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Research Monograph
On
Fundamental Rights in Bangladesh: A Critical Overview

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Submitted to:
Mrs. Sharmin Jahan Runa
Assistant Professor
Department of Law
Sonargaon University

Submitted by:
Jiyasmin Akter
ID No: LLM2203027006
Program: LLM (1 years)
Batch No: 27th
Department of Law
Sonargaon University

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Letter of Transmittal

To
Mrs. Sharmin Jahan Runa
Assistant Professor
Department of Law
Sonargaon University

Subject: Submission of Research on,

Fundamental Rights in Bangladesh: A Critical Overview

Dear Sir,

It is a great pleasure for me to submit the research monograph on the topic of "Fundamental Rights in Bangladesh: A Critical Overview'' While researching I tried my best to make this research monograph to enough standard. I hope that this paper will fulfill your expectation.

I therefore, hope that you be kind enough to go through this paper for evaluation.

Yours sincerely,

Jiyasmin Akter
ID No: LLM2203027006
Program: LL.M (1 year)
Batch No: 27th
Department of Law
Sonargaon University

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Jiyasmin Akter
ID No: LLM2203027006
Program: LL.M (1 year)
Batch No: 27th
Department of Law
Sonargaon University

CERTIFICATION OF ORIGINALITY

This is to certify that the thesis on **"Fundamental Rights in Bangladesh: A Critical Overview"** has been conducted by Jiyasmin Akter Id No: LLM2203027006 for partial fulfillment of the requirements for the Degree of LLM from Sonargaon University. The thesis has been conducted under my benevolent guidance and supervision and is recorded as a bona fide work carried out successfully.

……...…….

Mrs. Sharmin Jahan Runa
Assistant Professor
Department of Law
Sonargaon University

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ABSTRACT

Exercise of rule of law can only mitigate the impediments on the term fundamental right is a technical one, for when certain human rights are written down in a constitution and protected by constitutional guarantees they are called fundamental rights. They are called fundamental rights in that sense that they are placed in the supreme or fundamental law of the land which has a supreme society over all other law of the land. Article 27 to 44 of Bangladesh constitution confers a number of substantive fundamental rights on every citizen of Bangladesh e.g. the right to freedom of expression, assembly, association, movement and profession.

Main objectives of this thesis are- To find out the procedure of enforcement of article 27, 31, 33, 35 namely Equality before law, Right to protection of Law, Safeguard as to arrest and detention, Protection in respect of trial and punishment. Violation of this Acts. Consequence of violation of this Acts. And how can overcome this problem.

In this research only secondary data have been applied. Secondary data have been collected from various Acts, Books, Articles, Journals, Newspapers, and Web-sites etc. This thesis has found some issues which violates the fundamental rights of the citizen of Bangladesh. However this thesis has suggested some points to proper implementation of fundamental rights in Bangladesh such as; Government should take hard steps regarding death in police custody. Government and all political parties should need to reach in a settlement about this burning issue, as article 33(2) of Bangladesh constitution stated clearly that every person who is arrested and detained in custody shall be produced before magistrate court within 24 hours. Government should need to take appropriate steps to prevent corruption and provide adequate knowledge regarding protection of fundamental rights to the police force.

Table of Content

Chapter 1
INTRODUCTORY CHAPTER

SL No.	Description	Page No
1.1	Rights	11
1.2	Human Rights	11
1.3	Fundamental Rights	11
1.4	Aims / Objects of the study	12
1.5	Scope & Limitation of the study	12
1.6	Importance of the study	13
1.7	Research Methodology	14

Chapter 2

CONSTITUTIONAL PROVISION OF FUNDAMENTAL RIGHT

SL No.	Description	Page No
2.1	Basis of the fundamental rights	14
2.2	Fundamental Rights Provision	15-17
2.3	Conflicting Laws	18

Chapter 3

VIOLATION OF FUNDAMENTAL RIGHTS IN BANGLADESH

PERSPECTIVES

SL No.	Description	Page No
3.0	Violation of Fundamental Rights by Government	19-25

Chapter 4

CONSEQUENCE OF VIOLATION OF FUNDAMENTAL RIGHT

SL No.	Description	Page No
4.1	Effect of Violation of Fundamental Right	26
4.2	Suspension of Fundamental Right during emergency	27-28
4.3	Amendment Relation to Enforceability of Fundamental Right	29-30
4.4	Writ Petition Under Bangladesh constitution	31
4.5	The Supreme Court has upheld the verdict given by the HCD	32-34

Chapter 5

CASE STUDY

SL No.	Description	Page No
1	Dr. Nurul Islam vs Bangladesh	35
2	University of Dhaka vs Dr. Hossain and another	36
3	Blast and others vs Bangladesh and others	37-40
4	Blast and others vs Bangladesh and others [‘Shukur Ali’ Case]	41,42

Chapter 6

Findings, Suggestions & Conclusion

SL No.	Description	Page No
6.1	Findings	43
6.2	Suggestions	44
6.3	Conclusion	45
	References	46

CASE LIST

1. Dr. Nurul Islam vs Bangladesh.[1]
2. University of Dhaka vs Dr. S. Hussain and another.[2]
3. Blast vs other vs Bangladesh and others.['Section 54 guidelines case' or ' Rubel killing case' or ' guidelines on Arrest and Remand case'][3]
4. Blast and another vs Bangladesh and others ['Shukur Ali'case][4]

[1] 33(1981) DLR (AD) 201. [accessed on 03 July]
[2] 34(1981) DRL (AD) 69. [accessed on 03 July]
[3] http://www.blast.org.bd/issues/justice/214-3806of1998
[4] https:www.blast.org.bd/content/laws/Shukur Ali case

ABBREVIATION

CI	Chief Inspector.
CRC	Convention on the Rights of the Child.
Cr.PC	Criminal Procedure Code.
DLR	Dhaka Law Report.
HCD	High Court Division.

