



THESIS PAPER

ON

**PARAMETERS OF FREEDOM OF SPEECH UNDER THE
CONSTITUTIONAL MANDATE OF BANGLADESH AND OTHE
STATUTORY PROVISIONS.**

ABDULLAH AL MAMUN FARAZI

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Parameters of Freedom of Speech in the Constitutional Laws of Bangladesh and other statutory provisions.

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Supervised by:

**Md. Abdul Alim
Lecturer**

Department of law
Sonargaon University (SU)

Submitted By:

Name : Abdullah Almamun farazi
Program : LL.B (Hon's)
Class ID : LLB1901016019
E-mail : farazihclaw@gmail.com

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ABDULLAH AL MAMUN FARAZI

Id. : LLB1901016019

Program: Bachelor of Laws (LL.B.)

Department of Law

Sonargaon University (SU)

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ABSTRACT

This research is about the parameters of the freedom of Speech under the Constitutional mandate of the Bangladesh and other statutory provisions. In this research paper we explore the acceptable parameters of the freedom of expression in the constitutional law of Bangladesh and other statutory provisions and we also explore the ways to utilize comparative constitutional law method to develop to the contents for the freedom of speech in Bangladesh based on the other statutory provisions. The study is a doctrinal research based on analysis of the relevant primary and secondary legal sources from Bangladesh and other jurisdiction. The research paper presented the different parameters of US and Bangladesh freedom of speech doctrine in order to facilitate comparison. It did not detail on philosophical justifications for the freedom of speech, which potentially has some relevance in the development of parameters. The research paper also did not attempt to compare the differing extra-legal (political, economic) contexts of these two jurisdictions, and its potential impact on such comparative exercise.

This research is divided into six chapters. The first one is the present introductory chapter. In the Second Chapter, contains on the basis concept of freedom of speech. The Third Chapter contains on the acceptable parameters of freedom of Speech in the constitutional law of Bangladesh. The Fourth Chapter contains the acceptable parameters of freedom of Speech in the constitutional law of other statutory provisions. The Fifth Chapter contains lessons from the comparative exercise. Finally, the Six Chapter presents the conclusion.

Key Words : Freedom of speech, Constitutional law, Acceptable Parameters, Methods, Content, Constitutionalism, Development, Comparative analysis, Jurisdiction.

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CHAPTER ONE

INTRODUCTION

1.1 Background of the Study

Freedom of expression is the freedom to clear opinions and ideas without limitations or obstacles. It represents the freedom to speak without being censored or restricted. Liberty is not limited only to verbal speech but also to freedom from any act of receiving or sending information or opinions, regardless of the media used.

The freedom is one of the essential human rights, recognized in the Universal Declaration of Human Rights as well as all other human rights documents and treaties. Despite being the basic right for a democratic polity, frequent assaults on exercise of this right from governments around the world pose a difficult challenge to ensure the right. To address the challenge, the judicial organs of different jurisdictions in exercise of their authority to enforce human rights has developed a robust interpretation and detailed content of this right.¹

Bangladesh, as a country achieving independence in 1971, is understandably a late-comer in the field of constitutional protection of freedom of speech. Its new journey however faced a bumpy ride due to frequent authoritarian regimes that suspended or superseded the constitution, including the protection for freedom of speech. All these factors contributed to a dearth of robust analysis, content making and explanation of the right to freedom of speech.² Indeed, in view of essential threats to the very fabric of democracy and life of the citizens, the freedom of speech may have unfortunately represented a distant cry, and therefore received little attention from the judicial organ. Even after the return to multi-party democratic track in 1990, constant economic

¹American Declaration of the Rights and Duties of Man (1948) art 4; American Convention on Human Rights (1969) ('ACHR') art 13 and African Charter on Human and Peoples' Rights (1981) ('AChHPR') art 9.

