

**Research 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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## Letter of Transmittal

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 Critical Analysis”**.

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,

.....

Md. Asiqul Islam

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## Acknowledgement

I am deeply grateful 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 to allow 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 fulfillment of the requirements for the degree 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 or damage 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 the Fundamental Rights under the Constitutional Scheme of Bangladesh: A Critical Analysis**”, a study has been carried out by Md. Asiqul Islam (Student ID No. LLB1602008027), 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:

.....  
Mr. Md. Abdul Alim

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## Abbreviations

**ACC-** Anti Corruption Commission  
**AD-** Appellate Division  
**ADC-** Appellate Division Cases  
**ASK-** Ain O Salish Kendra  
**BCE-** Before the Common Era  
**BLAST-** Bangladesh Legal Aid and Services Trust  
**BLD-** Bangladesh Legal Decisions  
**CPR-** Civil and Political Rights  
**DLR-** Dhaka Law Reports  
**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  
**ICESCR-** International Covenant on Economic, Social and Cultural Rights  
**ICJ-** The International Court of Justice  
**ILO-** International Labour Organisation  
**MP-** Member of Parliament  
**NGO-** Non Government Organisation  
**NHRC-** National Human Rights Commission  
**PIL-** Public Interest Litigation  
**SC-** Supreme Court  
**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

## List of Cases

1. Aftab Uddin v. Bangladesh ((1996' 48 DLR 1).
2. Anwar Hossain v. Bangladesh [1989 BLD (SPL) 1, 41 DLR (AD) 165]
3. Bangladesh v. Azizur Rahman [55 DLR (2003) 107]
4. Bangladesh National curriculum and Text Board v. AM Samsuddin and others [48 DLR (AD) (1996) 184]
5. Dr. Mohiuddin farooque v. Bangladesh and others [(2003) 55 DLR (HCD) 613]
6. East Pakistan vs. Mehdi Ali Khan [PLD 1959 (SC) 387]
7. Islam Mahmud v. Bangladesh
8. Jibendra Kishore V. The Province of East Pakistan [1957 9 DLR (SC) 21]
9. Kazi Mukhlesur Rahman v. Bangladesh [26 DLR (SC) 44]
10. Masdar Hossain v. Bangladesh [(1998) 13 BLD (HCD) 558]
11. Professor Ghulam Azam v. Bangladesh [46 DLR (AD) 1994 192]

## **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.

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## *Chapter I*

# 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.<sup>1</sup>

Bangladesh 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 secure and they would live with dignity and honor.<sup>2</sup> The constitution of Bangladesh protects human rights these have been incorporated both in justiciable and unjustifiable forms.<sup>3</sup> They are supreme fundamental law of the state and they provide the normative framework for protection 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 into two

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<sup>1</sup> *International human rights law: protection mechanism and contemporary issues* by Abdullah Al Faruque, New Warsi Book Corporation, Dhaka, 1st Edition: 2012, pp-2.

<sup>2</sup> Islam, Mahmudul, (2012), *Constitutional Law of Bangladesh*, 3<sup>rd</sup> ed, Dhaka, Mullick Brothers.

<sup>3</sup> Haque, Muhammad Ekramul, (2011), *The Bangladesh Constitutional Framework and Human Rights*, Dhaka University Law Journal, Volume 22, Number 1, pp-55.

category- civil and political rights.<sup>4</sup> 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.<sup>5</sup>

## **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.

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<sup>4</sup> Halim, Md. Abdul, (2016), *Constitution, Constitutional law and Politics: Bangladesh perspective*, Dhaka, CCB Foundation, pp-100.

<sup>5</sup> Cornell Law School, *Legal Information Institute*.

### **1.3 Limitation of the Research**

Although the research has reached its aims, there were some unavoidable limitations and 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 fact that it rarely can be independently verified.

### **1.4 Problem Statement**

The constitution of Bangladesh guarantees all the major internationally recognized human right<sup>6</sup>, however, violation of fundamental rights has been a common practice in a developing country like Bangladesh. The primary goal of the study is to assess framework of fundamental rights in constitution of Bangladesh and its paradoxes.

