Sonargaon University

Research Monograph on

"A Critical Analysis on Fundamental Rights of Bangladesh"

This research paper is submitted in partial fulfillment of the requirements of the degree of LLB (Honors) under Sonargaon University.

Supervised By:

Sharmin Jahan Runa

Assistant Professor,

Department of Law,

Sonargaon University

Submitted By:

Nupur Akter

ID No: LLB1802014028

Batch: 15(A)

Department of Law

Sonargaon University

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Preface

At first, thanks to almighty, who has been kind enough to let me complete this Research Monograph in right time.

I would like to acknowledge my gratitude to my honourable teacher Sharmin Jahan Runa, for permitting me to undertake this research. Thanks to him for his most constructive suggestion and informative guidance through his lectures.

From beginning of my research, I am personally indebted to some book writers for their kind and valuable writings. Thanks to all from the bottom of my heart.

Signature

Certification by the Research Advisor

This is hereby certified that the research Monograph on the topic "A Critical Analysis on Fundamental Rights of Bangladesh" submitted by Nupur Akter (ID No: LLB1802014028) in fulfillment of the requirements for LLB (Hons) from Sonargaon University, under my active supervision and guidance and that no part of this paper has been submitted any place earlier, as far as I know.

Sharmin Jahan Runa

Assistant Professor,

Department of Law

Sonargaon University, Dhaka.

Declaration

This is , a student of LL.B program of Department of Law of Sonargaon University, holding ID No: LLB1802014028 do hereby declare that the research monograph titled, ***"A Critical Analysis on Fundamental Rights of Bangladesh"*** is a original work. The assigned work has done by me for partial requirement of my LLB degree, as a part of academic curriculum .I certify that this thesis does not incorporate without acknowledgment any material previously submitted for a degree or diploma in any university; and that to the best of my knowledge and belief it does not contain any material previously published or written by another person except where due reference is made in the text.

I also declare that the presented work do not breach any existing copyright and no portion of this research monograph has been copied entirely from any work done earlier for a degree or otherwise.

Signature:

Date:

Letter of transmittal

To,

Sharmin Jahan Runa,

Assistant Professor, Department of Law

Sonargaon University, Dhaka.

Subject: For the submission of research Monograph titled "A Critical Analysis on Fundamental Rights of Bangladesh."

Dear Madam,

This is a matter of joy for me to submit the research monograph on the title "A Critical Analysis on Fundamental Rights of Bangladesh."

While doing this research monograph, I have tried my level best to keep the required standard. I hope, this dissertation will fulfill your expectation. I hope that you would be kind enough to go through this dissertation for you kind evaluation.

I am always available for any clarification or any other necessity of any part of this research monograph at your convenience.

Yours obediently

Nupur Akter

ID No: LLB1802014028

TABLE OF CONTENTS

SL No	Name of the contents	Page No
1	Cover Page	1
2	Preface	2
3	Certification by the Research Advisor	3
4	Declaration	4
4	Letter of Transmittal	5
5	Table of Contents	6

CHAPTER 1- INTRODUCTION

SL No	Name of the contents	Page No
01	Abstract	8
02	Introduction	8
03	Statements of problems	8
04	Objectives of the study	9
05	Importance of the study:	9
06	Limitations of the study	9
07	Conclusion	9

CHAPTER 2- CONCEPT OF FUNDAMENTAL RIGHTS

SL No	Name of the contents	Page No
01	Introduction	10
02	Definition of Rights	10
03	Fundamental Rights	10
04	Fundamental rights in international instruments	11
05	Key Differences Between Fundamental Rights and Human Rights	22

CHAPTER 3- FUNDAMENTAL RIGHTS AND THEIR JUDICIAL ENFORCEABILITY

SL No	Name of the contents	Page No
01	Enforceability of international instruments	13
02	Meaning of Judicial Enforceability	13
03	Fundamental Rights Under Bangladesh Constitution (3.3.1 – 3.3.15)	14
04	Fundamental Rights and Judicial Enforceability	20
05	Suspension of Fundamental Rights During Emergency	20
06	Restrictions in performance of Fundamental Rights	21

CHAPTER 4- RIGHTS & CONSTITUTIONAL REMEDIES FOR THE PROTECTION OF FUNDAMENTAL RIGHTS

SL No	Name of the contents	Page No
01	Violation of Right to Life & Personal Liberty	23
02	Violation of Right to Arrest & Detention	24
03	Remedies for the Protection of Fundamental Rights	25

CHAPTER 5- FINDINGS, SUGGESTION & CONCLUSION

SL No	Name of the contents	Page No
01	Findings	26
02	Recommendations	26
03	Conclusion	27

Chapter One
Introduction

1.1 Abstract :

As Jack Donnelly has written, "We have human rights not to the requisites for health but to those things `needed' for a life of dignity, for a life worthy of a human being, a life that cannot be enjoyed without these rights.[1]" Fundamental Right is a charter of rights contained in the Constitution of a particular state which assured all citizens to ensure living in peace and harmony as citizens. The fundamental rights of the peoples of Bangladesh have been guaranteed in Part III comprising Articles 26-44 of the constitution of Bangladesh . Fundamental Rights also enshrined in different regional and international instruments as like as – Universal Declaration of Human Rights(UDHR), International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESC).

