

Research Monograph

on

Fundamental Rights in Bangladesh Constitution and Their Enforcement Mechanism

A Research Monograph submitted for the partial fulfillment of LLB (Hons)

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LETTER OF TRANSMITTAL

To,

Deedarul Islam Bhuiyan

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Subject: Prayer for the submission of Research Monograph on "Fundamental Rights in Bangladesh Constitution and Their Enforcement Mechanism."

Dear Sir,

It is a matter of pleasure for me to submit the research monograph on "Fundamental Rights in Bangladesh Constitution and Their Enforcement Mechanism."

During the period of conducting the research work, I have tried my level best to maintain necessary requirements. I earnestly hope that it will fulfill your expectation, and accordingly you would be kind enough to go through this research monograph for evaluation.

I am always available for any clarification of any part of this Research Monograph at your convenience.

Sincerely Yours

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DECLARATION

I am Mahejabin Binte Alam Barsha with ID No. LLB1803015034, declare that this research monograph on the topic “Fundamental Rights in Bangladesh Constitution and Their Enforcement Mechanism” has been composed solely by myself and I have been maintained relevant copyright standard while composing this research monograph. And, I also affirm that it has not been submitted, in whole or in part, in any previous application for a degree in Law or otherwise.

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This is hereby certified that the Research Monograph entitled "Fundamental Rights in Bangladesh Constitution and Their Enforcement Mechanism" submitted by Mahejabin Binte Alam Barsha with ID No. LLB1803015034, in fulfillment of the requirements for the Graduate Degree in Law from Sonargaon University, was under my active supervision and guidance. It is also asserted that no part of this Research Monograph has been submitted or published anywhere offline or online.

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ABSTRACT

Fundamental rights are enshrined in the constitution of Bangladesh but is Bangladesh has been independent in 1971, but still the condition of the enforcement of fundamental rights is not so satisfactory. Fundamental rights are inserted in the constitution of Bangladesh by the framers of constitution and these rights can ensure a better way of life for the Bangladeshi people. There are lots of incidences seen in different newspapers that bear testimony to the violation of fundamental rights. Enforcement mechanism is available to the citizens of Bangladesh but fundamental rights cannot be enforced till now properly. Actually there is ignorance among the people of Bangladesh and for that reason fundamental rights cannot be enforced for every citizens in Bangladesh. The court structure and the condition of access to justice is not friendly to ordinary citizens. For the reason, enforcement of fundamental rights in Bangladesh is not so easy task, till now. But if the situation cannot be improved immediately then other rights of citizens will be inaccessible to them.

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CHAPTER I

ELEMENTARY DISCUSISON

1.1 Introduction

"Now the Law of Nature is so unalterable, that it cannot be changed even by God himself. For although the power of God is infinite, yet there are some things, to which it does not extend. Thus two and two must make four, nor is it possible otherwise; nor, again, can what is really evil not be evil."[1] In Bangladeshi constitution, fundamental rights are well written, and there's no barrier on enforcement of fundamental rights. And, all the mechanism for enforcing fundamental rights are there in the constitution, and our higher judiciary can enforce it. "The supreme judiciary is invested with the authority to issue directions or orders to any person or authority as may be appropriate for the enforcement of any of the fundamental rights under Article 102(1) of the constitution. The supreme judiciary, under the constitution, wields not only the authority to enforce fundamental rights but also the power of judicial review to declare so much of a law unconstitutional as is inconsistent with the fundamental rights or other judicially enforceable provisions of the constitution. The constitution endorses the power of the supreme judiciary to declare laws and makes them binding on the subordinate courts under Article 111. In addition, the supreme judiciary has been accorded the power to do complete justice in any cause or matter pending before it in the most befitting manner. In addition, the supreme judiciary has been accorded the power to do complete justice in any cause or matter pending before it in the most befitting manner, as per Article 104. However, the authority of the supreme judiciary to grant remedy in legal causes does not go uncontrolled. For instance, the constitution does not accord to the supreme judiciary the authority to go beyond the letters of the constitution so as to construe a cause as violation of substantive provisions of fundamental rights which however have not been expressly spelled out in the constitution as fundamental rights.[2] So, it is true that fundamental rights are in constitution, and constitution has provided the power to Supreme Court to enforce these rights, but the problem exists in the enforcement mechanism.

[1] Grotius Hugo, The Law of War and Peace, Jazzybee Verlag publiction, 2016, p.22

[2] Kawser Ahmed, Patterns of judicial activism in Bangladesh: Constitutional cases, The Daily Star, September 24, 2011.

1.2 Objective of the study

i. To find out the problems regarding the enforcement of fundamental rights in Bangladesh.

ii. To highlight some leading cases regarding fundamental rights in Bangladesh.

iii. To check the constitutional mandate as well as the judicial power to enforce fundamental rights in Bangladesh.

iv. To make recommendations to improve the current status of fundamental rights violation in Bangladesh.

v. To point out suggestions to reform the legal provisions related to fundamental rights.

1.3 Research Questions

i. What is the status of fundamental rights in the constitution of Bangladesh.
ii. When fundamental rights can be suspended by parliament, judiciary or any other agencies, or weather it can be suspended or not.
iii. Weather fundamental rights are properly enforced in Bangladesh or not.
iv. What is the barrier to establish fundamental rights properly in Bangladesh.
v. How fundamental rights of all the Bangladeshi citizens and non citizens resident in Bangladesh can be enforced properly.

1.4 Methodology

This paper is qualitative in nature and data has been collected from various secondary sources such as different books article, journal report, case laws and the like. A number of books have been studied and consulted to find the necessary information. Various national and international articles on fundamental rights by different authors have been critically observed. This has given a scope to find out the problematic issue in different views. Relevant literature has also been collected through internet browsing.

