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# Incompatibility of the Special Powers Act with Constitutional Jurisprudence and Human Rights Norms: A Comprehensive Analysis

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## Abstract

In a free and democratic society based on the rule of law and other fundamental principles of justice and human dignity, the necessity for the criminal law in conformity with constitutional principles and mandates as well as international human rights discourse knows no bounds as the adoption of these norms and principles has ushered in a new dawn of criminal jurisprudence. So the state requires not to enact and to remain any oppressive, unjust and arbitrary law in force in order to ensure a just and fair criminal justice system. Nonetheless, such non-reasonable and disproportionate legislation is enacted in guise of removing the dichotomy between state security and protection of human rights. The Special Powers Act, 1974 is one of such obnoxious laws endangering liberty jurisprudence. There is no denying that this legislation violates many constitutional norms and is also ultra vires human rights instruments like the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and other international instruments that have been ratified by Bangladesh. In consequence, Bangladesh becomes obliged to respect, protect, fulfil, uphold and implement human rights. For this reason in peace time there remains no necessity of sustaining a black law like this due to its anti-human rights and fundamental rights characteristics. This paper aims to examine the incompatibility of the provisions of the Special Powers Act with constitutional and international human rights norms. At the same time it portrays the practical scenario of the indiscriminate use of the Act by the executive authority and the impacts of such misuse affecting an individual and his family as well as the state. At this paper the legal sustainability of this Act with the help of judicial activism will be assessed.

**Keywords:** Fundamental Human Rights, Incompatibility, Preventive Detention, Double Criminalization, Impact.

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## 1. Introduction

In the criminal justice system, the Constitution of a jurisdiction is contemplated as the primordial protector of the persons accused with criminal charges or of those kept in detention without trial. The enshrinement in the Constitution of certain rights and safeguards of the accused is universally recognized as a booming enterprise of preventing miscarriage of justice. The 1972 Constitution of the People's Republic of Bangladesh (hereinafter the Constitution)<sup>3</sup> proclaiming the national fundamental aim of realizing a society based on the rule of law, fundamental human rights and freedom, equality and justice, and mandating a just criminal system has been the yardstick to justify and measure the arbitrariness and unreasonableness of the criminal laws, and disproportionality of the punishment to the magnitude of the offences<sup>4</sup> and resultantly a law being unreasonable, arbitrary, unjust and disproportionate to the mischief sought to be remedied becomes unlawful and unconstitutional.<sup>5</sup> So every functionary of the state must justify its action with reference to law. Law does not mean anything which the legislature may pass. It must pass the test of reasonableness and non-arbitrariness within the ambit of Article 31 of the Constitution which imports due process imperative (though the term 'due process' has nowhere been mentioned) and thus prohibits arbitrary or unreasonable law or state action.<sup>6</sup> Nonetheless, the government of Bangladesh has legislated some draconian laws disobeying Constitutional and criminal jurisprudence acting in the belief of the notion that harsh laws will automatically lessen crimes by its deterrent effect as a result of which constitutional rights and safeguards are whetted down by imposition of pre-trial incarceration or detention without trial and severe punishment upon the accused.<sup>7</sup> So the adherence to basic constitutional norms bears much more significance owing to criminalization and imposition of invariable punishment telling upon a person's right to life and liberty. In the furtherance of administration of criminal justice, though the Constitution inserted certain most fundamental and universally accepted principles of criminal justice in mandatory nature and articulated 'due process model' as opposed to 'crime

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<sup>3</sup> Adopted on 4 December, and entered into force on 16 December, 1972. To gather a useful knowledge on the history of Bangladesh's Constitution-making, see Abul Fazl Huq, *Constitution-making in Bangladesh* (46:1, Pacific Affairs 1973) 59-76.

<sup>4</sup> Ridwanul Hoque, 'Criminal Law and the Constitution: the Relationship Revisited' [2007] Bangladesh Journal of Law 45.

<sup>5</sup> Mahmudul Islam, *Constitutional Law of Bangladesh* (2nd edn, Mullick Brothers 2008) 255.

<sup>6</sup> *Ibid* 61.

<sup>7</sup> Sharmin Jahan Tania, 'Special Criminal Legislation for Violence against Women and Children- A Critical Examination' [2007] Bangladesh Journal of Law 199.

control model<sup>8</sup>, the impact of these constitutional norms on the country's criminal legislation whether general or special is alarmingly disappointing and beyond legitimate expectation. In addition to this, a considerable number of ratified international human rights instruments have also imposed obligations upon Bangladesh to ensure a fair, effective, accessible, and just criminal justice system through the well-protection of criminal procedural safeguards and rights of the accused with a criminal charge.<sup>9</sup>

Despite having the constitutional and international obligation upon Bangladesh to enforce the non-derogable rights of the individual, the government has taken the policy of thrusting a black, draconian and obnoxious law like the Special Powers Act 1974<sup>10</sup> (hereinafter SPA), at the very earlier stage since the coming into force of the original Constitution, emphasizing more on the protection of the state security rather than private individual's rights and interests. Under this Act, the executive authority exercises unfettered power overwhelmingly, arbitrarily and whimsically. So this Act is one of the most controversial legislations for the time being in force as the civil liberties to life and personal freedom are directly encroached upon by arrest, detention without trial and restrictions on movement<sup>11</sup> though the protection of the accused's right to a fair and just trial reliant on the preservation of his certain other human rights got an international recognition as the paramount impetus of a criminal justice system devised to achieve the rule of law.<sup>12</sup> It derives the legality and validity of moving its body and limbs in 1974 from the newly inserted provisions in Article 33 by amendment to the original Constitution through the Constitution (Second Amendment) Act 1973.<sup>13</sup> This Act is commonly known as preventive detention law leading to serious encroachment upon the civil liberties of an individual. Although there exists preventive

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<sup>8</sup> The primary goal of 'due process model' is justice. This model emphasizes on the rights of the individuals in the process of criminal adjudication. It is enunciated as constituting such rights of the accused as the right to protection against unlawful, unreasonable and arbitrary arrest and detention; the right to counsel and legal defense and to be informed of grounds of arrest, detention and charge; the right to be presumed innocent until proved guilty, the right to be tried in an impartial and independent court or tribunal; the right of freedom from inhuman, cruel or degrading punishment or treatment; the right to enforce certain other human rights; and the right against self-criminalization. On the other hand, 'crime control model' explicates the regulation of the criminal behavior as the most important function of the judicial system by imposition of harsh punishment influenced by deterrent theory of punishment.

<sup>9</sup> Hoque (n 4).

<sup>10</sup> Act No XIV of 1974.

<sup>11</sup> Sara Hossain, Shahdeen Malik and Bushra Musa (eds), *Public Interest Litigation in South Asia: Rights in Search of Remedies* (the University Press Limited 1997) 143.

<sup>12</sup> Hoque (n 4).

<sup>13</sup> Act No XXIV of 1973.

detention laws directly or indirectly in all the countries of the world,<sup>14</sup> any law like this Act begetting the scope of bewildered arbitrary exercise of the executive power is nowhere in the contemporary world. This Act was comprehensively enacted to achieve two purposes as enumerated in the preamble<sup>15</sup> to the Act which, among other things, authorizes taking special measures for the prevention of certain prejudicial activities, for more speedy trial and effective punishment of certain grave offences such as sabotage, hoarding, black-marketing, counterfeiting, smuggling, adulteration, restriction on freedom of press, restriction on association, ban on religion-based politics etc. But the most notable matter under the Act is the provision for preventive detention<sup>16</sup> of individuals by the executive authority on the suspicion of involvement with certain prejudicial acts against the state without charging them with a criminal offence. This Act gives room for sweeping powers to the executive to arbitrarily detain people for length of time along with creating fathomlessness and lawlessness of justifying and challenging its action before a court of law though liberty jurisprudence permitted by law is beyond the clutches of deviation from the people's constitutional rights and international human rights norms.

This paper will try to assess the incompatibility of the SPA with basic constitutional norms and international human rights instruments. This paper will critically examine the most important question of whether the SPA has complied with fundamental, mandatory and normative constitutional principles of justice, equality and fairness; constitutional rights, guarantees, safeguards and fundamental human rights, human dignity and worth of the accused; including judicial interpretations as well as the rule of law along with international obligation to adhere to criminal justice principles and the accused's rights jurisprudence reflected in international human rights laws. For the fulfilment of this paper, a

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<sup>14</sup> 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) Ordinance 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 Terrorism (Temporary Provisions) Act 1979.

<sup>15</sup> An Act to provide for special measures for the prevention of certain prejudicial activities, for more speedy trial and effective punishment of certain grave offences and for matters connected therewith.

<sup>16</sup> The term 'preventive detention' is used in contradistinction to the term 'punitive detention'. Preventive detention means detention of a person without trial and conviction by a court, but merely on suspicion in the minds of the executive authority where the executive is authorized to impose restraints upon the liberty of the individuals who are apprehended to commit acts which are prejudicial to public safety and state security. On the other hand, punitive detention means the detention of a person only after trial for committing a crime and after his guilt has been proved in a competent court of justice beyond reasonable doubt.

comprehensive analysis based on theoretical jurisprudence and practical impact of the use of the SPA is earnestly needed. This paper concludes by arguing the question of whether the viability of the SPA remains in existence.

## 2. Incompatibility of the SPA with Constitutional Jurisprudence and Human Rights Norms

The great Charter ‘Magna Carta’ signed in 1215 is the first instrument of human rights on the basis of which all of the international human rights instruments are framed.<sup>17</sup> In the history of human rights, the adoption of the Universal Declaration of Human Rights (hereinafter UDHR) in 1948 was the landmark step where universality of human rights is proclaimed for all peoples throughout the world as the first international instrument and some of the rights i.e. right to equality, right to life, liberty and security have partaken of the character of ‘*jus cogens*’ – fundamental norms from which no derogation is allowed.<sup>18</sup> Like many other countries, Bangladesh ratifying eight out of nine core human rights treaties including the International Covenant on Civil and Political Rights of 1966 (hereinafter ICCPR) becomes obliged to respect, protect and fulfil human rights under international law.<sup>19</sup> In the contemporary world, human rights have become dominant ideology since these rights received almost universal recognition by people of all creeds and all societies. Human rights are now regarded as *sine qua non* for the holistic development of human personality.<sup>20</sup>

Human Rights are moral norms or principles which are generally meant as inalienable fundamental rights to which all human beings are inherently entitled since birth irrespective of their nation, location, language, ethnic origin or any other status simply for the very reason that they are human beings.<sup>21</sup> These rights are protected as legal rights in international and domestic law and are sometimes identified with fundamental rights as being guaranteed by the constitution of a country. Without ensuring these rights in efficacious manner, no state can surface its existences and

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<sup>17</sup> Taru Faizunnessa, ‘Application of Fundamental Rights of Bangladesh Constitution: An Analysis on the Light of International Human Rights Instruments’ (2016) 46 Journal of Law, Policy and Globalization 40.

<sup>18</sup> Abdullah Al Faruque, *International Human Rights Law: Protection Mechanism and Contemporary Issues* (New Warsi Book Corporation 2012) 18-19.

<sup>19</sup> JAMAKON Report to the UN Human Rights Committee 4.

<sup>20</sup> Faruque (n 18) 2.

<sup>21</sup> Md Abdul Halim, *Constitution, Constitutional Law & Politics* (3rd edn, Human Development Foundation, 2006) 93.

intrinsic disciplinary action. If the state fails to ensure the best protection of such rights, it unleashes its acceptance from its citizens. The Government is the savior and knight in illuminating armor of such rights of its citizen. So, the Government being responsible should ensure the protection of the people's rights so that no question may arise as to the infringement of human rights by the law enforcing agencies.<sup>22</sup> Today throughout the world infringement of human rights is a major concern. Bangladesh is not an exception because human rights violations have become endemic and its remedies are mostly non-existent. The law enforcement agencies are often accused of abusing their powers and defying human rights. So there is always a must to have a balance in the social and national life between the rights of the individuals and safeguards provided as to secure the rights of the same as these rights should not be taken away except as a result of due process.

However, all international and regional documents of human rights recognize and make provisions for derogation of rights in case of emergency and of national crisis but when such rights are arbitrarily curtailed then the question of infringement arises.<sup>23</sup> The infringement of these rights is mostly caused by the arbitrary exercise of power by the law enforcing forces through different domestic laws. The SPA is such kind of law which is deemed by human rights activists and other members of civil society as a repressive and draconian law. The use and abuse of this Act in guise of protecting the security of the state has resulted in a steady pattern of the violations of constitutionally guaranteed rights and international human rights norms.<sup>24</sup>

### **A. Infringement of Right to Life, Imposition of Harsh Punishment and Double Criminalization**

The right to life is the most fundamental of all human rights, without which all other rights are meaningless. Pursuant to the provisions of the Constitution and international human rights norms, Bangladesh is obliged to take pragmatic measures to ensure the right to life of individuals. A combined reading of Articles 31<sup>25</sup> and 32<sup>26</sup> of the Constitution enshrines

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<sup>22</sup> Rabiul Islam, 'The Power of the Police and Human Rights Situation under Section 54 and 167 of the CrPC: A Critical Evaluation' (2016) 1 *The Millennium University Journal* 56.

