

Sonargaon University (SU)

Research Monograph

On

“ Fundamental Rights in Bangladesh Constitution and Their Enforcement Mechanism.”

Research Monograph Submitted for the partial fulfillment of the award of the degree in LLB (Hon's) in Department of Law Sonargaon University (SU)

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Letter of Transmittal

To

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Subject: Submission of Research Monograph on **“ Fundamental Rights in Bangladesh Constitution and Their Enforcement Mechanism. ”**

Dear Sir,

This is a great pleasure to submit the Research Monograph on “Fundamental Rights in Bangladesh Constitution and Their Enforcement Mechanism” as a partial requirement for the fulfillment of my LLB course under the Department of Law of the Sonargaon University (SU).

I have given due efforts to make this Research Monograph as fruitful one and to make it as informative as possible. I hope that this paper will not be the formality of academic course completion rather it will be a source of information for other purpose on this topic.

Yours sincerely

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Declaration

I do hereby declare that the Research Monograph Title **" Fundamental Rights in Bangladesh Constitution Their Enforcement Mechanism"** prepared solely by me and which has been submitted to the department of Law, Sonargaon University (SU) for achieving the LLB (Hon's) Degree. This is an original work of nine. No part of this research, in any way of or in from, has been submitted to any University or Institution for any Degree, Diploma or for other similar purposes.

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Supervisor certificate

This is to certify that the thesis titled " Fundamental Rights in Bangladesh Constitution Their Enforcement Mechanism" prepared and submitted by **Md. Masud Dewan(ID: LLB1803015006)** in fulfillment of the requirements for the award of the Graduate Degree in Law from Sonargaon University, under my active supervision and guidance and that no part of this paper has been submitted anywhere earlier, to the best of my knowledge.

Sanjoy Pal

Lecturer & Coordinator of Law Department

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Acknowledgement

In the name of Allah, the Beneficent, the Merciful".

Praise by Allah & thanks to Allah for patronizing me to finish this Research Monograph. I am very happy to finish it. It is a great Research of my life. It is a long cherished hope of my life to become a great lawyer. That's why I have admitted in the Department of Law in Sonargaon University (SU) to fulfill my dream. But through my whole study life in this field, I did not get much more opportunities to examine and show my knowledge and skill in this wide field. Lastly I have got a great chance to make my study meaningful when I got the chance to prepare a Research Monograph on **" Fundamental Rights in Bangladesh Constitution Their Enforcement Mechanism"** I acknowledge my grateful to respected course teacher **Sanjoy Pal** for instructing me how to prepare a Research Monograph and his famous Books lectures on this subject complete my task sincerely.

I am also thankful to my classmate as they help me to complete the Research Monograph. I am extremely paying my solitude to all the authors and writers whose works help me to draft this original Research Monograph.We are indeed thanks to everyone who inspired us to write this Research Monograph

Thank you

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Abstract

Bangladesh is one of the few countries in the world which allows preventive detention even during non-emergency periods. Since Independence preventive detention has been the most used tool in case of violation of Human Rights. Irrespective of any forms of government which has been in power in Bangladesh, has used this as a mean of political exploitation. Each of them have failed miserably to stop the endemic problem regarding preventive detention. However, this is against the spirit of our constitution, democracy and the rule of law. In my research I want to highlight the definition and scope of preventive detention, its historical development, its nature and our constitutional safeguards for it. I will also highlight why preventive detention is a necessary evil for our country.

I will cite the leading cases relating to preventive detention in Bangladesh and while emphasizing on the recommendations given by the Supreme Court. And lastly I will also give my recommendation on how we can put chains on this blackest of the black laws.

Key Words: *Enforcement, Writ, Fundamental Right, Constitutions, Human Rights, Citizens, State.*

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Abbreviations

BNWLA- Bangladesh National Women Lawyers Association

BLAST- Bangladesh Legal Aid Services Trust

Cr. P. C.- Code of Criminal Procedure

ICCPR- International Covenant on Civil and Political Rights

HCD- High Court Division

DLR- Dhaka Law Reports

ICT- Information Communication and Technology

NHRC- National Human Rights Commission

PIL- Public Interest Litigation

UNDP- United Nations Development Programme

UPR- Universal Periodic Review

RAB - Rapid Action Battalion

Chapter 1

Introduction

Fundamental Rights in Bangladesh Constitution Their Enforcement Mechanism

1.Introduction

The doctrine of fundamental rights is feature of United States law under which certain human rights that enshrined in the US constitution are given a high degree of judicial deference in conflicts between individual liberty and governmental intrusion. Although many fundamental rights are also more widely considered to be human rights. The classification of a right as fundamental invokes specific legal tests used by courts to determine the carefully contained conditions under which the United States Government and the various state governments may impose limitations on this right.

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 force with conflicting class or individual interests. Such conflicts make is 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.

This dissertation is mainly focusing on the features of fundamental rights in the constitution of Bangladesh inspired by the Universal Declaration of Human Rights, 1948[1]; the constitution of Bangladesh enumerated some basic civil and political rights common to most liberal democracies and also insures the rights to constitutional remedies for the protection of these

rights. In addition, the fundamental rights of the constitution of Bangladesh are aimed at overturning the inequalities of past social practice. I prohibit discrimination on the grounds of religion, race, sex, color place of birth, forbid trafficking human being, and forced labor.

Thomas Jefferson said, "We hold these truths to be self-evident. That all men are created equal.
That their creator with certain inalienable secure these rights, government are instituted among men, deriving their just, endows them powers form the consent of the governed. That whenever any form of government becomes destructive of those ends, it shall be the right of the people to alter or abolish it and to institute new government, laying its foundations upon such principles, and organizing its power in such forms, as shall seem to them most likely to affect their safety and happiness"[1].

The universal Declaration of Human Rights 1948[2], which states – "Everyone has the right to an effective remedy by the competent national tribunal for acts violating the fundamental rights granted him by the constitution or by law". Rights and freedoms from the bedrock of democracy. No democracy can function successfully in the absence of some basic freedoms. Again, modern democratic government is a party government. The party winning majority in the election form the government. However, coming in to power the government may turn itself into a one violating the basic rights of people and oppressing the opposition. The aim of having a declaration of fundamental rights in the constitution is to prevent such a possible danger. In order words, they provide a restraint on the power of the government so that it cannot interface with the people's basic rights according to its whims. When rights and freedom are placed the part of the supreme law and the government cannot take them away except by constitution amending process, which is always a right one. This is why insertion of a Bill of right in a written constitution is considered one of the safeguards of democracy. Bangladesh accepted fundamental rights and incorporated the same in their constitution. Within less than a year after the emergence of Bangladesh as a new, independent, sovereign republic, the constitution of Bangladesh was passed, though; however, it came into force on December 16, 1972, the first anniversary of the day of liberation. [3]

[1] *A Summary View of the Rights of British America (1774)*
[2] *The universal Declaration of Human Rights 1948*
[3] *Halim, Md. Abdul, Constitution, Constitutional law and Politics: Bangladesh perspective, Dhaka, CCB Foundation, 2016, p-96.*

2. Objective of the study:

-To get a better understanding of fundamental rights and fundamental rights protected by Bangladesh constitution

-To assess the protection system of Bangladesh

-To find out the challenges to effective enforcement of fundamental rights in Bangladesh

3.Limitation of the study :

Although the study has reached its aims, there were some unavoidable limitations and shortcomings.

