PREVENTIVE DETENTION AND VIOLATION OF HUMAN RIGHTS: BANGLADESH, INDIA AND PAKISTAN PERSPECTIVE

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INTRODUCTION

Since the adoption of the Universal Declaration of Human Rights by the General Assembly of the United Nations on 10 December 1948, humanities have been a very significant theme of discussion. The Human Rights Organisations have been working throughout the world to enforce human rights in different countries. Human rights are not limited or confined in any particular country. It is a universal right which the entire mankind can enjoy freely irrespective of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. These rights should be free from the clutches of despotic ruler or cruel man. Jaques Maritian says, "The human person possesses rights because of the very fact that it is a person, a whole, a master of itself and its acts and which consequently is not merely a means to an end but an end which must be treated as such.....these are things which are owed to man because of the very fact that he is a man."[1]

Although there exist preventive detention laws directly or indirectly in all the countries of the world,[2] yet there is no universal definition of preventive detention due to the difference in the application of law. The

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1 Quoted by, Hamid, Kaji Akhter; *Human Rights, Self-determination and the Right to Resistance*, 1994, Dhaka, p. 24.

2 For examples,

In Malaysia-The Internal Security Act, 1960; The Emergency (Public Order and Prevention of Crime) Ordinance, 1969.

In Nigeria-The State Security (Detention of Persons) Decree, 1966; Armed Forces and Police (Special Powers) Decree, 1967;

Public Security (Detention of Persons) Decree No. 1, 1979 The State Security (Detention of Persons) Decree, 1984.

In Singapore-Criminal Law (Temporary Provisions) Ordinance, 1955; Federation of Malaya Internal Security Act, 1960.

In Sri Lanka-Public Security Ordinance, 1947; The Prevention of Terrorism (Temporary Provisions) Act, 1979.

English people captured the ruling power of Indian sub-continent after their victory at the Battle of Plassey.[3] In order to stabilise their power they included for the first time the provision of preventive detention in the East India Company Act, 1784.

In R. vs Halliday[4] the expression, "preventive detention", was used for the first time in Britain. The word "Preventive" means that restraint, whose object is to prevent probable or possible activity, which is apprehended from a would-be detenu on grounds of his past activities.[5] The word "Detention" means keeping back.[6] The parliaments of Bangladesh, India and Pakistan have enacted laws regarding preventive detention. The term "preventive detention" means the detention the aim of which is to prevent a person from doing something which is likely to endanger the public peace or safety or causing public disorder.[7]

In A. K. Gopalan vs State of Madras[8] it was held that: "there is no authoritative definition of the term 'Preventive Detention'..." It is not a punitive but a precautionary measure. In *R. vs Halliday*[9] it has been stated that: "One of the obvious means of taking precautions against dangers such as are enumerated is to impose some restrictions on the freedom of movement of persons whom there may be any reason to suspect of being disposed to help the enemy."

Preventive detention is an abnormal measure whereby the executive is authorised to impose restraints upon the liberty of a man who may not have committed a crime but who, it is apprehended, is about to commit acts that are prejudicial to public safety.[10]

Preventive detention means detention of a person only on suspicion in the mind of the executive authority without trial and without conviction by the court.[11] Preventive detention is not to punish an individual for any

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3 For details *see*, Sarkar, J-N. *The History of Bengal: Muslim Period 1200-1757*, vol.2, Dhaka, 1948; Banaerjee, A.C., Ghose, D.K., (eds.), *A Comparative History of India, vol. 9 (1712-1772)*, London, 1978, at pp. 662-67; Smith, V.A., *The Oxford History of India*, (Spear P., ed), Delhi, 1994, at pp. 465-79.

4 (1917) AC 260.

5 *Sunil Kumar Samaddar vs. Superintendent, Hooghly Jail,* 75 Cal WN 51.

6 *Alamgir vs. the State,* AIR 1957 Pat 285.

7 Chowdhury, Badrul Haider; *The Long Echoes*, Dhaka; 1990, p. 3.

8 AIR 1950 SC 27.

9 Supra note 4, p. 269.

10 Brohi, A.K.; *Fundamental Law of Pakistan*, Karachi; 1958, p. 424.

11 Patel, T.; *Personal Liberty under the Constitution of India*, Delhi, 1993, at p. 48.

wrong done by him but to prevent him from acting in a manner prejudicial to the state.[12] It is a pre-trial internment.[13]

Preventive detention is a serious encroachment upon the personal liberty of a person, for the simple reason that, unlike ordinary arrest or imprisonment, preventive detention is effected without trial.[14]

Preventive detention is a peculiar measure in the sense that it imposes restrictions on the liberty of a citizen to the extent that a person who has not committed any offence may be presumed that he is about to commit an offence, which has been defined as prejudicial. As David H. Bayley said: "A law of preventive detention sanctions the confinement of individuals in order to prevent them from engaging in forms of activity considered injurious to the community and the likelihood of which is indicated by their past actions."[15] In guise of preventive detention law, the executive authority exercises discretionary power regarding arrest and detention. This study will consider the validity of preventive detention law and discover to what extent the rights are infringed due to misapplication of preventive detention laws and will finally put necessary recommendations to stop the misuse of the law.

Constitutional Provisions and Preventive Detention

On December 16, 1971, after nine months bloody war Bangladesh with a territory of 55,598 square miles emerged as an independent and sovereign state.[16] The first thing after achieving independence the people aspired to

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12 Hussain, F., *Personal Liberty and Preventive Detention,* Peshawar, 1989, at p. 101. *See* also Choudhury, G.W., *Constitutional Development in Pakistan*, London, 1969, at p. 235.

13 Frankowski, S., and Shelton, D., (eds.), *Preventive Detention Law: A Comparative and International Perspective*, Netherlands, 1992.

14 Ariff, Hassan, and "The Judiciary as a Bulwark against Illegal Detention", in Hossain, S., Malik, S., Musa, B. (eds.), *and Public Interest Litigation in South Asia: Rights in Search of Remedies,* Dhaka, 1997, at p. 143.

15 Bayley, David H., *Public Liberties in the New States*, Chicago, 1964, at p. 23.

16 The independence war of Bangladesh commenced on 25 March 1971 and remained till 16 December 1971. As regards the War of Independence, the enumeration of the American scholars is worth quoting: "During the civil war an estimated 2 lakh women and girls had been raped...Some 4 lakh children were orphaned, thousands of teachers and intellectuals were killed or maimed. Some 3 lakh schools were destroyed or damaged, and an unknown number of people variously estimated in between 1 million to 3 million were killed and nearly 10 million fled to India." Quoted by, Razee, Aleem-Al, *Constitutional Glimpses of Martial Law*, Dhaka, 1988, at p. 59.

get was a constitution where the fundamental rights of the people would be ensured.[17] The then government succeeded in drafting a constitution within six months after achievement of independence.[18] The Constitution of Bangladesh was adopted on the 4th November and was given effect to from the 16th December 1972, the first anniversary of the 'victory day'.[19] The constitution makers felt the necessity of giving recognition to the basic human rights in consequence of which they incorporated the provisions of the Universal Declaration of Human Rights, 1948. A study of he Constitutions of India and Pakistan reveals that the constitution makers of these countries allowed the Parliaments of their respective countries to pass the preventive detention laws. Nevertheless, the original Constitution of Bangladesh did not contemplate preventive detention law without the authority of the court.[20] Thus Moudud Ahmed observed:

> The desire to fulfil the political commitment of repealing all the black laws in order to establish a 'living democracy' was admirably noticeable. It was remarkable achievement on the part of the Awami League to have done away with the menacing provisions of detention without trial from the constitution of the country.[21]

But unfortunately it is a fact that by the Constitution (Second Amendment) Act, 1973, which amended Article 33, the parliament had been empowered to pass preventive detention laws.

Article 22 of the Constitution of India allowed the parliament and state legislatures to legislate on preventive detention subject to conformity with the provisions of Article 22 (4) to (9).