1.2 Introduction :

The desire for civil rights had its roots in the nineteenth century. The demand for equality of rights exemplifies not only the desire for civil liberty and self rule but also desire for rights.[2] Bangladesh is a country of constitutional supremacy. The constitution is the supreme law of this state. Fundamental rights for the peoples of Bangladesh has mentioned in this constitution. Article 26 to 43. 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.

Group: 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.

1.3 Statement of Problems;

Fundamental rights, legally speaking, are the rights that are recognized by the constitution and are awarded with better protection mechanisms in comparison with other rights. Here also the states differed in protecting these rights, some even afford better protection to certain rights though those are not termed there as fundamental rights. Thus, fundamental right is in fact used as a technical legal term to mean the rights recognized and protected by the written constitution. The constitution that incorporates fundamental rights within its fold also restricts the legislative competence so as to protect these rights

[1] Jack Donnelly, Universal Human Rights in Theory and Practice, Ithaca: Cornell University Press, 1989, p.17.

[2] Talukder, S. M. Hassan, Fundamental Rights in Bangladesh Constitution: An Appraisal, Bangladesh Law Research Centre, 2014, p. 24.

from unwanted encroachment to be made by the lawmakers. The constitution of Bangladesh recognized certain human rights as fundamental rights.

1.4 Objectives of the study

- To Analysis fundamental rights of Bangladesh constitution.
- To Analysis constitutional mandate of Fundamental Rights.
- To Examine Constitutional Mandate of Fundamental Rights.
- To evaluate the judicial enforcement of Fundamental Rights.

1.5 Importance of the study:

After reading this thesis a person will be able to know the basic concept of fundamental rights, their nature and scope. A comparative analysis with fundamental principles of state policy as well as human rights is focused as to create appeal on the aforementioned topic. A reader will be able to have a scrutiny on the fundamental rights which is specifically mentioned in the third chapter of the Bangladesh constitution and their judicial enforceability. Besides it contains the restrictions on the enforcement of the fundamental rights in certain circumstances. Finally a reader will be able to know the probable suggestions and recommendations regarding the judicial enforceability of fundamental rights.

1.6 Limitation of the study

Although the study has reached its aims, there were some unavoidable limitations and shortcomings. Firstly, I am an amateur researcher who is not even expert on the field of study; in the field of research too, therefore, it was a tough task to assess the objectives of this research perfectly within given time period (which was so short time-limit). Secondly, all the data I used in this study is mostly self-reported that is limited by the fact that it rarely can be independently verified.

1.7 Conclusion:

The constitution of Bangladesh protects human rights these have been incorporated both in justiciable and unjusticiable forms.[3] Fundamental rights play a very significant role in the life of any citizen. These rights can defend during the time of complexity & difficulty and help us grow into a good human being and that's why all the rights are the needs of people

[3] Haque, Muhammad Ekramul, The Bangladesh Constitutional Framework and Human Rights, Dhaka University Law Journal , Volume 22, 2011, p- 55.

Chapter Two

Concepts of Fundamental Rights

2.1 Introduction:

A fundamental right is one which is protected and guaranteed by a written constitution of state.[4] The Fundamental Rights in Bangladesh enshrined in the Part III of the Constitution of Bangladesh. This part of the constitution guarantee the civil liberties such that all Bangladeshi can lead their lives in peace and harmony as citizens of Bangladesh. These include individual rights common in liberal democracies such as equality before law, freedom of speech and expression, freedom of association and peaceful assembly, freedom to practice religion, and the right to constitutional remedies for the protection of civil rights by means of writs such as habeas corpus, mandamus etc.

2.2 : Definition of Rights:

Rights are those essential conditions of social life without which no person can generally realize his best self. These are the essential conditions for health of both the individual and his society. It is only when people get and enjoy rights that they can develop their personalities and contributes their best services to the society.

2.3 Fundamental Rights:

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.[5]

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?[6]

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

[4] Halim, Md. Abdul, Constitution, Constitutional law and Politics: Bangladesh perspective, CCB Foundation, 2016, page-100.

[5] hthttps://www.lawyersnjurists.com/article/fundamental-rights-in-the-constitution-of-bangladesh- 4

[6] www.lawyersnjurists.com/article/fundamental-rights-in-the-constitution-of-bangladesh-2/

of law making. They are placed beyond the reach of the executive and the legislative to act in violation of them.

"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"[7]

The same view was reaffirmed by the Pakistan Supreme court in State V. Dosso[8]. The Indian Supreme Court in Golak Nath V. State of Punjab [8]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."[9]

2.4 Fundamental rights in international instruments :

Universal Declaration of Human Rights (UDHR)

The UDHR was adopted by the UN General Assembly on 10 December 1948. After the end of World War II, the international community vowed never to allow atrocities like those of that conflict to happen again. The United Nations was founded and world leaders decided to complement the UN Charter with a road map to guarantee the rights of every individual everywhere. This road map become the Universal Declaration of Human Rights (it is a declaration and not a Treaty).