First, I am an amateur researcher who is not even expert on the field of study; therefore, it was a tough task to assess the objectives perfectly within short time-limit.

Second, all the data I used in this study is mostly self-reported that is limited by the fact that it rarely can be independently verified.

4.Methodology of the study:

This study is generally a non-empirical analysis. The main sources of this study include secondary sources like textbooks, reports, relevant national and international legislations, case studies, some important daily newspapers, online documents and some publications. The study has also relied on decided cases of Apex Court of Bangladesh and the Subcontinent.

Chapter 2

General Conceptual Framework

5.1.What is Rights?

Before understanding fundamental rights are should have idea about rights and human rights.

Rights are legal, social, or ethical principles of freedom or entitlement; that is, rights are the fundamental normative rules about what is allowed of people or owed to people, according to some legal system, social convention, or ethical theory.[1] Rights are of essential importance in such disciplines as law and ethics, especially theories of justice and deontology.

Rights are often considered fundamental to civilization, for they are regarded as established pillars of society and culture, and the history of conflicts can be found in the history of each right and its development. According to the *Stanford Encyclopedia of Philosophy*, "rights structure the form of governments, the content of laws, and the shape of morality as it is currently perceived".

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[4]. 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- natural rights and legal rights.

1) **Natural rights** are rights which are "natural" in the sense of "not artificial, not manmade", as in rights deriving from human nature or from the edicts of a god. They are universal; that is, they apply to all people, and do not derive from the laws of any specific society. They exist necessarily, inhere in every individual, and can't be taken away. For example, it has been argued that humans have a natural right to life. These are sometimes called moral rights or inalienable rights.

[4] *"Stanford Encyclopedia of Philosophy", Stanford University, July 9, 2007*

2) **Legal rights**, in contrast, are based on a society's customs, laws, statutes or actions by legislatures. An example of a legal right is the right to vote of citizens. Citizenship, itself, is often considered as the basis for having legal rights, and has been defined as the "right to have rights". Legal rights are sometimes called civil rights or statutory rights and are culturally and politically relative since they depend on a specific societal context to have meaning.

Some thinkers see rights in only one sense while others accept that both senses have a measure of validity. There has been considerable philosophical debate about these senses throughout history. For example, Jeremy Bentham believed that legal rights were the essence of rights, and he denied the existence of natural rights; whereas Thomas Aquinas held that rights purported by positive law but not grounded in natural law were not properly rights at all, but only a facade or pretense of rights.

5.2.What are 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[5].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 those rights, that are inherent in human person and without which they cannot live as human beings.

So we can say, ‘Human Rights’ are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible.

Universal human rights are often expressed and guaranteed by law, in the forms of treaties, customary international law, general principles and other sources of international law. International human rights law lays down obligations of Governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups

[5] *“Sepúlveda et al. 2004”, p. 3 copy”, Archived from **the original** on March 28, 2012.*

5.3.What are 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[6]. 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.

From WEX Legal Dictionary, Fundamental rights are a group of rights that have been recognized by the Supreme Court as requiring a high degree of protection from government encroachment. These rights are specifically identified in the Constitution (especially in the Bill of Rights), or have been found under Due Process. Laws encroaching on a fundamental right generally must pass strict scrutiny to be upheld as constitutional[7].

Article 26 to 47 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. [8]

5.4.Nature of Fundamental Rights

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 foster social revolution by establishing the conditions necessary for achieving justice, social, economic and political.

[6] *"International Covenant on Civil and Political Rights" Article 1*
[7] *WEX Legal Dictionary*
[8] Halim, Md. Abdul, Constitution, Constitutional law and Politics: Bangladesh perspective, Dhaka, CCB Foundation, 2016, p-96.

5.5.Distinction between Human rights and Fundamental rights

There are some Fundamental distinction between directives and fundamental rights:

First, when certain human rights are written down in a Constitution, a supreme law, and protected by constitutional guarantees they are called fundamental rights. Directive principles, on the other hand, are polices relating to social, economic and cultural rights which are to be followed in governance of the country.

Second, fundamental rights are enforceable in a court of law and they create justiciable rights in favour of individuals. And the courts can enforce them against the government. Again, the courts are competent to declare as void any law that is inconsistent with any of the fundamental rights. The directives, on the other hand, are not enforceable in a court of law and they do not create any justiciable rights in favour of individuals. The court can not compel the government to carry out any of the directives. Again, the courts cannot declare any void, which is otherwise valid, on the ground that it contravenes any of directives principles.

Third, fundamental rights are mandatory in nature whereas directives are declaratory in nature as they have expressly been excluded from the preview of the courts.

Fourth, the fundamental rights create negative obligation on the state, i.e., the state is required to refrain from doing something. The directives, on the other hand, impose positive obligation on the state i.e., to implement these principles the state will have to achieve certain ends by its actions.

Fifth, the directive principles may be described as inchoate fundamental rights while the fundamental rights are full-fledged i.e. the former requires legislation to become effective while the latter need not requires such legislation. And so long there is no law carrying out the policy laid down in directives neither the state nor an individual can violate any existing law or legal right under the colour of directive principles.

Sixth, Fundamental rights are primarily aimed at assuring political freedom to citizens by protecting them against excessive state action while directive principles are aimed at securing social and economics freedom by appropriate state action.

5.6.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 foster social revolution by establishing the conditions necessary for achieving justice, social, economic and political.

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. But the Fundamental Rights as contained in part III of the constitution, are neither rooted in the doctrine of natural law nor did they base on the theory of reserved rights. They are conferred rights and embody the social values of the present generation. As the social values are not static, the Fundamental Rights are subject to changes and modifications in order to fulfill the aspirations of man in the context of his changed conditions and environment in which he lives.

Chapter-3

Constitution of Bangladesh

9.Fundamental Rights in Bangladesh constitution

18 fundamental rights have been enumerated in the constitution commencing from Article 26 to 43. All of these rights are civil and political rights[9]. These 18 fundamental rights may be firstly divided into two groups:

A. Rights granted to all persons-citizens and non-citizens alike. These are six rights enumerated in Articles 32, 33, 34, 35, 41 and 44 of the constitution.

B. Rights granted to citizens of Bangladesh only, these are 12 rights enumerated in Articles 27, 28, 29, 30, 31, 36, 37, 38, 39, 40, 42 and 43.

Briefly discussion Article basis starting from Fundamental rights in Bangladesh constitution.

9.1. Laws in consistent with Fundamental rights to be void

Article, 26 Provides that all existing laws inconsistent with the fundamental rights as provided in part III shall to the extent of the inconsistency become void on the commencement of the constitution and the state shall not make any law inconsistent with those rights. In our jurisdiction, the case of *Anwar Hossain vs. Bangladesh*[10], popularly known as the constitution (Eight Amendment) case has also expressed the same view.

