

Writ Jurisdiction: Enforcement of Fundamental Rights in Bangladesh

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ABSTRACT

This research is focusing on the fundamental rights in the Constitution of Bangladesh. It's tries to analyses critically few fundamental rights like prohibition of foreign title, suspension of fundamental rights during emergency. Also, study some cases regarding these rights in this dissertation. Finally, some recommendations have been placed. From the study it was found that the constitution of Bangladesh has included all the basic attributes of fundamental rights. But practically sometimes the government is bound to violate the fundamental rights of the people in Bangladesh due to some unavoidable circumstances like the citizens vandalize state properties of public properties. To stop anti state activities, government do so. The ruling class should be truly respectful to the fundamental rights of the people. There should not be any international barrier Created by government for political interest and to oppress the opposite. It is the responsibility of the government to limit the events to violate the fundamental rights of the people. In addition, try their best respond these rights in some very rare cases, where there is no other alternative. Which is truly done for the sake of the country's overall benefit with no purpose of self-interest of the ruling party, some more restriction and controlling can be developed in the constitution of our country to regulate and prevent the indiscriminate and whimsical violation of the rights by the ruling power furthermore, the consciousness rights. Therefore, the ruling class for their self-interest can't violate their rights.

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

INTRODUCTION

The doctrine of fundamental rights is feature of United States law under which certain human rights that enshrined in the US constitution are given a high degree of judicial deference in conflicts between individual liberty and governmental intrusion. Although many fundamental rights are also more widely considered to be human rights. The classification of a right as fundamental invokes specific legal tests used by courts to determine the carefully contained conditions under which the United States Government and the various state governments may impose limitations on this right. Fundamental rights give the citizens dignity of life in an atmosphere of freedom and justice beyond the man made fetters that had constricted their physical and mental horizons. Modern judiciary is regarded as an excellent product of civilization to put the concept of justice to work in the midst of divergent force with conflicting class or individual interests. Such conflicts make it difficult to bring about equilibrium in the society for a peaceful and orderly association of citizens for their common good. An independent judiciary and strong democratic institutions are the best guarantee against assaults on the rights of the citizens.

This research is mainly focusing on the features of fundamental rights in the constitution of Bangladesh inspired by the Universal Declaration of Human Rights, 1948; the constitution of Bangladesh enumerated some basic civil and political rights common to most liberal democracies and also insures the rights to constitutional remedies for the protection of these rights. In addition, the fundamental rights of the constitution of Bangladesh are aimed at overturning the inequalities of past social practice. I prohibit discrimination on the grounds of religion, race, sex, color place of birth and forbid trafficking human being and forced labor. Thomas Jefferson said, "We hold these truths to be self-evident. That all men are created equal. That they are endowed by their creator with certain inalienable secure these rights, government are instituted among men, deriving their just powers form the consent of the governed. That whenever any form of government becomes destructive of those ends, it shall be the right of the people to alter or abolish it and to institute new government, laying its

foundations upon such principles, and organizing its power in such forms, as shall seem to them most likely to effect their safety and happiness”.

This easy is merely focusing on the features of fundamental rights as have been preserved in the constitution of Bangladesh. The frames of Bangladesh have been discussed in Article basis starting from the preamble of the constitution. The frames of these constitutions practically show concern for necessity of protecting human rights and ensuring fundamental freedoms. In the preamble of the constitution they declared that it shall be a fundamental object of the state to realize through the democratic process a society free from exploitation, a society in which the rule of law, the fundamental human rights and freedom, equality and justice, political, Economical and social will be secured for all citizens.

OBJECTIVES OF THE STUDY

The objectives of the Study are as follows:

1. To explore writ jurisdiction of Bangladesh.
2. To find out the fundamental rights provided by the Constitution of the People’s Republic of Bangladesh.
3. To provide policy recommendations.

METHODOLOGY OF THE STUDY

The study was documentary analysis type. Data and information were collected from the secondary sources. Data and information were collected from books, research reports, journals, website of Ministry of Law, Justice and Parliamentary Affairs of Bangladesh, internet etc. Constitution of the People’s Republic of Bangladesh has been studied rigorously.