The UDHR was drafted around four pillars – dignity, liberty, equality and brotherhood. Each pillar represents an ideal considered essential to the enjoyment of an individual's life in their community. Protected human rights link back to these pillars:

- dignity – all people may exercise the same rights, to the same extent, and may not be stopped from exercising a right on the basis of any personal characteristic, such as gender, race, religion or sexuality
- liberty – to interact in society is reflected in the right to vote or assemble in groups
- equality – speaks to second-generation rights, such as the right to education or the right to work
- brotherhood – relates to community and solidarity.

[7] In Jibendra Kishor V. The Province of East Pakistan the Supreme Court of Pakistan

[8] P.L.D. 1958 S.C. 553

[9] 1967 AIR 1643; 1967 SCR (2) 762

2.5 : Key Differences Between Fundamental Rights and Human Rights:

The points given below explain the difference between fundamental rights and human rights:

- The elemental rights of the citizens of a country, which are mentioned in the constitution and enforceable under the law is known as fundamental rights. On the other extreme, human rights are the rights that a human being needs to survive with respect and freedom.
- Fundamental rights includes only those rights which are basic to a normal life. On the contrary, human rights include those rights which are basic to a real life and are absolute, i.e. it cannot be taken away.
- While fundamental rights are country specific, i.e. these rights may vary from country to country, human rights have a global acceptance, meaning that all the human beings enjoy these rights.
- The fundamental rights rely on the basic principle of the right of freedom. As against, the human rights are based on the right of life with dignity.
- Fundamental rights are guaranteed under the constitution of the country, whereas the human rights are recognized at international level.
- Both fundamental and human rights are enforceable in nature, but the former is enforced by the law court, and the latter is enforced by the United Nation Organization.
- Fundamental rights are derived from the views of a democratic society. Conversely, human rights emerge from the ideas of civilized nations.

Chapter Three

Fundamental Rights and their Judicial Enforceability

3.1: Enforceability of international instruments

An instrument 'Magna Carta' named the great Charter was signed in 1215 at Runimid. This is the first charter where it is written that nobody can arrest without trial and the king also within the trial. This is the first instrument of human rights where all of the international human rights instruments are framed on the basis of that 'Magna Carta'. In the contemporary world, human rights have become dominant ideology as it received almost universal recognition by all societies and people of all creeds. Human rights are now considered as sine qua non for the holistic development of human personality. Sometimes human rights are identified with fundamental rights. When certain human rights are incorporated in a constitution of a country and are protected by constitutional guarantees, they are called fundamental rights. In this sense, all fundamental rights are human rights but all human rights are not fundamental rights. While fundamental rights have territorial limitations, human rights have no such territorial limitations and they have universal application. Finally fundamental rights are mainly enjoyed by the citizens but human rights are applicable to all human beings. However, volume of rights provided in the international Human Rights instruments including Universal Declaration of Human Rights (UDHR) and two1966 international Covenants on political & civil Rights , and on economic, social and cultural rights e.g. ICCPR and ICESCR is more extensive than the rights guaranteed in part III of the constitution and other relevant laws of Bangladesh. Judiciary has opportunities to illuminate existing domestic human rights law by international human rights law to extend its scope and area of application.

3.2: Meaning of Judicial Enforceability

Enforce means to compel observance of or obedience to. Enforceable means capable of being enforced. A right or obligation is enforceable if a party obligated to an act can be forced or ordered to comply with the legal process.

In other words, enforceable is an action which can be made effective. For example, an agreement or contract between persons in which either of the parties can legally compel the performance of the other is called an enforceable contract. In the general sense judicial enforceability means anything which is enforceable by law along with

Relating to the administration of justice; Relating to judgment in a court of law or to a judge exercising this function; Inclined to pass judgment : discriminating; Allowed or enforced by a court of law; A decree of judicial separation ; Having question appropriate to a judge ; Giving or seeking judgment, esp, determination or seeking determination of a contested issue.

3.3 Fundamental Rights Under Bangladesh Constitution

3.3.1 Equality Before Law:

Equality before law has been provided in the Article 27 of the Constitution of the Peoples Republic of Bangladesh. This Article says that-

Equality before law is the most important Article and fundamental concept of our constitution. General meanings of equality before law is all persons, regardless of wealth, social status, or the political power wielded by them, are to treat the same before the law. Article 27 of the Constitution of the People's Republic of Bangladesh provides that "all citizens are equal before the law and are entitled to equal protection of law "Most of the constitutions of the world carrying this article. Meaning of this article is that the citizens of the country are equal before the law. That means all citizens of the same standers or of the same classes are equal.

3.3.2 : Discrimination in the grounds of Religion

Article 28 of the Constitution of Bangladesh provides that –

The State shall not discriminate against any citizen on grounds of religion, race, caste, sex or place of birth.

Women shall have equal opportunity right with men in all spheres of public life.

No citizen shall , on grounds of only religion ,race, caste, sex or place of birth be subjected to any disability ,liability, restriction or condition with regard to access to any place of public entertainment or resort, or admission to any educational institution.

3.3.3 Equality of opportunity in public employment:

Equality of opportunity in public employment has been provided in the Article 29 of the Constitution of Peoples Republic of Bangladesh. This Article says that-

There shall be equality of opportunity for all citizens in respect of employment or office in the service of the Republic.