CHAPTER 2

MEANING AND HISTORY

2.1 Definition and common features of fundamental rights

Fundamental rights means some constitutionally mentioned rights that have been recognized for all the citizens of a country, and it requires a high degree of protection from government and any other encroachment. All the fundamental rights are specifically identified in and protected by the Constitution, which cannot be curtailed in any ways.

"The tem fundamental rights is very technical one, for when certain human rights are written down in a constitution and protected by constitutional guarantees they called fundamental rights. They are called fundamental rights in the sense that they are placed in supreme or fundamental law of the land which has a supreme or fundamental law of the state."[3]

Usually fundamental rights ensure a better way of life as that these right are set in the constitution keeping this in mind. "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."[4] But, all these things dependent on the enforcement of the fundamental rights, if these cannot be enforced then it keeping these in the constitution will be just valueless.

[3] Md. Abdul Halim, Constitution, Constitutional law and Politics: Bangladesh perspective, Dhaka, CCB Foundation, 2016, p- 96.

[4] Fundamental Rights, Banglapedia (https://en.banglapedia.org/index.php/Fundamental_Rights)

2.2 History in the Indian subcontinent

"The first demand for fundamental rights came in the form of the Constitution of India Bill, in 1895. Also popularly known as the Swaraj Bill 1895, it was written during the emergence of Indian nationalism and increasingly vocal demands by Indians for self-government. It talked about freedom of speech, right to privacy, right to franchise, etc. In the following period attempts were made from quarters asking the British government to grants rights for Indians .These demand were made in resolution by the INc between 1917 and 1919 in several reports ands bills. The fundamental rights were included in the First Draft Constitution (February 1948), the Second Draft Constitution (17 October 1948) and final Third Draft Constitution (26 November 1949), prepared by the Drafting Committee.[5]"

When India was independent on 15 August 1947, then the Constituent Assembly of India took the task of developing a constitution. And that Constituent Assembly of India was composed of elected representatives under the presidency of Rajendra Prasad. "While members of Congress constituted a large majority, Congress leaders appointed persons from diverse political backgrounds to positions of responsibility for developing the constitution and national laws.[6]" And, fundamental rights were inserted there in that time.

[5] Fundamental rights in India, Wikipedia (https://en.wikipedia.org/wiki/Fundamental_rights_in_India)
[6] Sardar Patel was the real architect of the Constitution, rediff.com, 5 May 2006 (www.rediff.com/freedom/22patel.htm)

CHAPTER 3

COMPARISON WITH OTHER RIGHTS

3.1 From where fundamental rights are derived

Actually fundamental rights are enumerated in the Bangladesh constitution or the constitution of other countries, and these are not made by the constitution framers. These rights are mainly included in different international rights documents like the universal declaration of Human rights of 1948, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), or something like that. But ordinarily no country adopts all the rights mentioned in an international rights document, rather they try to include in their constitution which resembles their way of thinking or so their social, economic, and religious perspective of their country. And there is no gain saying that the framers of the constitution add a few rights to the already existing rights in different international documents. "But it is, at the present time, impossible to frame a constitution which is absolutely new or original.[7]"

There are some fundamental rights in part 3 of our constitution which was actually in the universal declaration of Human rights of 1948. Suppose, Article 13 of Universal Declaration of Human Rights states "Everyone has the rights to freedom of movement, residence within the borders of each state, peaceful assembly and association. No one may be compelled to belong to an association." And the rights to freedom of movement is mentioned in article 36 of our constitution- "every citizen shall have the right to move freely throughout Bangladesh."

Prohibition of discriminate against any citizen on grounds only of religion, race, caste, sex is mentioned in the Article 28 of the Bangladesh Constitution- "the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex or place of birth." And, the same right is mentioned in the Article 7 of UDHR.

[7] Dr. S. M. Hassan Talukder, History of Constitutional Development: Bangladesh perspective, Bangladesh Law Research Centre, Second Edition, 2014, p. 1

3.2 Fundamental rights and human rights

At the first sight or in first reading, sometimes it seems that fundamental rights and human rights are the same because mainly fundamental rights are derived from different human rights documents and that's why there are similarities. But from the perspective of legal value or from the perspective of enforcement mechanism there are some important differences between these two. Suppose, rights like right to life or right to equal protection of law is mentioned in a most of the written constitutions and the constitutions consider these as fundamental rights. But, if the same right is mentioned in a human rights document only that doesn't mean the status of such right is the same in the eye of a state.

Usually States don't pay any heed to Human Rights because these are not enforceable by the state itself. On the other hand, the most important feature of fundamental rights is that the state will enforce these rights compulsorily.

It is the responsibility of every state to enforce fundamental rights by the state machineries. In the case of Bangladesh fundamental rights are enforced by our High Court division.

CHAPTER 4

FUNDAMENTAL RIGHTS: DIFFERENT COUNTRIES INCLUDING BANGLADESH

4.1 Fundamental rights in different countries

Fundamental rights are not new in the world perspective and many countries have inserted these rights in their constitution from many years ago. "A short history of Fundamental Rights – Just as a written Constitution has evolved out of the concept of natural law as a higher law, so Fundamental Rights may be said to have sprung out of the doctrine of natural rights. The doctrine of natural rights thus passed into the realm of practical reality. The philosophy underlying this doctrine of inalienable rights, superior to the civil rights, may best be explained in the words of a contemporary political thinker, - Thomas Paine, who said, all men are born equal and with equal Natural Rights."[8] In many countries when an absolute monarch himself was made to recognise that there were certain rights of the subject which could not be violated in any ways even by a Sovereign in whom all power was vested legally.

