

The Security and Emergency Related Laws in Bangladesh: Tools for Human Rights Violations

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1. Historical Context

Bangladesh had started its constitutional journey in 1972 with a unique Constitution having no security law provisions like provisions for preventive detention or emergency provisions. It was amended quickly in 1973 in order to insert such provisions and the first emergency was proclaimed on the ground of internal disturbance almost immediately in 1974. Further, the Special Powers Act (SPA) was promulgated in 1974 with provisions many of which appears a predecessor of security laws of today's world.

Dramatic changes in the governance scenarios follows when A Martial Law regime took over the state power after the brutal killing of the President in 1975. It was declared once again in 1981, in a bloodless usurpation of power. Internal disturbance was cited as the justification of Emergency Proclamation in 1987 basically to contain a popular movement against the Martial law regime.

A popular upsurge against the President led to another emergency proclamation in 1990.

Growing political unrest and violence on the issue of fair conduction of election led to the most recent proclamation, in 2006. A serious attempt for perpetuating that emergency was however resisted by the people leading the installation of a elected government in 2009.

In the meantime security concerns, actual or perceived increased hugely in the post 9/11 situation. As a backlash, religious extremism took root in Bangladesh for the first time and in that global, regional and domestic context, the Anti-terrorism Ordinance was passed by the CTG in 2007 without much opposition or debate in the country.

The promulgation of these laws however may look somewhat excessive in view of the degree of extremism and terrorism occurred in the country in last 40 years. First large scale violence occurred in 1974-1975 when the ruling party backed para-military force confronted resistance from opposition backed armed forces. It disappeared almost automatically after the fall of the then government in 1975. Thereafter, although a separatist movement of the ethnic minority group in the Chittagong Hill Tracts had been dubbed as terrorist movement by successive governments during the 1980s and 1990s, the 1996 Peace Treaty between two sides puts an official end to that conflict. Terrorist campaign later unleashed by the religious extremist group during 2003-2005 was contained when the ring leaders had been executed in 1996.

2. Constitutional Safeguards and their limitations

1972 Constitution had included various fundamental rights which should provide safeguards including to the victims of security laws of the country. Despite temporary suspension of these safeguards during various periods, these provisions survive till now. These safeguards are not applicable during emergency and may become non-applicable during other time if they fall within the restrictions defined in the very chapter of the constitution that describes the fundamental rights.

2.1. Constitutional safeguards

Among the constitutional safeguards, Article 32 of the Constitution guarantees that no one shall be deprived of life and personal liberty without a legal sanction. Article 33 of the Constitution provides safeguards from arbitrary arrest and detention. It provides an arrested person judicially enforceable rights to be informed of the reason of arrest, to be defended by a legal practitioner and to appear before a magistrate within 24 hours of arrest. Article 35 provides rights during trial including the right of not to be subjected to inhuman, degrading and cruel punishment and the right to be free from self-incrimination.

The 1972 constitution empowers the High Court to enforce fundamental rights listed in Part 3 of the Constitution and to conduct judicial review of executive acts and omissions. This jurisdiction of the High Court could only be suspended legally during the period of emergency and extra-constitutionally during the Martial law regime.

During other time, the fundamental rights remained enforceable subject to the reasonable restrictions imposed by laws on grounds of public order, public health, public interests, morality etc. There are other restrictions as well, for example, the rights under Article 33 do not apply to foreign enemy and person arrested under preventive detention laws.

2.2. Nature and scope of rights restrictions

Person arrested under preventive detention laws are granted accorded only limited and vague rights. As Article 33 (4) provides, he would be communicated the grounds of detention as soon as possible, unless the detaining authority would think that the disclosure would be against public interests. Further Article 33 (4) provides that the detention shall not be extended beyond six months unless such extension is approved by an Advisory Board, the formation of which may be highly manipulated by the incumbent government.

While Article 35 (5) prohibits cruelty, inhuman or degrading punishment to an arrested person, Article 46 allows the Parliament to enact law to acquit “any person in the service of the Republic or any other person in respect of any act done by him in connection with...the maintenance or restoration or order in any area in Bangladesh or validate any sentence passed, punishment, forfeiture ordered, or other act done in any such area”. In other words, Article 46 of the Constitution may be utilised to extend impunity to human rights violations including torture.

Further, the Code of Criminal Procedure encourages a culture of impunity and protects the perpetrators of torture. Under Section 132 of the Code of Criminal Procedure, no criminal complaint can be lodged against any State official without prior approval from the Government.

