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ON

Right to a Fair Trial for a Terrorist: A Critical Analysis

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The dissertation titled “**Right to a Fair Trial for a Terrorist: A Critical Analysis**” Prepared by Tania Khan Tanu; ID: 2017-3-66-001 submitted to Mohammed Shahjalal for the fulfillment of the requirements of course 406 (Supervised Dissertation) for LL.B. (Hons.) degree offered by the Department of Law, East West University is approved for submission.

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Acknowledgment

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DECLARATION

I, Tania Khan Tanu, with student identification number 2017-3-66-001, hereby solemnly declare and affirm that I conducted this research and that neither the entire research paper nor a portion of it has been submitted to or published by any journal, newspaper, or other article-publishing organization. This dissertation paper is my original work. A list of references and a footnote are also included, together with the proper acknowledgment of the sources used for this research.

Table Of Contents

CHAPTER 01: Introduction

1.1 Background History	1
1.2 Research question	2
1.3 Research Methodology	2
1.4 Literature Review.....	3
1.5 Limitation.....	4
1.6 Chapter Conclusion.....	5

CHAPTER 02: Fair Trial for terrorist suspects: Definitions and Concepts

2.1 Background.....	5
2.2 Principles of Fair Trial	6
2.3 The key element of a fair trial in terrorism cases.....	6
2.4 Chapter Conclusion.....	10

CHAPTER 03: Different Jurisdiction of Fair Trial

3.1 Overview of different legal systems and their approach to a fair trial in terrorism cases	11
3.2 The principles of a fair trial in common law and civil law jurisdictions	12
3.3 Chapter Conclusion	13

CHAPTER 04: Fair Trial in International Law

4.1 International human rights on fair trial for terrorists	14
4.2 Case law from international courts on fair trial for terrorist suspects.....	16
4.3 Chapter Conclusion.....	17

CHAPTER 05: Right to a Fair Trial in the context of Bangladesh

5.1 The legal framework in Bangladesh	18
5.2 Identifying the challenges for ensuring fair trial in terrorism cases	20
5.3 Chapter Conclusion.....	22

CHAPTER 06: Recommendation and Conclusion

6.1 Recommendation.....	23
6.2 Conclusion.....	24

Bibliography	25
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List of Abbreviations

AP - Appellate Division

ATA - Anti-Terrorism Act, 2009

BTA - Bangladesh Telecommunication Act, 2006

CAT - Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment

CIA - United States Central Intelligence Agency

CrPC - Code of Criminal Procedure, 1898

EA - Evidence Act, 1872

ECtHR - European Court of Human Rights

ECHR - European Convention on Human Rights

HCL - High Court Division

ICC - International Criminal Court

ICCPR - International Covenant on Civil and Political Rights

LAA - Legal Aid Act, 2000

PC - Penal Code

SC - Security Council

SPA - The Special Powers Act of 1974

UDHR - Universal Declaration of Human Rights

UN - United Nations

Abstract

One of the most essential concepts of justice in any judicial system is the idea of a fair trial. Nonetheless, there has recently been substantial discussion over whether a terrorism suspect may get a fair trial. On the one hand, some contend that since terrorists pose a risk to the country's security, they are not entitled to the same legal safeguards as ordinary suspects. Some, however, claim that depriving terrorist suspects of a fair trial breaches fundamental human rights and calls into question the authority of the legal system.

Terrorism poses a serious threat to national security. It is asserted that depriving suspects of an impartial trial undermines the integrity of the court system and violates the principles of justice and human rights. The study explores the difficulties legal systems experience with these conflicting interests and evaluates the ethical and legal ramifications of giving terrorism suspects a fair trial.

The study examines several strategies, such as the employment of specialist courts, security measures, and international legal norms, to guarantee a fair trial for terrorism suspects. It also considers the relevant legislation in Bangladesh, including the Constitution of Bangladesh, which guarantees the right to a fair trial for all citizens. The Code of Criminal Procedure. The study evaluates the Anti-Terrorism Act of 2009. Also examine international law such as the Universal Declaration of Human Rights (UDHR), 1948.

The study despite the enormous difficulties in guaranteeing a fair trial for terrorism suspects, these difficulties are surmountable with the use of legal and ethical principles. It stresses the significance of protecting human rights and the rule of law, especially in the face of terrorism, and makes the case that a fair trial is a crucial component of any just judicial system.

CHAPTER 01

Introduction

1.1 Background

After the events of September 11, 2001, there has been intense discussion on how to give terrorists a fair trial.¹ In reaction to these atrocities, several nations among them the United States passed several laws and regulations intended to curtail terrorism and hold those guilty accountable. Critics said that the creation of military tribunals to prosecute suspected terrorists violated international law and the right to a fair trial, raising worries about the preservation of human rights and due process. The inclusion of secret material, which can be essential for terrorism prosecutions but may potentially put in danger the defendant and one of the main obstacles to ensuring a fair judicial procedure for terrorists.² Judges may struggle to strike a balance between state's security-related issues and the right of the accused to a just trial because the government occasionally claims that revealing secret material might threaten national security or expose critical intelligence sources and techniques.³ It can be difficult to strike a balance between the objectives of national security and the defense of civil liberties and human rights, especially in the face of terrorism.⁴ As governments work to prevent terrorism while respecting the ideals of justice and the rule of law, this problem will be a topic of discussion both nationally and globally.⁵

¹ Jennifer C. Rubenstein, "Judging Enemy Combatants"(2008) *Ethics & International Affairs* 22, no. 2: 153-170.

