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RESEARCH MONOGRAPH

ON

A Critical Analysis of Judicial Enforceability of The Constitutional Rights in Bangladesh.

SUPERVISED TO

Md. Sagor Hossain
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SUBMITTED BY

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LETTER OF TRANSMITTAL

To
Md. Sagor Hossain
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Subject: A Critical Analysis of Judicial Enforceability of the Constitutional Rights in Bangladesh.

Dear Sir,

It is a great pleasure to submit my research on "Extra Judicial Killings is the Violation of the Constitutional Mandate and other International Instruments: Bangladesh Perspective". I have given best efforts to finish the research with relevant information that I have collected from various sources. I have concentrated my efforts to achieve the objectives the objectives of the work and hope that my endeavor will serve the purpose. I shall be grateful and obliged if you kindly accept my research and evaluate it.

Sincerely yours,

.....

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STUDENT'S DECLARATION

I hereby do solemnly declare that the work presented in this research has been carried out by me and has not been previously submitted to any other institution. The work I have presented does not breach any copyright. I further undertake to indemnify the university against any loss or damage arising from breach of the forgoing obligations.

.....

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SUPERVISOR'S CERTIFICATION

This is to certify that the research on Judicial Enforceability of the Constitutional Rights in Bangladesh is done by **Akash Das Topu ,** LL.B (Hon's), Roll. No. LL.B 1902017029,

Department of Law, Sonargaon University (SU).

The dissertation has been carried out under my guidance and is a record of the benefited work carried out successfully.

.....

Md. Sagor Hossain.

Lecturer

Department of Law

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Md. Sagor Hossain, Lecturer , Department of Law, Sonargaon University (SU) for giving me the opportunity to complete my research report under his supervision. He gave me his valuable time and important information to complete the research report. As without his proper guidance it was quite impossible for me to complete the research.

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ABSTRACT

The judicial enforceability of constitutional rights is pivotal in ensuring the protection and realization of fundamental liberties within a democratic society. This thesis critically examines the judicial enforceability of constitutional rights in Bangladesh, focusing on the role of the judiciary in upholding and safeguarding these rights. Bangladesh's Constitution guarantees an extensive range of rights, encompassing civil, political, social, and economic dimensions, which are essential for fostering a just and inclusive society.

Through an in-depth analysis of relevant case law, scholarly literature, and comparative perspectives, this study investigates the challenges, accomplishments, and potential avenues for reform in the judicial enforceability of constitutional rights in Bangladesh. It explores the approaches adopted by the Bangladeshi judiciary in interpreting and applying constitutional provisions pertaining to human rights, highlights landmark cases and legal developments, and assesses the impact of judicial activism on the protection and enforcement of constitutional rights.

The findings reveal that the judiciary in Bangladesh has played a crucial role in upholding constitutional rights, demonstrating a degree of activism in striking down unconstitutional laws, ensuring government accountability, and safeguarding political and civil liberties. However, challenges persist, including institutional constraints, case backlogs, limited access to justice for marginalized communities, and the need for continued judicial reforms to strengthen the effectiveness and efficiency of the justice system.

To address these challenges and enhance the judicial enforceability of constitutional rights, this thesis proposes a set of comprehensive recommendations. These include measures to strengthen judicial independence, expedite justice delivery, promote alternative dispute resolution mechanisms, enhance legal aid programs, and foster collaboration among the judiciary, legal professionals, civil society organizations, and government agencies. Additionally, the importance of public awareness campaigns, legal education, and the alignment of domestic laws with international human rights standards are emphasized.

By implementing these recommendations, Bangladesh can further strengthen the judicial enforceability of constitutional rights, thereby promoting social justice, equality, and the rule of law. This study contributes to the scholarly discourse on constitutional law, human rights, and judicial activism, providing valuable insights for policymakers, legal practitioners, and advocates seeking to advance the protection and enforcement of constitutional rights in Bangladesh

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Introduction:

The effective protection and enforcement of constitutional rights are fundamental pillars of any democratic society. Constitutional rights serve as safeguards for individual liberties, ensuring equal treatment, justice, and the preservation of human dignity. In Bangladesh, the judiciary plays a pivotal role in upholding these rights, interpreting constitutional provisions, and ensuring their enforcement. This thesis delves into the judicial enforceability of constitutional rights in Bangladesh, examining the challenges, achievements, and potential reforms in this critical aspect of the country's legal landscape.

Bangladesh's Constitution, adopted in 1972, embodies a comprehensive framework for the protection and promotion of fundamental rights. It enshrines a wide range of rights, including civil, political, economic, social, and cultural rights, aiming to create a society that values and respects the inherent dignity of every individual. The Constitution's commitment to fundamental rights reflects the country's aspirations for justice, equality, and social progress.

The role of the judiciary in enforcing constitutional rights cannot be overstated. The judiciary acts as a guardian of the Constitution, responsible for interpreting its provisions, adjudicating disputes, and ensuring the protection of fundamental liberties. The judiciary's role in upholding constitutional rights is essential for maintaining the rule of law, safeguarding democratic principles, and providing an avenue for individuals to seek redress for violations of their rights.

This thesis aims to examine the judicial enforceability of constitutional rights in Bangladesh through an analysis of key cases, legal developments, and comparative perspectives. It seeks to explore the approaches taken by the Bangladeshi judiciary in interpreting and applying constitutional provisions related to human rights, the impact of judicial activism on the enforcement of constitutional rights, and the challenges faced in ensuring effective enforcement.

While Bangladesh's judiciary has made significant strides in upholding constitutional rights, challenges persist in the effective enforcement of these rights. Issues such as delays in the justice system, limited access to justice for marginalized groups, socio-economic barriers, and the need for further judicial and legal reforms pose obstacles to the full realization of constitutional rights. It is imperative to critically assess these challenges and propose recommendations to strengthen the judicial enforceability of constitutional rights in Bangladesh.

By undertaking a comprehensive examination of the judicial enforceability of constitutional rights in Bangladesh, this thesis seeks to contribute to the scholarly discourse on constitutional law, human rights, and the role of the judiciary in a democratic society. The findings and recommendations put forth in this study aim to inform policymakers, legal professionals, civil society organizations, and advocates working towards enhancing the protection and enforcement of constitutional rights in Bangladesh.

In the subsequent chapters of this thesis, we will delve into the theoretical and conceptual frameworks surrounding constitutional rights, analyze key judicial decisions, examine the role of the judiciary in enforcing these rights, identify challenges and gaps in the current system, and propose recommendations for enhancing the judicial enforceability of constitutional rights.

Through this comprehensive exploration, we aim to contribute to the ongoing discourse on the importance of constitutional rights and the role of the judiciary in upholding these rights in the context of Bangladesh.