<sup>23</sup> Md Nazir Ahmed, 'Preventive Detention, Violation of Individual Human Rights: An Overview from Bangladesh Perspective' (2015) 5:1 *Manarat International University Studies* 84.

<sup>24</sup> Suraya Momtaz, 'Human Rights Violations in Bangladesh: A Study of the Violations by the Law Enforcing Agencies' (2013) 4 *Mediterranean Journal of Social Sciences* 112.

<sup>25</sup> Article 31 of the Bangladesh Constitution says, 'To enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every

that no deprivation of right to life is permissible except in accordance with law. But international human rights instruments such as ICCPR, UDHR and the Convention for protection of Human Rights and Fundamental Freedoms mandates the state to vividly ensure the protection of right to life with no exceptions.<sup>27</sup> The term ‘in accordance with law’ envisaging ‘due process law’ similar to the American Constitution concept prohibits the legislature from enacting an unreasonable or arbitrary law and attracts a person adversely affected by any state action detrimental to life to have constitutional remedy.<sup>28</sup> So the fundamental rights as postulated in Articles 31 and 32 of the Constitution which the state cannot deny by unreasonable or arbitrary action or inaction<sup>29</sup> can be interpreted as giving a person a right not to be interfered with the enjoyment of right to life by passing arbitrary or draconian legislation in the name of state security.

It’s pertinent to mention here that protection of life means one’s life cannot be endangered by any illegal action of any person or authority.<sup>30</sup> While interpreting right to life, the case of *Dr Mohiuddin Farooque v. Bangladesh*, the most glaring example, gives an extended and more liberalized interpretation observing that the term ‘right to life’ means a meaningful life- man can live with dream and dignity. It excludes anything which might affect the enjoyment and protection of life<sup>31</sup> and cannot be only confined to taking away of life but means something more than mere animal existence.<sup>32</sup> It includes the right to live orderly with human dignity and decency<sup>33</sup> and the inhibition against detrimental action extends to all those limbs and faculties by which life is enjoyed.<sup>34</sup> So no deprivation of right to life through sentencing policy of the state is permissible save in accordance with fair, just and reasonable procedure established by law.<sup>35</sup>

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citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law’.

<sup>26</sup> Article 32 of the Bangladesh Constitution says, ‘No person shall be deprived of life or personal liberty save in accordance with law’.

<sup>27</sup> According to Article 6 of the ICCPR ‘Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life’. Article 3 of UDHR says, ‘Everyone has the right to life, liberty and security of person’. Article 2 of the Convention for protection of Human Rights and Fundamental Freedoms depicts that everyone’s right to life shall be protected by law.

<sup>28</sup> Islam (n 5) 172-181.

<sup>29</sup> *Maneka Gandhi v. India* [1978] AIR 620 (SC).

<sup>30</sup> *Giasuddin v. Dhaka Municipal Corporation & others* [1997] 49 DLR 199.

<sup>31</sup> [1996] 48 DLR 438 (HCD).

<sup>32</sup> *Munn v. People of Illinois* 94 US 113.

<sup>33</sup> *Vikram v. Bihar* [1988] AIR 1782 (SC).

<sup>34</sup> *Saiakh Abdur Rahman & Others v. State* 15 BLT 326 (AD).

<sup>35</sup> *Bachan Singh v. State of Punjab* [1980] AIR 898 (SC).

Moreover, the legislature can prescribe sentences within the constitutional limit i.e. bar to enact legislation in breach of fundamental rights<sup>36</sup>, every person's right to be treated in accordance with law<sup>37</sup>, no subjection 'to torture or to cruel, inhuman or degrading punishment or treatment'<sup>38</sup>. These constitutional bars can be considered as having conferred on the accused a right against unreasonable criminal laws.<sup>39</sup> Therefore, the upper judiciary in Bangladesh can strike down a punishment as unconstitutional because of having 'everyone's right to judicially enforce fundamental rights'<sup>40</sup>, its 'authority to issue any appropriate direction or writs to enforce these rights'<sup>41</sup> as well as 'the principle of legality'<sup>42</sup> as interpreted as giving the accused to have effective and just constitutional remedies.<sup>43</sup> It is undeniable that the SPA known as preventive detention law is almost by definition arbitrary and unreasonable as the person detained virtually for an indefinite period has neither committed nor been convicted of any offence<sup>44</sup> but in anticipation of his involving certain vaguely defined prejudicial activities<sup>45</sup> and the enactment of such draconian law 'in accordance with law' does not make all these administrative detentions legal and proper as the grounds for detention being automatically satisfied<sup>46</sup>, and is in violative of Article 31 of the Constitution being so demonstrably unreasonable or arbitrary.<sup>47</sup>

It is axiomatic that one of the basic principles of criminal jurisprudence is the quantum of punishment should be controlled by the doctrine of proportionality between the sanction and the gravity of the offence<sup>48</sup> as the imposition of a rational and proportionate sentencing to the magnitude of harm inflicted on society materializes a sound criminal justice system.<sup>49</sup>

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<sup>36</sup> The Constitution of the People's Republic of Bangladesh, Art. 26(2).

<sup>37</sup> (n 25).

<sup>38</sup> The Constitution of the People's Republic of Bangladesh, Art. 35(5),

<sup>39</sup> Hoque (n 4) 54.

<sup>40</sup> The Constitution of the People's Republic of Bangladesh, Art. 44.

<sup>41</sup> The Constitution of the People's Republic of Bangladesh, Art. 102(1).

<sup>42</sup> The Constitution of the People's Republic of Bangladesh, Art. 102(2).

<sup>43</sup> Hoque (n 4) 54.

<sup>44</sup> Shahdeen Malik, 'Arrest and Remand: Judicial Interpretation and Police Practice' [2007] Bangladesh Journal of Law 264.

<sup>45</sup> Hoque (n 4) 65.

<sup>46</sup> Malik (n 44) 265.

<sup>47</sup> *Sohan Ajmee v. Commissioner of Customs* WP 1882 of 2000 (unreported) (Whether law is reasonable is to be seen through the eyes of the legislators; if the legislators thought it to be so, it cannot be unreasonable.)

<sup>48</sup> Andrew Ashworth, *Principles of Criminal Law* (Clarendon Press 1991) 58.

<sup>49</sup> Abdullah Al Faruque, 'Goals and Purposes of Criminal Justice System in Bangladesh: An Evaluation' [2007] Bangladesh Journal of Law 10.



Nevertheless, in Bangladesh a contemporary legislative trend of enacting harsh penal laws envisaging severe and often disproportionate punishments to combat offences or to thwart the rate of crimes<sup>50</sup> and to regulate the law and order situation denying social dimension of the problem goes inexorable<sup>51</sup> owing to having dreadfully eroded the constitutional principle of justice and due process of law by these penal laws which, constitutionality of which is dubious, tend to create serious human rights implications for the accused.<sup>52</sup> Under many criminal laws of Bangladesh, the imposition of harsh punishments is provided for many trivial offences which are out of proportion to the gravity of the offence.<sup>53</sup> In modern age of human rights, when the sentencing policy is becoming more and more rational and reformatory theory is becoming more and more popular with penologists, such widespread prescription of death penalty as a mode of punishment is incompatible with modern trend of correctional approach, constitutional & criminal jurisprudence and international human rights standard.<sup>54</sup> In democratic and welfare states, penal reforms have shifted punitive measures from death penalty becoming the exception and restricted to the 'rarest of rare cases' to life imprisonment becoming the rule.<sup>55</sup> But in Bangladesh, death penalty remains indispensable characteristic of almost every special criminal statute. Like many other statutes<sup>56</sup>, the SPA also prescribe harsh punishments i.e. death sentence for ordinary and petty offences such as for hoarding<sup>57</sup>, counterfeiting currency-notes and Government stamps<sup>58</sup>, adulteration of, or sale of adulterated food, drink, drugs or cosmetics<sup>59</sup>, and attempt of such offences<sup>60</sup> etc. The sentence may be in the reflection of the

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<sup>50</sup> Hoque (n 4) 64.

<sup>51</sup> Faruque (n 49) 10.

<sup>52</sup> Hoque (n 4) 64.

<sup>53</sup> Faruque (n 49) 12.

<sup>54</sup> *Ibid* 12.

<sup>55</sup> Mahendra P Singh, 'Capital Punishment: Perspective and the Indian Context' in R. S. Agarwal and Sarvesh Kumar (eds), *Crimes and Punishment in New Perspective* (Mittal Publication 1986) 28-40.

<sup>56</sup> The Penal Code 1860 prescribes death sentence for eight kinds of offence. Apart from the Penal Code, death sentence has been prescribed for kidnapping or abducting a minor under the Criminal Law Amendment Act 1958; keeping arms under the Arms Act 1878, causing explosion under the Explosive Substance Act 1908. After emergence of Bangladesh, a large number of criminal statutes were enacted prescribing death sentences for various crimes. The statutes that prescribe death sentence include the Emergency Power Act 1975; the Terrorism Control Act 1992, the Suppression of Oppression of Women and Children Act 2000, the Acid Offences Act 2002 etc.

<sup>57</sup> The Special Powers Act 1974, S. 25.

<sup>58</sup> The Special Powers Act 1974, S. 25A.

<sup>59</sup> The Special Powers Act 1974, S. 25C.

<sup>60</sup> The Special Powers Act 1974, S. 25D.

degree of injury or loss caused by the convict.<sup>61</sup> Sentence should be proportionate to the gravity of offence.<sup>62</sup> It should not be too harsh or more lenient.<sup>63</sup> The High Court Division encapsulates that so much light sentence relating to gravity of offence makes the administration of criminal justice ludicrous.<sup>64</sup> So imposition of proper and appropriate sentence is combination of many factors i.e. nature of offence, mitigating and aggravating circumstances of which a balancing ambience should be drawn up before subjecting a person to sentence.<sup>65</sup> Therefore, it is indubitable that the SPA is in violative of Article 32 of the Constitution as being failed the test of reasonableness of, and disproportionate to, the punishment prescribed.<sup>66</sup>

It also needs to be mentioned that the presidential clemency under Article 49<sup>67</sup> of the Constitution is of fundamental relevance to the administration of criminal justice as its object is to ensure that the rights of the accused to his life and liberty are not breached by a harsh law or judicial pronouncement or owing to ineffaceable mistakes of the legal process.<sup>68</sup> However, such kind of clemency is a matter of grace not right for the convict.<sup>69</sup> Therefore, the President's power of pardoning sentence particularly death sentence is often abused and controversial as in the absence of proper rules and standard guidelines for exercising such power.<sup>70</sup>

It is also inextricably evident that many provisions on offences under the SPA are already covered by the Penal Code.<sup>71</sup> It refers to double criminalization<sup>72</sup> which has a plenty of negative impacts stating in the way

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<sup>61</sup> E Green, *Judicial Attitudes in Sentencing* (Macmillan & Co. 1961).

<sup>62</sup> *Md. Yahia and Others v. State* [1966] 1 MLR 59 (HC).

<sup>63</sup> Tureen Afroz, 'Sentencing Practices in Bangladesh' [2007] Bangladesh Journal of Law 121.

<sup>64</sup> *Nurun Nabi (Mohammad) v. Sahin Alam alias Shahin and others* [2003] 8 MLR 218 (HC).

<sup>65</sup> *State v. Anjuara Khatun* [2005] 57 DLR 277.

<sup>66</sup> Islam (n 5) 196.

<sup>67</sup> Article 49 of the Bangladesh Constitution contemplates that the President of Bangladesh invokes a prerogative of mercy by which s/he has a power to grant pardons, reprieves and respites and to remit, suspend or commute any sentence passed by any court, tribunal or other authority.

<sup>68</sup> Hoque (n 4) 54.

<sup>69</sup> A convict is also not entitled to oral hearing from the President, the matter being entirely within the discretion of the President. See Tureen Afroz, 'Sentencing Practices in Bangladesh' [2007] Bangladesh Journal of Law 121.

<sup>70</sup> *Sarwar Kamal v. State* [2012] 31 CLC (HCD).

<sup>71</sup> See section 4C of Schedule to the Special Powers Act 1974 (amended in 1991 by Act of XVIII) by which sections 376, 385 and 387 of the Penal Code 1860 have been punishable under the former.