Likewise, Article 10 of the Constitution of the Islamic Republic of Pakistan, 1973, and formerly, those of 1956 [22] and 1962[23], allowed the

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17 Khan, Hamiduddin, *The Fundamental Right to Freedom of Association in Indo-Pak-Bangladesh Sub-continent,* Dhaka, 1980, at p. 109.

18 Rahim, Aminur, *Politics and National Formation in Bangladesh,* Dhaka, 1997, at p. 245.

19 Its adoption was a great historic event in the life of the people of Bangladesh. Puchkov, V.P., *Political Development of Bangladesh,* New Delhi, 1989, at p. 31.

20 Islam, Amir-ul, "Constitutional Development of Bangladesh: A Struggle for Constitutional Supremacy and Quest for a Civil Society", in Ahmed, Q.K. (ed), *Bangladesh: Past Two Decaes and the Current Decade*, Dhaka, 1994, at p. 194.

21 Ahmed, Moudud, *Bangladesh: The Era of Sheikh Mujibur Rahman,* Dhaka, 1993, at p. 100.

22 As regards this constitution, *see* Feldman, H., *Pakistan Constitution*, Oxford, 1956.

23 As regards this constitution, *see* Munir, M., *Pakistan Constitution*, Lahore, 1965.

parliament to enact laws relating to preventive detention subject to the limitations laid down by clauses (4) to (9) of Article 10.

Preventive Detention Legislation in India, Pakistan and Bangladesh

In India

In India, the first preventive detention law was enacted in 1950 which was named "Preventive Detention Act, 1950." Subsequently it was amended and replaced by the Maintenance of Internal Security Act (MISA), 1971. MISA, which was repealed on and from 3rd August, 1978, had been, in every sphere, very harsh in application and it was against democracy. Other Preventive detention laws are the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (COFEPOSA), 1974, Smugglers and Foreign Exchange Manipulators Act (SAFEMA), 1976, Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Ordinance, 1979, replaced by Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1980, the National Security Act, 1980, the Essential Services Maintenance Act (EMS), 1981 and the Terrorist and Disruptive Activities (Prevention) Act, 1985.

In Pakistan

The Indian Independence Act, 1947, which received the royal assent on the 18th July 1947, and came into force on the 15th August 1947, divided British India into two independent dominions, India and Pakistan.[24] All successive governments of Pakistan considered "preventive powers indispensable in view of the violative nature of the population and the existence of elements against whom the normal punitive law would be ineffective".[25] So, the central statutes that were passed were Pakistan Public Safety Ordinance, 1949,[26] Pakistan Public Safety (Amendment) Act, 1950,[27] Pakistan Public Safety Ordinance, 1952,[28] and finally Security of Pakistan Act, 1952[29]. Besides these Central Acts and Ordinances, the

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24 Patwari, A.B.M. Mafizul Islam, *Protection of the Constitution and Fundamental Rights under the Martial Law in Pakistan 1958-1962*, Dhaka, 1988, at p. 7.

25 Wheeler, Richard S., *The Politics of Pakistan: A Constitutional Quest*, Ithaca, 1970, at p. 143.

26 Ordinance XIV of 1949.

27 Act XXXVI of 1950.

28 Ordinance VI of 1952.

29 Act XXXV of 1952.

Provincial Government of East Bengal enacted a number of Public Safety Acts and Ordinances relating to preventive detention. [30]

In Bangladesh

After the liberation of Bangladesh, the Bangladesh Scheduled Offences (Special Tribunal) Order, 1972, popularly known as P.O. 50/1972 was promulgated with a view to control the market of necessary commodities and some marked criminal offences. The provisions of preventive detention were severe and as such popular discontent began to increase every day. Awami League, the then ruling party repealed the P.O. 50/1972 along with the Security of Pakistan Act, 1952 and Bangladesh Public Safety Ordinance, 1958 in the teeth of serious public criticism. Soon after the people got relief from the pangs of the repressive laws, the Parliament on February 9, 1974 enacted the anti-people black law, "Special Powers Act, 1974" [31] containing the provisions of preventive detention. The Act says that any person can be arrested and detained by the executive authority if there is "satisfaction" in the mind of the authorities that he may commit "prejudicial act" [32] which means-

(i) to prejudice the sovereignty or defence of Bangladesh;

(ii) to prejudice the maintenance of friendly relations of Bangladesh with foreign States;

(iii) to prejudice the security of Bangladesh or to endanger public safety or the maintenance of public order;

(iv) to create or excite feelings of enmity or hatred between different communities, classes or sections of people;

(v) to interfere with or encourage or incite interference with the administration of law or the maintenance of law and order;

(vi) to prejudice the maintenance of supplies and services essential to the community;

(vii) to cause fear or alarm to the public or to any section of the people;

(viii) to prejudice the economic or financial interests of the State.

It is pertinent to mention that the Awami League launched movements of repeal of all repressive laws. As a consequence, we find that the authority presented a bill in the Assembly on 20th September 1958 for repeal of the Security of Pakistan Act, 1952. But the same party, on being

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30 For examples, The East Bengal Preventive Detention Ordinance, 1949 (Ordinance VI of 1949), East Bengal Public Safety Ordinance, 1951 (Ordinance XXI of 1951).

31 Act XIV of 1974.

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

in power after the liberation of Bangladesh presented the Special Powers Bill, 1974 in order to materialise their heinous political interest.[33] Two members of the Parliament Mr Ataur Rahman Khan and Mr Abdus Sattar, belonging to the B.J.L. and J.S.D. vehemently objected to the Bill but the ruling party overlooked them. During the regimes of Sheikh Mujibur Rahman, this law was primarily enforced on the tribal people of Chittagong Hill Tracts, politically rival powers and especially, the suspected members of *Jatio Shmajtantirik Dol* and the *Shorbohara* party. In continuation, the governments have been using this law for the last thirty years to threat, suppress, torture and harass the opposition leaders, workers and their family members. The Special Powers Act, 1974 explicitly authorises an individual to be detained- without charge or trial- for up to six months and up to indefinite period if so sanctioned by the Advisory Board.

What happens in reality is that after arrest, the police officer prays to the court for remand and thereafter they start bodily and mental torture, which is a flagrant violation of international human rights law.[34] It may be reiterated that physical and mental torture has become a common feature in most of the countries of the world.[35]

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33 As regards the laws relating to preventive detention in India, Pakistan and Bangladesh, Golam W. Choudhury said: "The provision for preventive detention in the Indo-Pak sub-continent has a long history behind it. The British authorities exercised this power to control the unrest connected with liberation movements. It is, however, curious to find that after independence, both Pakistan and India and also of Bangladesh have retained provisions for preventive detention even in times of peace." Choudhury, Golam W., Pakistan, Essex, 1988, at pp. 204-05.

34 Article 7 of the International Covenant on Civil and Political Rights prohibits torture and ill treatment.

35 For instance, the March 1989 sitting of the Malaysian Parliament heard this disclosure of torture inflicted on Abdul Rahman Hamzah, a former Sarawak State Assemblyman:

"I was tortured by various means...at any one time there were always three officers present but on one occasion, seven officers tortured me by kicking, slapping and by hitting me with broom sticks. I lost consciousness a few times.

I was asked to duck walk, frog jump, crawl all over the room, corridor and bathroom, urinate like a dog, given the air-condition treatment after a cold shower, forced to do hundreds of push-ups…

A tin was used to cover my head and at the same time the tin was hit with a stick. The sound of hitting of the tin deafened one's hearing and cut and bruised my head, cheeks and ears. This caused my head and upper face to swell.

My interrogators would sometimes lift my body by throttling my throat with their hands and at the same time forcing me up. When this was done, my throat

All the political parties remaining out of power make serious criticism of the law and throw the challenge in the election manifesto that they would repeal this black law if put into power. For example, the three alliances during the movement for fall of the autocratic Ershad regime that they would introduce the practice of democracy after repealing the Special Powers Act, 1974 which violates human rights. But it is regretting that the Bangladesh Nationalist Party (B.N.P.) which came into power started emphasizing that it is a law of utmost necessity and Government cannot work without it. Likewise, Sheikh Hasina, Awami League Chairperson, declared before she came into power by the Parliament Election held on 12th June 1996 that she would repeal the law if she had come to power. But after assuming power she pulled her tone in opposition direction by announcing that its efficacy to past governments justified its existence. She was replying to a question asked by an opposition member of Parliament, who called the Act "a jungle law framed by the previous Awami League Government".[36] And finally the present government again stated in its election manifesto that it would scrap this tyrannical law if voted to power but, still now, it has not repealed the Special Powers Act, 1974.