RESULTS AND DISCUSSION

Meaning of Writ

In general writ means a written document but in legal terminology it has a restricted meaning. In legal terms, it is a document by which one is summoned or required to do or refrain from doing something. “Writ means” a written command, precept, or formal order issued by a court, directing or enjoining the person or persons to whom it is addressed to do or refrain from doing some act specified therein. According to Blackstone, writ is mandatory letter from the king in Parliament, sealed with his Great Seal, and directed to the Sheriff of the Country wherein the injury is committed or supposed so to be, required him to command International Journal of Law the wrong-doer or party accused, either to do justice to the complainant or else to appear in Court, and answer the accusation against him. According to Burton’s legal thesaurus writ stands for bid, bidding, command, commandment, decree, direction, directive, flat, mandate, order, ordinance, precept, regulation and requirement.

Simply the word writ is used to indicate a particular type of order or judicial process.

Concept of Writ

Historically writ originated and developed in English Legal System. In England, the writs are issued by the Crown as the head of the judicial system. Where there is no statutory source and the Crown issued it by virtue of prerogative, it was called the prerogative writ e.g. the writ of Habeas, Corpus, Mandamus, Prohibition, Certiorari, and Quo Warranto. There are some other kinds of writ, e.g. writ of execution, writ of error, writ for the election, writ of a Member of Parliament, etc. issued in the name of the reigning monarch, for the doing, or not doing, of some act or thing. In Bangladesh, there is no prerogative power belonging to any organ of government. But power to issue the writ corresponding to the English prerogative writ has been rested with the High Court Division under Article 102 of the constitution of the People's Republic of Bangladesh.

Since these writs are founded on the express provisions of the constitution, the High Court Division is also free to issue appropriate orders in the nature of those writs, embodying their essential principles. However, these writs are available not only for the enforcement of fundamental rights but also for the enforcement of non-fundamental legal rights created by various statutes and other Laws in force for the time being. In the context of Bangladesh, writ can be classified as: Habeas Corpus, Mandamus, Prohibition, Certiorari, and

Definition and characteristics of Fundamental Rights:

“Rights” occupy a significant place in books of Jurisprudence, having many facets and connotations. Briefly speaking, a right is an advantage, benefit or interest conferred upon a person by law, including the common law, statute or the Constitution of the land.¹ A legal right is one which is protected or enforced by law, as distinguished from a moral right or a convention which has no legal sanction so long as it is not adopted by legislation, when it becomes enforceable by means of a legal proceeding in the Courts.

A right is a relative concept. When the law recognizes a right, it imposes a duty on some other person or persons to do something or to omit to do something in relation to the right of the person on whom the right has been conferred by law. In private law, the person who owes the duty is a private person or individual. But in public law, to which Constitutional appertains, the duty is owed by and the right is enforced against the State itself, when the right is necessary for the existence and dignity of a person as a human being, irrespective of any other consideration, it is called a human rights. Rights are either substantive or procedural. That part of law which creates or extinguishes a right is called substantive law and that part of law which prescribes the method of enforcing that right is called procedural or remedial law. When a legal right is created and guaranteed by the Constitution, it is called a “fundamental right” because it is secured by the fundamental law, i.e., the Constitution of the State.

Natural rights are such as appertain originally and essentially to man, are inherent in his nature, and which he enjoys as a man, independently of any particular act on his side. They grow out of the nature of man and depend upon personality as distinguished from such as are created by law. These rights are necessarily inherent and innate, and come from the very elementary laws of nature. Fundamental rights are those natural rights which are personal to the individual as a citizen of a free and civilized community and belong alike to every man, woman and child. The mere statement of such rights in the enacting part of a Constitution is a prohibition by necessary implication of legislation inconsistent therewith, making such legislation void. They are, however not absolutely indefeasible, but are so unless or until the Government, acting in pursuant there to, requires their surrender for considerations of public welfare or safety.

The essential characteristic of fundamental rights is that they impose limitations, express or implied, on public authorities, legislative, executive and judicial, prohibiting them from interfering with their exercise. No right can be properly described as fundamental if the Legislature can take it away by a law not involving an amendment of the Constitution, or unless its suspension or surrender in a national emergency is specifically provided by the Constitution itself. A right to be fundamental must be such as is enforceable by judicial or some other process. Any action taken by the Legislature or the Executive in violation of a fundamental right is void in law and the Courts are bound to make a declaration accordingly and to give suitable relief to the aggrieved party.

