Recharge monograph

On

"Enforceability of the Fundamental Rights under the Constitutional Scheme of Bangladesh: A Critical Analysis"

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

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January 10, 2024

To,

Mr. Md. Abdul Alim

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Subject: Submission of research monograph.

Dear Sir,

It is a great pleasure to submit my research paper on "Enforceability of the Fundamental Rights under the Constitutional Scheme of Bangladesh: A CriticalAnalysis".

I have given my best efforts to finish the research with relevant information that I have collected from various source.

I have concentrated my best effort to achieve the objectives of the work and hope that my endeavor will serve the purpose. I shall be highly grateful and obliged if you kindly accept my research and evaluate it with your sagacious judgment.

Sincerely yours,

Sheikh Md Abdullah-Al
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Acknowledgement

I am deeply gratitude to Almighty Allah for providing me everything that required for completing my research work.

I would like to acknowledge everyone who played a role in my academic accomplishments. First of all, my parents, who supported me with love and understanding.

Without you, I could never have reached this current level of success.

Secondly, I am thankful to my supervisor Asst. Professor Mr. Md. Abdul Alim toallow me and support to prepare this research.

……

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Declaration

I do hereby declare that the research monograph entitled "Enforceability of the Fundamental Rights under the Constitutional Scheme of Bangladesh: A Critical Analysis" submitted to the Department of Law in Sonargaon University in the fulfillmentof the requirements for the decree of LL.B (Hon"s), is carried out by me under the guidance and

supervision of Mr. Md. Abdul Alim, Department of Law. Research method and approaches strictly have been followed during undertaking the work. The work I have presented does not breach any copyright. I further undertake to indemnify the University against any loss ordamage arising from breach of the foregoing obligations.

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Certificate of the supervisor

The undersigned certify that the research paper entitled “Enforceability of theFundamental Rights under the Constitutional Scheme of Bangladesh: A Critical Analysis”, a study has been carried out by Sheikh Md Abdullah-Al-Mamun (Student IDNo. LLB1701010027), under my constant supervision as per the rules regulations stipulated by the Sonargaon University in the partial fulfillment of the requirements for the degree of LL.B (Hon‟s).

Signature of supervisor:

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Abstract

This paper is an attempt to explore fundamental rights which is incorporated in our constitution on the basis of international human rights law. In spite of ratification of many international human rights instruments, every year many peoples are deprived to exercise fundamental rights because of political unrest. The Fundamental Rights of Bangladesh Constitution themselves have no fixed content, most of them are empty vessels into which is generation must pour its content in the light of experience. The study intends to examine violation of fundamental rights in the light of present situation. Furthermore, this paper attempts to examine the general criticisms of the enforcement of fundamental rights and desirability of judicial activism in the fulfillment of such right. This dissertation Corley tries to analyses critically few fundamental rights suspension of fundamental rights during emergency. Some cases regarding this rights also been studied in this dissertation. Finally some recommendations have been placed.

INTRODUCTION

1.1 Introduction

People in democratic countries enjoy certain rights, which are protected by judicial system of the country concerned. Their violation, even by the State, is not allowed by the courts. Bangladesh respects the rights of the people, which are listed in our Constitution,under the heading "Fundamental Rights".

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.1Bangladesh was born as an independent state through a historic war which happened

in exercise of people"s right to self-discrimination. The state has emerged to establish and maintain an ordered society wherein life and liberty of the individuals would be secureand they would live with dignity and honor.2 The constitution of Bangladesh protects human rights these have been incorporated both in justiciable and unjustifiable forms.3 They are supreme fundamental law of the state and they provide the normative framework forprotection of human rights and access to justice for all people. The constitution of

Bangladesh in its part 3 contains a set of judicially enforceable fundamental rights. In this part, 18 fundamental rights have been identified. All of them can be classified intotwo

1. International human rights law: protection mechanism and contemporary issues byAbdullah Al Faruque, New Warsi Book Corporation, Dhaka, 1st Edition: 2012, pp-
2. Islam, Mahmudul, (2012), Constitutional Law of Bangladesh, 3rd ed, Dhaka, Mullick Brothers.
3 Haque, Muhammad Ekramul, (2011), The Bangladesh Constitutional Framework and Human Rights, Dhaka University Law Journal, Volume 22, Number 1, pp-55.

In practice violation of those rights has been widespread in recent days in Bangladesh. Fundamental rights are a group of rights that have been recognized by the Supreme Court as requiring a high degree of protection from government encroachment. These rights are specifically identified in the Constitution (especially in the Bill of Rights), or have been found under due Process. Laws encroaching on a fundamental right generally must pass strict scrutiny to be upheld as constitutional.

1.2 Objectives of the Research

The aim of the paper is insight on the constitution of Bangladesh is based on the principles of liberty, equality, fraternity and justice. For achieving aim we have undertaken a concise study of all the journals and books which are linked with the provisions of the constitution manifest great respect for human dignity, commitment to equality and non-discrimination and concern for the weaker section in society. Further, the constitution makes it mandatory for the Government to protect and promote freedoms, and to assure every citizen a decent standard of living. In other words, the Constitution of Bangladesh guarantees the basic human rights to every citizen of Bangladesh. This paper dealt with general Constitutional Laws of Bangladesh and the amendments made into Constitution of Bangladesh. To get a better understanding of fundamental rights and fundamental rights enforcement by Bangladesh constitution.

To assess the protection system of Bangladesh.
To find out the challenges to effective enforcement of fundamental rights in Bangladesh.