In that decision, Shahabuddin Ahmed, j. held at paragraph 381, as under: "As to the constituent power, that is power to make a constitution, it belongs to the people along. It is the original power. It is doubtful whether it can be vested in the parliament, though opinion differ, people after making a constitution give the parliament power to amend it in exercising its legislative power strictly following certain special procedures constitutions of *Anwar Hossain vs. Bangladesh popularly known as the constitution (Eight Amendments) case has also expressed the same view. In that decision, Shahabuddin Ahmed, j. held at paragraph 381, as*

[9] *The Constitution Of People's Republic Of Bangladesh*
[10] *Case of "Anwar Hossain vs. Bangladesh" (known as The Constitution Case)*

under "As to the constituent power, that is power to make a constitution, it belongs to the people along. It is the original power. It is doubtful whether it can be vested in the parliament, though opinion differ, people after making a constitution give the parliament power to amend it in exercising its legislative power strictly following certain special procedures constitutions of some countries may be amended like any other status following the ordinary legislative procedure. Even if the constituent power is vested in the parliament the power is a derivative one and the mere fact that an amendment has been made in exercise of the derivative constituent power will not automatically make the amendment immune from challenge. In that sense there is hardly any difference whether the amendment is a law, for it has to pass through the order in validity test my considered opinion therefore is that an amendment of the constitution is not included in law" within the meaning of Article 7 in the same way as it is not law in Article[11].

9.2. Equality before law

Article 27 guarantees every citizen's right to equality before the law and the equal protection of the laws. It combines the English concept of equality before law and the American concept of equal protection of law.

"Equality before law" means that among equals law shall be equal and shall be equally administered. There shall not be any special privilege by reason of birth, creed etc. "Equal protection of law" means that all persons in like circumstances shall be treated alike and no discrimination shall be made in conferment of privileges or imposition of liabilities. The first part is negative while the second is positive in approach. Equality before law is involved in the enforcement of law, while equal protection of law involves the validity of a law. However, these are not independent or severable concepts in their application and will often be found to overlap each other this article more than others firmly embodies the concept of rule of law the establishment of which is one of the prime objectives of the constitution[10].

9.3. Discrimination on grounds of religion etc.

[11] *The Constitution Of People Republic Of Bangladesh*

Art. 28 has been introduced to make classification only or grounds of religion, race, caste, sex or place of birth parse unreasonable except when a provision is made in favor of women, children and backward section of citizens[12].

As a matter of fact, this article projects the citizen against discrimination. The state can't discrimination only on the grounds as mentioned in Article 28, but with some other national factor, the discrimination would be valid. The crucial word in this Article is discrimination, which means making an adverse destination with regard to or distinguishing unfavorably from others.

9.4. Equality of opportunity in public employment

Clause (1) of Article 29 of the constitution guarantees equality of opportunity for all citizens in the matter of employment or office in the service of the Republic[11]. The expression "the service of the Republic" means any service, post or office whether in a civil or military capacity, in respect of the government of Bangladesh and any other service declared by law to be a service of the Republic. Equality of opportunity in respect of employment under this clause means equality as between members of the same class of employees and not equality between members of separate classes. This clause gives effect to the doctrine of equality in respect of appointment as well as promotion. Inequality of opportunity for promotion between holders of posts in the same grade may be an infringement of this clause, but those who hold post in different grades are not entitled to invoke it. When an application for a post has been made, it must be considered on merits.

Prohibits discrimination in respect of employment an office in the service of Bangladesh on the grounds only of religion, race, caste, sex or place of birth. Where selection for promotion to the next higher grade is on the "basis of seniority cum-merit", a public servant is entitled to claim relief under this clause if he is placed in the placed in the list of seniority contrary to the rules governing seniority. Clause (3) provides an exception by restricting the operation of clauses (1) and (2) of Article 29. A provision an exception can't be so interpreted as to nullify or destroy the main provision[11].

[12] *The Constitution Of People Republic Of Bangladesh*

In the case of Bangladesh vs. Azizur *Rahman*[13], *will interpreting Article 29 of the constitution, Equal opportunity held at paragraph 44 as under: The guarantee of equal opportunity in respect of employment is available at the stage of initial appointment and of promotion. Merely because chances of promotion of the write petitioners may be said to have been affected by the impugned rules of 1990 would not amount to denial of equality of opportunity in respect of the employment, as chances of promotion are not conditions of service. As a matter of fact, no writ petitioners have been deprived of the right to be considered for promotion and as such, the submission that they have been denied the right of equal opportunity in respect of future employment is untenable and there is in fact no violation of Article 29(1) of the constitution.*

9.5. Prohibition of foreign titles, etc.

Article 30 provides that No citizen shall, without the prior approval of the president, accept any title, honor, award or decoration from any foreign state[14].

9.6. Right to protection of law

Article 31 deals with the protection of law to be enjoyed by citizens and persons residing in Bangladesh and in particular, in respect of life, liberty, body, reputation and property. The term in accordance with law is akin to American concept[13].

9.7. Protection of Right to life and personal liberty

No personal shall be derived of life on personal liberty saved in accordance with law. In the case of *Islam Mahmud vs. Bangladesh*[15], H.M.Habibur Rahman, j. held that the detaining authority must have some jurisdictional facts for detaining an individual, since the detaining authority is curtailing the liberty of a citizen by detaining him on preventive detention; it is exercising a non-judicial authority. To curtail fundamental rights of personal liberty enshrined in the constitution it is essential that the detaining authority.

[13] *Case of "Bangladesh vs. Azizur Rahman"*
[14] *The Constitution Of People Republic Of Bangladesh*
[15] *Case of "Islam Mahmud vs. Bangladesh"*

Must have report and materials that is jurisdictional facts for exercising power to the detune under the special power Act[13].

9.8. Safeguards as to arrest and detention

Article 33 consists of two parts: Clauses (1) and (2) relate to persons otherwise than a preventive detention of law. Clauses from (3) to (6) apply to person arrested or detained under preventive detention. This Article provides for protection against unreasonable arrest and detention. This Article provides for some specific procedural safeguard as in clause (1) of 33, a person in detention is entitled to know the grounds of his arrest and he cannot be denied the right to consult or be defended by a lawyer of his/her choice. In clause (2) a person arrested must be produced before the nearest magistrate within twenty four hours excluding the tie for such journey. The Article provides for certain substantive and procedural safeguard in respect of deprivation of life and personal liberty as a matter of fact, disclosure of grounds of arrest and detention before a magistrate even mandatory, under clause (1) of Article 33. There are numerous judicial decisions of the supreme court of Bangladesh on the question of preventive detention and the safeguards to be observed have become a highly specialized subject. Clause (4) provides that no person can be detained at the first place exceeding six months and during this time; he must be given an opportunity to be heard by an Advisory Board. This clause also speaks of the constitution of the board. Clause (5) of Article 33 provides for early communication of grounds of detention of such person, the provision of this clause also authorize the detaining authority for not disclosure of facts in public interest[13].