It is mentionable that in democratic countries preventive detention is usually a method resorted to in emergencies like war.[37] For instance, in America, the law relating to preventive detention is the Internal Security Act, 1950, which provides that the powers of preventive detention can be exercised only in times of an emergency like war. Similarly, provisions for preventive detention cannot be found in England, except during the currency only of an emergency like war. But in Indian sub-continent, laws

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protruded and saliva would come out of my mouth. At the same time I was being hit over the cheeks and jaw areas… They twisted my wrist and body round several times before swinging me violently against the wall. I was forced to do mock sexual acts before my sneering torturers who also used stretched elastic bands to flick at my ears and nipples…My head was pushed into a filthy squat toilet bowl while it was flushed repeatedly… I was also poked with a floor mop used for cleaning the toilet…

The interrogators would appear to be possessed by the devil. When they interrogated me, their lips, hands and fingers would quiver. At times like this, I was frightened as I felt I was in the hands of people who had lost their reason." (Kua, K.S., ''445 Days Behind The Wire" Oriengroup 1999: 194).

36 *The Daily Star*, 12 March 1997.

37 Kapur, Anup Chand, Misra, K.K., *Select Constitutions*, New Delhi, 2001, at p. 103.

regarding preventive detention can be resorted to in times of both peace and emergency which is really disappointing.

Nature of Detention

The word preventive detention is used in contradiction to the word punitive detention.[38] In respect of preventive and punitive detention Justice Mukharjee observed: "A person is punitively detained only after a trial for committing a crime and after his guilt has been established in a competent court of justice. Preventive detention, on the other hand, is not a punitive but a precautionary measure. The object is not to punish a man for having done something but to intercept him before he does it and to prevent him from doing it. No offence is proved, nor any charge formulated and the justification is suspicion or reasonable probability and not criminal conviction which can only be warranted by legal evidence."[39]

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38 Supra note 8.

39 Ibid. *See* also Harding, A., Hatchard, J., (eds.), *Preventive Detention and Security Law*, Netherlands, 1993, at p. 4. Similarly, in *Harkishan Singh vs. State of Punjab*, AIR 1996 Punj 248, it was held that a person is under punitive detention as a result of conviction for some offence or where he is under preventive detention because of an order of detention having been made under the Defence of India Rules or the Preventive Detention Act. In *Francis Coraie Mullin vs. Administrator, Union Territory of Delhi*, (1981) 1 SCC 608, it was held that punitive detention is intended to inflict punishment on a person who is found by the judicial process to have committed an offence; while preventive detention is not by way of punishment at all, but is intended to pre-empt a person from indulging in conduct injurious to the society. In this context, M. Munir says: "The power of punitive detention is a precautionary exercise in reasonable anticipation of acts which may or may not relate to an offence. The power of preventive detention is qualitatively different from that of punitive detention. It is not a parallel proceeding. Every preventive reason is based on the principle that a person should be prevented from doing something, which if left unchecked, there is reasonable probability that he would do it. The proceedings against detenu are therefore necessarily based on suspicion as distinct from proof." Munir, M., *Constitution of the Islamic Republic of Pakistan*, Lahore, 1996, at p. 264. Alen Gledhill has expressed similar points of view. According to him, the order of detention "is founded not on proof of guilty by legal evidence but on the subjective satisfaction of an authority, empowered under the statute that his detention is necessary to prevent him acting to the prejudice of the security of Pakistan or of a Province or of the maintenance of the public order or for such other reason as the Statute lays down." Gledhill, Alen, *The British Commonwealth-The Development of its Laws and Constitutions*, vol. 8 Pakistan, London, 1957, at p. 130.

Few people have described both actions as restraint of individual's freedom and personal liberty.[40]

In *Rameshwar Shaw vs District Magistrate, Burdwan and another,*[41] the Supreme Court of India held:

> ...the past conduct or antecedent history of the person on which the authority purported to act, should ordinarily be proximate in point of time and should have a rational connection with the conclusion that the detention of the person is necessary. The first stage in the process is to examine the material adduced against a person to show either from his conduct or his antecedent history that he has been acting in a prejudicial manner. If the said material appears satisfactory to the authority, then the authority has to consider whether it is likely that the said person would act in a prejudicial manner in future if he is not prevented from doing so by an order of detention...It is obvious that before an authority can legitimately come to the conclusion that the detention of the person is necessary to prevent him from acting in a prejudicial manner, the authority has to be satisfied that if the person is not detained, he would act in a prejudicial manner and that inevitably postulates freedom of action to the said person at the relevant time. If a person is already in jail custody, how can it rationally be postulated that if he is not detained, he would act in a prejudicial manner? At the point of time when an order of detention is going to be served on a person, it must be patent that the said person would act prejudicially if he is not detained and that is a consideration which would be absent when the authority is dealing with a person already in detention.

In *Sasti vs. State of W.B.,*[42] Supreme Court of India elucidated the nature of " preventive detention" as a detention of a person without trial in such circumstances that the evidence in possession of the authority is not sufficient to make a legal charge or to secure the conviction of the detenu by legal proof, but may still be sufficient to justify his detention.

The preventive detention laws allow much unlimited powers to the executive authorities to arrest and detain a person. As a result when it comes within the subjective satisfaction of the executive authority that a certain person is going to commit prejudicial acts, he may be detained by an order of preventive detention and abstain him from doing that act. It is understood from experience and judgment of the court that many times

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40 Feldman, D., *Civil Liberties & Human Rights in England and Wales*, Oxford, 1993, at p. 169.

41 SCR 1964 Ind. 921.

42 (1973) I SCR 468.

the detaining authorities, in order to satisfy the government, violate fundamental rights as envisaged in the Constitution.

Justification for Preventive Detention

In considering the justification for preventive detention Lord Atkinson in *R vs Halliday*[43] observed:

> ...where preventive justice is put in force some suffering and inconvenience may be caused to the suspected person. This is inevitable. But the suffering is...inflicted for something much more important than his liberty or convenience, namely for securing the public safety and the defence of the realm.

And such preventive justice proceeds "upon the principle that a person should be restrained from doing something which, if free and unfettered, it is reasonably probable he would do, it must necessarily proceed in all cases, to some extent, on suspicion or anticipation as distinct from proof." Similar view also expressed by Lord Alfred Denning. He said:

if there are traitors in our midst, we cannot afford to wait until we catch them in the act of blowing up our bridges or giving our military secrets to the enemy. We cannot run the risk of leaving them at large. We must detain them on suspicion.[44]

In the same case *i.e.*, *Halliday's* case, Lord Finlay (the Lord Chancellor) observed:

> Any preventive measure even if they involve some restraint or hardship upon individuals, do not partake in any way of the nature of punishment, but are taken by way of precaution to prevent mischief to the state.

In construing the rationale of the existence of provisions regarding preventive detention in the Indian Constitution, the Supreme Court of India observed:

That appears to have been done because the Constitutions recognises the necessity of preventive detention on extraordinary occasion when control over public order, security of the country, etc., are in danger of breakdown. But while recognising the need of preventive detention without recourse to the normal procedure according to law, it provided at the same time certain restrictions on the power of detention, both

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43 Supra note 4. In the same case his Lordship defined preventive justice as one "...which consists in restraining a man from committing a crime he may commit but has not yet committed, or doing some act injuries to members of the community which he may do but has not yet done..."

