Chapter-One: Introduction

1.1 Introduction

There are three organ of the State 1) Legislative 2) Executive 3) Judiciary. Judiciary is one organ of the State. But in Bangladesh we can see that judiciary is not independent literally practically. Our Judicial Enforceability is very poor in Bangladesh but we can see that our executive organ is will. Which mean the legislature and Executive are great in performing their duties and the judiciary is not. This kind of attitude is a great threat to the Judiciary. In many cases the Magistrates got call from the various Ministry of Bangladesh to do some favor which is not right at all. For that reason many judges and Magistrates do what they want. The promotion list of the Judges and Magistrate prepared by the law Ministry and they send to the Supreme Court for approval. The person who is loyal to the Government got promotion in most of the cases and the rest deprived from the promotion. By the 16th amendment of the Constitution of Bangladesh the parliament takes the removal power of the Judges in their hand. This is a real threat to the judicial system of Bangladesh.

Research Question

How can the A Critical Analysis of Judicial Enforceability of the Constitutional Right in Bangladesh?

1.2 Objective of the Thesis

As the subject matter of the thesis is Judicial Enforceability in Bangladesh, it is necessary to understand how can the Judicial Enforceability effective in Bangladesh. In order to know about the independence of judiciary it is evident to understand how the separation of can power has been insured separation of power has been insured in Bangladesh. Now it is needed to realize their mechanism by which they dominate the judiciary.

1.3 Literature Review

Md. Awal stated that independence of judiciary is highly dependent on the separation of power without the separation of power the independence of judiciary cannot be ensured.[1] Execution organ always keep presume upon the judiciary and try to bound them to do what they want. Now the separation of judiciary has been ensured in Bangladesh.[2]I agree with the view of the author and the author does not prescribe the present situation. How the judiciary independence is how in danger even after the separation the author does not pay enough attention regarding the matter.

For the independence of judiciary, the separation of judiciary is the prerequisite. Since British colonial rule the separation of judiciary has been a continuing debate. Independence of judiciary has not been property ensured because of political will lack of strong civil society. Executive dominative mind is over the judiciary, corrupted law makers.[3]

The author mentioned the reasons for which the judiciary is not capable to perform their duties properly. In his articles he can also add that how the court is being pressurized by giving threat of transfer by the executive.

Shariful Islam analyzed that Judiciary separation comes into force from 1st November, 2007.[4] But it is not separation in the true sense because our judiciary is still dependent on the executive.[5] Judges are still appointed by the executive. On the other hand, government gives executive magistrates some judicial power which makes conflict with the spirit of separation of judiciary from executive. The magistracy also needs to be brought under a separate secretariat under Supreme Court but it is not possible to make. Judiciary has been brought under the ministry of Law (MOL).[6]

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[1] Md Awal Hossain Mollah, 'Independence of judiciary in Bangladesh: an overview'(2012)54(1) *International Journal of Law and Management* 61-77.
[2]Ibid.
[3]Moniruz Zaman, *Independence of Judiciary in Bangladesh* (4th October, 2012) https://moniruzzamanjuror.Wordpress.com/2012/10/04/independence-of-judiciary-in-Bangladesh/ (last accessed on 15th May 2017).
[4]Mohammad Shafiqul Islam ,Nashir Uddin and Chowdhury Abdullah Al-Hossienie, 'The Independence of Judiciary in Bangladesh; A new Milestone and its challenges'(2008) 17 *Bangladesh Journal of Public Administration*,38.
[5] Ibid.
[6]Ibid.

1.4 Analytical framework

This Research there is two criteria which are as follows:

(a)The Separation of Power:

From the independent of judiciary, the separation of power is prerequisite. Article-22 of the constitution stated that the judiciary shall be separated from the executive. After the decisions of the Masdar Hossain Case, the judiciary was separated from the executive but there are some reasons for which the judiciary cannot functions their duty independently even after the separation. For this, I have chosen this criteria to analysis my thesis properly.