² Regina (Pro-Life Alliance v. B.B.C [2004] 1 AC 185 in Mahmudul Islam, Constitutional Law of Bangladesh, pg.345, third edition, Mullick Brothers (2012)

growth despite political back-and-forth might have contributed to the near silence in respect of vindicating the freedom of speech.³

In this context, the choice of constitutional law of the United States of America as the metric for comparison is fitting, even if only for juxtaposition. The US doctrine of freedom of speech, analyzed as part of the First Amendment doctrine, is unparalleled in the world in its long history, detailed rules-based analysis and interpretation, as well as parameter-setting practice.⁴ The judicial development of the First Amendment right in the USA is thus a potent source for transplantation, borrowing, and cross fertilization in Bangladesh context.

1.2 Statement of the Problem

The comparative method is not new to our courts. To develop the parameters and the content for the rights in our own context, the courts in Bangladesh frequently looked to other jurisdictions for inspiration.⁵ Thus the comparative constitutional law has a fertile land in this part of the world due to the positive practice and attitude of bar, bench and legislature towards comparative analysis.

Comparative study or exercise requires the use of materials from different jurisdictions. In contemporary scholarship and practice of constitutional law, the growth in use of comparative materials exemplifies the phenomenon of migration of constitutional ideas across various legal systems.⁶ Such migration happens in all stages of constitutional practice: in constitutional design and making, as well as in constitutional interpretation.

Though the origin of comparative law can be traced back to such names as Plato and Aristotle, constitutional comparison remained more in the domain of political science till the last few decades when the comparative study of constitutional law has emerged as the new frontier in comparative law, and subsequently as an independent field of

³ Freedom of expression explained, < <http://www.brightknowledge.org/knowledge-bank/law-andpolitics/spotlight-on-law/freedom-of-expression-explained> > accessed 14 November 2014

⁴ David Smith, "Time line: a history of free speech". The Guardian (London, 02 Feb2006) <<http://www.theguardian.com/media/2006/feb/05/religion.news>> accessed 13 November 2014.

⁵ Mahmudul Islam, Constitutional Law of Bangladesh, pg.329, third edition, Mullick Brothers (2012)

⁶ Tom Christiano, "Democracy", (2008) The Stanford Encyclopedia of Philosophy (Fall 2008 Edition), Edward N. Zalta (ed.), < <http://plato.stanford.edu/archives/fall2008/entries/democracy/> > Accessed 10

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study.⁷ Its emergence and utility with regard to the domestic constitutional law was soon contested, and the methods of comparative constitutional law provides the theoretical basis for the use of comparative materials in constitutional design and adjudication setting.⁸

Any comparative study of constitutional law if aimed at new knowledge cannot begin from arbitrary starting points, rather it is essential to make some methodological choices to the way the topic will be investigated.⁹ As the present dissertation aims to present a comparative study between laws of freedom of expression in Bangladesh and USA, it is necessary to examine the methodologies of comparative constitutional law in order to provide the necessary theoretical basis and direction for the comparative discussion.¹⁰

1.3 Research Questions

1. How do the parameters take shape in different national contexts, such as in Bangladesh and other statutory provisions ?
2. What will be the ways to utilize comparative constitutional law method to develop to the contents for the freedom of speech in Bangladesh based on the content in other statutory provisions?
3. What will be the acceptable parameters of freedom of speech to accommodate the diversification of culture in each country context?

1.4 Research Objectives

The objectives of the present research are stated bellow:

⁷ See Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Cheltenham: Edward Elgar Publishing 2011) 2-9; Michel Rosenfeld and AndrasSajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 3-4.

⁸See Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Cheltenham: Edward Elgar Publishing 2011) 2-9; Michel Rosenfeld and AndrasSajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 3-4.