44 Denning, Lord Alfred, *Freedom under the Law,* London, 1949, at p. 11.

legislative and executive, which it considers as minimum safeguards to ensure that the power of such detention is not illegitimately or arbitrarily used.[45]

Advisory Board and its Review

In Bangladesh

No person could be detained in preventive custody for a period exceeding six months without the intercession of the Advisory Board comprising of three persons, of whom two shall be persons who are, or have been, or are qualified to be appointed as, Judges of the Supreme Court of Bangladesh and the other shall be a person who is a senior officer in the service of the Republic.[46] Section 10 of the Special Powers Act, 1974 provides that in every case where a detention order has been made under this Act, the Government shall, within one hundred and twenty days from the date of detention under the order, place before the Advisory Board constituted under section 9 the grounds on which the order has been made and the representation, if any, made by the person affected by the order. So, if the grounds of detention are not placed before the Advisory Board within 120 days from the date of detention the detention will be illegal.[47] The Advisory Board shall, after considering the materials placed before it and calling for such further information as it may deem necessary from the Government or from the person concerned an opportunity of being heard in person, submit its report to the Government within one hundred and seventy days from the date of detention. The report of the Advisory Board shall specify in a separate part thereof the opinion of the Advisory Board as to whether or not there is sufficient cause for the detention of the person concerned. When there is a difference of opinion among the members of the Advisory Board, the opinion of the majority of such members shall be deemed to be the opinion of the Board. Nothing in this section shall entitle

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45 *Pankaj Kumar vs. State of West Bengal,* AIR 1970 SC 97.

46 Article 33(4), Constitution of Bangladesh and Section 9 of the Special Powers Act, 1974.

47 *Manik Chowdhury vs. Govt. of Bangladesh,* 27 DLR (1975) 295; *Sayedur Rahman Khalifa vs. Secretary, Ministry of Home Affairs,* 6 BLD (1986) DB 272; *Nafiza Mariam vs. State,* 39 DLR (1987) 50; *Sultana Ara Begum vs. Secretary, Ministry of Home Affairs,* 7 BLD (1987) DB 138; *Iftekhar Ahmed vs. Bangladesh,* 40 DLR (1988) 18; *Birendra Chandra Pal vs. State,* 40 DLR (1988) 319; *Khair Ahmed vs. Ministry of Home Affairs,* 40 DLR (1988) 353; *Mrs. Shahana Begum vs. Bangladesh,* 8 BLD (1988) DB 288; *Nazir Ali vs. Secretary, Ministry of Home Affairs,* 10 BLD (1990) HCD 258; *Md. Golam Hossain vs. State,* 11 BLD (1991) 54 and *Mrs. Samirannesa vs. Govt. of Bangladesh and others,* 14 BLD (1994) 206.

any person against whom a detention order has been made to appear by legal practitioner in any matter connected with the reference to the Advisory Board, and the proceedings of the Advisory Board and its report, excepting that part of the report in which the opinion of the Advisory Board is specified, shall be confidential.[48] In any case where the Advisory Board has reported that there is, in its opinion, sufficient cause for the detention of a person, the Government may confirm the detention order and continue the detention of the person concerned for such period as it thinks fit. It is provided that the Advisory Board shall, after affording the person concerned an opportunity of being heard in person, review such detention order, unless revoked earlier, once in every six months from the date of such detention order and the Government shall inform the person concerned of the result of such review.[49]

As regards the role of Advisory Board, Obaidul Huq Chowdhury says:

It is clear that the Advisory Board constituted under section 9 would not be functioning as a Court and not called upon to hold a trial of a detenu concerned; its function is limited to consideration of "the materials placed before it" by the Government and such other information from the Government and the detenu as it deems necessary and this is for the purpose of preparing its report refered *(sic)* to in section 12(1) of the Act, solely on the basis of material supplied. There is no investigation of the matter in order to arrive at a judgment as is usual in case of a trial before a Court in which both the sides, the prosecution and the detenu, enjoy full scope to lead its evidence in support of its case and subject the other party's statements to the test of a searching enquiry, besides making a full disclosure of each party's case to the other party. The report [under section 12(1)] to be submitted is one made 'after considering the materials before it" (that is the Board). There is no way of judging the accuracy of these materials or the sources from which they have been gathered, whether there are verified statements collected from reliable sources and not hearsays or rumours from any quarter tainted or otherwise. It seems the materials which come before an Advisory Board are treated as something guarded which the detenu is not allowed to see or have any access to; he is provided only with the grounds on which the order of detention has been made. When matters take a course like this it is difficult to say that justice has not been denied.[50]

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48 Section 11 of the Special Powers Act, 1974.

49 Ibid, Section 12,

50 Chowdhury, Obaidul Huq, *Special Powers Act*, Dhaka, 1996, at p. 49.

In India

The Constitution of India says that no law providing for preventive detention shall authorise the detention of a person for a longer period than three months, unless an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judge of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention.[51]

In Pakistan

In Pakistan, the term Advisory Board is known as Review Board. Explanation 1(i) to Article 10(7) of the Constitution of Pakistan says that Review Board means a Board appointed by the Chief Justice of Pakistan and consisting of Chairman and two other persons, each of whom is or has been a Judge of the Supreme Court or a High Court. The Review Board cannot pass an order of continuous detention for more than three months unless the Review Board has met, heard the detenu and gave opinion that there were sufficient causes for continuous detention.

The constitutional provisions for decision of the Advisory Board in Bangladesh, India and Pakistan are executive review of executive decision-making. It is apparent that the constitutions always keep those decisions outside the judicial decisions of the court. Those decisions also infringe the right of the detainees' from access to justice from independent and impartial tribunal, in direct violation of international human rights law including the Universal Declaration of Human Rights[52] and the International Covenant on Civil and Political Rights.[53]

Subjective Satisfaction of the Detaining Authority

Although it is said that the courts in England and America play vital role in establishing rule of law but it has no role to establish the rights of the person who has been detained under the preventive detention law. In this case, the opinion of the courts of these two countries is that if a person is detained under preventive detention law by the detaining authority in such case subjective satisfaction of the detaining authorities is enough and it cannot be a subject of consideration of the court. The doctrine of

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51 Article 22(4).

52 Article 10.

53 Article 14(1).

subjective satisfaction was first raised in *R. vs Halliday*[54] in Britain. In this case, Lord Finlay observed:

> … The question is whether there is ground for suspicion that a particular person may be disposed to help the enemy. The duty of deciding this question is by the order thrown upon the Secretary of State, and an advisory committee, presided over by a judge of the High Court, is provided to bring before him any grounds for thinking that the order may properly be revoked.[55]

It should be kept in mind that during the World War II, in England the Emergency Powers (Defence) Act, 1939 empowered the Executive to prepare Regulation 18B, which says:

> If the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations.… and that by reason thereof it is necessary to exercise control over him, he may make an order against that person directing that he be detained.

In 1942, the contention of subjective satisfaction was again significantly discussed in *Liversidge vs Anderson*[56] in Britain. In this case all the House of Lords except Lord Atkin held that the belief of the Secretary was subjective and the detention order cannot be scrutinised by invoking the objective satisfaction. Lord Atkin in his dissenting judgment observed:

> In this country, amidst the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law.

The majority view in the *Liversidge's* case had been the cause of much controversy in the Courts of law as well as in the forensic literature both in England and in India, as it purported to brush aside the distinction between the expression 'satisfaction on reasonable grounds,' as had been so long recognised in the authoritative judicial pronouncement.[57]

The general tendency of the Indian sub-continent Courts is to follow the decisions of the English Courts. So the Indian sub-continent Courts without any reservation followed the decision of the English Court in

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54 Supra note 4.

55 Ibid, at p. 269.

56 1942 AC p. 206.

57 *Abdul Latif Mirza vs. Govt. of Bangladesh and other,* 31 DLR (AD) (1979) 1.

