

GOVERNMENT OF THE PEOPLE'S REPUBLIC OF BANGLADESH

THE LAW COMMISSION

-SUBJECT-

**A COMPLETE REPORT BY THE LAW COMMISSION ON THE
PROVISIONS RELATING TO PREVENTIVE DETENTION AND
OFFENCES UNDER THE SPECIAL POWERS ACT, 1974**

OFFICE OF THE LAW COMMISSION

OLD HIGH COURT BUILDING
DHAKA-1000

MAY 15, 2002

Preface

Law Commission received a reference from the Ministry of Law, Justice and Parliamentary Affairs by on 01/01/2002 seeking its opinion on the provisions relating to preventive detention and offences under the Special Powers Act, 1974.

After receipt of the reference it was decided in the Commission that prior to sending its opinion to the Government six exchange of views programs would be arranged in six divisional headquarters with the officials who are directly involved with the enforcement of laws as well as academics, lawyers, journalists, representatives of NGO's, members of the civil society, etc. Accordingly six exchange of views programs were held successively in Chittagong, Sylhet, Khulna, Barisal, Rajshahi and Dhaka. In all the six exchange of views programs presence as well as deliberation of the persons invited was encouraging.

The Research Officers of the Commission duly noted down the proceedings of each of the exchange of views programs. The recommendations which the Commission has prepared are the outcome of the deliberation of the Commission after due consideration of the views expressed in the exchange of view programs and research on the subject made by the research officers of the Commission.

Ikteder Ahmed
Secretary

This is reference by the Government under section 6 (Ena) of the Law Commission Act, 1996, for examining the Special Powers Act, 1974 (Act XIV of 1974).

The relevant portion of the letter of reference under Memo No. Ain dated 1-1-2002 of the Ministry of Law, Justice and Parliamentary Affairs, Legislative Drafting Wing, runs as follows:-

বিষয়ঃ Special Powers Act, 1974 বাতিলক্রমে নতুন আইন প্রণয়নের ক্ষেত্রে সুপারিশ প্রদান প্রসঙ্গে।

উপর্যুক্ত (sic) বিষয়ে আইন কমিশনের সুপারিশ প্রদানের লক্ষ্যে নিম্নবর্ণিত বিষয়গুলি কমিশনের নিকট উপস্থাপনের জন্য নির্দেশক্রমে অনুরোধ করা যাচ্ছে; যথাঃ-

(ক) Special Powers Act, 1974 এ বর্ণিত “prejudicial act” এর ক্ষেত্রে detention (নিবর্তনমূলক আটক) সংক্রান্ত বিধান রেখে উহা সতর্কতার সহিত কার্যকরভাবে প্রয়োগের বিধানাবলী সমন্বয়ে নতুন আইন প্রণয়ন;

(খ) পূর্বোক্ত দফায় বর্ণিত অপরাধ ছাড়া উক্ত আইনের অধীনে সংজ্ঞায়িত ও বিচার্য অপরাধ সমূহ দন্ডবিধি যা অন্য কোনও বিশেষ আইনের আওতায় আনা; এবং

(গ) বিদ্যমান আইন শৃঙ্খলা পরিস্থিতি বিবেচনায় স্বল্পতম সময়ে দফা ক ও খ এ উল্লিখিত বিষয় সমূহ এবং উক্ত আইনের তফসিলভঙ্কাদের বিচার নিশ্চিতি।

বিষয়টি জরুরী। সুতারাং সরকারের প্রত্যাশা এই যে, কমিশন যথাশীঘ্র সম্ভব উহার সুপারিশ প্রেরণ করবে।”

(মোঃ জাকেরুল আবেদন)
সহকারী সচিব।

Rendered into English, the points of reference are:-

- (a) Retaining the provisions regarding detention of persons with a view to preventing the commission of “prejudicial act”, the Law Commission is required to make recommendations as to how these provisions can be “carefully and effectively” applied by suggesting additional provisions in a new enactment;

- (b) Whether offences under the Special Powers Act, 1974, other than the offence mentioned in clause (a) above should be made offences in the Penal Code, 1860 or in any other special law;
- (c) In the context of the prevailing law and order as to how the matters covered by clauses (a) and (b) and the cases arising out of the offences mentioned in the schedule to the Special Powers Act, 1974, can be disposed of within the “shortest possible” time.

At the very outset it should be pointed out that the points of references, particularly, the point of reference mentioned in clause (ga) of the letter of reference corresponding to clause (c) of the para hereto before is vague and suffers from incongruity in as much as the reference as to how the matters covered by clauses (ka) and (kha) of the letter of reference can be disposed of within the shortest possible time (স্বল্পতম সময়ে) is somewhat difficult to comprehend. This point of reference probably seeks suggestion as to how the cases arising out of the offences under the Special Powers Act, 1974 and the offences mentioned in the Schedule to the Act can be disposed of within the minimum possible time and it is in this context that we will examine this point of reference.

In the Special Powers Act, 1974, section 1 is the short title, section 2 defines various terms used in the Act, sections 3 to 14 deal with the provisions relating to preventive detention and sections 15 to 34B deal with substantive offences, punishment for these offences and procedures for their trial. The first point of reference involves preventive detention and the second and third points of reference involve the substantive offences.

A perusal of the first point of reference clearly shows that there is no scope for the Commission to examine whether there is at all any necessity to have a law of preventive detention. The reference unambiguously states that the Commission has to examine how the provisions of the Special Powers Act, 1974, relating to preventive detention can be effectively enforced with care by including additional provisions, if necessary, in a new enactment keeping the existing provisions of preventive detention in tact. (“----- detention (নিবর্তনমূলক আটক) সংক্রান্ত বিধান রেখে উহা সতর্কতার সহিত কার্যকরভাবে প্রয়োগের বিধানাবলী সমন্বয়ে নতুন আইন প্রণয়ন;.....”) The Government seems to have already made a policy decision to retain the provisions of preventive detention and is merely thinking of a new legislation to ensure a “careful and effective” application of the said provisions. We are not, therefore, required to embark on an exercise in order to examine the necessary or no of a law of preventive detention in Bangladesh.