### **1.5 Literature 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 general<sup>7</sup> 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.<sup>8</sup>

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<sup>6</sup> Islam, Md. Shariful, (2013) *Human Rights and Governance: Bangladesh*, Hong Kong: Asian Legal Resource Center.

<sup>7</sup> I.A, Shearer, (1994), *Starke's International Law*, Butterworths, p-63.

<sup>8</sup> *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 Bangladesh and 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, internet source are taken as reference.

## *Chapter II*

### **NATURE OF RIGHTS**

#### **2.1 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 fundamental to any civilization and the history of social conflicts is often bound up with attempts both to define and to redefine them. According to the Stanford Encyclopedia of Philosophy, "rights structure the form of governments, the content of laws, and the shape of morality as it is currently perceived".<sup>9</sup>

#### **2.2 Human Rights**

Human rights are moral principles or norms<sup>10</sup> for certain standards of human behavior and are regularly protected in municipal and international law. They are commonly understood as inalienable,<sup>11</sup> fundamental rights "to which a person is inherently entitled simply because she or he is a human being" and which are "inherent in all human beings",<sup>12</sup> regardless of their age, ethnic origin, location, language, religion, ethnicity, or any other status. They are applicable everywhere and at every time in the sense of being universal, and they are egalitarian in the sense of being the same for everyone. They are regarded as requiring empathy and the rule of law and imposing an obligation on persons to respect the human rights of others, and it is generally considered that they should not be taken away except as a result of due process based on specific circumstances.

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<sup>9</sup> "Stanford Encyclopedia of Philosophy" Stanford University. July 9, 2007. *Retrieved 2009-12-21.*

<sup>10</sup> James Nickel, with assistance from Thomas Pogge, M.B.E. Smith, and Leif Wenar, 13 December 2013, Stanford Encyclopedia of Philosophy, Retrieved 14 August 2014.

<sup>11</sup> The United Nations, Office of the High Commissioner of Human Rights, Retrieved 14 August 2014.

<sup>12</sup> Burns H. Weston, 20 March 2014, Encyclopædia Britannica.

## 2.3 Fundamental Rights

The term fundamental rights is very technical one, for when certain human rights are written down in a constitution and protected by constitutional guarantees they called fundamental rights. They are called fundamental rights in the sense that they are placed in supreme or fundamental law of the land which has a supreme or fundamental law of the state.<sup>13</sup> “Fundamental rights are a generally regarded set of legal protections in the context of a legal system, where in such system is itself based upon this same set of basic, fundamental, or inalienable rights”.

From WEX Legal Dictionary, 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.<sup>14</sup>

## 2.4 The International Bill of Rights

The International Bill of Rights is made up of five key United Nations' human rights documents:

- i) **Universal Declaration of Human Rights:** In 1948, for the first time, countries agreed on a comprehensive list of inalienable human rights. In December of that year, the United Nations General Assembly adopted the Universal Declaration of Human Rights (UDHR), a milestone that would profoundly influence the development of international human rights law.
- ii) **International Covenant on Economic, Social and Cultural Rights (ICESCR):** ICESCR is a multilateral treaty adopted by the United Nations General Assembly (GA) on 16 December 1966 through GA. It commits its parties to work toward the granting of economic, social, and cultural rights (ESCR) to all individuals including those living in Non-Self-Governing and Trust Territories. The rights include labour

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<sup>13</sup> Halim, Md. Abdul, (2016) *Constitution, Constitutional law and Politics: Bangladesh perspective, Dhaka, CCB Foundation, pp-96.*

<sup>14</sup> WEX Legal Dictionary.

rights, the right to health, the right to education, and the right to an adequate standard of living.

**iii) International Covenant on Civil and Political Rights (ICCPR):** ICCPR is a multilateral treaty that commits nations to respect the civil and political rights of individuals, including the right to life, freedom of religion, freedom of speech, freedom of assembly, electoral rights and rights to due process and a fair trial.

## **2.5 Distinction between Human Rights and Fundamental Rights**

There are some Fundamental distinction between directives and fundamental rights:

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

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

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

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

*Fifty*, 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.