Liversidge's case. It may be mentioned that the English Courts subsequently did not follow the decisions of *Liversidge's* case and adopted objective satisfaction in lieu of subjective satisfaction.[58] In India, the courts still support the subjective satisfaction of the detaining authority.[59] In *Ibrahim Ahmed vs State of Gujarat*[60], the Supreme Court of India is of opinion that if any executive authority desires to detain a person under the preventive detention law, in such a case the test would be subjective even if the court examines whether the detention order has been passed under the preventive detention law but the subjective satisfaction of the detaining authority will not be put to examine by the objective test. An exception to this view appears, however, to be the case of *Rameshwar Lal Patwary vs State of Bihar,*[61] where Hidayetullah, C.J. of the Indian Supreme Court appears to be virtually of the view that such opinion or satisfaction of a detaining authority should be objective in the sense that there must be some materials as the basis of such a view. Although the general trend of the Indian decisions is that the opinion or satisfaction of the detaining authority should be subjective, some objective elements have been introduced in such satisfaction by the requirement of the constitutional provisions and the specific detention laws, which provide that a person may be detained in order to prevent him from doing some particular kind of acts but that he shall have to be served with the grounds of his detention immediately after such detention in order to enable him to make a representation to the appropriate authority against such detention. The detaining authority is therefore obliged to disclose the grounds of his detention which must have some nexus with the statutory objects for which the detention is authorised and should be such as will enable the detenu to make an effective representation. The preponderant view of the Indian Judicial authority, no doubt, does not require the detaining authority to disclose the materials on the basis of which its opinion is formed because the subjective satisfaction of the detaining authority is not justiciable. Nonetheless, according to the said view, an order of detention can be struck down by a Court, on the ground of malafide, and also because of the reason that the ground of detention is not relevant to the

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58 The view of the majority in *Liversidge's* case was reverted in *Nakkuda Ali vs. Jayarante,* 1951 AC 66.

59 Ahmed, Naimuddin, "Law of Preventive Detention in Bangladesh", *in Public Interest Litigation in South Asia: Rights in Search of Remedies,* Supra note 14, at p. 109.

60 AIR 1982 SC 1500.

61 AIR 1968 SC 1303.

object of the law of detention or is totally non-existent. Even if the order of detention is found to be unexceptionable on such matters as have been just referred to, the Indian view holds, the detention may be declared to be illegal, if the detenu was not afforded the opportunity to make an effective representation against his detention at the earliest opportunity. For the said purpose, the detenu must be served with the grounds of his detention none of which should be vague, indefinite or illusory. If any one of the grounds of detention, as communicated to the detenu, is found to be irrelevant or non-existent or vague or uncertain, the detention is to be held to be illegal, despite the fact that the rest of the grounds do not suffer from any defects.

The Supreme Court of Pakistan appears to have made a departure from the said Indian view to a certain extent and has ultimately adopted the view that the requirement of the law is that the satisfaction of the detaining authority is not wholly subjective, but that it must have an objective basis which is amenable to a judicial scrutiny. [62]

Although the courts in Pakistan support the subjective satisfaction primarily, yet in Ghulam *Jilani vs Government of West Pakistan*[63] the judges abandoned the idea of subjective satisfaction. Cornelius CJ observed:

> The ascertainment of reasonable grounds is essentially a judicial or at least a quasi-judicial function. It is too late in the day to reply, as the High Court has done, on the dictum in the English case of *Livesidge* for the purpose of investigating the detaining authority with complete power to be the judge of its own satisfaction... Satisfaction of the detaining authority acting under rule 32 must be a state of mind, which has been induced by the existence of reasonable grounds for such satisfaction. The power of an authority acting under rule 32 is therefore, no more immune to judicial review than is the power of a police officer acting under rule 204 … Suspicion would include belief or knowledge, whether inferential or actual. On the same reasoning, it must follow that actions by other and perhaps higher authorities, under rule

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62 Supra note 57.

63 PLD 1967 SC 373. In this case, the validity of the detention order under Rule 32 of the Defence of Pakistan Rules, 1965 was challenged. Rule 32 says:

(1) The Central Government, if satisfied with respect to any particular person, that with a view to preventing him from acting in a manner prejudicial to the security, the public safety or interest or the defence of Pakistan the maintenance of public order, Pakistan's relations with the other power, the maintenance of peaceful conditions in any part of Pakistan, the maintenance of essential supplies and services or the efficient conduct of military operations or prosecution of war, it is necessary so to do, may make an order...

(b) Directing that he be detained,

32, like all other actions relatable to the power delineated in clause aforesaid, are equally susceptible of judicial review. [64]

Prior to *Jillani's* case the executive had monopoly power in preventive detention. Nevertheless, even after the epockmaking decision of this case, it is still considered that the executive has absolute power over preventive detention. The only contrast made is that "the subjective satisfaction of the executive has been made the subject-matter of scrutiny and examination by the Court which does not amount to enabling the court to substitute its own mind for that of the executive. The Court will only see whether on the allegations the satisfaction of the executive authority could be held to have been well-founded." [65]

After the liberation of Bangladesh the Supreme Court from the very beginning started to follow the objective satisfaction which was boldly declared by Lord Atkin. It has already been stated that in 1974, the Special Powers Act was passed with provisions of preventive detention in Bangladesh. Before enactment of this law, the first reported case regarding preventive detention was *Habibur Rahman vs Government of Bangladesh.* [66] But a

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64 In *Abul Baqi Baluch vs. Govt. of Pakistan,* 20 DLR (SC) (1968) 249, the court reaffirmed the principle of *Ghulam Jilani's* case. In this case, the Supreme Court of Pakistan held: "However, as I have said earlier, my reading of the majority decision in *Ghulam Jilani's* case to which I am a party, is that it alters the law laid down in *Liversidge's* case only to the extent that it is no longer regarded as sufficient for the executive authority, merely to produce its order, saying that it is satisfied. It must also place before a Court the material upon which it so claims to have been satisfied so that the court can, in discharge of its duty under Article 98(2)(b)(I), be in turn satisfied that the detenu is not being held without lawful authority or in an unlawful manner. The wording of clause (b)(I) of Article 98(2) shows that only the jurisdiction but also the manner of the exercise of that jurisdiction is subject to judicial review."

65 Rezaul Malik vs. Government of East Pakistan (1967) 19 DLR (Dac) 829.

66 26 DLR (HCD) (1974) 201. In this case, the court held: "if a person is arrested by the police on reasonable suspicion or he is ordered to be detained on the satisfaction of the detaining authority the materials which led the police to entertain reasonable suspicion against him or the materials upon which the detaining authority was satisfied regarding his involvement in any prejudicial act must be placed before the Court to justify that the suspicion entertained by the police was reasonable or that the satisfaction on the part of the detaining authority was reasonable. If the action of the police or of the detaining authority is challenged as malafide, the non-existence of reasonable suspicion on the part of the police, or of reasonable satisfaction on the part of the detaining authority would be sufficient to prove that the order of detention is malafide and therefore, illegal."

great dramatic change in preventive detention appeared in *Abdul Latif vs Government of Bangladesh.*[67] The court observed:

> The Constitution, therefore, has cast a duty upon the High Court to satisfy itself, that a person in custody is being detained under an authority of law, or in a lawful manner. The purpose of the Constitution is to confer on the High Court with the power to satisfy itself that a person detained in custody, is under an order which is lawful. Alongwith it, we are to keep in mind the provision of sec. 3 of the Special Powers Act, which gives the detaining authority a discretion to act under the Act, if it is of opinion, that a person's detention is necessary in order to prevent him from doing a prejudicial act. We, therefore, find that the Special Powers Act gives a wide discretion to the detaining authority to act according to its own opinion, but, on the other hand, the Constitution empowers the High Court to satisfy itself that a person is detained in custody under a lawful authority. The Bangladesh Constitution, therefore, provides for a judicial review of an executive action. It is well settled that a judicial review of an executive action does not imply that the Court is to sit on the order as on an appeal. But then, the Court is concerned to see that the executive authority has acted in accordance with law and it must satisfy the High Court that it has so acted. The Special Powers Act standing by itself emphasises that the opinion of the detaining authority to act is purely subjective, but the Constitution has given a mandate to the High Court to satisfy itself, as a judicial authority, that the detention is a lawful detention…. The High Court, therefore, in order to discharge its constitutional function of judicial review, may call upon the detaining authority to disclose materials upon which it has so acted in order to satisfy, that the authority has not acted in an unlawful manner.[68]

In *Ferdous Alam Khan vs State,*[69] the court held:

> If the executive authority passes any order without any material before him and or insufficient materials or without application of mind to the materials placed, it may lead to some unhappy consequences and, therefore, the superior courts of our country always favour the view that the subjective satisfaction of the authority can be looked into objectively by the High Court Division. This is based on the principle that one may look into a thing in a way and a man of natural understanding and experience may look at the same thing differently. That is why it has been said in regard to a judge of the English Court of Equity that the canon of an Equity Judge of England varies with the measurement of his feet.