In order to elicit opinion on the points of reference made by the Government the Law Commission arranged, in collaboration with the local administration, five programmes for exchanging views at five divisional headquarters, Chittagong, Sylhet, Khulna, Barisal and Rajshahi on 24.01.2002, 14.02.2002, 14.03.2002, 21.03.2002 and 28.03.2002 respectively and in the Capital on 02.05.2002. A cross section of the people such as, judges, magistrate, advocates, academics, journalists, public representatives, persons representing non-government organisations, law –enforcing agencies including police officers, and some other sections of civil society were invited to participate in these programmes and the response form them was highly encouraging.

The views expressed in the above programmes by different participants had some common features. Some participants were of opinion that the provisions relating to preventive detention in the Special Powers Act, 1974, conflicted with the Constitution, particularly, the “fundamental rights”

guaranteed therein and as such, should be altogether scrapped from the statute book. But, none of these participants explained which provisions of the Special Powers Act, 1974, relating to preventive detention was inconsistent with the Constitution. A large number of participants in all the programmes were unanimous in their opinion that the provisions relating to preventive detention in the Special Powers Act, 1974 were not being properly applied and were being largely misused for collateral purposes and as an weapon against political opponents. Some of them also proposed payment of adequate compensation to the victims of malafide use of the power of detention provided in the Special Powers Act, 1974 and some suggested imposition of personal liability for compensation on the detaining authority for such misuse. Some participants expressed the view that a law of preventive detention was essential for preventing such acts as are defined as “prejudicial acts” in the Special Powers Act, 1974, in the fast deteriorating socio-economic condition and sense of values among a desperate section of the people of the country but, at the same time, they laid stress on the need for proper and bonafide application of the law by the detaining authorities.

So far as the offences, the punishments for them and the special procedure for their trial prescribed in the Special Powers Act, 1974 are concerned, most of the participants in all the six programmes were in favour of their retention as they are. Some of them, however, expressed a contrary view and suggested that these offences might be included in the Penal Code 1860.

Although the first reference (reference “ka”) does not elaborate the meaning of “effective enforcement with care” (“সতর্কতার সহিত কার্যকরভাবে প্রয়োগের”.....) this expression may probably be read disjunctively as “effective enforcement” and “enforcement with care”. The words “effective enforcement”,

are supposed to mean that an order of detention passed by the detaining authority may be strictly according to law and may not be found to suffer from any illegality by any reviewing authority, such as the courts, resulting in nullification of the order. The words, “enforcement with care”, appear to mean that the power of detention is not abused or misused. In these contexts, it has to be examined whether the present law itself sufficiently ensures both ‘effective enforcement’ and “enforcement with care” or there is room for further improvement therein for achieving the said ends.

So far as “effective enforcement” of the provisions relating to preventive detention are concerned, section 3 of the Act lays down the substantive power and conditions of an order of detention. Sub-section (1) of section 3 of the Act empowers the Government to order detention of a person. It runs as follows:-
“The Government may, if satisfied with respect to any person that with a view to preventing him from doing any prejudicial act it is necessary so to do, make an order-

- (a) directing that such person be detained;
- (b) directing him to remove himself from Bangladesh in such manner, before such time and by such route as may be specified in the order;

Provided that no order of removal shall be made in respect of any citizen of Bangladesh.”

Sub-section (2) of the same section empowers a District Magistrate or an Additional District Magistrate to order detention of a person after arriving at similar satisfaction to that of the Government with a view to preventing such person from doing such prejudicial acts only as are described in sub-clauses (iii), (iv), (v), (vi) or (vii) of clause (f) of section 2 of the Act. Sub-section (3)

provides that an order of detention passed by a District Magistrate or an Additional District Magistrate, as the case may be, shall not remain in force for more than thirty days after the order has been made unless in the meantime it has been approved by the Government.

Clause (1) of section 2 of the Act defines that any act which is intended or is likely to cause any of the eight types of acts specified in clauses (i) to (ii) thereof would be “prejudicial act”.

Section 8 of the Act requires the detaining authority to communicate the grounds of detention to the within 15 days from the date of detention informing him at the same time that he has a right to submit a representation in writing against the order of detention and also affording him an opportunity of submitting the representation at the earliest possible opportunity.

Section 9 of the Act requires the Government to constitute an Advisory Board consisting of three persons of whom two persons are or have been or are qualified to be judges of the Supreme Court and the other person should be a senior officer in the service of the Republic. This section also requires the Government to appoint one of the two members who are or have been or are qualified to be judges of the Supreme Court as Chairman of the Advisory Board.

Section 10 of the Act requires the Government to place the grounds of detention and the representation, if any, submitted by the detenu before the Advisory Board within one hundred and twenty days from the date of detention.

Section 11 requires the Advisory Board to consider the grounds of detention, the representation submitted by the detenu, any other information which it may deem necessary and after allowing the detenu an opportunity of being heard to submit a report to the Government as to the propriety or otherwise of the detention within one hundred and seventy days from the date of detention of the detenu.

Section 12 of the Act provides that if the Advisory Board reports that there is no sufficient cause for detaining the detenu, the Government shall revoke the order of detention and release the detenu. It also provides that if the Advisory Board reports that there is sufficient cause for detention of the detenu, the Government may continue the detention. This section also enjoins the Advisory Board to review an order of detention once in every six months and give its opinion after affording the detenu an opportunity of being heard.

Section 13 of the Act empowers the Government to revoke an order of detention at any time.

Now, section 3 of the Act requires the detaining authority to be “satisfied”, before making an order of detention of a person, that the person concerned is likely to commit a “prejudicial act” as defined in section 2 (f) of the Act and that such act cannot be prevented unless the person concerned is detained. What constitute “satisfaction” of the detaining authority have been the subject-matter of debates and decisions in courts around the world for more than half a century and the law is now almost settled in Bangladesh as a consequence of judicial decisions. The long-standing century old principle that the “satisfaction” of the detaining authority as to the necessity of detention being entirely subjective the detaining authority was not bound to arrive at such

satisfaction on the basis of any objective material and was not bound to disclose the grounds of his satisfaction was for the first time dissented from in England in the lone judgment of Lord Atkin in *Liversidge vs. Anderson*¹. In England, enactments for preventive detention were made during the First and the Second World Wars and these were known as the Defence of the Realm Act and the Emergency Powers (Defence) Act. These enactments provided for preventive detention during times of war. Regulations were framed in 1939 under the Emergency Powers (Defence) Act and Regulation 1813 of these Regulations empowered the Secretary of State to order detention if he had:

“reasonable cause to believe any person to be of hostile origin or association or to have been recently concerned in acts prejudicial to the public safety or the defence of the realm or in the preparation or instigation of such acts and by reason thereof it is necessary to exercise control over him. *Liversidge*, a clergyman, raised suspicious of being pro-Nazi, having expressed some pro-Nazi views, and was detained by orders of Anderson, the Home Secretary, passed under Regulation 1813. *Liversidge* challenged the order of detention. The Home Secretary stated in reply that although “there was no case against him, no proof at all”, he was detained under Regulation 1813 as the Home Secretary had reasonable cause to believe him to be a person of hostile associations and it was necessary to exercise control over him. The case ultimately went to the House of Lords and the judgments were delivered in 1941. Four of the Law Lords took the view that the belief of the Home Secretary was subjective and could not be scrutinised by the courts and it was enough if the detaining authority had thought that there was reasonable cause to believe the existence of certain matters as enumerated in Regulation 1813 and had acted in good faith. Lord Atkin dissented and said:

¹ *Liversidge vs. Anderson*, 1949A.C. 206

“It is surely incapable of dispute that the words, if A has ‘X’ constituted a condition the essence of which is the existence of ‘X’ and the having of it by A, if it is condition to a right (including a power) granted to A, whenever the right comes into dispute the tribunal whatever it may be is charged with determining the dispute, must ascertain whether the condition is fulfilled. In some cases, the issue is one of fact, in others both fact and law, but in all cases the words indicate an existing something, the having of which can be ascertained. And the words do not mean and cannot mean ‘if A thinks that he has’. If ‘A has a broken ankle; and if ‘A has a right of way’ does not mean and cannot mean ‘if A thinks that he has a right of way.’ ‘Reasonable cause’ of an action or a belief is just as much a positive fact capable of determination by a third party as is a broken ankle or a legal right”.²

In Bangladesh, the successive decisions of the superior courts handed down since *Liversidge vs. Anderson* upheld the minority view expressed therein by Lord Atkin. Before referring to these decisions a few cases decided during Pakistan time should be very briefly referred to in order to trace the gradual development of the law of detention as it prevails to day. In *Tamizuddin Ahmed vs. The Province³ of East Bengal*, Dabirul Islam, a political activist, was detained by an order dated 15th March, 1949, under section 18 of the Bengal Special Powers Ordinance, 1946, on the ground that he was organising a movement among students, peasants and labourers. A petition under section 491 of the Code of Criminal Procedure, 1898, was filed before the High Court challenging his detention as no constitution had yet been adopted in Pakistan guaranteeing the right of habeas corpus and it was the only provision under which the right of

² Supra Note 1 at p.227

³ *Tamizuddin Ahmed vs. The Crown*, 1 DIR (1949)29; PLD (1949) Dacca,1.

habeas corpus was available. The order of detention was found to be illegal but the detenu was not released on the ground that a fresh order of detention had been passed during the pendency of the proceeding.

In *Nirmal Kumar Sen vs. The Crown*,⁴ Nirmal Kumar Sen and two others challenged their detention. In this case, the detenu admitted that he belonged to the Revolutionary Socialist Party of Pakistan and the court held that the grounds of detention served on the detenu could not be questioned and the court could not scrutinise whether the detention was justified on the objective determination of the subjective satisfaction of the detaining authority.

In 1956, the first Constitution of Pakistan was adopted. Article 22 of this Constitution empowered the Supreme Court of Pakistan and Article 170 thereof empowered the High Courts of the Provinces to issue appropriate writs to any person or authority including the Government in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari. Before any case of habeas corpus of any significance came up before the courts for decision under it the Constitution of 1956 was abrogated on 7th October, 1958, and martial law was proclaimed. In 1962, another Constitution was promulgated by the President of Pakistan. But, before the Constitution of 1962 came into force another case, *Mahbub Anam vs. the Government of East Pakistan*⁵ came up before the High Court of East Pakistan for decision. In this case, the detention of Abul Mansur Ahmed, a former provincial Minister, under the East Pakistan Prevention of Prejudicial Acts Ordinance, 1958, “with a view to preventing him from committing any act intended or likely to endanger public safety and maintenance of public order,” was challenged. Several grounds of detention were served on the detenu and some of grounds were *ex facie* beyond the scope

⁴ *Nirmal Kumar Sen vs. The Crown*, 55 CWN 25

⁵ *Mahbub Anam vs. Government of East Pakistan*, PLD (1959) Dacca 774.

C:\Documents and Settings\Touhid UzZaman\Desktop\lawcom\FULLFILL_ANNU_REPORT\FULLFILL_ANNUAL_REPORT_2002.DOC

and ambit of the Ordinance. It may be noted that the prejudicial act with a view to preventing the commission of which the order of detention was made was almost exactly similar to the 'prejudicial act' as defined in sub-clause (iii) of clause (f) of section 2 of the Special Powers Act, 1974. So, the decision in this case is very relevant to interpreting the present law of detention. The Division Bench referred the case to a larger bench for a decision on the following issue.

“Is the detention illegal when a detaining authority gives several grounds for detaining a man and out of the said grounds one or more, but not all, are beyond the scope and ambit of the Act of Ordinance conferring the power of detain?”

The Full Bench, to which the matter was referred, decided the issue as follows:

“When a detaining authority gives several grounds for a detaining a man and out of the said grounds of or more, but not all grounds are beyond the scope and ambit of the Act or Ordinance conferring the power to detain, the detention will be illegal, unless the said ground or grounds are of insignificant or unessential nature.”

The above decision laid the foundation of the principle that if some of the grounds of detention are unsustainable, the detention as a whole is vitiated although the court qualified the principle with the condition that those grounds must not be “of insignificant or unessential nature.” The Division Bench which ultimately heard the case found the detention illegal as the extraneous grounds were found to be not of insignificant and unessential nature but the detainee was not released and the rule was discharged as a fresh order of detention had in the mean time been passed and the court was of opinion that:

“the fact that the detenu is now detained under a fresh order is not disputed before us. Further, we are not in a position to say now that the said order is not a valid one.”

The Constitution of 1962 clearly and broadly defined the powers of the High Courts in matters of habeas corpus in Article 98 (2) (b) (i) thereof as follows:-

“(2) Subject to this Constitution, a High Court of a Province may, if it is satisfied that no other adequate remedy is provided by law-

(b) on the application of any person, make an order-

(i) directing that a person in custody in the Province be brought before the

High Court so that the Court may satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner.”