2.3. Emergency provisions of the Constitution

The provision on emergency in Bangladesh has its origin in the Constitution. According to Article 141 A of the Constitution, the President may proclaim a state of emergency if there is a grave emergency in which the security or economic life, or any part thereof is threatened by war, foreign aggression, or internal conflicts disturbances. However, for the validity of such proclamation, it requires to be prior counter-signed by the Prime Minister.

The state of emergency shall cease to operate through another proclamation, or it will cease to operate after 120 days unless it is approved by the Parliament. However, if the state of emergency is declared after the Parliament is dissolved or the Parliament ceased to be dissolved within 120 days, then the proclamation has to be approved within 30 days the next Parliament goes on session.

Article 141B of the Constitution provides for suspension of the some provisions of the constitution during emergency. These provisions concern fundamental rights of the citizen and include Article 36 (Right to freedom of movement), Article 37 (Right to assembly), Article 38 (Right to association), Article 39 (Right to thought and conscience), Article 40 (Right to profession or trade), and Article 42 (Rights to property).

Article 141 C goes further to empower the government to suspend the enforcement by any court of the any fundamental rights including the above ones during the emergency. For example: the Emergency Power Ordinance, 2007, and the Emergency Power Rules EPR 2007 authorised the government authority to “detain citizens without filing formal charges or specific complaints.”

3. Statutory Framework

Security laws of the country have been promulgated within the umbrella of right restriction defined in the constitution. Special Powers Act, the first law dedicated to the political social and economic security of the state gave outright priority to those security issues comparing to human rights needs of the citizens. It was used indiscriminately sometimes to oppress the political opponents. It was also found to be exhaustive and sufficient to contain the actual terrorism those grew in Bangladesh in the name of religion in the first years of 2001 government. In spite of this, the anti-terrorism act was passed in 2009 which actually was a modified version of the 2007 Ordinance.

3.1. Special Powers Act

The Special Powers Act (SPA) 1974 made under the scope of 2nd amendment of Bangladesh Constitution which, among other things, authorises promulgating laws for preventive detention, allows measures such as speedy trials for disposing of complaints of “prejudicial acts” and provides for capital punishment for such offences as the highest punishment. It defines “Prejudicial Acts” which contain a wide variety of crimes similar to terrorist activities.

As prejudicial acts, the SPA outlaws any activity that is intended or likely to prejudice the sovereignty or defence of Bangladesh, maintenance of friendly relations with Bangladesh, security of Bangladesh or to endanger public safety or the maintenance of public order, create or incite feelings of enmity or hatred between different communities, classes or sections of people, interfere with or encourage or incite interference with the administration of law or the maintenance of law and order, prejudice the maintenance of supplies and services essential to the community, cause fear or alarm to the public or to any section of the public, prejudice the economic or financial interests of the State.

Although Bangladesh succeeded in uprooting the religious extremists by 2006 under the provisions of the SPA, the Anti-Terrorism Act (hereinafter ‘ATA’) was passed on 25 February, 2009 replacing an earlier ordinance passed by the CTG in 2007. The ATA appears to be a potential tool of repression and injustice in the name of countering terrorism

3.2. Anti- Terrorism Act

The 2009 Anti-Terrorism Act (ATA) provides an exhaustive, if not over-elaborate definition of terrorist activities. Accordingly, ‘terrorist acts’ have two ingredients - *actus reus* and *mens rea*. The *actus reus* part describes that terrorist acts may be committed not only through actual killing or injuring grievously, but merely by possessing explosives, inflammable substance or fire arms. It also includes arranging money, service or property for terrorist activities, conspiring, attempting, abetting such activities, harboring of offenders and involving with proscribed organization’s activities,

The *mens rea* of the definition state that ‘terrorist acts’ means striking terror in mind of people in order to compel the Government or any other person to do or

abstain from doing any act with an intent to threaten unity, solidarity, security or sovereignty of Bangladesh. A critical analysis of its provisions are presented below.

a) Vague definition in the ATA: Terrorist activities are criminal offences punishable by death penalty or life imprisonment or a maximum 20-year imprisonment. However, the definition of terrorist activities in 2nd chapter of the ATA is too vague and is not consistent with UN standards. For example: it uses vague expressions such as “creating fear amongst the public or a segment of the public” and “solidarity of Bangladesh,” which could be conveniently used to harass political opponents.