² Joanna C. Schwartz, "National Security Evidence and the Role of the Judge in Terrorism Prosecutions," *Journal of National Security Law & Policy* 5, no. 2 (2011): 361-388.

³ David A. Harris, "The Role of the Judge in National Security Cases"(2010) *Ohio State Law Journal* 71, no. 3: 621-638.

⁴ Robert M. Chesney, "Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force"(2012) *Harvard National Security Journal* 3, no. 1: 69-132.

⁵ Nazrul Islam, "Terrorism and Counterterrorism Measures: The Bangladeshi Experience"(2013) *Journal of South Asian Studies* 36, no. 1: 63-80.

1.2 Research question

1. Whether the existing laws in Bangladesh regarding terrorists ensure the right to a fair trial?

1.3 Research Methodology

This thesis may be categorized as qualitative research since it is supported by a database survey, which is based on content analysis and concentrates on the present subject of fair trials for terrorists. The procedure is supported by literature reviews, which looks at books, journals, annual reports, newspapers, etc. which provide the backbone of the process. There were Both primary and secondary datas used. The current situation of a fair trial for terrorists is addressed in a descriptive way from both an International and Bangladeshi perspective. Laws, international regulations, Terrorist related books, DLR, Scholarly articles, and policies make up the bulk of the information used as primary data sources. For example, the Constitution of Bangladesh, The Code of criminal procedure 1898, The Anti-Terrorism Act of 2009, and The Special Powers Act of 1974. The analysis of the study is done using secondary sources. Secondary datas has been collected from newspapers, TV reports, YouTube, Facebook and other materials related to the subject matter.

1.4 Literature Review

There are numerous writings including books, essays, and research on the subject. However, the mention-worthy works on the Right to a Fair Trial for Terror Suspect done internationally and nationally will be focused here whether they be relevant fully or partially.

The tension between national security and fairness to suspects in terrorist trials is examined in the paper "The Competing Objectives of National Security and Fairness to Suspects in Terrorism Trials: A Comparative Perspective".⁶ The author advocates a balanced strategy that takes into account both national security and the rights of the accused terrorists.

'Anti-terrorism Legislation and Human Rights in Bangladesh: An Appraisal'⁷ is another journal that does not specifically address fair trials for terrorists. Instead, it said that the present legal systems and legislation such as anti-terrorism are ineffective to make a balance between the objectives of national security and the defense of human rights.

Now we have Naomi Roht-Arriaza's book "Impunity and Human Rights in International Law and Practice".⁸ She is an international writer and scholar. In her book, she explores the issue of human rights abuses and impunity in international law and practice, including fair trials for terrorism suspects.

There are some Bangladeshi writers' books as well. Such as Rahman's book⁹ (2016) discusses fair trials for terrorists in the context of the complex relationship between terrorism, human rights, and counterterrorism strategies. And, "Terrorism and Counterterrorism: Legal Problems, Challenges, and Solutions"¹⁰ by Md. Abdul Halim. The author examines the difficulties of prosecuting terrorists under international law, especially when terrorist attacks take place beyond

⁶ Yuval Shany, 'The Competing Goals of National Security and Fairness to Suspects in Terrorism Trials: A Comparative Perspective' (2007) *New Criminal Law Review* :459.

⁷ Farzana Shain, 'Anti-terrorism Laws and Human Rights in Bangladesh: An Appraisal' (2016) 5(2) *Dhaka University Journal of Law* 41.

⁸ Naomi Roht-Arriaza (ed), "Impunity and Human Rights in International Law and Practice" (Oxford University Press 2005).

⁹ Mohammad Mafizur Rahman, *Human Rights, Terrorism, and Counter-terrorism: A Global Challenge* (University Press Limited 2016).

¹⁰ Md Abdul Halim and Farhana Helal Mehtab, "Terrorism and Counterterrorism: Legal Issues, Challenges, and Responses" (Routledge 2020)

state boundaries. Even in instances of terrorism, the book emphasizes the significance of respecting the law and human rights.

1.5 Limitations

Many restrictions were encountered while doing the research. Internet access issues made it difficult to conduct resource collection study. Because of my time limitation I could not utilize many of my academic resources along with that I was allotted with other courses which barred me from giving proper effort to complete this dissertation. If there is sufficient time for this research, it might be able to get a better result. This study would be more planned, spontaneous, and informative without this limitation.

1.6 Chapter Conclusion

A difficult problem that calls for balanced solutions that take into account both national security and the rights of the accused is ensuring that terrorists get fair trials. The study proposal's literature review demonstrates the difficulties many nations have in giving terrorists a fair trial. Research shows how necessary it is to bring those responsible for human rights breaches accountable, particularly in terrorist prosecutions, and they emphasize the necessity for efficient legal systems that protect the rights of people who have been accused of crimes. Strong legislative frameworks must be established, and international collaboration must be enabled, to ensure fair and just judgments in these situations. To guarantee that terrorists are given a fair trial, it is ultimately critical to defend both national security and the accused's rights.