Halim, Md. Abdul, (2016), Constitution, Constitutional law and Politics: Bangladesh perspective, Dhaka, CCB Foundation, pp-100.
Cornell Law School, Legal Information Institute

1.3Limitation of the Research

Although the research has reached its aims, there were some unavoidable limitationsand shortcomings. First, I am an amateur researcher who is not even expert on the field of study; therefore,it was a tough task to assess the objectives perfectly within short time-limit. Second, all the data I used in this study is mostly self-reported that is limited by the factthat it rarely can be independently verified.

1.4Problem Statement

The constitution of Bangladesh guarantees all the major internationally recognizedhuman right6 , however, violation of fundamental rights has been a common practice in developing country like Bangladesh. The primary goal of the study is to assess framework of fundamental rights in constitution of Bangladesh and its paradoxes.

1.5Literature Review

Bangladesh has the obligations to implement international laws, with regard to human rights; therefore the constitution of Bangladesh recognizes those rights as the fundamental rights. There are two theories regarding relationship between international law and national law: monism and dualism. According to monism theory, international law and national law „are concomitant aspects of the general system-law in general7 and in case of the conflict between two laws, international law is said to prevail. Dualism treats international and national law as „two entirely distinct legal system.

Islam, Md. Shariful, (2013) Human Rights and Governance: Bangladesh, Hong Kong: Asian Legal Resource Center.7

I,A, Shearer, (1994), Starke's International Law , Butterworths, p-63.8 ibed .

1.6 Research Methodology

This research is generally a non-empirical analysis. The main sources of this study include secondary sources like textbooks, reports, relevant national and international legislations, case studies, some important daily newspapers, online documents and some publications. The study has also relied on decided cases of Apex Court of Bangladeshand the Subcontinent. It is a legal research, so international and national judicial decisions, related on this work are enumerated. Several books, articles in book, or articles in journal, internetsource are taken as reference.

Nature of rights

The twentieth century saw a vigorous debate over the nature of rights. Will theorists argued that the function of rights is to allocate domains of freedom. Interest theorists portrayed rights as defenders of well-being. Each side declared its conceptual analysis to be closer to an ordinary understanding of what rights there are, and to an ordinary understand-ing of what rights do for rightholders. Neither side could win a decisive victory, and the debate ended in a standoff.1

This article offers a new analysis of rights. The first half of the article sets out an analytical framework adequate for explicating all assertions of rights. This framework is an elaboration of Hohfeld's, designed around a template for displaying the often complex internal structures of rights. Those unfamiliar with Hohfeld's work should find that the exposition here presumes no prior knowledge of it. Those who know Hohfeld will find innovations in how the system is defined and presented. Any theo- rist wishing to specify precisely what is at stake within a controversy over some particular right may find this framework useful. The analytical framework is then deployed in the second half of the article to resolve the dispute between the will and interest theories. LEIF WENAR The Nature of Rights Many thanks to David Enoch, Gerald Gaus, Steven Gross, Alon Harel, Ulrike Heuer, Richard Holton, Rosanna Keefe, Simon Keller, Matthew Kramer, Stephen Macedo, Glen Newey, David Owens, Thomas Pogge, Henry Richardson, Jonathan Riley, Jennifer Saul, Gopal Sreenivasan, Hillel Steiner, Wayne Sumner, Joan Tronto, Melissa Williams, and the Editors of Philosophy & Public Affairs for their suggestions. A Laurance S. Rockefeller Fellowship supported the writing of this article, at the Princeton University Center for Human Values.

1. For the history and current state of the debate between the will and interest theo- ries, see Matthew Kramer, Nigel Simmonds, and Hillel Steiner, A Debate Over Rights (Oxford: Oxford University Press, 1998), hereafter DOR. The description of the debate as a "standoff" is from L. W. Sumner, The Moral Foundations of Rights (Oxford: Oxford Univer-sity Press, 1987), p. 51.

Despite the appeal of freedom and well-being as organizing ideas, each of these theories is clearly too narrow. We accept rights, which do not (asthe will theory holds) define domains of freedom; and we affirm rights whose aim is not (as the interest theory claims) to further the interests of the rightholder. A third theory, introduced here, is superior in describ- ing the functions of rights as they are commonly understood. Will theorists and interest theorists have erred in adopting analyses framed to favor their commitments in normative theory. This has turnedthe debate between them into a proxy for the debate between Kantian- ism and welfarism. Yet that normative dispute cannot be resolved through a conceptual analysis of rights. The third theory presented hereis not fashioned to fortify any normative position. Rather, it is offered asa vernacular standard against which to measure the interpretations of rights that various normative theories press us to accept. The ambitions of the article are thus principally descriptive. The first half of the article shows what kinds of things rights are (i.e., all rights are Hohfeldian incidents). The second half shows what rights do for rightholders (i.e., which Hohfeldian incidents are rights). The two halves together complete an analysis of the concept of a right. The analysis hereis general. It holds for all rights of conduct: moral rights, legal rights, cus- tomary rights, and so on.2 The analysis aims to reveal the logical struc- ture underlying our assertions of rights, while remaining faithful to an ordinary understanding of what rights there are, and of the significance rights have for those who hold them.

I. A Modified Hohfeldian Framework

The first half of the article sets out a modified Hohfeldian framework for explicating the meanings of rights assertions. The thesis of this section is that all assertions of rights can be understood in terms of four basic elements, known as the Hohfeldian incidents.3

2. The analysis here is not meant to apply directly to epistemic rights (rights to believe, infer, doubt), to affective rights (rights to feel), or to conative rights (rights to want). I pro- posed some initial contrasts between rights of conduct and these attitudinal rights in "Legal Rights and Epistemic Rights," Analysis 63 (2003): 142–46. An expanded versionof that paper is available on request.

