CONSTITUTIONALIZING PREVENTIVE DETENTION IN BANGLADESH: AN UNCONSTITUTIONAL BUT EFFECTIVE MEANS TO CURTAIL INDIVIDUAL LIBERTY

Written by ***Md. Ferdows Hossen***

Advocate, The District & Sessions Court, Dhaka, Bangladesh

ABSTRACT

The civilization's old right to individual liberty fell apart when the rulers idealized the concept of preventive detention to keep their power untroubled. Where the preventive detention starts to take place, the right to individual liberty begins to violate. Bangladesh was born as a secular state with a full guarantee of the right to individual liberty as well as safeguards against arbitrary arrest. But some monstrous events and dangerous turns in history forced it to rewrite its destiny afresh. This paper attempts to figure out what propelled our parliamentarians to introduce the draconian laws constitutionalizing and legalizing the preventive detention by illustrating the chaos arose from the constitutional amendments in question. It also argues that the basic structure doctrine and the principles of 'Legislative Purpose Test' turn the laws in Bangladesh legalizing the preventive detention unconstitutional. It further finds the Constitutional Court of Bangladesh as the last resort to have those black laws declared unconstitutional applying its supreme judicial review power within the current frameworks and limits of the constitution in reference to the landmark decisions of the American and Indian Constitutional Courts.

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INTRODUCTION

Scientism helped numerous secrets and super mysteries open to human history. It made almost everything possible that humans could not even imagine a century ago. But it cannot read humans' minds yet. It repeatedly fails to breach the wall of humans' insides. Surprisingly, when the rulers claim they can foretell and predict who amongst their citizens is likely to commit offense a day after tomorrow, the doubts creep into our minds that they probably have targets to exterminate the dissidents, and demoralize the different ideologies and take the rivals down. The Constitution Second Amendment Act, 1973, in Bangladesh, introduced the preventive detention measure first after its independence from Pakistan which blew away the century's old 'right to personal liberty' in a blink. By the second constitutional amendment, the government authorized itself to detain citizens for an indefinite amount of time, based on some mere suspicions that may or may not be true. Constitutionalizing this draconian law confronted the government's intention with a set of questions- were the people of Bangladesh going to be betrayed as before under the rule of British and Pakistani tyrants? Did the government want to extinct the political dissidents?

Nearly 50 years old preventive detention law remains intact still in Bangladesh. Ahead of every national election, political parties promise their people to outlaw this unconstitutionality. But when they come into power, they forget their promises and keep betraying their people years after years. They weaponize this law to extinct their political enemies, though they used to face the same fate when they were in the opposition a couple of years before. Perhaps, the Bengali nation loves to forget their wounds just after it gets healed. The people of Bangladesh already knew that no government will heal these 50 years old wounds because nothing can work more effectively like a razor blade than a preventive detention weapon to keep the power stable and untroubled as well as extinct the political dissenters. Preventive detention may occur during peacetime or in an emergency period. This paper covers preventive detention in peacetime only. I organize this paper into four parts. Part I conceptualizes and outlines the preventive detention. Part II flashes back into the history and current measures of the preventive detention laws in India only for the best to understand how this very democratic country deals with it. Part III illustrates the preventive detention laws and measures in the U.S.A, and finally Part IV discusses the legalization and constitutionalization of preventive detention laws in Bangladesh analyzing its historical background in an effort of finding out the true intentions of the lawmakers behind it. This Part also interprets the current provisions of our constitution in the

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light of the basic structure doctrine and the principles of the 'Legislative Purpose Test' and throws the constitutionality challenge to the laws constitutionalizing and legalizing the preventive detention in Bangladesh.

i. What is preventive detention and what does it behave like?

Detaining of a suspect to prevent future crime is preventive detention.[i] Though there is no authoritative definition of the term, using this extreme measure many countries developed a common precise idea that is to say; when the state authority apprehends someone likely to commit crimes, the authority detains suspects to prevent the would-be offense in an attempt to keep the society peaceful and danger free and the suspects may be detained for an indefinite amount of time without trial and getting no minimum protection of law like appearance before the magistrate within a short time, consulting with the lawyers, getting informed the grounds of detention, etc. Preventive detention is the quite opposite of individual liberty. Where preventive detention starts to take place, individual liberty begins to violate. For understanding the idea of the preventive detention better, we may take the view of John Stuart Mill on liberty, *"By liberty, was meant protection against the tyranny of the political rulers. The rulers were conceived (except in some of the popular governments of Greece) as in a necessarily antagonistic position to the people whom they ruled. They consisted of a governing One, or a governing tribe or caste, who derived their authority from inheritance or conquest, who, at all events, did not hold it at the pleasure of the governed, and whose supremacy men did not venture, perhaps did not desire, to contest, whatever precautions might be taken against its oppressive exercise"*.[ii] Supreme Court of India elucidated the nature of "preventive detention" as the 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.[iii]

ii. Preventive Detention in India:

The preventive detention in India dates back to 1818 when the British imperialists promulgated The Bengal State Prisoners' Regulation III, by which the Governor-General of British India and other provincial Governors enjoyed the unfettered powers detaining the citizens. No court of law and justice was authorized to question the legality of this preventive detention power exercised by the Governors.[iv] This detention without trial is a legacy of the colonial period to preserve and perpetuate British rule over India.[v] The laws and regulations, legalizing the

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detention without trial were gradually extended by the British imperialists in many provinces of India to suppress, take down, and exterminate the upsurges and the freedom movements against British imperialism. The Rowalt Act 1915 and The Defense of India Act 1939 were two of the draconian colonial laws institutionalizing the detention without trial.[vi] The freedom fighters and political leaders of the Congress[vii] suffered an indefinite period of imprisonment under these draconian laws at the hands of the British Rulers. In 1947, when the time came to rewrite the destiny of India by its citizens, the people of India expected the black laws of preventive detention shall be outlawed, but they were betrayed by their political leaders just after they earned their independence from British colonialists. Article 22 (1) (2) of The Indian Constitution, 1950, guarantees the fundamental rights of every citizen of being informed of the grounds and reasons for arrests, being brought to the nearest magistrate court within 24 hours from the time of the arrest and being consulted with his lawyer for the defense. On the contrary, Article 22(3), a proviso clause, made clauses 1 and 2 of Article 22 ineffective and meaningless by asserting that regarding preventive detention, a person may be detained for three months without trial or self-defense or even without informing of the grounds for detention. An arrestee under preventive detention may be detained without trial for more than three months, often an indefinite period subject to the recommendation of the Advisory Board, a subjective satisfaction executive body holding accountable to no judicial authority. This exception clause is a bare contradiction to another fundamental right to liberty clause as enshrined in Article 21 of The Indian Constitution, 1950. The Indian Parliament, under these constitutional provisions, enacted The Preventive Detention Act, 1950 which got validity from the apex court of India in the famous Gopalan case.[viii] This historic judgment inspired the Indian parliament to enact more draconian laws legalizing and institutionalizing preventive detention like The Maintenance of Internal Security Act, 1971 and the National Security Act, 1980, and finally, it embedded the preventive detention laws in its legal system permanently.[ix] Later on, in a series of cases, Indian Supreme Court warned the executive authority to be cautious in abusing the preventive detention laws, even, in some cases, the court tried to ensure some rights to the detainees within the limits of the preventive detention laws.[x] But the Indian Supreme court, which is constitutionally declared and assigned to be the guardian of the constitution and to check and guard the infringement of rights invoked herein, never questioned the constitutionality of these British-born black laws. Did the preventive detention laws of India pass the 'Legislative Purpose Tests' that I am going to discuss in detail with the case study of the U.S. Supreme Court? Can a Constituent Assembly contain a provision in its constitution

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curtailing the core human rights of the citizens? Does not incorporating a colonial black law into the constitution violate the very basic structure of the constitution? These crucial questions have remained unanswered still in India.

iii. Preventive Detention in the U.S.A:

Some facts of the detention without trial in the U.S.A. after it declared war on terror may surprise us. The terrible stories of detention without trial in Guantánamo Bay detention camp[xi] and Abu Gharib prison in Iraq[xii] may increase our heartbeat. Enacting the National Defense Authorization Act, 2012 (NDAA) by the United States Congress[xiii] made the whole world puzzled. A country that pioneered rule of law, personal liberty, right to life, due process of law, and tens of hundreds of legal doctrines guarantying human rights and individual liberty as well as who took the mission of democratizing the autocratic and non-democratic countries of the world, appeared ridiculous to the rest of the world.