After the promulgation of the Pakistan Constitution of 1962, various aspects of law of preventive detention as laid down in the East Pakistan Public Safety Ordinance, 1958, a law similar in many respects to the Special Powers Act, 1974, relating to detention, came up for interpretation in *Rowshan Bijaya Shawkat Ali Khan vs. Government of East Pakistan*⁶. Shawkat Ali Khan, a practising barrister and an active politician, was arrested and detained on 20th September, 1964, under section 41 of the East Pakistan Public Safety Ordinance, 1958. The detention was challenged by his wife before the High Court of East Pakistan. Subsequently, another order of detention was passed on 26th September, 1964. Both orders, which gave rise to two cases, came before the High Court for hearing. The court held that-

⁶ *Rowshan Bijaya Shawkat Ali Khan vs. Government of East Pakistan*, 17 DLR (Dacca) (1965).
C:\Documents and Settings\Touhid UzZaman\Desktop\lawcom\FULLFILL_ANNU_REPORT\FULLFILL_ANNUAL_REPORT_2002.DOC

(1) Service of the grounds of detention on the detenu was mandatory and non-service would vitiate detention; (2) a detention which had been considered illegal cannot be validated by a fresh order (a clear departure from Mahbub Anam's case); and lastly, (3) detention could be sustained if the grounds of detention were vague and indefinite. The court did not, however, completely overrule the majority view in Liversidge regarding satisfaction of the detaining authority and held that "subjective satisfaction" of the detaining authority, even if arbitrary, was justified during such emergencies as war but was not justified during peace-time when the question of the liberty of the citizen becomes a paramount issue. The detenu was ordered to be released. The appeal by the Government to the Supreme Court of Pakistan was dismissed and the law expounded by the High Court was affirmed.

The next important case in which the conventional theory of subjective satisfaction and its exclusion from scrutiny by the courts came under attack was Malik Ghulam Jilani vs. Government of West Pakistan⁷. Ghulam Jilani was detained under rule 32 of the Defence of Pakistan Rules, 1965. He challenged his detention before the High Court of West Pakistan. The High Court dismissed the petition holding that the satisfaction of the detaining authority under rule 32, Defence of Pakistan Rules, was subjective and was not open to scrutiny. The petitioner appealed to the Supreme Court of Pakistan and the Supreme Court disapproved of the High Court's view that the court was not empowered to examine the nature or grounds of satisfaction of the detaining authority. The theory of subjective satisfaction and its exclusion from scrutiny by the courts came under attack and the Supreme Court of Pakistan decisively interpreted the powers of the High Court conferred by Article 98 (2) (b) (i) of the Pakistan Constitution, 1962 as follows:

⁷ Malik Ghulam Jilani vs. Government of West Pakistan, 19 DLR (SC)1968, 249.
C:\Documents and Settings\Touhid UzZaman\Desktop\lawcom\FULLFILL_ANNU_REPORT\FULLFILL_ANNUAL_REPORT_2002.DOC

“It is too late in the day to day rely, as the High Court has done, on the dictum in the English case of *Liversidge* for the purpose of investing the detaining authority with complete power to be the judge of its own satisfaction.”

And:

“Public power is now exercised in Pakistan under the Constitution of 1962 of which Article 2 requires that every citizen shall be dealt with in accordance with law.”

Again:

“Power is expressly given by Article 98 to the Superior Courts to probe into the exercise of public power by executive authorities, how high however, to decide whether they have acted with lawful authority.”

And finally:

“The judicial power is reduced to a nullity if laws are so worded or interpreted that the executive authorities may make that statutory rules they please thereunder, and may use this freedom to make themselves the final judges of their own ‘satisfaction’ for imposing restraints on the enjoyment of fundamental rights of citizens.”

in *Abdul Baqui Baluch vs. Government of West Pakistan*⁸ as follows:

“However, as I have said earlier, my reading of the majority decision in *Gulam Jilani’s* case to which I am a party, is that it alters the law laid down in *Liversidge’s* case only to the extent that it is no longer regarded as sufficient for the executive authority, merely to produce its order, saying that it is satisfied. It

⁸ *Abdul Baqui Baluch vs. Government of West Pakistan*
C:\Documents and Settings\Touhid UzZaman\Desktop\lawcom\FULLFILL_ANNU_REPORT\FULLFILL_ANNUAL_REPORT_2002.DOC

must also place before a court the material upon which its so claims to have been satisfied- so that the court can, in discharge of its duty under Article 98 (2) (b) (i), be in turn satisfied that the detenu is not being held without lawful authority or in an unlawful manner. The wording of clause (b) (i) of Article 98 (2) shows that not only the jurisdiction but also the manner of the exercise of that jurisdiction is subject to judicial review.”

It may be pointed out that the power of the High Courts to issue writs of habeas corpus under the provisions of Article 98 (2) (b) (i) of the Pakistan Constitution of 1962 was exactly similar to the power of the High Court Division of the Supreme Court of Bangladesh to issue such writs under the provisions of Article 102 (2) (b) (i) of the Constitution of Bangladesh, the two Articles being replica of each other.

The Principles regarding ‘subjective satisfaction’ of the detaining authority expound in Abdul Baqui Baluch’s cases by the Supreme Court of Pakistan were in fact followed by the Supreme Court of Bangladesh in a number of cases on preventive detention after coming into force of the Constitution of Bangladesh on 16th December, 1972 and particularly after the enactment of the Special Powers Act, 1974. The Supreme Court of Bangladesh set down several other principles in various cases of detention decided by it. Reference to only a few of the numerous cases decided by the Supreme Court in the recent past will show these principles which are required to be complied with in making an order of, and perpetuating, detention of a person.

Prior to the enactment of the Special Powers Act, 1974, the leading case was Hibibur Rahman vs. Government of Bangladesh⁹. In this case, the detention

⁹ Hibibur Rahman vs. Government of Bangladesh, 26 DLR (HCD) 1974 201.

of one A.K.M. Habibur Rahman was challenged before the High Court Division by a petition under Article 102 (2) (b) (i) of the Constitution. The grounds of detention were that (a) the detenu had formed the Islami Smajbadi Muslim Bangla Biplobi Sarkar and was engaged in a movement for overthrowing the Government by violent means, (b) he had been involved as an active worker of the Muslim Bangla movement, (c) he had donated Taka 1000/- for furthering this movement and (d) he attended secret meetings of this movement. In this case, the court found that there were 'objective materials' for satisfaction that the detenu was involved in the above activities but found that in order of extension of detention of the detenu, the satisfaction of the Government which was an abstract body was noted but the order did not indicate as to who was actually satisfied. The court, accordingly, found the detention illegal.

