore, while many constitutional rights are subject to reasonable restrictions,[20] yet the right to

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19 Mahmudul Islam, Constitutional Law of Bangladesh, 2nd edition, reprint, Dhaka, 2003, pp. 193-197.

20 For example, Article 43 provides:

> "***Protection of home and correspondence.*** Every citizen shall have the right, subject to reasonable restriction imposed b y law in the interest of the security of the State, public order, public morality or public health –

personal liberty (though not absolute) must be judged by yard-sticks of such reasonableness which are more exacting and clearly and immediately connected to greater interest of the society and the state.

2.2.i. "Due process" in "law"

The expression "in accordance with law" does not include any law, but only laws which are (a) not violative of fundamental rights, and (b) incorporates both procedural and substantive safeguards.

If personal liberty could be curtailed by any law, i.e., whimsical and arbitrary, the protection against deprivation of liberty would become meaningless. Hence, the real import of protecting personal liberty in two Articles of the Constitution lies in the fact that laws depriving personal liberty must be a reasonable legislation reasonably applied.

> A law providing for deprivation of life or personal liberty must be objectively reasonable and the court will inquire whether in the judgement of an ordinary prudent man the law is reasonable having regard to the compelling, and not merely legitimate, governmental interest. It must be shown that the security of the State or of the organised society necessitates the deprivation of life or personal liberty.[21]

While deprivation of individual liberties in individual instances have routinely been challenged, yet only one "partially-successful" challenge has ever been mounted against a law providing for deprivation of personal liberty, i.e., a penal law.

A penal law, *Public Safety (Special Provision) Act, 2000,* was enacted for ensuring speedy trial of a specific number of crimes such as wilful and wanton destruction of property, extortion, abduction, causing bodily harm, preventing normal movement of traffic, etc. However, most of these criminal activities under the Act were also crimes under the primary criminal law of the country, i.e., the Penal Code, 1860. While many of these crimes are non-bailable under the Penal Code, 1986, yet the courts have frequently released persons arrested for alleged commission of these crimes on bail for the period of trial. However, the *Public Safety (Special Provision) Act, 2000* had provided that an accused under this Act could not be released on bail within 90 days of arrest. As anyone arrested under this

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to be secured in his home against entry, search and seizure; and to the privacy of his correspondence and other means of communication."

[21] Mahmudul Islam, Constitutional Law of Bangladesh, 2nd edition, reprint, Dhaka, 2003, at p. 193.

2000 Act was bound to suffer imprisonment for at least 90 days, it was seen as a "political" weapon in the armoury of the government to penalise, harass and intern its political opponents by filing allegations of crimes under the Act and, in fact, a number of the then opposition leaders and activities were arrested under this *Act*. The filing of criminal cases for the same alleged criminal acts under the Penal Code, it was deemed, would not have subjected the accused to the stringent non-bailable provisions of the Public Safety Act, 2000.

The constitutional validity of this Act was challenged within a few months after it's enactment. The arrest of a very prominent leader of the main opposition party, BNP, along with his sons for allegedly vandalising a "sweet-shop" prompted filing of criminal cases against them under this Act. Initially, the leader and his sons were charged under the *Penal Code, 1860* but crimes under some sections of the *Public Safety (Special Provision) Act, 2000* were later alleged by the police, calculated to intern the accused for at least 90 days in jail as bail could not have been granted under the Act.

The *Act* was challenged on a number of grounds, including that the *Act* was prone to arbitrary and discriminatory use; its provisions overlapped with *Penal Code* and, hence, police could 'pick and chose' in deciding to charge under this *Act* or under the Penal Code, with differing penal consequences; it was primarily enacted to harass political opponents of the government; it had taken away the power of courts to grant bail within the period of 90 days; it derogated from the procedural safeguards and fairness of trial as the cases under this *2000 Act* were to be tried summarily and for a number of other reasons. Moreover, the *Act* was passed as a "Money Bill" without, in fact, being a Money Bill and, as such, through a fraudulent process.[22]

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[22] Article 80 of the Constitution provides that after a Bill has been passed by Parliament, it will be presented to the President for his assent. The President may, however, return it to Parliament for reconsideration of the whole Bill or a part thereof, if he does not assent to the Bill. In cases of "Money Bill", so certified by the Speaker [Article 81(3)], the President does not have the option of returning it to Parliament for reconsideration, but his assent is mandatory.

The Constitution also details which is a Money Bill and which is not (Article 81). Generally, levying of taxes, custody of the Consolidated Fund and such other matters come under the definition of Money Bill while, Art. 81(2) provides: "A bill shall not be deemed to be a Money Bill by reason only that it provides for the imposition or alternation of any fine or other pecuniary penalty, or for the levy or payment of a licence fee or a fee or charge for any service rendered, or by reason only that it provides for the imposition, regulation, alteration, remission or repeal of any tax by a local authority or body for local purposes."

A huge number of petitioners who were arrested or charged under the *Public Safety (Special Provision) Act, 2000* joined the first writ petition challenging the constitutionality of the *Act* and, ultimately, a total of 486 writ petitions were heard analogously over a number of days during May and June of 2001. Ultimately, a split-judgment was delivered by the two-Judge Division Bench of the High Court Division.[23] While Justice Mr. M. A. Aziz found the whole *Act* to be ultra vires of the Constitution, the other judge, Mr. Justice Shamsul Huda, held that "sections 16(1), (2) and 18(Kha) of the Act are inconsistent with the provisions of the Constitution and in the result, the aforesaid sections of the Act are struck down."[24] Differing verdicts by the two judges required the case to be sent to a third Judge (by the Chief Justice) and this was done. However, the new BNP government, soon after coming to power, repealed the *Public Safety (Special Provision) Act, 2000* and the third judge, Mr. Justice A. T. Manowaruddin, held, on 30.4.2002, that:

> Since the Public Safety (Special Provision) Act, 2000 (Act VII of 2000) … which is under challenge in all the rules has in the mean time been repealed …. I find all the above rules have been infructuous.
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> Accordingly, the rules are disposed of as being infructuous.[25]

Consequently, a final decision regarding the constitutionality of the impugned *Act* was not reached and the judgments were not reported (published) in any law report. As a result of the divergence of the opinions and without a conclusive finding as to the constitutionality of the Act or otherwise by a majority judgment and hence the judgment was not reported as a precedent, to be cited and followed.