⁹ Tom Christiano, "Democracy", (2008) *The Stanford Encyclopedia of Philosophy* (Fall 2008 Edition), Edward N. Zalta (ed.), < <http://plato.stanford.edu/archives/fall2008/entries/democracy/> > Accessed 10

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¹⁰ Ms. Amrita Chowdhury, *Democratic Deficit in Bangladesh: A Cause for Concern* (2010) <www.globalindiafoundation.org/democratic%20deficit.pdf> accessed on 25 October 2014

- (1) To explore the parameters of the freedom of speech in the constitutional law of the Bangladesh & other statutory provisions other statutory provisions
- (2) To explore the ways to utilize comparative constitutional law method to develop to the contents for the freedom of speech in Bangladesh based on the content in other statutory provisions
- (3) To find out the acceptable parameters of freedom of speech to accommodate the diversification of culture in each country context other statutory provisions
- .(4) To find out the main problems the freedom of speech in the constitutional law of the Bangladesh & other statutory provisions
- (5) To identify the parameters of the right to freedom of speech and evolution, by using a comparative framework

1.5 Research Methodology

The study is a doctrinal research based on analysis of the relevant primary and secondary legal sources from Bangladesh and US jurisdiction. It uses an analytical approach in presenting the relevant information, with legal rights-based analysis to elucidate the parameters.

The necessary data will be collected from primary and secondary sources. The secondary data will be collected from books, magazines, articles, research reports, official publications, thesis, degree thesis, etc. Relevant and primary data will be collected by judges, defenders, litigants, members of legal committees, secretariat of law and justice, division of the Ministry of Justice and Parliamentary Affairs, relevant laws for procedures and civil and criminal relations, monthly declarations and annual reports of the Supreme Court.

1.6 Scope and Structure of Research

The aim of this study is to identify the parameters of the right to freedom of expression, using a comparative framework. Due to the limitation of words, the scope of the study focused on the fundamental right to freedom of expression, excluding

from the study interconnected rights such as the right to information and freedom of the press and media.

This research paper is divided into six chapters. The first one is the present introductory chapter. The rest chapters are structured as below.

In the **Second Chapter**, contains on the basis concept of freedom of speech and overview of the freedom of speech in the both jurisdictions.

Third Chapter contains on the acceptable parameters of freedom of Speech in the constitutional law of Bangladesh and follows through the texts of Bangladesh constitution and case laws of the Supreme Court to develop a narrative or framework for the parameters of the freedom of speech. The discussion presents useful overview of the parameters, as well as where there is need for improvement.

The **Fourth Chapter** consist of a concise summary of the major parameters that are used in the constitutional law of the US to enforce the right to freedom of speech. The discussion sometimes present the context of various parameters to better understand its potential usefulness.

The **Fifth Chapter** presents the result of comparative exercise, by indicating the points of convergence and divergence in the two jurisdictions to facilitate improvement of the national law.

Finally, the **Six Chapter** presents the findings and the conclusion part and to present a comparison of the parameters of the freedom of speech in both jurisdiction with a view to facilitate further development of the content of freedom of speech in Bangladesh.

CHAPTER TWO

BASIC CONCEPT OF FREEDOM OF SPEECH

2.1 Origin of freedom of Speech and expression

Freedom of speech consists of the right to express freely one's convictions and opinion on any matter, orally or by writing, printing or any other mode addressed to the eyes and ears of other persons.¹¹ It also includes the right to acquire and import from others ideas, thoughts and information about matters of common interest and thus the right to read and be informed.¹² The right also incorporates the freedom to disseminate one's speech and ideas in any manner, including press and other media. Thus freedom of speech is based on the absolute freedom of thought and conscience, and extend to include freedom of information and freedom of press and media.

The text of the constitution makes the freedom of speech and expression applicable to citizens only. Thus a non-citizen as well as a legal person cannot claim freedom of speech as a fundamental right.¹³

The concept of freedom of expression was born a long time ago. The Charter of Rights of 1689 adopted freedom of expression as a constitutional right and is still in force. This further affirmed freedom of expression as an undeniable right. The Declaration of Freedom of Expression referred to in Article 11 establishes:

The ease Speech of ideas and opinions is one of the most precious human rights. Consequently, every citizen can speak, write and print freely, but he will be responsible for abuses of this freedom as established by law.

¹¹Mahmudul Islam(n 17) 330.

¹² ibid. See also preamble to Right to Information Act, 2009.

¹³ Constitution of Bangladesh, Art 39(2)(b).

2.2 Meaning of freedom of Speech

Freedom of expression is a civil liberty. Freedom consists in the right to express oneself freely the belief and opinion of one on any matter orally or in writing, impression or in any other way directed at the eyes and ears of other people.