Britain has no written constitution, and there is no declaration of citizen's Fundamental Rights in Britain formally, but the people in UK enjoy comparatively more rights. The protection of individual liberty in Britain, therefore, rests not on constitutional guarantees or any constitutional provision, but on public opinion, good sense of people, strong common law traditions favouring individual liberty and the deep rooted democratic traditions. But the level of enforcement of other rights in Britain is satisfactory, and that's why there's almost no need for fundamental rights.

But, in the case of poor or middle income countries like Bangladesh, or Pakistan having fundamental rights in the constitution is really important. "In case of Indian subcontinent, The Part III of the Constitution of India, wherein has been incorporated a long list of Fundamental Rights is described according to the idea of Magna Carta."[9] Constitution of India inserted fundamental rights long ago, but the enforcement level is not so satisfactory there, till now. "The inclusion of a chapter on Fundamental Rights in the Constitution of India is in accordance with the trend of modern democratic thought. The aim of having a declaration of Fundamental Rights is to withdraw certain elementary rights from the vicissitudes of political controversy, to place them beyond the reach of shifting majority in legislature of the Country and to regard them as inviolable under all conditions. Certain elementary rights, such as, right to life, liberty,

[8] Thomas Paine , Rights of Man, 1958, p. 42.

[9] V. G., Ramchandran, Fundamental Rights and Constitutional Remedies, V o l. 1, 1964, p. 1.

freedom of speech, freedom of faith and so on, should not be submitted to vote, they being not depended on outcome of any election."[10] Fundamental rights are enshrined in the constitution of many countries, and from the constitution of those countries Bangladesh inserted fundamental rights in the BD constitution.

4.2 Fundamental rights enumerated in the Bangladesh Constitution

"Bangladesh was born as an independent state through a historic war which happened in exercise of people's right to self–discrimination. The state has emerged to establish and maintain an ordered society wherein life and liberty of the individuals would be secure and they would live with dignity and honor."[11] In the third part of the constitution of Bangladesh, there are 18 fundamental rights, an these rights were incorporated in 1972 at the time of enactment of the constitution, and till now these are in force.

"Many Observers have rightly pointed out that in many cases judiciary of Bangladesh has referred to international law, both customary and treaty, but failed to base their decisions on international law, although they had immense opportunity to do so.[12] Hussain mohammad Ershad v. Bangladesh cited above is one of them. In state vs. deputy commissioner, Satkhira[13], The High Court Division referred to Universal Declaration of Human Rights (UDHR) and Convention on the Rights of Children (CRC) not actually as source of Bangladeshi law but as to illuminate constitutional rights to free a minor boy from custody and save him from torture.

All the 18 fundamental rights have been mentioned in part 3 of the constitution- starting from Article 27 to 44, and these rights are mainly civil and political rights. Bangladeshi and foreigners resided in Bangladesh enjoy six rights among the 18 rights- enumerated in Articles 32, 33, 34, 35, 41 and 44 of the constitution. But the foreigners resided in Bangladesh cannot enjoy the other 12 rights which are mentioned in Articles 27, 28, 29, 30, 31, 36, 37, 38, 39, 40, 42 and 43, because these are only granted to of Bangladeshi citizens.

[10] A.K. Gopalan V. State of Madras , A.I.R., 1950, S.C. 27.
[11] Mahmudul Islam, Constitutional Law of Bangladesh, Third Edition, Mullick Brothers, Dhaka, 2012, p. 14
[12] Ridwanul Hoque and Mostafa Mahmud Naser ,Indian Journal of International law, vol.40, no. 2, 2006, p-162.
[13] 45 (1993) DLR (HCD) 643

CHAPTER 5

TWELVE FUNDAMENTAL RIGHTS- ONLY FOR THE CITIZENS OF BANGLADESH

5.1 Equality before law

Equality before law is one of the talked about issues around the world and it has been inserted in different constitutions from ancient times. And it is true from the perspective of the current world, no country has been able to enforce the right of equality for all of its citizens perfectly. Right to equality is mentioned in article 27 of the Bangladesh constitution which states that all citizens are equal before law and are entitled to equal protection of law. "In fact, Article 27 of the constitution does not speak about the right to equality before law alone, it includes right to equal protection of law too. It means every person is equal in the eye of law of the land and shall be treated equally in every function of the state and shall not be discriminated against on ground of religion, race, caste, sex, political belief, wealth, power, and other differences that might appear.[14]"

In a broad sense, this fundamental right signifies the general application of the principles of equality instead of following other methods on any particular aspect of rights. Not only in the Bangladesh Constitution, Right to equality is widely recognized by international and regional human rights instruments. Article 7 of UDHR recognizes this right- "all are equal before the law and are entitled without any discrimination to equal protection of the law." In the same way, article 26 of the International Covenant on Civil and Political Rights, 1966 (ICCPR) also recognized the right to equality in clear terms.

In the case of Govt. of Bangladesh vs. Hamento Kumar Barmon [15] the Supreme Court discussed about Right to equality and observed that in the absence of any guideline either in act or with rules compulsory retirement is a violation of article 27. So if any citizen feels aggrieved and thinks that he was subjected to discriminatory behaviour and as such his right has been infringed, he may file a writ petition before the High Court Division of the Supreme Court under article 102 of the constitution.

[14] Al Asad Md. Mahmudul Islam, Right to equality before law is a constitutional obligation, The Daily Star, December 30, 2006 (https://www.thedailystar.net/law/2006/12/05/index.htm)
[15] 65 DLR 152

5.2 Discrimination on grounds of religion, etc.

Article 28 mentions that, “the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex or place of birth.” It is such a provision which also mentioned in some other documents, suppose, Article 7 of UDHR enumerated almost similar provision as article 28 of our constitution. Similarly Article 15 of the Indian Constitution and Article 26, 27 of Pakistan Constitution deal with the nondiscrimination.