3. Wesley Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning (New Haven: Yale University Press, 1919). Explorations of the Hohfeldian systeminclude Stig Kanger, New Foundations for Ethical Theory (Stockholm: Stockholm UniversityPress

There are two fundamental forms of rights assertions: “A has a right to phi” and “A has a right that B phi,” where “phi” is an active verb. Webegin by connecting these two fundamental forms of assertion to the four Hohfeldian incidents: the privilege, the claim, the power, and the immunity. In the process it will emerge that each of the two fundamen-tal forms of assertion can also indicate complex “molecular” rights, whose structure will be resolvable into combinations of the four “atomic” incidents. Finally, at the end of this section we show how rights assertions that lack active verbs can be translated into active-verb form. We will then have covered all forms of rights assertions, and will have shown that all rights assertions can be understood in terms of the Hohfeldian incidents.

We begin with those rights assertions of the form “A has a right to phi” that indicate the privilege, the first of the four Hohfeldian incidents.

A. Privileges

A sheriff in hot pursuit of a suspect has the legal right to break down thedoor that the suspect has locked behind him. The sheriff’s having a legalright to break down the door implies that he has no legal duty not to break down the door.

For rights like the sheriff’s:

“A has a Y right to phi” implies “A has no Y duty not to phi.” (where “Y” is “legal,” “moral,” or “customary,” and “phi” is an activeverb)4

1957); Lars Lindahl, Position and Change (Dordrecht: D. Riedl, 1977); and Judith Jarvis Thomson, The Realm of Rights (Cambridge, Mass.: Harvard University Press, 1990).

The framework presented here is obviously heavily indebted to Hohfeld and his many com-mentators, yet certain aspects of it are controversial or new. Some examples: 1) It is notassumed that all rights are claims; 2) The incidents are matched with specific functions;3)

For the purposes of this article the tables of jural correlatives and opposites areunneces-sary, and the incidents are not here characterized in terms of the tables. Because the

current framework contains differences at this level, the Hohfeldian cognoscenti mayfind it useful to approach the text de novo.

4. Similarly, “A has no Y right to phi” implies “A has a Y duty not to phi.” See Wenar,“Legal Rights and Epistemic Rights.

The type of right here is what Hohfeld called a “privilege,” which is also called a “liberty” or a “license.”5 The sheriff’s right is a single privi- lege. A right that is a single privilege confers an exemption from a generalduty. While ordinary citizens have a duty not to break down doors, police officers have a privilege-right [no duty not] to break down doors. When President Nixon asserted that he had a legal right not to turn over the Watergate tapes, he was asserting “executive privilege.” Ordinary citizens have a legal duty to turn over evidence when subpoe- naed. Yet Nixon alleged that because he was President he had a legal right[no duty not] not to turn over his evidence. James Bond’s license to kill is also an exemption from a general duty. Bond’s (alleged) right exempts him from a duty not to do what civilians emphatically have a duty not to do, viz., to kill. Similarly, your driver’s license gives you the right to drive. This right exempts you from a duty not to do what you would otherwise have a strong duty not to do—to operate dangerous machin- ery at high speeds. We can represent a right that is a single privilege, such as your rightto drive, in graphic terms as seen in Figure 1. In Figure 1 your right to drive a car is displayed as a single privilege. This single privilege is classified according to its function (a single priv-ilege is a right of exemption), and according to the form of its assertion(a single privilege is asserted by expressions of the form “A has a rightto phi”).

Some assertions of the form “A has a right to phi” indicate not a single privilege, but a paired privilege. A paired privilege is composed of two privileges. The holder of a paired privilege has a privilege [no duty not] to phi, and also has a privilege [no duty not] not to phi. That is, for a rightthat is a paired privilege: “A has a Y right to phi” implies both “A has no Y duty not to phi” and“A has no Y duty to phi.” (where “Y” is “legal,” “moral,” or “customary,” and “phi” is an activeverb)

5. “Privilege” is in some ways an unfortunate name for this incident, as it may have dis-tracting connotations of hierarchy (compare “feudal privilege”). It is best regarded as a wholly technical term.

The Functions of Rights

A. Theories of the Functions of Rights

All rights are Hohfeldian incidents. Are all Hohfeldian incidents rights? That is, would any of the four Hohfeldian incidents, or any combination of incidents, count as A's right were it ascribed to A? We might label the theory that answers this question affirmatively the any-incident theory of rights. Both of the long-dominant theories of the functions of rights— the will theory and the interest theory—oppose this any-incident theory. According to the will theory and the interest theory, some (combinations of) Hohfeldian incidents do not qualify as rights because they do not perform the function that all rights perform. The will theory says that only those combinations of incidents that give their holders certain kinds of choices are properly regarded as rights. The interest theory

limits the term "rights" to those incidents that further their holders' well-being. The will and interest theories are each "single-function" theories of rights. According to these theories all rights have some single func- tion, although the two theories differ as to what that function is. Both single-function theories would therefore reject the explication of rights assertions in the first part of this article, in which rights have six distinctfunctions.

Jonathan Riley suggested the label "single-function theory."