<sup>72</sup> Double criminalization denotes the situation where the same conduct is made punishable under two or more different laws. This arise the problem of whether it is allowed to prosecute an

that further criminalization of most of offences already defined and enshrined in general criminal law leads to duplication of efforts often at the cost of efficiency of relevant authorities;<sup>73</sup> most of newly defined crimes creates a scope of their misuse and extensive discretion in application;<sup>74</sup> and penalizing the same act under more than one legislation can create problem of procedural multiplicity and consequential confusion.<sup>75</sup> This apparently inescapable shift towards double criminalization does not mirror popular notions of justice and consequently is habitually flouted.<sup>76</sup> Resultantly, this law cannot dream of shielding protection rather than derogation of right to life. Therefore, it is said to be deviated from constitutional jurisprudence and international human rights norms.

## **B. Infringement of Right to Liberty, Protection from Arbitrary Arrest and Detention and Freedom of Movement**

Freedom from arbitrary arrest and detention is constitutionally guaranteed as Art. 32 of the Constitution encapsulates this freedom saying that no person shall be deprived of life or personal liberty save in accordance with law. The genesis of the right to personal liberty and the implied protection against arbitrary arrest is traditionally traced to the French Declaration of Rights of Man and the Citizen 1789 as well as the first Ten Amendments of the American Constitution of the same span of time (1791), though the nucleus of this freedom can also be unearthed in earlier instruments such as the Bill of Rights 1689 (of England).<sup>77</sup> In modern age, international human rights instruments such as UDHR<sup>78</sup> and ICCPR<sup>79</sup> have unequivocally enshrined the right to personal liberty and freedom from

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accused under either of the two provisions or whether the subsequent law has the consequence of repealing the relevant provisions of earlier law. See Faruque (n 49) 5.

<sup>73</sup> *Ibid* 5.

<sup>74</sup> Shahdeen Malik, 'Laws of Bangladesh' in A.M. Chowdhury and Fakrul Alam (eds), *Bangladesh on the threshold of the Twenty-First Century* (Asiatic Society of Bangladesh 2002) 444.

<sup>75</sup> Faruque (n 49) 5.

<sup>76</sup> Malik (n 74) 445.

<sup>77</sup> Malik (n 44) 262.

<sup>78</sup> According to Article 3 of the UDHR 1948, 'Everyone has the right to life, liberty and security of person'.

<sup>79</sup> According to Article 9 (1) of the ICCPR 1966, 'Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law'. Please see also Art. 5(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 [hereinafter European Convention]; Article 6 of the African Charter on Human and People's Rights 1981 [hereinafter African Charter]; Article 7(1)-(3) of the American Convention on Human Rights 1969 [hereinafter American Convention]; and Article 55(1)(d) of the Statute of the International Criminal Court [hereinafter ICC Statute].

arbitrary arrest with no exceptions whereas the Bangladesh Constitution restricts this right on grounds of national security and public order to the effect that certain types of arrest and detention are legal even though in derogation of liberty jurisprudence.<sup>80</sup> These exceptions are legislated by preventive detentions laws which empower the executive to preventively detain citizens on the plea of deterring certain prejudicial acts and thereby such denial of liberty is exercised ‘in accordance with law’ meaning that deprivation of personal liberty must require the essence of ‘in accordance with law’ (American concept ‘due process of law’) not only when deprivation is legally authorized but also when the requirements implanted in the authorization have been painstakingly complied with<sup>81</sup>. So the deprivation of liberty permitted by law is not disproportionate, unjust or unpredictable as well as discriminatory;<sup>82</sup> and that’s why derogation is permitted only by reasonable and non-arbitrary law; and liberty jurisprudence must be judged by such reasonableness<sup>83</sup>. For this reason, the curtailment of liberty right whimsically and arbitrarily would suffer from no legality and will be unreasonable or arbitrary and void in terms of Article 32. Hence, right to liberty is meant to have restricted the power of the state to arrest a citizen only on the belief of having reasons that a citizen has committed a crime; and continued denial of liberty right would be possible only upon conviction, through a fair and open trial, on a charge of having committed a punishable offence and, hence, the resultant denial of liberty upon conviction.<sup>84</sup> Nonetheless, the State has made the SPA so far the most infamous piece of legislation, derogating the liberty and human security of the people making provisions for the administrative detention of anyone virtually for indefinite period in anticipation of his involving in certain vaguely defined prejudicial activities<sup>85</sup> and such acts are incompatible with the ICCPR which bans retroactive punishment for

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<sup>80</sup> Malik (n 44) 262.

<sup>81</sup> *Ibid* 262.

<sup>82</sup> Manfred Nowak, *UN Covenant on Civil and Political Rights* (CCPR Commentary, NP Engel 1993) 173.

<sup>83</sup> A law providing for deprivation of life or personal liberty must be objectively reasonable and the court will inquire whether in the judgment of an ordinary prudent man the law is reasonable having regard to the compelling, not merely legitimate governmental interest. It must be shown that the security of the organized society necessitates the deprivation of life or personal liberty. See Islam (n 5) 193.

<sup>84</sup> Malik (n 44) 262-264.

<sup>85</sup> The Special Powers Act 1974, s. 2(f). It says- ‘prejudicial act’ means any act which is intended or likely- (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 public; (viii) to prejudice the economic or financial interests of the State.

actions that were not clearly defined before the commission of the act.<sup>86</sup> This Act empowered the District Magistrate to order the detention of such person for 30 days and the Government to order the detention for 120 days.<sup>87</sup> Mere satisfaction of the government or Magistrate has been made enough for the order of detention. In this way, though curtailment of liberty jurisprudence requires objective satisfaction, the detaining authority being satisfied subjectively can detain the person. Pertinently the court adjudged that the curtailment of the right to life and liberty being fundamental rights requires justification by reports and materials and not by mere satisfaction of the Government<sup>88</sup> as liberty right is sacrosanct and cannot be taken away by the state without due process of law<sup>89</sup> and denial of the rights of the detainee is contrary to Article 32.<sup>90</sup> Therefore, the judiciary can interfere with an order made in a careless manner depriving a man of personal liberty by declaring such order as with no legal authority.<sup>91</sup> In the case of *Habibullah Khan v. S. A. Ahmed*<sup>92</sup> the Appellate Division held that it is not only the government but also the court must be satisfied that the detention is necessary for the public interest.

More significantly, Article 33 of the Constitution grants an arrestee or detainee four constitutional safeguards which are (i) the right to be informed of the ground of arrest as soon as possible<sup>93</sup>, it is immaterial to inform him of the full details of the alleged offence<sup>94</sup> but sufficiency of information is justiciable and its insufficiency would render the arrest unlawful<sup>95</sup>; (ii) right to be produced before a magistrate within 24 hours excluding journey period from the place of arrest to the court of the magistrate<sup>96</sup>, failure to comply with this requirement would render further detention illegal<sup>97</sup> (iii) right to consult and be defended by a legal practitioner of his choice<sup>98</sup>, and to make an effective and meaningful representation, the grounds served must contain sufficient particulars;<sup>99</sup>

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<sup>86</sup> See Article 15(1) of the ICCPR 1966.

<sup>87</sup> The Special Powers Act 1974, S. 3.

<sup>88</sup> *Anisul Islam Mahmood and others v. Government of Bangladesh* [1991] 20 CLC (HCD).

<sup>89</sup> *Huidrom Konungjao Singh v. State of Manipur & Others* [2012] 7 SCC 181.

<sup>90</sup> *Farzana Haq v. Government of Bangladesh* [1991] 11 BLD 553.

<sup>91</sup> *Krishna Gopal v. Govt. of Bangladesh* [1979] 31 DLR 145 (AD).

<sup>92</sup> [1983] 35 DLR 72 (AD).

<sup>93</sup> The Constitution of the People's Republic of Bangladesh, Art. 33(1).

<sup>94</sup> *Government of East Pakistan v. Mrs. Rowshan Bijaya Shaukat Ali Khan*, 18 DLR 214 (SC).

<sup>95</sup> *Vimal v. UP* [1956] AIR 56; *Madhu Limaye v. Punjab* [1959] AIR 506.

<sup>96</sup> The Constitution of the People's Republic of Bangladesh, Art. 33(2).

<sup>97</sup> *UP v. Abdus Samad* [1962] AIR 1506 (SC).

<sup>98</sup> The Constitution of the People's Republic of Bangladesh, Art. 33(1).

<sup>99</sup> *Habiba Mahmud v. Bangladesh* [1993] 45 DLR 89 (AD).

and (iv) right not to be detained for a period longer than 24 hours plus journey time without the magistrate's authorization.<sup>100</sup> Though any law or action incompatible with these rights is void,<sup>101</sup> these constitutional protections become inapplicable to an enemy alien and an arrestee or detainee under preventive detention law<sup>102</sup> and accordingly the SPA. But Article 33 (4) & (5) confers three constitutional safeguards for a detainee under such law. Firstly, the detainee has the right not to be detained more than six months except under the authority of the Advisory Board<sup>103</sup> if the government wishes. He has the right to be produced before the Board. If the Board gives its opinion to the government before the conclusion of the said period that there exists sufficient cause for detention, only then government can detain him more than six months.<sup>104</sup> If such opinion is affirmatively not given by the Board, the detainee has to be released on expiry of six months.<sup>105</sup> However, the Board cannot opine as to how long the detention should continue.<sup>106</sup> It is for the detaining authority to decide on the detention period and the approval by the Board is only a defence against vagaries and arbitrariness of the detaining authority.<sup>107</sup> However, the Board being a quasi-judicial body with the responsibility of advising the executive cannot be said to be independent in giving its opinion without any intervention of the executive.<sup>108</sup> In the case of *Ranabir Das v. Ministry of Home Affairs*, the High Court Division observed that a detention order is made *malafide* when it is repugnant to the object and purpose of the act or when the detaining authority allows him to be influenced by conditions which he ought not to allow.<sup>109</sup> As to the procedure of the Board, Parliament can enact law which must pass the test of reasonableness under Art. 32.<sup>110</sup> Secondly, the detainee has to be communicated the detention grounds by the detaining authority as soon as possible.<sup>111</sup> Although by using the expression 'as soon as may be' the

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<sup>100</sup> (n 96).

<sup>101</sup> Islam (n 5) 198.

<sup>102</sup> The Constitution of the People's Republic of Bangladesh, Art. 33(3).

<sup>103</sup> The Advisory Board shall consist 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 and the other shall be a person who is a senior officer in the service of the Republic.

<sup>104</sup> The Constitution of the People's Republic of Bangladesh, Art. 33(4).

<sup>105</sup> *Monowar Begum v. Secretary, Ministry of Home Affairs* [1989] 41 DLR 35.

<sup>106</sup> *Dattatraya v. Bombay* [1952] AIR 181 (SC).

<sup>107</sup> *Puranlal v. India* [1956] AIR 163 (SC).

<sup>108</sup> Halim (n 21) 304.

<sup>109</sup> [1976] 28 DLR 48 (HCD).

<sup>110</sup> The Constitution of the People's Republic of Bangladesh, Art. 33(6).

<sup>111</sup> The Constitution of the People's Republic of Bangladesh, Art. 33(5) (The word 'as soon as may be' is not defined in the Constitution. It means that the grounds must be communicated to the detainee within reasonable time.)

Constitution left the time indeterminate to allow the detaining authority reasonable time to formulate grounds, it cannot permit dilatoriness.<sup>112</sup> The expression refers to the time when the order is made.<sup>113</sup> But in its section 8, the SPA providing for not later than 15 days to inform the grounds of the detainee from the date of detention order<sup>114</sup> can be interpreted as deviation from constitutional jurisprudence and incompatible with Article 9(2) of the ICCPR.<sup>115</sup> So the Supreme Court of Bangladesh can examine the legality and manner of passing detention order and observed that service of the grounds of detention to the detainee under such law is mandatory.<sup>116</sup> Thirdly, the detainee has the right to make an effective representation against the detention order.<sup>117</sup> So the detaining authority has to inform this right of the detainee and failure to inform may make the continued order illegal.<sup>118</sup> In the case of *Md. Sekandar Ali v. Bangladesh*, the HCD declaring a detention order made under section 3 of the SPA illegal, adjudged that the government must serve the detainee specific grounds for detention so as to enable him to make an effective representation.<sup>119</sup> However, the authority can refuse to disclose the grounds which it considers against public interest to disclose.<sup>120</sup> Here lies the crux of the problem. Resultantly, second and third constitutional rights become quite meaningless as right to representation hinges on right to communication of grounds. If the latter is not ensured, the former also becomes ineffective.<sup>121</sup> So the detainee has only one right to enjoy-right to be personally produced before the Board and the question of that right sees the day light after the expiry of 6 months as section 10 of the SPA provides that the government shall place the detention grounds and the representation, if any, made by the detainee before the board within 120 days from the date of detention and the Board has to submit its report to

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<sup>112</sup> Islam (n 5) 204-205.

<sup>113</sup> *G.M. Loondhkar v. State* [1957] PLD 497.