(b) The role of the Constitution:

Article 94(4) of the constitution that the chief justice and the other judges shall independent in the exercise of their judicial functions subject to the provisions of this constitution. From article-94 of the constitution we can see that the president appoints the chief justice and president is the head of the state which basically hold the office as the ruling party want him to do the task. In Bangladesh practice that president is selected from the party who holds the majority seat in the parliament while article-98 stated that the president may appoint one or more duly qualified persons to be additional judges of that division for such period not exceeding two years. Again from Article-116A of our constitution, we know that all persons employ in the judicial service and all magistrates shall be independent in our exercise of their judicial functions subject to the provisions of the constitution. For this, I have chosen this criteria to analysis my thesis properly.

1.5 Structure of the thesis

Chapter two introduces the general concepts which are the main part of this thesis. This chapter discusses the meaning and Independence of Judiciary. Independence of Judiciary also highlights the Substantive independence, Personal Independence, Collective Independence and Internal Independence. This chapter analysis the Individual Independence and the analysis of Importance of Judicial Enforceability and finally conclusion.

Chapter three provides the Historical background of Judiciary in Bangladesh. This chapter identifies the history and discusses the concept of judicial system. This chapter also highlights the judicial system in British period and Pakistan period, Bangladesh period and Current Judicial system in Bangladesh and finally conclusion.

Chapter four discuss the Appointment of Judges in the Judiciary in Bangladesh, the issues relating to the Appointment of Judges in the Supreme Court and Subordinate Court. Discusses the issues relating to Appointment Process of Judges. Additionally it also discusses the Masder Hossain case which is considered a comer stone of Judicial Enforceability and conclusion.

Chapter five finally presents a general conclusion to the thesis based on the Summaries of finding and recommendations in each chapter. It provides a synopsis of the background including the strengths and weakness of the Judiciary in Bangladesh and the specific problem addressed in the thesis. It also summaries the main arguments of the thesis and recommends ways of preserving and building on the values of Judicial Enforceability. The main theme of conclusion is to give opinion whether the judiciary is truly independent in practice.

1.6 Limitation of the Research

This study covers how the Judicial Enforceability can be more effective in Bangladesh. Due to the lack of time many things left behind. I was not able to do the field work.

Chapter Two

Judicial Enforceability

2.1 Meaning of Judicial Enforceability

One of the three organs of the government is Judiciary.[7] The judiciary of a country comprises all courts and tribunals which interpret law, settle legal disputes, enforce rights of the citizens and impose penalty to the offenders.[8]

Sarkar Ali Akkas says that, "Generally, Judicial Enforceability means the freedom of judges to exercise judicial powers without any interference or influence. The most central and traditional meaning of Judicial Enforceability is the collective and individual independence of judges from the political branches of the government, particularly from the executive government."[9]

2.2 Elements of the Judicial Enforceability

The concept of Judicial Enforceability has two important elements:

2.2.1 The Individual Independence of Judges;[10]

2.2.2 The Collective Independence of the Judiciary.[11]

2.2.1 The Individual Independence of Judges

'Individual Independence of judges means that a judge is free to exercise judicial functions without any fear or anticipation of retaliation. It requires that a judge should

[7] Md Abdul Halim, *A Comparative Study of Problems of Constitutionalism in Bangladesh*(5th edition 2012)339.
[8] Ibid.
[9] Sarkar Ali Akkas, *Independence and Accountability of Judiciary ,A Critical Review*,(1st edition 2004)19.
[10] Ibid.
[11] Ibid.

decide cases in accordance with an impartial and without any direct or in direct improper influence or interference from any source or for any reason.'[12]

In fact, the first essential for an independent judiciary is that the individual judges should enjoy complete freedom in discharging his or her judicial functions and other official duties. The complete freedom of an individual judge has three elements; a) Personal independence, b) Substantive independence and, c) Internal independence.[13]

a) Personal Independence

Personal independence signifies that the tenure of judges and the terms and conditions of their service are adequately secured, so as to ensure that individual judges are not subject to executive control.[14]

b) Substantive Independence

Substantive independence, which is also referred to as functional or decisional independence, means that in the discharge of their judicial functions and other official duties, judges are subject to nothing but the law and their conscience.[15]

c) Internal independence

Internal independence means the independence of a judge from his or her fellow judges. The independence of individual judges may be undermined not only by the outside sources of interference or influence but also by fellow judges particularly by senior judges using their administrative power and control.[16] In this regard, the *Montreal declaration* 1983 provides:

In the decision- making process, judges shall be independent vis-a-vis their judicial colleagues and superiors. Any hierarchical organization of the judiciary and any difference in grade or rank shall in no way interfere with the right of the judges to pronounce his or her judgment freely.[17]

2.2.2 Collective Independence of the Judiciary

Collective independence means the institutional, administrative and financial independence of the judiciary as a whole vis-a-vis other branches of the government

[12]Supra note-9.
[13] Ibid.
[14] Ibid.
[15] Ibid.
[16] Ibid.
[17] *Montreal Declaration* 1983,Art 2.03.

namely the executive and legislative.[18]Collective or institution independence is associated with Court administration, which includes assignment of case, control over administrative personnel, maintenance of court buildings and preparation of judicial budgets and allocation of resources.[19] The Montreal Declaration 1983 and the Beijing Statement 1995 emphasize that the main responsibility for court administration should be vested in the Judiciary.[20]

In fact the principal of collective Judicial Enforceability requires that in different aspect of court administration, the involvement and control of the executive or legislature should be removed[21].

2.3 Importance of Judicial Enforceability

Judicial Enforceability has an important value in any democratic system of government . As Larkin says an independent judiciary is the essential –indeed indispensable – component of a free and democratic society[22]. In every society, the judiciary is primarily entrusted with the functions to resolve disputes between citizens or between citizens and the government. In performing these functions judiciary needs to be independent from the executive, the legislature or any other sources of influence or interference. Judicial Enforceability is also an important issue of public discussion at the national level around the world. The question which needs to be asked is why is judicial independent so important? A modern state is governed by three branches of government, the executive, the judiciary, and the legislature and each organ has some special responsibilities. Among the three branches of the government the judiciary is considered the weakest branch[23]. In fact, the power of the judiciary is limited only to pronouncing judgment; it has no additional power to enforce its decisions. The enforcement of judicial decisions is the functions of the executive and therefore the power of the executive is ultimately dependent on the executive government. Despite this weakness, the judiciary being an essential organ of government critically contributes to maintaining the peace and order of a society by resolving legal disputes.

[18] Md Abdul Halim, *A Comparative Study of Problem of Constitutionalism in Bangladesh* (5th edition 2012)340.
[19] *Montreal Declaration* 1983,Art 2.40;*Beijing Statement* 1995,Art 36.
[20] Ibid.
[21] *Montreal Declaration* 1983, Art 2.42.
[22]Dilara Chowdhury, *Constitutional Development in Bangladesh*,(Dhaka:UPL,1995)345.
[23] Md. Jashim Ali Chowdhury, *The Constitutional Law of Bangladesh* (NUB,1st edition 2010)449

The anterior discussion gives a very clear definition of Judicial Enforceability. Though the meaning is very clear in theoretical term, but we have a doubt that how far the meaning is practically applied. An independent judiciary, by impartial application of the law, can ensure the fair administration of justice which is very significant to maintain public confidence in the judiciary. for the existence of the judiciary as an institution it needs public support that can be sustained by public confidence in the administrative of justice.

Chapter Three

The Constitutional Provision on Fundamental Rights

3.1. Fundamental Rights

Rights and freedoms form 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 forms the government. But even a democratic government coming into power may turn itself into a dictatorial 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 other words, they provide a restraint on the power of the government so that it cannot interfere with the peoples' basic rights according to its whims. When rights and freedoms are placed in the Constitution they become the part of the supreme law and the government cannot take them away except by constitution amending process which is always a rigid one. This is why insertion of a Bill of Rights in a written Constitution is considered so be one of the safeguards of democracy.

There the protection of rights and freedoms rests not on constitutional guarantees but on supremacy of law, i.e. the rule of law, public opinion and strong common law traditions. These conditions do not prevail in other countries which are composed of diverse elements, having no deep-rooted traditions of individual liberty. Secondly, almost all the modern countries emerging from the bondage of colonialism had a painful experience of denial of people's right. They, therefore, felt that mere custom or tradition alone cannot provide to some basic rights the same protection as their importance deserves. The unique English tradition, as *Bowie* says, is not simply exportable and other nations have generally felt that their governments teed the constant reminder which a bill' of rights provides, while their people need the reassurance which ii can supply.