In the case of professor Ghulam Azam vs. Bangladesh, Md. Abdul Jalil[16], j. held at paragraph 25 asunder: From the facts and circumstances as discussed above we are of the opinion that the petitioner having been living in Bangladesh is entitled to the protection under Article 33(5) of the constitution and as such the detaining authority was under constitutional obligation to communicate grounds of detention as soon as may be, but no grounds were communicated within such long period of more than 1 year and 3 months.

[16] *Case of "Professor Ghulam Azam vs. Bangladesh"*

9.9. Prohibition of forced labour

Clause (1) of Article 34 prohibits all forms of forced labour and any contravention of this rule has been made punishable in accordance with law. Clause (2) prevents persons undergoing punishment for sentence given by a court of law from invoking the prohibition against forced labour provided in the proceeding clause and further the state is empowered to require compulsory services for public purposes. The Article does not expressly mention slavery as has been mentioned in the thirteen Amendments of the United States constitution, and though there is no longer the remotest likelihood of enforcing such institution the prohibition against forced labour would extend to it if at all any attempt is made to introduce it[17].

9.10. Protection in respect of trial and punishment

Article 35 guarantees a cluster of rights in respect of trial and punishment. Clause (1) provides protection against ex post facto laws, clause (2) provides guarantee against double jeopardy, clause speedy and fair trial: clause (4) grants privilege against self-incrimination and clause (5) prohibits torture and cruel, inhuman or degrading punishment. Clause (6) provides that nothing in clause (3) or clause (5) shall affect the operation of any existing law, which prescribes any punishment or procedure for trial[16].

9.11. Freedom of movement

Rights of locomotion is an important part of liberty, the right of a person to move freely to reside where he will and to work where he will is connected with his livelihood and pursuit of happiness. Even though this right may be protected by the due process clause of article 31, as an important segment of liberty, the frames of the constitution made special provision to protect the freedom of movement of citizens. Article 36 provides that subject to reasonable restrictions imposed by law in the public interest, every citizen has the right to move freely through out Bangladesh, to reside and settle in any place in Bangladesh, and to leave and re-enter Bangladesh[16].

[17] *The Constitution Of People Republic Of Bangladesh*

In the case of Dr. Mohiuddin Farooque vs. Bangladesh and others[18], Mustafa Kamal, j. held at paragraph 31 as under: These rights, attached to a citizen are not local. They pervade and extend to every inch of the territory of Bangladesh stretching up to continental shelf.

9.12. Freedom of assembly

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[16].

9.13. Freedom of Association

The very existence of democracy is dependent on the right to form associations, without the right; there can't be any political party, which is an essential institution of democracy. The right of free association is closely allied with the freedom of speech and which is a right to free speech, and foundation of a free society[19].

9.14. Freedom of thought, conscience speech and press

Freedom of thought and conscience is essential to the development of human personality and every person should be free in his thought and conscience. On the other, freedom of speech is essential for the development and functioning of democracy. Without freedom of speech there can't be any democracy and the first thing and autocrat does is to curb the freedom of speech[18].

In the case of Bangladesh National curriculum and Text Board vs. A.M Samsuddin and others[20], A.T.M. Afzal, c.j. held at paragraph 32 while interpreting Article 32(2) as under: The right to freedom of speech and expression as claimed by the writ petitioners does not extend to the right of printing and publishing of note books or textbook prepared and published by the textbook board under stationary authority the court was not justified in declaring the impugned Act to be ultra vires of Article 39(2) of the constitution.

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[18] *Case of "Dr. Mohiuddin Farooque vs. Bangladesh and others"*
[19] *The Constitution Of People Republic Of Bangladesh*
[20] *Case of "Bangladesh National curriculum and Text Board vs. A.M Samsuddin and others"*
[20] *The Constitution Of People Republic Of Bangladesh*

9.15. Freedom of profession or occupation

Article 40 provides that every citizen shall have the right to enter upon any lawful profession or occupation and to conduct any lawful trade or business[18].

9.16. Freedom of religion

Article 41 ensures that every citizen has the right to profess, practice or propagate any religion and every religious community on group can establish, maintain and manage its religious institutions subject to reasonable restriction imposed by law on the ground of public order and morality[18].

9.17. Rights to property

Article 42 guaranteed that every citizen has right to acquire, hold, and transfer or otherwise dispose of property, subject to restrictions imposed by law compulsory acquisition, nationalization and requisition of property is not permissible without the authority of law[18].

9.18. Protection of home and correspondence

Article 43 ensures the citizens right to be secured in his home against entry, search and seizure and also to the privacy of his correspondence and other means of communication.

Restriction can be imposed on such rights on the ground of security of the state, public order, public morality and public health. This article guarantees the privacy of home and correspondence and communications[20].

10.Right to enforce fundamental rights:

As per article 44 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.Article 44 guarantees the right of 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.

Chapter 4

Supremacy of the Fundamental Rights & Enforcement

11.Supremacy & Enforcement:

The constitution but not parliament is supreme. It is stated in the preamble that it is our sacred duties to safeguard protects and defend this constitution and to maintain its supremacy as the embodiment of the will of the people of Bangladesh. Article 7 states all powers in the Republic belong to the people and their exercise on behalf of the people shall be affected only under and by the authority of this constitution. This constitution is as the solemn expression of the will of the people.

The supremacy of law of republic and if any other law is inconsistent with constitution that other law shall to the extent of the inconsistency to void. Article 26 states that all existing laws inconsistent with the provisions of this part i.e. Fundamental Rights, shall to the extent of such inconsistency become void on the commencement of this constitution. The state shall not to make any law inconsistent with the provision of this part and any law so made shall to the extent of such inconsistency is void. Under article 102 the Supreme Court has been empowered to scrutinize the government actions done is violation of Fundamental Rights. Again under Article 7 and 26 the Supreme Court exercises the power of judicial review i.e. to examine the constitutionality of any law passed by the parliament.

12.Enforcement of Fundamental Rights

Article 44(1) provides that the right to move the Supreme Court for enforcement of any of the fundamental rights is itself a fundamental right. Art. 44(2) enables parliament to confer the jurisdiction to enforce fundamental rights on any other court, but such conferment cannot be in derogation of the power of the Supreme Court under Art. 102(1), which means that such

other court may be given concurrent, but not exclusive, power of enforcement of fundamental rights. The Court must always have the power of enforcement of fundamental rights[21].

13. Writ:

The term "Writ' is not properly defined anywhere. Initially it was the royal prerogatives and was exercised by the king or queen as the fountain of justice. The Constitution of the Peoples Republic of Bangladesh provides 5 kinds of Writ although their name is not specifically used.

14.1 Writ Jurisdiction in Bangladesh

In our constitution, the law of writ is mandated in Article 102 and the remedial measures in different forms are amalgamated to be taken under this provision of law.All sorts of relief under writ jurisdiction are available in our constitutional dispensation. Now I discuss the constitutional recognition of writ jurisdiction in Bangladesh.