<sup>114</sup> Section 8 (2) of the SPA says, ‘ In the case of a detention order, the authority making the order shall inform the person detained under that order of the grounds of his detention at the time he is detained or as soon thereafter as is practicable, but not later than fifteen days from the date of detention’.

<sup>115</sup> Article 9 (2) of the ICCPR states, ‘ Anyone who is arrested shall be informed, at the time of the arrest, of the reasons for his arrest and shall be promptly informed of any charges against him’. Please see also Article 5(2) of the European Convention; Article 7(4) of the American Convention; Principle 10 of Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UN General Assembly resolution 43/173, December 9, 1988; Paragraph 2(B) of the 1992 Resolution on the Right to Recourse Procedure and Fair Trial of the African Commission on Human and Peoples’ Rights.

<sup>116</sup> *Abdul Latif Mirza v. Government of Bangladesh* [1979] 31 DLR 41 (AD).

<sup>117</sup> The Constitution of the People’s Republic of Bangladesh, Art. 33(5).

<sup>118</sup> *Jayendra Thakur v. India* [1999] AIR 3517 (SC).

<sup>119</sup> 42 DLR 346 (HCD).

<sup>120</sup> The Constitution of the People’s Republic of Bangladesh, Proviso to Art. 33(5).

<sup>121</sup> Halim (n 21) 302-304.

the government within 170 days from the date of detention order.<sup>122</sup> In addition to, section 10 of the SPA saying that the government can detain a person without trial for as long as 120 days is also incompatible with Art. 9(3) of the ICCPR stating that “anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.”

Many can argue here that as the Act, being a preventive detention law, the detainee has no right to be informed of the detention grounds as soon as possible, and therefore not informing him of the grounds as such is no violation of the Constitution but it is a violation of international human rights instruments<sup>123</sup> as ICCPR has manifestly proclaimed that an arrestee shall be informed of the grounds of any charges against him and his arrest promptly and at the time of arrest respectively.<sup>124</sup> Apart from this, any law derogating freedom from movement will be void under Art. 32 being failed the test of reasonableness. In this sense, detention derogating personal liberty can also be interpreted as deviation from constitutionally guaranteed and universally recognized right to freedom from movement and resultantly the SPA can be said to be violative of the Constitution and human rights law.<sup>125</sup>

It is undeniable that liberty jurisprudence and protection from arbitrary arrest and detention is affected by the SPA. It is also well recognized that the formulation of the eight prejudicial acts as laid down in section 2(f) (i) of this Act is general in nature, enabling the government to include almost any conceivable act or suspicion within the ambit of one or the other of these formulations and resultantly a detainee initially arrested under Section 54<sup>126</sup> of the Code of Criminal Procedure, 1898 may be later

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<sup>122</sup> Halim (n 21) 304.

<sup>123</sup> Md. Shahjahan Mondol, ‘Repealing the Special Powers Act, Law and our rights’ *Daily Star* (Dhaka, 31 March 2007).

<sup>124</sup> Article 9 (2) of ICCPR says, ‘Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him’.

<sup>125</sup> Article 36 of the Bangladesh Constitution says, ‘Subject to any reasonable restrictions imposed by law in the public interest, every citizen shall have the right to move freely throughout Bangladesh, to reside and settle in any place therein and to leave and re-enter Bangladesh’. According to Article 13 of UDHR, ‘everyone has the rights to freedom of movement, residence within the borders of each state’. Similarly, Article 12 of the ICCPR, Article 15 of the American Convention on Human Rights, 1969 and Article 10 of the African Charter on Human & Peoples’ Rights, 1981 talk about the right to freedom of movement.

<sup>126</sup> Section 54 of Code of Criminal Procedure 1898 states- (1) Any police-officer may, without an order from a Magistrate and without a warrant, arrest-

Firstly, any person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received, or a reasonable suspicion exists of his having been so concerned;



detained and charged under the SPA.<sup>127</sup> In addition, such preventive detention law suffers from legal infirmity as the executive authority subject to its satisfaction often take the advantage of detaining a person under its colourful exercise and of using as a weapon to dominate, crush the opposition and to perpetuate rule.<sup>128</sup> Many times the detaining authority violates constitutional rights to satisfy the executive in many ways. Firstly, if any person who is actually criminal is arrested under the general law, then that person must be brought before the Magistrate within 24 hours<sup>129</sup> but there is no provision to bring a suspected person before the Magistrate arresting him under the SPA within such period. Resultantly, a person without bringing before the Magistrate can put in detention month after month. In India<sup>130</sup> and Pakistan<sup>131</sup>, the initial period of detention without trial is three months but in Bangladesh, that period is six months. This is a bad process because nowhere in the world exists such a long period.<sup>132</sup> Secondly, Neither the Constitution nor the Special Powers Act did specify any maximum period of detention. So a person can be detained for indefinite period if the advisory board gives an affirmative opinion whereas the maximum period in India is 2 years and in Pakistan 8 months in a year<sup>133</sup> though detention without trial is contrary to the doctrine of

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secondly, any person having in his possession without lawful excuse, the burden of proving which excuse shall lie on such person, any implement of house-breaking;

thirdly, any person who has been proclaimed as an offender either under this Code or by order of the Government;

fourthly, any person in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing;

fifthly, any person who obstructs a police-officer while in the execution his duty, or who has escaped, or attempts to escape, from lawful custody;

sixthly, any person reasonably suspected of being a deserter from the armed forces of Bangladesh;

seventhly, any person who has been concerned in, or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been concerned in, any act committed at any place out of Bangladesh, which, if committed in Bangladesh, would have been punishable as an offence, and for which he is, under any law relating to extradition or under the Fugitive Offenders Act, 1881, or otherwise, liable to be apprehended or detained in custody in Bangladesh;

eighthly, any released convict committing a breach of any rule made under section 565, subsection (3);

Ninthly, any person for whose arrest a requisition has been received from another police-officer.

<sup>127</sup> JAMAKON (n 19) 15.

<sup>128</sup> Halim (n 21) 293-298.

<sup>129</sup> The Constitution of the People's Republic of Bangladesh, Art. 33.

<sup>130</sup> The Indian Constitution, Art. 22(4).

<sup>131</sup> The Pakistan Constitution, Art. 10(7).

<sup>132</sup> Halim (n 21) 305.

<sup>133</sup> Halim (n 21) 305.

presumption of innocence (Article 14(2) of ICCPR)<sup>134</sup> as the subject of criminal investigation must be gauged as innocent at all stages of criminal proceedings irrespective of the probable consequence of the trial.<sup>135</sup> Thirdly, in most democratic countries like USA, UK, and Singapore, such detention is a method resorted to be in emergencies like war but in Bangladesh it can be applied in both peace and emergency period. Because of having no such specification in our constitution, it can be used at any time as a weapon to dominate, crash the opposition and to perpetuate rule and a large number of political activists and leaders are detained without trial under the SPA<sup>136</sup> which causes massive violation of right to liberty, prohibition of arrest and detention, and freedom of movements.

### **C. Infringement of the Principle of Natural Justice and Due Process of Law**

Like the concept of justice, the principles of natural justice seen as embodiment of requirements of procedural fairness are supposed to have universal significance. The principles of natural justice are not merely philosophical abstraction; rather they have fathomless pertinence in every conception of administration of justice to posit the executive authorities to act fairly.<sup>137</sup> According to IP Massey, ‘natural justice represents higher procedural fairness developed by judges, which every administrative agency must follow in taking any decision adversely affecting the rights of a private individual. It enjoys no express constitutional status.’<sup>138</sup> As Choudhury opines, “the principles of natural justice operate as checks on the freedom of administrative action. Where a statute confers on an administrative authority coupled with wide discretion, the possibility of its arbitrary use can be controlled or checked by insisting on their being in manner which can be said to be procedurally fair.”<sup>139</sup> In fact, violation of natural justice results in arbitrariness and jurisdictional error.<sup>140</sup>

Natural justice reiterates that harsh law, if there be two parallel laws, should not be applied to an accused as his right to fair trial cannot be

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<sup>134</sup> According to Article 14 (2) of ICCPR, ‘Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law’.

<sup>135</sup> PJ Schwikkard, ‘The Presumption of Innocence: What is it?’ (1998) 11 South African Journal of Criminal Justice 403.

<sup>136</sup> Halim (n 21) 298-305.

<sup>137</sup> Abdullah-Al Faruque, *Natural Justice- From Principles to Practice* (Palal Prokaashoni 2013) 8.

<sup>138</sup> IP Massey, *Administrative Law* (Eastern Book Company 1995) 144.

<sup>139</sup> Tapas Gan Choudhury, *Penumbra of Natural Justice*, (Eastern Law House 1997) 4.

<sup>140</sup> Islam (n 5) 482.

possible under such law.<sup>141</sup> That no person should be deprived of his right without hearing before an independent authority is the essential feature of the principle of natural justice.<sup>142</sup> More importantly, the High Court Division adjudged that prolonged mental suffering caused to the petitioner hanging him under suspension about 22 months without framing any charge is against the principle of natural justice.<sup>143</sup> Therefore, it is no denying the fact that the nexus between right to fair trial and natural justice is well established.

It's germane to postulate here that the principles of natural justice are applied to administrative process to ensure procedural fairness.<sup>144</sup> In applying these principles, balancing the competing interests of administrative justice and the exigencies of efficient administration is a crying need.<sup>145</sup> Procedural fairness meaning equality of treatment with people in the procedure<sup>146</sup> is always central to the administration of justice as the sense of fair treatment in dealing with people in accordance with the law is an important and indispensable element in any society purporting to be just.<sup>147</sup> Application of natural justice is also evident to be a requirement for due process which covers presumption of innocence and privilege against self-incrimination as discussed earlier. Due process is a right to a procedure, a right to have one's treatment determined as per some prescribed method; and the moral basis of such a legal or constitutional right would be grounded in the notion that citizens have a right to be treated justly by the state.<sup>148</sup>

It is well recognized that the principles of natural justice have found concrete expression in international human rights law. UDHR, ICCPR and the European Convention on Human Rights and Fundamental Freedoms, 1950 as well as the Bangladesh Constitution recognize right to fair and public hearing of any criminal charge against an accused by an independent and impartial tribunal established by law.<sup>149</sup> So an enquiry

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<sup>141</sup> *State v. Anjila Debi* [2009] 61 DLR 743 (HCD).

<sup>142</sup> *Samsuddoha v. Bangladesh* [2008] 13 MLR (HCD).

<sup>143</sup> *Zulfikar Mahmud v. National University* [2008] 60 DLR 40 (HCD).

<sup>144</sup> Islam (n 5) 482.

<sup>145</sup> *Helaluddin v. Bangladesh* 45 DLR 1 (AD).

<sup>146</sup> Michael D Bayles, *Procedural Justice Allocating to Individuals* (Kluwer Academic Publisher 1990) 3.

<sup>147</sup> DJ Galligan, *Due Process and Fair Procedures* (Clarendon Press 1996) 5.

<sup>148</sup> David Resnick, 'Due Process and Procedural Justice' in J R Pennock and W C Jhon (eds), *Due Process* (New York University Press 1971) 207.

<sup>149</sup> Please see Article 10 of UDHR, Article 14 of ICCPR, Article 6 (1) of the European Convention on Human Rights and Fundamental Freedoms, 1950, and Article 35 (3) of the Bangladesh Constitution.

cannot be held behind the back of the accused.<sup>150</sup> Likewise many countries, the principles of natural justice become constitutionally entrenched rules in Bangladesh. Although the Bangladesh Constitution didn't explicitly incorporate the expression 'due process', the expression 'in accordance with law as enshrined in some of its provisions as Article 31 contemplates that personal liberty of an individual cannot be curtailed whimsically and arbitrarily.<sup>151</sup> Wade remarked, 'the right to natural justice should be as firm as the right to personal liberty'.<sup>152</sup> It is an established rule that personal liberty cannot be curtailed until he has had a fair opportunity of hearing the charge against him. In *Anwar Hossain v. State and Others*,<sup>153</sup> the court held that a preventive detention is the deprivation of the liberty of a citizen, which should not be curbed in an arbitrary manner. Whenever any authority is legally empowered to make a detention order to the repugnancy of another person, such authority has the concomitant duty of acting judicially in making such an order based on decision of consideration of some materials by following the rule of natural justice. In the case of *Abdul Latif Mirza v. Government of Bangladesh*,<sup>154</sup> the Supreme Court of Bangladesh held that the detaining authority in exercise of the powers given under the SPA had no unfettered and arbitrary power in forming its opinion regarding the necessity of a person's detention and was under an obligation to have its satisfaction and opinion based on some materials which may be judicially scrutinized. So in arriving at the decision concerning the necessity of detention of a citizen, the authority must observe the rule of natural justice despite having any legal impediment<sup>155</sup> and executive exigency.