This duty is the very essence of what is called judicial review of legislation. And since such rights amount to restrictions on legislative power, they cannot exist where the Legislature is supreme and not subject to limitations, as for instance, in the United Kingdom, or where the Government takes the form of an absolute monarchy. The power of judicial review can, therefore, exist only where the Legislature functions under limitations imposed on it by the Constitution and not where, unhampered by any constitutional restrictions; it acts as a sovereign body.²

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. Rights and freedoms from the bedrock of democracy. No democracy can function successfully in the absence of some basic freedoms. Again, modern democratic government is a party government. The party winning majority in the election form the government. But coming in to power the government may turn itself into a one violating the basic rights of people and oppressing the opposition. The aim of having a declaration of fundamental rights in the constitution is to prevent such a possible danger. In order words, they provide a restraint on the power of the government so that it cannot interface with the people’s basic rights according to its whims. When rights and freedom are placed the part of the supreme law and the government cannot take them away except by constitution amending

¹Durga Das Basu, *Constitutional Remedies and Writs*, Second Edition, 1999, p.3.

²M. Munir, *Constitution of the Islamic Republic of Bangladesh*, Lahore, 1965 p, 83.

process which is always a right one. This is why insertion of a Bill of right in a written constitution is considered to be one of the safeguards of democracy. Bangladesh accepted fundamental rights and incorporated the same in their constitution. Within less than a year after the emergence of Bangladesh as a new, independent, sovereign republic, the constitution of Bangladesh was passed, though; however, it came into force on December 16, 1972, the first anniversary of the day of liberation.

What is Rights?

Before understanding fundamental rights are should have idea about rights and human rights. Rights mean a claim of some interests adverted by an individual or a group of individual which has either moral or legal basis and which is essential for his development in the society. In a sense right not created by law it originates itself as an obvious result of mutual interaction between man and society. Rights are primarily divided in to two categories-moral rights and legal rights.

What are Human rights?

The term "human rights" which does not mean any right is used in special sense. Human rights are those of legal and moral rights which can be claimed by any person for the very reason that is a human being. These rights come with birth and applicable to all people throughout the world irrespective of their race, color, sex, language or political or other opinion. These are therefore those rights that are inherent in human person and without which they cannot live as human beings.

What are fundamental rights?

The term fundamental right is a technical one, for when certain human rights are written down in a constitution and protected by constitutional guarantees they are called fundamental rights. They are called fundamental rights in that sense that they are placed in the supreme or fundamental law of the land which has a supreme society over all other law of the land. Article 26 to 47 of Bangladesh constitution confers a number of substantive fundamental rights on every citizen of Bangladesh e.g. the right to freedom of expression, assembly, association, movement and profession

Distinction between Human rights and Fundamental rights

There are some Fundamental distinction between directives and fundamental rights:

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

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

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

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

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

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

Nature of Fundamental Rights

The Fundamental Rights were intended to serve three important purposes, namely:

1. to prevent the Executive from acting arbitrarily;
2. to ensure some amount of security and protection to various types of minorities; and
3. to promote and foster social revolution by establishing the conditions necessary for achieving justice, social, economic and political.

The immutability and permanence of the Fundamental Rights were sought to be established first on the reasoning that these rights are rooted in the doctrine of natural law and were, therefore, natural rights as expressed in the traditional parlance and secondly, on the ground that they have been given a place of permanence by the constitution within its scheme. But the Fundamental Rights as contained in part III of the constitution, are neither rooted in the doctrine of natural law nor did they base on the theory of reserved rights. They are conferred rights and embody the social values of the present generation. As the social values are not static, the Fundamental Rights are subject to changes and modifications in order to fulfill the aspirations of man in the context of his changed conditions and environment in which he lives.

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. 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 inconsistent 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” within 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 on 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 cannot discriminate 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.

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 framers 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 throughout Bangladesh, to reside and settle in any place in Bangladesh, and to leave and re-enter Bangladesh. In the case of *Dr. Mohiuddin Farooque v. Bangladesh 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 cannot be any political party which is an essential institution of democracy. The right of free association is closely allied with the freedom of speech and which is a right to free speech, and foundation of a free society.

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 cannot 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.

Modification of rights in respect of disciplinary law

Article 45 is a modification of rights in respect of disciplinary law. The provisions of part III will not be applicable to the members of disciplined forces for ensuring proper discharge of their duties or maintenance of discipline in that force, disciplinary law is kept out of the ambit of enforcement of fundamental rights.