14.2Constitutional Recognition:

Writ jurisdiction is the instrument for enforcement of fundamental rights. In Bangladesh, fundamental rights are provided in Article-26 to -47 that is part three of the constitution. The High court division is empowered with writ jurisdiction by Article-44 and Article-102 of Bangladesh constitution. Article-44(1) of the Constitution declares that rights to move to the Supreme Court in accordance with the clause (1) of Article-102, for the enforcement of fundamental rights conferred by part III is guaranteed. According to Article-102(1) the High Court division for the enforcement of fundamental rights may give directions or orders to any person or authority including any person performing any function in connection with the affairs of the Republic forth enforcement of fundamental rights Article 102(2) of the Constitution defines various kinds of writ jurisdictions but it does not mention the names of the writs. However, but by analyzing this Article, all the writ jurisdictions can be found.

According to Article 102(2) the High Court Division may, if satisfied that no other equally efficacious remedy is provided by law-

[21] *The Constitution of The People's Republic of Bangladesh*

a) On the application of any aggrieved person may make an order –

i. Directing any person performing any functions in connection of the Republic or of a local authority to refrain from doing that which he is not permitted bylaw to do - This is clearly the Writ of Prohibition. Or to do that which he is required by law to do - This is the Writ of Mandamus.

ii. Declaring that any act done or any proceeding taken by a person performing functions in connection with the affairs of the Republic or of a local authority, has been done or taken without lawful authority and is of no legal effect- This is the writ of Certiorari.

b) On the application of any person make an order-i. Directing that a person is custody be brought before it so that it may satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner - This is the writ of Habeas Corpus.

ii. Requiring a person holding of purporting to hold a public office to show under what authority he claims to hold that office - This is the writ of Quo-Warranto.

It is also found that the Appellate Division is empowered with Writ Jurisdiction too. Article 104 of the Constitution provides the Appellate Division Shall have power to issue directions, orders or writs whenever necessary.

Chapter 5

Classification of Writ

15.Types of writ:

The Constitution of Bangladesh indicates towards following kinds of writs, namely-

- Habeas Corpus
- Certiorari
- Prohibition
- Mandamus &
- Quo-Warranto.

15.1.Writ of Habeas Corpus:

Writ of Habeas Corpus means 'have his body' i.e. to have the body before the Court. So it is a kind of order of the Court that commands the authorities holding an individual in custody to bring that person before Court. The authorities must then explain in the Court why the person is being held. Under sub-clause (i) of clause (b) of sub-article (2) of article 102 of the Bangladesh Constitution, the High Court Division, on the application of any person, directs that a person in custody be brought before it to satisfy itself as to whether he is being held in custody with or without lawful authority. If the Court finds that he is being illegally held in custody by the authority, it then can declare the same to be without lawful authority. CrPC also authorizes the High Court Division to issue a direction in the nature of a writ of habeas corpus to bring before it a person detained in public or private custody in order to see as to whether he is being detained illegally or improperly.

15.2.Writ of Mandamus:

Mandamus means 'we command'. By writ of mandamus, the superior court directs any person, corporation, lower court or government to do something, specified therein, which pertains to his or their office and is in the nature of a public duty. This writ is issued when the lower tribunal has declined to exercise jurisdiction vested in it or any public authority declined to do what he is required by law to do. Sub-clause (i) of clause (a) of sub-article (2) of article 102 of

the Constitution authorizes the High Court Division to direct a person performing functions in connection with the affairs of the Republic or a local authority to do what he is required by law to do. This remedy is available when any right of a person, arising from any law and not from any contract, is violated. The applicant must show that he has a legal right to the performance of legal duty by the person or authority against whom the writ is prayed for.

According to Ferris,' Generally speaking, it may be said that mandamus is a summary writ, issuing from the proper court, commanding the official or board to which it is addressed to perform some specific legal duty to which the party applying for the writ is entitled of legal right to have performed.

15.3.Writ of prohibition:

Prohibition means 'to forbid' from doing something. In other words, it is a writ issued by the superior court to a lower court, tribunal or administrative authority prohibiting it from doing something which it is not authorized by law to do.

Prohibition is a preventive writ and issued to stop illegal exercise of power of jurisdiction to the detriment of any legal right of a person. Sub-clause (i) of clause (a) of sub-article (2) of article 102 of the Constitution authorizes the High Court Division to direct a person performing any functions in connection with the affairs of the Republic or local authority to refrain from doing what he is not permitted by law to do.

Prohibition has been defined as the name of a writ issued by a superior court, directed to the judge and parties to a suit in an inferior court, commanding them to cease from the prosecution of the same, upon a suggestion that the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court.6

15.4.Writ of Certiorari:

Certiorari means 'be certified' of the proceedings of any lower court or tribunal to be investigated by the superior court. Records of any pending or concluded proceedings before

any authority or court including a tribunal can be called for by the High Court Division of the Supreme Court of Bangladesh for its examination as to the legality or otherwise of the said proceedings.

Under sub-clause (ii) of clause (a) of article 1027, not only legality of a proceedings but also any act done by a person, performing functions in connection with the affairs of the Republic or a local authority, can be declared to have been done without any lawful authority and with no legal effect. Thus remedy under the aforesaid sub-clause (ii) is wider than that of the remedy available in a writ of certiorari.

15.5.Writ of Quo Warranto:

Quo Warranto means 'by what warrant or authority'. Writ of quo warranto provides remedy against illegal occupation or usurpation of any public office or franchise or liberty. It enables inquiry into the legality of the claim, which a person asserts to an office or franchise and to oust him from such position, if he is an usurper. The holder of the office has to show to the court under what authority he holds office.

Such remedy is available under sub-clause (ii) of clause (b) of sub-article (2) of article 102 of the Constitution from the High Court Division. Writ of quo warranto is a judicial order issued by the High Court by which any person who occupies or franchise or liberty is asked to show by what right he claims it, so that the title to the officer, franchise or liberty may be settled and any unauthorized person ousted.

A writ can be filed either against the government or against the local authorities or any person performing any functions in connection with the affairs of the Republic. The High Court Division shall have no power to pass any interim order or other order in relation to any law to which article-47 applies.

15.6.Paradoxes of fundamental rights

15.6.1. Emergency provisions and fundamental rights

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 emergencies 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 torture6. The functioning of the national courts in securing the unhindered enjoyment of the core human rights during emergencies has often been unsatisfactory. [22]

15.6.2. Violation of fundamental rights

RAB (Rapid Action Battalion) and other security agencies have been accused of using torture during custody and interrogation. One allegation of such came from a young man who was arrested in Dhaka for protesting against the assault of an old man by plainclothes RAB agents. He was later severely tortured. On 27 July 2005, two brothers from Rajshahi, Azizur Rahman Shohel and Atiquer Rahman Jewel, were arrested on fabricated charges, beaten with batons and subjected to electric shocks. It is alleged that this brutality stemmed from the brothers' family being incapable of paying a sufficient bribe. The brothers were tortured to such an extent that they were hospitalized at the Rajshahi Medical School Hospital under police custody.[8] The most thorough account of torture in Bangladesh was the May 2007 case of torture against Tasneem Khalil, a journalist and blogger. He was tortured while in the custody of Directorate General of Forces Intelligence during the interim government, and after his release, Khali wrote a report published by Human Rights Watch. Sweden granted Khalil asylum after he fled Bangladesh[23].