Constitution of Bangladesh

The **Constitution of Bangladesh** (Bengali: বাংলাদেশের সংবিধান — *Bangladesher Sambidhāna*), officially the **Constitution of the People's Republic of Bangladesh** (Bengali: গণপ্রজাতন্ত্রী বাংলাদেশের সংবিধান — *Gaṇaprajātantrī Bangladesher Sambidhāna*) is the supreme law of Bangladesh. The document provides the framework that demarcates the Bangladeshi republic with a unitary, parliamentary democracy, that enshrines fundamental human rights and freedoms, an independent judiciary, democratic local government and a national bureaucracy.

The four fundamental principles of the Constitution
are nationalism, socialism, democracy and secularism. The Constitution endeavors to create a socialist society in which the rule of law, fundamental human
rights and freedom, equality and justice, political, economic and social, is secured for all its citizens. It commits Bangladesh to "contribute to international peace and co-operation in keeping with the progressive aspirations of mankind".

It invokes constitutional supremacy, as opposed to legislative supremacy since it was created by a constituent assembly not Parliament and was adopted by the people of Bangladesh in its preamble. Parliament cannot quash parts of the Constitution.

Judicial precedent is enshrined in Bangladesh's Constitution under Article 111, which makes Bangladesh an integral part of the common law world. Judicial review is also supported by the Constitution.

It was adopted by the Constituent Assembly of Bangladesh on 4 November 1972 and became effective on 16 December 1972. The Constitution replaced the Proclamation of Independence as the country's fundamental instrument of government. The Constitution became effective on Bangladesh's Victory Day, precisely one year after the signing of the Instrument of Surrender.[5] The constitution has been amended 17 times since its adoption, a two-thirds supermajority is required in the Jatiya Sangsad to secure a constitutional amendment.

Constitutional History

Bangladesh

The Provisional Government of Bangladesh issued the Proclamation of Independence on 10 April 1971, which served as the interim first Constitution of Bangladesh. It declared "equality, human dignity and social justice" as the fundamental principles of the republic. East Pakistani members of Pakistan's federal and provincial assemblies were transformed into members of the Constituent Assembly of Bangladesh. The constituent assembly had 404 members. After the war, the Constitution Drafting Committee was formed in 1972. The committee included 34 members with Dr. Kamal Hossain as its chairman. [1]

The Constitution Bill was introduced in the Assembly on 12 October. Its first reading began on 19 October and continued till 30 October. The second reading took place from 31 October to 3 November. Manabendra Narayan Larma made an impassioned appeal to declare the term of citizenship as "Bangladeshi" instead of "Bengali". Larma argued that labeling all citizens as Bengali discriminated against non-Bengali communities, including his own Chakma ethnic group.

The third reading began on 4 November and it approved 65 amendments to the Constitution Bill and adopted and enacted the Constitution on 4 November. The Constitution came into effect on 16 December 1972. A Westminster style political system was established. It declared nationalism, socialism, democracy and secularism as the fundamental principles of the republic. It proclaimed fundamental human rights, including freedom of speech, freedom of religion, freedom of movement, freedom of assembly, the right to education and public healthcare among others. A two thirds vote of parliament was required to amend the Constitution.

After winning the 1973 general election, the Awami League government often flouted Constitutional rules and principles. The government received strong criticism from the Bangladeshi press, including both Bengali and English newspapers. The Committee for Civil Liberties and Legal Aid was formed to defend the Constitution. The Awami League enacted three Constitutional amendments between 1973 and 1975. The most drastic amendment was in January 1975. It introduced a one party state and a presidential government, while the judiciary's independence was greatly curtailed.

Constitutional rule was suspended on 15 August 1975 with the assassination of President Sheikh Mujibur Rahman and the declaration of martial law. The Chief Martial Law Administrator issued a series of Proclamation Orders between 1975 and 1979 which amended the Constitution. Lieutenant General Ziaur Rahman is credited for many of these Proclamation Orders. The most significant of these orders was defining citizenship as Bangladeshi; other orders included the insertion of religious references and the controversial Indemnity Ordinance. In 1979, martial law was lifted, multiparty politics was restored and Constitutional rule was revived. The Fifth Amendment in 1979 validated all Proclamation Orders of the martial law authorities. An executive presidency continued until 1982.

Martial law was again imposed in the 1982 Bangladesh coup d'état. When Constitutional rule was restored in 1986, the Sixth Amendment validated previous Proclamation Orders issued by the Chief Martial Law Administrator. The Eighth Amendment in 1988 declared Islam as the state religion and initiated limited devolution of the judiciary.

[1] https://en.wikipedia.org/wiki/Constitution_of_Bangladesh?fbclid=IwAR210QibDFK5T75Az_NYvoQ43-Vb1pBufgOXwzU7W3AcUFVW-CRbXlPlSEI

In 1990, a pro-democracy uprising ousted President Ershad. The uprising was followed by parliamentary elections in 1991. The Twelfth Amendment passed by the fifth parliament is the most influential Constitutional amendment in Bangladesh. It re-established parliamentary government. It amended Articles 48, 55, 56, 57, 58, 59, 60, 70, 72, 109, 119, 124, 141A and 142.[8] The Prime Minister became the executive head of government, and along with the cabinet, was responsible to parliament. Local government was made more democratic. However, the amendment restricted the voting freedom of MPs. According to Article 70, MPs would lose their seat if they voted against their party. This made it impossible for parliament to have a free vote, including no-confidence motions to remove a prime minister. Experts have described the amendment as instituting prime ministerial dictatorship. The Thirteen Amendment in 1996 introduced the Caretaker government of Bangladesh.

In 2010, the Supreme Court of Bangladesh ruled that the Fifth Amendment of 1979 went against the Constitutional spirit of the country and hence invalidated its removal of clauses related to secularism. The Supreme Court gave the verdict in the case of *Bangladesh Italian Marble Works Ltd. v. Government of Bangladesh*. While implementing the supreme court's verdict in the Fifteenth Amendment in 2011, the Awami League-led parliament abolished the caretaker government system, which the party itself had advocated in 1996.

In 2017, the Supreme Court declared the Sixteenth Amendment Act of 2014 illegal and void. The amendment had introduced the provision of impeaching judges in parliament. The Supreme Court held that parliament cannot have conscience votes due to Article 70. [2]

FUNDAMENTAL RIGHTS IN THE CONSTITUTION OF BANGLADESH

FUNDAMENTAL RIGHTS

Before understanding fundamental rights one should have idea about rights and human rights. Right means a claim of some interests adversed by an individual or a group of individuals which has either moral or legal basis and which is essential for his development in the society. In a sense right is not created by law; it originates itself as an obvious result of mutual interaction between man and society.