Power to provide indemnity

Article 46 grants indemnity by law in respect of acts done during the national liberation struggle or the maintenance or restoration or order in any area in Bangladesh.

Saving for certain laws

47 certain laws have been saved and Clause (1) of this Article grants immunity from challenge on the ground of violation of fundamental rights. Clause (2) gives the protection of certain laws in first schedule in spite of the inconsistency with any provision of the constitution. Clause (3) of this article provides for detention, prosecution and punishment for genocide, war crimes against humanity under international law and in case of conflict with any provision of this constitution, the law made for such detention, prosecution or punishment of any person under international law shall not be void.

Inapplicability of certain Articles

The persons in respect of whom Clause (3) of Article 47 applies shall be precluded from moving the Supreme Court for any remedy under the constitution. It provides for inapplicability of certain Article of this part mentioned in Article 47(A) of the constitution. In the above-named the Article basis starting from the preamble, Security for the fundamental rights in Bangladesh constitution.

Supremacy of the Fundamental Rights

Supremacy of the Fundamental Rights is safeguarded by the constitution of Bangladesh. It is a rigid constitution; it can be amended by two third majorities of the parliament members. The constitution but not parliament is supreme. It is stated in the preamble that it is our sacred duties to safeguard protects and defend this constitution and to maintain its supremacy as the embodiment of the will of the people of Bangladesh. Article 7 states all powers in the Republic belong to the people and their exercise on behalf of the people shall be affected only under and by the authority of this constitution. This constitution is as the solemn expression of the will of the people. The supremacy of law of republic and if any other law is inconsistent with constitution that other law shall to the extent of the inconsistency to void. Article 26 states that all existing laws inconsistent with the provisions of this part i.e. Fundamental Rights, shall to the extent of such inconsistency become void on the commencement of this constitution. The state shall not to make any law inconsistent with the provision of this part and any law so made shall to the extent of such inconsistency is void. Under article 102 the Supreme Court has been empowered to scrutinize the government actions done is violation of Fundamental Rights. Again under Article 7 and 26 the Supreme Court exercises the power of judicial review i.e. to examine the constitutionality of any law passed by the parliament.

Imposition of Restriction over Fundamental Right

The enjoyment of rights can now where be seen in an absolute position, for the enjoyment of one's right in the society is subject to the enjoyment of other's right. Moreover, modern states are welfare states where-collective interests are given priority over individual's rights or interests. Unrestricted individual liberty becomes a license are jeopardizes the liberty of others. Civil liberties as guaranteed by the constitution imply the existence of an organized society maintaining public order without liberty it sells would be lost in the excess of unrestrained abuses. If individuals are allowed to have absolute freedom of speech and action, the result would be chaos, ruin and anarchy. On the other hand, if state has absolute power to determine the extent of personal liberty, the result would be tyranny. So restrictions may be imposed on the enjoyment of fundamental rights for the greater purpose of public welfare. This idea has got recognition in article 29(2) of the Universal Declaration of Human Rights, 1948-

'In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality public order and the general welfare in a democratic society. It is also worthy here to mention the judgment of justice Mukharjee in *Gopalan v. State of Madras*. There cannot be any such thing as absolute or uncontrolled liberty wholly free from restraint; for that would lead to anarchy and disorder. The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, healthy, peace, general order and morals of the community.

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 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 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 people's rights for the protection of which the government is formed, cannot 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- "Everyone 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".

A list of fundamental rights conferred by the Constitution of Bangladesh:

Bangladesh: Fundamental rights as conferred in the Part III of the Bangladesh Constitution, 1972 are:

Articles

- 27 Equality before law
- 28 Discrimination on grounds of religion, etc.
- 29 Equality of opportunity in public employment
- 30 Prohibition of foreign titles, etc.
- 31 Right to protection of law
- 32 Protection of right to life and personal liberty
- 33 Safeguards as to arrest and detention
- 34 Prohibition of forced labour
- 35 Protection in respect of trial and punishment
- 36 Freedom of movement
- 37 Freedom of assembly
- 38 Freedom of association
- 39 Freedom of thought and conscience and of speech
- 40 Freedom of profession or occupation