The principles of natural justice are also deeply embedded in the statutes and regulations but the Special Powers Act is an exception as mentioned earlier as section 11 of the Act does contemplate that the detenu shall have no right to defend himself through a legal practitioner<sup>156</sup> and the Bangladesh Constitution has also preached its sacred verses in support of

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<sup>150</sup> *Abdur Rahman v. The Collector and Deputy Commissioner* [1964] 16 DLR (SC).

<sup>151</sup> Shahdeen Malik, 'Arrest and Remand: Judicial Interpretation and Police Practice' [2007] Bangladesh Journal of Law 267.

<sup>152</sup> HWR Wade and CF Forsyth, *Administrative Law* (8<sup>th</sup> edn, Oxford University Press 2000) 470.

<sup>153</sup> [2003] 55 DLR 643 (HCD).

<sup>154</sup> [1979] 31 DLR 1 (AD).

<sup>155</sup> Although under preventive detention laws, disclosure of relevant information is prohibited when such disclosure would be contrary to the public interest, the principles of natural justice are totally excluded in matters of preventive detention.

<sup>156</sup> Section 11(4) of the Special Powers Act 1974 says, 'Nothing in this section shall entitle any person against whom a detention order has been made to appear by any 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'.

this view as earlier discussed. But this provision of negating his defence and production of his statement by the detenu is ultra vires the principle of natural justice as one of the preconditions of natural justice is *audi alterum partem* meaning that none shall be condemned unheard. Opportunity to be heard is a universally recognized fundamental principle of both criminal and civil justice system. The right to be heard involves not only an opportunity to be heard and to present evidence and submissions in favor of one's own cause but it also implies the obligation of the court to consider the submissions of the defence.<sup>157</sup> In the case of *Abdul Hannan v. State*, right of an accused to be defended by a lawyer is an inalienable right guaranteed in the law of land.<sup>158</sup> So, legal representation through a lawyer is an indispensable part of the principle of natural justice and fair trial. In the case of *Bangladesh Steamer Agent's Association v. Bangladesh and Others*,<sup>159</sup> the court observed that no person should be deprived of his right without hearing before an independent authority is an essential feature of the principles of natural justice. Its object is to prevent miscarriage of justice. An unjust decision by an administrative authority affecting the right of a person can be judicially scrutinized. The principle of natural justice also applies in case of administrative proceedings where the authority is required to act on objective determination of facts.

Because of the exclusionary of the principle of natural justice in case of overriding consideration of national security through the instrument of preventive detention i.e. the Special Powers Act, application of natural justice is supposed to be nugatory resulting in arising incompatibility with constitutional jurisprudence and international human rights norms. Therefore it is established that even though the statute is silent on the principles of natural justice, it must be observed as a requirement of procedural fairness as being these principles recognized as norms rather than exception.<sup>160</sup>

#### **D. Infringement of Right to Freedom from Torture and Cruel, Inhumane or Degrading Treatment**

Freedom from torture and cruel, inhumane or degrading treatment is a constitutionally guaranteed right. It is also universally recognized right as enshrined in international human rights laws as well as a norm of

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<sup>157</sup> Faruque (n 137) 86.

<sup>158</sup> [2009] 61 DLR 713 (HCD).

<sup>159</sup> [1979] 31 DLR 272 (AD).

<sup>160</sup> Faruque (n 137) 147.

customary international law that belongs to the category of *jus cogens*.<sup>161</sup> Article 35(5) of the Constitution prohibits torture and cruel, inhuman or degrading punishment.<sup>162</sup> So any form of torture or illegal punishment infringing one's right to life and liberty as enshrined as non-derogable rights as in Articles 31 and 32 of the Constitution signifies a gross violation of fundamental human rights. Different international and regional documents have also outlawed any kind of such activities as contributing to torture. Article 5 of the UDHR and Article 7 of the ICCPR stipulate the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment.<sup>163</sup> This right is regarded as *jus cogens* all over the world from which no derogation is permissible.<sup>164</sup> Similarly, the ICCPR recognizes this right as absolute, demands non-interference on the part of state authorities<sup>165</sup> and rejects its violation on ground of emergency, national security or any other reasons by such authorities. So its duty of law enforcing agencies to treat all the detainees humanly as 10 Basic Human Rights Standards for Law Enforcement Officials reiterates that all detainees must be treated humanely.<sup>166</sup> Likewise, Article 10(1) of the ICCPR contemplates that "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person".<sup>167</sup> So it is easily understandable that the right of detainees to humane and dignified treatment works as the basis for positive obligations of state parties as enshrined in Articles 10(2) and 10(3) of the ICCPR, which are tailored to criminal justice context. This obligation tends to ensure the observance of minimum standards concerning the conditions of detention and exercise of their rights when deprived of

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<sup>161</sup> Lawyers Committee for Human Rights, 'WHAT IS A FAIR TRIAL? A Basic Guide to Legal Standards and Practice' (2000) 8.

<sup>162</sup> According to Article 35(5), 'No person shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment'.

<sup>163</sup> Article 5 of the UDHR says, 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'. Article 7 of the ICCPR also states that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. See also Principle 6 of Body of Principles; Article 5 of the Code of Conduct for Law Enforcement Officials.

<sup>164</sup> The provisions of the Universal Declaration of Human Rights 1948 are for the most part considered declarative of customary international law and may be of paramount importance if a state has not ratified or acceded to the ICCPR, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (Torture Convention), or any regional human rights instrument. The most directly relevant articles 5, 9, 10 and 11 of the UDHR will most probably be used as a supplementary source of a state's obligations to follow customary international law.

<sup>165</sup> Nowak (n 82) 244.

<sup>166</sup> Amnesty International, 'Basic Standard no. 8 out of 10 Basic Human Rights Standards for Law Enforcement Officials' 13. For details please visit. <http://www.amnesty.org>

<sup>167</sup> Article 5 of the American Convention on Human Rights 1969; Article 8 of the African Charter on Human and People's Rights 1981; Principle 1 of the Basic Principles for the Treatment of Prisoners and Article 3 of The European Convention on Human Rights and Fundamental freedoms echoed the same.

liberty<sup>168</sup> and inhumane treatment as depicted in Article 10 can be interpreted as a lower intensity of disrespecting for human dignity, to material conditions and treatment befitting that dignity than that within the meaning of Article 7.<sup>169</sup> Therefore, states are obliged to provide detainees and prisoners with services meeting their essential needs,<sup>170</sup> as for example, right to food,<sup>171</sup> to clothing,<sup>172</sup> to adequate medical attention<sup>173</sup> and to communicate with their families<sup>174</sup> as justification of humane treatment. But the SPA is silent on such rights of the detainee though Bangladesh is obliged to incorporate such rights in its domestic law.

Apart from ICCPR, Bangladesh also ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (hereinafter CAT)<sup>175</sup> which legislate absolute prohibition of torture. The CAT defines torture as intentional infliction of severe pain or suffering whether physical or mental by a public official on a person who has committed or is suspected of having committed an act in order to obtain an information or confession from him<sup>176</sup> and stipulates that State Party shall ensure that all acts of torture including an attempt to commit torture and an act by any person constituting complicity or participation in torture are punishable offences under its criminal law providing appropriate penalties in proportion to the gravity of offences.<sup>177</sup> More importantly, no law enforcement official may inflict, instigate, or to tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat of

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<sup>168</sup> Lawyers Committee for Human Rights (n 161) 9.

<sup>169</sup> Nowak (n 82) 186.

<sup>170</sup> Human Rights Committee, General Comment No. 9/16, July 27 1982.

<sup>171</sup> Rules 20 and 87 of Standard Minimum Rules for the Treatment of Prisoners, UN Economic and Social Council resolution 663 C (XXIV), July 31 1957 and resolution 2076 (LXII), May 13 1977.

<sup>172</sup> Rules 17, 18, and 88 of Standard Minimum Rules for the Treatment of Prisoners, UN Economic and Social Council resolution 663 C (XXIV), July 31 1957 and resolution 2076 (LXII), May 13 1977; and Principles 15-16 of Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UN General Assembly resolution 43/173, December 9 1988.

<sup>173</sup> Principle 24 of Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UN General Assembly resolution 43/173, December 9 1988; Rules 22-25, 91 of Standard Minimum Rules for the Treatment of Prisoners, UN Economic and Social Council resolution 663 C (XXIV), July 31 1957 and resolution 2076 (LXII), May 13 1977; and Article 6 of the Code of Conduct for Law Enforcement Officials, UN General Assembly resolution 34/169, December 17 1979. (Imposing a duty on officials to ensure the health of prisoners).

<sup>174</sup> Principle 15 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

<sup>175</sup> Bangladesh became a signatory party to the Convention on 05 October 1998.

<sup>176</sup> CAT 1984, Art. 1(1).

<sup>177</sup> Kapaeng Foundation, 'Article 4(1) of the CAT, 1984 and Indigenous Peoples Human Rights report: in Bangladesh 2007-2008' (2009) 109.

war, a threat to national security, internal political instability or any other public emergency a justification of torture or other cruel, inhuman or degrading treatment or punishment.<sup>178</sup> Therefore, states are obliged to take pragmatic legislative, administrative, judicial and other steps to prevent acts of torture in any domain under their jurisdiction.<sup>179</sup>

Despite the total constitutional ban on torture underpinned by Bangladesh's concerned international commitments, the law enforcing official often take resort to torture to extract confessions from the accused or for other purposes<sup>180</sup> and any law providing for definition and absolute prohibition of torture is yet to enact as before 2013.<sup>181</sup> In such situation, the government can use the law enforcing officials to arrest and detain any person under the SPA and infliction of torture whether physical or mental, or cruel treatment on the detainee to extract information from him has become a common practice amongst them as the court, being aware of the fact that torture has become deep-seated in the criminal process, issued in *BLAST v. Bangladesh*<sup>182</sup> a detailed guideline in the form of 15 directives on arrest without warrant, detention, remand and treatment of suspects and directed that in order to prevent torture, or cruel or inhuman punishment or treatment, a police officer shall not arrest any person under section 54 of the Code of Criminal Procedure, 1898 for the purpose of detaining him under the SPA and the magistrates shall not make any such order of detention. Also, the Court, focusing on principles of constitutional justice and relying on Article 33 of the Constitution, nudged in *Saifuzzaman v. State and Others*<sup>183</sup> the rationale of the BLAST's case further forward, and provided a 11-point guidelines to be followed in all cases of arrests so that harassment of citizens and the use of 'third method degrees' (torture) can be eradicated. Therefore, it is undeniable that the SPA is a weapon to inflict torture, cruel or degrading treatment deviating from the detainee's constitutional rights and international human rights norms.

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<sup>178</sup> See Article 2(2) of the Torture Convention 1984; Principle 6 of Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UN General Assembly resolution 43/173, December 9 1988; Article 8 of the Code of Conduct for Law Enforcement Officials, UN General Assembly resolution 34/169, December 17 1979 and Article 5 of The International Standards of Police Behavior, and Code of Conduct for Law Enforcement Officials (General Assembly resolution 34/149).

<sup>179</sup> CAT 1984, Art. 2(1).

<sup>180</sup> Hoque (n 4) 59.

<sup>181</sup> In 2013, Bangladesh has legislated the Torture and Custodial Death (Prevention) Act 2013 which is the first attempt to provide a legal definition of 'torture' and 'custodial death' and has also sought to introduce effective victim protection mechanisms. The Act also provides details about provisions for making a complaint, the investigation procedure, and sentencing provisions.

<sup>182</sup> [2003] 55 DLR 363 (HCD).

<sup>183</sup> [2004] 56 DLR 324 (HCD).



## E. Infringement of Right to Fair Trial and Protection against Self-incrimination

The right to a fair trial is a constitutional right as well as a norm of international human rights law devised to protect individuals from arbitrary and unlawful curtailment of other fundamental rights and freedoms. It is guaranteed under Article 35(3) of the Constitution saying that ‘Every person accused of a criminal offence shall have the right to a speedy and public trial by an independent and impartial court or tribunal established by law’. The similar tone is underpinned in Article 14 of the ICCPR.<sup>184</sup> The right of everyone against retrospective operation (*ex post facto*) of criminal laws and penalties,<sup>185</sup> the right against double jeopardy (repeated prosecution or conviction)<sup>186</sup>, and the right to remain silent or the right against self-incrimination<sup>187</sup> are the core components of the right to a fair and just trial as guaranteed in the Constitution and human rights instruments. The rights of persons charged with criminal offence include: to be presumed innocent until proved guilty<sup>188</sup>; to be informed promptly of the nature and cause of the charge against him<sup>189</sup>; to have adequate time and facilities to prepare a defence<sup>190</sup>; to be tried without undue delay<sup>191</sup>; to

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<sup>184</sup> Article 14 of the ICCPR provides that ‘everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law’. See also Article 6(1) of the European Convention; Article 8 of the American Convention.