CHAPTER 02

Fair Trial for terrorist suspects: Definitions and Concepts

2.1 Background

Terrorism does not have a specific definition that the whole world will agree on.¹¹ According to the Broad definition or general definition, a group of people attack and target an individual or a group of people for political or ideological reasons and it is called terrorism.¹² In 1994, UN General Assembly adopted a resolution in 1994.¹³ Here it is said that terrorism is an illegal act through which fear is created among common people and it does these things by targeting a specific group or a person to achieve their political or ideological objective and they can get motivation to do this in many ways. It may be political, philosophical, intellectual, racial, ethnic, or religious motivation.¹⁴ Whatever the motivation, it will never be justifiable.

The Security Council's resolution 1566 (2004)¹⁵ defines terrorism as any illegal activity that causes serious harm to civilians and, in some cases, death. Or trying to intimidate a country or government by holding someone, hostage. Or trying to compel an international body or government to do something. In 2004, United Nations, Secretary General made a panel called High-Level Panel on Trades, Challenge, and Change.¹⁶ This panel defines terrorism. Any act which may cause serious injury or death to the general public. They also say something similar to the Security Council resolution.

¹¹ Martin Scheinin and Mathias Vermeulen, "Unilateral Exceptions to International Law: Systematic Legal Analysis and Critique of Doctrines that Seek to Deny or Reduce the Applicability of Human Rights Norms in the Fight against Terrorism"(2014) (3) accessed 17 April 2023

¹² *ibid*

¹³ "Measures to Eliminate International Terrorism", UNGA Res 49/60 (9 December 1994)

¹⁴ *ibid*

¹⁵ International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) art 2.

¹⁶ UNSG High-Level Panel on Trades, Challenge and Change-page 157.

2.2 Principles of Fair Trial

A fair trial is a critical component in defending human rights and respecting the law. It must be conducted impartially and conform to the principles of due process and procedural fairness.¹⁷ Due process ensures that individuals involved in legal proceedings are granted certain rights, such as receiving notice about the proceedings, having access to legal representation, participating in a fair and unbiased hearing, cross-examining witnesses, and having a judge make decisions based on evidence and arguments presented by both parties.¹⁸ Procedural fairness requires a trial that is open and unbiased. The Constitution of Bangladesh, under Article 35(3), guarantees the right to a fair trial. Numerous international laws, including the UDHR, ICCPR, and ECHR, also recognize the right to a fair trial. This means that all individuals must receive equal treatment before the judicial process. To ensure a fair trial, key elements such as the presumption of innocence, public trial, adequate notice of the charges, the right to question witnesses, presenting evidence, impartial judges, the right to appeal, and an unbiased trial are crucial. If these elements are upheld then a fair trial is established.¹⁹

2.3 The key element of a fair trial in terrorism cases

2.3.1 The privilege to know the reason for an arrest

ICCPR said that whoever is being held will be quickly notified any charges against them as well as the specifics of why they are being held.²⁰ This notice should include broad justifications at first and more specific explanations subsequently, enabling the accused to challenge the legality of their arrest using sufficient proof. Even while it is not always required, the absence of a documented arrest warrant may give rise to suspicions of arbitrary detention.

¹⁷ ICCPR, art 14

¹⁸ “Due Process of Law”, JUSTICE US LAW < <https://law.justia.com/constitution/us/amendment-14/04-due-process-of-law.html> > accessed 18 April 2023

¹⁹ Sabrina Mahtani and Jennifer Riddell, “What makes a fair trial?” (2018) Tearfund Learn < <https://learn.tearfund.org/en/resources/footsteps/footsteps-101-110/footsteps-104/what-makes-a-fair-trial> > accessed 18 April 2023

²⁰ ICCPR, art 9(2)

2.3.2 Right to pre-trial detention

The pre-trial stage is where a person is arrested on a charge and held until the trial begins. This is a big problem in the case of terrorism. Because the accused person is detained for a long time. Since the terrorism case is somewhat complex in nature and prosecution takes time to settle the case. Apart from this, there are sometimes no reasons for delays in government work. At this time the accused person is in detention without charge. And in such a situation the accused cannot challenge his detention.²¹

2.3.3 Adequate legal representation

A legal representative is essential because generally, people do not understand the law or procedure. The state needs to ensure this right. CrPC, 1898 of Bangladesh section 340 says the appointment of legal aid lawyers to represent an accused person. There is a statute in our country that provide Legal Aid Service named the Legal Aid Service Act 2000.

2.3.4 Enhanced Interrogation Techniques

The intelligence agencies of different countries do various tortures to collect information from the accused person. In this way, the accused person is forced to admit the crime even if he has not committed a crime. These tortures include waterboarding, sleep deprivation, and stress positions.²²

2.3.5 Impartial tribunal

Fair Trial or impartial tribunal means that the court will not give any biased decision against the accused. Bangladesh constitution states that everybody has the right to a fair trial.²³ The term "Fair Trial" refers to an unbiased tribunal. A fair trial or impartial tribunal is very important under human rights law. Because of the eternal inequality, the court holds much more power than the accused. So, the court must be impartial to decide whether the accused is guilty or innocent. The court should be beyond external political pressure and the law must be applied properly.

²¹Professional Training Series No. 3, 'Human Rights and Pre-Trial Detention: A Handbook of International Standards Relating to Pre-Trial Detention' (United Nations, New York and Geneva, 1994).