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67 Supra note 57.

68 Ibid, at pp. 9-10.

69 44 DLR (1992) 603.

So, it is clear that preventive detention laws support the subjective satisfaction of the detaining authority and the case of preventive detention keep beyond the jurisdiction of court. Though the courts of Bangladesh and Pakistan have accepted the doctrine of objective satisfaction yet a completely different concept prevails in Indian courts. In such a way the strategy of depriving a person from getting access to law by detaining him under the Act, is a flagrant violation of international human rights law.[70]

Right to Counsel

The significant personal liberty is that an arrested person should be accorded all opportunities to engage counsel, and the counsel engaged should be provided reasonable opportunity to defend him. The person arrested has a right to have a purposeful interview with the legal practitioner out of the hearing of the police or jail staff, though it may be within their presence.[71] Article 33(1) of the Bangladesh Constitution, Article 22(1) of the Indian Constitution and Article 10(1) of the Pakistan Constitution guarantee the right to legal counsel, but Article 33(3)(b) of the Indian Constitution and Article 10(3) of the Pakistan Constitution strip this fundamental right from persons arrested or detained under preventive detention laws.[72] Such a denial is cruel, inhuman, oppressive and in short, violation of fundamental rights.[73]

Right to be informed of Grounds

Article 22(5) of the Constitution of India, Article 10(5) of the Constitution of Islamic Republic of Pakistan and Article 33(5) of the Constitution of Bangladesh say, when any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall communicate[74] to such persons the

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70 Article 9, Universal Declaration of Human Rights, 1948; Article 5, European Convention on Human Rights, 1950; Article 7(3), American Convention on Human Rights, 1964; Article 6, African Charter on Human and peoples' Rights, 1981; Article 9, International Covenant on Civil and Political Rights, 1966.

71 Munir, M., *Constitution of the Islamic Republic of Pakistan,* Supra note 39, at p. 259.

72 *See* also section 11(4) of the Special Powers Act, 1974.

73 *Abdul Ghani Hassan vs. Ketua Polis Negara* (2001) 2 MLJ 689.

74 In *Harikisan vs. State of Maharashtra,* AIR 1962 SC 911, it was held that communication means "imparting to the detenue sufficient knowledge of all the grounds on which the order of detention is based…. Communication…must mean bringing home to the detenu effective knowledge of the facts and circumstances on which the order of detention is made."

grounds[75], on which the order of detention is made.[76] It must be communicated 'as soon as may be'[77] but 'not later than fifteen days from the date of detention'[78]. If the grounds of detention are not communicated to a detenu 'as soon as may be', there would be an infringement of his fundamental rights.[79]

In *Fazal Ahmed vs State*[80] it was held that the words "as soon as may be" denote that the detaining authority would expeditiously enable the detenu by supplying the grounds to make a representation to the authority concerned. It is difficult to read the words "as soon as may be" to mean an indefinite period. The order of detention was illegal and void because of the extraordinary delay in communication of the grounds of detention.

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75 In *Shazia Parveen vs. District Magistrate*, PLD 1988 Lah 611, the court explained the expression "grounds" in the following words:

As there must be grounds on which the order has been made, there can be no order without grounds; therefore," grounds" are the basis supporting the order. Grounds are therefore the necessary substratum of fact upon which the satisfaction of detaining authority is founded.

76 *See* also Haider, S.M., *Judicial Review of Administrative Discretion in Pakistan*, Lahore, 1967, at p. 151.

77 Article 22(5) of the Constitution of India and Article 33(5) of the Constitution of Bangladesh. Mahmudul Islam says that ''as soon as may be'' means "as early as is reasonable in the particular circumstances of a case." Islam, Mahmudul, *Constitutional Law of Bangladesh*, Dhaka, 1995, at p. 176. In *Ghulam Muhammad Khan Loondkhawar vs. The State*, in explaining the words "as soon as may be", the court observed: "If these words 'as soon as may be' have the same meaning in clause (5) as they have in clause (1), or at least as near them as may be, then a delay of sixteen days clearly violates the constitutional safeguard. The grounds on which the detaining authority makes the order, must be known to it on the day when the order is made, and can ordinarily be served on the detenu along with the order of detention."

78 Article 10(5) of the Constitution of the Islamic Republic of Bangladesh and Section (1) of the Special Powers Act, 1974. In *Dr. Md. Habibullah vs. Secretary, Ministry of Home Affairs*, 41 DLR (1989) 160 it was held that the expression "but not later than fifteen days from the date of detention" does not give a general licence to the detaining authority to cause service of the order containing the grounds of detention in a leisurely way within 15 days in every case deliberately to deprive the detenu of this valuable legal right to make effective representation at the earliest possible opportunity to the authority or to move the court at once.

79 Pirzada, S. Sharifuddin, *Fundamental Rights and Constitutional Remedies in Pakistan*, Lahore, 1996, at p. 200.

80 PLD 1957 (Kar) 190.

The grounds of detention of a person must not be vague. In *State of Bombay vs Atmaram*[81] Kania CJ of the Indian Supreme Court observed:

> If the ground which is supplied is incapable of being understood, or defined with sufficient certainty it can be called vague…..It is, however, improper to contend that a ground is necessarily vague if the only answer of the detained person can be to deny it…..If on reading the ground furnished it is capable of being intelligently understood and is sufficiently definite to furnish materials to enable the detained person to make a representation against the order of detention it cannot be called vague.

Where the person arrested is illiterate, the grounds may be communicated to him verbally;[82] where he is literate, they are to be made in the language, which the detenu could understand.[83]

We have already mentioned that in Bangladesh and Pakistan, the authority making the order of detention must communicate within the stipulated time of 15 days to the person so detained, the grounds on which the order of detention has been made.[84] On most occasions, the authority does not furnish the grounds of detention within this period.[85] Sometimes the grounds supplied to the detenu are insufficient and inadequate to make a proper representation to the authority concerned.[86]

Even when the court has ordered the release of a detenu upon a finding that the order of detention was illegal and without lawful authority, the authority after releasing the detainee, in most cases, he is detained again and so on and so forth. In *Farzana Huq vs Bangladesh*[87], Sanaul Haq Niru was arrested and

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81 AIR 1951 SC 157.

82 *Juma Khan vs. Government of Pakistan,* PLD 1957 Kar 939.

83 *See* Munim, F.K.M.A.; *Rights of the Citizen under the Constitution and Law,* Dhaka, 1975, at p. 140.

84 In *Mrs. Samirannesa vs. Government of Bangladesh,* Supra note 47, it was held that the necessity of communication of the grounds of detention within 15 days has to be calculated from the date of detention but in view of section 9 of the General Clauses Act, 1897, the date of detention is to be excluded while computing this period.

85 *Sayedur Rahman Khalifa vs. Secretary, Ministry of Home Affairs,* Supra note 47; *Khair Ahmed vs. Ministry of Home Affairs,* Supra note 47; *Dr. Md. Habibullah vs. Secretary, Ministry of Home Affairs,* Supra note 78; *Alam Ara Huq vs. Government of Bangladesh,* 42 DLR (1990) 98; *Haji Md. Kashem Ali vs. Government of Bangladesh,* 11 BLD (1991) DB 361; *Haji Md. Jainul Abedin vs. Bangladesh,* 10 BLD (1990) 364; *Md. Shah Alam vs. Bangladesh,* 11 BLD (1991) HCD 428; *Shameem vs. Government of Bangladesh,* 47 DLR (1995) 109; *Muklesur Rahman (Md.) vs. Bangladesh,* 49 DLR (1997) 63.