*Sixth*, 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 directive principles.

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

*Eighth,* 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.

*Ninth,* 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.

*Tenth,* 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.

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

### *Chapter III*

## **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 to move the High Court Division in accordance with clause (1) of Article 102 for the enforcement of 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 in Article 102 of Part VI 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 accord with 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 in 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.

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 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.

### **3.2 Classification of Fundamental Rights**

The Fundamental Rights enumerated in the Bangladesh Constitution may be classified in 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. They are 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 restriction it 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 in Bangladesh**

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.<sup>15</sup> Bangladesh has some institute for the protection system of fundamental rights, these are follow:

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<sup>15</sup> *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.<sup>16, 17</sup> However, the 2009 Act itself may not inspire confidence in the efficacy, independence or transparency of the institution. The reasons are to be found in formation of the selection committee, the size 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

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<sup>16</sup> *National Human Rights Commission, Bangladesh, (2016), About NHR.*

<sup>17</sup> *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 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".

### **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 Case<sup>18</sup> that there is no 'anxiety as to whether the Preamble is a part of the constitution or not as it has been the case in some other country.<sup>19</sup> In the same case, Rahman J termed the preamble as 'the pole star of the Constitution.'<sup>20</sup> In this case, the majority judgment declared the impugned amendment to be void on the ground of violation

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<sup>18</sup> (1989) 41 DLR (AD) 165, 197.

<sup>19</sup> The status of the constitutional prearible is controversial in India. It was held in *Re Berubari Union & Exchange of Enclaves* ([1960] AIR SC 845), in India, that the preamble of the Constitution is not a part of the Constitution. Subsequently, the Indian Court changed its position and recognized the preamble as a part of the Constitution in *Kesavananda Bharati v State of Kerala* [1973] AIR SC 1461.

<sup>20</sup> 1989) 41 DLR (AD) 165, 274.

of a basic structure of the Constitution.<sup>21</sup> Although the new article 7B declared the whole preamble as an unamendable basic structure of the Constitution, the Constitution 8<sup>th</sup> Amendment Case recognized certain parts of the preamble as unamendable basic structure 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 in the name of Permanent Benches.<sup>22</sup> However, Chowdhury J also considered the whole aim of the state, contained in the preamble, as a basic structure of the Constitution. Chowdhury J observed:

That Constitution promises 'economic and social justice' in a society in which 'the rule of law, fundamental human right and freedom, equality and justice' is assured and declares that as the fundamental aim of the State. Call it by any name- 'basic feature' or whatever, but this is the basic fabric of the Constitution which can not be dismantled by an authority created by the Constitution itself- namely, the Parliament.<sup>23</sup>

Shahabuddin Ahmed J, the second concurring judge, declared the amendment void on the ground of violation of the basic structure of ‘oneness of the High Court Division.<sup>24</sup> He did not seem to base his judgment on the preamble.

The third concurring judge, Rahman J, declared the amendment void on the ground of violation 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 out as 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.<sup>25</sup>

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<sup>21</sup> A.T.M. Afzcd J dissented.

<sup>22</sup> 1989) 41 DLR (AD) 165, 232.

<sup>23</sup> Ibid 221-22.

<sup>24</sup> Ibid 264.

<sup>25</sup> Ibid 272.

He found that the impugned amendment impaired the rule of law contained in the preamble:

The impugned amendment is to be examined in the light of the Preamble. I have indicated 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 in the Constitution. Now by the impugned amendment that structure of the rule of law has been badly impaired, and as a result the high Court Division has fallen into sixes and sevens-six at the seats of the permanent Benches and the seven at the permanent seat of the Supreme Court.<sup>26</sup>

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’,<sup>27</sup> 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 unamendable basic structure 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 8<sup>th</sup> 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 a basic structure of the Constitution. The pledge made in the preamble to secure fundamental

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<sup>26</sup> Ibid 274.

<sup>27</sup> Ibid.