The long and unresolved historical contest between these two single- function theories stretches back through Bentham (an interest theorist) and Kant (a will theorist) into the Dark Ages.19 In the twentieth century the scholarly contest between advocates of the two theories ended in stalemate. I believe that, as is often the case with unresolved historical debates, this situation is explained by each side giving a partial accountof a larger terrain. Here I will briefly review the standing objections to

each single-function theory in order to show how each is too restrictive as an account of the functions of rights, and to indicate how the weak-ness of each theory is the strength of the other. A better alternative, I believe, is what might be called the several func- tionstheory of rights. The several functions theory captures what is plau- sible in the will and interest theories; yet because it does not require that all rights have some single overall function it avoids the procrustean strictures of each. The test of a theory of the functions of rights is how

well it captures our ordinary understanding of what rights there are andwhat significance rights have for rightholders. The several functions theory is, I will argue, preferable to both the will theory and the interesttheory on these grounds.

B. The Will Theory

The will theory of rights asserts that the single function of a right is to give the rightholder discretion over the duty of another. A land owner has a right, for instance, because he has the power to waive or not to waive the duties that others have not to enter his land. A promisee hasa right because she has the power to demand performance of the

promisor's duty, or to waive performance, as she likes. As Hart describesthe central thesis of the will theory, "The individual who has the right is

a small scale sovereign to whom the duty is owed. "20

The attraction of the will theory is that it reserves for rights the specialrole of securing dominion over significant spheres of action. Many

important rights do endow rightholders with this kind of discretion, and so serve the freedom of those who hold them. The connection between

See the historical sources cited in n. 49, especially the works by Tuck, Tierney,Brett, and Simmonds.
H.L.A. Hart, Essays on Bentham (Oxford: Oxford Univp. 183

rights and freedom, so powerful in modern politics, is for will theoristsa matter of definition.

However, the will theorist's sole focus on a certain sort of freedom constrains what he recognizes as a right. The will theorist recognizes asa right only those Hohfeldian incidents that confer on their bearers the discretion to alter the duties of others. Thus the will theorist recognizes as rights only those molecular structures that include a paired power (not) to create, waive or annul a claim that one person has against another.21 This view of the function of rights also entails a restriction onthe class of potential rightholders. The will theorist recognizes as poten-tial rightholders only those beings that have certain capacities: the capacities to exercise powers to alter the duties of others. These constraints render the will theory implausibly narrow. This nar- rowness is evident, first, in the range of rights that the theory recognizes. Many important rights, such as the complex bodily right in Figure 4, doinclude a paired power to alter a claim. But many do not. For example,you have no legal power to waive or annul your claim against being enslaved, or your claim against being tortured to death. The will theorytherefore does not recognize that you have a legal right against being enslaved, or against being tortured to death. Yet most would regard theseunwaivable claims as rights, indeed as among the more important rights that individuals have.22 Will theorists have responded to this charge of narrowness in twoways. The first is to restrict the relevance of the theory to a limited context. Hart himself takes this strategy. He admits that the will theory is satisfactory "only at the level of the lawyer concerned with the workingof the 'ordinary' law," and is not adequate to handle individual rights at the level of constitutional law.[23] The second strategy is to try to redeemthe incidents in question as rights by finding someone who does have Besides Hart, influential advocates of a choice-based approach to rights includeSavigny, Kelsen, Wellman, and Steiner.

Hart, pp. 183–84; cf. Wellman, A Theory of Rights, p. 199.

It is a peculiarity of the will theory that it regards one's trivial claims (such as yourwaivable claim not to have your left foot touched with a feather) as one's rights, whilenot being able to acknowledge one's weighty claims (such as your unwaivable claim againstbeing tortured) as one's rights. See Neil MacCormick, "Rights in Legislation," in Law, Morality and Society: Essays in Honour of H.L.A. Hart, ed. P.M.S. Hacker and Joseph Raz(Oxford: Oxford University Press, 1977), pp. 189–209, 197.

Hart, pp. 185–86, 192–93.

discretion with regards to them, such as a government official who hasdiscretion over whether to prosecute a torturer.24 Yet even were this search for "choosers" always successful, the result would fit poorly withan ordinary understanding of rights. For here the will theory is still committed to saying that you have no right against being tortured. Rather, the right that you not be tortured would be the district attorney's right, since the district attorney is the person with the discretion. The limitations of the will theory are also evident in its inability to account for the rights of incompetent (e.g., comatose) adults, and of chil- dren.25 The will theory can acknowledge rights only in those beings com- petent to exercise powers, which incompetent adults and children are not. Incompetent adults and children therefore cannot on this view have rights.26 This is certainly a result at variance with ordinary understand- ing. Few would insist that it is conceptually impossible, for example, forchildren to have a right against severe abuse.

C. The Interest Theory

The will theory faces serious problems in explaining many rights that most believe there are. Yet where the will theory falters, the interest theory flourishes.27 The interest theory holds that the single function of rights is to further their holders' interests. More specifically, rights are those incidents whose purpose is to promote the well-being of the

24. Steiner in DOR, pp. 248–56.

25. Neil MacCormick, Legal Right and Social Democracy (Oxford: Oxford UniversityPress, 1982), pp. 154–66.

26. Nor can animals. Hart saw it as a "substantial merit" of the will theory that it cannotassign rights to animals, because animals "are not spoken or thought of as having rights"
(Hart, p. 185). Since animals are now often spoken and thought of as having rights, thisfeature of the will theory may now appear less meritorious. Hart did in a footnote allow that children can have rights, which rights are exercised by their representatives, e.g., parents (Hart, p. 184). Yet he was only able to reach this position by suppressing the central
will theory thesis that a rightholder is sovereign over the duty of another.

