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Arrest Under the Code of Criminal Procedure, 1898: A Critique

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ABSTRACT

Amar Shonar Bangla (or literally translated as my Golden Bengal) the first verse of the national anthem is the expected reflection of Bangladesh especially given the fact that the country was born of nine long months of vicious struggle against occupation, lawlessness and prejudice. The glory contemplated in the national anthem is envisaged through lawfulness, democracy whereby rule of law along with fundamental human rights and freedom is institutionalized. However, glory has somehow become synonymous with ignominy in respect of various law enforcing agencies in Bangladesh. The golden Bengal now accommodates officials that degrade the law and human life in general, exhibits disregard to the constitutional mandates and somehow are always entitled to authority. *De integro* above, this study efforts to elucidate how such glory maybe restored, provide voice to the voiceless, bestow knowledge upon the knowledge less on how arrest and detention are perceived by the Constitution *in tadem* various rights guaranteed by the Constitution and other statutes and the lawful dos and the don'ts of arrest and detention and the scope of misuse of statutory arresting jurisdiction.

Keywords: Criminal procedure code, Apprehension, Arrest, Detention, Exploitation, and Police.

INTRODUCTION:

The billion-dollar question 'Who will Police the Police' tendered by Justice Krishna Iyer of the Supreme Court of India (Prem Chand Paniwala vs Union of India, 1981) is inquisitively captivating and fundamentally badgering especially in a developing democracy like Bangladesh. Supremacy has been ordained to the Constitution since its promulgation. It is none other but the Constitution in its supremacy that is incapacitated, victimized in its failure to answer the aforesaid question, particularly when unlawful arrests, detention, extrajudicial killings, custodial deaths, viciousness, etc. occurs (Sinha, 2020). Within the realm of common-law, arrest is the executioner's procedure to secure attendance of an accused to answer charges (Li, 2021). Thereby the jurisdiction to arrest is invested principally in the law enforcement agencies specifi-

cally the police (Akbas, 2019). The jurisdiction aforementioned allows limited discretionary power to the arresting officer (Li, 2021) by the use of the word 'reasonable suspicion' (Criminal Procedure, 1898). Engel *et al.* (2019) in their book entitled Power to Arrest mentions of the plausible stimulus that regulates the discretion of an arresting police officer as proposed originally by Shermanviz -

- 1) Individuality of the Arresting Officer such as character, age, ethnic background, etc.
- 2) Circumstance of apprehension like the magnitude of suspicion, infliction on the victim, etc.
- 3) Communal aspects like characteristics of the neighborhood, political influence over it, etc.
- 4) Forte of the institute of employment *via* professionalism, management, supervision, size of the agency, respondent superior, etc.

- 5) Regard for the law such as grievousness of the felony, potency of available evidence, etc.

Furthermore, arrest by a citizen or arrest by private security or person under compelling circumstances is legitimate (Akbas, 2019). However, the compelling circumstance is constrained to maintaining public peace or to avert imminent disorder (Li, 2021). The substance of arrest is material in the criminal jurisprudence due to its effect of curtailing the fundamental right of freedom of movement and invasion of privacy (Engel *et al.*, 2017). In *Whitehouse v Gormley*, 2019 it was observed that the statutory ambit of power to arrest is 'relatively undeveloped,' nonetheless such claim must additionally bear reverence to evidence of malice for the legality of arrest to be assessed on an equivalent basis (Reid, 2019). The elongated estrangement between statutory principles and prudence relating to arrest is fairly conspicuous and overwhelming (Rana *et al.*, 2021).

Unfortunately, such is the *status quo* generally in any country like Bangladesh i.e., under the tag of a 'developing State' wherein corruption (Hossain, 2019) in the form of political influence, exploitation of the unwarranted police power for *quid pro quo* persists (Mamun, 2019), which casually impedes justices *via* false implications, unlawful detention (Hossain, 2019) or false arrest, coerced confession, misrepresentation of evidence and unfortunate custodial death due to continuously transpiring brutality. All of the aforementioned grievances are begotten of in compliance to statutory principles and improper investigation (Rana, 2021). Fundamentally, any law that deprives any person of personal liberty within its local jurisdiction must not be arbitrary or must be reasonable and unbiased (Islam, 2012, pp. 275-276)

Defining Arrest

Lebertas in Legibus i.e., liberty in/under the law or in other words liberty may be curbed only under the law, a globally recognized apothegm that is enshrined constitutionally in Bangladesh, which must never be meddled with under the pretense of public safety, public law and order, public interest, etc (Afzal Hossain vs Ministry of Home, 2002)). Though the term arrest has not been statutorily defined within legislative Bangladesh, however, it is the act of taking an apprehended into custody (Ajaib Singh vs Punjab, 1952) on the basis

of *actus rea* (Akbas, 2019), inflicted by a lawful authority in response to secure admission for criminal charges, to administer justice (Black, 2009, 124-125), to compel obedience to the order of a Court of Justice or to prevent the commission of a crime (Mukherjee and Singh, 1982, pp.175-176). In *United States vs Smith*, the term arrest was categorically defined as the act of seizing, taking or detaining the arrestee by