Rights are primarily divided into two categories—moral rights and 1ega1 rights. Moral rights are those rights which have their basis on the rule of natural justice and the violation of which results in moral wrong. Legal rights, on the other hand, are those rights which are recognized by the

[2] https://en.wikipedia.org/wiki/Constitution_of_Bangladesh?fbclid=IwAR210QibDFK5T75Az_NYvoQ43-Vb1pBufgOXwzU7W3AcUFVW-CRbXlPlSEI

positive law of the country and can be claimed on legal basis and the violation of which results in legal wrong. As mentioned earlier right originates in the society and remains as a moral right so long it is not recognized by law. Whenever a law recognizes it and secures its protection, it transforms into a legal right. All legal rights in this sense are moral rights and the distinction between the two is one of degree rather than of form.

Human Right

The term "human right" which does not mean any right is used in a special sense. 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. These are, therefore, those rights that are inherent in human person and without which they cannot live as human beings.' Jaques Maritain says, "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 the have, they are fundamental and inalienable. More specifically, they were born not of ***man but with man."***

Human rights, therefore, have two inherent characteristics— universal inherence and inalienability. These two characteristics distinguish the concept of human right from other right. Universal inherence means that these rights are universally inherent in all human beings and anyone can claim these rights after his birth. Inalienability as an essential feature of human rights means that these rights cannot be taken away; they cannot be the object of sale or purchase or any kind of transfer. In this sense human rights are different from citizens' rights2 which are protected by the positive law of the state and the state can any time take away or abolish any citizen's right. But human rights are rights that existed before the state came into being and for this they are natural and inalienable rights.

It is noteworthy that if 'inalienability' is considered as an essential element of human rights, there is a danger and confusion. Because a perusal of all human rights will give the idea that this element does not apply to all human rights. For example, right to ***property which*** is recognized in Article 17 of both the French Declaration on Rights of Man and Citizen, 1789 and the Universal Declaration of Human Rights, 1948. But this right is undoubtedly an alienable right. Only one common characteristic, can, therefore, be found for human rights and that is 'universal inherence'. It is rather better to divide all human rights into two categories—fundamental or basic human rights like right to life, food, shelter, basic necessaries of life, speech etc. and other human rights.

It is also important to indicate here that what has been told here so far about human rights is the only theoretical side of human right while the real picture is quite different. Because everywhere human rights are being violated; there are some human rights which can be taken away by the state, e.g, right to nationality, right to property etc. The truth is that the concept of human right is not at all a legal concept; it is purely a matter of international law. If a particular human right is

recognized by a positive law of a state and is maintained through enforcement machinery only then it becomes legal and enforceable right. It is therefore; better to describe human rights as universal moral rights.

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 rights 25 rights are civil and political rights and 6 are economic, social and political rights and 6 are economic, social and cultural rights.

Concept of Fundamental Right

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

Following the footsteps of the French Declaration of Rights of Man and Citizen, 1789 and the American Declaration of Independence, 1776 and then the incorporation of a Bill of Right in the US Constitution in 1791 most of the democratic countries with written constitution are including a chapter for Bill of Rights or Fundamental Rights with special sanctity. Why is such a trend being followed invariably in written constitutions?

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 can not 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 from the vicissitudes of political controversy; to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One’s fundamental rights may not be submitted to vote, they depend on the outcome of no elections.”

In Jibendra Kishor V. The Province of East Pakistan the Supreme Court of Pakistan held—

“The very conception of a fundamental right is that it being a right guaranteed by the Constitution cannot be taken away by the law, and it is not only technically inartistic but a fraud on the citizens for the makers of a Constitution to say that a right is fundamental but that it may be taken away by the law.”

The same view was reaffirmed by the Pakistan Supreme court in State V. Dosso. The Indian Supreme Court in Golak Nath V. State of Punjab4 held—

"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."

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 form, the government. But coming into power the government 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 to be one of the safeguards of democracy.

It is important to mention here that in Britain there is no Bill of Rights; no formal declaration of any fundamental right has ever been made. It does not, of course, mean that the rights of the people are less guaranteed in Britain. What are fundamental rights under written constitution are all ordinary rights in Britain. 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. Though the British parliament, under the doctrine of parliamentary supremacy, can any time abridge, modify or abolish any right of the people, it is the deep-rooted democratic traditions and vigilant public opinion which act as a constant check on the parliament to do that and the power of the executive is limited in the sense that it cannot interfere with the rights of the people without the sanction of law and it is, under the doctrine of rule of law, answerable to the courts for any action which is contrary to the law of the land. But 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 Bowic says, "is not simply exportable and other nations have generally felt that their governments need the constant reminder which a bill of rights provides, while their people need the reassurance which it can supply" [3]

[3] https://www.lawyersnjurists.com/article/fundamental-rights-in-the-constitution-of-bangladesh-2/?fbclid=IwAR0gFqvWSBNjyR3l1b6XIEZjfiC_9_gR7arvEMf0Gr-Hf8m7PH6IIKbbWTM

Distinction between Human Rights and Fundamental Rights

Firstly, all fundamental rights are human rights but all human rights are not fundamental rights. Fundamental rights are those of human rights which are placed in a written constitution. Human rights, therefore, are the whole of which fundamental rights are a part.

Secondly, the source of a fundamental right is the Constitution whereas the source of human rights is the international law.

Thirdly, fundamental rights have territorial limitations i.e. they have no application as fundamental rights outside the territory of a particular state. But human rights have no territorial limitations; they have universal application.

Fourthly, fundamental rights are protected by constitutional guarantees and can be enforced through the state courts. But there is no effective enforcement machinery for human rights.

Fifthly, fundamental rights are largely applicable to the citizens while human rights are universally applicable to all human being.

Enforcement of Fundamental Rights

The insertion of fundamental rights in a constitution becomes meaningless if it is not provided by the Constitution for easy and effective procedure for their enforcement. And this easy and effective enforcement should be available not only against the executive but also against the legislative. If the executive does anything in violation of fundamental rights, the citizens must have a remedy. Similarly if the legislature enacts any law which is inconsistent with any of the fundamental rights, there must be procedure to declare that law unconstitutional. The idea of protection of fundamental rights can be best understood from the American Declaration of Independence, 1776 where it is stated—

"That all men are created equal, that they are endowed by their creator with certain inalienable rights; that among these are life, liberty and pursuit of happiness;

that to secure these rights governments are instituted among men deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it and to institute a new one."

The Declaration, therefore, has laid the utmost emphasis on the enforcement of rights that if the peoples' rights for the protection of which the government is formed, cannot be enforced then the government would be useless. The importance of remedies to enforce fundamental rights has also got recognition in article 8 of the Universal Declaration of Human Rights, 1948 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."