27. Bentham gave the first modern statement of the interest theory; other champions
include Ihering, Austin, Lyons, Raz, MacCormick and Kramer. For an exceptionally clearexposition of the interest theory, see Kramer's essay in DOR. I will here use both "interest"
and "well-being" to indicate the interest theorist's central concept of what is good for abeing. This concept can be construed broadly enough to include a person's agency
inter- ests in having and making choices over a range of options.

rightholder.28 As MacCormick puts it, "The essential feature of rules which confer rights is that they have as a specific aim the protection oradvancement of individual interests or goods."29 The interest theory is not committed to the implausible thesis that each right is always in the interest of the rightholder. Some inheritances, for example, are more trouble than they are worth. Rather, the interest theory holds that the function of rights is to promote rightholders' inter- ests in the general case: "To ascribe to all members of a class C a right totreatment T is to presuppose that T is, in all normal circumstances, a good for every member of C."30 Since the interest theory turns on the rightholder's interests instead of her choices, it can recognize as rights unwaivable claims such as the claims against enslavement and torture. The interest theory also has notrouble viewing children and incompetent adults as rightholders, since children and incompetent adults have interests that rights can protect. Moreover, the interest theory can accept a wide range of Hohfeldian inci- dents—such as a claim to another's assistance and the immunity that protects free speech—as promoting the well-being of their holders and so as rights. Finally, the interest theory can acknowledge that individuals may be better off having the power to make choices, and so can embracemany of the rights central to the will theory. The appeal of the interest theory emanates from the wide range of rights that it can endorse, and from the evident fact that having rights can make a life go better. Yet the interest theory is also inadequate to our ordinary understand- ing of rights. There are many rights the purpose of which is not to further the well-being of the rightholder, even in the general case. This is clearest with rights that define occupational roles. A judge has a (power) right to sentence criminals, but this right is not designed to benefit the judge.

28. A more exact statement of the interest theory would be necessary to overcome the long-standing objection of third-party beneficiaries. Simmonds gives a good summary ofthe problem in DOR, pp. 197–98; for the classic objection and reply see Hart, pp. 180–81; David Lyons, Rights, Welfare and Mill's Moral Theory (Oxford: Oxford University Press,1994), pp. 36–46. For an adaptation of Bentham's response to the objection see Kramer, DOR, pp. 81ff. Kramer's endorsement of "Bentham's test" produces an overly expansive version of the interest theory which I do not discuss here.

29. MacCormick, "Rights in Legislation," p. 192.

30. Neil MacCormick, "Children's Rights: A Test-Case for Theories of Rights," Archiv für Rechtsund Sozialphilosophie 62 (1976): 311; see Joseph Raz, The Morality of Freedom(Oxford: Oxford University Press, 1986), p. 180.

ENFORCEABILITY OF FUNDAMENTAL RIGHTS

3.1 Fundamental Rights in Bangladesh Constitution

The fundamental rights of the people of Bangladesh have been guaranteed in Part III (Article 26-44) of the constitution of Bangladesh. All past laws inconsistent with these rights are made void by the Constitution, and it directs the State not to make any law inconsistent with these rights. Article 44 of the constitution guarantees the right of every citizen tomove the High Court Division in accordance with clause (1) of Article 102 for the enforcementof any of the fundamental rights conferred by Part III of the Constitution. The jurisdiction of the High Court Division of the Supreme Court to enforce the fundamental rights is defined inArticle 102 of Part Vl of the Constitution of 1972. In Chapter three of the Bangladesh Constitution there has been introduced an entrenched Bill of Human Rights known as Fundamental Rights substantially in accordwith the rules of the International Bill of Human Rights. Rights enshrined in this chapter include such rights as equality of all irrespective of religion, race, caste, sex or place of birth,and entitled to equal protection of law, non-discrimination iii all matters including opportunity in public employment, right to protection of law, of life and personal liberty, safeguards as to arrest and detention, protection in respect of trial and punishment under retroactive law, freedom of movement and assembly, freedom of thought, conscience and speech,freedom of profession or occupation, freedom of religion, right to property etc. 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 6 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.

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3.2 Classification of Fundamental Rights

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

A. Absolute Rights:

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

1. Equality before law, (Article 27).
2. Discrimination on grounds of religion etc. (Article 28).
3. Equity of opportunity in public employment (Article 29).
4. Prohibition of foreign titles etc. (Article 30).
5. Safe guards as to arrest and detention (Article 33).
6. Prohibition of forced labour (Article 34).
7. Protection in respect of trial and punishment (Article 35).
8. Enforcement of Fundamental Rights (Article 44).

B. Rights on which reasonable restriction can be imposed:

They are following:

1. Freedom of movement (Article 36).
2. Freedom of Assembly (Article 37).
3. Freedom of Association (Article 38).
4. Freedom of thought and conscience and of speech (Article 39).
5. Freedom of religion (Article 40).
6. Protection of home and correspondence (Article 43).

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

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

4. in the interest of the security of the state, friendly relation with foreign state, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence (Article 39)

5. in the interest of the public order and morality (Article 41)

6. in the interest of the security of the state, public order, public morality or public health. (Article 43).