[22]Section 49, The Code of Criminal Procedure, 1898.
Ferries, The Law of Extra-ordinary Legal Remedies, London: Sweet and Maxwell, 1999, p.187..
[23] *M. Ehteshamul Bari, (2014), The unjust exercise or emergency powers in Bangladesh and their impact on the Fundamental Rights: A critical appraisal; Australia, Macquarie University*

15.6.3.Violation of Human Rights by Preventive Detention in Bangladesh :

The violation of Human rights has started from very beginning of our civilization. It is being made in culture of violation of human rights through preventive detention all over the world, mostly in the third world countries. It is sorry to say that Bangladesh is one of them. Human rights violation in case of preventive detention is a familiar feature in Bangladesh.

Chapter 6

Preventive Detention

16. Preventive Detention and Violation of Human Rights

Right against arbitrary arrest and detention is one of the prime portion of Human Rights the best part of numerous international human rights instrument. Preventive detention, though an evil, is sometimes a necessity for state reliability. Although this detention has to be only under special circumstances and with accordance with the due procedure of law. Unlawful detention affects several other rights guaranteed by the Constitution consequently it violates Human Rights of a person. Amongst the national institutions, the judiciary always comes in the front line of the national systems for the protection of human rights. One of the major functions of the judiciary is to safeguard human rights guaranteed in constitutions and laws. In protecting human rights, the function of the judiciary is to supervise the way in which the various powers of government are used within the framework of laws and a set of values, and to protect person from arbitrary governmental movement. Preventive detention is a serious encroachment upon the personal liberty of a person, for the easy motive that, unlike common arrest or imprisonment, preventive detention is attained without trial. But in appearance of preventive detention law, most of the times the executive authority exertion discretionary power concerning arrest and detention and violates human rights.

16.1.Violation of Rights to Life by Preventive Detention

'**Life' within the meaning of Art.31**[24] means something more than mere animal existence. It

includes the right to live consistently with human dignity and decency, right to the bare necessities of life such as adequate nutrition, clothing and shelter and the facilities for reading, writing and expressing oneself its diverse forms, freely moving about and mixing and commingling with fellow human beings and all that which gives meaning and content to a man's life including tradition, culture and heritage.

[24] Article 31 of the Constitution of the People's Republic of Bangladesh, 1972.

According to a leading news daily of Bangladesh, country's 68 jails, which are designed to detain 34,147 inmates but currently they are holding 71,606. Preventive detention is not for punitive purpose, but the condition in which a person is detained is more than what punishment can be meant. So by detaining a person under preventive detention in jails, which are degrading for any human being to live in, is a gross violation to right to life of the detenu person.

16.2. Violation of Right to Liberty and Freedom of Movement:

Article 32 of the Bangladesh Constitution[25] ensures personal liberty to every person and Art. 36 ensures freedom of movement, which means every citizen shall have the right to move freely. But by detaining any person under colorful exercise of the laws regarding preventive detention, the detaining authority violates these fundamental human rights. Again the laws regarding preventive detention it has many lacunas which the executive authority often takes advantage of. In **Bangladesh without trial six months'** detention can conferred to the detainee. This is a bad process because nowhere in the world such a long period is not found. In India and Pakistan, the initial period of detention is three months.

No maximum period of detention has been fixed by the Constitution or the Special Powers Act[26] So a person can be detained for indefinite period where the advisory board thinks it fit. Whereas the maximum period in India is 2 years and 8 months in a year in Pakistan. Also in Bangladesh there is no specific time when preventive detention law can be applied. It can be applied in both peace time and emergency t[1] 8 Article 32 of the Constitution of the People's Republic of Bangladesh, 1972.

9 Constitution ime. However, in most democratic countries Preventive detention is a method resorted to in emergencies like war. The western developed countries like USA, UK, and Singapore, it is specifically mentioned that only in time of emergency, Preventive detention is applied for and also for specific purposes, but there is no specification in our constitution an can be restored to in times of both peace and emergency.

Moreover, in Bangladesh the Government frequently uses the police for political purposes and provided *immunity* to members of security forces. There are wide spread corruption allegations and a severe lack of resources, training, and discipline amongst the detaining authorities present. Bangladesh has a large number of political workers and leaders detained without trail

25Article 32 of the Constitution of the People's Republic of Bangladesh, 1972..

[26] Constitution or the Special Powers Act, 1974.

through preventive detention under the Special Powers Act 1974[27], which is a great violation of right to liberty and freedom of movements. On 7 September 2000 a three-member Sub-committee of the Parliamentary Standing Committee submitted a 31-page report on SPA to the Parliament, in which it mentioned that 69,010 people were detained under SPA of 1974 in the last 24 years and 68,195 persons were released by order of the High Court Division.Special Powers Act has become a draconian law because of its unconstitutional provisions and also its unlawful use by detaining authority. Special Powers Act is a draconian law because under this Act,

➢ Firstly, a detainee has not given any right to know the grounds for which he is detained

through the judicial body.

➢ Secondly, the Govt. can arrest and detain any person at any time.

➢ Thirdly, the Govt. can detain a person for an indefinite period of time if wishes.

➢ It is against the commitment and spirit of the Constitution and human rights.

16.3. Violation of Right to Freedom from Torture and Cruel, Inhumane or Degrading

Treatment Under the Special Powers Act Govt. can use the police officers to arrest any person. And it is a common practice amongst the police to inflict bodily and mental torture or cruel treatment of the persons detained. In spite of constitutional guarantees and protection under International Bill of Rights, such as UDHR and ICCPR the police often in the name of state security detain any person they wish and use torture and cruel treatments in the name of getting information from them. An example of the scale of the problem is the four-week crackdown on May 28, 2008 resulting in the arbitrary arrest and detention of more than 50,000 Bangladeshis. Media reports indicated that most persons arrested were subjected to same from of ill-treatment, including beating and that torture was also used on a significant number of detainees, during which the police extracted money or confessions.

[27] Special Powers Act, 1974

16.4.Violation of Right to Fair Trail:

When a police officer arrests a person under sec. 54 of the CrPC[28], then the arrested person must be produced before the magistrate within 24 hours of such arrest. But if the Govt. wants to detain any person under sec. 3 of the SPA[29] and makes an order for such detention, the police can put him into prison for 6 months without producing him to any Judicial or Executive authority.Moreover, many suspected people are detained under wrong information. And most of them don't possess the means to go to the judicial body to seek remedy. Only the rich can go to the High Court Division and get remedy by instituting the writ of Habeas Corpus[30].

Art. 33(5)[31] requires that the grounds of detention must, as soon as may be, be communicated to the detenu and the detaining authority must afford him the earliest opportunity of making a representation against the order of detention. It is very important because it not only enables the detenu to make the representation, but also enables him to file a proper application for a **writ of Habeas** corpus. But there is a proviso to Art. 33(5) and also Section 8(1) of the SPA, 1974 permits the detaining authority to refuse to disclose the facts which it considers against the public interest.