- 1) Touching or putting hands or using force to apprehend the arrestee
- 2) Show of any indicative act of apprehension
- 3) Willful surrender or *apprehensio de consensu*

This very definition has been adopted in Bailentine's Law Dictionary. Moreover, arrest maybe defined as the *de jure* deprivation of liberty of the arrestee without prejudice (BLAST vs Bangladesh, 2003). The deprivation is deemed complete when the arrestee comprehends/acknowledges and submits to the authority of the arrestor (Desai, 1996, p.206) or when movement is actually restrained and not when mere intention to arrest is rendered via oral declaration (HM Lal vs Emperor, 1930). However, restraint must be proportionate i.e., essentially required to prevent escape (Mullick, 1996, p.58). Hence, arrest is the moderation of the freedom of an individual (Ahmad, 2020). *Enroute* investigation, a police officer is authorized to execute arrest under the authority of warrant or without a warrant (Mullick, 1996) for non-cognizable and cognizable offences respectively *vide* Schedule II Column 3 Code of Criminal Procedure, 1898. Characteristically, the term arrest is exhaustive as any apprehension by a lawful authority either civil or criminal falls under its wingspan. Nevertheless, it must always be understood under the elucidation of the fundamental rights (Mukerjee and Singh, 1982, pp. 175-176) as protection of life, privacy, liberty against unlawful arrest and detention is unquestionably a constitutional concern (KK Lal Khushalani vs Maharashtra, 1981). Along, with the fundamental rights, an arrestee is also entitled to bail on being arrested (Dhanji Ram vs Union of India, 1960) and every arrestee must *de jure* be facilitated to invoke various fundamental and statutory rights (BLAST vs Bangladesh, 2003).

Aims & Scope

The New York Times has alleged that unlawful detentions and disappearances are customary in Bangladesh

and additionally reported approximately 15,000 arrests in June, 2016 alone (Board, 2016). Amnesty International has called the Digital Security Act as 'draconian' as it excessively empowers authorities. Under the Statute at least 433 individuals were unlawfully detained, tortured as of July, 2021 for criticizing powerful people on social media (Amnesty, 2021) which is the practice of freedom of speech. Unfortunately, every such criticism is adopted as either sedition, or defamation or criminal conspiracy (Penal Code, 1860) or any other offence under any special criminal statute, but never the democratic practice of dialogue (Constitution, 1972). Bangladesh being in the spotlight of such allegations and given the current democratic process, this research undertakes to elaborate

- a) How the Constitution justifies arrest and curtailing the freedom of movement and the purpose behind inflicting arrest on individuals
- b) The provisions of various categories of arrest and detention available within the statutory ambit of the Code of Criminal Procedure, 1898
- c) The fundamental and statutory rights available to the arrestee
- d) Exploitation of the jurisdiction to arrest by the empowered authority(ies)

METHODOLOGY:

The course of this study is empirical whereby the approach of qualitative data analysis was adopted to extract its results. Qualitative study deploys in-depth scrutiny *en route* revealing the relevant interconnection and interdependency between concepts (Bari, 2022). Primary and secondary documents for e.g., relevant scholarly articles, relative laws of Bangladesh like the Constitution of Bangladesh 1972, the Code of Criminal Procedure 1898, the Penal Code 1860 etc., *pari materia* statutes of other countries and reports of local and international organizations were extensively studied and analyzed. It is a well-established that Bangladesh regulates in the legal system of the common-law (Bari, 2022) whereby any decision of the Apex Court not subjected to *per incurium* by the same division gracefully maintains the status of *stare decisis* (SH Bhuiya vs Chairman First Court of Settlement, 2017). Law declared by the Apex Court extends irrefutable binding effect on all other Courts inferior to it (ACC vs. Barrister Nazmul Huda, 2008). Keeping that in mind,

law journals and decision of higher Courts of Bangladesh and other countries relevant to the scope of this research shall be elaborately analyzed.

Justifying Arrest

Uninterrupted movement across the local jurisdiction of Bangladesh, leaving and re-entering within such local jurisdiction is the guaranteed right of every citizen (Ruhul Kabir Rizvi vs Govt. of Bangladesh, 2017). However, Article 36 of the Constitution of People's Republic of Bangladesh permits reasonable statutory restrictions on the freedom of movement (Constitution, 1972) within the purview of Chapter V of the Code of Criminal Procedure, 1898. Such restrictions may only be invoked when an individual is in conflict with the law or such is inevitably essential for interest of the public at large. In compliance with the aforementioned, any penal statute providing for deprivation of personal liberty must be characteristic reasonable and non-arbitrary otherwise it stands contrary to or in conflict with Article 31 of the Constitution (Emrul Kayes vs State, 2014). On every occasion of curtailing the freedom of movement by a lawful authority, it is presumed that the apprehension was inflicted in compliance to the requirements of safeguards against arrest and detention (Mukherjee and Singh, 1982, pp.175-176). Additionally, such safeguards are available constantly so long arrest is executed regardless of the offence being committed by the arrestee or otherwise (Ajaib Singh vs Punjab, 1952). In *Rumeen Farhana vs Bangladesh*, (2017) the petitioner was arbitrarily detained by Immigration Officers, which was recognized accordingly by the High Court Division. The presiding bench declared such detention to be unlawful and having no force of law unless the traveler is wanted in a criminal case as exiting and re-entering into Bangladesh with valid documents is the fundamental right of the petitioner. Restraint provided must just be sufficient to preclude escape and the arresting officer must efficiently justify trespassing the rights of the arrestee (Perason, Rowe and Turner, 2018) and carrying out searches and seizure. The justification contemplated herein is suspicion depending on the severity of the incurred intrusion (Akbas, 2019) as provided in the Fourth Amendment of the American Constitution, which is *pari material* the collective provisions of Article 36 of the Constitution (1972) and