C. Fundamental rights which has been practically left to the legislature: There are some rights on which parliament can by law impose any restrictionit pleases. They are following:

1. Right to protection of law (Article 31).

2. Protection of right to life and personal liberty (Article 32).

3. Freedom of profession or occupation (Article 40).

4. Rights to property (Article 42).

3.3 Institutional Mechanism for the Protection System of Fundamental Rights inBangladesh

The domestic implementation of human rights court rulings is an especially demanding and obtrusive kind of state observance of international norms. It involves the efforts of national authorities to redress detected violations and to bring existing laws and practices in line with the underlying standards and principles.15 Bangladesh has some institute for the protection system of fundamental rights, these are follow:15 Anagnostou and Mungiu, 2014, pp- 52

1. National Human Rights Commission (NHRC)

The National Human Rights Commission (NHRC) was established in 2009 under the National Human Rights Commission Act, 2009 with aim to contribute to the embodiment of human dignity and integrity as well as to the safeguard of the basic order of democracy. NRHC consists of three members, one chairman and other two members.16, 17 However, the 2009 Act itself may not inspire confidence in the efficacy, independence or transparencyof the institution. The reasons are to be found in formation of the selection committee, thesize of the Commission, in restraints on its investigative powers, and limited mandate to try

perpetrators.

2. Anti-Corruption Commission (ACC)

An Anti-Corruption Commission (ACC) was established in 2004 by Anti-Corruption Commission Act, 2004. The Act sought to establish an independent agency for combating corruption with legal authority to conduct inquiries and investigations, file and conduct cases, review legal measures for preventing corruption, demand statement. It has been observed not to make the desired impact, but following its reconstitution in February 2007, the Commission began working with renewed vigor and impetus duly acceding to the United Nations' convention against corruption that was adopted by the General Assembly away back on 31 October 2003.

3. National Legal Aid Organization (NLAO)

Recognizing inherent difficulties that impede marginalized and poor people"s access to justice, the government enacted the Legal Aid Act in 2000 under which a National Legal Aid Organization has been set up to provide legal aid services to the poor and the disadvantaged of assets and liabilities, and seize property in excess of known sources of income.

3.4 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 16 National Human Rights Commission, Bangladesh, (2016), About NHR. 17 Section 4(1), the National Human Rights Commission Act, 2009.for their enforcement. And this easy and effective enforcement should be available not only against the executive but also against the legislative. If the executive does anything in violation of fundamental rights, the citizens must have a remedy. Similar if the legislature enacts any law which is inconsistent with any of the fundamental rights, there must be procedure to declare that law unconstitutional. The idea of protection of fundamental rights can be best understood from the American Declaration of Independence, 1776 where it is stated that all men are created equal that they are endowed by their creator with certain in alienable rights, that among these are life, liberty, and pursuit of happiness; that to secure these rights governments are instituted among men deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these

ends, it is right of the people to alter or abolish it and to institute a new one. The declaration, therefore, has laid the utmost emphasis on the enforcement of rights that if the 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 fundamentalrights 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".

3.5 Constitutional Status and Enforcement of the Preamble

The preamble of the Constitution of Bangladesh is not a mere introductory note to the Constitution is a part of the Constitution, the supreme law of the land. Chowdhury J said in the Constitution Amendment Case18 that there is no „anxiety as to whether thePreamble is a part of the constitution or not as it has been the case in some other country.19 In thesame case, Rahman J termed the preamble as „the pole star of the Constitution.‟20 In thiscase, the majority judgment declared the impugned amendment to be void on the ground of violation of a basic structure of the Constitution.21 Although the new article 7B declared the whole preamble as an unamendable basic structure of the Constitution, the Constitution 8 th Amendment Case recognized certain parts of the preamble as unamendable basicstructure of the Constitution 22 years ago in 1989. In this case, among the three concurring majority judges, Chowdhury J said that the impugned amendment was void for, inter alia, it destroyed the essential limb of the judiciary "by setting up rival courts to the High Court Division inthe name of Permanent Benches.22 However, Chowdhury J also considered the whole aim of the state, contained in the preamble, as a basic structure of the Constitution. Chowdhury Jobserved:

That Constitution promises 'economic and social justice' in a society in which 'the rule oflaw, fundamental human right and freedom, equality and justice' is assured and declares thatas the fundamental aim of the State. Call it by any name- 'basic feature' or whatever, but this isthe mbasic fabric of the Constitution which can not be dismantled by an authority created bythe Constitution itself- namely, the Parliament.23 Shahabuddin Ahmed J, the second concurring judge, declared the amendment void onthe ground of violation of the basic structure of „oneness of the High Court Division. 24 He did not seem to base his judgment on the preamble.

The third concurring judge, Rahman J, declared the amendment void on the ground ofviolation

of the basic structure of the „rule of law" engraved in the preamble of the Constitution. He observed: In this case we are concerned with only one basic feature, the rule of law, marked outas one of the fundamental aims of our society in the Preamble. The validity of the impugned amendment may be examined, with or without resorting to the doctrine of basic feature, on the touchstone of the Preamble itself.

He found that the impugned amendment impaired the rule of law contained in thepreamble: The impugned amendment is to be examined in the light of the Preamble. I haveindicated earlier that one of the fundamental aims of our society is to secure the rule of law for all citizens and in furtherance of that aim Part VI and other provisions were incorporated inthe

Constitution. Now by the impugned amendment that structure of the rule of law hasbeen badly impaired, and as a result the high Court Division has fallen into sixes andsevens-six at the seats of the permanent Benches and the seven at the permanent seat of the Supreme

Court.26 Thus, it appears that Rahman J treated the „rule of law" contained in the preamble as a basic structure of the Constitution and declared the Amendment as void as it violated this basic structure. It is submitted that if one part of the preamble, for example, concerning the „rule of law",27 is a basic structure of the Constitution, then the concept of „fundamental human rights and freedom" enshrined in the same manner in the same paragraph of the

preamble also seems to be entitled to be another basic structure of the Constitution. It is clear from the above discussion that two of the three concurring majority judges indicated that the preamble, or at least part of it, was part of the unamenclable basicstructure

of the Constitution. The preamble protected fundamental human rights as a constitutional pledge where the securing of all fundamental human rights has been set as an aim of the state. The Constitution 8th Amendment Case arguably elevated „fundamental human rights" to a higher constitutional status. This part of the preamble is not only enforceable by law but constitutes an important basic structure of the Constitution of Bangladesh. It is now settled law in Bangladesh that according to new article 7B of the Constitution, the whole preamble is abasic structure of the Constitution. The pledge made in the preamble to secure fundamental