No citizen shall , on grounds only of religion , race, caste, sex or place of birth, be ineligible for , or discriminated against in respect of any employment or office in the service of the Republic.

Nothing in this Article shall prevent the State from-

Making Special provision in favour of any backward section of citizens for the purpose of securing their adequate representation in the service of the Republic.

Giving effect to any law which makes provision for reserving appointments relating to any religious or denominational institutions to persons of that religion or denomination:

Reserving for members of one sex any class of employment or office on the ground that it is considered by its nature to be unsuited to members of the opposite sex.

3.3.4: Prohibition of foreign titles, etc:

Prohibition of foreign titles, etc has been provided in the Article 30 of the Constitution of Peoples Republic of Bangladesh. This Article says that-

No citizen shall , without the prior approval of the President, accept any title , honour, award or decoration from any foreign state.

Article 30 states that no citizen shall, without the prior approval of the President, accept any title, honour, award or decoration from any foreign state. Title is something that hangs to one's name as an appendage. During the British rule, there was a complaint that power to conferred titles was being abused by government for imperialistic purpose and for corrupting public life.[10] Thought of people are not limited. As this is the time of globalization, the problem and solution of all people should be solved in the same way. And that's why it is not necessary to prohibit the foreign title.

3.3.5 : Right to protection of law (arts.31-32):

Article 31 deals with the protection of law to be enjoyed by the citizens and persons residing in Bangladesh and in particular in respect of life, liberty, body, reputation and property. According to article 32, no person shall be deprived of life or personal liberty. The International Covenant on Civil and Political rights states vividly the right to life. According to art.6 of the ICCPR
"Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." Article 3 of UDHR states, 'Everyone has the right to life, liberty and security of person.' Article 2 of Convention for protection of Human Rights and Fundamental Freedoms states that everyone's right to life shall be protected by law. Likewise, art.21 of the Constitution of India provides that there shall not be any deprivation of life or personal liberty except according to procedure established by law. American Constitution also mentioned prohibition on all deprivation of life, liberty or property." The Court interprets art.31 of the constitution…. "Protection of life means that one's life cannot be endangered by any action which is illegal, but it does not mean protection of an illegal action of any person.2 The

[10] Talukder, S.M. Hassan, Fundamental Rights in the Bangladesh Constitution: An Appraisal, Bangladesh Law Research Centre, First Edition, 2014, p. 55.

case of Dr. Mohiuddin Farooque vs. Bangladesh is the most striking example of the illuminating interpretation of right to life. In this case, the court gives an extended and more liberalized interpretation by Abdul Mannan vs. Bangladesh.[11] Giasuddin vs. Dhaka Municipal Corporation & others[12], , Policy and Globalization www.iiste.org ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online) Vol.46, 2016 43 observing that the term 'right to life' means a meaningful life- man can live with dream and dignity. Here the court showed its adherence to exclude anything which might effect the enjoyment of life. The Court observed that "articles 31 & 32 of our constitution protect right to life as fundamental right .It encompasses within its ambit, the protection and preservation of environment, ecological balance free from pollution of air and water, sanitation without which life can hardly be enjoyed. Any act or omission contrary thereto will be violation of the said right to life."1 Art.31 of the constitution guarantees protection of life and liberty to every citizen. The term cannot be confined only to taking away of life, but mean something more than mere animal existence..

3.3.6 :Safeguard as to arrest and detention (art.33):

The Universal Declaration of Human Rights provides safeguard as to arrest and detention in art.9 which states that no person "shall be subjected to arbitrary arrest, detention or exile." Art.9 of the ICCPR also states about the safeguard as to arrest and detention. In this regard, art. 33 of the constitution of Bangladesh provides four constitutional safeguards to a person who has been arrested .However the said constitutional protections are not to be applicable to any person who is arrested or detained under any law providing for preventive detention. It is to be noted that the original constitution, enacted in 1972 is silent in the matter of preventive detention. The framers of the constitution carefully avoided such type of black provision & the original art.33 did not leave any scope for preventive detention. Afterwards, by the constitution (2nd amendment)Act 1973 the provision of preventive detention is inserted by art.33 which provides that the safeguards as to arrest and detention will not be applicable to persons arrested or detained under any law providing preventive detention. Thereafter, Special power Act, 1974 was enacted. It is true that most of the developing countries used the preventive detention as a weapon to dominate, crash the opposition and to perpetuate rule. When a person comes within the satisfaction of the government authority that a person is going to commit prejudicial acts, he may be detained by preventive detention to defend him from doing that act. The court presumed that many times detaining authority violates fundamental rights to satisfy the government by the following ways.

3.3.7: Protection against forced labour (art.34):

Article 4 of Convention for Protection of Human Rights & Fundamental Freedoms, art.6 of American Convention on Human Rights & art.8 of ICCPR declare that No one shall be required

[11] 55 DLR 537

[12] 49 DLR

to perform forced or compulsory labour .The UDHR does not directly states about the forced labour but it declares, "No one shall be held in slavery and servitude; slavery and slave trade shall be prohibited in all their forms. In spite of this provision Bangladesh has long had notoriously poor workplace safety, with inadequate inspections and regulations. This issue was spotlighted when Rana Plaza building, which housed five garment factories, collapsed. The building had been evacuated the day before due to cracks in the structure, but the workers had then been ordered back to work. More than 1,500 workers died. Workers in Bangladesh faced poor working conditions, low wages and excessive hours: they are indirectly forced to work on a bare minimum wages.