Section 54 and Section 51 of the Criminal Procedure Code (1898). It has been provided therein that police on reasonable suspicion may lawfully arrest or curtail movement of any person suspected and conduct search on such person. Moreover, the concept of reasonable suspicion has been found to be vague and in compliant the constitution in *BLAST vs Bangladesh* (2003).

Purpose of Arrest & Detention

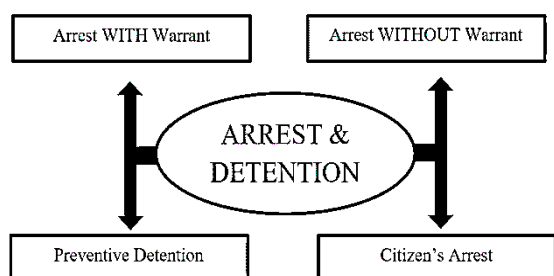
Arrest is a constituent factor of investigation that is intended to procure several fundamental purposes (State vs Professor Dr. Morshed Hasan Khan, 2019) viz.

- 1) To ensure the availability of the accused/ arrestee for interrogation (*ibid*)
- 2) To prevent the accused from absconding lawful arrest and trial (Nizam Hazari vs State, 2001)
- 3) To confirm attendance before a Court to answer charges (Li. 2021)
- 4) To uphold the maxim *salus populi est suprema lex* i.e., in this context to deter the arrestee from performing any prejudicial or (Afzal Hossain vs Ministry of Home, 2002) to ensure public safety
- 5) To uphold and confirm that justice is served to the accused/arrestee
- 6) To ascertain that the victim is compensated or remedied accordingly

An individual may only be denied the fundamental rights of freedom of movement and personal liberty in discharge of justice or in interest of justice by the execution of a statute.

Types of Arrest & Detention

The concept of Arrest being the act of forsaking freedom of movement and personal liberty at the expense of committing or omitting to commit any statutorily punishable or statutorily directed act respectively has been meticulously covered and elaborately defined in Section 1.1 of this study. **Fig.1** depicts the types of arrest and detention available within the purview of the statute mentioned herein below.



In this Section the various forms of arrest and detention encompassed in Chapter V of the Code of Criminal Procedure in reference to Schedule II Column 3, Article 33 of the Constitution & Section 3 of the Special Powers Act shall be expounded.

Arrest with Warrant

Schedule II-Column 3 of the Code of Criminal Procedure, 1898 demarcates how an arrest is to be executed i.e., either with a warrant or without a warrant. Whereby arrest for an offence cannot be affected without a valid warrant form a competent magistrate is recognized as non-cognizable offences (Black, 2009, pp. 124-125). Along with arrest, neither investigation nor search without being authorized is manifestable (Siddique Ahmed vs. State, 1985). It is the rebuttable presumption of law that arrest made under the authority of a warrant does not vitiate the fundamental rights as the arrestee is sufficiently informed the grounds of arrest (Chaturvedi, 1998, p.721) and the allegations or the case causing issuance of the warrant (Gaibinding-pao Kabui vs Manipur, 1963). Essentially, the act of arresting demand seizure or detention with the intention of arresting the person warranted by a competent authority and not via mere words or gestures (Miah, 2010, p.47). Section 75 to Section 86 provides regulations relating to arrest by executing a warrant whereby the executing officer can execute such warrant anywhere in Bangladesh (Criminal Procedure, 1898) and employ ‘all means necessary’ to prevent the apprehended from bolting for e.g., utilize restraining equipment like handcuffs, chain, chord or use reasonably justifiable force (Miah, 2010).

Arrest without Warrant

In *Abdur Rahman vs State*, (1977) the Apex Court held that in a case involving an offence of cognizable nature, the accused can be apprehended without a warrant. Section 54 lays down the directives of exerting arrest without a warrant whereby nine grounds are permitted. Nonetheless, the very first ground causes adrenaline rush due to its uncertainty, ambiguity (Criminal Procedure, 1898) and vagueness as there exists immense possibility of misuse of authority by a police officer (Bangladesh vs BLAST, 2017) since it allows unregulated power to arrest anyone and everyone without a warrant (Al Faruque, 2013). It must never be disregarded that the promulgation of the provision and