CHAPTER-1

Introduction

1.1 Rights:

Before understanding fundamental rights are should have idea about rights and human rights. Rights mean a claim of some interests adverted by an individual or a group of individual which has either moral or legal basis and which is essential for his development in the society. In a sense right not created by law it originates itself as an obvious result of mutual interaction between man and society. Rights are primarily divided in to two categories-moral rights and legal rights.[5]

1.2 Human rights:

The term "human rights" which does not mean any right is used in special sense. Human rights are those of legal and moral rights which can be claimed by any person for the very reason that is a human being. These rights come with birth and applicable to all people throughout the world irrespective of their race, color, sex, language or political or other opinion. These are therefore those rights that are inherent in human person and without which they cannot live as human beings.[6]

1.3 Fundamental rights:

The term fundamental right is a technical one, for when certain human rights are written down in a constitution and protected by constitutional guarantees they are called fundamental rights. They are called fundamental rights in that sense that they are placed in the supreme or fundamental law of the land which has a supreme society over all other

[5] Md. Abdul Halim, Constitution,Constitutional law and politics: Bangladesh perspective, 2nd ed. (Dhaka: Md. Yusuf Ali Khan,2003), p.89.[accessed on 05 June 2015]
[6]Idid, p.89.[accessed on 05 June 2015]

law of the land. Article 27 to 44 of Bangladesh constitution confers a number of substantive fundamental rights.

1.4 Aims/Objectives of the Study

1. The main object of the study is to find out the main problem to implement of the fundamental rights in Bangladesh.
2. To find out the reasons of violation of Fundamental Rights.
3. To Find out some solution about the effects of violation of Fundamental Rights.
4. To make some suggestion for judicial procedure to end cases in due time with proper justice.

1.5 Scope and Limitation of the Study

My topic is so much demandable in this time. Actually till now in our country every day is done various types of illegal tasks. In our country regularly we may see paper or other telecasting way a lot of offences about fundamental rights. Here I am to choose this topic only to develop the existing law and order regarding in fundamental rights. In my research I am to follow many books, websites, article, and journal. Actually in research sectors in our country have some institutions may provide a lot of documentary evidences and also other things which needed for doing research.

There are a lot of scopes to do research in this topic because in whole of our country is related with violation of fundamental rights. To do this research I am to talk with some BSF, BGB, Politician, some Advocates, general people also and they both said to me that

all the responsibilities goes to the Government and sometime it is done by mistakenly.

The limitations of the study are those characteristics of design or methodology that impacted or influenced the application or interpretation of the results of my study. They are the constraints on utility of findings that are the result of the ways in which I chose to design the study and the method used to establish internal and external validity.

As is the case with any research, readers need to consider the presented results within the context of limitations. Also, the process of posing and answering particular research questions typically generates more questions that need to be explored through further research. Most importantly with respect to the current research, readers need to remember that we considered only clearly determined to make a clear concept about violation of human rights and fundamental rights in Bangladeshi area.

1.6 Importance of the Study

The Fundamental Rights were intended to serve three important purposes, namely:

1. To prevent the Executive from acting arbitrarily;
2. To ensure some amount of security and protection to various types of minorities; and
3. To promote and faster social revolution by establishing the conditions necessary for achieving justice, social, economic and political factors.

The immutability and permanence of the Fundamental Rights were sought to be established first on the reasoning that these rights are rooted in the doctrine of natural law and were, therefore, natural rights as expressed in the traditional parlance and secondly, on the ground that they have been given a place of permanence by the constitution within its scheme.

1.7 Research Methodology:

This Research Monograph is Qualitative in nature. This study is based secondary data collected from law reports, text-books, journals, newspapers, websites and training workshops on economic, social and cultural rights. This collected data have been processed and prepared in the present form in order to make the study more informative, analytical and useful for the users. This research is prepared by using the analytical approach of research which is the most important one and widely used in legal research.

CHAPTER 2
Constitutional Provision of Fundamental Rights

2.1 Basis of the fundamental rights

Fundamental rights give the citizens dignity of life in an atmosphere of freedom and justice beyond the man-made fetters that had constricted their physical and mental horizons. Modern judiciary is regarded as an excellent product of civilization to put the concept of justice to work in the midst of divergent forces with conflicting class or individual interests. Such conflicts make it difficult to bring about equilibrium in the society for a peaceful and orderly association of citizens for their common good. An independent judiciary and strong democratic institutions are the best guarantee against assaults on the rights of the citizens.

2.2 Fundamental Rights Provisions

The fundamental rights in Bangladesh are listed under Articles 27 to 44 of Part III, and the jurisdiction of the High Court Division of the Supreme Court to enforce the rights is defined in Article 102 of Part VI of the Constitution of 1972.

2.2.1 Articles 27 and 28 of the Constitution provide that all citizens are equal before law and are entitled to equal protection of law, and the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex or place of birth.

2.2.2 Articles 29 provide that there shall be equality of opportunity for all citizens in respect of employment or office in the service of the Republic irrespective of religion, race, caste, sex or place of birth. Nothing in this article shall prevent the State from making special provision in favor of any backward section of citizens for the purpose of securing their adequate representation in the service of the Republic.

2.2.3 Article 31 and 32 provide that to enjoy the protection of the law, and to be treated in accordance with law, is the inalienable right of every citizen, and no action detrimental to the life, personal liberty, body, reputation or property of any person shall be taken except in accordance with law[7].

2.2.4 Article 33 provides that no person who is arrested shall be detained in custody without being informed of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice. Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty four hours of such arrest, and no such person shall be detained in

[7] Par iii31 &32 of the constitution of peoples Republic of Bangladesh;1972

custody beyond the said period without the authority of a magistrate except in the case of any person who for the time being is an enemy alien, or who is arrested or detained under any law providing for preventive detention[8].

2.2.5 Article 34 guarantees that all forms of forced labor are prohibited, and any contravention of this provision shall be an offence punishable in accordance with law. Nothing in this article shall apply to compulsory labor by persons undergoing lawful punishment for a criminal offence, or required by any law for public purposes[9].

2.2.6 Article 35 provides that no person shall be convicted of any offence except for Critical of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than, or different from, that which might have been inflicted under the law in force at the time of the commission of the offence. Every person accused of criminal offence shall have the right to a speedy and public trial by an independent and impartial court or tribunal established by law[10]. No person shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment.

2.2.7 Article 36 provides that subject to any reasonable restrictions imposed by law in the public interest, every citizen shall have the right to move freely throughout Bangladesh, to reside and settle in any place therein and to leave and re-enter Bangladesh[11].

[8] Constitutional law of Bangladesh; Islam Mahmudul;2nd edition;p.283
[9] Opcit 8.
[10] Ibid. p. 284
[11] The Constitution of Bangladesh 1972, Art 36.