Nevertheless, as indicated above, this seems to be only "semi-successful" exercise vis-à-vis constitutionality of a penal law and, hence, a discussion of this judgement is deemed not irrelevant. Moreover, both the judges agreed on the unconstitutionality of a number of sections, including section 16 of the *2000 Act*. On section 16, Justice M.A. Aziz held:

> Section 497 [of] Cr.P.C., unlike section 16 of *Public Safety Act, 2000* ., does not deny the jurisdiction and power of courts and does not run contrary to the fundamental right of the petitioners guaranteed under Article 33(2) of the Constitution. Section 16 of the *Public Safety Act, 2000*. is therefore, without any doubt ultra vires of Article 33(2) of the Constitution and as such void. It is also

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23 *Afzalul Abedin and others vs Bangladesh,* 8 (2002) BLC (HCD) 601

24 *Afzalul Abedin and others vs Bangladesh, ibid, at p. 635* of Mr. Justice Shamsul Huda's judgment.

25 Ibid., Judgement of Mr. Justice A. T. Monwaruddin, at p. 10.

> void for contravening the Article 116A of the Constitution which enjoins that "subject to the provisions of the Constitution, all persons employed in the judicial service and all magistrates shall be independent in the exercise of their judicial functions inasmuch as under Section 16 of the *public safety act, 2000,* the magistrate has been transformed into a lame, deaf and dumb duck. …… Had the magistrates been under the judicial control of the sessions judge and that of the Supreme Court, there could be no violation of Article 116A of the Constitution and there could be no law like Section 16 of the *Public Safety Act, 2000* . The magistrates can never act independently so long they are under the control of the Executive inspite of Article 116A and 33(2) of the Constitution. It should be sacred duty of the legislature to pass a law placing the magistrates under the control of the Supreme Court to secure fair and impartial justice from them in discharge of their judicial functions. [26]

Both the Judges also agreed that section 18(1)(kha) of the *Public Safety Act, 2000* , which provided for recording the substance of the evidence and not the testimony in its entirety, was unconstitutional. By not requiring the recording of the testimony in its entirety, Justice M.A. Aziz held, the accused may be prejudice as those parts of the testimony which alludes to his innocence may be omitted by the Tribunal. [27]

As for police and their power of arrest "in accordance with law", the judgement by Mr. Justice M.A. Aziz pointed out:

> The rule of law is a basic feature of the Constitution of Bangladesh. To attain this fundamental aim of the State, the Constitution has made substantive provisions for the establishment of a polity where every functionary of the State must justify his action with reference to law. 'Law' does not mean anything that Parliament may pass. Arts. 27 and 31 have taken care of the qualitative aspects of law. Art, 27 forbids discrimination in law or in State action, while Art. 31 imports the concept of due process, both substantive and procedural, and thus prohibits arbitrary or unreasonable law or State action. [28]

As for our penal laws and police's power of arrest, Justice M.A. Aziz elaborated:

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[26] Ibid., Judgement of Mr. Justice M.A. Aziz, at pp. 140-41.

[27] Ibid., at p. 142. Justice M.A. Aziz also held:

"Offences calling for imprisonment for life and triable by the Tribunal who is a sessions Judge would be allowed to re record substance of the evidence and that the Tribunal shall follow the Procedure laid down under Chapter XX of the Cr.P.C. (of the Trial of Cases by magistrates) is by any standard a novel, ingenious and revolutionary idea unknown in the criminal jurisprudence of any civilised country."

[28] Ibid., at p. 131.

> I am rather of the opinion that it is not the enacting of law, rather sincere, faithful and honest enforcement of the law which is required to check lawlessness and crime. Penal laws in the guise of special enactments made in Bangladesh in the last 30 years will surely exceed Penal laws made in say England over 200 years. Questions may be raised that England is a highly advanced and civilised country, so Bangladesh should not be equated with England. It is quite true and logical but can harsh law provide the panacea? Besides the *Public Safety Act, 2000* , we have some other harsh laws. What result did those laws yield? Take the case of the impugned *Public Safety Act, 2000* . After it was enacted has the rate of crime gone down?
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> Law enforcing Agency is an institution. Its employees are public servants. They must [profess] allegiance to the State and serve the people. …. They have been over the years made to owe allegiance to and serve a class of people having political clout. They serve individuals and parties in power instead of their real masters namely the people. Through the illegal and partisan use, the police department has been allowed to rot and degenerate so mush so that it has lost its human face. It has been consistently, unethically and so unscrupulously used as a tool of oppression that it has lost its identity beyond recognition. The discipline and chain of command have totally and completely collapsed. The police no longer act as the enforcers of law. In collusion and connivance with the police, the "maastans" under the protective umbrellas of the godfathers sitting in high position go on committing crimes against the properties, lives and liberties of innocent people with impunity. ……
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> Many more unfortunate victims fell prey to the predators in "khaki uniform" [who are] supposed to protect the victims of crimes and maintain law and order. And this is the police force entrusted to implement the *public safety act, 2000 ,* and to choose whether to prosecute some one under the *Public Safety Act, 2000* , or under the Penal Code alleged to have committed the identical offence. … . *Public Safety Act, 2000 ,* in the hands of the police force that we have, is nothing but a lethal and deadly weapon in the hands of an overindulgent, frolicsome, mischievous, whimsical and capriciously unscrupulous and wicked child. The weapon and the child are equally baneful and dangerous. [29]

We have quoted in length from this judgement to indicate the judicial reflection on the quality and performance of our police. It is these aspects of policing which need to be taken into serious consideration [30] in understanding the normative framework of the police's power to arrest on suspicion.

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29 Ibid., at pp. 154-55.

30 Our empirical data below reinforces these perceptions of arbitrary policing.

3. ARREST AND REMAND

As indicated earlier, deprivation of liberty is effected under the Criminal Procedure Code, 1898 and the *Special Powers Act, 1974*. We now proceed by, first, stating the law, and, then, analysing the relevant interpretations of these provisions.

3.1. ARREST

Section 54 of the Code of Criminal Procedure, 1898 (Cr.P.C.) is the centrepiece of police's power to arrest on suspicion. And section 167 of the Code authorises police, with the permission of a Magistrate, to take an accused to police custody for further investigation and interrogation, if investigation cannot be completed within 24 hours of arrest. The maximum term for which an accused can be kept in police custody (under section 167) is 15 days.

Section 54 enumerates nine circumstances in which a police-officer may arrest a person without a warrant. The first set of these nine circumstances is wide and general while other circumstances enumerated in the section, such as "thirdly, any person who is proclaimed as an offender either under this Code or by order of the Government", or "fifthly, any person who obstructs a police-officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful authority" are specific and due to their specifications are not liable to much misuse. It is the first set of circumstances which has been widely misused by police and has been the primary tool for harassment and abuse of police power. This first set of circumstances of section 54 reads:

> **54. When police may arrest without warrant** – (1) Any police-officer may, without an order from a Magistrate and without a warrant, arrest – first, any person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned; "

A plain reading of these circumstances indicates that the last two conditions, i.e.,

(a) credible information has been received, or

(b) reasonable suspicion exists of his having been concerned with a cognizable offence can easily be manipulated to justify any arrest by a police-officer. The law requires that either "credible" information has been received or there is a "reasonable" suspicion

> but no test or threshold of information or suspicion has been elaborated as prerequisites for the arrest to be proper and legal.