the Code generally was adopted during the colonial era and given the present scenario, this provision and Part III of the Constitution cannot coexist (Bangladesh vs BLAST, 2017). Furthermore, the jurisdiction to arrest without a warrant under the provisions of section 54 is unreasonably vast as a police officer may elect to exercise arrest on receiving credible information or on having reasonable suspicion of engagement in any cognizable offence (Kalandiar Kabir vs Bangladesh, 2002). The test lies to expand the concept of 'credible information.' According to *BLAST vs Bangladesh* (2003), the credibility of information is the definite/ certain knowledge of subsistence of facts whereby the officer executing such arrest must be in a position to disclose the nature and source of information and also simultaneously vindicate the grounds of belief. An unfurnished assertion without any material grounds does not constitute credible information (Saifuzzaman vs State, 2004). As a matter of fact, the prudence stands on the contrary, i.e., the consideration of such arrest must relate to specific averments subject to the distinct circumstances of each case (Mia, 2020). The power to arrest conferred by the Code should never be arbitrarily employed at the whim and desire of a police officer. The arresting officer as a mandatory prerequisite must investigate or verify the credibility of the information in reference to the grievousness of the offence (Bangladesh vs BLAST, 2017). The reasonable doubt contemplated within the provision must be established from genuine, real and unimaginary facts intelligible by any normal thinking man (State vs Montaz Ali, 2005). It is binding on the arresting officer to record the justifiable reasons causing the suspicion which resulted in the arrest and such reason being mere suspicion of involvement in a cognizable offence is bound to be rejected (BLAST vs Bangladesh, 2003). Yet again we are at the junction where it is sufficiently proved that the scope of power to arrest is relatively undeveloped (Reid, 2019). The High Court has directed that before ordering detention, a Magistrate must apply his judicial mind which was not done in the case of *Seing Hia Maung vs Government of Bangladesh* (2003) and the Buddhist clergyman was arrested and detained unlawfully. Ambiguity and vagueness of the wide, undefined concept of 'credible information' and 'reasonable suspicion' is to be held liable for every mischief done by police under the provision along with

utter disregard of the constitutional safeguards. Unlawful arrests, detention, custodial rape, torture, death is nothing new and largely persistent in Bangladesh (Al-Faruque and Bari, 2019). It is not only upon the Government to keep the authorities under check, citizens alike should take it upon themselves to educate and get familiarized with the constitutionally guaranteed rights.

Preventive Detention

Inter alia doctrine of preventive detention was introduced in the Constitution *via* the Second Amendment in 1973 which principally is the only exception to Article 33 of the Constitution as it suspends the rights therein provided. Such detention is operational under the Special Powers Act, 1974, which may extend consecutively for 6 months unless extension is sanctioned by the three-member Advisory Board in view to avert the occurrence of any unlawful event by curtailing the liberty of the suspected by executive orders (Islam 2012, p.280). The aforementioned executing statute in Section 3 permits uninhibited authority by the use of 'if satisfied' wherein the scope is *ad infinitum*. The Government (specifically District Magistrate or Additional District Magistrate) on being satisfied may detain anyone suspected of perpetrating any prejudicial act *in futuro* (Das *et al.*, 2016). Which is sufficiently justified when it comes to state terrorism. However, in the unfortunate turn of events the authorities usually act as clairvoyants implicating the innocent in most cases (Saifuzzaman vs state, 2004). In the case of *Md Humayun Kabir vs State* (1976), the presiding Court directed that the concerned Minister must be referred to before an order of detention is made as it deprives a citizen's liberty. Furthermore, it is incumbent that the ordering authority acts judicially adhering to the rule of natural justice (Anwar Hossain vs State, 2003) and also keeping in mind that the provisions of the Constitution always supersede the Special Powers Act (Motiar Rahman vs Bangladesh, 2005). Considerations of the detention must be material, relevant, *bonafide* and unprejudiced use of statutory power (Abdul Latif Mirza vs Bangladesh, 1979) or in other words, inexplicit, indeterminate and imprecise grounds of detention is injurious in law and cannot be sustained (Abu Sayed Commissioner vs Bangladesh, 2007). In addition to the above, the order of detention must reflect the reasons provided in support of it or not be

eccentric to one another (Azimul Kabir vs Bangladesh, 2002) furnished clearly and precisely to the detenu (Abdul Latif Mirza vs Bangladesh, 1979) within fifteen (15) days of ordering such detention without failure as provided by Section 8 of the Statute (Azizur Rahman vs Bangladesh, 2009; Nazrul Islam vs State, 2003). Thus, enabling the detenu to make effective representation (Serajul Islam vs State, 2011; Abdul Latif Mirza vs Bangladesh, 1979) or legally challenge the unspecific nature of such order relating to time, place, overt act, etc (Maksuda Begum vs Ministry of Home, 2000). The order may also be challenged on the fact that it was executed by an *ultra-vires* authority (Anwar Hossain vs State, 2003). *Stare decisis contra* has been evident regarding the ordering of detention after an individual has been arrested without a warrant. The landmark judgements of *BLAST vs Bangladesh* (2003), *Saifuzzaman (Md) vs State* (2004), *Abu Sayed Commissioner vs Bangladesh* (2007), etc. declared such to be unlawful while in *Mokbul Hossain vs Government* (2002), *Golam Mohammad Khan vs Government of Bangladesh* (2002), etc. it has been stated an order of detention can be made after apprehension without a warrant. From the language of Section 3 of the Special Powers Act, it is vividly clear that an order of detention is pre-apprehension as detention may only be ordered to prevent the occurrence of any prejudicial act and under no circumstance is preventive detention and remand synonymous. The Apex Court came to the rescue applying *per incurium* to the two latter decisions thereby establishing that no arrest can be made in view of detaining the arrestee under the Special Powers Act or no order of detention can be executed after inflicting arrest without a warrant (Bangladesh vs BLAST, 2017). Detention is preventive while arrest is usually repercussive. Pendency of criminal cases is not a valid ground for detention (Golam M Khan vs Bangladesh, 2002), however, mentions of it as back-ground does not vitiate the order either (Kalandiar Kabir vs Bangladesh, 2002). An order for preventive detention is purely executive and constrained to a maximum of thirty (30) days unless approved by the Government (Special Powers Act, 1974). It is fairly conclusive that the Government is the approving authority and not the authority of extension (Abu Sayed Commissioner vs Bangladesh, 2007), i.e., provided the initial order of detention exceeds the statutory prescribed period of 30