2.2.8 As per Articles 37 and 38 every citizen shall have the right to form associations or unions, to assemble and to participate in public meetings and processions peacefully and without arms, subject to any reasonable restrictions imposed by law in the interests of morality, public order or public health.

2.2.9 Freedom of thought and conscience is guaranteed in Article 39 of the Constitution. Subject to any reasonable restrictions imposed by law in the interests of the security of the State, friendly relations with foreign states, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence the right of every citizen to freedom of speech and expression, and freedom of the press are guaranteed[12].

2.2.10 Article 40 provides that subject to any restrictions imposed by law, every citizen shall have the right to enter upon any lawful profession or occupation, and to conduct any lawful trade or business.

2.2.11 Article 41 provides that every citizen has the right to profess, practice or propagates any religion, and every religious community has the right to establish, maintain and manage its religious institutions. Article 42 of the Constitution provides that every citizen shall have the right to acquire, hold, transfer or otherwise dispose of property, and no property shall be compulsorily acquired, nationalized or requisitioned save by authority of law. According to Article 43 every citizen shall have the right to be secured in his home against entry, search and seizure, and to the privacy of his correspondence and other means of communication. Article 44 guarantees the right of

[12] Opcit 8. P. 205

every citizen to move the High Court Division in accordance with clause (1) of Article 102 for the enforcement of any of the fundamental rights conferred by Part III of the Constitution.

2.3 Conflicting Laws

Most of the laws, which are conflictive with the fundamental, rights Provisions of the Constitution, violate the basic principles of Article 27 and 31. Some of the laws also

Come into conflict with other fundamental rights as well for the example, the right to personal liberty, and the right to property guaranteed by the Constitution. My research reveals that the following laws are conflictive with one or more of the Fundamental Rights Provisions of the Constitution:

The vested and Non-Resident Property (Administration) Act 1974

The Special Powers Act 1974 Section 54 of the Code of Criminal Procedure 1898 the Bangladesh Citizenship (Temporary Provisions) Order 1972

The Indemnity Ordinance 1975 Order V, Rule 1(3) of the Code of Civil

Procedure 1908

Various retrospectives legislation, including the Fifth and Seventh Amendments to the Constitution.

The Official Secrets Act 1923

The Secretarial Instructions, 1976 ad the Rules of Business,

1996 Certain Provisions of the income Tax Ordinance 1984

CHAPTER 3

CRITICAL ANALYSIS OF FUNDAMENTAL RIGHTS IN BANGLADESH PERSPECTIVES

Fundamental Rights violated in all of the third world countries. All third world countries Constitution ensured this right but they cannot exercise it. In the view of our country fundamental rights Critical is highly, today in the view of our country our executive body, our legislative body, our judicial body violates the fundamental rights.

3.1Violation of Fundamental Rights:

1. Once again the government has promulgated an uncivilized ordinance that defies all norms of humanity and violates fundamental human rights. During the 87 days of the army operation that began on 16th of October 2002, a black chapter has been added in the history of Bangladesh. It may be mentioned that under direct orders from the Prime Minister.
2. They Army operation known as „Operation Clean Heart" has resulted in serious Critical of human rights and political persecution. The promulgation of this black ordinance denies the right to justice to 50 victims of army custodial deaths and to others who became handicapped and lame due to inhuman physical torture[13].

3. October 16, 2002 and January, 2003. With this the door of justice has been shut

[13] The daily Bangladesh observer. (25 January 2003)

for the people depriving them their right to equal justice and security[14]. No court of Bangladesh can try the forces for their acts. It can be firmly said that the government is solely responsible for their rapid deterioration of law and order situation, wide spread violence, mismanaged economy and frustrating socio-political condition.

4. Ever since the government usurped power through the rigged election of October 1, 2002, a reign of terror has been unleashed by terrorists belonging to BNP-Jamaat alliance. The leaders, activists and supporters of Awami League and the minority community became the victims of the worst ever repression and political vendetta. Political persecution and the degree of atrocities intensified with the release of 45 thousand identified criminals who are the cadres of the ruling party. In the last one year, it is not only the political activists who suffered, the common people having nothing to do with politics suffered gravely in the hands of the cadres of the ruling party alike. Terrorists having blessing of the government have taken a toll of life of 24 thousand innocent people. Women, young and old, were subject to gang rape. Mothers and daughters were assaulted and violated irrespective of their age throughout the breadth and length of Bangladesh. Widespread violence, extortion, forceful occupation, vandalism, nepotism became rampant throughout the country.

[14] Ibid 15.

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6. Failure and mismanagement in all spheres of life be it financial, commerce and industry, educational institutions have shattered the hopes of common people. The complete breakdown of law and order has created a state of chaos and anarchy. In the backdrop of the massive failure in all spheres of government had its civil administration called in the army to run the country. Though, the 87 day-long anti-crime drive brought some relief to the people, the case of 50 deaths in army custody and the physical and mental torture of people in custody created a frightening situation in the country. The ruling alliance used the army operation to oppress, harass and arrest leaders and workers of main opposition Awami League and other political parties.

7. The Critical of fundamental human rights and cases of political persecution has led to widespread condemnation both at home and abroad. The bright image of Bangladesh has been tarnished in the international arena as a result of this. The role of armed forces that are meant to protect the country from external aggression and guarding its sovereignty has been made controversial. Though some respite from the terrorists was observed yet the hardcore criminals enjoying government blessing evaded arrests. Under political pressure the administration released criminals possessing illegal arms mysteriously, onThe other hand no members of the fundamentalist party Jamaat was arrested during the army operation.
8. Meanwhile, the schedule local government election known as Union Parishad has been announced. Election to 4228 grass root local government institution is scheduled between 25 January and 16 March 2003. Earlier, the Election Commission was forced to postpone the UP polls to allow the army operation to continue. When the election commission declared the deployment of army to ensure fair polls, it was denied the constitutional authority and army was pulled back to the barracks. It became abundantly clear that the sudden army withdrawal was made so that the BNP-Jamaat backed criminals win the upcoming UP polls by stuffing false vote and capturing polling stations. Though one would tend to believe that the army was withdrawn in the face of strong criticism of Critical of human rights, in reality the sudden withdrawal of army was done to fulfill narrow partisan needs. The ulterior routine of this withdrawal is to capture the local government institutions during the ensuring UP polls. All previous elections

heldunder this regime such as by-elections, city corporation elections were anything but fraudulent. This regime wants the local government election results in their favor this time as well. Hence the pullout of army is seen as a tactical ploy. Strangely enough the government is playing hide and seeks with respect to matters relating to army operation. No discussion was allowed on army deployments in the parliament despite strong demands.