Freedom of expression is not limited to a particular field of human interest, but rather guarantees the broadest exercise of the right to religious, political, economic, scientific or information purposes. In a free democracy society, the heads of public administration must always be open to criticism.¹⁴ Any attempt to stifle or chain such criticism amounts to political censorship of the most insidious and questionable.¹⁵In *Dewan Abdul Kader v. Bangladesh* has defined freedom of speech given as in:

‘The right to express one's opinion with absolute freedom through spoken, written, impression or in any other way that can be opened to the eyes and ears. That's it includes expressing one's ideas on any subject by any means, including gestures, postures, banners and posters. Therefore, it seems to us that this freedom is broad enough to include the expression of one's original ideas.’

2.3 Freedom of Speech and Expression in the Constitution of Bangladesh:

In addition to the general protection of law and due process previously guaranteed, freedom of expression also enjoys special protection. Article 39 of the Constitution states :

- (1) Freedom of thought and conscience is guaranteed.
- (2) Subject to reasonable restrictions imposed by law in the interests of state security, friendly relations with foreign states, public order, decency or morals
 - a) the right of every citizen to freedom of expression and expression;

¹⁴ *Douglas v. Jeanette* 319 US 157

¹⁵ *Hector v. A.G. of Antigua and Barbuda*, 1990 2 All E.R 103, 106

b) freedom of the press is guaranteed.

From the previous article it is clear that the right to freedom of expression and expression was guaranteed by the constitution of Bangladesh but was subject to reasonable restrictions.

Restrictions on Freedom of Expression

If we analyze article 39 (2) of the Constitution said that:

- a. the interests of state security;
- b. friendly relations with the foreigner states,
- c. public order, decency or morality, or
- d. in relation to the contempt of nice, defamation or incitement to commit a crime.

2.4 Freedom of expression in the United States

Schauer, in a philosophical treatise on free speech, has identified three lines of argument that are particularly important regarding the philosophical basis of free speech.¹⁶

Free speech, also called free speech, means the free and public expression of opinion without government censorship, interference and moderation. The term "free speech" incorporated into the First Amendment includes the decision of what to say and what not to say. The Supreme Court of the United States has recognized several categories of speeches to which the First Amendment grants little or no protection and has recognized that governments can impose reasonable restrictions on time, place or form on speech. However, laws may limit the ability of private companies and individuals to restrict the speech of others, such as labour laws which limit the ability of employers to prevent employees from disclosing their wages to colleagues or from attempting to organize a union. Government restrictions or positions that discriminate

¹⁶ Hugelier, 'Freedom of expression and transparency: two sides of one coin' (2010-2011), Jg. 47, Jura Falconis, <<http://www.law.kuleuven.be/jura/>> accessed 14 November 2014.

among speakers limit the government's liability for wrongdoing by requiring individuals and companies to speak out or finance certain types of speech they disagree with. The categories of speech that receive little or no protection under the First Amendment include obscenities (as determined by the Miller test), fraud, child pornography, language that is integral to illegal conduct, language that incites imminent wrongdoing, and regulation of business speech, as advertising. Within these limited areas, other restrictions on freedom of expression balance the rights to freedom of expression and other rights, such as copyright in their works (copyright), protection against imminent or potential violence against individuals, using lies to harm others, (slander and insults) and communications while a person is in prison. When a parole restriction is challenged in court, it is presumed invalid and the government has the burden of convincing the court that the restriction is constitutional.

CHAPTER THREE

PARAMETERS OF FREEDOM OF SPEECH IN CONSTITUTIONAL LAW OF BANGLADESH

3.1 The general Protection of Freedom of Speech as Liberty

Following the international human rights instruments and the practices of other states, the Constitution of Bangladesh incorporated within its scope much of the International Bill of Rights. Most of the political and civil rights has been included in Part III of the Constitution named 'Fundamental Rights'.