A lawsuit was filed challenging the constitutionality of the NDAA law and a court in *Hedges v. Obama* case issued an injunction blocking the indefinite detention powers of the NDAA. On July 17, 2013, the Second Circuit Court of Appeals overturned the district court's permanent injunction grounding that the plaintiffs lacked legal standing to challenge the indefinite detention powers of the NDAA. The Supreme Court declined to hear the case on April 28, 2014, leaving the Second Circuit decision intact.[xiv] The NDAA law raises a series of controversies all over the world. As I discuss the preventive detention during peacetime in the U.S.A, hence; the preventive detention during an emergency period under the NDAA law does not receive the attention of this paper.

In the U.S.A., preventive detention during peacetime ensures every citizen- the right to consult with a lawyer, the right to know the reasons for arrest, and the right to trial by judicial officers or a court of law. But sometimes, judicial officers are authorized to deny the accused out on bail if the accused's criminal records and behaviors expose any threat or prejudice to society. In the Bell case, confinement of inmates awaiting a trial was challenged on the ground of violating due process of law as enshrined in the U.S. Constitution Fifth Amendment clause. The U.S. District Court for the Southern District of New York and the U.S. Court of Appeals for the Second Circuit found that preventive detention awaiting a trial is unconstitutional and a violation of due process. Upon preferring an appeal, on May 14, 1979, the U.S. Supreme Court overturned the lower courts' verdict and found the preventive detention constitutional.[xv]

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Five years after the *Bell*, the Supreme Court of the U.S. upheld the constitutionality of preventive detention of juveniles in the *Schall case.*[xvi] In this case, the Court reviewed a New York statute that authorized family court judges to detain juveniles for a maximum period of seventeen days if there is a serious risk that the accused will commit a crime while out on bail. In the *Schall*, the Court was asked to determine whether preventive detention of juveniles was compatible with the fundamental fairness required by due process.[xvii]

In 1984, Congress signed The Bail Reform Bill into Act authorizing judicial officers to detain an accused before trial if the officer determines that the accused is likely to commit a crime while out on bail pending trial.[xviii] Since this Act was passed, several times it was challenged before the courts of law through lawsuits for violation of the due process of law in the Constitution Fifth Amendment clause and excessive bail of the Constitution Eighth Amendment clause. In the MELENDEZ-CARRION case, the Second Circuit court, on June 02, 1987, rejected the petitioners' appeal giving opinion that preventive detention is in line with due process of law.[xix] In the *Salerno* case, the legality and constitutionality of The Bail Reform Act, 1984 were challenged again. The majority of judges of the Supreme Court of the U.S.A. decided that the Act in question which permitted the federal courts to detain an arrestee before trial if the government could prove that the individual was potentially a danger to society is constitutional. It is neither violation of the United States Constitution's Due Process Clause of the Fifth Amendment nor its Excessive Bail Clause of the Eighth Amendment.[xx] Justice Marshall a dissenter judge of the *Schall*, reasoned that "no diagnostic tools exist that would enable even the most highly trained criminologists to reliably predict future criminal behavior". In the *Edwards* case,[xxi] Judge Mack of the District of Columbia Court of Appeals concurred with Justice Marshall's view. Judge Mack referred to a study by the American Psychiatric Association which concluded that even psychiatrists cannot accurately predict criminal behavior.

Through *Bell and Schall's* cases, four legislative purpose tests were developed and The Bail Reform Act 1984 had to pass every test when the U.S. Supreme Court examined it. Scott D. Himsell used the term 'Legislative Purpose Test' first and he described it as under:

> *"The first factor is whether Congress expressed an intention to punish pretrial detainees. The second factor is whether Congress expressed an alternative intention to regulate the future behavior of the detainee. The third factor is whether preventive*

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> *detention is excessive in relation to Congress's alternative intention to regulate the future behavior of detainees and fourth factor is the duration of the detention without trial"*[xxii]

Every law dealing with preventive detention must go through legislative purposes tests and is to pass accordingly. On the other hand, preventive detention measures during peacetime in the U.S.A. appears quite judicial and maintain the due process of law clause as there is no intervention of military, executive authority, or any non-judicial body to decide the detention of an accused or suspect without trial.

iv. Preventive Detention in Bangladesh:

The Awami League, a political party of Bangladesh that led the liberation war in 1971 against Pakistan, and its leaders had to suffer the countless agony of black laws dealing and regulating preventive detention during the Pakistan period at the hands of Pakistani tyrants.[xxiii] When the time was come to adopt a democratic constitution for the newly born country; Bangladesh, Awami League took lessons from the disasters of Pakistan and decided to outlaw the black laws dealing with preventive detention, and accordingly the Constituent Assembly of Bangladesh did not contain any provisions of preventive detention in its constitution.[xxiv] But the evil spirit of Pakistan did not leave us and started haunting therefrom. Less than a year just after the Constitution of Bangladesh was into operation, a bill amending Article 33 and inserting four new clauses 3, 4, 5, and 6, constitutionalizing a long time controversial law dealing with preventive detention, were signed into the Act.[xxv] Following that amendment, a year later, another Act was enacted providing detailed measures and procedures to execute preventive detention.[xxvi]

This Act enables the government of Bangladesh to detain anybody whom the government seems is likely to commit any offense or prejudicial acts [xxvii]. The government may detain the suspects for seven months and twenty days without giving the arrestees the reasons for detention, consulting with their lawyers, and of course, getting no trial by a court of law.[xxviii] If the Advisory Board, a body that is formed, worked, regulated, and accountable solely upon the government's subjective satisfaction, reports that the apprehension of prejudicial acts by the arrestees may take place in the near or distant future, the government may detain the suspects or arrestees for an indefinite amount of time without trial.[xxix] The Advisory Board and the government are not liable or legally bound to disclose on what grounds they formed their

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opinions for the detention.[xxx] The legal black hole begins from here. No accountability, no responsibility, no rights, no constitutionality, nothing sustains here that every state is bound to ensure and swears to ensure to its citizens when it comes into operation.

Now let us see whether these two Acts in Bangladesh deal with preventive detention constitutional or not. I examine the laws under the 'Legislative Purpose Test' of the U.S. Supreme Court.

First and second: whether parliament expressed an intention to punish detainees arrested under preventive detention Acts? Whether preventive detention is excessive concerning parliament's alternative intention to regulate the future behavior of detainees?

The preamble of the Special Powers Act 1974 runs as "An Act to provide for special measures for the prevention of certain prejudicial activities, for more speedy trial and **effective punishment** of certain grave offenses and matters connected therewith". The preamble ensures a speedy trial but in the later provisions, there is no trial at all for the arrestees under this law. What did the lawmakers mean by 'effective punishment' may be understood better if we take the definition of "prejudicial act[xxxi]" from the Act which includes amongst others- prejudice to the sovereignty or defense of Bangladesh, the punishment for which runs life imprisonment [xxxii]; to prejudice the maintenance of friendly relations of Bangladesh with foreign states the punishment for which runs death penalty[xxxiii]; to prejudice the security of Bangladesh or to endanger public safety or the maintenance of public order the punishment for which runs death penalty;[xxxiv] to prejudice the economic or financial interests of the State the punishment for which runs death penalty.[xxxv] The harsh punitive measures indicate that the lawmakers had no intention to prevent some would-be crimes but to punish some target people. If we look back into the background of enacting the Act, it may look crystal clear that dozens of revolutionaries arose between 1973 to 1974. Their main target was to over through the government and lead the country towards a more effective democracy. But the government of Bangladesh planned to demoralize their ideology and take down their organizations and as accordingly passed the Act.[xxxvi]

The third: whether the parliament expressed an alternative intention to regulate the future behavior of the detainees?

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The Special Powers Act and The Constitution Second Amendment Act fail this third test outright because nearly 50 years elapsed since this Acts were promulgated but still the government or parliament could not provide any alternative measures to regulate the detainees' behaviors in question.

The fourth: Whether the duration of the detention without trial is excessive?

Under the preventive laws, the government of Bangladesh may detain the suspects for seven months and twenty days without giving the suspects the reasons for detention, consulting with their lawyers, and of course, getting no trial by a court of law.[xxxvii] Upon the recommendation of the Advisory Board, an executive body may detain the suspects for an indefinite amount of time without trial. The Tenth Circuit in the *Theron* case of the U.S.A. concluded that detention for four months without trial was too lengthy and thus unconstitutional.[xxxviii] But in Bangladesh, detention without trial under order of executive authority goes decades after decades.

The Special Powers Act and The Constitution Second Amendment Act contradict Article 32 of the Bangladesh Constitution which guarantees the right to life and the right to personal liberty. These Acts also violate American 'due process of law' which in Bangladesh has been spelled as 'in accordance with law' in Article 31 of our constitution. The detention of a person for years without trial and self-defense under an executive order in Bangladesh also violates a civilization's old principle 'presumption of innocence of the world criminal justice administration which has been invoked in Article 35 of our constitution.