The basic rights to free speech and protection of self and property are to be considered unalienable by any person or government. This means people are given these rights

not from government, but from nature. As such government cannot infringe upon one's fundamental rights without enslaving those they wish to control.

The Supreme Court of the United States has generally determined whether rights are to be considered fundamental by examining the historical foundations of those rights, and determining whether their protection was part of a longstanding tradition. Other rights may be guaranteed as fundamental by individual states.[24]

Some rights generally recognized as fundamental rights:

- Right to freedom of movement within the country
- Right to property
- Right to freedom of association
- Right to freedom of speech
- Right to equal protection under the law
- Right to freedom of thought
- Right to vote in general election.
- Right to privacy

The object of enumeration of fundamental rights in a constitution is not to make them unalterable in any way but main object is that they cannot be taken away by ordinary process of law making. They are placed beyond the reach of the executive and the legislative to act in violation of them, the object of the incorporation of fundamental rights in the US Constitution was pointed out by, Justice Jackson-"The very purpose of a Bill of Rights is to withdraw certain subjects-

Irons the vicissitudes of political controversy, to place them beyond the reach or majorities and officials and to establish them as legal principles to be applied by the coons. One's fundamental rights may not be submitted to vote. They depend on the outcome of no elections.[25]

The declaration of the fundamental rights of the citizens are inalienable rights of the people The Constitution enables an individual to oppose successfully the whole community and the state to claim his right.

24 Please visit:http.//209.85.229.132/search?q=cache:rbrq6tuvhSIJ:en.wikipedia.org/wiki/Fundamental_right+FundamentaI+Rights Last visited on: 10.11.2013.

25 *West Virginia State Board Education Vs. Barnette*

3.2 Human Rights

Human rights are those of legal and moral rights which can be claimed by any person for the very reason that he is a human being. These rights come with birth and are applicable to all people throughout the world irrespective of their race, colour, sex language or political or other opinion. The concept of human rights has got its formal and categorical shape from the Universal Declaration on Human Rights adopted by the UNO in 1948 where 25 human rights have got their place. These 25 rights are mostly referred to as human rights. Of these 25 rights 19 are civil and political rights and 6 are economic, social and cultural rights.

These are, therefore, those rights that are inherent in human person and without which they cannot live as human beings. "The human person possesses rights because of the very fact that it is a person, a whole, a master of itself and its acts and which consequently is not merely a means to an end but an end which must be treated as such these are things which are owed to man because of the very fact that he is man." It is also pertinent here to mention the comment of *Sridath Ramphal* as to human rights, "They have their origin in the fact of the human condition, and because they have, they are fundamental and inalienable. More specifically, they were born not of man but with man."

United States Declaration of Independence, 1776, The Virginia Declaration of Rights of 1776 encoded a number of fundamental rights "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."[26]

3.3. Fundamental Rights in the Constitution of Bangladesh

18 fundamental rights have been enumerated in the Constitution commencing from Article 26 to 44. All of these rights are civil and political rights. These 18 fundamental rights may be firstly divided into two groups:

26 Please visit:http://.org/wiki/Human_rights+human+rights&cd=1&hl=bn&ct=clnk&gl=bd&client=firefox-a, Last visited on: 25.10.2013.

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.

3.4 Imposition of Restriction over Fundamental Rights

The enjoyment of rights can nowhere be seen in an absolute position, for the enjoyment of one's right in the society is subject to the enjoyment of others right. Moreover, modern states are welfare states where collective interests are given priority over individual's rights or interests. Unrestricted individual liberty becomes a license and jeopardizes the liberty of others. "Civil liberties as guaranteed by the Constitution imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excess of unrestrained abuses".' if individuals are allowed to have absolute freedom of speech and action, the result would be chaos, ruin and anarchy. On the other hand, if state has absolute power to determine the extent of personal liberty, the result would be tyranny. So restrictions may be imposed on the enjoyment of fundamental rights for the greater purpose of public welfare. This idea has got recognition in article 29(2) of the Universal Declaration of Human Rights, 1948- "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society".