3.3.8: Protection in respect of trial and punishment (art.35):

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 (3) provides 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 effect the operation of any existing law, which prescribes any punishment or procedure for trial. 2 In different international, regional and constitutional documents, this right has been preserved carefully. Article 5 of the UDHR states, “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”.

3.3.9:Right to Freedom of movement, freedom of assembly and freedom association

The right to freedom as guaranteed by the constitution of Bangladesh classified as: (a) freedom of movement, of assembly and of association (art.36-38) (b) freedom of thought and conscience, and of speech (art.39) (c) freedom of profession (d) freedom of religion.

Freedom of movement, of assembly and of association (art.36-38): Art. 13 and 20 of UDHR state, “Everyone has the rights to freedom of movement, residence within the boarders[13] Tarique Rahman vs. govt. of Bangladesh[14], Mohammad Ullah vs. Session Judge, Noakhali & others[30], Deputy Commissioner ,Satkhiramvs.[15] No one may be compelled to belong to an association.” Similarly, arts. 12,21 &22 of ICCPR,art.15 & 16 of American Convention on human rights,arts.10,11 & 12 of African charter on human & peoples’ right has been stated about the right to freedom of movement, of assembly and of association which have been reflected in our constitution by the article 36,37 & 38. Freedom of Assembly. The constitution guarantees that every citizen shall have the right to move freely throughout Bangladesh (art.36) but many

[13] BLAST vs. Bangladesh, 55 DLR 363 2

[14] 63 DLR. 4

[15] Bangladesh Journal of Law, Policy and Globalization www.iiste.org ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online) Vol.46, 2016 45 of each state, peaceful assembly and association.

members of the political party has been detained everyday which is rendered meaningless. In disposing of a public interest litigation challenging the holding of hartals (general strikes), the High Court observed that if hartals lead to violence, death, and damage to the life and property of the citizens such actions would be punishable by the law of the land.[16] However, hartals per se, enforced through persuasion, unaccompanied by threats, intimidation, force or violence, are a democratically recognized right of the citizens to freedom of assembly guaranteed under article 37 of the constitution.[17] Every citizen shall have the right to assemble peacefully (art.37) is another constitutional guarantee but citizens are prevented from assembling. British imperial power enacted Section 144 in 1898, a device to keep the natives from becoming restless. After more than a century, government continues to take recourse to this instrument of oppression that violates the constitution. Every citizen shall have the right to form association (article 38) is yet another fundamental right which is being denied. The 'association' have formed with civil society is indirectly threatened by the Govt. The Government was increasingly hostile in 2012 to civil society groups. Civil society and human rights defenders reported increased governmental pressure and monitoring.

3.3.10: Freedom of thought and Conscience and of speech (article 39):

Articles 18 & 19 of the UDHR set out freedom of thought, conscience opinion and expression ,Likewise ,article 19 of the ICCPR includes freedom of thought and conscience ,again articles 9 & 10 of the Convention for protection of Human Rights and Fundamental Freedom guaranteed this right. Article 39(1) talks of fundamental right by which freedom of thought and consciences are guaranteed. However, we look at the Article 70 of our constitution, it says that a member of parliament will lose membership if he votes against his party. Besides this, the same provision does not shine upon the BTV network and this rights are not also properly enforced in Bangladesh. Some Private Telivision Channels are forcedly stopped by the Government like ETV, Diganta TV, Islamic TV and Channel 1 because they think that it is newsworthy to show what the actual political situation in our country. For example, in May 2010, the Information Minister met the owners of private television channels and suggested that they refrain from broadcasting content critical of the Government. Shortly thereafter, the Bangladesh Telecommunications Regulatory Commission (BRTC) used a technicality in the communications law to shut down a private television station. In recent years, publishers and editors of a good number of popular newspapers had to appear before the Supreme Court for their alleged contempt of the Court. Frequent attacks on journalists are a serious threat to freedom of expression. According to Odhikar and media watchdog groups, at least four journalists were

[16] BLAST vs. Bangladesh, 55 DLR 363

[17] Islam, Mahmudul, Constitutional law of Bangladesh, 2nd Edition, Mullick Brothers, Dhaka,2003,p-207

killed, 118 were injured, two were arrested, 43 were assaulted, 49 were threatened, and 12 had cases filed against them in 2010 alone.[18]

3.3.11 Freedom of Profession and Occupation (article 40):

Article 40 of the constitution of Bangladesh states that every citizen shall have the right to enter upon any lawful profession or occupation and to conduct any lawful trade or business. Article 23 of the UDHR also provides for freedom of occupation. Article 25 of ICCPR states, "to have access, on general terms of equality, to public service in his country." The Rural Electrification board took a decision barring all ex-employees of the said board from participating in any tender to be floated by it. The secretary of the Board communicated the said decision under his office order dated 30, 1986-the order of the board is violation of art.40 of this constitution.