To this respect the Pakistan Supreme Court in Moudoodi V. Government held—

The basic principle underlying a declaration of Fundamental Rights in a Constitution is that it must be capable of being enforced not only against the executive but also against the legislature by judicial process."

Constitutional Guarantees or Remedies

Though it is a claim of a written constitution embodying fundamental rights that effective constitutional remedies for the enforcement of fundamental rights should be provided for by the Constitution itself, practical experience teaches us that some of the written constitutions do not specifically provide for the remedies in the Constitution. The US and the French Constitutions are two of them. But most of the written constitutions provide for the right to constitutional remedies in case of violation of fundamental rights. This right to constitutional remedy has two dimensions-judicial review and judicial enforcement.' Judicial review in relation to fundamental rights is provided for with a view to enforcing fundamental rights against the legislature. In other words, if the legislature passes any law which is inconsistent with the fundamental rights, the highest seat of the judiciary must have the jurisdiction to declare that law unconstitutional. The Supreme Court of Bangladesh can exercise this jurisdiction under Articles 26 and 102 of the Constitution. Judicial enforcement, on the other hand, is provided for with a view to enforcing fundamental rights against the executive. In other words, if any public authority violates any of the fundamental rights enumerated in the Constitution, the right to move the highest court of the land for enforcing that right must be specifically guaranteed in the Constitution and it should be guaranteed as of an independent fundamental right. This right is guaranteed in article 44 and the High court Division of the Supreme Court is empowered to enforce fundamental rights under Article 102 of the Bangladesh constitution.

As mentioned earlier, the US Constitution incorporating a Bill of Rights does not specifically provide for constitutional remedies for the enforcement of fundamental rights. In other words, no right has been created, as has been in the Constitution of Bangladesh, India, Pakistan etc., in the US Constitution in favour of citizens to move the Supreme Court for the enforcement of any of the Bill of Rights. The direct enforcement procedure of fundamental rights in USA is dealt with the Judiciary Act of 1789 and the US Supreme Court hears the fundamental rights cases only in its appellate jurisdiction.3 In France the position is also a narrower one. The French Constitution provides neither any right to constitutional remedies nor is any court in France empowered to declare a law which is inc1nsistent with fundamental rights unconstitutional.

Fundamental Rights in the Constitution of Bangladesh

18 fundamental rights have been enumerated in the Constitution commencing from Article 27 to 44. All of these rights are civil and political rights. These 18 fundamental rights may be firstly divided into two groups:

1. 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.
2. 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. [4]

Classification of Fundamental Rights

The Fundamental Rights enumerated in the Bangladesh Constitution may be classified in to following three groups:

A. Absolute Rights:

1. Equality before law, (Art. 27).
2. Discrimination on grounds of religion etc (Art.28).
3. Equity of opportunity in public employment (Art.29).
4. Prohibition of foreign titles etc (Art.30).
5. Safe guards as to arrest and detention (Art.33).
6. Prohibition of forced labour (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:

1. Freedom of movement (Art.36).
2. Freedom of Assembly (Art.37).
3. Freedom of Association (Art.38).

[4] Constitution, constitutional law and politics, Bangladesh perspective, MD Abdul Halim

4. Freedom of thought and conscience and of speech (Art.39).

5. Freedom of religion (Art. 40)

6. Protection of home and correspondence.

C. Fundamental rights which has been practically left to the legislature

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)

Fundamental Rights in Bangladesh constitution

18 fundamental rights have been enumerated in the constitution commencing from Article 27 to 44. All of these rights are civil and political rights. 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.

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 v. Bangladesh*, 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 v. 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 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" with in the meaning of Article 7 in the same way as it is not law in Article.

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. But 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.

3. Discrimination on grounds of religion etc

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.

As a matter of fact, this article projects the citizen against discrimination. The state can not 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.

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. 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. Clause (2)

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 not be so interpreted as to nullify or destroy the main provision.

In the case of *Bangladesh v. Azizur Rahman,* 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.

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.

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.

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 v. Bangladesh,* 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.

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

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 authorizes the detaining authority for not disclosure of facts in public interest.

In the case of *professor Ghulam Azam v. Bangladesh,* Md. Abdul jalil, 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.[31]

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.

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.

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 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.

In the case of *Dr. Mohiuddinfarooque v. bangldesh and others*, 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.

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.

13. Freedom of Association

The very existence of democracy is dependent on the right to form associations, without the right there can not 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.

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 not be any democracy and the first thing and autocrat does is to curb the freedom of speech.

In the case of *Bangladesh National curriculum and Text Board v. A.Msamsuddin and others*, 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.

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.

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.

17. Rights to property

Article 41 guaranteed that every citizen has right to acquire, hold, 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. 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.

19. 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.

The Enforcement of the Fundamental Rights

The insertion of fundamental rights in a constitution in a constitution becomes meaningless rights if it is not provided by the constitution for easy and effective procedure for their enforcement. And this easy and effective enforcement should be available not only against the executive but also against the legislative. If the executive does anything in violation of fundamental rights, the citizens must have a remedy. Similar if the legislature enacts any law which is inconsistent with any of the fundamental rights, there must be procedure to declare that law unconstitutional. The idea of protection of fundamental rights can be best understood from the American Declaration of Independence, 1776 where it is stated that all men are created equal that they are endowed by their creator with certain in alienable rights, that among these are life, liberty, and pursuit of happiness; that to secure these rights governments are instituted among men deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is right of the people to alter or abolish it and to institute a new one. The declaration, therefore, has laid the utmost emphasis on the enforcement of rights that if the peoples rights for the protection of which the government is formed, can not be enforced than the government would be useless, the importance of remedies to enforce fundamental rights has got recognition in article 8 of the universal declaration of human rights, 1948 which states-

"Every one has the right on an effective remedy by the competent national tribunal for acts violating the fundamental rights granted him by the constitution or by law".