9. There is no explanation on the part of the government as to the legal basis for army deployment. On its first anniversary on October 10, 2002 the Prime Minister claimed improvement in law and order situation. What happened within the next 6 days that the army had to be called in on the midnight of 16th October, 2002? The government neither cares for the voters or for accountability. It does not respect neither has faith in the constitution and in parliamentary democracy. This explains why the present regime promulgated speedy justice trial by passing the parliament and the current black Indemnity Ordinance. Legal and constitutional experts believe that fundamental human right has been seriously violated with the promulgation of the ordinance. Article 27 of the constitution clearly spells out that, “Everyone is equal in the eye of the law and every citizen has the right to seek legal shelter”. No government can snatch away this Fundamental right.Prime Minister Sheikh Hasina violated the constitution by deploying the army which was her unanimous decision.
10. The ordinance was promulgated to indemnify her from the offense she made by violating the constitution and basic human rights. It is simply unconceivable that at the dawn of 21st century citizens can no longer take legal shelter of deaths that occurred in custody. Once again the identify of Bangladesh as a nation of

democratic and law abiding citizens has been seriously jeopardized through the promulgation of such a black and infamous ordinance.

11. The ordinance was promulgated to indemnify her from the offense she made by violating the constitution and basic human rights. It is simply unconceivable that at the dawn of 21st century citizens can no longer take legal shelter of deaths that occurred in custody. Once again the identify of Bangladesh as a nation of democratic and law abiding citizens has been seriously jeopardized through the promulgation of such a black and infamous ordinance.

12. Section 54 of the Code of Criminal Procedure provides that any police officer may, without an order from a Magistrate and without a warrant, arrest any person against whom a reasonable suspicion exists of his having been concerned in any cognizable offence. Therefore under section 54 there is reasonable ground for arresting a person without a warrant. Thus a person liberty may be curtailed by his arrest if reasonable suspicion exists as to his having been concerned in a cognizable offence[15].

Section 2(1) of the Bangladesh Citizenship (Temporary Provisions) Order 1972 states-

"Every person shall be deemed to be a citizen of Bangladesh – who or whose father or grandfather was born in the territories, now comprised in Bangladesh and who was a permanent resident of such territories on the 25th day of March 1971, and continuous resident.[20]," The above provision violates the provision of equality before the law and is discriminatory against women. Similarly Order V, Rule 1(3) of the Code of Civil

[15] Criminal Procedure, s. 54.

Procedure does not ensure prohibition of discrimination on grounds of sex. The said sub rule provides On the application of any defendant in a suit for the payment of money, in which the plaintiff is a woman, the Court may at any stage of the suit make a like order if it is satisfied that such Plaintiff does not possess any sufficient immovable property within Bangladesh.

The above provision applies only to a female Plaintiff who does not possess sufficient immovable property within Bangladesh and is as such discriminatory. The official Secrets Act 1923 in its section 5 make the communication of any official information by a Government Officer an offence punishable under the said Section and thereby prevents citizen from having access to official information[16]. Thus, equality before the law is not ensured by the Official Secrets Act 1923.

[16] Criminal Procedure, s. 54.

Chapter-04

CONSEQENCES OF VIOLATION OF FUNDAMENTAL RIGHTS

4.1 Effects of Violation of Fundamental Rights

Art. 26(1) provides that all existing law inconsistent with the provisions of Part III shall, to the extent of inconsistency, become void on the commencement of the Constitution, while art. 26(2) provides that the State shall not make any law inconsistent with any provisions of Part III, and any law so made shall, to the extent of inconsistency, be void. Questions arise as to whether a law inconsistent with the provisions of Part III becomes void ab initio or simply unenforceable and whether the effect of inconsistency is the same in respect of the pre-constitution and post-constitution laws.

The American Constitution does not contain any provision similar to art.7 or art.26 of the Constitution. Applying the general principles of constitutional law [17] the American Supreme Court held early that an unconstitutional law is in reality no law and is wholly void; it imposes no duties and creates no rights and it confers no power or authority and justifies no act performed under it.[18]But an all-inclusive statement of a principle of absolute retroactive invalidity was later found to be not justified.[19] It was held that an unconstitutional statue is not necessarily a nullity; it may have consequences binding upon people.Proceeding on the principle that a statue declared unconstitutional is void in the sense that it is inoperative or unenforceable and remains in a dormant state or hibernation, it was held by the federal Court of Appeal that a statue once declared unconstitutional and later held to be constitutional does not require re-enactment to restore its operative force.[20]

[17]*Marbury v. Madison, 2 L.ed. 60.*[accessed on 27 June 2015]
[18] *Ex parte Royall, 117 US 241; Norton v. Shelby Country, 118 US 425; ChicagoI&L.R.Co. v. Hackett, 228 US 559; Osborne v. President, Director & Co. of Bank, 22 US738.* [accessed on 27 June 2015]
[19] *Chicot Country Drainage District v. Baxter State Bank, 308 US 371.* [accessed on 28 June 2015]
[20]Poulos v. New Hampshire, 345 US 395.[accessed on 28 June 2015]

The commencement of the constitution its operation is eclipsed by the provisions of the constitution. If the constitution is so amended as to remove the inconsistency, the law becomes operative without re-enactment. But the law remains valid all the time as against those who are not entitled to fundamental rights. So far as post-constitutional law the Indian Supreme Court held the view that such a law is void ab initio and anything done under the unconstitutional law, whether closed, completed or inchoate, will be wholly illegal; such a law is not revived by any subsequent event. The court seems to have shifted form this position in Gujarat v. Shri Ambica Mills wherein it took the view that where fundamental rights have been conferred only on some persons, natural or justice, a pre-constitution or post-constitution law contravening those rights is void qua those persons on whom the rights have been conferred, but is valid qua other person on whom those rights have not been conferred and it cannot be said that such a law is still-born or non-est; the doctrine of eclipse equally applies to pre-constitution and post-constitution laws which violate rights conferred only on some persons.