It is also worthy here to mention the judgment of *Justice Mukharjee* -"There cannot be any such thing as absolute or uncontrolled liberty wholly free from restraint; for that would lead to anarchy and disorder. The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, general order and morals of the community."[27]

27 *Gopalan V. Stale of Madra*, 1980 AC 458

In the line with this idea restriction has been imposed on some fundamental rights under the Bangladesh constitution. On the basis of this restriction all fundamental rights enumerated in the Bangladesh Constitution may be classified into following three groups:

a) **Absolute Rights:**

Sonic rights have been kept in an unfettered form in the sense that parliament cannot, except as provided in the Constitution, impose any restriction over them. They are following:

1. Equality before law (Art. 27);
2. Discrimination on grounds of religion etc. (Art. 28);
3. Equality of opportunity in public employment (Art. 29);
4. Prohibition of foreign titles etc. (Art, 30);
5. Safeguards as to arrest and detention (Art. 33);
6. Prohibition of forced labor (Art. 34);
7. Protection in respect of trial and punishment (Art. 35);
8. Enforcement of fundamental rights (Art. 44).

b) Rights on which reasonable restriction can be imposed:

They are following:

1. Freedom of movement (Art. 36);
2. Freedom of Assembly (Art. 7);
3. Freedom of Association (Art. 38);
4. Freedom of thought and conscience and of speech (Art. 39);
5. Freedom of religion (Art. 40);
6. Protection of home and correspondence (Art. 43);

The grounds for imposing restriction on these rights have been laid down by the respective sections—

1. in the public interest (Art. 36);
2. in the interest of public order or public health (Art. 37);
3. in the interest of public order or morality (Art. 38);

4. in the interest of the security of the state, friendly relation with foreign state, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence (Art. 39);
5. in the interest of the public order and morality (Art. 41);
6. in the interest of the security of the state, public order, public morality or public health. (Art.43).

Above mentioned fundamental rights parliament can by law impose only reasonable restriction as mentioned in the respective articles. The reasonability of the law can be examined by the Supreme Court and if the restriction seems to be unreasonable the court can declare the law illegal. It was held "Legislation which, arbitrarily invades the right cannot be said to contain the quality of reasonableness The determination by the legislature of what constitute a reasonable restriction is not final or contusive it is subject to supervision of courts.[28]

The concept of public interest, morality, public order, security of the state, public health etc. all are collective interests. The maintenance of social order and peace depends principally on safe enjoyment of these collective interests which would remain unprotected leading to a realm of anarchy had there been no provision to impose reasonable restriction on individual's liberty.

c) Fundamental rights which have been practically left to the legislature:

There are some rights on which parliament can by law impose any restriction it pleases. They are following:

1. Right to protection of law (Art. 31).
2. Protection of right to life and personal liberty (Art. 32)
3. Right to lawful profession, occupation or business (Art. 40)
4. Protection of property right (Art.42)

It has been detailed in the Constitution that the enjoyment of these rights shall be 'in accordance with law', 'except in accordance with law', 'subject to any restriction imposed by law', etc.

28 *Chintamoni Rao V. Srate of Modhya Pradesh'* AIR 1951 Sc 118

Therefore the parliament can impose any restriction over these four rights. And the court cannot examine the reasonability of the restriction; it can see only the following two things:

i) if the law imposing restriction is a valid one;

ii) if the right has been infringed Or abridged in accordance with the law.

For example, it was the law that a person could not possess more than 300 big has of land. Then a change was made in the law that one could not possess more than 100 big has of land and the present law provides that one cannot possess more than 60 big has of land. Even in near future parliament may make law that one will possess not more than 30 big has. If the penalty for a particular offence is life imprisonment, the parliament can, by law, substitute it for death sentence, and the court cannot declare the law illegal howsoever unreasonable it is.

Finally**,** in the constitution of Bangladesh give the protection for fundamental rights of the citizens. But in most of the time this provisions are violated by the different political parties, by their leaders. It is shame for the people for Bangladesh. It was noted that in 2001 to 2003 in three times Bangladesh was top listed for the corruption. It was also affects to our citizen's rights.

Here the caretaker government also corrupted by their activities. Here the corrupted persons were the army man who comes from the cantonment. And violate the provisions of the constitution. Then our people what can they do?