Some Case studies On The Fundamental rights:

Case Reference no.1

Dr. Nurul Islam v. Bangladesh

Fact of the case

The appellant Dr. Nurul Islam was appointed an assistant surgeon in 1952(in East Bengal) and by successive promotions he became the Director and professor of medicine of the Institute of post-graduate and Research in 1971(in Bangladesh).In November, 1978 the Govt. issued a notice where by the appellant was relieved of his duties as professor of Medicine; he was to continue as Director of the institute which was made a non-practicing post. The appellant challenged this notice in the High Court Division by write petition no. 571 of 197889 and a bench of the High Court Division on 6-12-79 declared the notice to have been issued without lawful authority. The government as found by the Supreme Court , reacted to the High Court declaration by ordering the retirement of the appellant from service under sub-section(2)of section 9 of the public servants Retirement Act, 1974 which is to the effect that the Govt. is empowered to retire a govt. servant on the completion

of 25 years service . The appellant again challenged this order in a fresh write petition to the High Court Division on the ground, amongst others, that the retirement order is just a measure of punishment on him for his successful challenge of the Governments previous notice declared to have been issued without lawful authority. The High Court Division in the present instance refused with the Govt.'s decision in retiring the appellant 4/s 9(2) of the public service retirement Act and gave him no relief where upon the appellant move the Appellate Division as against the aforesaid decision of the High Court Division *alleging, inter alia,malafide* in the Government in causing his premature retirement; he further stated that there are in the cadre as many as 34 doctors who have completed 25 years service and many of whom were senior to the appellant in service but none of them had been retired . It was therefore contended that the impugned notification issued on June 5, 1980 was issued for collateral purposes the provisions of Article 27 and 29 of the constitution appellant was not given any opportunity of being heard before the impugned notification was issued it was violated of Article 135 of the constitution.

Judgment of the case

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

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

Case reference no 2

University of Dhaka v.Dr.S.Hussain and another

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. [5]

Reasonable Restriction on Fundamental Rights

Absolute or unrestricted fundamental rights do not and cannot exist in any modern state.Since the disappearance of laissez fare and the emergence of the welfare state, it is generally acknowledged that the individual can have no absolute or unfettered right in any matter and the welfare of the individual. As a member of the collective society, lies in happy compromise between his rights as an individual and the interests of the society to which he belongs. There is a measure of control and the regulation of the right of each individual in the interests of all.

The right to determine the reasonableness of the restriction vests in the court and it requires no mention that there can be no absolute test of reasonableness which would be applicable to all circumstances. It is now settled that restriction imposed under any of the limitation prescribed in constitution or law in order to be valid must be proximately related to the object which the legislature seeks to achieve. [6]

Restriction on Freedom of Religion

Dewanbagh Darbar Sharif v.Bangladesh 7 MLR (HC) 309

A serious clash arose between the Dewan Bagh devotees and the Islami Shashantantra Andolan of the Pir Shaheb Charmonai. Dewanbaghis claim to practice Sufism in their own way which is anti-islamic in the eyes of the Pir Shaheb Charmonai. During 1999 on the eve of Ahsekey Rasul Shammelon the followers of Pir Shaheb Charmonai declared to take possession of the Dewanbagh premises and went in action. A violent clash brook out between the two rival factions resulting in death of several people including the damage to the government and private property. Police entered the Dewanbagh premises and drove away the rival factions. Thereafter for a long period

[5] https://lawhelpbd.com/constitution/fundamental-rights-constitution-bangladesh/?fbclid=IwAR0D6NZa9tyatW9MyQQx9pWLyW16j78kGOJsPeNfBPghdNIGJAw2VS9yT00

[6] The constitutional law, Bangladesh M. Jashim All Chowdhury

of two and half years the devotees of Dewanbagh were not allowed to enter the premises to perform their religious ceremonials on the excuse that allowing them to enter there would result in law and order situation. Pir of Dewanbagh brought a writ petition in the High Court Division arguing that though the government may put reasonable restriction on the right to religion under Article 41 of the constitution, it cannot altogether prohibit the right.°The government argued that still there was commotion in the area and if the petitioner along with his devotees was allowed to enter the campus there would be serious clash again.Interpreting the Article 41, the Court held that the enjoyment of fundamental rights as mentioned in sub-clauses (a) and (b) of clause (1) of Article 41 may be restricted by any law or order on ground of public order and morality. But any such restriction must be reasonable. What is reasonable may depend on the facts and circumstances under which such restriction is imposed. Such restriction may be imposed to regulate the activities of a religious group.However, a total prohibition on religious activites may be imposed only in extreme cases. Since this two and half years' restriction amounted to a total ban on religious activity, the Court ordered the government to allow the devotees to enter the Dewanbagh Sharif.Had there been any law and order concern,the government was to be ready to tackle it by the help of law and order force.12[7]

Publication attacking the religious sentiment

Bangladesh Anjumane Ahmadia v. Bangladesh 45 DLR 185

In this case a book titled Islam-e-Nabuat published by the Ahmadia Muslim Jamat contained the argument that Prophet Hazrat Mohammad (Sm) was not the last Prophet and there may be further revelation in future according to the promises of Allah. As a fulfillment of that promise, Allah sent Hazrat Miraza Golam Ahmad in the first part of 1400 Hiziri as Prophet to rescue the mankind.13 Considering the religious sensitivity it may create in the public mind, the government confiscated the copies of the book and prohibited its marketing.

Challenging the decision of the government, the petitioner claimed that they had freedom of religion and expression as per Articles 41 and 39.14 Justice Sultan Hossain Khan argued that bulk of the Muslims in Bangladesh are devoted to their beliefs and have firm faith and belief that the

7 Dewanbagh Darbar Sharif v. Bangladesh 7 MLR(HC)309,Para 5

Ibid,Para 6

Ibid, Para 9

Bangladesh Anjumane Ahmadia v. Bangladesh 45 DLR (HCD) 185, Para 8

Prophet Hazrat Muhammad (SM)is the last prophet and Al Quran is the last book of revelation and that there shall be no prophet after him. The book being outrageous and offensive to their feelings, the government was justified in putting restriction over the freedom of expression of the petitioner. [8]

Writs

A writ is a formal, legal document drafted by courts that commands an individual or entity to conduct or stop doing a certain action or deed. The right to a writ is a crucial legal remedy that citizens have when their fundamental rights have been violated, such as by an illegal act of government, a legal error, etc., in order to enforce and apply substantive law. According to **Article 102 of the People's Republic of** Bangladesh Constitution, this right is exercised in Bangladesh by submitting a written petition, or writ petition, to the High Court Division of the Supreme Court, asking for the court's recommendations or rulings on the topic. The opposing parties, or respondents, are then summoned by the court and ordered to do or to refrain from doing something.

There are five types of writs in Bangladesh:

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

1. Writ of Habeas Corpus

The first type of writ in Bangladesh is referred to as Habeas Corpus. Habeas Corpus is Latin for "have his body." Since 1640, this law has protected the liberty of British subjects against their unlawful imprisonment in public or private custody. The King's Bench issues a writ of habeas corpus to determine if an individual was unlawfully detained. In accordance with **sub-clause I of**

[8] An Introduction to The Consttutlonal Law of Bangladesh

M.Jashim Ali Chowdhury

clause (b) of sub-clause (2) of article 102 of the Bangladesh Constitution, the High Court Division, upon the application of any person, directs that a person in custody be brought before it so that it may determine whether he is being detained with or without legal authority. Illegally detained individuals may file a petition for the writ of habeas corpus. However, if the prisoner is unable to make such an application, any other interested party may do so on his behalf. Thus, a wife, a father, or even a friend may apply for the writ of habeas corpus in such situations.