3.3.12 Freedom of religion (art.41):

Article 18 of the UDHR and article 18 of the ICCPR have the provision of rights to freedom of religion Traditionally, Bangladesh is a moderate Muslim country, wherein every citizen has the constitutional right to profess, practice or propagate any religion, and every religious community or denomination has the right to establish, maintain and manage its institution. However, although governments publicly support freedom of religion, in recent areas, attacks on religious and ethnic minorities continue to be a problem since religious minorities are often at the bottom o f the social hierarchy and, therefore, have the least political recourse. Abdul Mannan Bhuiyan & another vs. state[31] , judgment dated 2 December,2007.

3.3.13 Right to property (art.42):

Article 17[19] of the UDHR states that everyone has the right to own property and no one shall be arbitrarily deprived of his property. Art.42 of the constitution guarantees that subject to any restriction imposed by law, every citizen shall have the right to acquire, hold, transfer or otherwise dispose of property. The right cannot be affected by administrative order. The Court declared that if a man's property does not ex-facie answer the description of abandoned property, inclusion of the property in the list of abandoned properties violates the right to property.

3.3.14 Protection of Home and correspondence (art.43):

Article 12 states that no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence …Everyone has the right to the protection of the law against such interference or attacks. Likewise same provision has been incorporated in the art.17 of the

[18] 12 MLR 5 55 DLR 6

[19] Article 17 of UDHR 1948

ICCPR. The Fourth amendment of the American Constitution provides[20], "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated……" The amendment recognizes "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." 2 Article 43 of the Bangladesh Constitution guarantees the privacy of home and correspondence and communications. It provides that every citizen shall have the right to be secure in his home against entry, search and seizure and to the privacy of his correspondence and other means of communications. In Malone vs. Metropolitan Police Commissioner[21] Megurry vc turned down a complaint against telephone tapping on the ground of absence of any common law right of privacy, but in Bangladesh such telephone tapping will be unconstitutional for violation of the privacy unless a law permits it in any of the grounds of restriction mentioned in article 43.[22]

3.4 Fundamental Rights and Judicial Enforceability :

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.

3.5 Suspension of Fundamental Rights During Emergency

There are some special provision in the Bangladesh constitution that is emergency under Article 141 of the Bangladesh construction. President can declare for emergency on the grounds of external aggression or internal disturbance.

These provisions in the constitutions of some countries but nowhere it is exactly defined what emergency is. Normally emergency means an unexpected occurrence" requiring immediate action. In Bhagat Singh V. King[23]-

[20] 60 DLR (AD)2007,49
[21] Malone vs Metropolitan Police Commissioner [1978 M. no 3772]
[22] 4th Amendment of Us Constitution 1791
[23] 1931 ILR12LAH280

Emperor Lord Dunedin said, "a state of emergency is something that does not permit of any exact definition. It connecters a state of matters calling for drastic action."1Stiphen P. Marks says that emergency is a situation which results from temporary condition, which place institutions of the state in a precarious position, which leads the authorities to feel justified suspending the application of certain principles. Strictly speaking, the concept of emergency, from the view point of constitutional law, means the suspension of and restriction over certain fundamental rights of citizens in order to deal with a situation when the security of the state is threatened or the national interest is in peril. From the Bangladesh constitutional point of view, emergency means the existence of a condition whereby the security or economic life of Bangladesh or any part thereof is threatened by war or external aggression or internal disturbance.

Some of the Writs of Habeas Corpus can be delegated to District Judges. Many of the Writs of Habeas Corpus are simple. Such as in the case of Sardar Begum vs. Habib Shah Khan.[24]

3.6 : Restrictions in performance of Fundamental Rights:

The Constitution of Bangladesh has applied some restrictions for his citizens to perform their fundamental Rights. These restrictions are provided in the Article 39 of the Constitution. Its provided that -

The freedom of thought and conscience and speech of the citizens of Bangladesh has been guaranteed except it is the subject to any reasonable restrictions impeached by law in the interest of –

- The security of the state.
- Friendly relationship with foreign countries.
- Public order.
- Decency or morality
- Contempt of court 6. Defamation of any person
- Incitement to an offence.

The Constitution guaranteed the of freedom of thoughts, conscience, speech as well as the freedom of presses.

The right to freedom of opinion is the right to hold opinions without interference, and cannot be subject to any exception or restriction. The right to freedom of expression extends to any

[24] PLD 1976 Lah. 216

medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising. However, the right is not absolute. It carries with it special responsibilities, and may be restricted on several grounds. For example, restrictions could relate to filtering access to certain internet sites, the urging of violence or the classification of artistic material Under article 4 of the ICCPR, countries may take measures derogating from certain of their obligations under the Covenant, including the right to freedom of opinion and expression 'in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed'. In addition, under article 19(3) of the same Covenant, freedom of expression may be limited as provided for by law and when necessary to protect the rights or reputations of others, national security, public order, or public health or morals.

The national security limitation would justify prohibitions on transmission of information, including 'official secrets', which would adversely affect the security of the nation. On the other hand, 'public order' is understood to mean the rules which ensure the peaceful and effective functioning of a society. The limitation in article 19(3) would justify prohibitions on speech that may incite crime, violence or mass panic, provided the prohibition is reasonable and effective to protect public order or national security, and restricts freedom of expression no more than is necessary to protect the same.