It can be said that ordinary people like the other people of his religion, caste, or something like that. And by an article in the constitution it is almost impossible to improve the situation but the importance of the article is that people will have a chance to seek remedy if his rights are violated on the grounds of his religion, caste, or others.

Women, difference castes, and other people in Bangladesh shall have equal rights with men in all spheres of the State and of public life. No citizen shall, on grounds only of religion, race, caste, sex or place of birth be subjected to any disability, liability, restriction or condition with regard to access to any place of public entertainment or resort, or in any other ways, according to article 28 of the constitution. But it is not in practice perfectly in Bangladesh now, due to so many reasons.

5.3 Right to equal opportunity in public employment

As per article 29, “there shall be equality of opportunity for all citizens in respect of employment or office in the service of the Republic. No citizen shall, on grounds only of religion, race, caste, sex or place of birth, be ineligible for, or discriminated against in respect of, any employment or office in the service of the Republic.”

Article 21 of UDHR states similar provision- everyone has the right of equal access to public service in his country. And this concept is reflected in the constitution and laws of many countries. “These equality clauses are at least theoretically sounds better. Though in reality hardly the minorities in Bangladesh are getting the benefit of this constitutional guarantee. May be the constitution placed the minorities in a position equal to all other citizens of the state, but that does not necessarily ensure them equal benefits of law and necessary protection and assistance in their development. Rather the highly discriminatory government policy makes the equality clauses into bogus lines. The members of the administrative service and the members

of other services of the Republic have been appointed on the basis of the same competitive examination and there has not been any different procedure in appointing them and the members of the other services cannot be treated differently from the members of the administrative service without violating the guarantee of article 29 of the constitution."[16]

5.4 Prohibition of foreign titles

"Title is something that hangs to one's name as an appendage. During the British rule, there was a complaint that power to conferred titles was being abused by government for imperialistic purpose and for corrupting public life."[17]

Article 30 states that "no citizen shall, without the prior approval of the President, accept any title, honour, award or decoration from any foreign state." Actually, it doesn't ensure any rights for citizens, rather provides a power to government.

5.5 Right to protection of law

According to article 31, "To enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law."

Right to protection of law is discussed in many cases by our apex court. According to the Supreme Court of Bangladesh "Protection of life means that one's life cannot be endangered by any action which is illegal, but it does not mean protection of an illegal action of any person."[18]

"Art.31 of the constitution guarantees protection of life and liberty to every citizen. The term cannot be confined only to taking away of life, but mean something more than mere animal existence. The inhibition against its deprivation extends all those limbs and faculties by which life is enjoyed."[19] But, now due to long standing practice, right to protection of law is a dream to Bangladeshi citizens.

[16] Abdul Mannan vs. Bangladesh 55 DLR 537
[17] Dr. S.M. Hassan Talukder, Fundamental Rights in the Bangladesh Constitution: An Appraisal, Bangladesh Law Research Centre, First Edition, 2014, p. 55.
[18] Giasuddin vs. Dhaka Municipal Corporation & others 49 DLR 199.
[19] Saiakh Abdur Rahman & others vs. state 15 BLT 326

5.6 Right to movement

As per article 36, “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.” Article 13 of Universal Declaration of Human Rights states about similar provision in almost similar language- “Everyone has the rights to freedom of movement, residence within the borders of each state, peaceful assembly and association. No one may be compelled to belong to an association.”

But now, this right is considered non-enforced one by various rights organizations- “as human being, we all have the freedom to move freely and no one has the right to take it away from us. Reality is that we are in a situation, we cannot achieve our logical rights easily, but we know, if we do not start a movement step by step or protest against the patriarchal system, we will never achieve our rights, as well as freedom.[20]”

5.7 Right to assembly

Right to assembly is mentioned in the article 37 of the Bangladesh Constitution- “every citizen shall have the right 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 public order or public health.”

In this regard, the Supreme Court of Bangladesh observed that “if hartals lead to violence, death, and damage to the life and property of the citizens such actions would be punishable by the law of the land. However, hartals per se, enforced through persuasion, unaccompanied by threats, intimidation, force or violence, are a democratically recognized right of the citizens to freedom of assembly guaranteed under article 37 of the constitution.”[21] Thanks to the activities of some political parties, now this rights are criticized by different quarters.

[20] Nasir Uz Zaman, FREEDOM OF MOVEMENT: take back the night, The New Age, Nov 04,2018 (newagebd.net/article/54957/freedom-of-movement-take-back-the-night)
[21] Abdul Mannan Bhuiyan & another vs. state 60 DLR (AD) 49.

5.8 Rights to freedom of association

Right to freedom of association is mentioned in almost all the constitutions of modern states. In Article 38 of the constitution it is enumerated that "every citizen shall have the right to form associations or unions, subject to any reasonable restrictions imposed by law in the interests of morality or public order." In 2018 the daily New Age published a report entitled 'Right to freedom of association violated again,' and it seems from the report that such violation is so common in Bangladesh."The rights to freedom of assembly and freedom expression are foundation of any democracy. It cannot be continued to use excess force on peaceful protest and continue to claim that it is working for a democratic Bangladesh. In order to prove its mettle, the government has to create an enabling environment in which any citizen or civic organisation can exercise their democratic right to organise and participate in a peaceful protest. In doing so, it must judicious investigate all cases in which police have allegedly used brute and excess force, eventually injured and harmed citizens."[22]