Over the years, somewhat surprisingly, the contents or meaning or threshold-requirements of "credible information" or "reasonable suspicion" have not been elaborated or interpreted in any authoritative judgment. Issues such as what would make an information "credible" in terms of content, source, accuracy, reliability, etc. or what would make the suspicion "reasonable" has not been judicially scrutinised. No less importantly, subsequent finding that the information was not credible or the suspicion was not reasonable has not led to adverse consequences in terms of disciplinary or other measures against arresting officers. As a result, the police power of arrest under section 54 has widely been used and misused. Similarly, it is generally acknowledged that an arrestee is often subjected to torture in police custody when he/she is brought back on "remand" under section 167.

In such a background, *BLAST vs Bangladesh*[31] was practically the first judgement to scrutinise the meaning or interpretation of "credible" information and "reasonable" suspicion, leading to the formulation of a number of guidelines to be followed by police and magistrates in arrest and granting remand, respectively. A year later, many of the issues interpreted in the *BLAST* judgement was also taken up in another judgement – *Saifuzzaman vs State*[32] -- which added a few more directives for police and state. The primary concern of this later judgement, however, was the power of preventive detention under the Special Power Act, 1974. Usually, a detainee is initially arrested under section 54 and then a detention order under the *Special Powers Act, 1974* is served on the arrestee and in this *Saifuzzaman* judgement court discussed in detail the power of arrest under section 54 and the subsequent detention under the *Special Powers Act, 1974* and not the power of arrest under section 54 per se.

3.2. REMAND

Section 167 provides that, when investigation cannot be completed in twenty four hours of the arrest, a Magistrate can authorise the detention of an accused in police custody for upto 15 days for further investigation. Under this section, police requests and Magistrates allows this request to bring the accused back to the police station for further questioning.

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31 55 (2003) DLR (HCD) 363.

32 56 (2004) (HCD) 324.

Such questioning during remand, carried out in police station, in total isolation and without the presence of any outsider, often leads to unearthing of evidence to prove the involvement of the accused in criminal activities, i.e., his guilt. It is readily believed that police takes recourse to torture and other improper and illegal methods to extract such evidence.

Though there are a good number of formal requirements for recoding confession by a Magistrate to ensure that confessions are "voluntary", yet tortures in police custody during remand have often led to "confession" by arrestees who had spent a few days in police custody. "Voluntariness" of confessions has been an issue in much criminal litigation but, again, these had hardly been scrutinised in terms of Article 35(4) and 35(5) of the Constitution.[33] It, however, needs to be mentioned that the accused confesses only to a Magistrate in the court premises and not to police when in police custody during remand. Remand is seen as to 'persuade' the accused to confess to Magistrate.

4. EVOLUTION OF INTERPRETATION OF RIGHT TO LIBERTY

As indicated earlier, the focus of this study is on two dimensions of the deprivation of liberty through (i) arrests under "suspicion" of section 54 of the Criminal Procedure Code, 1898, and (ii) "preventive detention" under the *Special Powers Act, 1974*. Remand – a corollary of arrest under section 54 is another important component of this paper. This section now deals with judicial interpretation of the right of the executive (police) to arrest under section 54 and preventively detain citizens under the *Special Powers Act, 1974*.

The *BLAST* and *Safiuzzaman* judgements are the only two significant pronouncements of our highest courts on sections 54 and 167 while the "liberty-jurisprudence" to, virtually, negate the power of the executive to detain under the *Special Powers Act, 1974* has evolved through a large number of judgments over a quarter of a century. We first take-up section 54 judgments and then elaborate upon the more important ones under the *Special Powers Act, 1974*.

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[33] Article 35:

Protection in respect of trial and punishment: …

"(4) No person accused of an offence shall be compelled to be a witness against himself.

(5) No person shall be subjected to torture or cruel, inhuman or degrading punishment or treatment."

4.1. The *BLAST* Judgement: Background

The judgement in Writ Petition No. 3806 of 1998 was delivered on 7th April, 2003 and later reported as *Bangladesh Legal Aid Services Trust and others vs Bangladesh and others* in 55 (2003) DLR (HCD) 363.

The case was filed by *BLAST* , as already indicate, a few months after the shocking death of Rubel in police custody. Brutal torture of Rubel (a young student of the Independent University of Bangladesh) by police in custody and then in front of his relatives near his house had led to widespread public condemnation and outcry, compelling the then government to set up an inquiry commission. A number of police personnel's who had beaten up Rubel were later prosecuted.

The judgement in the *BLAST* case was delivered by a Division Bench of the High Court Division comprising of Mr. Justice Md. Hamidul Haque (the author judge) and Ms. Justice Salma Masud Chowdhury on the 7th April, 2003.

4.1.i. Section 54

The crux of the judgement is, of course, on sections 54 and 167. Section 54 of the Code of Criminal Procedure empowers any police officer to arrest a person.

The provision of this section that of 'there is a reasonable suspicion' about a person's involvement in a crime — is what enables police to arrest anyone, claiming that the police had suspected the person of being involved in a crime. Police can arrest anyone on this suspicion which, until this judgement, was not limited by any criterion or ground of reasonableness of suspicion. To limit the abuse of police power, the judgement laid down that if a person is arrested on suspicion:

> "… the police officer shall record the reasons for the arrest including the knowledge which he has about the involvement of the person in a cognizible offence, particulars of the offence, circumstances under which arrest was made, the source of information and the reasons for believing the information …" [34]

Any suspicion now, after the judgement, is not good enough. The arresting officer has to record all the relevant information which led to his suspicion regarding the involvement of the arrestee in a crime. The judgement distinguished between suspicion and knowledge. **"**A police officer can exercise the power if he has definite knowledge of the existence of some facts and such knowledge shall be the basis of arrest without

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[34] 55 (2003) DLR (HCD) 363, at p. 374.

warrant,**"** further emphasising that **"**There can be knowledge of a thing only if the thing exists.**"** The 'suspicion', which has been abused and misused by police as the alleged reason for arrest can no longer, after this judgement, be an indefinite and undefined guess or imagination or whim of police. The judgement elaborated:

> **"**If a person is arrested on the basis of 'credible information', nature of information, source of information must be disclosed by the police officer and also the reason why he believed the information. 'Credible' means believable. Belief does not mean make-belief. An ordinary layman may believe any information without any scrutiny but a police officer who is supposed to posses knowledge about criminal activities in the society, nature and character of the criminal etc., cannot believe any vague information received from any person. If the police officer receives any information from a person who works as 'source' of the police, even in that case also the police officer, before arresting the person named by the 'source' should try to verify the information by perusal of the diary kept in the police station about the criminals to ascertain whether there is any record of any past criminal activities against the person named by the 'source'.
>
> …… Use of the expression 'reasonable suspicion' implies that the suspicion must be based on reasons and reasons are based on existence of some fact which is within the knowledge of that person. So when the police officer arrests a person without warrant, he must have some knowledge of some definite facts on the basis of which he can have reasonable suspicion.**"** [35]

After arrest on such suspicion, which now has to be grounded on known fact and knowledge and these grounds have to be recorded by the arresting police, the person arrested must be informed of the grounds for which he has been arrested. After any arrest, the Constitution provides that the arrested person shall not be denied the right to consult and be defended by a legal practitioner of his choice.