²²Professional Training Series No. 3, 'Human Rights and Pre-Trial Detention: A Handbook of International Standards Relating to Pre-Trial Detention' (United Nations, New York and Geneva, 1994).

²³The Constitution of the People's Republic of Bangladesh, article 35(3)

Terrorism cases contain complex legal issues, sensitive information related to state and political considerations.²⁴ Due to this, the tribunals have a chance to be influenced very naturally. Because of this, there is a possibility of a partial and unfair outcome.

2.3.6 Presumption of innocence

A person must be presumed innocent in the eyes of the law until proven guilty.²⁵ Whether it is any kind of criminal trial. Presumption of innocence is very important in terrorism cases because there is a possibility of a death sentence in such cases. So, guilt cannot be assumed based on mere suspicion or contact with terrorist organizations.²⁶ Doing so will violate Article 11 of the UDHR. To give an example of how important the presumption of innocence is, *United States v Zacarias Moussaoui*²⁷ is enough. Where Zacarias first wants to plead guilty. But the court rejected it and decided to have a full trial. Although the prosecution can prove the guilt of the accused in six charges, the court does not give the death sentence to the accused because they cannot prove it beyond a reasonable doubt. In this case, it was claimed that the accused was involved in the 9/11 attacks.

2.3.7 Access to evidence

Access to evidence is crucial for a fair trial and to effectively challenge the prosecution's case. Denial of such access could lead to an incorrect outcome, depriving the accused of a proper trial. Sometime government do not want to show some evidence because of setae's security purpose and it may unveil some intelligence agency's identification.²⁸

²⁴UN High Commissioner for Human Rights, 'Human Rights, Terrorism and Counter-terrorism', Fact Sheet No. 32 (UN, Geneva, 2019).

²⁵ Evidence Act 1872, section 101

²⁶ Dr. Abdullah Al Faruque, "GOALS AND PURPOSES OF CRIMINAL JUSTICE SYSTEM IN BANGLADESH: AN EVALUATION" (2007). Bangladesh Journal of Law 434. accessed 19 April 2023

²⁷Professor Douglas O. Linder, 'The Trial of Zacarias Moussaoui', Famous Trials, < <https://famous-trials.com/moussaoui/1810-home>> accessed 19 April 2023.

²⁸ Serrin Turner & Stephen J. Schulhofer, "The Secrecy Problem in Terrorism Trials" (Liberty & National Security Project, Brennan Center for Justice at NYU School of Law)

2.3.8 The right to examine witnesses

It allows the accused and their legal representatives to challenge the credibility, reliability, and accuracy of the witnesses' testimony, promoting transparency and accountability in the judicial process. Through cross-examination, the defense can expose biases, motives, inconsistencies, or falsehoods in the witness's statements, helping to uncover the truth and prevent false accusations.

2.3.9 Secrecy

Some secrecy is maintained in terrorism cases such as referring to the use of confidential information, or state's secret privilege to withhold information from the public.²⁹ Due to these reasons, the accused person faced problems. The government uses all such secret evidence that the accused's lawyer does not get access to.

2.3.10 Double Jeopardy

The double jeopardy prohibition, as stated in Article 14(7) of ICCPR, prevents individuals from being tried or punished multiple times for the same offense, as long as the previous trial complied with the law and penal procedure. Also, Bangladesh constitution³⁰ article 35(2) and Code of Criminal Procedure, 1898 prohibits double jeopardy.³¹

2.3.11 Right to appeal

Two stages of judicial review are guaranteed under Article 14(5) of ICCPR protection of the right to a legal appeal of conviction and punishment. The requirement for authentic review by a higher court suggests that appeals restricted to legal issues might not be adequate. In addition, people have a right to compensation for a miscarriage of justice if their conviction is reversed or revoked due to new evidence, unless they are largely or totally to blame for the non-disclosure of the new information.

²⁹ Daphne Barak-Erez and Matthew C. Waxman, 'Secret Evidence and the Due Process of Terrorist Detentions' (2009) Faculty Scholarship Faculty Publications, Columbia Law School accessed 19 April 2023

³⁰ Bangladesh Constitution, article 32(2).

³¹ Code of Criminal Procedure, 1898. section 403.

2.4 Chapter Conclusion

While looking for the definition of a fair trial, we found some key components. If we explain all of them, we get the idea of a fair trial and for justice and human rights protection, they must be followed by a country and its court. But still, there are many challenges. As a result, it becomes difficult to establish a fair trial which includes pre-trial detention without charge, maintaining the secrecy of information, the potential for retribution and the employment of intensified inquiry tactics.

CHAPTER 03

Different Jurisdiction of Fair Trial

3.1 Overview of different legal systems and their approach to a fair trial in terrorism cases

3.1.1 Common Law Legal System

About 80 countries of the world follow the common law legal system. Countries that follow this common-law legal system try to follow the general principle of due process and protection of individual rights in terrorism cases. We have already discussed the key components of these such as the presumption of innocence, the liberty to a legal representative, the legitimacy to access evidence, etc. All these countries have procedural and substantive laws and besides they follow judge-made laws as well and this country has a judicial review system also.

3.1.2 Legal System of Civil Law

In this system, laws are written in advance through legislative bodies. Judges don't have to use their judicial minds. They just follow the laws and apply them in the case and in the civil law system, the judge plays an active role in the court.³² Like the common law system, the civil law system also gives importance to issues like the presumption of innocence, the right to legal representation, etc.