- 41 Freedom of religion
- 42 Rights to property
- 43 Protection of home and correspondence
- 44 Enforcement of fundamental rights
- 45 Modification of rights in respect of disciplinary law
- 46 Power to provide indemnity
- 47 Saving for certain laws
- 47A Inapplicability of certain articles

Need for guarantee of right for redress in case of violation of substantive right:

A declaration of fundamental rights is meaningless unless there are effective judicial remedies for their enforcement.³ As Dicey⁴ demonstrated a century ago, abstract declarations of the rights of man are of little value unless there are definite means or machinery for such rights in case any of those rights are violated by the State or its officials. He insisted that even where such rights are guaranteed by a written Constitution, as in the U.S.A., what is more important is not the declaration of the rights in the Bill of Rights, but the means of enforcing those rights under the American constitutional system. The value of Dicey's emphasis upon the importance of the remedy to enforce the right apart from the declaration of the substantive right remains as ever.

All modern International Charters relating to human rights as well as written Constitutions guaranteeing individual rights, therefore, contain provisions for a remedial right for the enforcement of the substantive rights as guaranteed by these Constitutions. Now, this remedy may be provided for in the written Constitution itself or in the ordinary law. When the remedy is also guaranteed by the Constitution as a fundamental right, it may be called a remedial fundamental right. In England, individual rights are safeguarded, even without any declaration that they are fundamental, by means of the prerogative writs, which have been called "the bulwark of English liberty". Briefly speaking, they were called prerogative writs because they were extraordinary remedies which originated in the royal prerogative (discretionary power), namely the writs of habeas corpus, mandamus, prohibition, ceatorari and quo warranto.

Nature of the Remedies provided by the Constitution of India, Pakistan and Bangladesh: A Comparative Study:

Article 32 of the Indian Constitution and art. 22 of the Pakistan Constitution of 1956 conferred power on the Supreme Court to enforce fundamental rights and made the right to apply to the Supreme Court for enforcement of fundamental rights itself a fundamental right. The high Courts of the provinces had also power to enforce fundamental rights, but this power was discretionary, while the power of the Supreme Court was not discretionary and once a law or an administrative action was found to be violative of a fundamental right, it was obligatory for the Supreme Court to grant relief to the aggrieved person. In the Constitution of Pakistan of 1962, the original jurisdiction of the Supreme Court was omitted and the aggrieved persons were to move the provincial High Courts for redress and the Supreme Court had jurisdiction to hear appeals from the judgments of the High Court.

The power of the High Courts to enforce fundamental rights remained a discretionary power as the right to move for enforcement of fundamental right was no longer a fundamental right. Under the Constitution of Bangladesh, the High Court Division has power under article 102(1) to pass necessary orders to enforce fundamental rights and under article 44(1) the right to move the High Court Division under article 102 (1) is itself a fundamental right. 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.⁵ 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 Bangladesh constitutional dispensation, a petitioner does not have this problem; he can by

³ Durga Das Basu, *Commentary on the Constitution of India*, Third Edition, Volume one, p.370.

⁴ Dicey 10th Ed. P197ff.

⁵ *Romesh Thaper v. Madras*, AIR 1950 SC 124

one petition enforce his right under art. 44 at the same time press other grounds of ultra vires in respect of a State action.

CONCLUSION AND RECOMMENDATION

“Injustice anywhere is a threat to justice everywhere”. A system of law, without effective remedies either fails in its mission or serves very little purpose. An effective system of remedies would also serve no good purpose unless there is a vast awareness of the existence and availability of those remedies. Out of all legal remedies, writ is a very important piece of legal remedy against arbitrary administrative action. If proactive approaches are taken to the practical modification in the existing system of Law of Writs in Bangladesh, it can be proved truly effective as a remedy to the public to guarantee their rights. Initially the development of Writ in Bangladesh was slow due the prolonged periods of Martial Laws and autocratic regimes that curtailed the fundamental rights and disrupted the normal functions of the judiciary. Once the democratic institutions had changed to operate the judiciary boldly re-asserted its proper constitutional role. As a result, progressive interpretations of the Constitution, including the development of PIL, became possible. The Supreme Court tackled the problem of access to justice by people through radical changes and alterations made in the requirements of *locus standi* and of party aggrieved. Public Interest Litigation as it has developed in recent years marks a significant departure from traditional judicial proceedings. The court is now seen as an institution not only reaching out to provide relief to citizens but even venturing into formulation of policy which the state must follow.

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