The rights guaranteed by Part III of the Constitution has been categorized into two groups by the constitutional jurist Mahmudul Islam:¹⁷

- a. **Rights general in nature**, applicable to whole range of human activities and to every law irrespective of subject matter. These are the rights of equality, equal protection of law and protection of law provided by Articles 27 and 31. So far as right to 'liberty' is concerned, it is embedded within this category of fundamental rights as part of Article 31. The protection of right to liberty is essential and is applicable to all sorts of state actions.¹⁸
- b. **Rights in respect of specific liberties**, for example, speech and expression, movement, association, assembly and religion. These are protections of particular kinds of liberties and freedoms.

¹⁷Mahmudul Islam, *Constitutional Law of Bangladesh* (3rd edn, Dhaka: Mullick Brothers, 2012) 133.

¹⁸ Sara Hugelier, 'Freedom of expression and transparency: two sides of one coin' (2010-2011), Jg. 47, *Jura Falconis*, <<http://www.law.kuleuven.be/jura/>> accessed 14 Novem Methods ber 2014.

(A) ‘Right to Protection of Law’ and Due Process

Article 31 provides the jurisprudential basis for the concept of protection of law and due process. It consists of one sentence of two parts, the second part (‘B’) is illustrative of the first substantive part (‘A’):

- A. (a) ‘To enjoy the protection of the law,
(b) ‘and to be treated in accordance with law, and only in accordance with law,
- B. ‘and in particular: no action detrimental to the
(a) ‘life,
(b) ‘liberty,
(c) ‘body,
(d) ‘reputation or
(e) ‘property

The Article intends to provide that any kind of interaction of state with any individual must be according to authority and procedure established by law. The right provided by this Article extends to the whole range of human activities, and is not limited to the five specified matters.¹⁹ The protection of law is an inalienable right to be enjoyed by all citizens as well as persons present within Bangladesh more particularly operates in respect of individual’s right to life, liberty, body, reputation and property.²⁰

(i) Protection from executive as well as legislative actions

The fundamental right to protection of law mentioned in Article 31 is applicable to all executive actions in as much as the executive cannot take any action without any specific statutory sanction and authority of law to justify it. However, the Article is not

¹⁹Moha. Waheduzzaman, ‘Economic, Social and Cultural Rights under the Constitution: Critical Evaluation of Judicial Jurisprudence in Bangladesh’ (2014) 14 Bangladesh Journal of Law 1-42, 27.

²⁰ David Smith, “Time line: a history of free speech”. *The Guardian* (London, 02 Feb2006)
<<http://www.theguardian.com/media/2006/feb/05/religion.news>> accessed 13 November 2014

only to protect against unauthorized executive action, it also acts as a restriction on the power of parliament to legislate.²¹ The reasons are:

- a. Article 26(2) mandates that the state shall not make a law inconsistent with Part III including provisions of Article 31.²²
- b. Further, if the restriction was not applicable to the Parliament, the whole provision would be nugatory as the parliament could, in theory, legislate away all rights intended to be protected by this Article.

(ii) In accordance with...not ‘any’ law: the jurisprudence of due process

The key expression in this Article ‘in accordance with law’ does not mean any law. ‘Law’ has been used here in the sense of jus, not in the sense of lex. It envisages a concept similar to the concept of due process of the American jurisprudence, which demands reasonable and non-arbitrary laws.²³ Thus, a law providing for any action against a right of an individual must be:

- (1) law of the land as defined in Article 152
- (2) reasonable and non-arbitrary, or in other words, it must fulfil both (a) procedural and (b) substantive aspects of due process.

The rationale behind this view is that:

- a. If Article 31 is interpreted to mean any law passed by the Parliament, it would cease to be a fundamental right as such interpretation takes away the restriction on Parliament which is quintessential feature of a fundamental right according to Article 26(2).²⁴
- b. The concept of ‘rule of law’ enshrined by the Preamble to the Constitution also requires that the laws must be reasonable and not arbitrary.²⁵

²¹Mahmudul Islam(n 17) 233.

²²ibid.

²³ ibid at 245.

²⁴ ibid at 233.

²⁵ ibid.

The full import of reasonableness and non-arbitrariness of any law affecting rights of citizens under Article 31 can be better explained by alluding to the contents of 'due process of law' in the American jurisprudence.