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

### **3.6 Constitutional Status and Enforcement of Fundamental Rights**

Part III sets express restrictions on law-making power. Article 26 declares all existing laws 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.<sup>29</sup> 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.<sup>30</sup> Thus, it does not only restrict the lawmaking power of the legislature, but it imposes equal restriction on the executive 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 any of his or her fundamental rights guaranteed in the Constitution. Under article 102(1), the said rights can be enforced against any person including the persons who are ‘performing any function in connection with the affairs of the republic’. The court is empowered to give any direction or order as it thinks ‘appropriate for the enforcement of any of the fundamental rights conferred by Part III of this Constitution’.

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<sup>28</sup> However, in 'spit; of the above observations from the Appellate Division in the *Constitution 8<sup>th</sup> 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.

<sup>29</sup> Article 26 of the Constitution reads as follows: '(1) All existing law inconsistent with the provisions of this Part shall, to the extent of such inconsistency, become void on the commencement of this Constitution.

<sup>30</sup> Article 152 of the Constitution defines the term ‘state’ that includes ‘Parliament, the Government and statutory public authorities’. The term ‘statutory public authority’ has been further defined 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 as in 1974, shortly after the adoption of the Constitution of Bangladesh, liberally interpreted the meaning of that phrase. The Court, in *Kazi Mukhlesur Rahman v. Bangladesh* expanded the scope of ‘any person aggrieved’. In admitting the *locus standi* of the petitioner, the Court said:

If a fundamental right is involved, the impugned matter need not affect a purely personal right of the applicant touching him alone. It is enough if he shares that right in common with others.<sup>31</sup>

The judgment remained unnoticed until 1997 when the Appellate Division finally relied on it in *Locus Standi Case*.<sup>32</sup> 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 owing to 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 Division for hearing.<sup>33</sup> 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.<sup>34</sup> 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 social and collective justice, the court being ready to disregard the constraints of the adversary model

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<sup>31</sup> Ibid 12.

<sup>32</sup> (1997) 49 DLR (AD) 1.

<sup>33</sup> Ibid 16.

<sup>34</sup> Naim Ahmed, *Public Interest Litigation* (Bangladesh Legal Aid and Services Trust, Dhaka, 1999) 45.

litigation.<sup>35</sup> 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*'<sup>36</sup> that in Bangladesh, 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 who is personally aggrieved. PIL standing would be granted also in cases of 'breach of public duty or for violation of some provision of the Constitution or the law.'<sup>37</sup> It is worth mentioning here that the PIL is not only restricted to cases where violation of any fundamental right is 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 written advice of the Prime Minister, by order, declare that the right to move any court for the enforcement of such of the rights conferred by Part III of this Constitution as may be specified in the order, and all proceedings pending in any court for the enforcement of the right so specified, shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order.

It appears that the fundamental rights do not disappear even during the period of emergency. However, the right to move to the court for their enforcement can be removed 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 and the governance of the country, but they have not been made judicially enforceable.<sup>38</sup> The Constitution itself terms them as principles, though Article 7 declares the whole Constitution

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<sup>35</sup> Ibid 51.

<sup>36</sup> (1997) 49 DLR(AD) 1.

<sup>37</sup> Ibid 4 [8] ( *Afzal CJ*).

<sup>38</sup> 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, it has been observed by the highest judiciary that the lack of judicial enforceability does not mean that the state can ignore implementation of these FPSP for an indefinite period of time.<sup>39</sup>

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<sup>39</sup> See *Masdar Hossain v. Bangladesh* (1998) 13 BLD (HCD) 558 (Md. Mozammel Hoque J).

## *Chapter IV*

### **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 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. 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 the burden of unbecoming attitudes to human rights. Moreover, public sentiment deserves due respect from the Government and all the political parties. However, in order to eliminate gross human rights violation of the current situation in our country pursues the following recommendations:

- The Constitution of Bangladesh has no provision for forbidding the arbitrary expulsion of residents and aliens (ICCPR-13) that should be 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 2<sup>nd</sup> 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 Indemnity ordinance 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 get special 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 for established human rights and fundamental freedom like that all the people enjoys these rights equally and none can suspend these rights in any cause.

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**\*\*\*\*\*THE END\*\*\*\*\***