86 *Nazir Ali vs. Secretary, Ministry of Home Affairs,* Supra notes 47.

87 11 BLD (1991) 553.

detained first on 13.9.1987 under the Special Powers Act. His wife, Farzana Huq, challenged his detention and the High Court Division declared his detention illegal on 10.5.1988. And an order was passed for his release. But he was not released. Another fresh order of detention was served against him on 29.9.1988 which was subsequently challenged and declared illegal. And the court directed his release. But he was not freed; rather he was served with another fresh order of detention which the court declared illegal. And the court directed the release of detainee. But he was not freed; rather another fresh order of detention was served. The matter came up before a Division Bench of the High Court Division. The Court observed:

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

Similarly, in *Alam Ara Huq vs Government of Bangladesh*[88], the court directed the release of the detenu. But the authority did not comply with the orders of the court. In this case, the court held:

> As we have stated before, the detenu was directed to be released by this Court on as many as two occasions in the past. The advance order of release was served on the respondents. Those orders were defied. Fresh orders of detention were served upon the detenu in jail on both the occasions without complying with the orders of this Court. We have directed the corpus of the detenu to be brought before us today in view of this exceptional situation in order to ensure that our order is carried out if we decide to release the detenu. We do hereby declare that the detenu Anjarul Huq has been detained without lawful authority and is being held in custody without lawful authority and in an unlawful manner. We direct his immediate release from these Court premises if not wanted in connection with any other case.

Rule of Law and Preventive Detention

Preventive detention laws confer on the detaining authority a wide discretion to act under the Act, if it is of opinion that a person's detention is inevitable for the purpose of restricting him from doing a prejudicial act. In this case, the detaining authority exercises arbitrary discretion. This arbitrary and wide discretionary power of the detaining authority is contrary to the concept of rule of law.

The position adopted by civil society groups and a significant cross-section of Bangladesh, Indian and Pakistan society is that the preventive

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88 Supra note 85.

detention law is a draconian and obnoxious law which undermines the rule of law and fundamental principles of human rights.

Remedies against Preventive Detention

Habeas Corpus Writ

Government illegally puts the opposition members into detention just for strengthening their power. If the detention is not in conformity with the provisions of the law under which he is purported to be detained, he may secure release by moving the courts of law.[89] If an individual is illegally detained he can invoke Article 102 of the Constitution of Bangladesh in the High Court Division of the Supreme Court by way of writ of *"habeas corpus"*[90]. The detenues of Pakistan may do so under Article 199 and those of India under Article 226 of their respective Constitutions. The detenu may seek remedy against his arbitrary detention through the writ of *habeas corpus*. The High Court/High Court Division, when satisfied that the detenu has been put into detention by the detaining authority arbitrari by, may declare that order as illegal and thereby order for immediate release. It is to be mentioned that there is no hard and fast rule for an application under the *habeas corpus* writ. This petition does not require any special class of people or person *i.e.*, any person can file a petition under this provision.[91] Thus the detenu himself[92], or his father[93], his wife[94], his son[95],

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89 Mahmood, Sh. Shaukat; *A Study of the Constitution of Pakistan*, Lahore, 1962, at p. 67.

90 In *Greece vs. Home Secretary,* (1941) 3 All ER 388 it was held that the full name of the writ of *habeas corpus* is *habeas corpus ad subjuciendum* (you have the body to submit or answer). It is applicable as a remedy in all cases of wrongful deprivation of personal liberty, where there is no legal justification for the detention. It is but a writ of remedial nature and cannot be used as an instrument of punishment. Halsbury's Laws of England, Simond Ed. vol. II, at p. 27. The history of the writ of *habeas corpus* is lost in antiquity. It was in use before Magna Charta, and exists in England as a part of the common law. It is intended and well adapted to effect the great object secured in England by Magna Charta, and made a part of the Constitution, that no person shall be deprived of his liberty without the process of law. This writ cannot be abrogated or its efficiency curtailed by legislative action. The privilege of the writ cannot even be temporarily suspended, except for the safety of the state, in cases of rebellion or invasion. 49 Amm. Rep. 505, 19 Am. Rep. 211.

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

92 *Charanjit Lal vs. Union of India,* AIR 1951 SC 41 (paras 43,81).

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

his sister[96], his relative[97], or even his friend[98] can apply. In the case of a minor, however, the application should be by a person who is entitled to the custody of the minor or to represent the minor legally, and in the absence of such person, by a person interested in the welfare of the minor[99] and the rule is the same in the case of a lunatic[100]. It may be stated here that most of the cases the court had found the grounds of detention to be vague, indefinite and weak grounds. In other cases, orders of release have been conferred for the following reasons: (i) government's unlawful authority in ordering detention; (ii) failure to inform the detenu of his right to representation; (iii) failure to state the grounds of detention within the statutory period; (iv) lack of nexus in between some of the reasons shown in the order of detention and the facts and reasons for detention as disclosed in the grounds; (v) detention for criticism of an ideology, which cannot be a prejudicial act in a society that permits political activity; (vi) failure to produce the detenu before the Advisory Board within a specified time; (vii) mixing of good grounds with bad ones; (viii) retrospective issuance of orders and (ix) government's failure to produce essential documents in court.

What happens in practise is that in spite of the order of the court for release of the detenu the detaining authorities pass fresh order of detention.[101] In such a situation the number of detained persons exceeding the number of persons ordered for release. Besides the detenues have got some difficulties in their access to court. For example, the detenu is not aware of this procedures and their relations along with themselves fail to contact with the lawyers and a remedy of this kind cost a big amount of money, say in Bangladesh the legal fees being over Tk. 10,000 (or U$ 160). Moreover the power of the detaining authorities not to disclose the grounds of detention[102] brings much difficulty and the detenu cannot claim any remedy before the court.

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94 *Begum Nazir Abdul Hamid vs. Pakistan,* PLD 1974 Lah 7.

95 *Province of East Pakistan vs. Hiralal,* PLD 1970 SC 399.

96 *Daley, Re* (1860) 2 F & F 258.

97 Supra 39 at p. 74.

98 *Rajdhar, RC,* AIR 1948 Bom 334.

99 *Raj Bahadur vs. Lehal Remembrancer* (1953) 47 CWN 507.

100 Ex parte Child (1854) 15 CB 238.

101 *Alam Ara Huq vs. Government of Bangladesh,* Supra note 85; *Farzana Huq vs. Bangladesh,* Supra note 87.

102 Section 8 (1), Special Powers Act 1974.

Suo Motu Rule

The judge of the High Court Division may, on the basis of a newspaper report/comment, proceed *suo motu*.[103]

Right to Compensation for Wrongful Arrest

The International Covenant on Civil and Political Rights, 1966 lays down in Article 9(5):

> Anyone who has been victim of unlawful arrest or detention shall have an enforceable right to compensation.

The Supreme Court of India in consideration of individual freedom for the first time passed an order for compensation in the famous *Rudul Sah vs State of Bihar*.[104] The court observed:

Administrative sclerosis leading to flagrant infringements of fundamental rights cannot be corrected by any other method open to the judiciary to adopt. The right to compensation is some palliative for the unlawful acts of instrumentalities which act in the name of the public interest and which present for their protection the powers of the State as a shield. Respect for the rights of individuals is the true bastion of democracy. Therefore, the State must repair the damage done by its officers to the petitioner's rights. It may have recourse against those officers.

The Supreme Court of Bangladesh does not usually approve compensation but there are certain exceptions. For example, in *Bilkis Akhter Hossain vs Government*[105] the court directed the state to pay compensation to the detenues. In this writ petition four leaders of BNP were arrested and detained under the Special Powers Act, 1974 in 1997 during the period of Awami League Government. Mrs. Bilkish Akhter Hossain, the wife of one of these four arrested leaders, Dr. Mosharrof Hossain submitted a writ petition before the High Court Division against the detention of her husband. The court declared the detention order illegal, passed order for immediate release of the detenues and to pay taka one lakh to each detenu as compensation. The court observed:

In the instant case it appears that the detainee's rights of freedom of movement (Article 36), the right of freedom to assemble (Article 37) and

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103 *State vs. D.C. Satkhira*, 45 DLR (1993) 643.