However, the ambit of public interest has not been defined, so this proviso is often used as an exploitation tool and in denying right to fair trial. Again Section 11(4) of the SPA states that, the detainee against whom a detention order has been made cannot appear by any legal practitioner in any matter connected with the reference to the Advisory Board, and the proceedings of the Advisory Board and its report, excepting that part of the report in which the opinion of the Advisory Board is specified, shall be confidential. And as the report of the Advisory Board is binding on the executive authority and the Govt., it is always influenced by the authority.

[28] sec. 54 of the Code of Criminal Procedure, 1898.
[29] sec. 3 of the Special Powers Act, 1974
[30] writ of Habeas Corpus Art. 102 of the Constitution of the People's Republic of Bangladesh, 1972.
[31] Art. 33(5) the Constitution of the People's Republic of Bangladesh, 1972.

16.5.Freedom of Speech and Expression:

Human rights defenders and professionals, including from media, were regularly being monitored, threatened and intimidated by the personal of the country's armed forces and various intelligence agencies. The democratically elected government do not always have the scope to utilize the emergency provisions for doing the above misdeeds.

However, in the name of SPA and anti-terrorism Act, it has arrests various persons, inflicts torture on some of them and threatens everyone who wish to speak against the govt. of order of preventive detention against them.

16.6.Recent cases of Preventive Detention in Bangladesh and Violation of Human Rights[32]:

Article 33 of the Constitution[33] guarantees that a person arrested be informed of the grounds for detention; provided access to a legal practitioner of her/his choice; and brought before a court of competent jurisdiction within 24 hours of arrest. Throughout the year, how-ever, law enforcement agencies arrested and detained persons arbitrarily under section 54 of the Criminal Procedure Code (Cr PC) 1898[34] the Special Powers Act, 1974[35] and the Public Safety Act, 2000.[36] Section 54 of the CrPC empowers the police to detain any individual on nine grounds of reasonable suspicion' of criminal activity without any order from a magistrate or a warrant. The Code however provides of specific legal safeguards. Under section 162, forced confessions are in admissible in evidence unless admitted by the accused before a magistrate, who accepts it as being given voluntarily. Section 163 of the Code prohibits the police from making any inducement, threat or promise during investigation, while section 164 protects the detainee's right to remain silent in case s/he wishes not to confess.

[32] https://www.lawyersnjurists.com/article/preventive-detention
[33] Article 33 of the Constitution of Bangladesh
[34] section 54 of the Criminal Procedure Code (Cr PC) 1898.
[35] the Special Powers Act, 1974.
[36] The Public Safety Act, 2000.

Even though three different governments were in office during the year, there was little change in the nature of police excesses and there was no decrease in arbitrary arrests and detention during the terms of the two elected governments. The administration functioned somewhat neutrally only during the three-month Caretaker regime. In its last year, the AL rule was marked by numerous incidents of arrest, detention and persecution of political opponents. Soon after the Caretaker Government took office, police arrested hundreds of armed cadres associated with the major political parties for the purpose of confiscation of illegal firearms. Under the BNP led Four- Party Alliance, which took office on 10 October, the number of arms cadres were arrested.

Remedies against Preventive Detention

Habeas corpus writ

Government illegally puts the opposition members into detention just for strengthening their power. If the detention is not in conformity with the provisions of the law under which he is purported to be detained, he may secure release by moving the courts of law.[37] If an individual is illegally detained he can invoke Article 102 of the Constitution of Bangladesh in the High Court Division of the Supreme Court by way of writ of "habeas corpus"[38] . The detenues of Pakistan may do so under Article 199 and those of India under Article 226 of their respective Constitutions. The detenu may seek remedy against his arbitrary detention through the writ of habeas corpus. The High Court/High Court Division, when satisfied that the detenu has been put into detention by the detaining authority arbitrary by, may declare that order as illegal and thereby order for immediate release. It is to be mentioned that there is no hard and fast rule for an application under the habeas corpus writ. This petition does not require any special class of people or persons; any person can file a petition under this provision.[39] Thus the detune himself

[37] 42 Mahmood, Sh. Shaukat; A Study of the Constitution of Pakistan, Lahore, 1962, at p. 67.
[38] Greece vs. Home Secretary, (1941) 3 All ER 388 it was held that the full name of the writ of habeas corpus is habeas corpus ad subjuciendum. It is applicable as a remedy in all cases of wrongful deprivation of personal liberty,
where there is no legal justification for the detention. It is but a writ of remedial nature and cannot be used as an instrument of punishment. Halsbury's Laws of England, Simond Ed. vol. II, at p. 27. The history of the writ of habeas corpus is lost in antiquity.
[39]See also Dicey, A.V.; Introduction to the Study of the Law of the Constitution, Oxford, 1938, at p. 215

[40] , or his father[41], his wife[42], his son, his sister, his relative , or even his friend can apply. In the case of a minor, however, the application should be by a person who is entitled to the custody of the minor or to represent the minor legally, and in the absence of such person, by a person interested in the welfare of the minor [43] and the rule is the same in the case of a lunatic[44]. It may be stated here that most of the cases the court had found the grounds of detention to be vague, indefinite and weak grounds.

In other cases, orders of release have been conferred for the following reasons:

➢ government's unlawful authority in ordering detention;

➢ failure to inform the detenu of his right to representation;

➢ failure to state the grounds of detention within the statutory period;

➢ lack of nexus in between some of the reasons shown in the order of detention and the facts and reasons for detention as disclosed in the grounds;

➢ detention for criticism of an ideology, which cannot be a prejudicial act in a society that permits political activity;

➢ failure to produce the detenu before the Advisory Board within a specified time;

➢ mixing of good grounds with bad ones;

➢ Retrospective issuance of orders and

➢ Government's failure to produce essential documents in court.

[40] Charanjit Lal vs. Union of India, AIR 1951 SC 41 (paras 43,81)
[41] Thompson, Re (1860) 40 MLJC 19: 9 WR 203; Sundarajan vs. Union of India, AIR 1970 Del 29 (FB).
[42] Begum Nazir Abdul Hamid vs. Pakistan, PLD 1974 Lah 7
[43] Raj Bahadur vs. Lehal Remembrancer (1953) 47 CWN 507
[44] 53 Ex parte Child (1854) 15 CB 238

What happens in practice is that in spite of the order of the court for release of the detenu the detaining authorities pass fresh order of detention.[45] In such a situation the number of detained persons exceeding the number of persons ordered for release. Besides the detenues have got some difficulties in their access to court. For example, the detenu is not aware of this procedures and their relations along with themselves fail to contact with the lawyers and a remedy of this kind cost a big amount of money, say in Bangladesh the legal fees being over Tk. 10,000 (or U$ 160).Moreover the power of the detaining authorities not to disclose the grounds of detention[46] brings much difficulty and the detenu cannot claim any remedy before the court.