<sup>185</sup> Article 35(1) of the Constitution says, ‘No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than, or different from, that which might have been inflicted under the law in force at the time of the commission of the offence’. Please see more Article 15(1) of the ICCPR; Article 7 of the European Convention; Article 9 of the American Convention; Article 7(2) of the African Charter; and Article 22 of the ICC Statute.

<sup>186</sup> Article 35(2) of the Constitution says, ‘No person shall be prosecuted and punished for the same offence more than once’. Please see more Article 14(7) of the ICCPR; Article 4 of Protocol 7 to the European Convention and Article 20 of the ICC Statute.

<sup>187</sup> Article 35(4) of the Constitution says, ‘No person accused of any offence shall be compelled to be a witness against himself’. The case of *BLAST v Bangladesh* [2005] 57 DLR 11 (HCD), is of very significance to mention pertinently that it was held that remand for the purpose of interrogation is not necessary except for extorting information from an accused by physical torture or other means, but such extortion of information is contrary to the mandate of article 35(4). Please see more Article 14(3)(g) of the ICCPR, 1966; Articles 8(2)(g) and 8(3) of the American Convention on Human Rights, 1969; and Articles 55(1)(a) and 67(1)(g) of the Statute of the International Criminal Court (ICC Statute).

<sup>188</sup> Article 14(2) of the ICCPR; see also Article 6 (2) of the European Convention; Article 8(2) of the American Convention; Article 7(1) (b) of the African Charter, *supra* note 8, Article 7(1) (b); and Article 66 (1) of the ICC Statute.

<sup>189</sup> ICCPR 1966, Art. 14(3)(a).

<sup>190</sup> ICCPR 1966, Art. 14(3)(b). See also the European Convention, Art. 6(3)(b); the American Convention, Art. 8(2)(c); the 1992 Resolution on the Right to Recourse Procedure and Fair Trial of the African Commission on Human and Peoples’ Rights (African Commission Resolution), Art. 2(E)(1) and ICC Statute, Art. 67(1)(b) and 67(2).

<sup>191</sup> ICCPR 1966, Art. 14(3)(C). Note that a person who is in pre-trial detention may be entitled to release prior to the commencement of the trial even if there has not been undue delay.

be present at the trial, and to defend oneself<sup>192</sup>; to have legal assistance from the state<sup>193</sup>; and to examine and cross-examine witnesses.<sup>194</sup> The right to fair trial applies to both the determination of an individual's right and any criminal charge against him or her in all court proceedings including administrative proceeding.<sup>195</sup> On any criminal case, this right commences on the formal lodging of a charge (from the moment of arrest depending on the circumstances of the case) including the date of state activities significantly affecting the conditions of individuals.<sup>196</sup> So fairness must be observed in both pre-trial and post-trial stages (from the moment of commencement of investigation against accusation until the completion of criminal proceeding including appeal).<sup>197</sup> Despite constitutional safeguards underpinned by international commitments, excessive delay in justice delivery system, political interference and widespread allegation against the law enforcement agencies for extracting confessional statements with the use of force and torture in violation of legal norms and absence of adequate legal aid to the poor litigants may vitiate fair trial principles.<sup>198</sup> Prolonged incarceration of the accused pending their trials raises concern respecting procedural fairness as well as their right to speedy trial<sup>199</sup> as the court emphasized on the human rights of these persons, entitled them to be released on bail, or to make their charges withdrawn.<sup>200</sup> Nevertheless, all offences including petty offences are made cognizable and non-bailable under the SPA<sup>201</sup> and the detaining authority can detain the accused for 120 days not producing him before any judicial body and later, for indefinite time.<sup>202</sup> Most of them have no means to go to the judicial body to seek remedy and only the rich can go to the High Court Division and get remedy through instituting the writ of Habeas Corpus.<sup>203</sup> It is also one of the attributes of the fair trial as guaranteed in the Constitution and human rights norms that the accused person is given adequate opportunity to defend himself but the proviso to Article 33(5) of the Constitution and also

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<sup>192</sup> ICCPR 1966, Art. 14(3)(d).

<sup>193</sup> *Ibid.*

<sup>194</sup> ICCPR 1966, Art. 14(3)(e); the European Convention, Art. 6(3)(d); the American Convention, Art. 8(2)(f); the African Commission Resolution, Paragraph 2(e)(3) and the ICC Statute, Art. 67(1)(e).

<sup>195</sup> Dominic McGoldrick, *The Human Rights Committee, Its Role in the Development of the International Covenant on Civil and Political Rights* (Clarendon Press 1994) 415.

<sup>196</sup> Nowak (n 82) 244.

<sup>197</sup> Hoque (n 4) 58.

<sup>198</sup> JAMAKON (n 19) 18.

<sup>199</sup> Hoque (n 4) 58.

<sup>200</sup> *BLAST v Bangladesh* [2005] 57 DLR 11 (HCD).

<sup>201</sup> The Special Powers Act 1974, S. 32.

<sup>202</sup> The Special Powers Act 1974, S. 3.

<sup>203</sup> Nazir, (n 23).

Section 8(1) of the SPA, 1974 permits the detaining authority to refuse to disclose the facts which it considers against the public interest as a result of which the opportunity of defending himself becomes meaningless and due to having not defined the ambit of public interest, this proviso is often used as an exploitation tool and in denying right to fair trial. Again Section 11(4) of the SPA stipulates that the detainee against whom a detention order has been made cannot appear by any lawyer in any matter connected with the reference to the Advisory Board, and the proceedings of the Advisory Board and its report except specified part of opinion by the Board in its report shall be confidential. And as the report of the Advisory Board is binding on the executive authority, it is always influenced by the authority.<sup>204</sup>

In particular, overriding application of the SPA over all laws makes the 30-day time frame of preferring appeal to the High Court Division imperative and the provision as to condonation of delay under section 5 of the Limitation Act, 1908 becomes inapplicable under the former<sup>205</sup> and similarly the court adjudged that application for delay in preferring appeal under the SPA is not amenable when such appeal is barred by limitation.<sup>206</sup> This rigid time frame may go against the convicted if he fails to prefer the same owing to circumstances beyond his control.<sup>207</sup> In addition, the overriding enforceability of the SPA excludes the applicability of the Code of Criminal Procedure, 1898 as the court reasoned that section 35A of the Code of Criminal Procedure of 1898 requiring deduction from the accused's sentence the period which he has already spent in custody is inapplicable to the offenders tried under the SPA.<sup>208</sup> Though the underlying philosophy of this provision is to compensate the accused delays in his trial pursuant to his constitutional rights to have a speedy trial irrespective of the law governing his offence, the legislation explicitly and specifically limit the applicability of section 35A only to general offenders, and resultantly such inapplicability to the offenders under the SPA seems to have deprived them of the right to equal protection of law.<sup>209</sup>

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<sup>204</sup> Halim (n 21) 304.

<sup>205</sup> Section 34B of the SPA says, 'The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in the Code or in any other law for the time being in force.' Section 30 (1) says, 'An appeal from any order, judgment or sentence of a Special Tribunal may be preferred to the High Court Division within thirty days from the date of delivery or passing thereof'.

<sup>206</sup> *Shamsul Haque v. State* [1991] 43 DLR 247 (HCD); *Bashi v. State* [1991] 43 DLR 209 (HCD).

<sup>207</sup> Faruque (n 49) 8.

<sup>208</sup> *Hiru Miah v. The State* [2005] 10 MLR 388 (HCD).

<sup>209</sup> Hoque (n 4) 58.

## F. Threat to Freedom of Thought, Speech and Conscience

Though in 1991, sections 16, 17 and 18 of the Act were repealed by the Special Powers (Amendment) Act, the SPA is a threat to freedom of thought, speech and conscience and thereby targets political activists, the opposition and other critics of the government to prevent dissenting voices.<sup>210</sup> It infringes the people's constitutional right and international human rights norms as UDHR and ICCPR encapsulates that everyone has the right to freedom of thought, conscience... and right to freedom of opinion and expression including freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.<sup>211</sup> Likewise the Bangladesh Constitution guarantees freedom of thought and conscience<sup>212</sup> and ensures the right of every citizen to freedom of speech and expression; and freedom of the press subject to certain reasonable restrictions.<sup>213</sup> But the court observed that press is the mouth-piece of public opinion... It has to work as a link between the parliament which frames the legislation and the public which express their hope and aspirations through it.<sup>214</sup> Nonetheless, human rights defenders and professionals, political opponents and media members are routinely being monitored, detained and harassed by the law enforcing agencies.<sup>215</sup> For example, an instructor in the Law Department of the Northern University Bangladesh in Khulna was arrested and detained under the SPA in July 2014 for allegedly making comments criticizing the President, Prime Minister and former president of Bangladesh during his class but he was released from jail on bail a week after his arrest as the investigating police officer claimed to have no proof in support of the allegations. These types of cases are violations to freedom of thought, speech and conscience.<sup>216</sup> Not only that, journalists who write stories criticizing the government can also be arrested under the SPA.<sup>217</sup> In contrast, in a report submitted to the UN Human Rights Council, Bangladesh authorities talked to withdraw the use of the SPA to make the media free from any kind of control.<sup>218</sup> However, in the name of SPA, the executive authority arrests various persons, inflicts torture on

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<sup>210</sup> <https://www.justice.gov/sites/default/files/coir/legacy/2015/01/08/BGD104943.E.pdf>.

<sup>211</sup> UDHR, Art. 18-19; ICCPR, Art. 18-19; the Convention for protection of Human Rights and Fundamental Freedom, Art. 9-10.

<sup>212</sup> The Constitution of the People's Republic of Bangladesh, Art. 39(1).

<sup>213</sup> The Constitution of the People's Republic of Bangladesh, Art. 39(2).

<sup>214</sup> *Mujaffar Khan v. the State* [1959] PLD.

<sup>215</sup> International Federation of Human Rights, 'Bangladesh: Criminal justice through the prism of capital punishment and the fight against terrorism'.

<sup>216</sup> 'NUB Teacher Accused of Defamation Gets Bail' *Dhaka Tribune* (10 July 2014).

<sup>217</sup> <http://freedomhouse.org/report/freedom-world/2013/Bangladesh>

<sup>218</sup> <http://freedomhouse.org/report/freedompress/2013/Bangladesh>

some of them and threatens everyone wishing to speak against the Government of order of preventive detention against them.<sup>219</sup> Therefore, it's unequivocally uttered that the SPA is contrary to the mandate of the constitutional spirit and human rights dictum.

## G. Infringement of Freedom of Assembly and Association

The right to assemble peacefully as well as to form association of every citizen subject to reasonable restrictions is constitutionally guaranteed right in Bangladesh.<sup>220</sup> The freedom of association includes the right to organize and join in any association for the advancements of beliefs and ideas pertaining to religious, economic, civic, political, cultural or other matters.<sup>221</sup> The restrictions imposed by law not an administrative order will be violative of the freedom of association.<sup>222</sup> These fundamental rights have also been reflected in international human rights instruments as the UDHR reiterates that everyone has the right to freedom of peaceful assembly and association. No one may be compelled to belong to an association.<sup>223</sup> Similarly, the ICCPR have recognized the right of peaceful assembly and the right to freedom of association subject to restrictions, in conformity with the law, which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.<sup>224</sup> But Section 20 of the SPA has made impediments to form political party based on religion not taking the circumstances into consideration as to the existence or non-existence of religious and communal harmony among individuals as its effect.<sup>225</sup> It is noticeable here that political parties are generally formed on ground of any particular spirit or for the furtherance of any particular aim and target. No human rights norms also did prohibit or restrict the formation of any party on ground of any particular ideal, spirit or aim. Similarly, the Constitution has abstained

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<sup>219</sup> 'Preventive Detention and Violation of Human Rights: Bangladesh Perspective' (A sample research monograph submitted for partial fulfillment of the requirements for the degree of Master of Laws) Bangladesh Journal of Legal Studies. <<http://bdjls.org/research-monograph-preventive-detention-and-violation-of-human-rights-bangladesh-perspective/>>

<sup>220</sup> The Constitution of the People's Republic of Bangladesh, Art. 37-38>

<sup>221</sup> *National Association for the Advancement of Colored People v. Alabama* 357 US 449.

<sup>222</sup> *Dacca National Institute v. East Pakistan* 10 DLR 343.

<sup>223</sup> UDHR, Art. 20; American Convention on Human Rights, Art. 16; African Charter on Human & Peoples' Rights, Art. 11.

<sup>224</sup> ICCPR, Art. 21-22; American Convention on Human Rights, Art. 16; African Charter on Human & Peoples' Rights, Art. 12..