Chapter Four

Rights & Constitutional Remedies For The Protection of Fundamental Rights

4.1: Violation of Right to Life & Personal Liberty :

They are called fundamental rights in the sense that they are placed in supreme or fundamental law of the land which has a supreme or fundamental law of the state.[25] Right to life and personal liberty are the most appreciated and vital fundamental human rights around which other rights of the individual rotate.

Article 31 is the famous provision of the Constitution of Bangladesh and occupies a unique place as a fundamental right.

It guarantees right to life and personal liberty to citizens and aliens and is enforceable against the State.

`Right to life` and `personal liberty` is the contemporary name for what have been usually known as `natural right`. It is the primeval right necessary for the development of human personality.

It is the moral right which every human being everywhere at all times ought to have simply because of the fact that in contrast with other beings, he/she is lucid and moral.

It is the fundamental right which enables a man or woman to plan his/her own life in the manner he/she likes best. Right to life and personal liberty is one of the rights of the people of Bangladesh preserved by its Constitution.

Despite having the most appreciated and pivotal fundamental human rights guaranteed in our Constitution, it has been widely reported in Bangladesh that in the last few years there has been a pattern of extrajudicial killings going on in the name of “crossfire”, “gunfights” or “encounters”, even though we live in a democracy and our Constitution protects and ensures fundamental rights for every individual in our country.

Until recently a new term has been improvised, a new culture of enforced disappearances has developed, which is alarming and this adds to the disrespect for human rights and thus the long practice of impunity and a weak criminal justice system common in Bangladesh.

We are deeply worried that the present government has not done enough to efficiently address the extrajudicial killings and the recent spate of killings and disappearances, and that this inaction has led to a culture of impunity in which even more killings and human rights violations can take place.

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

4.2 Violation of Right to Arrest & Detention:

Code of Criminal Procedure 1861 were enacted.1 Today, the Penal Code 1860,2 the Police Act 1861,3 the Evidence Act 1872,4 the Code of Criminal Procedure1898,5 and the Jail Code 19436 are still in force, with only peripheral amendments. It is often argued that the law-making process in colonial Bengal was erratic and norms were often enacted randomly (Malik, 1994: 2). Alongside the steady growth of series of 'special laws' in 1980s and afterwards, some half-hearted palliative reforms have also been initiated with a view to easing the strain in criminal procedure. Despite this, the contemporary law of Bangladesh is still largely colonial in nature. As a result, the Code of Criminal Procedure 1898 is today still the major procedural criminal law in Bangladesh. It allows arrest on suspicion, followed by detention in police custody, pursuant to ss 54 and 167, with few safeguards. As a result, arbitrary arrest, detention and custodial torture by law-enforcing agencies have remained a persistent feature of the criminal justice system of Bangladesh since independence in 1971 (Ain o Salish Kendra, 2008). These practices have been widespread in Bangladesh irrespective of the form of government in power, and successive governments have failed to remedy the problem. Although there has been widespread concern expressed by human rights organisations and citizens alike regarding abuse of criminal laws in Bangladesh, no judicial intervention was made to check abuse or misuse of ss 54 and 167 of Code of Criminal Procedure 1898 until 2003. In 2003, in the case of Bangladesh Legal Aid and Services Trust (BLAST)and others v State,7 the High Court Division of the Supreme Court of Bangladesh condemned any sort of abuse in the course of arrest on suspicion or detention in police custody. It declared that ss 54 and 167 of the Code, are 'to some extent inconsistent' with the provisions of the Constitution and accordingly proposed a set of recommendations for reform. In 2004, an almost identical set of findings and guidelines were proposed by another bench of the High Court Division in Saifuzzaman v State and others.8 The decision in the BLAST case was appealed by the Government of Bangladesh to the Appellate Division of the Supreme Court and, on appeal, the Appellate Division of Supreme Court of Bangladesh upheld the decision of the High Court Division, with some modifications. The Appellate Division was of the view that some of the recommendations provided by the High Court Division were either redundant or exaggerated. .

4.3:Remedies for the Protection of Fundamental Rights:

Fundamental Rights can be protected in 2 ways.

- Make a petition of Writ in the Supreme Court of Bangladesh.
- To make a petition of Public Interest Litigation (PIL) in the Supreme Court of Bangladesh.