What usually happened until now is that after arrest on vague and undefined 'suspicion', police would keep the person in police/thana custody and produce him to the Magistrate within 24 hours without any obligation of informing the persons of the reasons for his arrest, nor communicating the fact of his arrest to any relative or friend of the arrested person and the arrested person would not be allowed to talk to a lawyer. Now all these would have to change; as the judgement laid down that:

(a) the arrested person has to be informed of the reasons for his arrest;

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35 Ibid., at pp. 367-68.

(b) the police would have to inform a friend or relative of the person arrested, unless he is arrested from his home or work place (the assumption is that in such an instance of arrest his relatives/friends would know of the fact of arrest and take appropriate measures); and

(c) the arrested person must be allowed to consult a lawyer, if he so chooses.

The judgement re-iterated:

> **"**We like to give emphasis on this point that the accused should be allowed to enjoy these rights before he is produced to the Magistrate because this will help him to defend himself before the Magistrate properly, he will be aware of the grounds of his arrest and he will also get the help of his lawyer by consulting him. If these two rights are denied, this will amount to confining him in custody beyond the authority of the constitution.**"** [36]

These are very important propositions of citizens' charter of liberty, which would now be our duty to safeguard and preserve.

4.1.ii. Section 167

Section 167 of the Code of Criminal Procedure, 1898 comes into play when police, after arresting a person and producing him before a Magistrate within 24 hours, ask the Magistrate to return the arrested person to the police custody (remand) on the ground that the police believed that the arrested person should be further interrogated for information about crimes.

It is a common knowledge that Magistrates routinely allow this request for remand — the word 'remand' is not mentioned in the section but has come to mean this 'taking back of the arrested person to the police thana', instead of sending him to jail. After bringing the arrested person back to the thana on remand **"**the police tries to extort information or confession from the person arrested by physical or mental torture and in the process sometimes also causes death.**"**

Needless to say, the Constitution guarantees freedom from torture. Under Article 35 of the Constitution, no one can be tortured or subjected to cruel or inhuman or degrading punishment or even treatment and none can be compelled to be a witness against himself, i.e., no one can be compelled to confess to a crime, even if he has committed that crime. If someone voluntarily confesses to a crime, that is a different matter.

In many ways, the power conferred to police by section 167 to ask the Magistrate for remand for further investigation is an exceptional power to be applied only in exceptional instances. In ordinary course of things, police must

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[36] Ibid., at p. 372.

have enough credible and justifiable information implicating the arrested person in the commission of a crime. However, to say, as the police often seem to do, that a person may be connected with a crime, so lets arrest him first and then find out whether he is actually connected with any crime or not is obviously a travesty of the most fundamental of fundamental rights, i.e., right to liberty. One of the most fundamental premises of rule of law and governance under the constitution is that the right to liberty is the most cherished right and it can be curtailed only when it is absolutely necessary to prevent a person from committing another crime by keeping him confined in jail during the process of his trial for the crime and to imprison him only if he is convicted of a crime. Instead, what we have is the often whimsical arrest, and request for remand to find out whether the person has committed any crime. This is surely a notion of the feudal era when the powerful could do anything as they were not bound by any law.

The judgement points out that before asking for remand, **"**the police officer must state the reasons as to why the investigation could not be completed within 24 hours and what are the grounds for believing that the accusation or the information received against the person well founded**"**

Besides, the judgement also points out that there is a third requirement to be fulfilled before asking for remand. Police Regulations require the arresting police officer to record the relevant information about the involvement of the arrested person in the commission of a crime, what investigation has been undertaken by the police, the places visited, the persons questioned, and so forth. However, police hardly ever produce these records to the Magistrates when asking for remand. But Magistrates without being satisfied of these legal requirements, routinely grant remand. Such practice is illegal. The judgement very forcefully held that:

> So we do not understand how a police officer or a Magistrate allowing 'remand' can act in violation of the Constitution and provisions of other laws including this Code and can legalise the practice of remand. …. Such interrogation may be made while the accused is in jail custody if interrogation is necessary.
>
> Next, the use of force to extort information can never be justified. Use of force is totally prohibited by the Constitution. ….. So we find that even if the accused is taken in police custody for the purpose of interrogation for extortion of information from him, neither any law of the country nor the Constitution gives any authority to the police to torture that person or to subject him to cruel, inhuman and degrading treatment. Thus, it is clear to us that the very system of taking an accused on 'remand' for the purpose of interrogation and extortion of information by application of force on such person is totally against the spirit and explicit provisions of the Constitution. [37]

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[37] Ibid., at p. 371.

It must be recognised that police may need to further interrogate an arrested person. It seems that the Hon'ble Justices delivering this landmark judgement were aware that it may not be practically possible to monitor whether the police is continuing with their illegal practice of torture in police *thana hazat* or not when the arrested person is brought back there on 'remand'. To eliminate the possibility of torture the Court directed that such interrogation can take place only in the jail. By implication, it seems that the judgement has totally prohibited 'remand' of the accused to the *thana hazat*. This is a most remarkable aspect of this extraordinarily forward-looking judgement. Development, advancement and civilisation are all about expanding and safeguarding rights of citizens and this principle of the centrality of rights has been most explicitly enunciated in this judgement.

4.1.iii. Punishment of Police Officers for Torture and Death

The Writ Petition provided detailed accounts of deaths in police custody over a number of years and these numbers, as we all know, are large and horrific. Over the years many people have been killed in *thana hazat* or jails, but there has hardly been any prosecution of the persons responsible for these murders and tortures in custody.