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

105 MLR Mainstream Law Reports, vol. 2, 1997 (Dhaka).

the right to protection of life and personal liberty (Article 32) as guaranteed by the constitution have been invaded by the detaining authority with malafide intention under the garb of the Special Powers Act. Considering the facts and circumstances of the case and provisions of law as considered above as well as the order and grounds of detention made in this case and also considering the materials on record, we are of the view that the detention of the detainee is absolutely illegal, without lawful authority and is made in an unlawful manner. Since the fundamental rights of the present detainee guaranteed under the Constitutions have been invaded and violated by the detaining authority maliciously as stated above, since the detainee has been depicted as a leader of the terrorists and provocateur and instigator of the saboteurs and thereby the detaining authority caused irreparable damage to his reputation, name, dignity, honour, prestige, image and social status in the eyes of the public at large, since all these scandalous, derogatory and defamatory news have been circulated through various Government news media, other news agencies, newspapers and journals of this country and abroad, since he was detached from his family members and deprived of his normal avocation of life for being subjected to inhuman mental and physical torture in jail for last 17 days, since such detention is malicious and malafide and made for political victimisation and since then detainee has been compelled to take shelter before this court for proper belief and redress and thereby he has been forced to spend a huge sum of money as litigation costs, we are of the view that the ends of justice will be met if we award a reasonable but exemplary lump-sum monetary compensation in favour of the detainee. Therefore, we assess such reasonable and rational lump-sum monetary compensation of Tk. 1,00,000/= (Taka one lakh only) to be paid by the Respondent Nos. 1 and 2 to the detainee considering the above reasons and sufferings of the detainee and his social position."

There is no provision for payment of compensation for illegal detention under the preventive detention laws. As a result the detaining authority exercises arbitrary and malicious discretion. Every year a huge number of politically opponent persons become detenues without committing any offence whatsoever. It will be surprising to know that a High Court Division Bench of the Supreme Court of Bangladesh declared 198 detentions illegal in a day. There is no example of such a huge detention cases being declared illegal in one day in the judicial history of Bangladesh.[106] The result of these judgments leads us to believe that the

[106] *The Prothom Alo,* 08 December 2002.

court is not satisfied on the order of detention passed by the government. So a provision for compensation in the preventive detention laws for illegal arrest and detention will restrain the detaining authorities from whimsically applying their power.

CONCLUSION

This study has been concerned with preventive detention and violation of human rights. The preventive detention laws have been applied since the British regime in India. As a result, a huge number of Hindus and Muslims of India were in detention.[107] Even after the independence from the misrule of the British, the Constitution makers of India in 1950 and those of Pakistan in 1956 and 1962 incorporated the provisions of preventive detention in the constitutions. When the Bengalis started armed conflict for independence, the Pakistani authorities recklessly arrested and detained countless innocent people. The politicians of Bangladesh promised not to incorporate the provisions of preventive detention in the constitution. As a result, the Constitution of Bangladesh, which came into effect on 16 December 1972, did not contain any provision for preventive detention, which was appreciated both at home and abroad. It guaranteed the fundamental rights to life and personal liberty, freedom of movement, freedom of assembly, freedom of association, freedom of thought and conscience, and of speech, freedom of religion and freedom of property etc. But on 22 September 1973, the politicians broke their commitment and enacted the Special Powers Act, 1974 by amending Article 33 of the Constitution through the Constitution (Second Amendment) Act. This amendment paved the way for enacting the Special Powers Act, 1974, which provides for preventive detention for all times.

The philosophy lying behind the preventive detention is the safety of the community at large, but may create an atmosphere which affects the community in general and liberty of the person in particular. It may warp popular attitudes towards law enforcement authority, particularly the police, until they become hated oppressors rather than reliable servants of the public will. It may provide an authoritarian opposition with the ammunition to accuse a democratically inspired regime of being itself anti-democratic, thereby commandeering the image of champion of democracy. It may cause a drawing together of society against government, bringing to a head the hankering for rebellion which was, previously, felt only by a minority. It may create a tendency towards elitist isolation among the leaders of government. Further, it may establish an example of repression,

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[107] Supra note 21, at p. 100.

which can be used subsequently by the unscrupulous leaders in order to stabilize their power. [108]

So those persons who are detained in pursuance of an order made under any law providing for preventive detention must not be kept in jail indefinitely. [109]

Personal liberty is a basic human right of every individual. [110] Preventive detention laws added fuel to the fire against personal liberty. It is an anathema to all those who love personal liberty. Preventive detention makes an inroad on the personal liberty of a citizen without the safeguards inherent in a formal trial before a judicial tribunal and …it must be jealously kept within the bounds fixed for it by the Constitution and the relevant law. [111] It is a general rule, which has always been acted upon by the courts of England, that if any person procures the imprisonment of another he must take care to do so by steps, all of which are entirely regular and that if he fails to follow every step in the process with extreme regularity the court will not allow the imprisonment to continue. [112]

The study reveals that preventive detention is serious violation of personal liberty of a citizen. The detaining authority, at its will, may detain anybody and this law provides the authority all immunities from liability. Consequently the detaining authorities misuse their power. Considering the above discussion the author ventures to put forward the following recommendations:

1. A Judicial Review should be held for those who are arrested under the preventive detention law.
2. If the preventive detention is to remain in the constitution, then there must be constitutional provisions describing certain limited period when the powers of preventive detention may be exercised.
3. Article 33(2) of the Bangladesh Constitution, Article 22(2) of the Indian Constitution and Article 10(2) of the Pakistan Constitution state that every person who is arrested and detained in custody shall be produced

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108 Supra note 15, at p. 46.

109 See Newman, K.J., *Essays on the Constitution of Pakistan*, 1956, Dacca; at p. 217.

110 *Muhammad Anwar vs. Government of Pakistan,* PLD 1963 Lah 109.

111 *Inderjit Singh vs. State of Delhi,* AIR 1953 Punj 52.

112 *Enraught's Case,* (1881) 6 QBD 376. In *Ram Krishna vs. State of Delhi,* AIR 1953 SC 318, the Indian Supreme Court observed: "Preventive detention is a serious invasion of personal liberty and such meager safeguards as the Constitution has provided against the improper exercise of the power must be jealously watched and enforced by the Court."

before the nearest magistrate within a period of twenty-four hours of such arrest. However under Article 33(3)(b) of the Bangladesh Constitution, Article 22(3)(b) of the Indian Constitution and Article 10(3) of the Pakistan Constitution, the detained person has been deprived of this opportunity and as such this provision should be repealed for the sake of human rights.

4. Judicial detention is preferable to executive detention.
5. The detenu must be held within the environs of the place where he usually resides.
6. The detenu should be given all reasonable opportunities like human repeatability.
7. The detenu must not be kept with regular convicts.
8. The detenu shall be informed immediately about the reasons of his arrest in details.
9. The relatives of the detenu should be promptly notified of the detention and transfer of the detenu.
10. The detenu must be allowed immediate and regular access to lawyer, family members and unbiased medical board.
11. The detenu shall not be subjected to torture and cruelty or other ill-treatment in detention. All allegations of oppressions should be quickly and immediately investigated and the persons against whom allegations of oppression are made should be answerable to the court.
12. According to Article 9(5) of the International Covenant on Civil and Political Rights, 1966 if any person is detained illegally he is entitled to get compensation other than public emergencies. So, the Government should add a provision in the constitution ensuring the right to compensation at least in peace time if any person is detained unlawfully.
13. The court orders should be obeyed entirely, immediately and strictly.

It is therefore necessary that in order to ensure the proper functioning of democracy and to maintain the standard of international human rights law, the recommendation stated above, should be properly adhered to, otherwise the dream of enforcing human rights will end in smoke. In such a dilemma the sincerity of the government will go a long way in enforcing human rights.