The Pakistan Constitution of 1956 contained provisions similar to art.26 of the Constitution. In East Pakistan vs. Mehdi Ali Khan the Pakistan Supreme Court was dealing with a pre-constitution law and following the line adopted by the American Supreme Court made a distinction between the legislatures inherent luck of power to enact a law in which case the law is void ab initio and a limitation put on the power of a competent legislatures which renders the law void only to the extent of inconsistency in the sense that it cannot be applied to a particular case. Art.6 of Pakistan Constitution of 1962 contained a similar provision.

4.2 Suspension of Fundamental Rights during emergency

There are emergency provisions in the constitution of some countries but nowhere it is exactly defined what emergency is. Normally emergency means an unexpected occurrence requiring immediate action.The idea of suspension of some fundamental rights in time of emergency is

common to all legal systems. Somewhere the constitution itself and somewhere a special law makes provisions in legal terms for situations of crisis when states of emergency may be involved.

The necessity for suspension of certain rights in times of emergency is internationally recognized. Almost all regional and international instruments of human rights make provisions for suspension of rights in cases of emergency. Article 4(1) of the international covenant on civil and political rights, 1966, article 15 of the European convention for the protection of Human Rights and Fundamental Freedom 1950 and article 27 of the American convention on Human Rights, 1969 make, more or less, the same provision to the effect that in time of war, public danger, or other emergency that threatens the independence or security of a state party, it may take measures derogating from its obligation under the convention. [21]Bangladesh has been under a state of Emergency since January 11, 2007. This is the fifth time this has happened since the independence issued by the president clearly declared that "the right to lodge cases with the courts in order to reinstate the fundamental rights ensured in part III of the constitution shall remain suspended during the State of emergency" according to the Article 141B and 141C of the constitution of Bangladesh. Article 141B concerns the suspension of provisions of certain article during emergencies and Article 141C concerns the suspension of enforcement of fundamental rights during January 25, 2007. Both the ordinance and the rules have empowered the "law and order maintaining force" to arrest citizen without a warrant, Around 55,000 military personnel were already deployed on December 9, 2006- 33 days before the store of Emergency to "aid the

[21] Md. Abdul Halim, Ibid, p.272. [accessed on 28 June 2015]

civil administration for the maintenance of law and order in the country according to the Home Ministry's proclamation".[22]

1.While a proclamation of Emergency is in operation, the president may, on the written advice of the prime Minister, [by order], declare that the right to move any court for the enforcement of such of the rights conferred by part III of this constitution as may be specified in the order, and all proceedings pending in any court for the enforcement of the right so specified, shall remain suspended for the period during which the proclamation is in force or for such shorter period as may be specified in the order.

2. An order made under this article may extend to the whole of Bangladesh or any part thereof.

3. Every order made under this article shall, as soon as may be, be laid before parliament.[23]

4.3 Amendment Relating to Enforceability of Fundamental Rights.

Two very significant events have taken place which have had significant events taken place which have had significant consequence upon the operation and enforcement of the fundamental rights. One is the proclamation of emergency throughout the country on December 28, 1974 whose effect, however is bound to be short lived. As consequences of this proclamation an order was passed on the court of law during the continuance of the emergency. As soon as the emergency ends, these rights will be revived. The other event which is of permanent nature is the enactment of the constitution (Fourth Amendment) Act, 1975 on January 25, 1975. So far, the changes effected by the fourth amendment to the constitution related to the enforcement of the fundamental rights, it is unusualness is as attractive as it is full of significance, if not for any other reason, at least for introducing a unique and unprecedented departure from the normal

[22] [http://en.wikipedia.org/wiki/UN HRCOUNCIL_BANGLADESH state of emergency in Bangladesh accessed on 13th June2010] [accessed on 28 June 2015]

[23] The Constitution of the People`s Republic of Bangladesh, 1972, art.141C. [accessed on 28 June 2015]

constitutional pattern followed elsewhere. Under unlamented provisions of articles 44 and 102 of the constitution, any citizen or in some cases, any person aggrieved by an infraction of any of the fundamental rights could move the supreme court for the necessary relief. Besides, being in conformity with the constitutional principles followed in countries which declared similar rights in their constitutions, the provisions relating to enforcement of fundamental rights by the supreme court as originally incorporated in article 44 and 102 of the constitution were considered necessary for three reasons, namely, rights of citizens declared under the constitution should, in fitness of thing and in accord with constitutional propriety, be adjudicated upon by one of the principal organs of government, namely, the highest tribunal, the supreme court of Bangladesh, for, in many cases involving the breach of fundamental rights the respondent against whom remedy would be sought is one or the remaining two organs of the government, namely, the executive or the legislature. Since the constitution declared the fundamental rights, they are limitation on the powers of the legislature as well as the executive and whether such limitations have been transgressed by them determination, by an independent and impartial body or tribunal, involving high policy considerations. Secondly, such adjudication by the highest tribunal in the country was preferred because it is likely to command respect both of the rulers and the governed, perhaps, quite understandably, more than any other tribunal or court set up under an act of parliament. Thirdly, such means of enforcement would ensure speedy remedy, the number of appeals against an order made by the court would be minimized; under the un amended provision of articles 44 and 102 only one appeal from such an order lay to the appellate division of the court. If leave to appeal was granted to be it under article 103(3), or a certificate to appeal was granted by the High court Division under article 103(2) of the constitution.[24]

[24]*Ibid, pp.332-334.* [accessed on 28 June 2015]

Protection mechanism

The way of Challenge by an aggrieved party whose fundamental Rights are violated? Aggrieved person has the right which is mentioned on Bangladesh Constitution.

4.4 Writ Petition under the Constitution of Bangladesh.

If fundamental rights is violate the aggrieved party may take remedy by the Constitution of Bangladesh under Article 102. According to Article 102 of the Constitution "The High Court Division on the application of any person aggrieved, may give such directions or order to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any of the fundamental rights conferred by Part 3 of this Constitution".