b) Risks of torture allowed: The ATA allows up to 15 days lengthy police remand which is notorious in Bangladesh for inflicting physical and mental torture for extracting confession and/or bribe. Moreover, requirement in section 24 of the ATA that the police investigations has to be completed within 30 days increases the risk of the use of ill-treatment and torture for extracting confession.

c) ATA crimes non-bailable: According to Section 39 (1) of the ATA, “all offences under this Act are non-bailable”. Such blanket denial of bail to a variety of offences vaguely defined as terrorist activities goes against the normal practice of the Criminal Procedure Code and violates fundamental rights of the accused persons

d) Tribunals invite abuse: For speedy disposal of cases, Section 28 of the ATA provides for establishment of Anti-terrorism Special Tribunals with judges chosen predominantly by the executive.

e) Speedy Trial is controversial: The ATA requirement of “speedy trials” for cases as complicated as terrorist offences appear inappropriate since such cases by definition require in-depth and elaborate enquiries, which cannot be “speedy”.

f) Restriction on freedom rights: Unless sufficient transparency and the right of defense is guaranteed, the provision that the government can ban any suspected terrorist organisation may have serious negative impact on freedom rights embodied in the Bangladesh Constitutions such as freedom of expression, freedom of assembly and freedom of association.

3.3. Anti-terrorist surveillance legislation

The Bangladesh Telecommunication (Amendment) Act of 2006 authorises the Government to engage in telecommunication surveillance and intelligence gathering without judicial oversight and allows information thus collected to be admissible evidence at trial .

This is an arbitrary interference with the privacy provision of Article 43 and with the right to a fair trial guaranteed by Article 35 of Bangladesh Constitution.

4. Jurisprudence

The security and emergency laws have been challenged or debated in the court proceeding at various times. Some of the important observations of the court are discussed below.

a) **Constitutional safeguards:** In 2003, the High Court in *BLAST v. Bangladesh and others* provided an elaborate guideline in the form of fifteen directives on arrest without warrant, detention, remand and treatment of suspects to be followed by law enforcement agencies and magistrates. It directed that the legislature consider amending sections 54, 167, 176 and 202 of CrPC dealing with the powers and functions of police and magistrates.

It observed that the existing provisions of sections 54 and 167 of the CrPC (which provide police with powers to arrest without warrant, and magistrates to place persons on police remand, respectively) are inconsistent with the constitutionally guaranteed rights to equality before law and equal protection of law, to be treated in accordance with law to life and personal liberty, to protection against arbitrary arrest and detention, and to ensure fair trial in criminal prosecution (Articles 27, 31, 32, 33 and 35 respectively). It also directs that in the application for taking the accused on remand in police custody for interrogation, the investigating officer shall state grounds for taking the accused to the custody.

Subsequently, in *Saifuzzaman v. State and Others (56 DLR (HCD) 2004 324)*, the Court issued further guidelines which are essential for safeguarding vulnerable persons from arbitrary detention and torture in the police custody and are often being cited in the lower courts and higher court as well.

b) **Anti-terrorism laws and emergency laws/regulations:** In *BLAST vs. Bangladesh 2003*, the Court further directed that in order to prevent torture, or cruel or inhuman punishment or treatment, a police officer shall not arrest any person under section 54 of the Code for the purpose of detaining him under Special Powers Act, 1974, and the magistrates shall not make any such order of detention.

The High Court Division of the Supreme Court of Bangladesh on July 13, 2008, rules that the President of a Caretaker Government does not have the constitutional power to promulgate ordinances, including the Anti-terrorism Ordinance unless such ordinances regard the general election. The same court also declared all ordinances made by the then military-controlled government to be ultra vires and unconstitutional. However, the Appellate Division of the Supreme Court on July 21, 2008, stayed this order.

c) **Statutory ouster clauses:** As to communication of the grounds to the person detained, it was held that the service of the grounds of detention to the person detained under SPA is mandatory. 'Grounds' means the conclusions drawn by the authority from the facts of the particulars (*Abdul Latif Mirza v Bangladesh*, 31 DLR (AD) 1). However, the Court later (in *Ghulam Azam v. Bangladesh*, 46 DLR 29) provided that the detaining authority may refuse to disclose facts which he considers to be against public interest to disclose. Again in *Farzana Huq v. Bangladesh (writ petition no. 271 of 1990)* it was held that disregarding by the detaining authority of the Court Order as to the rights of detained person are against Article 32 of the Constitution which protects the liberty of the citizens and also of Article 112 that requires the executive to act in aid of the court's order.