5.9 Freedom of thought and conscience and of speech

According to article 39, Freedom of thought and conscience and of speech has been ensured in the language "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." But incidents of violation of this right are not a new or uncommon scene in Bangladesh, and it happens all the time, not only now. "Constitutionally protected freedom of expression is one of the fundamental rights in Bangladesh. Article 39 of the Constitution of the People's Republic of Bangladesh ensures this right 'subject to reasonable restriction imposed by law'. Freedom of expression reinforces most other rights and allows them to embellish. The right to speak your mind freely on important issues, access information and hold the powers that be to account, together play a vital role in the healthy development process of any society. If people are unable to communicate effectively their ideas, views, worries and needs, they are often excluded from the meaningful participation in the society, and from the opportunity to better their own circumstances."[23]

[22] Right to freedom of association violated again, The New Age, Dhaka, Jun 12, 2018 (https://www.newagebd.net/article/43483/right-to-freedom-of-association-violated-again)
[23] Ahmed, Fayazuddin, Restrictions on freedom of expression, The Daily Star, Dhaka, October 06, 2015 (https://www.thedailystar.net/law-our-rights/restrictions-freedom-expression-152341)

5.10 Freedom of profession or occupation

Freedom of profession or occupation is guaranteed by the Article 40 of the constitution- "subject to any restrictions imposed by law, every citizen possessing such qualifications, if any, as may be prescribed by law in relation to his profession, occupation, trade or business shall have the right to enter upon any lawful profession or occupation, and to conduct any lawful trade or business."

Freedom of profession or occupation has been in many cases and writ petitions, in our apex court. "The Rural Electrification board took a decision barring all ex-employees of the said board from participating in any tender to be floated by it. The secretary of the Board communicated the said decision. The order of the board is violative of article 40 of the constitution."[24]

5.11 Right to property (Subject to restrictions)

As per article 42(1) and 42(2), "Subject to any restrictions imposed by law, every citizen shall have the right to acquire, hold, transfer or otherwise dispose of property, and no property shall be compulsorily acquired, nationalised or requisitioned save by authority of law. A law made under clause (1) of this article shall provide for the acquisition, nationalisation or requisition with compensation and shall fix the amount of compensation or specify the principles on which, and the manner in which, the compensation is to be assessed and paid ; but no such law shall be called in question in any court on the ground that any provision of the law in respect of such compensation is not adequate"

But, in many cases this equal right provision is not maintained properly, and in different events it draws our attention. "The present government declared the draft 'Jatiyo Naree Unnoyon Neeti 2011' (National Women Development Policy 2011) on March 8, 2011. The alleged aim is 'to improve the socio-economic condition of women in Bangladesh'. The cabinet has approved this new draft policy. From the very day of the declaration, religion-based political parties not only boycotted the policy but also declared resistance against it, claiming that it gave men and women equal inheritance rights."[25] There are many cases in Supreme Court of Bangladesh which mentioned different flaws regarding this right. "The Supreme Court of Bangladesh declared that if a man's property does not ex-facie answer the description of abandoned property, inclusion of the property in the list of abandoned properties violates the right to

[24] Abdul Jalil vs. Rural Electrification Board 45 DLR 24.

[25] Kaberi Gayen, Equal Property Right, The daily Star, Mar 8, 2019 (thedailystar.net/star-weekend/news/equal-property-right-1711810)

property."[26] In spite of all these things policy makers actually don't pay any heed to the equal property rights for Bangladeshi citizens.

5.12 Protection of home and correspondence

Article 43 of the Bangladesh constitution states that, "every citizen shall have the right, subject to any reasonable restrictions imposed by law in the interests of the security of the State, public order, public morality or public health – to be secured in his home against entry, search and seizure; and to the privacy of his correspondence and other means of communication."

"Article 43 of the Bangladesh Constitution guarantees the privacy of home and correspondence and communications. It provides that every citizen shall have the right to be secure in his home against entry, search and seizure and to the privacy of his correspondence and other means of communications. In Malone vs. Metropolitan Police Commissioner, Megurry vc turned down a complaint against telephone tapping on the ground of absence of any common law right of privacy, but in Bangladesh such telephone tapping will be unconstitutional for violation of the privacy unless a law permits it in any of the grounds of restriction mentioned in article 43."[27]

On Jan 28,2021, the Daily New Age published a report with the title 'Data protection law to secure personal information demanded,' and in the report it was mentioned that "Coercion has taken a new digitalised form in a world dominated by technology. Surveillance has become more prevalent than before and personal information and data have become more exposed to the government as well as to other agencies.[28]" This is not an isolated incident in Bangladesh, there are so many incidents of surveillance, which is clear violation of article 43.

[26] Nurun Nahar vs. Bangladesh 49 DLR 432
[27] Mahmudul Islam, Constitutional law of Bangladesh, 2nd Edition, Mullick Brothers, Dhaka, 2003, p. 279.
[28] Data protection law to secure personal information demanded, the Daily New Age, Jan 28,2021 (https://www.newagebd.net/article/128578/data-protection-law-to-secure-personal-information-demanded)

CHAPTER 6

SIX FUNDAMENTAL RIGHTS GUARANTEED FOR BOTH-BANGLADESHI AND FOREIGNERS

6.1 Protection of right to life and personal liberty

For the survival of Bangladeshi and foreigners residing in Bangladesh this fundamental right is the most important one. Because it recognises that everyone has the right to save his life and he has personal liberty, without which people cannot lead a normal life. Protection of right to life and personal liberty is guaranteed in many constitutions including the constitution of Bangladesh. Article 32 of the Bangladesh Constitution clearly mentions that "no person shall be deprived of life or personal liberty, save in accordance with law." But due to so many incidents of extra-judicial killings, it cannot be said that Protection of right to life and personal liberty is properly enforced in Bangladesh.