<sup>225</sup> The Special Powers Act 1974, S. 20(1) says, 'No person shall form, or be a member or otherwise take part in the activities of, any communal or other association or union which in the name or on the basis of any religion has for its object, or pursues, a political purpose'.

itself from imposing such restrictions except for the purposes of destroying the religious harmony and creating discrimination based on religion among the citizens.<sup>226</sup> The precondition imposed on the formation of an assembly or association is that it should be peaceful. But in guise of state security as well as in the name of the SPA, citizens are prevented from peaceful assembling and the right to form association is being denied.<sup>227</sup> The association formed with civil society is indirectly threatened by the Govt. The Government was increasingly hostile to civil society groups in 2012 and civil society as well as human rights defenders reported augmented governmental pressure and monitoring.<sup>228</sup> The SPA has also been used to detain trade union activists. A 2012 report about the violation of trade union rights in Bangladesh by the International Trade Union Confederation (ITUC) notes that if a strike is considered a “threat to national interest,” the SPA can be used to detain trade union activists without charge.<sup>229</sup> Therefore section 20 of the SPA has infringed citizens’ constitutional rights and international human rights norms.

## H. Infringing Right to Compensation

Provision for compensation to victim is now viewed as a constitutive part of criminal justice system in many developed and developing countries since crime portrays a pattern of downfall of the political and administrative structure of society;<sup>230</sup> and also is regarded as an integral part of the concept of restorative justice implying that the state must be equally just and fair to victim by devising a compensatory and protection scheme for rendering justice to him.<sup>231</sup> Where Article 35(5) of our Constitution prohibits cruelty, inhuman or degrading punishment to an arrested or detained person, Article 46<sup>232</sup> permits the Parliament to enact law to provide impunity to the perpetrators rather than to pay

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<sup>226</sup> The Constitution of the People’s Republic of Bangladesh, proviso (a) (b) of Art. 38.

<sup>227</sup> Mondol (n 123).

<sup>228</sup> [www.hrw.org](http://www.hrw.org)

<sup>229</sup> International Trade Union Confederation, ‘Annual Survey of Violations of Trade Union Rights-Bangladesh’ [2012]. <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=printdoc&docid=4fd88965c>

<sup>230</sup> In UK- The Criminal Injuries Compensation Act 1995; the Criminal Injuries Compensation Act 1976, New South Wales (Australia); the Victims of Crime Act 1984; In India- The Code of Criminal Procedure 1973, S. 357.

<sup>231</sup> KI Vibhute, ‘Justice to Victims of Crime: Emerging Trends and Legislative Models in India’ in KI Vibhute (ed), *Criminal Justice* (Eastern Book Company 2004) 370-395.

<sup>232</sup> Article 46 of the Bangladesh Constitution may be utilized to acquit, or to extend impunity to, ‘any person in the service of the Republic or any other person in respect of any act done by him in connection with...the maintenance or restoration or order in any area in Bangladesh or validate any sentence passed, punishment, forfeiture ordered, or other act done in any such area’.

compensation for the victims of human rights violations by the state or the perpetrators. Not only that, Bangladesh is denying “international obligation to promote, protect and respect human rights including the right to compensation for the victims.”<sup>233</sup> Because the ICCPR stipulates that every victim of unlawful arrest or detention shall have an enforceable right to get compensation.<sup>234</sup> Bangladesh has also an international obligation to run victim compensation scheme under its domestic law as the CAT reiterates, “Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.”<sup>235</sup> The UN Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power<sup>236</sup> also solicited the state to treat victims with compassion and respect but also take appropriate measures to uphold their access to justice and fair treatment,<sup>237</sup> restitution,<sup>238</sup> compensation<sup>239</sup> and assistance<sup>240</sup>. Though unfortunately, it is bitter true that the government denies such compensation or rehabilitation as a result of which the concerns of victims under special legislation in Bangladesh are nowhere reflected in the criminal justice system as a whole and accordingly there is no provision for payment of compensation for illegal detention under the SPA.

The Higher Judiciary supposed to show strong judicial activism has played a pivotal role *suo moto* or of on its own motion by giving directives to the state to pay the victims compensation for human rights violations by the law enforcing agency.<sup>241</sup> In the case of *Smt Nilabati Behera @ Lalita Behera v. State of Orissa & Ors*,<sup>242</sup> the Indian Supreme Court, as the primordial protector of the accused’s basic rights strangled by the state

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<sup>233</sup> Compensation scheme of victims discerns of three patterns: i) compensation by the state; ii) compensation by an offender either by asking him to pay it from the fine imposed or a specified amount; and iii) duty to repair the damage done by the offence. Vibhute (n 232) 382.

<sup>234</sup> The International Covenant on Civil and Political Rights 1966, Art. 9(5).

<sup>235</sup> The Convention against Torture and other Cruel, Inhuman or Degrading Punishment 1984, Art. 14(1).

<sup>236</sup> General Assembly Resolution 40/34, 1985.

<sup>237</sup> The UN Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power 1985, Art. 4-7.

<sup>238</sup> The UN Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power 1985, Art. 8-11.

<sup>239</sup> The UN Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power 1985, Art. 12-13.

<sup>240</sup> The UN Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power 1985, Art. 14-17.

<sup>241</sup> Momtaz (n 24) 117.

<sup>242</sup> [1993] 2 SCC 746.

officials, adjudged that the State has obligation to pay compensation to the near and dear ones of a person deprived of life by their wrongful action. Again, the Indian Supreme court directed for compensation in *Rudul Sah v. State of Bihar* case.<sup>243</sup> In Bangladesh, in the case of *Muhammad Ali v. Bangladesh*<sup>244</sup> the Court fined 5000 taka as ‘token compensation’ against each of the two Police Officers. In *Bilkis Akhter Hossain v. the Government*,<sup>245</sup> the court ordered the government to pay one lakh to each detainee as compensation for illegal detention. Furthermore, the Indian Supreme Court in a landmark judgment in *D. K. Basu v. State of West Bengal*<sup>246</sup> awarded compensation to the unlawfully arrested detainee on the ground that India was a signatory to the ICCPR. Therefore, it is undoubtedly admissible that the SPA is against the constitutional spirit and human rights norms.

## I. Incongruity with the Rule of Law

The concept of rule of law talks about the establishment of democracy and society free from exploitation in which fundamental human rights and freedoms, respect for the dignity and worth of the human person, equality before law and justice for all are guaranteed as a fundamental aim of the state which is the desired dimension and spirit of the constitution.<sup>247</sup> It is a basic feature of the Constitution of Bangladesh.<sup>248</sup> As a state organ, the function of the legislature in a democratic society under the rule of law is to undertake such activities as will uphold and respect for the supreme value and dignity of the individual.<sup>249</sup> Rule of law refers to the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and the exclusion of the existence of arbitrariness, of prerogative or even of wide discretionary authority on the part of the government; equal subordination of all classes to the ordinary law of the land; and guarantee of citizen’s rights.<sup>250</sup> This concept demands that power

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<sup>243</sup> [1983] AIR 1083 (SC).

<sup>244</sup> [2003] 23 BLD 389 (HCD).

<sup>245</sup> [1997] 2 MLR 113.

<sup>246</sup> [1997] 1 SCC 416.

<sup>247</sup> The Constitution of the People’s Republic of Bangladesh, Preamble and Art. 11.

<sup>248</sup> *Anwar Hossain Chowdhury v. Bangladesh* [1989] spl 1 BLD; *Farida Akter v. Bangladesh* [2007] 15 BLT 206 (AD); *Ekushey Television Ltd. v. Dr. Chowdhury Mahmood Hasan* [2003] 55 DLR 26 (AD).

<sup>249</sup> This concept was developed by the International Commission of Jurists known as Delhi Declaration 1959 which was later on confirmed at Lagos in 1961. See for details, Journal of the International Commission of Jurist, Spring-Summer 1959 and the Rule of Law in Free Society published by the Commission in 1960.

<sup>250</sup> AV Dicey, *Law of the Constitution* (1885) 193, 202-203.



is to be exercised in a just, fair and reasonable and not in an unreasonable, capricious or arbitrary manner leaving room for discrimination.<sup>251</sup> So the rule of law hinges upon the provisions of adequate safeguard against abuse of power by the executive, and an effective governance ascertaining conditions of life.<sup>252</sup> But in Bangladesh, every successive government has taken the SPA in its hand as a deadly instrument; and every year so many persons are detained without trial to purposively subjugate political opponents;<sup>253</sup> and constitutional and basic human rights as guaranteed in Articles 27, 31, 32, 33, 35, 36, 37, 38, 39 and 44 of the Constitution become non-protected for the detention orders under this Act arbitrarily and abusively; and resultantly almost all fundamental rights of a person become meaningless when unlawfully detained for once under this law. In Bangladesh, all governments always exercise such law in peace time as a lethal weapon unlike in the UK, the USA and Singapore during war and emergency time.<sup>254</sup> Therefore, the provisions permitting preventive detention in peace time is incompatible with the concept of rule of law. Moreover this law empowers the detaining authorities to exercise their arbitrary discretion to detain any person upon a mere subjective satisfaction on any vague grounds as discussed earlier. This arbitrary and wide discretionary power of the detaining authority has no room in the institution of rule of law. The dependence of excessively exercise of the executive on tyrannical laws like the SPA decreased the government's status as adopting 'rule by law' not 'rule of law'<sup>255</sup>. The abuse of 'rule by law' manifests itself in the passing of and reliance on unjust laws. So it keeps much more consistency to mention here in such way that the Special Powers Act is a draconian, unjust, black and obnoxious law which strangulates the rule of law and fundamental principles of human rights.

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<sup>251</sup> *Delhi Transport Corporation v. DTC Mazdoor Congress* [1991] AIR 101 (SC); *Uttaranchal Jal Sansthan v. Laxmi Devi* [2009] 7 SCC 205.

<sup>252</sup> 'The Congress Committee IV Report' in Dr Ershadul Bari, *Rule of Law and Human Rights* (a booklet in Bengali) 14-15.

<sup>253</sup> Shashi Kanto Das, Md Bashir Uddin Khan and Md Kamruzzaman, 'Preventive Detention and Section 54 of the Code of Criminal Procedure: The Violation of Human Rights in Bangladesh' (2016) 1 *American Journal of Business and Society* 60-67. <<http://www.aiscience.org/journal/ajbs.>>

<sup>254</sup> Halim (n 21) 302-304.

<sup>255</sup> 'Rule of law' is distinct from 'rule by law' which refers to abuse and excessive use of power by the government through the use of laws as instruments of government's policy.

## J. Other Drawbacks

### i. Exaggerated Act

Notwithstanding having the operation of section 54 of the Code of Criminal Procedure, 1898, the justification of remaining the SPA in force gets no ground.<sup>256</sup> The underlying philosophy of granting the powers of arrest without warrant under section 54 is that prevention is the most effective approach to control crime. Its object is to give widest powers to the police in cognizable cases subject to the mandatory use of powers reasonably and cautiously though discretionary as abusing the power is not at all intention of the legislators. Despite this, allegation always arises as to the misuse of these powers.<sup>257</sup> Therefore judicial intervention developed guidelines on prevention of arbitrarily arrest and detention in presence of which the SPA is exaggerated legislation.

### ii. Insertion of Vague Definition

The definition of the crucial term ‘prejudicial act’ in the SPA is not precise; vague and open to interpretation widely by the government and its executives which creates scope for gross abuse of the law<sup>258</sup> as the Act makes provisions for putting the accused in detention in anticipation of his involving in certain vaguely defined prejudicial activities.<sup>259</sup> There are no set procedures for, and no clear pattern on, the use of the SPA.<sup>260</sup>

### iii. Act of Secretive Nature

The statistics on the use of the SPA are not available in public due to reluctance of the government to divulge information about its use with human rights defender and complexity of monitoring the situation and collecting information about the executive actions of the detaining authority not because of its secretive nature<sup>261</sup> but the proceedings of

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<sup>256</sup> <http://www.calternatives.org/projects/cads/pps/special-power-act-people-or-regime-security.php>

<sup>257</sup> Das, (n 254) 60-67.

<sup>258</sup> UN Development Programme, ‘Human Security in Bangladesh: In Search of Justice and Dignity’(United Nations: 2002) <http://www.un-bd.org/undp/info/hsr/index.html>

<sup>259</sup> Hoque (n 4) 65.

<sup>260</sup> Asian Legal Resource Centre, Telephone interview with the Program Coordinator, Bangladesh Desk, N.d. “Background of ALRC.” (August 22 2014). <http://www.alrc.net/doc/mainfile.php/background/2/>

<sup>261</sup> In correspondence with the Research Directorate, a representative of the Dhaka-based NGO *Odhikar*, available at <http://odhikar.org/about-us/about-odhikar/>

the government-constituted advisory board to review preventive detention and examine evidence on which such detention is based are also very confidential. As contemplated in the Dhaka Law Reports commentary of the SPA, there exists no means of justifying the veracity of these materials whether these are verified as gathered from credible sources and not hearsays or rumours from any quarter tainted or otherwise.<sup>262</sup> Resultantly the transparency of record keeping or exercising the law also becomes non-existent.