In *Aruna Sen vs. Government of Bangladesh*,¹⁰ the detention of Chanchal Sen who had been taken away by the Rakki Bahini was challenged by a petition under Article 102 (2) (b) (i) of the Constitution by his mother, Aruna Sen. After much effort she came to know that her son had been handed over to the Special Branch of the Police Department and was in custody at Mohammadpur Police Station within Dhaka city. She visited her son and found him in miserable condition. Signs of physical torture were visible on his whole body. The case of the Government was that the detenu had been detained under section 3 of the Special Powers Act, 1974, for various activities such as illegal possession of arms, robberies, murders, etc. After reviewing various decisions, including *Liversidge*, the court observed, among others, as follows:

“The English principle as expressed by Lord Atkin in his dissenting speech in *Liversidge vs. Anderson*, that every imprisonment without trial

¹⁰ *Aruna Sen vs. Government of Bangladesh*, 27 DLL (DCH) 1975, 122
C:\Documents and Settings\Touhid UzZaman\Desktop\lawcom\FULLFILL_ANNU_REPORT\FULLFILL_ANNUAL_REPORT_2002.DOC

and conviction is prima facie unlawful and the onus is upon the detaining authority to justify the detention by establishing the legality of its action according to the principles of English law has been adopted in the legal system of this Subcontinent, as has been rightly observed by Hamoodur Rahman, J., (as he then was) in the Government of West Pakistan and another vs. Begum Agha Abdul Karim Sohorish Kashmiri.”

It is further observed in Aruna Sen’s case that an order of detention of malafide or collated purpose is illegal, it must be shown that the grounds of detention are relevant and do not suffer from vagueness, are not indefinite and are not such as to deprive the detained person of his constitutional and legal right of making an effective representation against his detention at the earliest opportunity as provided in clause (5) of Article 33 of the Constitution and sub-section (1) of section 8 of the Special Powers Act, 1974. It is also held in that case that if some of the grounds are irrelevant or non-existent, the satisfaction of the detaining authority, in that particular case, may be said to have been caused by both valid and invalid grounds and such satisfaction cannot be held to be sufficient compliance with the requirement of law. Similarly, on question relating to furnishing of grounds of detention to the detenu as required by clause (5) of Article 33 of the Constitution and sub-section (1) of section 8 of the Special Powers Act, 1974, it is held that if some of the grounds are vague and indefinite although some other grounds are not so, the constitutional and legal requirements of the above provisions cannot be said to have been complied with.

Innumerable decision followed Aruna Sen’s case and the principles laid down therein were reiterated in all these decisions. In this connection, Abdul Latif Mirza vs. Government of Bangladesh¹¹ deserves special mention. In this

¹¹ Abdul Latif Mirza vs. Government of Bangladesh, 31 DLR (AD) 1979,1
C:\Documents and Settings\Touhid UzZaman\Desktop\lawcom\FULLFILL_ANNU_REPORT\FULLFILL_ANNUAL_REPORT_2002.DOC

case, some important aspects of the law of detention were authoritatively interpreted by the Appellate Division of the Supreme Court. It was noticed that the detaining authority invented a device to foil the release order of a detenu passed by the court by passing a fresh order immediately after the release order had been passed and also tried to validate an illegal order of detention by passing another apparently valid order. In this case, the Appellate Division of the Supreme Court held that 'satisfaction' of the detaining authority, as provided in section 3 of the Special Power Act, 1974, was not sufficient. As that provision was controlled by Article 102 (2) (b) (i) of the Constitution, the court must scrutinise the materials considered by the detaining authority for its 'satisfaction' and must itself be satisfied that the detention was legal. The Appellate Division also held that the grounds of detention must be clear, unambiguous and must not be vague so that the detenu might be able to submit an effective representation against his detention. If the grounds of detention are indefinite and vague, the detention, as a whole, becomes illegal. Lastly, the court held that an illegal detention cannot be continued by a later valid order.

In an earlier case¹² the pendency of a criminal case against a person cannot be used as a ground of his detention under section 3 of the Special Power Act, 1974 was followed in all subsequent cases and has become good law now.

In Farzana Haq vs Government of Bangladesh¹³ one Sanaul Huq Niru's detention under section 3 of the Special Powers Act, 1974, was challenged by his wife, Farzana Huq. It was alleged that he had been arrested and detained first of all on 13th September, 1984 and the detention was declared illegal by the High Court Division on 10th May, 1988 and an order was passed for his release. He was not, however, released. His detention was continued under a fresh order

¹² Shahidul Haque vs. Government of East Pakistan, 26 DLR (1968)1005.

¹³ Farzana Haq vs Government of Bangladesh, (1991)11 BLD 553

C:\Documents and Settings\Touhid UzZaman\Desktop\lawcom\FULLFILL_ANNU_REPORT\FULLFILL_ANNUAL_REPORT_2002.DOC

which was subsequently challenged and declared illegal by another order. The same drama was repeated several times and ultimately his detention came up before a Division Bench of the High Court Division. The court observed as follows:-

“The least that can be said is that, the detaining authority paid the regard to the order that was made by this court in Writ Petition No. 989 of 1989. It is unfortunate that the authority, which is obligated under Article 32 of the Constitution to protect the liberty of citizens and further required under Article 112 thereof to act in aid of this court, should flout the laws by resorting to authoritarian acts.”

the court directed his release and this time the order was complied with.

We will refer to one other case and then summarise the principles and guidelines expounded in the above decisions and numerous other decisions relating to preventive detention under the Special Powers Act, 1974. These principles and guidelines have become settled laws and their observance alone by the detaining authority will, in our opinion, ensure ‘effective enforcement’ and ‘enforcement with care’ of the law of preventive detention. The case to which we have referred above is *Md. Mohmood vs. Government of Bangladesh*.¹⁴ In this case, the detention of a former senior minister was called in question. The Division Bench consisting of two Judges hearing this case was divided. According to one view, the order of detention was held to be valid because-

“The detaining authority had before it the antecedent history of the detenu, the recent outburst of a section of the people for his statement in

¹⁴ *Md. Mohmood vs. Government of Bangladesh*, 43 DLR (HCD) (1991) 372.

the Morning Sun, his absconion (sic) along with the overall prevailing circumstances in the country, justifying the order of detention..... An action by way of preventive detention must be passed on suspicion and the court is not the tribunal to investigate whether circumstances exist warranting restraint order of the persons.”