High Court Division upheld many things for the protection of Protection of right to life and personal liberty, "Article 32 of our constitution protect right to life as fundamental right .It encompasses within its ambit, the protection and preservation of environment, ecological balance free from pollution of air and water, sanitation without which life can hardly be enjoyed. Any act or omission contrary thereto will be violative of the said right to life."[29]

6.2 Safeguard as to arrest & detention

Under article 33 Safeguard as to arrest & detention has been ensured- "No person who is arrested shall be detained in custody without being informed, as soon as may be, 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, excluding the time necessary for the journey from the place of arrest to the Court of the magistrate, and no such person shall be detained in custody beyond the said period without the authority of a magistrate."

[29] Mohiuddin Farooque v Bangladesh 48 DLR 438

But besides safeguarding as to arrest & detention Article 33(4) provides an destructive provision that is preventive detention- "No law providing for preventive detention shall authorise the detention of a person for a period exceeding six months unless an Advisory Board consisting of three persons, of whom two shall be persons who are, or have been, or are qualified to be appointed as, Judges of the Supreme Court and the other shall be a person who is a senior officer in the service of the Republic, has, after affording him an opportunity of being heard in person, reported before the expiration of the period of six months that there is, in its opinion, sufficient cause for such detention."

Such provision of preventive detention has been inserted immediately after the liberation of Bangladesh. "After the liberation of Bangladesh, the Bangladesh Scheduled Offences (Special Tribunal) Order, 1972, popularly known as P.O. 50 of 1972 was promulgated with a view to control the market of essential commodities and some marked criminal offences. The provisions of preventive detention were severe and as such popular discontent began to increase every day. Then parliament repealed the P.O. 50 of 1972 along with the Security of Pakistan Act, 1952 and Bangladesh Public Safety Ordinance, 1958. Then the Parliament on February 9, 1974 enacted the "Special Powers Act, 1974" containing the provisions of preventive detention. The Act says that any person can be arrested and detained by the executive authority if there is apprehension in the mind of the authorities that he may commit prejudicial act which means-

(i) To prejudice the sovereignty or defence of Bangladesh;

(ii) To prejudice the maintenance of friendly relations of Bangladesh with foreign States;

(iii) To prejudice the security of Bangladesh or to endanger public safety or the maintenance of public order;

(iv) To create or excite feelings of enmity or hatred between different communities, classes or sections of people;

(v) To interfere with or encourage or incite interference with the administration of law or the maintenance of law and order;

(vi) To prejudice the maintenance of supplies and services essential to the community;

(vii) To cause fear or alarm to the public or to any section of the people;

(viii) To prejudice the economic or financial interests of the State."[30]

[30] Md. Jahid Hossain Bhuiyan, Preventive detention law in Bangladesh: A review, The Daily Star, January 5 , 2008.

"The provisions of preventive detention statute prevailing in Bangladesh, i.e. The special Powers Act 1974 may be applied, if cannot be omitted altogether, where it is truly needed it and in that case party in power have to show their honesty while applying provisions of this Act. As regards enemy aliens the Act may be treated as a strong weapon. Article 33 is to be revised in such a way that reduced initial period of detention to maximum of 15 days and the maximum period should also be fixed to a reasonable one."[31]

In Bangladesh without trial six months detention can confer to anyone if any government agency thinks it fit and proper. This is a bad process because now here in the world such a long period is not found anywhere. In India, this time is three months, according to Article 22(4) of the Indian Constitution. And in Pakistan, the initial period of detention is three months, as per Article 10(7) of the Pakistani Constitution, but in the Bangladesh it is still six months. This type of provision should not be in the constitution of Bangladesh at least for now because if such a provision is forced in the constitution then there will be a huge chance of abuse of power by different government machineries. Immediately after the independence of Bangladesh there was irregularity all over Bangladesh and that's why such a provision of preventive detention was necessary but the situation of Bangladesh is not like that now, but in the provision of preventive detention in the constitution of Bangladesh is intact, still today.

6.3 Prohibition on forced labour

As per article 34(1), "All forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law."

And, according to 34(2) "Nothing in this article shall apply to compulsory labour– (a) by persons undergoing lawful punishment for a criminal offence; or (b) required by any law for public purposes." But these provisions in constitution cannot prevent the forced labour in different garments factories or other industries where children are appointed for works in almost a compulsory manner.

[31] Talukder, S. M. Hassan, Fundamental Rights in the Bangladesh Constitution: An Appraisal, Bangladesh Law Research Centre, First Edition, 2014, p. 127.

6.4 Protection in respect of trial and punishment

Protection in respect of trial and punishment is in article 35- “No person shall be convicted of any offence except for violation 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. No person shall be prosecuted and punished for the same offence more than once. Every person accused of a criminal offence shall have the right to a speedy and public trial by an independent and impartial Court or tribunal established by law. No person accused of any offence shall be compelled to be a witness against himself. No person shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment.”

The renowned rights organization BLAST filed different writ petitions regarding this right, but situation is still not satisfactory. “In BLAST vs. Bangladesh it has been held that remand for the purpose of interrogation is not necessary except for extorting information from an accused by physical torture or other means, but such extortion of information is contrary to the mandate of article 35 interrogation of the accused , if necessary , may be done in the jail custody ; as is the present practice prayer for police remand and grant of it is unconstitutional being violative of the fundamental rights ensured by the constitution.”[32]

“The quintessence of fair trial or fair administration of justice is the ‘presumption of innocence until proven guilty’. The history and origin of a fair trial are inherited from the Magna Carta in the United States law as the narrative of a hard-won right that fills in the solitary guarantee against the exemption of state-violence. In Bangladesh, the right to a fair trial has been recognised in Article 35 (3) of the Constitution where every person accused of a criminal offence shall be entitled to a prompt, public trial by an independent and non-partisan court or tribunal established by law. Fair trial is a cardinal characteristic of a democratic polity, determined by the rule of law.”[33]

[32] BLAST vs. Bangladesh 55 DLR 363.