The judgement points out that: **"**If a person dies in custody either in jail or in police custody, the relations are reluctant to lodge any FIR or formal complaint due to apprehension of further harassment.**"**

Under our present laws, a Magistrate can initiate legal proceeding upon a complaint lodged by a complainant. For deaths in police custody, as indicated in the judgement, the relatives are reluctant to lodge any complaint and police does not do so to implicate themselves in the crime of murder in police custody. Hence, the judgement recommended that in cases of death in police or jail custody, where post mortem indicates foul play, a Magistrate should be empowered to initiate legal proceedings against the suspect police without waiting for a complaint from the relatives of the murdered person.

Also the Penal Code, 1860 provides for punishment for extorting confession or information from any person and for confinement to extort such information. But these sections of the Penal Code do not provide for any specific crime of extortion for confession in police custody. The judgement, therefore, recommends that the relevant sections be modified to include a new crime of hurt in police or jail custody for extorting confession and such a crime be punished with imprisonment of upto ten

years, with a minimum sentence of seven years of imprisonment as well as compensation.

The judgement also held that:

> According to us, this Court, in exercise of its power of judicial review when finds that fundamental rights of an individual has been infringed by colourable exercise of power by the police under section 54 of the Code or under section 167 of the Code, the Court is competent to award compensation for the wrong done to the person concerned.[38]

4.1.iv. Recommendations for Amendment of Laws

Another most important aspect of the judgement is the detailed recommendations for the necessary amendments to the relevant sections of the Code of Criminal Procedure,1898, the Penal Code, 1860 and the Evidence Act, 1908 to ensure that the directions, guidelines and safeguards enunciated in the judgement are strictly followed as a matter of law. Obviously, judge-made laws through precedents often suffice to change the meaning and application of laws and these are done routinely by judgments of both the Divisions of the Supreme Court. However, the Hon'ble Justices clearly recognised that their interpretation of sections 54, 167 and some sections of the Penal Code and Evidence Act are so far reaching that the goal of safeguarding rights and liberties of the citizens would best be served by amendments of the relevant provisions of the laws.

The judgement made a total of seven sets of recommendations (Recommendations A through G in the judgment). For most of these recommendations about amendment of laws, the judgement quoted the relevant sections as they now stand and side by side formulated the recommended amendments. The judgement suggested amendments to sections 54, 167, 176, and 202 of the Code of Criminal Procedure; section 302, 330 and 348 of the Penal Code; section 106 of the Evidence Act (or in the alternative section 114 of the Evidence Act); and section 44 of the Police Act.

The amendments proposed indicate the painstaking exercise undertaken by the Hon'ble Justices. Needless to say, as the judgment itself re-affirms, the High Court Division, under Article 102 of the Constitution, does have the power to recommend amendments of laws. However, whether the amendments would be accepted verbatim is a completely different issue.

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[38] Ibid., at p. 373.

Until the sections are suitably amended, as recommended by the judgement, the 15 directives at the end of the judgment should protect and safeguards the rights and liberties of citizens from misuse and abuse by the police.

It needs to be recognised though that the legislature is not limited by the recommendations for amendment of law. The legislature is free to amend the relevant laws as it deems fit, keeping in view the concerns of the Court and the safeguards of rights of people which the Court has directed to be implemented.

Enacting and amending laws is the domain of the legislature and Article 112 of the Constitution recognises that, albeit indirectly, when it provides that **"**All authorities, executive and judicial, in the Republic shall act in the aid of the Supreme Court**"**. By omitting the legislature from the list of authorities which shall act in the aid of the Supreme Court, the framers of the Constitution clearly reinforced the separate, independent and sovereign law making role and authority of the Parliament. Needless to say, laws enacted by the Parliament are subject to the scrutiny of the Supreme Court and the Supreme Court may declare any law enacted by the Parliament invalid, i.e., unconstitutional and void. Though the recommendations of the Court are not binding in terms of the exact words and forms, it is a natural expectation that the Parliament will amend the recommended sections of the laws, as suggested by the Court.

The 15 directives of the judgements, though, are certainly mandatory for the executive, i.e., police and magistrates. They must begin to act in terms of the directives of the judgments.

4.1.v. Conceptual Complexities in the judgment

An important aspect of the *BLAST* judgment is that it did not find any part or provision of section 54 unconstitutional. The application of section 54 and the resultant arrests often exceed the limits imposed on police power of arrest by the relevant constitutional mandates. Moreover, the conditions that are required to be fulfilled for arrests on suspicion to be legal and proper are often not adhered to by the arresting officers. However, such a state of practical affairs does not and cannot lead to the finding by the court that the section itself is unconstitutional.

One needs to recall that, over the years, only a very few laws have actually been declared unconstitutional by the Supreme Court. In fact, not entire laws but only a few sections of some laws have actually been declared unconstitutional by

judgements of the Supreme Court.[39] The most celebrated of these is the finding that the part of the Eight Constitutional Amendment which provided for the establishment of High Courts in various districts of the country, though it was passed by the Parliament following all the formalities and requirements, were struck down by the Supreme Court in *Anwar Hossain Chowdhury vs Bangladesh.*[40] A number of other cases had challenged the constitutionality of a number of constitutional amendments, but these have not been successful.[41]

The expression "inconsistent" with the Constitution, following the language of the Constitution itself[42], is used in judgements which declared a law or a provision of law unconstitutional. However the *BLAST* judgement, in evaluating the provisions of section 54, did not use the word "inconsistent with provisions of the Constitution", rather it took recourse to the following expressions:

> "The power given to the police officer under this section, in our view, to a large extent is inconsistent with the provisions of Part III of the Constitution."[43]
>
> ".. the provision of these sections are to some extent inconsistent with the provisions of the Constitution and requires some amendments."[44]

As for remand the Court held: "Thus, it is clear to us that the very system of taking an accused on 'remand' for the purpose of interrogation and extortion of information by application of force on such person is totally against the spirit and explicit provisions of the Constitution. So the practice is also inconsistent with the provisions of the Constitution."[45]

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39 Insert examples of judgments declaring laws as unconstitutional.

40 1989 BLD (Spl) 1; popularly known as the Eight Amendment Judgement.

41 The most recently reported one is *M. Saleemullah vs Bangladesh*, 57 (2005) DLR (HCD) …… which challenged the validity of the 13th Amendment --- Care Taker Government Amendment –- of the Constitution. A few month ago, the part of the latest constitutional amendment – the 14th Amendment – reserving 45 seats in the parliament for women was also unsuccessfully challenged.

42 Article 7 of the Constitution provides: 7(2) ….. if any other law is inconsistent with this Constitution that other law shall, to the extent of inconsistency, be void."

Similarly, Article 26 provides: 26(2) "The State shall not make any law inconsistent with any provisions of this Part, and any law so made shall, to the extent of such inconsistency, be void."

43 *BLAST vs Bangladesh*, 55 (2003) DLR (HCD) 363, at p. 368. Underline added for emphasis.