The dissenting view was that the grounds of detention had no nexus with the order of detention and the grounds did not at all constitute ‘prejudicial acts’ as defined in section 2 (1) of the Special Powers Act, 1974, with a view to preventing which alone an order of detention under section 3 of the said Act could be passed. As such, according to this view, the detention was wholly illegal. Moreover, the court noticed.

“Since the impugned order of detention does not expressly record the satisfaction of the Government to the effect that the detention is necessary with a view to preventing him from doing any prejudicial act or any act which is intended or likely to endanger public safety or maintenance of public order, the detention of the detenu is ex facie illegal and without lawful authority.”

The case was then referred to another Judge who agreed with the dissenting view and held:

“Obviously, there is nothing in the order even to suggest that the Government was satisfied that it was necessary to make the order of detention with a view to preventing the detenu from doing any prejudicial act which is the sine qua none for the exercise of power under section 3 (1) of the said Act. The omission undoubtedly constitutes a serious infirmity, which was inevitably taken the order of detention out of the ambit of the section..... I am, therefore, of the

opinion that, on its very fact, the impugned order of detention does not fall within the scope and ambit of section 3(1) of the Act.”

The principles and guidelines laid down in the above cases and many other cases may now be summarised as follows:-

- (1) The ‘satisfaction’ of the detaining authority necessitating detention of a person under section 3 of the Special Power Act, 1974, must be based on ‘objective’ materials before it and may not merely be ‘subjective’ satisfaction, (Section 3 of the Act; Abdul Baqui Baluch vs. Government of West Pakistan, 20 DLR (SC) (1968) 249.
- (2) The order of detention must be bonafide i.e. must be passed only with a view to preventing a person from “doing any prejudicial act” as defined section 2 (f) of the Act and not for any collateral purpose. (Section 3 of the Act; Supra, note 10).
- (3) The grounds of detention must be communicated to the detenu within 15 days from the date of his detention. Non-compliance with this mandatory provision will render the detention illegal. (Section 8 (1) and 8 (2) of the Act, Haji Jainul Abedin vs. Bangladesh, 1990 BLD 364).
- (4) The grounds of detention must not be vague, ambiguous or indefinite but must be clear and definite so as to enable the detenu to make effective representation against his detention as provided in section 8 (1) of the Act (section 8 (1) of the Act, supra, note 11, Rokeya Begum vs. Bangladesh, represented by the Secretary, Ministry of Home Affairs 47 DLR 411.

- (5) Of more than one ground, if some of the grounds are good and some are bad, detention becomes illegal (*Hasina Karim vs. Bangladesh*, 94 DLR 366).
- (6) Reference to the Advisory Board constituted under section 9 of the Act must be made strictly according to section 10 of the Act. Failure to do so in any manner will render the detention illegal. (*Iftekhhar Ahmed vs. Bangladesh*, 50 DLR 18).
- (7) The advisory Board must examine the case of the detenu and submit its report to the Government strictly according to the procedures laid down in section 11 of the Act. Non-compliance with any of the procedures laid down in the said section will render the detention illegal. (Section 11 of the Act, *Md. Mansur vs. the Secretary, Ministry of Home Affairs*, 42 DLR 272).
- (8) Failure to revoke the order of detention according to the opinion of the Advisory Board will render the detention illegal (Section 12 (2) of the Act).
- (9) The Advisory Board is required to review the order of detention of a person every six months from the date of his detention as required by section 12 (2), proviso. Non-compliance with this provision will render the detention illegal. (*Sirajuddin vs. State*, PLD 1957 (WP) Lohore 962, *Monowar Begum vs. Secretary, Ministry of Home Affairs*, 1989 BLD 467).
- (10) Detention which is initially illegal cannot be validated or extended by a subsequent order of detention which may not suffer from any infirmity and may be valid. (*Tahera Islam vs. Secretary, Home*, 40 DLR 193).
- (11) An order of detention passed by a District Magistrate or an Additional District Magistrate under section 3 (2) of the Act must be approved by

the Government within 30 days from the date of detention if the detention is required to be continued beyond 30 days. Continuance of detention beyond 30 days without approval of the Government will be illegal. (Section 3 (3) of the Act, Saleha Chowdhury vs. Government of Bangladesh, 40 DLR 207; Iskandar Laskar vs. District Magistrate, Jessore and others, 47 DLR 12.

The above general principles have been repeatedly reiterated in many other cases and have virtually become good law.

Article 33 of the Constitution, particularly, clauses (4), (5) and(6) provide certain constitutional safeguards to persons detained under any law of preventive detention. Sections 3, 8,9,10,11 and 12 of the Special Powers Act, 1974, which we have already referred to above, reflect these constitutional safeguards and re perfectly in conformity therewith. These constitutional and statutory provisions have been interpreted authoritatively by the superior courts in innumerable cases some of which have been cited and discussed by us heretofore. These interpretations which we have summarized above have become good law. The above statutory provisions and the principles laid down by the court contain in-built safeguards for ensuring effective enforcement as well as enforcement with care of the existing law of preventive detention provided that the detaining authority, while making an order of detention or perpetuating a detention, keep the above statutory provisions in mind and make the orders inconformity therewith. Unfortunately, the prevailing situation is otherwise and this will be evident from the following table wherein during the years 1998,1999,2000 and 2001 the total number of applications for haveas corpus disposed of in the Supreme Court High Court Division and the result thereof have been shown (supplied by the office of the Registrar, Supreme Court).

Applications under Article 102 (2) (b) (i) of the Constitution.

Year	Disposal	Rule absolute	Rule discharged	% of Rule absolute	%of Rule discharge
1998	623	578	45	92½%	7½%
1999	1122	1029	93	91½%	8½%
2000	1193	1139	54	95½%	4½%
2001	612	597	15	91½%	9%

Applications under section 491 of the Code of Criminal Procedure.