[33] Fariha Anjum, The conundrum of free media vs fair trial, The New Age, Jan 17,2021 (https://www.newagebd.net/article/127372/the-conundrum-of-free-media-vs-fair-trial)

6.5 Freedom of religion

Freedom of religion is found in article 41 of the constitution of Bangladesh- "Subject to law, public order and morality – every citizen has the right to profess, practice or propagate any religion; every religious community or denomination has the right to establish, maintain and manage its religious institutions. No person attending any educational institution shall be required to receive religious instruction, or to take part in or to attend any religious ceremony or worship, if that instruction, ceremony or worship relates to a religion other than his own."

However, Bangladesh as a state publicly support freedom of religion, in recent areas, attacks on religious and ethnic minorities shows a different thing. And there is actually no organization to prevent such attacks and ensure proper safety for the followers of every religion.

6.6 Enforcement of fundamental rights

Article 44 guarantee the enforcement of fundamental rights and states that "the right to move the High Court Division in accordance with clause (1) of article 102, for the enforcement of the rights conferred by this Part is guaranteed. Without prejudice to the powers of the High Court Division under article 102, Parliament may by law empower any other court, within the local limits of its jurisdiction, to exercise all or any of those powers."

"The mandate is clear and express if Article 44 and 102 are read together. It is well settled that in interpreting the Constitution that the entire constitution is to be looked into and if any amendment to the constitution does not fit with the constitution itself then the amendment is to be declared ultra vires because constitution is a logical whole."[34]

[34] S. M. Hassan Talukder, Fundamental Rights in the Bangladesh Constitution: An Appraisal, Bangladesh Law Research Centre, First Edition, 2014, p. 85.

CHAPTER 7

WHERE FUNDAMENTAL RIGHTS ARE NOT APPLICABLE

7.1 Saving of laws under article 47

“Rights concerning liberty, freedom of movement, freedom of thought, conscience and speech and freedom of assembly are curtailed during the period of an emergency, for if these rights are allowed to be enjoyed in an unrestrained manner. They might interfere with a government's effort to contain the threat posed to the life of the nation and thereby restore peace. However, experience demonstrates that emergency situations are commonly characterized not only by the suspension of the abovementioned fundamental rights, but also the dispensation of the core fundamental rights, such as the right to life and prohibition on torture. The functioning of the national courts in securing the unhindered enjoyment of the core human rights during emergencies has often been unsatisfactory."[35]

According to article 47 provides that “No law providing for any of the following matters shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges, any of the rights guaranteed by Part III – the compulsory acquisition, nationalisation or requisition of any property, or the control or management thereof whether temporarily or permanently; the compulsory amalgamation of bodies carrying on commercial or other undertakings; the extinction, modification, restriction or regulation of rights of directors, managers, agents and officers of any such bodies, or of the voting rights of persons owning shares or stock therein; the extinction, modification, restriction or regulation of rights to search for or win minerals or mineral oil; the carrying on by the Government or by a corporation owned, controlled or managed by the Government, of any trade, business, industry or service to the exclusion, complete or partial, of other persons ; or the extinction, modification, restriction or regulation of any right to property, any right in respect of profession, occupation, trade or business or the rights of employers or employees in any statutory public authority or in any commercial or industrial undertaking.” If the state enact any law violating the fundamental rights regarding any of those matters, none can go to the High Court division.

[35] M. Ehteshamul Bari, The unjust exercise or emergency powers in Bangladesh and their impact on the Fundamental Rights: A critical appraisal, Macquarie University, Australia, 2014, p. 19.

7.2 Fundamental rights are suspended when emergency is declared

Article 141B of the constitution states that "while a Proclamation of Emergency is in operation, nothing in articles 36, 37, 38, 39, 40 and 42 shall restrict the power of the State to make any law or to take any executive action which the State would, but for the provisions contained in Part III of this Constitution, be competent to make or to take, but any law so made shall, to the extent of the incompetency, cease to have effect as soon as the Proclamation ceases to operate, except as respects things done or omitted to be done before the law so ceases to have effect." Son by declaring emergency, Bangladesh can suspend the fundamental rights any time, if the president thinks fit.

"Soon after the second amendment, the then president Mohammad ullah issued a proclamation of emergency in December 1974, and suspended many fundamental rights of citizens. The emergency was lifted five years later in November 1979. On January 11, 2007, the then president Iajuddin Ahmed declared a state of emergency amid a growing political turmoil over holding of general election. His proclamation came around 16 years after restoration of democracy in 1991."[36]

[36] Shakhawat Liton, State of emergency maximum 120 days, The Daily Star, Dhaka, July 02, 2011.

CHAPTER 8

ENFORCEMENT MECHANISM AND ITS DIFFERENT SIDES

8.1 Enforcement mechanism of fundamental rights

If someone's fundamental rights is violated in Bangladesh there is one way open to him- that is the filing of a writ petition before the high court division, as per article 102. If, by filling a writ petition he can satisfy the high court division that he is fundamental rights have been violated then high court division may give order which seems necessary to it. And there are five types of writs which a person can file before high court division and any citizen of this country may file any of these writs. And upon filing writ petitions the high court division may direct any agencies for the protection of fundamental rights of any citizen. But there are no other way of enforcement of fundamental rights in Bangladesh.

This right- for the enforcement of fundamental rights- is guaranteed in article 44 of the constitution and the High Court is empowered to enforce fundamental rights under article 102 of the constitution. It is true that Bangladesh constitution specifically mentioned the enforcement mechanism in easy words, but in many cases it is not implemented by the by the party in power, or people having much power and wealth.