3.1.3 International Jurisdictions

Some international crimes are tried in international tribunals. ICC is one of them. In such tribunals, fair trials are conducted following international law.³³ Such as UDHR, and ICCPR. Like other national laws, the components of fair trial are used here such as the presumption of

³²Caslav Pejovic, 'Civil Law and Common Law: Two Different Paths Leading to the Same Goal' (2001) 40(155) ResearchGate accessed 17 April 2023.

³³ Rome Statute of the International Criminal Court, Article 4.

innocence, the right to legal representation on the right to a public trial, the right to an impartial tribunal, etc.

3.2 The principles of a fair trial in common and civil law jurisdictions

Both these jurisdictions a basic right is the right to a fair and just trial.³⁴ However, how this principle is implemented and enforced can differ significantly among these two judicial systems. Within common law, the court follows statutes as well as judicial precedent and has scope to interpretation.³⁵ In contrast, civil law regimes frequently give more weight to written rules and codes, with judges taking a more prominent role in assessing the facts of a case. However, fair trial principles continue to be of utmost significance in these systems. In civil law jurisdictions, the right to a fair trial typically includes the following: the right to an impartial judge, the right to be informed of the charges, the right to present evidence, the ability to question witnesses as well as the right to counsel.

In a civil law setting, the judge is actively involved in the proceedings. They give more importance to written laws and rules and do not give importance to judge-made laws like common law jurisdiction. The judge investigates and examines the evidence. In common law, the judge has the opportunity to interpret the law and can use precedent. In this way, the law can be applied by understanding the current situation of the case. The result of the case is more perfect. But in civil law jurisdiction, courts do not have this opportunity. Civil law jurisdiction only gives importance to written laws and rules. In common law, evidentiary rules and the burden of proof are also different.

³⁴ Legal Information Institution, “Legal System”. < https://www.law.cornell.edu/wex/legal_systems > accessed 20 April 2023

³⁵Diffen, “Civil Law vs. Common Law”. < https://www.diffen.com/difference/Civil_Law_vs_Common_Law > accessed 20 April 2023

3.3 Chapter Conclusion

In conclusion, ensuring a fair trial is a complex issue, and different jurisdictions have developed different approaches to achieve this goal. Each system has its strengths and weaknesses, and the key is to find a system that balances the need for a fair trial with the practical realities of the legal system. Regardless of the system used, it is essential to ensure that defendants are treated fairly and that justice is served.

CHAPTER 04

Fair Trial in International Law

4.1 International human rights on fair trial for terrorists

4.1.1 The Universal Declaration of Human Rights (UDHR)

It is a set of rules that the United Nations made in 1948. It talks many human right aspects. There are a few articles of the UDHR that talks about fair trial. It said all types of people have right to fair trial.³⁶ Terrorist suspects are also included because nothing was said about terrorists here separately. They cannot be judged separately and secretly.³⁷ They should be judged in open court in front of people. They should not face any political revenge. This declaration provides some guarantees such as presumption of innocent, the right to have a legal counsel and right to present their evidence.³⁸ If the prosecution cannot vindicate guilty absolutely without a doubt, then the court will presume the accused is innocent. Retrospective effect also mentioned in this declaration. Retrospective effect is, when a crime was committed, there was no law against it but after that a new law enacted by the state for that previous offence and punish the offender for his past offence. It is completely against international law.³⁹ It is forbidden to do so. Also said that no person can be detained in jail without any reason.⁴⁰ He cannot be kept in jail without reason unless there is a proper charge against him and before the crime is proven. Because later, if his crime is not proven, the government will not be able to return his precious time.

³⁶ The UDHR (adopted 10 December 1948 Res 217 A (III)) (UDHR)

³⁷ Ibid

³⁸ Ibid, Article 11(1)

³⁹ Ibid, Article 11(2)

⁴⁰ Ibid, Article 9

4.1.2 The International Covenant on Civil and Political Rights (ICCPR)

It is an international treaty between countries that says state have to protect people's civil and political rights.⁴¹ This international treaty mentions the liberty of an accused, especially when he is kept in jail or police custody.⁴² When legal proceedings are pending against an accused almost every human right declaration or treaty says the same thing and uphold the right of an individual. Common among them are presumption of innocence. This article also discoursed about presumption of innocent. Besides, there are some other instruments of fair trial such as the right to be informed promptly, detail information of the charge against the accused person. Besides, enough time is given to prepare the case. So, this article impose responsibility on the state to ensure a fair trial for all types of accused. Another article of this treaty discourse that a person should not arrest without any specific charge and kept in custody for a long period.⁴³ From the Universal Declaration of Human Rights we already know about retrospective effect which also mention in this treaty.⁴⁴

4.1.3 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

It has been asked all the member countries of United Nation in this treaty to refrain from all types of torture, inhumane cruel activity, punishment.⁴⁵ The law-and-order forces often try to force the prisoners to speak to extract information. In this, the accused person often dies or is physically injured for life. And this technique is widely used in our country. The treaty clarify that any statement obtained by torture will not be admissible in court.⁴⁶ This treaty does not say anything about terrorist suspects because it applies for every type of suspect. Besides, it's saying that every state should take urgent measures and make strict laws so that the accused person is not subjected to cruel and inhuman torture.⁴⁷ All types of law enforcement forces must be