As to preventive detention, it was held that preventive detention can not be extended unless an Advisory Board, before the expiry of six months, opines that there is sufficient cause for detention (*Abdul Aziz v. West Pakistan*, PLD 1958 SC 499, 513). If no such affirmative opinion is given by the Advisory Board, the detenu has to be released on the expiry of six months (*Monwara Begum v. Secy., Ministry of Home*, 41 DLR 35). In *Gopalan v. Madras AIR 1950 SC 27* it was held that the function of the Board is to consider whether there is sufficient cause for detention for a longer period. However, the Advisory Board cannot express opinion as to how long the detention should continue (*Dattatraya v. Bombay*, AIR 1952 SC 181).

5. Human Rights Cost

Human rights violation during emergency is a common feature in Bangladesh. As an example, the experience during the last emergency (2007-2008) are discussed below. The information hereinafter are largely extracted from a report of The Asian Legal Resource Centre (<http://www.alrc.net/doc/mainfile.php/hrc9/519/>)

a) **Killings and disappearances:** A significant increase in extra-judicial killings was experienced during the last emergency regime. Reliable reports indicated that over 300 persons had been extra-judicially killed since the State of Emergency was imposed. The authorities justified these as encounter, crossfire, shoot-out, gun-fight, or "in the line of fire" killings. There had been no effective investigations or criminal prosecutions concerning any of these killings to date.

b) **Arrest, detention and torture:** Rampant human rights violations during the emergency included widespread and massive arbitrary arrests and detentions, estimated at numbering over 500,000, as well as rampant ill-treatment and torture. An example of the scale of the problem is the four-week crackdown that started on May 28, 2008, resulting in the arbitrary arrest and detention of more than 50,000 Bangladeshis. During this, the Inspector General of Police (IGP)

admitted to the media, on June 9, 2008, that the police had to use the emergency laws, as these did not permit bail, therefore avoiding courts releasing suspects. The IGP also admitted that an average of 1,667 persons had been being arrested in the country each day since the beginning of the emergency.

Media reports indicated that most persons arrested were subjected to some form of ill-treatment, including beatings, and that torture was also used on a significant number of detainees, during which the police extracted money or confessions.

c) **Fair trial and due process:** Despite the Special Power Act-1974, the Emergency Power Ordinance-2007 and the Emergency Power Rules-2007, which already gave the government wide powers to arbitrarily arrest and detain people, the government had armed itself further with the Anti Terror Ordinance-2008 to increase its crackdown, As with corruption charges that were being tried in special, military backed caretaker government appointed tribunals, charges under the Anti-Terror Ordinance were tried by Anti-Terror Special Tribunals. There were serious concerns about such tribunals' ability to deliver fair trials, as they were held in camera, without the presence of the public even the accused persons' relatives.

d) **Freedom of speech and expression:** Human rights defenders and professionals, including from the media, were regularly being monitored, threatened and intimidated by the personnel of the country's armed forces and various intelligence agencies.

The democratically elected government of 2009 could not have the scope to utilize the emergency provisions for doing the above misdeeds. However, in the name of SPA and anti-terrorism Act, it has arrested various persons, inflicted torture on some them and has already banned some religious organization without offering them sufficient scopes to defend their position.

6. Key Recommendations

A) Bangladesh should also amend the emergency provisions and preventive detention provisions in order to strike a balance between the needs of state security and those of protecting human rights. It should consider amending Article 46 of the Constitution in order to delimit the power of the Parliament by excluding acts of torture and other cruel treatment or punishment from the scope of acts for which public officials can be indemnified.

B) The Parliament should amend the Code of Criminal Procedure (Cr.P.C) according to the guidelines provided by the High Court in the *BLAST* case. The immunity provisions for public officials engaged in torture within the Cr. P.C. (in particular Section 132) should be repealed. The Penal Code should define and criminalize torture in line with global standards.

C) The judiciary should exert closer scrutiny on conditions of detention and interrogation by the police during the remand procedure. Police investigations should be streamlined and strengthened , in particular through material and forensic information collection, and proper training in those fields should be ensured to minimize the needs and practice of torture on suspects of terrorist activities.

D) If the ATA is maintained, it must be amended in order to eliminate vagueness in its wording and the potential for abuse in its application, including regarding the length of police custody, the systematic non-bailable character of the crimes, and the establishment of anti-terrorism special tribunals. Judicial oversight should be instituted for all surveillance, searches, and wire tapping.

E) Finally, further allocation of funds for staff improvement and hiring within the NHRC must be ensured in order to maintain the Commission's effectiveness and independence without any hindrance from the government.