Every request for a writ of habeas corpus must be accompanied by an affidavit detailing the facts and circumstances that led to the request. If the court determines that there is a prima facie case for granting the petition, it will issue a rule directing the detaining authority to show cause on a certain date why the ruling should not be made absolute. The court will assess the merits of the case and issue an appropriate order on the specified date.

If the court determines that he is being unlawfully detained by the authority, it can declare that authority to be without legal jurisdiction. **Section 491 of the Code of Criminal Procedure** also permits the High Court Division to issue an order in the manner of a writ of habeas corpus to summon a person imprisoned in public or private custody before it in order to determine whether he is being detained illegally or inappropriately. If the High Court Division determines that the detainee is being detained illegally or improperly, it orders the detaining authority or person to release him.

Case Law References:

- **AKM Azizul Hoque Vs. Bangladesh**, 42 DLR 189

  When a specific criminal accusation has been lodged and a specific criminal case is ongoing, the executive authority should not commit resources to preventative detention. The administrative authority has a solemn constitutional commitment to assist the Supreme Court.

- **Habiba Mahmud Vs. Bangladesh**, 45 DLR (AD) 89

  The Court must maintain a balance between the State's duty to prevent harmful actions and the citizen's right to personal freedom.

  Government of Bangladesh v. Sajeda Parvin, 40 DLR (AD) 178

  Important is the reality of detention, not the date of the order for detention.

- **Bangladesh and Others v. Jamil Huq,** 1 BLD (AD) 488

  The only thing that can be asserted is that the grounds on which a Court Martial established under the Army Act can be challenged by habeas corpus will be analogous to those available under Article 102, subsection 5, of the Constitution.

2. Writ of Certiorari

Certiorari is Latin meaning "to be certified" or "to be more completely aware of." Initially, certiorari was a court order. With the passage of time, the scope of this writ was expanded to include judicial, quasi-judicial, and even administrative powers. This writ power enables the High Court Division of the Supreme Court to control the actions of the inferior or subordinate courts, i.e. to determine whether the subordinate courts in Bangladesh are operating within their jurisdiction or beyond it.

A writ of certiorari may be submitted by the aggrieved party or, in some circumstances, by anyone against a lower court, tribunal, or authority that abused its power or breached the principle of natural justice.

The court should give ex.debito justitiae relief if the application is made by the party directly impacted by the lawsuit. However, if the application is made by a person not directly affected by the litigation, the court has complete discretion to grant the writ.

A writ of certiorari may be issued on the basis of the following:

1. Error evident on the face of the record

By issuing a writ of certiorari, a decision of a lower court or a tribunal can be overturned if there is an obvious mistake of law on the face of the record.

2. infringement of natural justice

A writ of certiorari may be issued when the standards of natural justice have been violated.

3. Error of jurisdiction

A writ of certiorari may be granted against a lower court or tribunal that acts without jurisdiction, exceeds its jurisdiction, or fails to exercise the jurisdiction conferred in it by law.

4. Jurisdictional fact

Insufficient jurisdiction may also result from the absence of certain preliminary facts that must exist before a court exercises its authority. These facts are referred to be "jurisdictional" or "collateral."

Case Law References:

- **Secretary, Ministry of Home Affairs v. Sk Ali Ahmed**, 40 DLR (AD) 170; 48 DLR (AD) 20. Even though the statute is silent, notice must be given if a person's right, interest, property, or character is to be affected. When the law mandates service of notice, the authority cannot evade this obligation.

- **Regional Transport Authority of Dhaka versus Momin Motor Company** (1958) 10 DLR 284
  A writ of certiorari was granted when a quasi-judicial entity, such as the regional Transport Authority, issued an order negatively impacting a person's interests without his knowledge.
- **Ashraf Ali & Others v. Bangladesh,** 5 BLT (AD) 261
  The learned Judges of the High Court Division exceeded their jurisdiction when they exercised their certiorari authority to overturn the decision of a lower court.

3. Writ of Mandamus

Mandamus is Latin for "we command." By writ of mandamus, the superior court orders any individual, corporation, lower court, or government to perform a defined public duty related to their office. This writ is issued when a lower court has refused to exercise the jurisdiction vested in it, or when a public official has refused to comply with the law. In accordance with **sub-clause I of clause (a) of subparagraph (2) of article 102 of the Constitution** the High Court Division may direct a person performing tasks related to the affairs of the Republic or a local authority to comply with the law. This remedy is accessible when a person's legal rights, as opposed to contractual rights, are breached. The applicant must demonstrate that he has a legal right to the fulfilment of a legal obligation by the individual or entity against whom the writ is sought.

The following requirements must be met by the petitioner before a writ of mandamus can be issued:

(i) Legal duty:

A legal obligation must have been imposed on the authority, and the fulfilment of that obligation must be mandatory, not voluntary or discretionary. There must be a right for the applicant to compel the opponent to undertake some obligation. Therefore, if the government grants dearness allowance to its employees at its own discretion, there is no legal obligation and a writ of mandamus cannot be filed against the government for fulfilment of such duty. Such a duty must be statutory, i.e. imposed by the constitution, another statute, or some rule of common law, but should not be contractual in certain circumstances. However, the writ of mandamus may be issued for the enforcement of such a duty if discretionary power is conferred on the authority and statutory provisions are made for the exercise of such power. This obligation must be of a public character. The writ of mandamus may be issued if the public authority vested with discretionary power abuses

the power, exceeds it, acts maliciously, fails to apply its mind, or takes irrelevant circumstances into account.

(ii) Legal privilege:

The petitioner must possess legal standing. Thus, when a petitioner claimed that he was passed over for promotion by the government and it was determined that he was not qualified for the position, his petition was denied.

(iii) Demand and refusal:

A demand for justice and its denial must precede the petition for a writ of mandamus. In Halsbury's Laws of England, it is stated: "as a general rule, the order will not be granted unless the party complained of knew what he was required to do, so that he could weigh whether or not to comply, and it must be shown by evidence that there was a distinct demand of that which the party seeking the mandamus wishes to enforce, and that demand was refused."

(iv) Good faith:

A request for mandamus must have been submitted in good faith and without any ulterior motive or covert objective. Even though a petition for mandamus is filed in good faith, it will not be granted if it is intended to annoy the respondent or exact personal revenge.