⁴¹ ICCPR (adopted in 1966)

⁴² Ibid, Article 14

⁴³ Ibid, Article 9

⁴⁴ Ibid, Article 15

⁴⁵ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984 UNGA Res 39/46) (CAT)

⁴⁶ Ibid, Article 15

⁴⁷ Ibid, Article 2

educated on this issue during training.⁴⁸ Especially those involved in the arrest and imprisonment of the accused. The government should keep under close observation the law enforcement agencies that interrogate any accused person.⁴⁹

4.2 Case law from international courts on fair trial for terrorist suspects

There have been several cases before international courts that have addressed the issue of fair trial for terrorist suspects. There are few notable examples, one of them is *Al-Nashiri v. Poland*.⁵⁰ It is a significant case that highlights the importance of ensuring a fair trial for terrorist suspects. The case involved the detention and transfer of Mr. Abd al-Rahim al-Nashiri, a Saudi Arabian national, to United States Central Intelligence Agency (CIA) black sites. CIA black sites were secret detention facilities operated by the CIA.⁵¹ In Poland, where he was subjected to torture and other forms of ill-treatment. The European Court of Human Rights (ECtHR) found that the treatment of Mr. al-Nashiri amounted to a violation of the European Convention on Human Rights (ECHR).⁵² This forbids the use of torture and cruel treatment.⁵³ The Court also found that Mr. al-Nashiri's detention and transfer to the black sites violated Article 5 of the ECHR, which guarantees the right to liberty and security.⁵⁴ In addition, the ECtHR found that Mr. al-Nashiri's right to a fair trial under the ECHR had been violated. The Court noted that evidence obtained through torture or other forms of ill-treatment cannot be used in court and that the use of such evidence would undermine the fairness of the trial. The ECtHR also emphasized the importance of an independent and impartial investigation into the allegations of torture and ill-treatment. The Court found that the Polish authorities had failed to conduct an effective investigation into Mr.

⁴⁸ Ibid, Article 10

⁴⁹ Ibid, Article 11

⁵⁰ *Al-Nashiri v. Poland* (2011), European Court of Human Rights (ECHR) 28761/11 (2014)

⁵¹ Adam Liptak, 'C.I.A Black Sites Are State Secrets the Supreme Court Rules', *The New York Times*, New York 2022 < <https://www.nytimes.com/2022/03/03/us/politics/supreme-court-cia-black-sites-guantanamo.html> > accessed 19 April 2023

⁵² ECHR: POLAND RESPONSIBLE FOR SECRET DETENTION, TORTURE, AND RENDITION OF TWO GUANTÁNAMO DETAINEES (International Justice Resource Center, 30 July 2014) < <https://ijrcenter.org/2014/07/30/european-court-of-human-rights-poland-responsible-for-secret-detention-torture-and-rendition-of-two-guantanamo-detainees/> > accessed 20 April 2023

⁵³ ECHR (adopted 4 November 1950), Article 3

⁵⁴ Ibid, Article 5

al-Nashiri's allegations of torture and that this failure amounted to a violation of the ECHR.⁵⁵ The case highlights the importance of ensuring that terrorist suspects are treated by international criteria for human rights and that their right to a fair trial is respected.

Another international case is *Prosecutor v. Lubanga*⁵⁶ was filed before the International Criminal Court (ICC). Thomas Lubanga Dyilo, a Congolese warlord who was accused of recruiting child soldiers to fight in the Democratic Republic of Congo. The trial emphasized several important provisions on fair trial for terrorist suspects, including the right to legal representative, right to an impartial tribunal, right to a trial without undue delay, right to examine witnesses and present a defense. Ensuring that the accused had access to legal representation by their choice or, in the event that they lacked the funds to hire counsel, to have counsel assigned for them, the importance of ensuring that the tribunal was impartial, and that the judges were independent and unbiased. The Court noted that an impartial tribunal was essential to ensuring a fair trial.

4.3 Chapter Conclusion

The key international human rights instruments and case law from international courts highlights the importance of ensuring a fair trial for terrorist suspects. Provisions in these instruments guarantee the right to a fair trial. International courts issued judgments that emphasize the importance of fair trial rights for terrorist suspects including the prohibition of torture and the lawfulness of detention. Upholding these rights is crucial in ensuring that justice is served while upholding the foundations of fairness, impartiality, and adherence to human rights.

⁵⁵ *Al-Nashiri v. Poland* (2011), European Court of Human Rights (ECHR) 28761/11 (2014)

⁵⁶ *Prosecutor v. Lubanga* (2012), International Criminal Court (ICC) 01/04-01/06-284

CHAPTER 05

Right to a Fair Trial in the context of Bangladesh

5.1 The legal framework in Bangladesh

The Special Powers Act of 1974 give Parliament power to pass national security laws. The definitions of "prejudicial acts" in the Special Powers Act, 1974 (SPA) are too broad and violate international law,⁵⁷ which forbids the application of penalty to activities that were not clearly specified prior to their commission in the first place. Additionally, the SPA allows the government for a 120-day detention without charge or trial,⁵⁸ which goes against ICCPR that guarantees prompt judicial review or release.⁵⁹

The Anti-Terrorism Act (ATA) was enacted in 2009. While Bangladesh's National Report submitted to the Human Rights Council claims that the Anti-Terrorism Act 2009 demonstrate the country's commitment to human rights protection and compliance with international obligations, human rights defenders have criticized these laws as a black law that can lead to torture and other human rights violations.⁶⁰ It does not match the definition given by the UN⁶¹ for protecting human rights while fighting terrorism.