3.5 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 cannot 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 economic freedom by appropriate state action.

Chapter Four

Situation of Fundamental Rights during State of Emergency in Bangladesh

4.1 Fundamental Rights during Emergency

Under Article 141A of the constitution of the people's republic of Bangladesh, if the president declare a state of emergency to tackle an unexpected occurrence, he can suspend the provisions of certain Articles (Under Articles 141B) and the enforcement of Fundamental rights (Under Article 141C) as contained in the constitution. The term 'suspension of Fundamental rights' means that the enjoyment of those certain fundamental rights are remained restricted during emergency period. No citizen of the country can demand to get the benefit of that right until the proclamation of emergency is revoked by a subsequent proclamation. So the proclamation of emergency bear with it two effects:-

- Suspension of provisions of certain Articles during emergencies
- Suspension of enforcement of fundamental rights during emergency

4.1.1 Suspension of Provisions of Certain Articles during Emergencies

As the constitution leaves the power to declare a proclamation of emergency to the president, if he declares so, certain Articles of the Constitution of Bangladesh will be suspended automatically. And this suspension will continue till the proclamation of emergency is in force. In this regard, Article 141 B of the constitution says 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 the constitution, be competent to make or to take, but any law so made shall, to the extent of the incompetence, 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".

4.1.2 Suspension of enforcement of fundamental rights during emergency

As soon as emergency is declared, the president in consultation of prime minister by order can declare the suspension of enforcement of any of the fundamental rights

conferred by part III of the constitution. In this regard Article 141C of the constitution says that-

> a) While a Proclamation of Emergency is in operation, the president may,[29] on the written advice of the prime minister, by order, declare that the right to move any court for the enforcement of such of the rights conferred by Part III of the constitution as may be specified in the order, and all proceedings pending in any court for the enforcement of the right so specified, shall remain suspended for the period during which the proclamation is in force or for such shorter period as may be specified in the order,
>
> b) An order made under this article may extend to the whole of Bangladesh or any part thereof,
>
> c) Every order made under this article shall, as soon as may be, be laid before the parliament."

Thus Articles 44 of the constitution which deals with the enforcement of fundamental rights is suspended. So if any person's rights are violated by any of those articles, (Article 141B and 141C) he, on an application to the high count Division, gets no remedy under Article 102 (I) of the constitution. It the case of *Kripa Shindu Hazrav V The state,*[30] *C J Badrul Haider chowdhury* says that-

"During emergency when the fundamental rights are suspended and the right to move any court for the enforcement of the same has been taken away, neither article 102 of the constitution nor section 491 of the CrPC is available to seek the enforcement of these rights."

As soon as, proclamation of emergency is withdrawn, all the constitution rights which are suspended during emergency situation get their full constitutional status.

- Writ jurisdiction of High Court Division during emergency period:

Can the High Court Division (HCD) exercise its Writ Jurisdiction Under Article 102 of the Constitution of the People's Republic of Bangladesh when a Proclamation of

29 Substituted for the word 'by order' by the Constitution (twelfth amendment) Act,1991(Act XXVIIIof 1991),section 18.

30 1978 ,30 DLR 103 ,114.

Emergency is in force, may be the main question to everyone who wants to know when the President declare state of emergency under Article 141A of the Constitution. Under Article 102 of the Constitution the High Court Division (HCD) of the Supreme Court (SC) of Bangladesh exercises its power of judicial review by issuing writs in the nature of prohibition, mandamus (do it), certiorari (lack or excess of jurisdiction) and quo-warranto, against the concerned public functionaries and a writ of habeas corpus have the corps (body) before us (court) against anyone, including a private individual, if there is a violation of any relevant provision of this Article.

Being a Constitutional enforcement it cannot be taken away or curtailed by ordinary legislation,[31] or even by amendment of the Constitution[32]. The jurisdiction of the Court under this Article is known as Special Original Jurisdiction or writ jurisdiction. The Rule Nisi, which may be issued under this Article, requires the respondent to explain that his action was not unlawful and an interim order in the form of 'stay' or a direction also may be granted under this Article. This interim order would usually be for a certain period or until the adjudication of the matter.