[45] Alam Ara Huq vs. Government of Bangladesh, Supra note 85; Farzana Huq vs. Bangladesh, Supra note 87.
[46] Section 8 (1), Special Powers Act 1974

Chapter -7

Cases of fundamental rights

17.1. Dr. Mohiuddin Farooque v Bangladesh:

It is the most striking example of the illuminating interpretation of right to life. In this case, the court gives an extended and more liberalized interpretation by observing that the term right to life' means a meaningful life-a life where men can live with dream and dignity. Here, the court showed its adherence to exclude anything which might affect the enjoyment of life. The Court observed that: articles 31 and 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.[47]

17.2.M. Saleem Ullah Vs. Bangladesh and another:

High Court Division observed that the people of Bangladesh, under Art.31 of the Constitution are entitled to enjoy the protection of laws enacted in Bangladesh. Under Art.21 every person in the service of the Republic has a duty to ensure the observance of the Constitutional mandates and the laws of the land, to strive at all times to serve the people to whom all powers in the Republic belong. It is also the constitutional obligation of the Government to ensure that the rights of the people, envisaged in under Art. 18 and Art.32 of the Constitution are vindicated and defended. In case of any breach in this respect, such constitutional obligations can be enforced against the Government under Article 102 of the Constitution.[48]

[47] 49 DLR 1997 AD 1, para- 102

[48] 15 BLD (HCD)

17.3.Anwar Hossain Chowdhury v. Bangladesh

The 8th Amendment: The Doctrine of Basic Structure of the Constitution

The case of **Anwar Hossain Chowdhury v. Bangladesh**[49] popularly known as the 8th Amendment case is a historic judgment in the constitutional history of independent Bangladesh.

Background of the Case

After martial law was imposed on 24th March, 1982, on 8th May the CMLA by amending the Schedule to the Proclamation of the 24th March, 1982 had set up six permanent Benches of the High Court Division at Chittagong, Commila, Jessore Barishal, Sylhet and Rampur. By a further amendment of the Proclamation by Proclamation Order no III of 1986 these permanent Benches were designed as "Circuit Benches" and it was provided that when Article 100 of the Constitution would be revived, the Circuit Benches should be deemed to be sessions of the HCD at Dhaka under that Article.2Martial law was withdrawn on 10th November, 1986 and the Constitution was fully revived on the same date. As the Constitution was revived the Proclamation Order no III of 1986 was no longer operative and the Chief Justice under the revived Article 100 in consultation with the President, proceeded to implement the provisions of six sessions benches in the same places where Circuit Benches were functioning during the martial law period. The Chief Justice issued six other notifications specifying the jurisdiction to be exercised by each session and the areas covered by them. However, when the Chief Justice issued under the revived Article 100[50] six other notifications specifying the jurisdiction to be exercised by each session and the area.[51]

[49] 11989 BLD (SPL) 1.
[50]The Constitution of People's Republic of Bangladesh, 1972; Art.100.

University of Dhaka v.Dr.S.Hussain and another[52]

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 chancellor of the DhakaUniversity 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.

18.Cases Preventive Detention

When a person is detained under any law regarding preventive detention, he cn file a writ petition against such order in the High Court Division under Art. 102 of the Constitution. Generally, most cases of detention order are quashed by the Supreme Court. Some leading cases regarding preventive detention has come to time in exercising this constitutional right to

[52] University of Dhaka v.Dr.S.Hussain and another

seek remedy from the apex court. Some of the leading cases regarding preventive detention are:

18.1.Farzana Haq vs Government of Bangladesh[53]

Facts of the case: Sanaul Huq Niru was arrested and detained first on 13th September 1987 under SPA. His detention order was challenged and the Court directed that the detention order was illegal and ordered the release of the detainee. He was not released rather a fresh detention order was passed against him under section 3 of the Special Powers Act, 1974[54]. The same drama was repeated several times and ultimately his detention came up before a Division Bench of the High Court Division.

Judgment: The Court ordered the detaining authority to pay regard to the order of the Court It decided that the detention was illegal and the detainee should be set at liberty forthwith. And this time the order war complied with by the detaining authority.

18.2 Bilkis Akter Hossain v. Government[55]

Facts of the Case: Dr. Khandakar Musharraf Hossain was arrested on the ground of delivering provocative speech.

Judgment: The court held that the detention was illegal and also held that there was a non-application of mind in giving the detention order. And in this case along with three other similar petitions, detention of four political leaders was held mala fide, and illegal. For the first time, the court awarded compensation of one lakh taka to each detenues.

[53] 32 Farzana Haq vs Government of Bangladesh
[54] section 3 of the Special Powers Act, 1974
[55] Bilkis Akter Hossain v. Government

18.3.Abdul Latif Mirza v. Bangladesh[56]

Facts of the case: Abdul Latif Mirza was detained under the SPA 1974 on the ground of vehemently criticizing the fundamental principles of the government and also allegation was made that he is trying to over through the government through violent means.

Judgment: The Court held that the grounds on which the person is detained are vague and hence bad. The ground that he addressed public meetings criticizing fundamental principles of the government is not clear. Also the court denied that it amounts to a prejudicial act under the meaning of the Special Powers Act 1974.

18.4. Habiba Mahmud v. Bangladesh and Others[57]

Facts of the case:The appellant's husband, Kazi Mohamood Hossain, was arrested on August 20, 1991 in pursuance of an order of detention date August 18, 1991 under section (3) (1) (a) of the Special Powers Act, 1974.In the grounds of detention it is stated that the detenu had been engaged in various anti-social and lawful activities, and for that there was resentment and hatred against him in the minds of the public. The detenu was previously detained twice from April 1982 to April, 1983 and from November 1984 to March 1985. In November 1988 another order for his detention was passes, but the detenu evaded arrest by going over to India. For his oppressive and terrorist activities the detenu was suspended form the post of chairman of kotwali para upozila. So that nobody dares raise any objection against him, the detenu organized an armed illegal bahini known as the Special Army and that bahini is still existing.

Judgment: In view of the above, I hold that the detenu Kazi Mahmood Hossain Montoo Kazi is being detained without lawful authority. The judgment and order of the High Court Division is set aside. The appeal is allowed, but without any order as to costs. The detenu be released forthwith, if not wanted in connection with any other case.

[56]Abdul Latif Mirza v. Bangladesh
[57] Habiba Mahmud v. Bangladesh and Others

Chapter -8

Concluding Remarks

Conclusion:

We have been observed that the constitution of Bangladesh has included all the basic attributes of fundamental rights. But practically sometimes the government is compelled to violate the fundamental rights of the people in Bangladesh due to some unavoidable circumstances. The ruling class should be truly respectful to the fundamental rights of the people. There should not be any international barrier Created by government for political interest and to oppress the opposite. It is the responsibility of the government to limit the events to violate the fundamental rights of the people. In addition, try their best respond these rights in some very rare cases, where there is no other alternative. Which is truly done for the sake of the country's overall benefit with no purpose of self-interest of the ruling party, some more restriction and controlling can be developed in the constitution of our country to regulate and prevent the indiscriminate and whimsical violation of the rights by the ruling power furthermore, the consciousness rights. Therefore, the ruling class for their self-interest can't violate their rights.

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