days the government may approve such order but cannot extend it (Azizur Rahman vs Bangladesh, 2009). Therefore, any extension of the period of detention made by the Government is invalid having no force in law (Zilanuddin vs State, 2003). Notwithstanding the limitations, the Government has the authority to order *ad infinitum* detention subject to review every six (6) months, majority collective consent and approval of the advisory body (Yeasmin Akhtar vs State, 1996). The law mandates the authority to show by an affidavit-in-opposition that the detenu was held in detention under the lawful authority in a lawful manner (Nasima Begum vs Bangladesh, 1996) on the recommendation of the advisory board (Khorshed Alam vs Bangladesh, 2005). Whenever any of the fundamental right is infringed by colorable exercise of authority, it is only fair to award compensation for such encroachment (BLAST vs Bangladesh, 2003). Especially when the acting authority is in contempt of Court whereby detention has been disproved based on the grounds being vague and yet authorities advance to order detention, a classic example of erroneous use of power (Abdul Mannan vs Bangladesh, 2002). In *Korban (Md) vs Government of Bangladesh* (2003), the concerned District Magistrate Abdul Huq was directed pay a sum of Tk. 5000 as compensation for whimsical use of power. Associating 'dangerousness' to particular individuals and branding such individuals by characteristic 'criminal persona' are radical approach to exert unlawful authority based on character responsibility which surfaces as key points in the history of common law criminal justice (Li, 2021).

Citizen's Arrest (Arrest by Private Persons)

The Apex Court in the case of *Iqbal Hasan Mahmood Tuku vs Anti-Corruption Commission* (2018) held that arrest by private persons is lawful provided the offence commissioned is one of cognizable nature and furthermore empowered private persons with the authority to execute arrest without a warrant under the provisions of Section 54 of Criminal Procedure Code and present the arrestee to the nearest police station. Such jurisdiction is attributed to every private person in Bangladesh in effort to prevent imminent disorder or breach of public peace (Li, 2021) by the common law practice which has gained statutory status over time (Nemeth, 2017). The four-walls of citizen's arrest are strictly

confined to cognizable offences beyond which any arrest made is unlawful (Spencer, 1992). Sir Rufus Isaacs C.J in *Walters v. W.H. Smith and Son Ltd* (1914) stated that arrest by a private person on reasonable suspicion of another having committed an arrestable offence is lawful and if the offence is a non-arrestable one, the arrest is unlawful. The same principles have been incorporated in Black's Law Dictionary; it has further been stated therein that the arrestable offence must be committed in presence of the arrestor (Black, 2009, pp 124-125). *In re* liberty of a citizen the Courts pride in construing such very strictly (Bangladesh vs. Dr. Dhiman Chowdhury, 1995) evident from the judgement of *R vs Self* (1992) wherein Self was prosecuted for theft of chocolate and resistance to lawful arrest by a citizen. It is well settled that theft is an arrestable offence however the plea of *bonafide* forgetfulness to make the payment of the alleged item was accepted by the jury however convicted Self on the charges of assault which was later quashed by the Court of Appeal and the Court held that the arrestable offence thereto being dismissed, private arrest seizes its force therefore the assault committed by Self was to break free and reclaim freedom. To summarize, a citizen has the power to arrest without warrant like a police officer on two occasions *viz*

- 1) Any cognizable or arrestable offence has been committed in their presence (physical presence is *sine qua non* making the arrestor an ocular witness) or
- 2) On reasonable suspicion of an individual having committed or is committing or is about to commit a cognizable/arrestable crime (Akbas, 2019).