John Stuart Mill in his ON LIBERTY portrayed the real motive of the governments in the case of preventive measure of crimes, "*The preventive function of government, however, is far more liable to be abused, to the prejudice of liberty, than the punitory function; for there is hardly any part of the legitimate freedom of action of a human being which would not admit of being represented, and fairly too, as increasing the facilities for some form or other of delinquency"*.[xxxix] The government in the name of 'greater interest' or 'keeping the society danger free' drives its hidden and secrete plans to extinct its dissidents.

As a promising signatory of the Universal Declaration of Human Rights, 1948, and International Covenant on Civil and Political Rights, 1966, Bangladesh cannot escape the obligations of Article 9 of both Treaties that ensure the right to personal liberty and safeguards against arbitrary arrest and detention without trial. On November 30, 2010, the International

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Court of Justice, in the Republic of Guinea v. the Democratic Republic of the Congo case, opined that every state party that signed International Covenant on Civil and Political Rights, 1966, is obliged to carry forward the mandates of the provisions contained herein the Covenant.

This serious deviation from the obligation of the international human rights law and contradiction with the constitution itself by the government of Bangladesh raises a question- can a parliament amend its constitution violating the international human rights law and breaching the basic structure doctrine of the constitution itself and turn it into a weaker one? In the Supreme Court of India in 1973 opined that the parliament cannot amend the constitution's basic structure.[xl] In 1989, Bangladesh Supreme Court opined that basic structures of the constitution cannot be amendable by the parliament.[xli] In defining the basic structure of the constitution, Shahabuddin Ahmed J said *"there is no dispute that the constitution stands on certain fundamental principles which are its structural pillars and if these pillars are demolished or damaged the whole constitutional edifice will fall down".*[xlii]

Personal liberty is not merely a right recognized by the most of the world constitutions but it is a right that is indefeasible, inherent, and never falling in nature which drove the major revolutions of the world[xliii] and caused the modern states to be shaped. Our historical struggles and long line movements for democracy, independence, rule of law, personal liberty, fair trial and due process of law from British period to Pakistan unequivocally witness that our constitution stands on some basic structures; personal liberty is one of them which cannot be taken down or weakened through amendment by any parliament. This two black laws' constitutionality never was challenged before any constitutional court of Bangladesh. In *Abdul Aziz*[xliv] and *Monowara Begum*[xlv] Cases, Supreme Court of neither Pakistan nor Bangladesh spoke about the laws' very constitutionality instead it tested only the duration of the preventive detention.

Section 54 of The Code of Criminal Procedure, 1898, provides an alternative measure to arrest and detain every would-be offender who is likely to commit crimes in society. Arrest and detention under section 54 are executed and enforced within the judicial norms and practices i.e. bringing the arrestee before the nearest magistrate within 24 hours since the arrest, allowing consulting with lawyers, and keeping in traditional jail where some fundamental rights of prisoners are ensured. Constant arbitrary use of this section 54 by the law enforcement authority made the provision impugned, thereafter, the controversy spread across the country which

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resulted in an intervention of the High Court Division of the Supreme Court of Bangladesh. In public interest litigation, a set of guidelines to prevent the abuse of the section were issued by the High Court Division of the Supreme Court of Bangladesh.[xlvi] While there is a century-old alternative regulation and measure to prevent and detain the suspects from committing crimes [xlvii], what made our lawmakers inspired to enact such draconian laws deal with preventive detention?

CONCLUSION

The century-long struggle for individual liberty and protection of law fell prostrate just after the government of Bangladesh legalized the preventive detention law and constitutionalized it thereafter by enacting The Constitution Second Amendment Act, 1973 and The Special Powers Act, 1974. These laws contradict Article 32 guarantying the right to personal liberty that is historically recognized as indefeasible, inviolable, inherent human rights categorized into one of the constitutional basic structures. On the other hand, these two laws fail the "Legislative Purpose Test" as developed in jurisprudence of the U.S. Supreme Court, to be stood enough legal and constitutional. The Supreme Court of Bangladesh is quite entitled to declare the laws legalizing the preventive detention unconstitutional within the current frameworks and limits of the constitution applying its supreme judicial powers.

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ENDNOTES

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