Role of Writ to protect fundamental rights:

The position of the high court division in respect of enforcement of fundamental rights is the same as that of the Indian Supreme Court with the difference that its decision is not final and is subject to appeal under article 103. Thus it is not discretionary with the high court division to grant relief under article 102(1). Once it finds that a fundamental right has been violated, it is under constitutional obligation to grant the necessary relief[26]

Under article 32, the Indian Supreme Court entertains only disputes involving breach of the fundamental rights. If a person wants to challenge any state action on various grounds including breach of the fundamental rights, he shall have to seek the remedy under article 226 which is discretionary. Under the constitutional dispensation of Bangladesh, a petitioner does not have this problem, he can by one petition enforce his right under article 44 and at the same time press other ground of ultra vires in respect of a state action.[27]

However, there must be an application by an aggrieved person so that the High Court Division may pass an order or direction for the enforcement of a fundamental right. In the case of Md. Shoib vs. Bangladesh[28] the petitioner, one of the three partners of a partnership firm, field a writ petition at the High Court Division challenging the validity of a government order staying a proceeding for release and handing over possession of the said partnership to the petitioners which affected the petitioners fundamental right to freedom of profession or occupation contained in Article 40 of the Constitution.
If the infringement of fundamental right is established, the enforcement of the fundamental right becomes obligatory upon the High Court Division and exhaustion of all other equally efficacious remedy provided by law is not necessary. D.C. Bhattacharya J. observed: "Any person aggrieved by any order or act may move this court for relief against such order or act and the petitioner being very much affected by the impugned order has every right to move this Court for necessary orders[29].

[26] Kochumi vs madras 1959, AIR SC 725
[27] Mahmudul islam , Constitutional Law of Bangladesh , 2002, 2nd Edition
[28] 27 DLR 315
[29] 27 DLR 315

Chapter Five

Findings, Suggestion & Conclusion

5.1 Findings:

The findings are as follows:

1. The value and substance of the various fundamental rights and the courts role in maintaining, nourishing and preserving them against executive, legislative and even individual action.

2.In attendance may be occasions when these rights will be infringed by legislative or executive action.

3.The citizens can, by appropriate proceedings in the courts, thwart any possible attempt to infringe them.

4.At the same time it can hardly be forgotten that it is the duty of the court to be last, not first to give them up.

5.2 Suggestions

Given the situation which is arisen in our country centering around to go to power, it is urgent for the Government and all political parties to realize the need for unity and solidarity as collectively or singly , all the political parties of Bangladesh more or less take the burden of unbecoming attitudes to human rights. Moreover, public sentiment deserves due respect from the Government and all the political parties. However, in order to eliminate gross human rights violation of the current situation in our country pursues the following recommendations:

- The Constitution of Bangladesh has no provision for forbidding the arbitrary expulsion of residents and aliens (ICCPR-13) that should be included.
- The constitution of Bangladesh did not include the provision for the right to be treated with dignity and humanity of the convicted person until being proved criminals which should be inserted in our constitution.
- There is no direction in the constitutional provision regarding to the workers to join international trade union organizations (ICCPR-8) which may be included in our constitution . 4. Article 33(4)(5) which was inserted by the 2nd amendment must be removed.

- Since Special Power Act, 1974 is a black law, which was constituted on the basis of art. 33(4)(5) deprives a man of his fundamental rights and puts a person into prison for not fault at all , it should remain in force any more. In the whole of this sub-continent repressive law like this or in any other form is extremely detrimental to the growth and maintenance of human rights. For this reason, Special Power Act,1974 must be repealed.

- In most of the cases it is found that the police as well as law enforcing agencies directly or indirectly responsible for violation of human rights in Bangladesh. So police must be made accountable for the commission of such violation.

5.3. Conclusion

No doubt Bangladesh Constitution contains all the good principles of human rights, these are all fundamental to the development of a human being, but unless the constitutional provisions are properly enforced and if the violators are not properly brought to book no relief will give to the common people of Bangladesh. The ongoing confrontational politics based on diametrically opposing stands and approaches of the two major political parties, has created a serious stalemate causing threats to democracy and human rights. The political parties are apparently investing their total efforts and time for devising ways and means mainly to go to power. All the political parties, while in power, hardly make any attempt voluntarily to strengthen the bases of democracy and human rights.2

Human rights have emerged to be one of the core fundamental rights since it gives positive rights to citizens of a state as individuals. Individual rights have to be attended as they provide concrete human rights such as right to freedom from torture and inhuman treatment, right to liberty, right to freedom of movement, freedom of speech and more. Most importantly it provides the right to life. The Constitution does not mention the relief which may be granted to redress the violation of fundamental rights. It has been left to the High Court Division to fashion the relief according to the circumstances of particular cases. It may be one injunctive relief preventing the infringement of fundamental right or it may be a direction or order including an order in the nature of various kinds of writs. In this context, the observations made by M.A. Jabir, J., in Bangladesh vs. Ahmed Nazirar to direct relevance: “We have, accordingly, no doubt that the framers of the Constitution intended to empower the High Court Division to pass appropriate orders .... and the power to do so is not at all fettered because of the absence of nomenclature of the nature of writ in the Constitution” . It can be seen from the above discussion that the High Court either by an application by any aggrieved party or in its own initiative can issue writ to ensure proper protection of fundamental rights as enunciated in the constitution.

The above issues could also be addressed by statutory regulation, should constitutional amendment be considered too ambitious. It will require the parliament to introduce a bill on negotiation, conclusion, ratification and implementation of treaties as well as international customary norms within domestic jurisdiction. t is also possible to address the problem by making special approaches to specific categories of treaties and customs, e.g. a Bill of Rights incorporating all human rights universally recognized as such as well as all rights enshrined in international human rights instruments to which Bangladesh is a party, could be adopted by the parliament to make them part of domestic law as well. This would substantially serve the cause of protection, promotion and development of human rights which has now become a credible measure of human progress and welfare.

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