Citizen's arrest that is beyond the scope of the aforementioned is unlawful

Right(s) of an Arrestee or a Detenu

Then Chief Justice of Bangladesh, SK Sinha stated 'effective enforcement of fundamental rights shall always prevail over subordinate Laws.' It is undisputed that fundamental rights are characteristic *inherent* and *inalienable* and safeguarding it can never truly be endorsed enough (Bangladesh vs BLAST, 2017). *In re* aforementioned, due diligence and caution must be comprehensibly observed before stripping an individual off freedom of movement or liberty (Serajul Islam vs State, 2011) which *vide* provisions of Article 32 may only be done in concurrence with civil and crimi-

nal laws that stipulates arrest and detention. (State vs Faisal Alam, 2001) Furthermore, the guaranteed *provisio* of Article 33 and Article 35 of the Constitution must neither be meddled with nor be compromised an atom (Belayet Hossain vs Deputy Commissioner, 1976) for it to survive judicial assessment as matters relating to liberty of a citizen is construed strictly against the ordering authority (Bangladesh vs. Dr. Dhiman Chowdhury, 1995). To elaborate, liberty of a citizen may only be stripped under absolute compelling circumstances rendering such inevitable (Afzal Hossain vs Ministry of Home Affairs, 2002). Nonetheless, the detenu or the arrestee has the right to be informed and it is incumbent to furnish the arrestee or detenu with the grounds amounting to such arrest or detention (Dr. Md. Habibullah vs Ministry of Home Affairs, 1989) and also has the right to consultation and representation by a legal practitioner of preferences without undue prejudice (BLAST vs Bangladesh, 2003). In *Samirannesa vs. Bangladesh* (1994), prejudice was so distinct that it reflected through the order of detention which was extended 35 days prior to its expiry. Speaking of prejudice, it must also be remembered that the grounds of detention communicated to the detenu must materially represent the initial order of detention (Chunnu Chowdhury vs District Magistrate Rangpur, 1989). The Miranda Rights, a familiar phrase among the legal community across the globe which evolved from the infamous *Miranda vs Arizona*, (1966), a case involving custodial interrogations wherein the confession obtained were conflictive of the Fifth Constitutional Amendment. In the very litigation, it was affirmed that due process was followed and that the fifth was waived by the apprehended voluntarily. The Supreme Court instructed the enforcing agencies and its officials to assess the knowledge of the arrestee based on age, education, intelligence, prior contact with authorities to ascertain that Miranda Rights were waived in all awareness of the consequences of such waiver done voluntarily, uncoerced (Morejon, 2021). In *Golam Mohammad Khan vs Government of Bangladesh* (2002), the Honorable High Court clarified that detenus are not fugitives of law and should be humanely treated and allowed frequent opportunities to meet with their family. An order of detention in its capacity as an executive order is time constricted to a period of six (6) consecutive

months (Constitution, 1972) and not further unless an Advisory Body is constituted within 120 days since the initial order of detention (Special Powers Act, 1974). Prolonged detention is permissible only on approval or recommendation by the Advisory Body. Article 33(4) and Section 10 collectively exhibits the significance of the Advisory Board in its jurisdiction to curtail liberty for extended intervals (Zilanuddin vs State, 2003). Failure to constitute the advisory body within the period provided in the statute invokes incompliance and thereby the detenu is liable to be released without further ado (Nafiza Mariam vs State, 1987) as incompliance or inconsistency to the obligations of law and *mala fide* unveils illegality having no force of law (Sultana Ara Begum vs Ministry of Homes, 1988; Md. Mansur vs Ministry of Homes, 1990; Habibur Rahman vs State, 2005). By virtue of the Constitution, every arrestee or detenu is privileged with speedy-fair-public trial (Constitution, 1972). It has been established in *Supreme Court of Bangladesh (AD) vs Election Commission* (2006), that every judge especially of the Superior Court is capable of dealing all cases under all circumstances fairly.

Right to Bail

Bail has been held to be a fundamental right (Begum Khaleda Zia vs State, 2020) which must not be repudiated irrationally merely to punish an arrestee (Rafi vs State, 2020). The term principally expounds to 'release on condition' whereby an arrestee is emancipated from custody and delivered to the sureties on condition that the sureties undertake to produce the bailed in Court on demand (State vs Abdul Wahab Shah Chowdhury, 1999; Rafi vs State, 2020). Within the criminal jurisprudence of Bangladesh relating to bail, offences are either bailable or non-bailable (Criminal Procedure, 1898). Therein Schedule II Column 5 of the Criminal Procedure Code, 1898 any offence delineated bailable, Courts cannot deny such statutory rights under the shade of discretionary power (Mia Nuruddin vs State, 2016). However, the grant of bail is completely discretionary, guided by judicial principles and statutory provisions for any offence designated as non-bailable conceded in the interest of justice due to -

- 1) Inability of the Court to conduct hearing of appeal causing prolonged delay (Begum Khaleda Zia vs State, 2020)