44 Ibid., at p. 373. Underline added for emphasis.

45 Ibid., at p. 371. Underline added for emphasis.

Clearly, such expressions leave scope for differing understanding of the status of these (54 and 167) sections or parts thereof. A strict reading of the Constitution would entail a definitive finding as to whether any provision is inconsistent with the Constitution or not. Hence, the finding that a provision is "to a large extent" or "to some extent" inconsistent may not satisfy the constitutional test. Secondly, the Constitution provides for inconsistency of a law or a part thereof, and not of any practice. Hence, it remains unclear whether an inconsistent practice makes the law, which gives rise to the practice, is also inconsistent and, hence, void.

This, clearly, is the weakest part of the judgement as, one the one hand, it does not declare any part of Section 54 unconstitutional, but, on the other, recommends amendments of Section 54. Similarly, actions in implementing section 167 are found to be inconsistent with the Constitution, but no part of section167 is declared unconstitutional. Section 54 and 167 remain valid laws and, hence, the recommendations for amendments of these and other sections clearly are only persuasive.

4.2. The Saifuzzaman Judgement

As already indicated *Saifuzzaman vs State and others*[46]also dealt with the issues of police power of arrest under section 54 and remand under section 167. This judgement took into account the earlier *BLAST* judgement and, similar to that judgement, also offered guidelines for police for the exercise of their power of arrest and for Magistrates in granting remands.

The fact of this case is somewhat different in that the 2 petitioners in this case were leading political activists. Secondly, they were repeatedly shown arrested in a series of cases to thwart court orders granting them bails. Thirdly, upon arrest under section 54, they were sent to jail on the plea of police that preventive detention orders were being issued and it was necessary to detain them until such orders could be served upon them.

Ultimately, the Court held that arrests under section 54 and subsequent police request for detention in jail custody until orders of preventive detention could be served upon the arrestees under the *Special Powers Act, 1974* was illegal. In all the cases filed against the petitioners, they were initially arrested under section 54, police had taken (in some of the cases) them on police remand and, hence, the elaborate holdings of the court on the application, use and abuse by police of their powers under these two sections of the *Code of Criminal Procedure, 1898*

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46 Saifuzzaman vs State and Others, 56 (2004) DLR ((HCD)) 324

In scrutinising the police power of arrest, the *Saifuzzaman* Court also dwelt upon the meaning of "credible" information and "reasonable" suspicion. Similar to the *BLAST* judgement, this Court also emphasised that any information or suspicion can not, by itself, be sufficient to justify deprivation of the right to liberty of a citizen. The Court elaborated:

The expression "credible information" used in the section includes any information which, in the judgment of the officer, to whom it is given, appears entitled to credit in the particular instance. The word "reasonable" has reference to the mind of the person receiving the information. The "reasonable suspicion" and "credible information" must relate to definite averments, which must be considered by the police officer himself before he arrests a person under the provision. What is a "reasonable suspicion" must depend upon the circumstances of each particular case, but it should be at least founded on some definite fact tending to throw suspicion on the person arrested and not on a mere vague surmise.

The words "credible" and "reasonable" used in the first clause of section 54 must have reference to the mind person receiving the information which must afford sufficient materials for the exercise of an independent judgment at the time of making the arrest. In other words, the police officer upon receipt of such information must have definite and bonafide belief that an offence has been committed of is about to be committed, necessitating the arrest of the person concerned. A bare assertion without anything more cannot form the material for the exercise of an independent judgment and will not therefore amount to credible information.[47]

The *Saifuzzaman* Court also dwelt the on meaning of liberty and the imporance of safeguarding it at all costs.

It is clear that this Court, similar to the *BLAST* court, also felt that interpretation alone of the requirement of "credible" information and "reasonable" suspicion alone may not suffice as liberty also depends on the understandings of those who have the power to deprive a citizen of his liberty:

We would like to reiterate the views consistently held by this Court that those who feel called upon to deprive other persons of liberty in the discharge of what they conceive to be their duty must, strictly and scrupulously, observe the forms and rules of law.[48]

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47 Ibid., at p.

48 Ibid., at p.

This Court also suggested amendments of the relevant sections, but unlike the *BLAST* Court, it refrained from formulating its own amendments of the relevant provisions of law, stating:

The old order has changed yielding place to new, and we must have new need for the new hour. Our procedural law is more than a century old, this piece of legislation has stood the test of time and it is felt that necessary amendments are required to be introduced to this law to bring it in line with India and Malaysia. We are told that amendments to sections 54 and 167 of the Code are under implementation as per recommendation of the Law commission. Before such change is made, the Legislature should consider whether a new section similar to section 50 of the Indian Code might be inserted which will bring the law in conformity with the provisions of Article 33(1) of the Constitution. This change in the provisions of the Code is necessary to remove anomalies and ambiguities brought to light by the extensive amendments of 1978. We cannot direct the Government to make necessary amendments of the relevant provisions of the Code without declaring the relevant provisions of the Code as unconstitutional. The provisions of the Code are applicable in this country over a century and after lapse of decades, it would be improper if we declare those provisions as unconstitutional without having a comprehensive revision of the entire Code.[49]

The Court clearly recognised that it could not direct the Legislature to amend the relevant laws without declaring the existing laws unconstitutional. Hence, it did not proceed with formulating specific amendments.

It is clear that these two judgements of the High Court Division, unlike any previous judgements, reflect the anxiety of the judiciary regarding continuous abuse of power by police under sections 54 and 167 of the Code. Both the Court attempted to insert new requirements for information to be credible and suspicion to be reasonable for justifying arrest. Recognition of the police practice of torture on remand was also implicit in both the judgements.

One can not legislate torture away by mere enactments of laws prohibiting torture. Our Constitution had prohibited torture, as did a number of prior legislations. Bangladesh's ratification of a number of international human rights covenants and instruments also indicate the formal state policy of not taking recourse to torture. The reality of remand

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[49] Ibid., at p. ...

in police custody, however, is completely different and remand is often taken to be synonymous with torture.[50]

The *Safiuzzman* Court, unlike the *BLAST* Court, did not offer specific amendments for sections 54 or 167. Instead, the Court explained:

After the deletion of Chapter XVIII by Ordinance No. XLIX of 1978, we are of the view that necessary amendments should be made to sections 167, 344 and chapter XX of the Code in order to remove inconsistency. In India there is legislative change in this section 167 of the Code with the object to eliminate the chronic malady of protracted investigation. A time limit with a provision for extension under certain circumstances is fixed by adding a proviso to sub-section (2). This proviso makes it obligatory to produce the accused before the Magistrate at the time of making remand. These changes are made with a view to affording protection to the accused against unnecessary harassment at the hands of the investigation agency.