24 Ibid 274.

25 Ibid.

human rights for all citizens is elaborated in two chapters, namely, the FPSP and the fundamental rights.28

3.6 Constitutional Status and Enforcement of Fundamental Rights

Part III sets express restrictions on law-making power. Article 26 declares all existinglaws inconsistent with any fundamental right to be void to the extent of inconsistency,and prohibits the state from making any law inconsistent with any provision of that part. 29 The use of the term „state" instead of merely „parliament" is significant as the term clearly includes the legislature, executive and all other statutory authorities.30 Thus, it does not only restrict the lawmaking power of the legislature, but it imposes equal restriction on theexecutive and other statutory authorities.

The duties of the state regarding human rights recognized as fundamental rights are immediately enforceable by individuals. Articles 44(1) and 102(1) provide that an Individual person who feels aggrieved can move to the High Court Division for enforcement of anyof his or her fundamental rights guaranteed in the Constitution. Under article 102(1), thesaid rights can be enforced against any person including the persons who are „performingany function in connection with the affairs of the republic". The court is empowered to giveany direction or order as it thinks „appropriate for the enforcement of any of the fundamentalrights conferred by Part III of this Constitution".

26 However, in 'spit; of the above observations from the Appellate Division in theConstitution 8th Amendment case, the High Court Division in a subsequent case of Aftab Uddin v. Bangladesh made a negative comment regarding enforceability of the preamble. ((1996' 48 DLR 1). The Court said that „[i]t is true that the Preamble to the Constitution is not enforceable."(Ibid 11). The High Court Division did not substantiate this sentence. It is submitted that this particular comment made by the High Court Division in disregard of the earlier Appellate Division Judgment does not have legal authority.

27 Article 26 of the Constitution reads as follows: "(1) All existing law inconsistent withthe provisions of this Part shall, to the extent of such inconsistency, become void on the commencement ofthis Constitution.

28 Article 152 of the Constitution defines the term „state" that includes „Parliament, theGovernment and statutory public authorities". The term „statutory public authority" has been furtherdefined to mean „any authority, corporation or body the activities of or the principal activities of which are authorized by any Act, ordinance, order or instrument having the force of law in Bangladesh".

The prerequisite for enforcing any fundamental right under article 102(1) is that the application has to be made by „any person aggrieved". The Supreme Court as early asin 1974, shortly after the adoption of the Constitution of Bangladesh, liberally interpretedthe meaning of that phrase. The Court, in Kazi Mukhlesur Rahman v. Bangladesh expandedt

scope of „any person aggrieved". In admitting the locus standi of the petitioner, theCourt said: If a fundamental right is involved, the impugned matter need not affect a purely personalright of the applicant touching him alone. It is enough if he shares that right in common with others.31 The judgment remained unnoticed until 1997 when the Appellate Division finally mrelied on it in Locus Standi Case.32 In the words of Kamal J, a member of the Appellate Division:What happened after Kazi Mukhlesur Rahman"s case in Bangladesh was a long period of slumber and inertia owing not to a lack of public spirit on the part of the lawyers and the Bench but owing to frequent interruptions with the working of the Constitution and owingto intermittent de-clothing of the Constitutional jurisdiction of the superior Courts. In spite of the precedent of Kazi Mukhlesur Rahman, when the 'Locus Standi Case' was heard first before the High Court Division, the High Court Division did not allow the locus standi and construed the literal construction and narrower meaning of the term „aggrieved" to include only that person who was personally aggrieved. However, the Appellate Division granted the locus standi saying that the High Court Division was „wrong" in not allowing the locus standi, and remitted the case back to the High Court Divisionfor hearing.33 Thus, Kazi Mukhlesur Rahman was finally endorsed in 'Locus Standi Case'.

The eventual impact of the 'Locus Standi Case' judgment is that it has accelerated public interest

litigation in Bangladesh.34 Public interest litigation (PIL) is „a type of litigation where the interest of the public is given priority over all other interests with an aim to ensure socialand collective justice, the court being ready to disregard the constraints of the adversarymodel

31. Ibid 12.
32 (1997) 49 DLR (AD) 1.
33 Ibid 16.
34 Naim Ahmed, Public Interest Litigation (Bangladesh Legal Aid and Services Trust,Dhaka, 1999) 45.

litigation."35 The general rule of locus standi that a person must be personally aggrieved to file litigation is not applicable in PIL. It was established in 'Locus Standi Case'36that inBangladesh, PIL, which is about any public wrong or injury, can be filed by any person of the society on behalf of the public at large or a community, rather than only by a person whois

personally aggrieved. PIL standing would be granted also in cases of „breach of publicduty or for violation of some provision of the Constitution or the law."37 It is worth mentioninghere that the PIL is not only restricted to cases where violation of any fundamental rightis found; PIL can be filed for violation of any constitutional provision.