The Supreme Court of Bangladesh can exercise this jurisdiction under Article 26 and 102 of the Constitution Judicial enforcement, on the other hand, is provided for with a view to enforcing fundamental rights against the executive. In other words, if any public authority violates any of fundamental rights enumerated in the Constitution, the right to move the highest court of the land for enforcing that right must be specifically guaranteed in the Constitution and it should be guaranteed as of an independent fundamental rights. This right is guaranteed in Article 44 and the High court division of the Supreme Court is empowered to enforce fundamental rights under Article 102 of the Bangladesh Constitution. [26]

4.5 The Supreme Court has upheld the verdict given by the HCD[25]:

The Supreme Court has upheld the verdict given by the HCD, and rejected the Appeal by the state, challenging a High Court verdict on section 54 (arrest without warrant) and 167 (seeking remand) of the Code of Criminal Procedure (CrPC), The Appellate Division bench led by Chief Justice Surrender Kumar Sinha completed hearings on the matter and kept its verdict pending. The court also said Sections 54 and 67 of the CrPC are contradictory to articles 31, 33 and 35 of the constitution.

Background of the Case

Shamim Reza Rubel, a student of the Independent University Bangladesh, was killed in custody at the Detective Branch (DB) office on July 24, the very next day of the arrest.

Following Robel's death, the Trial Court sentenced AC Akram and 13 other convicts for life imprisonment. The government formed a judicial inquiry headed by Justice Habibur Rahman. The probe recommended some amendments to Sections 54 and 167 of the CrPC.

Bangladesh Legal Aid and Services Trust (BLAST) filed a petition before the High Court Division ((Writ Petition No. 3806 of 1998)) as the recommendations of the Committee were not implemented. In April 2003, the court pronounced its verdict through which it provided some special directives on amending the laws relating to arrests without warrants and grilling in custody. It also issued a set of instructions over the matter before amending the CrPC sections, with an order to the government to implement the instructions within six months. (BLAST vs Bangladesh, 55 DLR 363)

The State, however, moved to appeal against the verdict, which was granted in 2004, but the High Court's order did not stay then. After 12 long years, on March 22, 2016 this year, hearings

[25] The daily observer
www.observer.com.2016/06/02/154261.hp.

on the appeal commenced.

The Appellate Division heard the matter for the second day and wrapped up the proceedings before fixing a date for the verdict on May 17, 2016.

The Directives from the judgment of High Court Division (55 DLR 363) are as follows -

1. No Police officer shall arrest anyone under Section 54 for the purpose of detention under Section 3 of the Special Powers Act, 1974.

2. A police officer shall disclose his/her identity and show his/her ID card on demand to the person arrested or those present at the time of arrest.

3. A record of reasons of arrest and other particulars shall be maintained in a separate register till a special diary is prescribed.

4. The concerned officer shall record reasons for marks of injury, if any, on the person arrested and take him/her to nearest hospital or government doctor.

5. The person arrested shall be furnished with reasons for arrest within three hours of bringing him/her to the Police Station.

6. If the person is not arrested from his/her residence or place of business, the relatives should be informed over the phone or through messenger within one hour of bringing him/her to Police Station.

7. The person concerned must be allowed to consult a lawyer of choice or meet nearest relations.

8. While producing the detained person before the Magistrate under Section 61 of the CrPC, the police officer must forward reasons in a forwarding letter under Section 167 (1) of the CrPC as to why the investigation could not be completed within twenty-four hours and why s/he considers the accusation and information to be well founded.

9. On perusal of the forwarding letter, if the Magistrate satisfies him/herself that the accusation and information are well founded and materials in the case diary are sufficient for detaining the person in custody, the Magistrate shall pass an order of detention and if not, release him/her forthwith.

10. Where a person is released on the aforesaid grounds, the Magistrate shall proceed under 190 (1)(c) of the CrPC against the Officer concerned under Section 220 of the Penal Code.

11. Where the Magistrate orders detention of the person, the Officer shall interrogate the accused in a room in a jail until a room with glass wall or grille on one side within sight of lawyer or relations is constructed.

12. In any application for taking accused in custody for interrogation, reasons should be mentioned as recommended.

13. The Magistrate while authorizing detention in police custody shall follow the recommendations laid down in the judgment.

14. The police officer arresting under Section 54, or the Investigating Officer taking a person to custody or the jailor must inform the nearest Magistrate about the death of any person in custody in compliance with these recommendations.

15. The Magistrate shall inquire into the death of any person in police custody or jail as per the recommendations.

CHAPTER 5

Some Case studies On the Fundamental rights

Case Reference no: 01

Dr. Nurul Islam vs Bangladesh[26]

Fact of the case:

The appellant Dr. Nurul Islam was appointed an assistant surgeon in 1952(in East Bengal) and by successive promotions he became the Director and professor of medicine of the Institute of post-graduate and Research in 1971(in Bangladesh).In November, 1978 the Govt. issued a notice where by the appellant was relieved of his duties as professor of Medicine; he was to continue as Director of the institute which was made a non-practicing post. The appellant challenged this notice in the HCD by write petition no. 571 of 197889 and a bench of the High Court Division on 6-12-79 declared the notice to have been issued without lawful authority. The government as found by the Supreme Court , reacted to the High Court declaration by ordering the retirement of the appellant from service under sub-section(2)of section 9 of the public servants Retirement Act, 1974 which is to the effect that the Govt. is empowered to retire a govt. servant on the completion of 25 years' service . The appellant again challenged this order in a fresh write petition to the High Court Division on the ground, amongst others, that the retirement order is just a measure of punishment on him for his successful challenge of the Governments previous notice declared to have been issued without lawful authority. The High Court Division in the present instance refused with the Govt.'s decision in retiring the appellant 4/s 9(2) of the public service retirement Act and gave him no relief where upon the appellant move the Appellate Division as against the aforesaid decision of the High Court Division alleging, inter alia, malafide in the Government in causing his premature retirement; he further stated that there

[26] 33 (1981) DLR (AD) 201. [accessed on 03 July 2015]

are in the cadre as many as 34 doctors who have completed 25 years' service and many of whom were senior to the appellant in service but none of them had been retired . It was therefore contended that the impugned notification issued on June 5, 1980 was issued for collateral purposes the provisions of Article 27 and 29 of the constitution appellant was not given any opportunity of being heard before the impugned notification was issued it was violated of Article 135 of the constitution.

Judgment of the case:

Article 27 of the constitution which speaks of entitled to equal protection of law interpreted by R.Islam, J.at paragraph 87 as under:

"The principle on which the doctrine of equal protection of laws is founded is that persons in similar circumstances must be governed by the same laws. The legislative classification by itself does not offend against the principle of equal protection of the laws provided the laws operate equally in all members of the said class or group. For valid legislation, classification must be reasonable for the purpose of legislation, should be based on proper and justifiable distinction, should not clearly arbitrary and should have all reasonable relation to the objects and to the public purpose sought to be achieved by the legislation.