Regulation 263 of Police Regulations, chapter I speaks of case diary, which is in the verbatim language of section 172 of the Code. It is said that the police officer is bound by law to keep record of the proceedings in connection with the investigation of each case, (a) the time at which the information was reported to him, (b) the time at which he has closed his investigation, (c) the place of places visited by him and (d) a statement of the circumstances ascertained through his investigation. Nothing, which does not fall under the above heads, need be entered. It has been instructed that the diary shall mention every clue obtained and every step taken by the investigation officer. As regards house searches and arrest, particulars shall be noted in the diary. The diary shall contain full and unabridged statements of persons examined by the police officer so as to give the Magistrate of perusal of the said diary a satisfactory and complete source of information which would enable him to decide whether or not the accused should be detained in such custody as he thinks fit. This clearly indicates the purpose of production of an accused before a Magistrate of ensure that the arrest without warrant and the detention of the accused is at any rate prima facie justified.[51]

As we shall see below, both the *BLAST* and *Saifuzzaman* Courts detailed a number of directions for the police as pre-conditions for the exercise of their

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50 For a detailed study of torture see REDRESS, Torture in Bangladesh: Making International Commitments a Reality and Providing Justice and Reparation to Victims, London, 2004, available at www.redress.org

51 *Saifuzzaman,* ibid,. at p.

power of arrest and remand. These directives could easily become charters of righs of accused in our criminal justice system. However, the courts' pronouncements are yet to be translated into practice.

5. TOWARDS A MORE EFFECTIVE RIGHT TO LIBERTY

It is clear that the High Court Division in the *BLAST* and *Saifuzzaman* judgements has ushered in a new dimension of liberty jurisprudence. The new dimension, in detailing the requirements of "credible" and "reasonable" for arrest under section 54 are certainly designed to rein in the police power of arrest. Both the Courts offered detailed guidelines for arrest and remand.

As for arrest, the *BLAST* Court issued the following guidelines:

1) No police officer shall arrest a person under section 54 of the Code for the purpose of detaining him under section 3 of the Special Powers Act,1974
2) A police officer shall disclose his identity and, if demanded, shall show his identity card to the person arrested and to the persons present at the time of arrest.
3) He shall record the reasons for the arrest and other particulars as mentioned in recommendation A(3)(b) in a separate register till a special diary is prescribed.
4) If he finds, any marks of injury on the person arrested, he shall record the reasons for such injury and shall take the person to the nearest hospital or Government doctor for treatment and shall obtain a certificate form the attending doctor.
5) He shall furnish the reasons for arrest to the person arrested within three hours of brining him to the police station
6) If the person is not arrested from his residence or place of business, he shall inform the nearest relation of the person over phone, if any, or through a messenger within one our of bringing him to the police station.
7) He shall allow the person arrested to consult a lawyer of his choice if he so desires or to meet any of his nearest relations. [52]

Similarly, the *Saifuzzaman* Court also issued guidelines on arrest:

i. The police officer making the arrest of any person shall prepare a memorandum of arrest immediately after the arrest and such officer shall obtain the signature of the arrestee with the date and time of arrest in the said memorandum.

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[52] *BLAST* , Ibid., pp. 380-81

ii. The police officer who arrested the person must intimate to a nearest relative of the arrestee and in the absence of the relative, to a friend to be suggested by the arrestee, as soon as practicable but not later than 6(six) hours of such arrest notifying the time and place of arrest and the place of custody.

iii. An entry must be made in the diary as to the ground of arrest and name of the person who informed the police to arrest the person or made the complaint along with his address and shall also disclose the name and particulars of the relative of the friend, as the case may be, to whom information is given about the arrest and the particulars of the police officer in whose custody the arrestee is staying.

iv. Copies of all the documents including the memorandum of arrest, a copy of the information of complaint relating to the commission of cognizable offence and a copy of the entries in the diary should be sent to the Magistrate at the time of production of the arrestee for making the order of the Magistrate under section 167 of the Code. [53]

Both the Courts also issued guidelines for remand and we first quote the guideliens of the *BLAST* judgement below:

8) If the Magistrate is satisfied on consideration of the reasons stated in the forwarding letter as to whether the accusation or the information is well-founded and that there are materials in the case diary for detaining the person in custody, the Magistrate shall pass an order for further detention in jail. Otherwise, he shall release the person forthwith.

9) If the Magistrate authorizes detention in police custody, he shall follow the recommendations contained in recommendation B(2)(c)(d) and B(3)(c)(d). ...

10) 12) The police officer of the police station who arrests a person under section 54 or the Investigation Officer who takes a person in police custody or the jailor of the jail, as the case may be, shall at once inform the nearest Magistrate as recommended in recommendation B(3)(e) of the death of any person who dies in custody. [54]

As for the *Saifuzzaman* Court on remand, the following guidelines were issued:

v) If the arrested person is taken on police remand, he must be produced before the Magistrate after the expiry of the period of such remand and in no case he shall be sent to the judicial custody after the period of such remand without producing him before the Magistrate.

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53 *Saifuzzaman,* ibid., at pp. 342-43

54 *BLAST* , ibid., at p. 381.

vi) Registration of a case against the arrested person is *sine qua non* for seeking the detention of the arrestee either to the police custody or in the judicial custody under section 167(2) of the Code.

vii) If a person is produced before a Magistrate with a prayer for his detention in any custody, without producing a copy of the entries in the diary as per item No. (iv) above, the Magistrate shall release him in accordance with section 169 of the Code on taking a bond from him. [55]

The guidelines of both the cases are quoted in detail to indicate the painstaking detail into which the court have gone to safeguard the rights of arrested persons, both in course of arrest and during police remand.

The *Saifuzzaman* Court specifically directed all concered to implement these guidelines:

> The requirement Nos. (i), (ii), (iii), (iv), (v) and (vi) be forwarded to the Secretary, Ministry of Home Affairs and it shall be his obligation to circulate and get the same notified to every police station for compliance within 3 months from date. The requirement Nos. (v), (vi), (vii), (viii), (ix),(x) and (xi) be forwarded to all Chief Metropolitan Magistrates and District Magistrates and it shall be their obligation to circulate the same to every Metropolitan Magistrate and the Magistrate who are authorized to take cognizance for compliance within 3 (three) months from date. The Registrar, Supreme Court of Bangladesh is directed to circulate the requirement as per direction made above. It is hoped that these requirements would curb the abusive power of the police and harassment of citizen to be apprehended by the police. If the police officers and the Magistrates fail to comply with above requirements, within the prescribed time as fixed herein, they would be rendered liable to be punished for contempt of Court, if any application is made by the aggrieved person in this Court. The police officers and the Magistrates shall follow the requirements strictly so that no citizen is harassed nor his fundamental right guaranteed in part III of the Constitution at any event is curtailed. [56]

Despite these very detailed guidelines and instructions to the concerned officials of the Government, it is clear that these guidelines, as it were, have not seen the light of the day.