- 2) Deficiency of evidence to prove the accusation beyond reasonable doubt (Begum Khaleda Zia vs State, 2020)
- 3) Appeals to the judicial minds a strong possibility to succeed in the appeal (Begum Khaleda Zia vs State, 2020)
- 4) Inordinate delay in holding trial without any fault on part of the accused (Nurul Amin alias Bada vs State, 1996)
- 5) Trial is not concluded within a reasonable time or rather the time allowed by Section 339C of Criminal Procedure Code (Emran Hossain vs State, 1999)
- 6) Failure to complete investigating within a reasonable time (Md Hossain (Driver) vs State, 2018) or the case not ready for trial (Moong Chindaj Marma vs State, 2021)
- 7) The accused is a person who is either under sixteen (16) years of age, a female or infirm (Criminal Procedure, 1898)
- 8) No specific overt act but mention of the accused in the FIR (AKM Mosharaf Hossain vs State, 1992)
- 9) Unwarranted delay in lodging FIR (Ahmed, I. and Ahmed, Z. 2006, pp. 395-396)
- 10) Co-accused of the offence has been enlarged on bail (Serajul Hoque vs State, 1990)
- 11) Plea of *alibi* (Behra *et al.*, 2003, pp. 743-744)
- 12) No possibility of *absconson* of the accused (SM Shajahan Ali Tara vs State, 1989)
- 13) Benefit of the doubt (The State Vs. Tayeh Ali, 1987)

Bail must not be refused when *prima facie* case of the prosecution appears to be ludicrous (Kawsar Alam Khan vs State, 2000). In *Ibrahim vs State* (2020), the Judges/Magistrates of the subordinate Courts were instructed not to revoke bail granted by the Division without proven misuse of such privilege. In case of an ad-interim bail granted under a pending rule under section 498 CrPC or appeal against any special law provided the accused confirms appearance, the accused must not be detained on the ground that the bail extension was not submitted under such circumstances the Courts below must await the result or its discharge.

Exploitation of Power

Caution! The discussion hereinafter raises great concern and ultimate disappointment and is a classic

example of when the protector becomes the predator and yet may not be astonishing to a Bangladeshi reader. Statistically according to Stevenson pretrial detention incubates 13 percent (13%) guilty pleas which resultantly increase incarceration length by 42 percent (42%) in the United States (Stevenson, 2017) where rule of law is strictly adhered to. One cannot fathom envisioning such statistics in the context of a country like Bangladesh. It is appalling that the police in Bangladesh constantly sabotage the very protective jurisdiction to feast on the citizens. There have been instances where allegations of misconduct, defiance of law, contempt against instructions of the Court, accepting bribe to manipulate evidence or to play a partisan role, unlawfully arresting and detaining people, invading the fundamental rights of a citizen has surfaced (Adil, 2020). Exploitation of the statutory jurisdiction or misuse of power is well established and the scope of such is arguably endless (Al-Mamun, 2019). However, operative within two broad grounds of jurisdiction *firstly*, the aspect of discretion relating to arrest, detention, investigation, etc. and *secondly* the 24-hour detention rule. The police are empowered to discretionary impose arrest under Section 54 of the Criminal Procedure on the broad grounds of reasonable suspicion or on receiving credible information. People associated with money or known to have money are the indiscriminate victims whereby arrest is inflicted unreasonably for ransom and the consequences of agreement or disagreement reaps accordingly (Hossain, 2019). Multiple instances of forced disappearances, extrajudicial killings by police or other forces have been evident which usually is overshadowed under the cover of denial of involvement by the authorities (Adil, 2020). According to the Apex Court a person cannot be shown arrested without being produced in Court and without being afforded the opportunity of being heard through his lawyer (Government vs Mahmudur Rahman, 2016). The Constitution and the Criminal Procedure Code allows a 24-hour span excluding the travel time to present an arrested before a competent Court, thereby providing one of the most misapplied jurisdictions. In *Dolon (Md) vs State* (2012), the officer acted outwith the law by confining the apprehended accused in a private place and thereafter producing the accused to the police station only after 27 hours. Police custody without the orders of a com-

petent Magistrate beyond 24 hours is bad in law (Belal vs State, 2002) as it exhibits utter disregard towards rights fortified by the Constitution (Mehnaz Sakib vs Bangladesh, 2000) be it an inconsistency by an or 48 hours as in the case of *Mujibor Rahman vs State* (2005). It can be construed that inconsistency mentioned above is a byproduct of discretion and illiteracy of law. *Yeasir Arafat (Sabuz) vs Bangladesh* (2008) is an example that comes to mind wherein the appellant-detenu after being apprehended by Joint Forces was submitted to Sutrapur Police, the receiving police later forwarded the detenu before a concerned Magistrate *nexus* no specific case or specific charge, but only the order of arrest under the Emergency Power Rules, 2007. In criminal law, a case without specific charge is like a body without a soul. The reasonable suspicion that invokes discretionary arrest must be based on certainty of information and *bonafide* belief of the officer inflicting such arrest i.e., far from going wild goose hunting (Yusuf Ali vs State, 2003). The allegations rained so heavy that the Apex Court took it upon self in the landmark case of *Bangladesh vs BLAST* (2017) to direct and enforce the responsibilities on the uniformed men *viz.*

- a. Fulfill with highest degree of professional responsibility all duties imposed by law, serve the community, protect people from all illegal acts
- b. Respect & protect human dignity, uphold human rights *en route* performing lawful duties
- c. Use of force is permitted only under absolute compelling circumstances to the extent that is rendered necessary
- d. Torture, cruel, inhuman or degrading treatment or punishment shall not be inflicted
- e. Respect and protect the fundamental rights guaranteed to every citizen by the Constitution
- f. Prioritize the protection of the most precious resource that is human life and dignity
- g. Prevent crime rather than seeking recourse after it has been committed