Case Law References:

- **Government of Bangladesh vs. Zamiruddin Ahmed,** 1 BLD (HCD) 304 Mandamus may be issued even though no demand for justice has been made previous to the filing of the writ petition if specific circumstances suggest that a demand for justice would be useless.
- **M. Walid Ahmed Chowdhury versus Mahfuzul Huq Chowdhury,** 8 DLR 429 (1956). A mandamus will not be issued unless the party seeking it has not only stated on affidavit that he demanded of the party against whom the mandamus is sought to be enforced by the writ and that such demand was refused, but has also satisfied the court that this is a principle that has been universally accepted and insisted upon as an essential and invariable condition for the issuance of the writ.

4. Writ of Prohibition

Another type of common writ in Bangladesh is called prohibition. The term prohibition refers to a preventive writ. It empowers the High Court Division to prevent a court, tribunal, authority, or person from engaging in conduct that is prohibited by law. A writ of prohibition is appropriate where there is a lack or excess of jurisdiction, an abuse of power, or a violation of the principle of natural justice.

If judicial or quasi-judicial authorities issue an order that is illegal or exceeds the court's jurisdiction, the aggrieved party may file a writ petition with the superior court, i.e. the High Court Division of the Supreme Court, and if the court finds the complaint to be valid, it may issue a writ of prohibition against the lower court, i.e. the District Judge Court etc. Prohibition is the opposite of mandamus in that, although mandamus requires the authority to act, prohibition stops a court or tribunal from acting where it lacks the authority to do so.

In essence, writs of prohibition may be issued on the following grounds:

i. Absence or excess of jurisdiction

ii. Violation of natural justice

iii. Statute's Unconstitutionality

iv. Violation of fundamental human rights

When the lack of jurisdiction is clear on the face of the proceedings, not only the injured party but also a third party may file a motion for prohibition. The rationale underpinning this rule is that usurpation of authority constitutes a breach of the royal prerogative and an insult to the crown. Therefore, it is irrelevant who informs the court about the usurpation.

However, administrative authority cannot be prohibited from performing administrative, executive, or ministerial duties. Similarly, it would not lie against the legislature to prevent it from passing or enforcing a law.

5. Writ of Quo-Warranto

The final type of writ in Bangladesh that will be discussed in this article is called writ of quo-warranto. The term quo-wattanto means "what is your authority" in Latin. It is judicial remedy against an occupant or usurper of an independent public office, franchise, or liberty. It imposes jurisdiction and authority on the judiciary to control executive conduct in terms of making appointments to public positions contrary to relevant statutory provisions, so protecting citizens from being denied a public post to which they may be entitled. In a writ of quo warranto, the petitioner challenges the legitimacy of the claim of the incumbent of a public office. Therefore, this writ can be requested by anyone, regardless of whether they have a personal stake in the outcome.

The purpose of the writ of quo warranto is to prevent a person who has illegitimately seized a public office from remaining in that position. Therefore, an application for a writ of quo warranto challenging the legitimacy and validity of an appointment to a public position may be filed by any

private individual, even if he has no personal stake in the matter. Before the quo warranto can be issued, the following specifications must be met:

i. . Before issuing the writ, the court must be convinced that the post in question is public in nature and that the occupant lacks the legal authority to retain said office. This writ will not lie in relation to a private office, such as a private school's governing board.

ii. The position must be substantive in nature. The phrase "substantive character" indicates that the office in question must be independent.

iii. The office must be created by statute or the constitution.

iv. The holder must have made a legitimate claim to the office.

Quo warranto is a discretionary remedy, and the petitioner has no inherent right to obtain this writ. Taking into account the facts and circumstances of the case, the court may decline to grant this writ. This may include situations when the issues of a writ would be vexatious, where the petitioner has consented, or where it would be pointless since the incumbent of the office in question has resigned. It may also be denied if there is a simple electoral irregularity.

A writ of quo warranto may also be denied on the grounds that the petitioner has access to alternative statutory remedies. Thus, when it was sought to issue a writ of quo warranto against a member of the State legislature, it was denied on the grounds that an election petition provided an alternative remedy.

Case Law References:

- **The District Registrar and Others v. Mohammad Abdur Rab Mia**, 19 BLD (AD) 24. The petitioner did not appear before the writ court to establish a public right; rather, he did so to further his own interests. A quo warranto cannot be used in such a manner or for such a purpose.
- **Sajda Parvin v. Bangladesh**, 40 DLR (AD) 178; Ahmed Nazir v. Bangladesh, 27 DLR 199; Alam Ara Huq v. Bangladesh, 42 DLR 98.

  No public office can be held without a legitimate claim to that office.[9]

Public Interest Litigation (PIL)

Public Interest Litigation means a legal action initiated by the court for the enforcement of law for public interest or general interest in which the public or class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected. Public Interest

[9] https://tahmidurrahman.com/writs-in-bangladesh/

Litigation's explicit thepurposes to alienate the suffering off all those who have borne the brunt of insensitive treatment at the hands of fellow human being. Transparency in public life & fair judicial action are the right answer to check increasing menace of violation of legal rights. Traditional rule was that the right to move the Supreme Court is only available to those whose fundamental rights are infringed. According to Justice P. N. Bhagwati, Public Interest Litigation is a litigation which is intended not for the benefit of one individual but for the benefit of a class or group of persons who are either victims of exploitation or oppression or who are denied their constitutional rights but cannot come to the court because of their ignorance, poverty and destitution. Public interest litigation in a litigation which can be filed in any court of law by any public spirited person for the protection of 'public interest' i.e. benefit of public. 2. Background and Development of PIL in Bangladesh The very early concept of PIL in Bangladesh is founded on the case of Kazi Mukhlesur Rahman vs. Bangladesh and others. Former Mustafa Kamal J. remarked in the judgment of the Dr. Mohiuddin Farooque vs. Bangladesh and others case, having the following words: In Bangladesh an unnoticed but quiet revolution took place on the question of locus standi after the introduction of the Constitution of the People's Republic of Bangladesh in 1972 through the case of Kazi Mukhlesur Rahman vs. Bangladesh, 26 DLR (SC) 44, decision on September 3, 1974 and hereinafter referred to as Kazi Mukhlesur Rahman's Case. The appellant challenges the Delhi Treaty signed on the 16th May, 1974 by the Prime Ministers of the Government of Bangladesh and the Republic of India providing therein inter alia that India is to retain the southern half of south Berubari Union No. 12 and the adjacent enclaves and in exchange Bangladesh is to retain the Dahagram and Angarpota enclaves. The ground of the challenge was that the agreement involved cession of Bangladesh territory and possession without lawful authority by the executive head of government. The case that first provides a conceptual groundwork for PIL is the 8th Amendment case of 1989 where it declares that the Parliament cannot alter the basic structure of the Constitution and decentralize the Supreme Court. This is not a case on social justice, but related to the power relations debate. It came as an inspiration to the judges and lawyers favoring activism and a greater role for the judiciary. The judges declared the need for progressive and dynamic interpretation of the Constitution. They re-affirmed and re-established the principle that while interpreting the Constitution, the intention of its makers and its spirit must be taken into consideration and an Article should not be looked into in isolation. Our Constitution is not the result of the process of the Indian Independence Act 1947 though we have taken inspiration from the wisdom of the past.