5.1. Advocacy

In terms of time necessary for filtering down of interpretations of laws offered by the High Court Division, both the *BLAST* and *Saifuzzaman*

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55 *Saifuzzaman,* ibid., at p. 342.

56 Ibid., at p. 343.

judgements are rather recent and it would, it seems, take a while for the import of these judgements to filter through to all nooks and corners of the legal world.

These judgements, it needs to emphasised, directed major changes in the way police acts. The police power of arrest and remand had never been scrutinised before and neither had the constitutional safeguards regarding arrest and detention of the Constitution made to bear upon these powers of police. In such a long-standing practice of unfettered power, these two judgements laid down very exacting details regarding what police can and must do in effecting arrest and asking for remand. If police were to follow these, they would have to drastically revise their methods and practices. Such a change, needless to say, is not in the interest of the police but in the interest citizens and it is for citizens to press for implementation of these directives.

It needs to be mentioned that many a major changes directed by Courts have not come about smoothly or automatically. For example, the Appellate Division had issued 12 directives for the separation of the judiciary in 1999. The directives of this, now famous, the *Masdar Hossain*[57] judgement is being implemented only now, in 2007, after 8 years of constant efforts by the bench. The leading lawyers of the case had kept on going back to the court for direction upon the government for implementation of the directives of the case and it is only from 1 July, 2007 that the Rules necessary for implementation of the separation of the judiciary have been promulgated. Similarly, in *Kudrat E Elahi vs Bangladesh*[58] the Supreme Court had directed the Government to hold elections of local government bodies within 6 months, but government has gone back to the court every six months or so for the extension of time to hold these elections and these elections are yet to be arranged.

In other words, inspite of the constitutional dictate of Article 112 that law declared by the Supreme Court is binding on all concerned, directives of the type enunciated in the *BLAST* and *Saifuzzaman* cases are not automatically implemented for the reason that these entail major changes in the way police functions and these changes are detrimental to the exercise of unrestricted power of police which they would be reluctant to implement. In the milieu, as mentioned earlier, of weak notions about the importance of the right to liberty, there does not seem to be any natural constituency to press for restriction on the police power of arrest and

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57 *Secretary, Ministry of Finance vs Masdar Hossain and others,* 52 (2000) DLR (AD) 104 = 20 (2000) BLD (AD) 84

58 *Kudrat E Elahi vs Bangladesh* 44 (1992) DLR (AD) 314

remand. As a result, the police and the executive have been able to "ignore" the directives of the Court in these two cases.

No less importantly, the perceived increase in crimes and the impunity of criminals have found public resonance and approval in the strong-arm tactics of the government in recent years to deal with these alleged notorious criminals in extra-legal manner. "Cross-fire" and "encounter" have become accepted euphemisms for extra-judicial killings of alleged notorious criminals by the police and other law enforcing agencies and such killings are deemed to enjoy tacit public support. Remand of criminals to police custody for torture, again, is largely accepted.

The ground reality of public acceptance of erosion and disregard of the rights of the accused have gradually led to the strengthening of a virtual police-state. Therefore, the bold pronouncement of the courts to safeguard the rights of the accused during remand and citizens in arrest has, virually, gone unnoticed.

6. CONCLUSION

This paper has argued that the right of liberty, when litigated in the constitutional (writ) jurisdiction of the court, has routinely resulted in verdicts in favour of the detenue under the *Special Powers Act, 1974*.[59] However, except the rights of detenue under the *Special Powers Act, 1974*, rights of others who are arrested and interrogated in police custody had not attracted judicial scrutiny until the *BLAST* judgement. The interpretation of police power of arrest and remand of the *BLAST* judgement was followed in the *Saifuzzaman* case a year later.

Despite some conceptual unclarity of the *BLAST* judgement, the directives to the police in effecting arrests of citizens are crystal clear. These directives, though novel for our jurisdicition, are known to other jurisdictions, the beginning of which can easily be traced to the famous *Miranda* judgement of the American jurisdiction. The *BLAST* judgement also provided detail recommendations for amendment of the relevant provisions of law. The *Saifuzzaman* judgment repeated some of the directives for police of the *BLAST* judgement and added a few more. The Saifuzzman judgement, however, did not offer specific suggestions for amendment of the laws.

The directives of these judgements, it seems, have fallen on deaf ears. Police have continuted to exercise their unfettered power of arrest. The

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[59] The trend has continued, as evidenced by recent reported judgements in *Dr. Abida Sultana Bhuiyan vs Bangladesh,* 55 (2003) DLR (HCD) 430, *Nazru; Islam vs State,* 55 (2003) DLR (HCD) 401, etc.

BLAST judgement was widely reported and in the immediate post judgement period police were a bit cautious and the number of arrests under section 54 was somewhat reduced. But soon police took recourse to arrests under the relevant provisions of the Metropolitan Police Acts of various metropolitan cities to bypass the dictates of the *BLAST* and *Saifuzzaman* judgement. The practice of taking arrestees on remand to police custody has remained unchanged.

An important directive of both the judgements regarding access to legal advice for arrestees and those taken in remand is not implemented and the arrestees are routinely denied this right. Similarly, the right to be informed of the charges, and the obligation upon police of informing the near and dear ones are hardly ever adhered to. Upon arrest, the jail regime of not allowing access to prisoners are strictly enforced and none (including lawyers) are allowed to meet and talk to arrestees.

The directives of these two judgements are not likely to be implemented by the executive organs of the state on their own volition. Experience suggest that major changes in the way powers are exercised had required sustained engagements on the part of the civil society and the legal community for implementation. The directives of these two judgments are yet to attract similar attention and advocacy measures by the relevant civil society organisations. This is not to say that nothing has been done to disseminate the directives of these judgment, but clearly a lot more need to be done.

The legal community has not pressed the rights enunciated by the judgements during the relevant legal proceedings. Lack of engagements by trial lawyers in favour of the directives is a major reason for non-utilisation and non-implementation of the judgements. Also, these judgments are yet to be cited in subsequent cases on misuse and abuse of police power and against grant of remand my Magistrates.

To end, the *BLAST* and *Saifuzzaman* judgements have ushered in a restricted regime for the exercise of police power of arrest under section 54 and for limiting remands of arrested persons to police custody for questioning and investigation. However, this new threshold of right to person liberty can only be meaningful if there is a sustained campaign amd advocacy to compel the police and magistrates to follow the directives of these two judgements. Lawyers can play an important role by demanding treatments of arrestees in terms of these judgements and taking the issues of violations of these judgements in higher courts to further affirm and re-affirm