The Court, usually, will not entertain any writ application on a premature grievance; however, an application can be brought when there is an apprehension of immediate danger to legal right.[33]

- Article102:

Under clause 1 of Article 102 the HCD may issue directive or order against 'any person or authority including any person performing any function in connection with the affairs of the Republic' for the enforcement of the fundamental rights guaranteed in Part III of the Constitution. Right to move HCD under Article 102(1) is itself a fundamental right [Article 44(1)]. Although writ jurisdiction is an equitable jurisdiction; however, power of the HCD under clause 1 is not a discretionary power rather it is obligatory for the Court to grant necessary relief to the aggrieved person.

31 22 DLR SC 203.

32 1989 BPD (Spl) 1

33 22 DLR SC 437.

Clause 2 deals with the rights, which are not fundamental in nature as mentioned in Part III of the Constitution. If the High Court Division is 'satisfied that no other equally efficacious remedy is provided by law' on an application by the 'person aggrieved', under clause 2(a) (i) of the Article the Court may prohibit 'a person performing any function in connection with the affairs of the Republic or of a local authority' from taking any illegal steps (writ of prohibition) or coerce to do something which is 'required by law to do' (writ of mandamus). Writ of prohibition stops the executives from taking any steps beyond the mandate they were given (negative sense) whereas writ of mandamus orders the executives to do something what they were required to carry out (positive sense).

Likewise, regarding clause 2(a)(i) (stated above), if there is 'no other equally efficacious remedy' and, once again, only on an application by the aggrieved person, under clause 2(a)(ii) of the Article the High Court Division may declare that the 'act done or 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' by issuing a writ in the nature of certiorari.

A writ of certiorari restrains the public functionaries within their jurisdiction. Proceedings are ultra vires (illegal) which was conducted without complying with the statutory procedure, when the principles of natural justices (i.e. a man cannot be condemned unheard (audi alterram partem) and a man cannot be the judge of his own cause (nemo debet esse judex in propria causa)[34] or the principle of legitimate expectation was breached.

Clause 2(b)(i) of the Article invests the High Court Division, 'on an application by any person', to issue a writ of habeas corpus, to bring someone (detained unlawfully) before the court. A writ of habeas corpus can be issued against anyone including a private individual. Clause 2(b)(ii) of Article 102 sanctions the High Court Division a jurisdiction to issue a writ, in the nature of quo warranto, to inquire under what authority a person is 'holding or purporting to hold a public office'.

34 *R V. BSMS Magistrate* ,1ALL E.R.577.

Thus a Proclamation of Emergency may hit only Article 102(1); however, force of all the provisions of the Article 102(2) would remain intact always. Unless it is enacted otherwise nothing, including the fundamental rights even, is suspended automatically during a Proclamation of Emergency. And force of Article 102 is always there although may be restricted by some kind of law regarding one or more of the fundamental rights. Use of words 'as may be specified' and 'the rights so specified' in Article 141C(1) further suggest that whatever the restriction the President may impose during a Proclamation of Emergency must be specifically specified in the Order. Article 141C (2) allows the President to make law for the entire country or part of the country means nothing is automatic it must be specifically stated. Had it been automatic and for the entire Part III there was no need for the Article 141C (2). A general order suspending the entire Part III of the Constitution would also suspend force of Article 102(1)-the power of High Court Division to issue certain orders or directions to enforce fundamental rights.

4.2 Briefly discussion Article basis starting from Fundamental rights in Bangladesh Constitution:

- Protection of Right to Life and Personal Liberty

No personal shall be derived of life on personal liberty saved in accordance with law.

- 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.[8] In our jurisdiction, the case of Anwar Hossain v. Bangladesh, popularly known as the constitution (Eight Amendment) case has also expressed the same view.

- 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 art, 31, as an important segment of liberty, the frames of the constitution made special provision to protect the freedom of movement of citizens,

Art.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.

- Freedom of assembly

Under Article 37 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 health.

- Freedom of association:

Under Article 38 The very existence of democracy is dependent on the right to form associations, without the right there cannot 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.