Case reference no: 02

University of Dhaka vs Dr. S. Hussain and another[27]

Fact of the case:

The principle of protection as provided in Article 35 of the constitution was invoked in as much as presidents order No. 67 of 1972 does not contain any express words giving retrospective effect, but the statute is prospective in nature only. Dr. Sayed Sajjad Hossain, who was the vice

[27] 34(1982) DLR (AD) 69. [accessed on 03 July 2015]

chancellor of the Dhaka University during the war Liberation. His case was referred to the First screening Board constituted under the presidents order No. 67 of 1972. The screening Board found him guilty. Accordingly, the respondent was dismissed from his service. The dismissal order was challenged before the High Court Division. The High Court Division upheld the order of dismissal.

Judgment of the case:

B. H. Chowdhury, J. in paragraph 45 as held as follows:

In view of the matter the opinion of the activities attributed to the respondent Dr. Sajjad Hossain and Dr. Mohar Ali allegedly were performed in 1971 do not come within the mischief of the presidents order No. 67 of the 1972. Such activities are punishable under presidents order No. 8 of 1972 which was given retrospective effect. Both the respondents were given clemency and in the write petition they quoted the statement of the prime minister as mentioned in the press note. After assurance of such clemency, it was not permissible for initiation of any proceedings. Presidents order NO.67 of 1972, however, has no manner of application because it was not given respective effect.[28]

Case Reference no: 3

BLAST and others vs. Bangladesh and others ['Section 54 Guidelines Case', or 'Rubel Killing Case' or 'Guidelines on Arrest and Remand Case'][29]

Writ Petition No. 3806 of 1998

High Court Division of the Supreme Court of Bangladesh

[28] 34(1982) DLR (AD) 69. [accessed on 03 July 2015]
[29] http/www.blast.org.bd/issue/justice/214-3806of1998

Facts: BLAST, Ain o Salish Kendra, Shonmilito Shamajik Andolon and several individuals filed a writ petition in the High Court challenging the abuse of police powers to arrest without warrant under Section 54 of the Code of Criminal Procedure (CrCP) and the abuse of powers regarding taking the accused into remand (police custody) under Section 167 of the CrPC. The petitioners referred to recent incidents of gross abuse of power, including allegations of custodial death, torture and inhuman treatment, especially the killing of a young student, Rubel, in remand after arrest under Section 54 of the CrPC.

Argument: The petitioners argued that law enforcing agencies routinely abuse the powers granted under Sections 54 and 167 of the CrPC, and further that these provisions suffer from vagueness and allow for arbitrary exercise of power. The petitioners argued that the Court should enunciate safeguards to prevent or curtail police abuse of powers and arbitrary actions by Magistrates, which constitute violations of citizens' fundamental rights to life and liberty, to equal protection of law, to be treated in accordance with law and to be free from cruel, inhuman and degrading treatment and punishment as guaranteed under articles 32, 27, 31, 33 and 35 of the Constitution.

Order: The High Court initially issued a Rule Nisi, and upon full hearing delivered judgment on 07.04.2003, observing that Sections 54 and 167 of the CrPC are not fully consistent with constitutionally guaranteed freedoms and safeguards. The Court laid down a comprehensive set of recommendations regarding necessary amendments to both sections of the CrPC, along with the Police Act, The Penal Code and the Evidence Act,

and directed that these should be acted upon within six months. It also laid down a set of fifteen guidelines with regard to exercise of powers of arrest and remand:

- No Police officer shall arrest anyone under Section 54 for the purpose of detention under Section 3 of the Special Powers Act, 1974
- A police officer shall disclose his/her identity and show his/her ID Card on demand to the person arrested or those present at the time of arrest
- A record of reasons of arrest and other particulars shall be maintained in a separate register till a special diary is prescribed
- The concerned officer shall record reasons for marks of injury, if any, on the person arrested and take him/her to nearest hospital or government doctor
- The person arrested shall be furnished with reasons of arrest within three hours of bringing him/her to the Police Station
- If the person is not arrested from his/her residence or place of business, the relatives should be informed over the phone or through messenger within one hour of bringing him/her to Police Station
- The person concerned must be allowed to consult a lawyer of choice or meet nearest relations
- While producing the detained person before the Magistrate under Section 61 of the CrPC, the police officer must forward reasons in a forwarding letter under Section 167 (1) of the CrPC as to why the investigation could not be completed within twenty four hours and why s/he considers the accusation and information to be well founded

- On perusal of the forwarding letter, if the Magistrate satisfies him/herself that the accusation and information are well founded and materials in the case diary are sufficient for detaining the person in custody, the Magistrate shall pass an order of detention and if not, release him/her forthwith
- Where a person is released on the aforesaid grounds, the Magistrate shall proceed under 190(1)(c) of the Cr PC against the Officer concerned under Section 220 of the Penal Code.
- Where the Magistrate orders detention of the person, the Officer shall interrogate the accused in a room in a jail until a room with glass wall or grille on one side within sight of lawyer or relations is constructed
- In any application for taking accused in custody for interrogation, reasons should be mentioned as recommended
- The Magistrate while authorizing detention in police custody shall follow the recommendations laid down in the judgment
- The police officer arresting under Section 54, or the Investigating Officer taking a person to custody or the jailor must inform the nearest Magistrate about the death of any person in custody in compliance with these recommendations
- The Magistrate shall inquire into the death of any person in police custody or jail as per the recommendations.

Status: The Government has preferred an appeal (Civil Appeal No. 53/2004), which is now pending before the Appellate Division. However, no stay was granted and the Guidelines are in force.