Year	Disposal	Rule absolute	Rule discharged	% of Rule absolute	%of Rule discharge
1998	2880	2847	33	94½%	5½%
1999	1537	1488	51	97½%	2½%
2000	1600	1541	59	96½%	3½%
2001	1832	1828	8	99½%	½%

The above table shows that in 1998,1999,2000 and 2001, in applications under Article 102 (2) (b) (i) of the Constitution in 92½%, 91½%, 95½% and 91½% cases respectively and in applications under section 491 of the Code of Criminal Procedure, 1898, 98½%, 97½%, 96½%, 99½% cases respectively orders of detention were found to be illegal. Moreover, in may cases, rules were discharged as these had become infructuous, the detenu having been released before the case was taken up for hearing and not on merit. So, in almost in 99% cases the orders of detention were found to be illegal and without lawful authority. This fact indicates how carelessly and without regard to the provisions of the law of detention as they stand to day in Bangladesh, the detaining authorities applied this law. The detention orders were almost always

set aside by the superior courts because the authorities applying the law never cared to be aware of the judicial pronouncements laying down the 'dos' and 'don'ts' for them. In this connection, we are tempted to quote an observation made by the Supreme Court in Abdul Latif Mirza's case:"... I have been sadly disappointed to find that the change that has occurred in the judicial view as to the duty of the detaining authority in a proceeding in which the legality of detention of a certain person is challenged and also as regards the Court's power to investigate the question of such legality, has not made much impression on them. It seems, there has not been adequate appreciation of their duty, not only to show that the grounds of detention communicated to the prisoner are relevant and not vague, uncertain or illusory, but also to show that there were in fact some materials having some probative values as the basis of the satisfaction of the detaining authority that the detenu was likely to do a prejudicial act, if not detained."¹⁵

In fact, during the workshops held in the six divisional headquarters in which various sectors of society including the law enforcing agencies participated, more than one detaining authority frankly disclosed before the Law Commission that they had passed detention orders mechanically and without application of mind on the basis of recommendations made by the police although they had no convincing materials before them as they were under various types of pressure including political pressure to do so. During these workshops it was patent before us that the abuse and misuse of the provisions in the Special Powers Act, 1974, relating to preventive detention occur from improper application of the law and not because of any defect or infirmity in the law itself. If the law is properly applied by the authorities concerned and the application of the law is properly applied by the authorities concerned and the

¹⁵ Supra note 11, para 32 D.C. Bhattacharya, J.

application of law is in conformity with sections 2 (f) to 14 of the Special Powers Act, 1974, and the interpretation thereof by the Supreme Court, there will hardly be any occasion for its abuse or misuse. Although the law of preventive detention and the principles underlying therein are now settled by judicial decisions some of which we have already referred to above and although there is no doubt that there is very little possibility of any abuse of the power of detention if the detaining authorities concerned meticulously observe these principles flowing from judicial decisions, we would like to suggest a further statutory safeguard by proposing an amendment to sub-section (3) of section 3 of the Act by adding a proviso thereto as follows:-

“Provided that an order made under sub-section (2) shall not be approved by the Government unless the Government is satisfied that the District Magistrate or the Additional District Magistrate, as the case may be, making the order had before him reasonable materials to satisfy himself that the detenu was likely to do a prejudicial act and that it was necessary to detain him with a view to preventing him from doing such prejudicial act.”

We are, therefore, of the opinion that except the above amendment, there is no necessity of any amendment, alteration, modification or replacement of section 2 (f) to 14 of the Special Powers Act, 1974, and our recommendations will follow accordingly.

In the next place, we do not find any legal or jurisprudential or even practical necessity to replace the Special Powers Act, 1974 by a new enactment keeping the provisions of the former relating to detention intact in the latter as proposed by the Government in their reference. As no jurisprudential purpose will be served by putting the same wine in a new

bottle, we do not recommend replacement of the existing enactment by another enactment. What is really required is not a new law or any major change in the existing law but a new mindset which must reflect all that we have said hereinbefore to ensure “effective and careful” application of the law.

Sections 15 to 34B of the Act relate to the next point of reference i.e. substantive offences triable under the Act, the punishments prescribed therefore and the procedures for their trial.

Section 15 defines the offences of “sabotage” and the punishment for committing it “Sabotage” is defined in clauses (a) to (f) of sub-section (1) of section 15 as “any act with intent to impair the efficiency or impede the working of, or cause damage to,-

- (a) any building, vehicle, machinery, apparatus or other property used, or intended to be used, for the purposes of the Government or of any local authority or nationalised commercial or industrial undertaking;
- (b) any railway, aerial ropeway, road, canal, bridge, culvert, causeway, port, dockyard, lighthouse, aerodrome, telegraph or telephone line or post or television or wireless installation;
- (c) any rolling stock of any railway or any vessel or aircraft;
- (d) any building or other property used in connection with the production, distribution or supply or any essential commodity and sewage works, mine or factory;
- (e) any place or area prohibited or protected under this Act or any other law for the time being in force; or
- (f) any jute, jute product, jute godown, jute mill or jute baling press.

Sub-section (3) prescribes death penalty as the maximum punishment for an offence under sub-section (1).

The offences covered by this section correspond to some of the offences covered by Chapter XVII of the Penal Code, 1860 (see section 425 to 438, Penal Code, 1860) but the punishments prescribed for those offences in the Penal Code, 1860, are much less. Moreover, in section 15 of the Special Powers Act, 1974, some other types of offences not covered by the Penal Code, 1860, have been included and the measure of punishment is the highest conceivable.

Sections 16,17and 18 of the Act were repealed.

Section 19 empowers the Government to suspend, by order, the activities of any association which acts in a manner prejudicial to public order for a period no exceeding six months. Sub-section (6) of this section prohibits all persons from managing or assisting, etc. such associations during the period its activities are suspended and sub-section (8) of this section makes the contravention of sub-section (6) thereof a punishable offence.

Section 20 of the Act prohibits formation of, and association with, any communal association or any association which uses religion for political purpose and sub-section (2) of this section empowers the Government to dissolve such associations. Sub-section (3) of this section makes membership or taking part in such a dissolved association a punishable offence.

Section 21, 22 and 23 empower the Government to declare certain sensitive places and areas as protected places and protected areas respectively and make entry into such places and areas without permission punishable offences.

Section 24 empowers the District Magistrate and the Police Commissioner in a Metropolitan area to impose, by order, curfew, that is, prohibit persons from coming out of doors and makes contravention of such order a punishable offence.