Writ amounting Public Interest Litigation (PIL)

A writ petition filed by the aggrieved person, whether on behalf of group or together with group can be treated as a PIL. However, the writ petition should involve a question, which affects public at large or group of people, and not a single individual. And there should be a specific prayer, asking the court to direct the state authorities to take note of the allegation. Also, according to

some lawyers, the ‘representative suit’ instituted under Code of Civil Procedure, 1908 can also be treated as PIL when it represents the interest of a large faction of people.

Important features of PIL

Through the mechanism of PIL, the courts seek to protect human rights in the following ways1) By creating a new regime of human rights: It can be done by expanding the meaning of fundamental right to equality, life and personal liberty. In this process, the right to speedy trial, free legal aid, dignity, means and livelihood, education, housing, medical care, clean environment, right against torture, sexual harassment, solitary confinement, bondage and servitude, exploitation and so on emerge as human rights. These new re-conceptualised rights provide legal resources to activate the courts for their enforcement through PIL. 2) By democratization of access of justice: This is done by relaxing the traditional rule of locus standi. Any public spirited citizen or social action group can approach the court on behalf of the oppressed classes. Courts attention can be drawn even by writing a letter or sending a telegram. This has been called epistolary jurisdiction. 3) By fashioning new kinds of reliefs: It can be executed under the court’s writ jurisdiction. For example, the court can award interim compensation to the victims of governmental lawlessness. This stands in sharp contrast to the AngloSaxon model of adjudication where interim relief is limited to preserving the status quo pending final decision. The grant of compensation in PIL matters does not preclude the aggrieved person from bringing a civil suit for damages. In PIL cases the court can fashion any relief to the victims. 4) By judicial monitoring of state institutions: Judicial monitoring may be carried on by the state institutions such as jails, women’s protective homes, juvenile homes, mental asylums, and the like. Through judicial invigilation, the court seeks gradual improvement in their management and administration. This has been characterized as creeping jurisdiction in which the court takes over the administration of these institutions for protecting human rights. 5) By devising new techniques of fact-finding: In most of the cases the court has appointed its own socio-legal commissions of inquiry or has deputed its own official for investigation. Sometimes it has taken the help of National Human Rights Commission or experts to inquire into human rights violations. This may be called investigative litigation. 7. Practice, Procedure and Remedies of PIL Public Interest Litigation is a totally different type of litigation from the ordinary and traditional case which is an adversarial character whereas PIL is intended to vindicate the rights of the people. In such a case the benefit will be derived by a 3495 | Dr. Md. Anisur Rahman Access To Justice Through Public Interest Litigation In Bangladesh large number of people in contrast to a few.1 Public Interest Litigations can be initiated by any letters or telegrams sent to the court. The Court has powered to treat these letters as writ petitions and it is termed as ‘epistolary jurisdiction of the court’.2 The judge can also act suo motu and initiate a PIL case. After initiating a case the judge can appoint a commission for the purpose of carrying out an

inquiry and investigation and presenting reports and recommendations. The court can appoint any amicus curriae or take any expert opinion to get assistance while providing relief and remedies to the victims. Finally it gives the awards or compensations to the victims for wrong done to them. This can be awarded in two stages. First, when the rule is issued the court may grant any compensation as an immediate interim relief and secondly, at the time of the disposal the court may finally determine the award of compensation. [10]

RECOMMENDATIONS

1. Judicial Reforms: The judiciary should undergo comprehensive reforms to address issues such as case backlog, delays in justice delivery, and judicial capacity. Implementing measures to streamline court procedures, enhance judicial training programs, and allocate sufficient resources to the judiciary can help expedite the resolution of constitutional rights cases.
2. Access to Justice: Efforts should be made to ensure equal access to justice for all citizens, particularly marginalized groups and vulnerable populations. Establishing legal aid programs, promoting alternative dispute resolution mechanisms, and increasing awareness about legal rights can enhance the accessibility and inclusivity of the justice system.
3. Human Rights Education: Strengthening human rights education and legal literacy among the general public, including students, civil society organizations, and government officials, is crucial. Promoting awareness of constitutional rights, their significance, and the avenues for seeking redress can empower individuals to assert and protect their rights effectively.
4. Collaboration and Coordination: Effective collaboration among the judiciary, legal professionals, civil society organizations, and government agencies is essential. Encouraging dialogue, cooperation, and partnerships can lead to the development of holistic strategies for promoting and protecting constitutional rights.
5. Legislative Reforms: Regular review and amendment of legislation to align it with constitutional rights standards are necessary. The government should engage in comprehensive legislative reforms to eliminate any conflicting laws and ensure that all legislation is consistent with the Constitution and international human rights standards.
6. Strengthening Judicial Independence: Ensuring the independence of the judiciary is crucial for upholding constitutional rights. Measures should be taken to safeguard the autonomy of the judiciary from undue influence, including guaranteeing tenure and security of judges, strengthening the process of judicial appointments, and establishing effective mechanisms for addressing judicial misconduct.

[10] https://www.ilkogretim-online.org/fulltext/218-1663678239.pdf
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CONCLUSION

In conclusion, the judicial enforceability of constitutional rights in Bangladesh is of paramount importance for the protection of fundamental liberties and the establishment of a just society. Through an examination of key cases, legal developments, and comparative perspectives, this thesis has shed light on the challenges, achievements, and recommendations concerning the enforcement of constitutional rights.

While significant progress has been made, challenges such as delays in the justice system, limited access to justice, and the need for further judicial and legislative reforms remain. It is crucial to prioritize judicial capacity building, enhance access to justice, promote human rights education, foster collaboration among stakeholders, and undertake legislative reforms to address these challenges effectively.

By implementing these recommendations, Bangladesh can further strengthen the judicial enforceability of constitutional rights and create an environment where all individuals, regardless of their background, can exercise their rights fully. This will contribute to the consolidation of democracy, social justice, and sustainable development in the country.

Ultimately, ensuring the effective enforcement of constitutional rights requires the commitment and concerted efforts of the judiciary, legal professionals, civil society organizations, and the government. By working together, Bangladesh can establish a rights-respecting society where the principles of the Constitution are upheld and every individual's dignity and freedoms are protected.

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