Laws Cited: Constitution, Articles 27, 31, 32, 33 and 35; The Code of Criminal Procedure, 1898

Reported: 55 DLR (2003) 363

Case reference no: 4

BLAST and another vs. Bangladesh and others ['Shukur Ali' Case][30]

Civil Appeal No. 16 of 2010

Appellate Division of the Supreme Court of Bangladesh

Facts: Shukur Ali, then aged 14,was convicted of sexually assaulting to death a 7 year old girlunder section 6(2) of the Nari-o-Shishu Nirjaton (Bishesh Bidhan) Ain, 1995 by the Nari-o-Shishu-Nirjaton Bishesh Adalat, Manikganj (the Special Tribunal on Violence against Women and Children) on 12 July, 2001. Shukur Ali was sentenced to death, according to the mandatory death sentence in effect at the time of the occurrence.While the case was under trial, the mandatory death penalty for the offence under section 6(2) was in February 2000 replaced by a sentence of life imprisonment orthe death penalty. The 1995 Act was replaced by the Nari o Shishu Nirjaton Domon Bishesh Bidhan Ain 2000. It differed from the 1995 Act in that it did not necessarily prevail over the Children Act, 1974. Shukur Ali was 14 years old at the time of the offence and 16 years old at the time of trial. He appealed the judgment and sentence, but these were upheld by both the High Court and Appellate Divisions of the Supreme Court. At this stage, BLAST became involved and challenged the constitutionality of the mandatory death sentence under section 6(2) of the 1995 Act, and its application to Shukur Ali's case, given he was a minor at the time of the offence. The High Court delivered its judgment and pronounced sentence on 2 March 2010. The Court ruled that section 6(2) of the Nari-O-Shishu Nirjaton (Bishesh Bidhan) Ain 1995, now repealed, was unconstitutional on the basis that a mandatory death penalty removed judicial discretion in a manner inconsistent with Articles 31 and 35 of the

[30] http://www.blast.org.bd/content/laws/Shukur Ali case.

Constitution. It upheld the conviction of the Tribunal at Manikganj, but stayed the execution of the death sentence for two months to allow an appeal to the Appellate Division and gave a certificate to that effect. The appeal was filed before the AD on 28 April 2010 by BLAST and Shukur Ali. Arguments: The petitioners argued that Section 6(2) of the Nari-O-Shishu Nirjaton (Bishesh Bidhan) Ain, 1995 was unconstitutional on the ground that it provided for a mandatory death penalty with no alternative. They argued that in removing any scope for the exercise of judicial discretion in sentencing, the power of the judiciary had been transgressed upon by the Legislature, which is inconsistent with Articles 31 and 35 of the Constitution. Further, they argued that no action detrimental to the life of a citizen can be taken except in accordance with law. Judgment: The appeal was allowed in part. The Court declared that pending cases and appeals in respect to offences under the Ain of 1995 would be tried in accordance with the provisions of the Ain of 1995, but sentences would be imposed according to the Ain of 2000. The Appellate Division affirmed the High Court's decision that mandatory death sentences are unconstitutional. However, in the case of Shukur Ali, the Court upheld a sentence of death as appropriate for the facts of the case at bar. The Court held that, with regard to the young age of the victim (7 years old) and the "brutal and diabolical" nature of the killing, that there were no extenuating grounds to commute Shukur Ali's sentence. The Court did not address Shukur Ali's status as a minor at the time of the offence, on the basis that he was charged under the 1995Ain. Laws Cited: Constitution of Bangladesh, Articles 35, 44; Children Act, 1974; Nari O-Shishu Nirjaton Domon Ain, 2000. International Instruments Cited: Universal Declaration of Human Rights; 1948, International Covenant on Civil and Political Rights (ICCPR), 1966. Status: A review petition will be filed within 30 days of 5 May in the Appellate Division against the judgment and order of the Appellate Division dated 5 May 2015.

Chapter 6

Findings, Suggestions & Conclusion

6.1 Findings

1. Many police officers believe that information or confessions cannot be extracted without physical threat or torture. Although torture is prohibited under the law, but its practice is rampant particularly under the „remand". The form of torture includes beating on the soles of the feet, hanging, and suspension upside down, electric shocks, and threat and insult etc. Police may torture the accused person to take information which is the violation of the provision of Article 35(5) of the Constitution.

2. In practice a huge number of persons are detained every year without trial purely for political purpose, which is contradictory to Article 31, 32 and 33 of the constitution.

3. Custodial death becomes a common happening for quite a long time. An inhuman trait that springs out of a perverse desire to cause suffering when there is no possibility of any retaliation. In Jatiyo Mahila Ainjibi Samity vs. Bangladesh and Others (criminal), the High Court held that detention in safe custody against the will of a detained person was illegal.

4. The enforced disappearance of persons has been practiced since the mid-20th century. Enforced disappearances constitute an extreme violation of human rights, infringing many fundamental rights. Furthermore, not only is the person affected who becomes the direct victim, Most of the disappeared are persons who are critical of their governments.

5. Corruption, political interest, inhuman life of police, lack of human rights training for police personnel and overall insufficient rule of law is one of the main reasons behind the violation of fundamental rights and proper implementation of fundamental rights in Bangladesh.

6.2 Suggestions

- Obligations should be imposed by the government over the enforced disappearance and extra judicial killing. Government and all political parties should need to reach in a settlement about this burning issue.

- Police department and concerned ministry should consider zero tolerance regarding the torture issue in police custody. Liable or accused police member should get exemplary punishment.

- As article 33(2) of Bangladesh constitution stated clearly that every person who is arrested and detained in custody shall be produced before magistrate court within 24 hours. But the detained person has been deprived of this opportunity and as such this provision should be repealed.

- Government should take appropriate steps to prevent corruption and provide adequate knowledge regarding protection of fundamental rights to the police force. However proper execution of rule of law can only mitigate the impediments on fundamental rights.

6.3 Conclusion

In the third world countries like Bangladesh, the fundamental rights are frequently violated and these Critical are neglected. People of Bangladesh are not conscious enough about the fundamental rights. Moreover, because of the complex and lengthy process of the judiciary general people are scared of demanding justice from the court. Necessary reforms in the judiciary system are now mandatory to ensure the effective implementation of the laws regarding the fundamental rights.

While it is very encouraging that the apex court of the country has produced some pro-active and positive judgments and has initiated some public interest proceedings during the span of a year; it is very frustrating to observe unnecessary pending for disposal of a large number of cases for many years. This large backlog of cases in the Supreme Court poses a threat that the public interest involved in these cases may ultimately be ignored even if a positive judgment comes at end. Very recently, it was disclosed in Parliament that a total of more than 10 million[31] cases were awaiting disposal in both divisions of the Supreme Court. The Chief Justice himself admitted in a meeting that the judiciary is losing the credibility and failing to achieve the confidence of the mass people.

[31] The Daily Star (9 December, 2015)

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