- Freedom of thought and conscience, and of speech

Under Article-39(l) of the Constitution -Freedom of thought and conscience is guaranteed. And (2) 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-

(a) the right of every citizen of freedom of speech and expression; and

(b) freedom of the press, are guaranteed

In the time 2007 to 2008 there have no any right in relating to freedom of thought and conscience in Bangladesh. It this right specifically guaranteed by the constitution of Bangladesh. In that emergency period no person has the right to giving his own opinion in respect of any matter or right. And if any person says something he was in under the follow-up of the government. That's why in that time the people fall on a fear of arms forces arrest and also remand and detention.

For example in June- 2007 when Awami League President Sheik Hasina criticized the actives of the caretaker government for arrest and detention, but after some days she

was arrested by the police and overthrown to the jail. And she was in jail without any conviction for a long term. The fundamental right of freedom of expression has been severely curtailed since the imposition of the State of Emergency on 11 January 2007. People do not have free access to information as journalists continue facing negative pressure for publishing factual reports, contravening recognized rights of press under national and international laws .

- 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.

- 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.

- Rights to property

(1)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, nationalized or requisitioned save by authority of law. A law made under clause (1) shall provide for the acquisition, nationalization or requisition with compensation and shall either fix the amount of compensation or

(2)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 in respect of such compensation is not adequate. Nothing in this article shall affect the operation of any law made before the commencement of the Proclamations (Amendment) Order, 1977 (Proclamations Order No. I of 1977), in so far as it relates to the acquisition, nationalization or acquisition of any property without compensation.

- 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. 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.

As the Article 141B empowered the executive to take any action, they utilize their power in taking action even in violating the fundamental right as contained in the constitution and without out showing any humanity to the citizens of the country. The emergency Government mostly take any action to oppress the opposite party and to control the anti-government movement.

At the same time the parliament can make any law which is inconsistent with the Fundamental right as contained in part III of the constitution thus the Article 26 which limits the state power to make any law inconsistent with fundamental rights is violated. The parliament makes such law only to enable their government to perpetuate the rule and to protest the opposite party.

The power of the Executive and parliament given by Article 141B will continue until the proclamation of emergency cease to operate.

Chapter Five

Conclusion

This thesis presents an evaluation of the existing conditions of Judicial Enforceability in Bangladesh. The concepts of Judicial Enforceability involve numerous aspects including the appointment, posting, promotion and transfer of judges, tenure and other terms and conditions of judicial service, discipline and other forms of informal secreting of judges.

The foregoing discussion makes it clear that there are so many obstacles or problems behind the making of judicial body independent in practice. The appointment procedure, the rules of administering judicial body are very complicated. In spite of having honesty sometimes it is seen that judges cannot act impartially in practice because of political or other influence or intervention. In 2001 before the Awami League Government ended its term, it appointed some additional Judges in the High Court Division on two occasions. In the first instance in February 2001 the government appointed 9 Additional High Court Judges under Article 98 of the Constitution. After two years in February 2003 the confirmation of these appointments as regular judges came to be considered by the BNP led coalition government. However, the government did not confirm the services of 7 additional judges out of 9. It is alleged that the Chief Justice recommended for confirmation in favour of at least 5 of them, but the government ignored the suggestions breaking the constitutional convention. In the second instance in July 1, 2001 the Awami League Government appointed 9 Additional High Court Judges. On July 2, 2003 the BNP Government did not confirm the services of 4 of these 9 additional judges. It is contended that the Chief Justice had recommended in favor of all of them[35]. It is to be mentioned that following the non-confirmation of 7 judges out of 9 additional judges in February 2003 three Writ Petitions were moved to the High Court Division; a rule issued on May 05, 2003 on the Government asking it to explain why non-appointment of additional judges should not be declared illegal. The Appellate Division has,

[35]Haider Badrul Chowdhury , *Evaluation of the Supreme Court of Bangladesh,(*1990),Vol. IV, *Dhaka University Law Journal* 175.

however, stayed the proceedings of three writs till September 2003 following a Government petition[36].

We know in a democratic country the sovereign power vests on the hands of the people. So when we talk about the personal or individual independence of the judges, we also ensure the vested responsibilities towards the litigants or the country or the countries people that the judges should need to do from his personal way. If a judge is able to ensure his or her personal responsibility in performing his or her official duty then we may expect impartial judgment also; though state should ensure the environment to act the judges impartially in practice.

[36] Supra note-118.

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