Terrorist activities can result in the death penalty or 20 years imprisonment. So, the legislative must follow international laws and treaties such as ICCPR which say that laws must be clear and specific about what is illegal and what the punishment will be.⁶² The Anti-Terrorism Act 2009 law, however, uses vague language like subsection 1 of section 6 clause (a). It is said that "If any person, entity or foreigner threatens the unity, integration, public security or sovereignty of Bangladesh". This statement is using vague language. The wording of this law can be interpreted

⁵⁷ ICCPR, art 15

⁵⁸ Special Power Act 1974, section 10

⁵⁹ ICCPR (adopted 16 December 1966), art 9(3)

⁶⁰ Bangladesh National Report submitted following paragraph 15(A) of the Annex to Human Rights Council Resolution 5/1, A/HRC/WG.6/4/BGD/1 (19 November 2008). para 70

⁶¹ United Nations, General Assembly, Document A/59/565, 2 December 2004,

< <https://casebook.icrc.org/case-study/un-report-threats-challenges-and-change#:~:text=Description%20of%20terrorism%20as%20%E2%80%9Cany,the%20purpose%20of%20such%20an> >. (Accessed on [24 April 2023]).

⁶² ICCPR (adopted 16 December 1966) art 15

in different ways by the law enforcement authorities and can be misused. Wording of this Act is very similar to Code of Criminal Procedure, 1898 section 54 in terms of application.

According to ATA, 2009 that magistrate can grant an application for remand up to 15 days⁶³. But a recent report published by the International Federation for Human Rights (FIDH) where it is mentioned that in Bangladesh, mistreatment and torture are frequently used by police during custody to force people to confess and pay bribes.⁶⁴ A report by Jamuna News recently revealed that the police arrested some suspects in connection with a kidnapping case and they confessed in court that they kidnapped and killed the victim but after 51 days, the teenage victim returned to her family⁶⁵. This shows how brutally the police torture the accused in remand.

The ATA, 2009 give obligation to law enforcement body that investigations crimes under this law must be done within 60 days,⁶⁶ then the Act also give opportunity police to ask for more time to investigate if police officer fails to complete investigation within the time-limit mentioned.⁶⁷ Then there is no point in setting a time limit. There is no rule or laws subject to departmental action for delay. According to ATA, 2009 all crimes related to terrorism are non-bailable offence.⁶⁸ It also goes against ICCPR which says that people should not be held in custody while waiting for their trial unless there is a good reason.⁶⁹ The ICCPR says that just because someone is accused of a terrorism-related crime, it doesn't automatically mean they should be denied bail.⁷⁰

The ATA, 2009 mentioned speedy trial, that the government can create special courts to handle terrorism cases quickly.⁷¹ These courts will have judges appointed by the government in

⁶³ Anti-Terrorism Act 2009, s 26

⁶⁴ International Federation for Human Rights, 'Bangladesh: End torture and ensure justice for victims' (Press Release, 31 May 2019) < <https://www.fidh.org/en/region/asia/bangladesh/bangladesh-end-torture-and-ensure-justice-for-victims> > accessed 26 April 2023.

⁶⁵ Jahid Hasan, Jamuna TV (25 August 2020) < https://www.youtube.com/watch?v=eZu9B_yL0ew > accessed 26 April 2023.

⁶⁶ Anti-Terrorism Act 2009, s 24(1)

⁶⁷ Ibid, s 24(2)

⁶⁸ Ibid, s 39(1)

⁶⁹ ICCPR (adopted 16 December 1966), art 9(3)

⁷⁰ Ibid

⁷¹ Anti-Terrorism Act 2009, s 28(1)(2)

consultation with the Supreme Court. This means that the special courts may not be completely independent international laws said that courts should be independent and fair.⁷²

The Bangladesh Telecommunication Act, 2006 give power to the law enforcement body power to listen in on people's phone calls and the information collected under⁷³ this law is to be acceptable evidence at trial⁷⁴ stage under the Evidence Act of 1872. This is an arbitrary violation of the ICCPR's privacy guarantee which said that no one should interference with someone's privacy arbitrarily.⁷⁵

5.2 Identifying the challenges for ensuring fair trial in terrorism cases

5.2.1 Constitution of Bangladesh

In Bangladesh, the judiciary is not completely separate from the government. The government can control the judiciary by choosing who becomes a judge, giving promotions, or punishing judges who do not agree with them. The 16th Amendment of the Constitution Article 96(2) gives power to the parliament to remove the Judge. Also, the Chief Justice is employed by the president under Article 95(1). In the case of Siddiqui v. Bangladesh, the 16th Amendment's validity was contested before the High Court. On July 3, 2017, Chief Justice Surendra Kumar of the Supreme Court's Appellate Division support the reasoning of the High Court. According to the Chief Justice, it was unlawful for the Parliament to remove Supreme Court judges since it threatened the independence of the judiciary.⁷⁶

5.2.2 Lack of independence of judiciary

According to Justice Sinha, "An independent judiciary is essential to the rule of law in any country the Judges are not subject to other branches of the government and therefore equipped with the armor of impartiality".⁷⁷ On September 13, 2017, the ruling party of Parliament all

⁷² ICCPR (adopted 16 December 1966) art 14

⁷³ The Bangladesh Telecommunication Act of 2006, section 97A

⁷⁴ Ibid, s 97B

⁷⁵ ICCPR (adopted 16 December 1966) art 9(3)

⁷⁶ Advocate Asaduzzaman Siddiqui v. Bangladesh (Writ Petition No. 9989/2014)

⁷⁷ Ibid, page 288

agreed to take action against the High Court's decision and get rid of the Chief Justice's comments that were considered against the law and passed a resolution.⁷⁸ After that Chief Justice Surendra Kumar was forced to resign.⁷⁹ So, it is very clear from this incident that the judiciary is not free.