Section 19 to 24 appear to have made certain types of activities as described above punishable offences.

Section 25 of the Act makes hoarding as defined in clause (e) of section 2 of the Act and dealing in the black market as defined in clause (b) of the same section as punishable offences. “Hoarding” has been defined as “stocking or storing anything in excess of the maximum quantity of that thing allowed to be held in stock or storage at any one time by a person by or under any law” and “dealing in the black market” have been defined as selling or buying anything for purposes of trade at a price higher than the maximum price fixed by or under any law, or, selling, bartering exchanging supplying or disposing of any rationed article or using or dealing with any licence, permit or rationed document otherwise than in accordance with law.

Section 25A makes counterfeiting of currency-notes and Government stamps punishable offences. This section to some extent corresponds to the offences covered by Chapter XII of the Penal Code, 1860, except that in the Penal Code, 1860, counterfeiting of currency-notes does not find place as an offence although counterfeiting of Bangladesh coin and Government stamps are offences thereunder.

Section 25B makes smuggling of jute, gold, silver, currency, articles of food, drugs, imported goods or any other goods out of Bangladesh and

smuggling of any goods into Bangladesh in contravention of any law for the time being in force punishable offences. Selling, displaying or possessing smuggled goods for sale have also been made punishable offences under this section.

Section 25C makes adulteration of food, drinks, cosmetics, etc. or sale of adulterated food, drink or cosmetics punishable offences. This section corresponds to section 272 to 276 of the Penal Code, 1860. But, the scope of section 25C of the Act is much wider and the punishments prescribed are more severe than in the Penal Code, 1860.

Section 25D makes attempt to commit any offence under the Act also punishable.

It appears that the Act has included certain acts which were already offences under the Penal Code, 1860, as offences with enhanced punishments. It has also made certain activities which are not a offences or are considered as petty offences in the Penal Code, 1860 as offences of very grave nature. The changing socio-economic condition and the consequent change in the method, nature and the rate of crimes appear to have prompted the legislature to enact the penal provisions in sections 15 to 25D of the Act. As we will readily see that special provisions have also been made for trial of the offenders charged with the offences under the Act.

Apart from the offences described in section 15 to 25D, the offences under the Arms Act, 1878, the Explosive Substances Act, 1908 and offences punishable under any rules made under the Emergency Powers Act, 1975 or any order made under any such rule have been made triable by the Special Tribunals constituted under the Special Powers Act, 1974, in accordance with the special

procedures laid down in the said Act, because, these offences have also been considered by the legislature as grave as the substantive offences under the Act.

Although some of the offences under the Act partly correspond to some of the offences under the general law i.e. the Penal Code, 1860, this Act overrides all other laws for the time being in force. The offences covered by the Act have been comprehensively defined and special and deterrent punishments have been provided therefor. We do not see any need to include these offences in the general law and treat these offences as ordinary offences under the general law and particularly so, in view of the increasing intensity of these offences in society. Moreover, the law has been in force for more than 25 years and no major defect has been reported in the trial of the offences under the Act. Considering every aspects of the matter we are of the opinion that there is no need to include the offences covered by the Act in any existing enactment including the Penal Code, 1860 or in any new enactment.

So far as the last point of reference is concerned, for expeditious disposal of the cases under the Act, Special Tribunals have been established under section 26 of the Act. In view of section 27 of the Act, the Special Tribunals are empowered to take cognizance as soon as a report is filed by a competent police officer after investigation. In view of sub-section (4) of section 27, the Special Tribunals are required to follow the procedure laid down in the Code of Criminal Procedure, 1898, for summary trial of summons cases. Sub-section (5) of section 27 discourages adjournment once trial begins. Sub-section (6) of section 27 allows trial in absentia if the accused in absconding. Section 29 of the Act bars trial de novo. An examination of the procedures of trial laid down in the Act shows that there cannot be any better procedure for expeditious trial and at the same time ensuring fair dispensation of justice. If the courts trying the

cases under the Act strictly follow the procedures laid down therein, delay in disposal is bound to be eliminated and expeditious disposal will be ensured. We do not find any defect in the law itself in the respect.

Recommendations

In the light of the above observations, we make the following recommendations regarding the points of reference made by the Government:-

1. There is no legal or jurisprudential necessity of enacting any new law embodying the provisions relating to the law of preventive detention as they are in the Special Powers Act, 1974 by repealing the said Act as the provisions in the existing Act relating to preventive detention are adequate and comprehensive enough to ensure effective and careful enforcement.

2. We propose the following amendment:

In section 2 sub-section (2) the full stop (.) shall be substituted by a colon (:) and the following proviso shall be inserted:-

“Provided that an order made under sub-section (2) shall not be approved by the Government unless the Government is satisfied that the District Magistrate or the Additional District Magistrate, as the case may be, making the order had before him reasonable materials to satisfy himself that the detenu was likely to do a prejudicial act and that it was necessary to detain him with a view to preventing him from doing such prejudicial act.”

3. The offences covered by the Special Powers Act, 1974, need not be included in any existing law or embodied in any new law.

4. There is no legal defect in the procedures for trial of the offences under the Special Powers Act, 1974, so as to hamper expeditious disposal of the cases under the Act at the shortest possible time.

Additional Recommendations

In addition to the above recommendations made by us on the specific points of reference made by the Government, we would also like to make the following additional recommendations:-

5. For effective and careful enforcement of the law of preventive detention the detaining authority is required to comply with the provisions of sections 3 to 14 read with section 2 (f) of the Special Powers Act, 1974, strictly in letter and spirit.
6. For speedy disposal of trials of offences under the Special Powers Act, 1974, the Special Tribunals constituted under the Act are required to follow the procedures of trial laid down in section 27 of the Special Powers Act, 1974, both in letter and spirit and the superintending authorities of these tribunals the Supreme Court and the Special Tribunal consisting of the Sessions Judges in a district in the respect of the other Special Tribunal in the district) may monitor the work of the Special Tribunals.
7. In the areas where there is heavy load of cases under the Act, some tribunals may be earmarked exclusively for trying the cases under the Act.

JUSTICE A.K.M. SADAQUE

JUSTICE NAIMUDDING AHMED

MEMBER

MEMBER

JUSTICE A.T.M. AFZAL
CHAIRMAN