8.2 Enforced mechanism- beneficial aspects

"Part 3 of the Bangladesh Constitution entitled Fundamental Rights contains a clear statement regarding the right of individuals and those rights are fundamental not only in the sense that they have been mentioned in and guaranteed by the constitution but are such neither the legislature nor the executive can in any manner curtail or diminish. Bangladesh as a welfare state under part 3 of the constitution featured the most striking balance between written guarantee of individual rights and collective interest of the community."[37]

Though the issue of Locus Standi was a barrier for a long time for filing writ petitions in different issues. "However, the Appellate Division granted the locus standi saying that the High Court Division was 'wrong' in not allowing the locus standi, and remitted the case back to the

[37] S. M. Hassan Talukder, Fundamental Rights in the Bangladesh Constitution: An Appraisal, Bangladesh Law Research Centre, First Edition, 2014, pp. 115-116.

High Court Division for hearing. Thus, Kazi Mukhlesur Rahman was finally endorsed in 'Locus Standi Case'."[38]

Like other constitutions Bangladesh constitution includes all the beneficial provisions for Bangladeshi citizens. "In fact constitution is meant for ultimate well-being of the individuals of the country concerned and, if of course, as a welfare state, Bangladesh Constitution should portray fine balance between individual rights and collective interest of the society as there can be no absolute rights. But on the wider grounds of public interest, public morals, public order and so on, enjoyment of fundamental rights in no way be put into peril."[39] Article 102 clearly provides the provision of how to enforce fundamental rights by filling writ petition before the high court division. There is no provision in the Constitution that creates a barrier on the enforcement of fundamental rights. And written constitutions provide similar provision and actually the constitution Bangladesh specially article 102 lift no stone unturned for the enforcement of fundamental rights. From this perspective, we can say the framers of Bangladesh constitution tried, in all the possible ways to make legal provision, to protect the fundamental rights of every citizen.

8.3 Why enforcement mechanism in article 102 is not enough?

"Under Article 102(1) of the Constitution, the High Court Division has been made the guardian for the enforcement of fundamental rights not only against the Executive but also against the Legislature. The judicial review with regard to the vires of a law passed by the Legislature flows from the court's constitutional duty to enforce a fundamental right."[40] But the guardian doesn't play the role that it should play, at least in some cases.

It is true that constitution of Bangladesh has the provision for the enforcement of fundamental rights like the other constitutions in different countries. But from the perspective of socio economic condition in Bangladesh, not all the citizens of this country can manage all the necessary things for filing a writ petition before high court division. There is no branch of high court division in different districts, so, if a citizen wants to file a writ petition before the high court division he has to come to Dhaka and manage all the necessary things which is almost impossible for a mentionable portion of Bangladeshi citizens, who lived in different rural areas.

[38] Naim Ahmed, Public Interest Litigation, Bangladesh Legal Aid and Services Trust, Dhaka, 1999, P. 45.
[39] S. M. Hassan Talukder, Fundamental Rights in the Bangladesh Constitution: An Appraisal, Bangladesh Law Research Centre, First Edition, 2014, pp. 127-128.
[40] Asaduzzaman v Bangladesh 42 DLR 144.

For the reason, Constitution provides all the necessary remedies for citizens but citizens do not get their rights properly.

Another thing is that high court division may issue suo moto rule for the prevention of fundamental rights violation. And there are so many incidents in Bangladesh in which high court division issue such rule, and these are positive for Bangladesh. But it is upon the high court division, that means high court division can issue such a rule or may be silent on a particular issue. For that reason, there are instances where high court division was silent on some sensitive cases which violates citizens fundamental rights. Suppose, in 2018 parliament enacted digital security act which was a gross violation of fundamental rights, but, our apex court was silent in the regard. There are so many instances like this, and this cannot go on for the betterment of this country and for the protection of citizen's fundamental rights.

There are incidents like crossfire in Bangladesh, but "Article 31 guarantees right to protection of law, which unequivocally speaks that every citizen and every person in Bangladesh has an inalienable right to enjoy the protection of law, to be treated in accordance with law, and not only in accordance with law and no action detrimental to life, liberty, body, reputation, or property of any person shall be taken except in accordance with law. But if we taken into account the so-called crossfire of the elite force Rapid Action Battalion as per media reports, electronic and print, and international organizations dealing with human rights, it will be revealed that with so many laudable roles played by this force on many occasions, its killing of citizens on the alibi of self defense extra judicially renders the provision of article 31 hopeless."[41]

[41] S. M. Hassan Talukder, Fundamental Rights in the Bangladesh Constitution: An Appraisal, Bangladesh Law Research Centre, First Edition, 2014, p. 120.

CHAPTER 9

RECOMMENDATION AND CONCLUSION

9.1 Recommendations for proper enforcement of fundamental rights

1. There should be a special bench of high court division composed of judges trained especially for the protection of citizen's fundamental rights.

2. The high court decision should not be only in the capital of Bangladesh, because in such a situation, poor rural peoples cannot come and file a petition before it easily.

3. There should be a agency under any government machinery or under our apex court who will oversee the fundamental rights violation taken place in different areas of Bangladesh.

4. Time limitation for hearing a writ petition regarding fundamental rights vibration should be determined and the time limitation should be in no case, more than 1 year.

9.2 Ending Portion

Bangladesh Constitution has all the effective provisions and by implementing which fundamental rights can be enforced. But the judicial institutions are not perfect for the proper enforcement of fundamental rights and that's why still fundamental rights violation is common scene in Bangladesh. If the incidents of violation of fundamental rights cannot be checked immediately then the future of Bangladesh will be jeopardized.

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