5.2.3 Political motivation

It is being claimed that terrorism trials in Bangladesh are being misused to target political rivals by falsely accusing them of terrorism. These trials appear to be aimed at opposition supporters and are being used as a means for seeking revenge in politics.

5.2.4 Human rights concerns

Numerous accusations have been made against security forces in Bangladesh regarding their treatment of individuals during anti-terrorist operations. These allegations include enforced disappearances, extrajudicial killings, and torture, which all greatly interfere with the ability to conduct fair trials.⁸⁰

⁷⁸ Syed Zainul Abedin Eiffel, Parliament adopts resolution challenging 16th Amendment verdict, Dhaka Tribune 14 September 2017;

<<https://www.dhakatribune.com/Bangladesh/2017/09/14/parliament-adopts-resolution-challenging-16th-amendment-verdict/>>

⁷⁹ David Bergman, 'Bangladesh: Ex-chief justice alleges he was 'forced' to resign' (28 September 2018) Al Jazeera < <https://www.aljazeera.com/news/2018/9/28/bangladesh-ex-chief-justice-alleges-he-was-forced-to-resign>> accessed 29 April 2023.

⁸⁰ Staff Correspondent, "51 extrajudicial killings, 1,134 DSA cases in 2021", NewAge Bangladesh (Jan 01,2022) < <https://www.newagebd.net/article/158797/51-extrajudicial-killings-1134-dsa-cases-in-2021> > accessed 29 April 2023.

5.3 Chapter Conclusion

The key statutes for terrorist suspect of Bangladesh highlights some problem which cause bar for a fair trial and become tools of abutment of power. It's also show that the legislative does not follow the international standard while making the law. Other hand the independency of judiciary is in question because the overall process of judge appointment and removing from there office is controversial.

CHAPTER 06

Recommendations and Conclusion

6.1 Recommendation

The government of Bangladesh must take proper steps to establish Fair Trials for Terror Suspects. For trials to be fair, the judges need to be independent from executive. Because the president appoints judges and can remove by the parliament. To make judges are chosen based on their abilities and not influenced by politics. It is important for those accused in terrorism cases to have competent lawyers to represent them. Those who cannot afford it should receive legal aid. Also, the purpose of pre-trial detention should be to guarantee that the defendant appears in court and to safeguard public safety, rather than as a means of punishment.⁸¹ Also any allegations against law enforcement agency of torture or ill-treatment should be promptly investigated. If someone is forced to say something because they were tortured, that statement should not be allowed in court according to the UN Convention against Torture⁸², and self-incriminatory statement are forbidden mentioned in the Constitution of Bangladesh.⁸³ Also, allowing the public to attend trials and permitting media coverage of proceedings is vital to promoting transparency in the trial process. To maintain the fairness of terrorism trials, Bangladesh must implement measures to disclose any evidence used in court to the defendant and their legal team, as the use of secret evidence can be detrimental to the integrity of the trial. Another important action should take by the government that the Parliament and Ministry of Justice should amend the Anti-Terrorism Act 2009. There was a recent amendment in 2013, but that is not adequate. A description of the punishment to be meted out in The Penal Code for law enforcement officers if they torture any accused.

⁸¹ Adriano Martufi and Christina Peristeridou, 'The Purposes of Pre-Trial Detention and the Quest for Alternatives' (2020) 28 *European Journal of Crime, Criminal Law and Criminal Justice*, no 3: 156-160.

⁸² Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984 UNGA Res 39/46) (CAT) art 12 and 13

⁸³ The Constitution of the People's Republic of Bangladesh, art 35(4)

6.2 Conclusion

The trial system for terrorists in Bangladesh does not always follow the rules of fair treatment and innocence until proven guilty. For some crimes, like those against women and children, and if someone is suspected of terrorist activity, bail isn't an option for him. The Anti-Terrorism Act gives the government too much power and can take away people's rights and people can be deprived of a fair trial. Also, some of the sections of the law are not clear, which can let police use their power too much. The criminal legal system is very slow for that reason the justice system apparently drags cases on for years. For the most suffering people are those held for non-bailable offenses or who cannot have money for bail. *State vs. Babul Hossain*⁸⁴ the High Court Division said that unreasonable delay in obtaining the testimony of a witness, it raises doubts about the authenticity and credibility of the evidence presented.

Though Bangladesh is part of many international treaties so, our government should update and develop our criminal laws and justice system more so that they can maintain the international standard and make Bangladesh's image bright at the international level, and the right to a fair trial for terror suspects will be established.

⁸⁴ *State vs. Babul Hossain* (2000) 52 DLR (HCD) 400

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