The safeguards against arrest and detention are available to any person within the local jurisdiction of Bangladesh, i.e., citizens and non-citizens alike (Professor Ghulam Azam vs. Bangladesh, 1994). Invoked the very moment a person is abducted by an officer of law (Ajaib Singh v. Punjab, 1952). Unarguably, mere

allegation cannot be grounds of arrest or detention (Alamgir alias Alam vs State, 2001), especially when a person exercises any one of the rights guaranteed under the constitution. Seems pretty legit in black and white, however, such was not the case with photographer, activist, Shahidul Alam, who was unlawfully detained, inhumanely beaten and violated of his rights, which occasioned due to exercising right of freedom of speech and press in 2018 (CNN, 2019). Amnesty International reports of multiple personnel being detained unlawfully over questionable grounds; cartoonist Ahmed Kabir, journalist Mohammad Mahtab Uddin Talukder, photojournalist Shafiqul Islam Kajol, writer Mushtaq Ahmed among many others were held and tortured in prison for ulterior reasons (Amnesty International, 2021). Is it prejudice or incompetence? According to Lord Malcolm competence relating to unlawful detention is to be construed broadly as long as such is falls within the circumference of authorized duties (Reid, 2019) and prejudice, it has been evident that unlawful detention continued in jail after a person has served the lawfully imposed sentence (Faustina Pereira, Advocate Supreme Court vs State, 2001).

CONCLUSION:

The claim of (*amar shonar Bangla* translated my golden Bengal) the very first verse of the national anthem is the expected scenario of Bangladesh pertaining to the fact that the war waged in 1971 was against lawlessness and occupation. The glory contemplated therein is principally the inverse of lawlessness, i.e., lawfulness established through democracy, the prevalence of rule of law and ascertainment of fundamental and human rights. Considering the execution of affairs of various law enforcing agencies in Bangladesh, unfortunately glory has attained synonymy with indignity. The golden Bengal now accommodates public servants that degrade human life; exhibits disregard to the constitutional mandates and are always entitled to authority. In the words of Jean-Jacques Rousseau 'man was born free but everywhere is in chains' applies to Bangladesh like bread on butter with the addition of 'and scorned down upon' as tea to the mix. Imagine, if the father of the nation Bangabandhu Sheikh Mujibur Rahman was alive now, imagine under the context of this study, what emotions would overtake him? How would he tackle such unlawfulness and absurdity? What advice would he have for us? Would he yet again

command preparation to sweep such unlawfulness like he did in 1971? Throughout the course of this study, it has been consistently proven citizens are frequently stripped of their rights at the instance of prejudice and incompetency and such can be attributed to factors like non-accountability, little to no liability, etc. Which can be turned around by seeking accountability, through educating the mass on fundamental rights, by proper implementation of law and *stare decisis*, by employing referendum on repeal of statutes that permit unreasonable violation of rights, by allowing unprejudiced freedom of speech and dialogue, etc. to reinstate the status of protector of the various law enforcing agencies and uphold the conspicuously displayed locution' service is the religion of police 'to its true sense.

Recommendations

Menefee, (2018) insists that statutes that administer special interests enhance the divergence between perceived neutrality and its bigoted reality more frequently than anticipated. Additionally, a decision to arrest or detain made discretionarily by actors of criminal justice distorts the aura of criminal justice (Abdul Mannan vs Bangladesh, 2002) further on every occasion of colorable exercise of authority. Based on the established trend of this study it is fair to conclude that the observations by Menefee are extensively applicable to Bangladesh. This carefree misapplication of statutory power has to stop and it has to stop now. In such context, it has been contemplated by the Superior Courts in Bangladesh to allow the unlawfully detained or arrested to be compensated personally by the person issuing such order (Abdul Mannan vs Bangladesh, 2002). State must be liable to fix the damages incurred on the wrongfully arrested, wrongfully detained, wrongfully incarcerated persons (Rahman, 2020). It has already been mentioned that pretrial detention engenders approximately 13 percent (13%) more plea of guilt (Stevenson, 2017) which as of inevitable consequence effects employability status of such individuals as defendants released pretrial are more likely to find employment than defendants detained pretrial (Dobbie *et al.*, 2018). Evidently the adversity on employment effects income and daily livelihood. *In re* compensation contemplated herein, along with monetary compensations, the authorities must aid in restoring emp-

loyability of any person who has been wronged by officers of the State. The concept of justice is depicted by the scale and blindfold globally and criminal statutes attempt to serve justice by compensating the victim and remedying the predator. Applying the same context, authorities that act *ultra vires* the permitted jurisdiction must be prosecuted without proof of malice (Reid, 2019). Unfortunately, legal awareness or legal knowledge among citizens in Bangladesh is very primitive. The Government must on their part undertake initiatives to change it and the citizens on their part must take it upon themselves to educate themselves on the fundamental rights and other laws of the land. A reminder to its readers, the presumption of *ignorantia juris non excusat* i.e. the plea of ignorance or unawareness of law is not acceptable.

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CONFLICTS OF INTEREST:

The authors are designate co-first authors and are *consensu bonafide* with one another without any conflict of interest.

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