During the time of emergency declared under article 141 A, the right to enforce the fundamental rights in any court may be suspended under article 141C of the Constitution, Article 141C(1) says: While a Proclamation of emergency is in operation, the President may, on the writtenadvice of the Prime Minister, by order, declare that the right to move any court for the enforcement of such of the rights conferred by Part III of this Constitution as may be specified in theorder, and all proceedings pending in any court for the enforcement of the right so specified, shall remain suspended for the period during which the Proclamation is in force or forsuch shorter period as may be specified in the order. It appears that the fundamental rights do not disappear even during the period ofemergency. However, the right to move to the court for their enforcement can beremoved for a limited period of time.

3.7 **Constitutional Status and Enforcement of the Fundamental Principles of State Policy (FPSP)**

The FPSP have a significant role to play in the making and interpretation of laws andthe governance of the country, but they have not been made judicially enforceable.38The Constitution itself terms them as principles, though Article 7 declares the whole Constitution

35 Ibid 51.

36 (1997) 49 DLR(AD) 1.

37 Ibid 4 [8] (Afzal CJ).

38 See The Constitution of Bangladesh art 8(2)

to be the supreme law of the land. However, the state is constitutionally obliged to implement the FPSP by following the directions given in the principles themselves. Generally speaking, the state cannot be held liable, on the application of aggrieved persons, for non- implementation of the FPSP, unlike the fundamental rights in Part III. Nevertheless, ithas
been observed by the highest judiciary that the lack of judicial enforceability does notmean that the state can ignore implementation of these FPSP for an indefinite period of time.39

39 See Masdar Hossain v. Bangladesh (1998) 13 BLD (HCD) 558 (Md. MozammelHoque

CONCLUDING CHAPTER

4.1 Constitutional Guarantees or Remedies

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

4.2 Recommendations

We have been observed that the constitution of Bangladesh has included all the basic attributes of fundamental rights. But practically sometimes the government is compelled to violate the fundamental rights of the people in Bangladesh due to some unavoidable circumstances. The ruling class should be truly respectful to the fundamental rights of the

people. There should not be any international barrier Created by government for political interest and to oppress the opposite. It is the responsibility of the government to limit the events to violate the fundamental rights of the people and try their best respond these rights in some very rare cases where there is no really no other alternative and which is trulydone fo

the sake of the country s overall benefit with no purpose of self-interest of the ruling partym 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. So their rights cannot be violated by the ruling class for their self-interest cannot violet their rights. 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 theburden 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 include. 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 constitution provision regarding to the workers to join international trade union organization (ICCPR-8) which may be included in our constitution. 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.

4.3 Conclusion

In conclusion we can say, attention must be drawn to some legislation which are in flagrant conflict with the basic rules of the International Bill of Rights, and the earlier they are repealed, the better for the prevalence of the Rule of law. The laws are Indemnityordinance 1975, the Vested Property that which is nothing but the alter ego of the Enemy Properties Ordinance of Ayub‟s dictatorial regime, and the Special powers Act, 1974.Though there are many provisions in Bangladesh constitution for protecting human rights but these right cannot protected by the state. We can see the MP‟s, Ministers or VIP‟s getspecial facilities in trial and jail. So we can say all are not equal in the eye of law. President can suspend the fundamental rights in emergency. So we can say fundamental rights itself is not fundamental. We hope parliament and the government should make policy forestablished human rights and fundamental freedom like that all the people enjoys these rightsequally and none can suspend these rights in any cause.

Abbreviations

ACC- Anti Corruption

CommissionAD- Appellate

Division

ADC- Appellate Division Cases

ASK- Ain O Salish Kendra

BBC- British Broadcast Company

BCE- Before the Common Era

BLAST- Bangladesh Legal Aid and Services Trust

BLD- Bangladesh Legal Decisions

CAT- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

CMW- The Committee on Migrant Workers

CP- Civil and Political

CPR- Civil and Political Rights

CRPD- The Committee on the Rights of Persons with Disabilities

DAW- Division for the Advancement of Women

DLR- Dhaka Law Reports

ECHR- European Court of Human Rights

ELCOP- Empowerment through Law of the Common People

ESC- Economic, Social and Cultural

ESCR- Economic, Social, and Cultural Rights

FIR- First Information Report

FPSP- Fundamental Principles of State Policy

HRA- Human Rights Act

ICC- The International Criminal Court

ICCPR- International Covenant on Civil and Political Rights

ICEDAW- International Convention on the Elimination of all forms of Discrimination Against Women

ICERD- International Convention on the Elimination of all forms of Racial Discrimination

ICESCR- International Covenant on Economic, Social and Cultural Rights

ICJ- The International Court of Justice

ICPPED- International Convention for the Protection of All Persons from Enforced Disappearance

ICRMW- International Convention on the Protection of the Rights of All Migrant Workersand Members of Their Families

IDP- Internally Displaced People

IHRL- International Human Rights Law

ILO- International Labour Organisation

MP- Member of Parliament

NCTB- National Curriculum and Textbook Board

NGO- Non Government Organisation

NHRC- National Human Rights Commission

NLAO- National Legal Aid Organization

OHCHR- Office of the High Commissioner on Human Rights

OP- Optical Protocol

PHRA- Protection of Human Rights Act

PIL- Public Interest Litigation

PWD- Public Works Department

RAB- Rapid Action Battalion

SC- Supreme Court

SEP- Stanford Encyclopedia of Philosophy

UDHR- Universal Declaration of Human Rights

UN- United Nations

UNCRC- United Nations Convention on the Rights of the Child

UNHCHR- UN High Commissioner for Human Rights

UNHRC- United Nation Human Rights Council

UNICEF- United Nations International Children's Emergency

FundUPR- Universal Periodic Review

US- United States

USA- United States of

AmericaUSC- United States

Code

USCA- United States Code Annotated.

THE END