#### iv. Creation of Impunity Culture

As long as the Special Powers Act remains operative, it is likely to be utilized as an apparatus for arbitrary detention because the perpetrators are protected by section 34 of the SPA which contemplates that any suit, prosecution or legal proceeding is not tenable against the government or any person for anything done or intended to be done in good faith. Such provision gets validity from the Constitution which empowers the Parliament to legislate to provide indemnity to any state official for any act done to maintain or restore order, and to lift any sanctions inflicted on this person.<sup>263</sup> These constitutional provisions and anachronistic legal frameworks are incompatible with a state's obligation under the ICCPR as amnesties prevent investigation, prosecution and punishment of perpetrators of human rights violations and impede the victims of such violations from being granted reparations.<sup>264</sup> The Human Rights Committee opines that such amnesty for acts of torture is inconsistent with Article 7 of the ICCPR.<sup>265</sup> Moreover, the Committee against Torture, being aware of

<sup>262</sup> Dhaka Law Reports, *The Special Powers Act and Anti-Corruption Commission Act with Some other Allied Laws* (8<sup>th</sup> edn, 2007) 81.

<sup>263</sup> According to Article 46 of the Bangladesh Constitution, 'Notwithstanding anything in the foregoing provisions of this Part, Parliament may by law make provision for indemnifying any person in the service of the Republic or any other person in respect of any act done by him in connection with the national liberation struggle or the maintenance or restoration of order in any area in Bangladesh or validate any sentence passed, punishment inflicted, forfeiture ordered, or other act done in any such area'.

<sup>264</sup> UN Human Rights Committee, General Comment No. 20, Prohibition of Torture and Cruel Treatment or Punishment (Forty-Forth session, 1992) para 15, <http://www.unhchr.ch/tbs/doc.nsf/0/6924291970754969c12563ed004c8ae5?>  
See also UN Human Rights Committee, 'Consideration of Reports Submitted under Article 40 of the Covenant, Comments of the Human Rights Committee, Argentina' paras. 3 and 11 CCPR/C/79/Add.46, 1995, available at <http://www1.umn.edu/humanrts/hrcommittee/ARGENTNA.htm>;  
"Consideration of Reports Submitted under Article 40 of the Covenant, Comments of the Human Rights Committee, Chile", at para. 5. CCPR/C/CHL/CO/5, May 18, 2007, available at <http://www2.ohchr.org/english/bodies/hrc/docs/AdvanceDocs/CCPR.C.CHL.CO.5.pdf?Opendocument>.

<sup>265</sup> HRC General Comment No 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment) para. 15

the fact that prohibition of torture is absolute and non-derogable, makes assessment that amnesties infringes the principle of non-derogability under the CAT.<sup>266</sup> To meet the requirements of the ICCPR and CAT, such provisions need to be amended.

### 3. Practical Scenario of the Use of the SPA and its Impact

Successive governments have massively used the SPA to thwart political opponents and partakers in peaceful exhibitions, as well as against individuals involved in personal altercations with people in authoritative position. Sometimes detentions have been earthed on mere allegations. Over the years, hundreds and thousands people have been detained under the Act.<sup>267</sup>

Since the promulgation of the SPA on 9 February 1974 to the end of the Awami League regime in August 1975, some 35,000 people were detained under the SPA mostly for political grounds. During the Ziaur Rahman regime between 1975 and 1982, over 100000 people were detained whereas about 150000 people were detained during the Ershad regime between 1982 and 1990.<sup>268</sup> From 1991 to July, 1997, the number of detainees was 30,561.<sup>269</sup> From 1974 to July 1997, of 63,653 detained people, 15,034 people were released through writ of habeas corpus.<sup>270</sup> Under the emergency rules in force after January 2007, the potential future criminal acts for which a person could be preventively detained were substantially increased.<sup>271</sup> Therefore, as explicitly listed,<sup>272</sup> the SPA was also frequently used during such time. In addition, *Odhikar* representative opines that most SPA cases are unreported, and few cases involving local activists are publicized.<sup>273</sup>

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<sup>266</sup> CAT General Comment No. 2, CAT/C/GC/2 para. 5.

<sup>267</sup> Cathy McWilliam, 'Exercising the big stick' in States of Insecurity (Seminar, New Delhi, issue 512, 2002). <http://www.india-seminar.com/2002/512/512%20cathy%20mcwilliam.htm>

<sup>268</sup> Amnesty International, Bangladesh: a summary of human rights concerns, April 1993, AI Index: ASA 13/01/93, <file:///E:/Recent%20doc%20on%20SPA/A%20summary%20of%20human%20rights%20concerns.pdf>

<sup>269</sup> Md Abdul Halim, *Constitution, Constitutional Law and Politics* (edt, CCB Foundation 2009) 299.

<sup>270</sup> *Ibid* 299.

<sup>271</sup> The Emergency Power Rules 2007, s. 21.

<sup>272</sup> The Emergency Power Rules 2007, s. 14.

<sup>273</sup> <https://www.justice.gov/sites/default/files/eoir/legacy/2015/01/08/BGD104943.E.pdf> p.2

As per court records, from 1974 to March 1995, of the 10,372 habeas corpus writs filed with the High Court Division of the Supreme Court to challenge detentions, only in less than 9 percent did the court find the detention to be valid which reveals an indication of the extent to which the Act has historically been misused.<sup>274</sup> In the vast majority of such cases, the court has found the detention grounds to be vague, indefinite and lacking in particular materials.<sup>275</sup> However, the executive appears to have little or no discerning about the Supreme Court's repeated criticism of the law and its execution. It has even ignored release orders forcing the court to initiate contempt of court proceedings<sup>276</sup> and flagrantly violated such orders with a fresh detention order at the jail gate when about to walk to freedom.<sup>277</sup>

Such indiscriminate use of the SPA may affect not only detained individuals but also his family, children, community and state. It may have intergenerational effect as well. Lost human potential is one of the salient impacts of excessive arbitrary detention without trial or charge. Manfred Nowak, UN Special Rapporteur on torture opines, "Many people think that torture is primarily the fate of political and other 'high-ranking' prisoners. In reality, most of the victims of arbitrary detention, torture, and inhuman conditions are usually ordinary people who belong to the poorest and most disadvantaged sectors of society..." Therefore the poorest and marginalized echelons of society are least equipped to deal with criminal justice system and the experiences of detention. They with little family or social support are more likely to lack the ways to secure their legal right not to stay for indefinite time including bail challenging arbitrary detention.<sup>278</sup> The excessive and arbitrary use of such detention critically impairs socio-economic development and disproportionately affects individuals and families living in or at the edge of the poverty.<sup>279</sup> Because the detained persons cannot work or earn income during detention and frequently lose their jobs after only a short period away from their work, and are at risk of bankruptcy if self-employed. If the detention period is lengthy, detainees' future earning potential is also crippled. They are also at risk of long term unemployment or underemployment after release which hastens abject poverty commonly reduced to begging due to non-

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<sup>274</sup> Human Rights Features, 'Dealing with Dissent: The 'Black Laws' of Bangladesh' 1999. <<http://www.hrdc.net/sahrdc/hrfeatures/HRF08.htm>>

<sup>275</sup> S M Hasan Talukder, *Development of Administrative Law in Bangladesh: Outcomes and Prospects* (3<sup>rd</sup> edn, Bangladesh Law Research Center 2015) 114.

<sup>276</sup> Islam (n 5) 206.

<sup>277</sup> Talukder (n 276) 114.

<sup>278</sup> Fernando Salla and Paula Rodriguez Ballesteros, *Democracy, Human Rights and Prison Conditions in South America* (Center for the Study of Violence, University of São Paulo, 2008).

<sup>279</sup> Open Society Foundations, 'The Socioeconomic Impact of Pretrial Detention: A Global Campaign for Pretrial Justice' 22-23.

availability of any other options for earning income.<sup>280</sup> If the detainee is a parent, the education of children is often disrupted. According to an NGO report, such children may have to move to a new era, a new home or a new school because of imprisonment.<sup>281</sup> If the detained are mothers, the lives of their children are severely disrupted resulting in heightened rates of school failure and eventual criminal activity<sup>282</sup> and an increased likelihood of their becoming 'NEET' (Not in Education, Employment and Training).<sup>283</sup> Although an individual's detention may be only for a few weeks, the impact can be felt over the rest of his life and into the next generation eventually linking to negative outcomes including increased propensity for violence and other antisocial behaviours, increased likelihood of suffering anxiety and depression,<sup>284</sup> and increased likelihood of criminality when parents are detained.<sup>285</sup> The over-use of detention harms not only the detainee but the community as a whole and furthers the social exclusion of marginalized groups. Detention may also have impact on the state as every state spends money to meet the basic necessities of the detainee resulting in increased state's expenditure and reduced revenues.<sup>286</sup>

#### 4. Conclusion

It may be logically drawn in fine that the SPA has taken the most formidable form striking down a balance between the needs of state security and protecting fundamental human rights and thereby contributing to a culture of arbitrary arrest, detention and torture; and creating the justification for the institutionalization of legal impunity of the human rights violators. The SPA is in flagrant violation of constitutional jurisprudence and international human rights norms as it has become the biggest threat for the safety of the public creating a dangerous ambience which affects public order and tranquillity and makes individual liberty fall into the clemency of the government and thereby impedes the flourishing of proper and sound environment for democratic society

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<sup>280</sup> *Ibid* 27-29.

<sup>281</sup> Oliver Robertson, *The impact of parental imprisonment on children* (Geneva: Quaker United Nations Office, 2007) 7.

<sup>282</sup> Barbara J Myers and others, 'Children of Incarcerated Mothers' (1999) 8(1) *Journal of Child and Family Studies* 11.

<sup>283</sup> New Economics Foundation, *Unlocking value: How we all benefit from investing in alternatives to prison for women offenders* (London: New Economics Foundation, 2008).

<sup>284</sup> Jennifer Rosenberg, *Children Need Dads Too: Children with Fathers in Prison* (Geneva: Quaker United Nations Office, 2009) 14.

<sup>285</sup> Herman-Stahl, Kan & McKay, *Incarceration and the Family: A Review of Research and Promising Approaches for Serving Fathers and Families* (Washington DC: RTI International for the US Department of Health and Human Services, 2008) 1-3.

<sup>286</sup> Open Society Foundations (n 280) 33-35.

governed by rule of law. It is aptly evident that till date since its enactment, the SPA has been rampantly misused in peace time by the successive governments, in the absence of determining its applicability in case of grave emergency and occurrence of situation of war, or external aggression or internal disturbance threatening the security of the state, as a deadly instrument to harass the opposition of the ruling party, suppress the anti-government movements, even democratic movements and perpetuate the political regime resulting in making the greatest instance of mutual distrust of the political parties. The SPA is indiscriminately used encroaching upon the basic human rights of the general people of the country even with no minimum care and thereby making them the worst sufferers of this draconian law owing to putting them into prolonged detention for no fault at all through the issuance of arbitrary detention order and restrictions on movement by the executive authority which derived their powers from the vague terms and provisions as contained in the Act itself of which the literal, lexicographic or pedantic construction or interpretation would render liberty jurisprudence nugatory. This Act undoubtedly suffers from the non-observance of criminal jurisprudence i.e. absence of proportionate sentence, double criminalization as well as failure of passing the test of reasonableness within the purview of constitutional jurisprudence. Given the priority over crime control model between two predominant models, this Act negates due process model suitable for a fair and just criminal justice system deviating from the principle of presumption of innocence, right to fair trial and protection against self-incrimination, right to freedom from torture and cruel, inhumane or degrading treatment, right to compensation as well as the cardinal principles of natural justice and due process of law. The judiciary has also remained the most zealous and steadfast protector of liberty jurisprudence and upheld compensatory justice for the victims. The overriding application of the Act over limitation laws weighs psychological distress of appealing within the rigid timeframe if failed beyond his control and misapplication and exclusionary clause of this Act to the SPA offenders to invoke the general benefit of the Criminal Procedure Code concerning post-trial concession of the time spent in custody or detention seems to have deprived of the principle of equal justice and right of equal protection of law. This Act is an exaggerated legislation as it is a common for the arrestee under section 54 of the Code of Criminal Procedure are later charged under the SPA. This Act negatively impacts not only on the individuals but also on their families, communities as well as the state. So there is no denying that such repressive law has deviated from constitutional jurisprudence and international human rights norms. From this perspective, such unreasonableness, arbitrariness, unjustness, incompatibility and draconian characteristics of the Act and the developing human rights jurisprudence demands that it has become a time befitting

concern of whether the sustainability of this black legislation should be rethinking or abrogated.