(a) Procedural due process

Procedural due process is American counterpart of English principle of 'natural justice'. It makes it necessary that the affected person must be treated according to fair procedures of law. The procedure must include giving notice of any proceeding against a person sought to be affected, providing him with reasonable opportunity to defend himself as well as hearing before any taking any action.²⁶

(b) Substantive due process

Following of the fairest procedure may not protect a person's rights if the law itself is in substance arbitrary or unreasonable.²⁷ This substantive aspect is determined through the following way:

(1) There must be proximate and rational relation between the law affecting right (e.g. liberty) of a person and the objective sought to be achieved by the legislator. There are three tests of reasonableness:

- (i) Rational basis test: a law is valid if is rationally related to any legitimate government purpose.
- (ii) Intermediate scrutiny test: a law is valid if it is substantially related to an important government purpose.
- (iii) Strict scrutiny test: a law is valid if it is necessary to achieve a compelling government purpose.

The relaxed test is applied usually in respect of social and economic regulations and non-fundamental rights matters. Where any fundamental right is in concern, stricter forms of scrutiny of reasonableness is followed so that fundamental rights are not affected.

(2) The law must not be vague.

²⁶ ibid at 235-236.

²⁷ ibid at 237.

(3) The law must not be disproportionate to the mischief sought to be remedied.²⁸

(4) The fairness and reasonableness of a law must be considered with reference to the existing economic and social conditions and current values of the society.²⁹

(iii) Scope of the right to protection of law: ‘any detrimental action’

The right to protection of law under Article 31 is applicable in all situations where a person is adversely affected by station action. The five rights of life, liberty, body, reputation and property are illustrative of the wide range of human activities covered by the Article, and mentioning these five puts special emphasis on the need to protect them. Thus any kind of detrimental action taken against any person attracts this Article. In this sense, its scope is wider than the American due process clause which is attracted only when detrimental action relates to life, liberty or property of a person.³⁰

(B) Liberty under Article 31 includes freedom of speech and expression

Liberty under Article 31 is liberty in widest sense. It is not limited to personal locomotion, rather it also includes right of personal to be free in enjoyment of all his faculties and to be free to use them in all lawful modes.³¹ Thus it denotes both freedom from bodily confinement (personal liberty) as well as freedom of action within lawful boundaries, including the freedom of speech and expression.

3.1 The acceptable parameters of freedom of speech in Bangladesh:

In addition to the general protection of law and due process previously guaranteed, freedom of expression also enjoys special protection. Article 39 of the Constitution states:

- (1) Freedom of thought and conscience is guaranteed.
- (2) Subject to reasonable restrictions imposed by law in the interests of state security, friendly relations with foreign states, public order, decency or morals.

²⁸Mahmudul Islam(n 17) 244.

²⁹ ibid at 247.

³⁰ ibid at 231.

³¹ ibid at 260.

(A) The freedom of speech: meaning and scope

Freedom of speech consists of the right to express freely one's convictions and opinion on any matter, orally or by writing, printing or any other mode addressed to the eyes and ears of other persons.³² It also includes the right to acquire and import from others ideas, thoughts and information about matters of common interest and thus the right to read and be informed.³³ The right also incorporates the freedom to disseminate one's speech and ideas in any manner, including press and other media. Thus freedom of speech is based on the absolute freedom of thought and conscience, and extend to include freedom of information and freedom of press and media.

The text of the constitution makes the freedom of speech and expression applicable to citizens only. Thus a non-citizen as well as a legal person cannot claim freedom of speech as a fundamental right.³⁴

(i) Other topics:

There are also important arguments in favour of free speech that are based on the distrust of the government, either because the government is believed to have an inherent or even corrupt self-interest or because it believes that the fallibility of government officials provides a reason for distrust the ability government to regulate speech even when acting in good faith.³⁵ Along with these, there are more general arguments about the futility of expression suppression which, at least in some cases, is deemed ineffective or even counterproductive.

(ii) The jurisprudence of Bangladesh

The justification that the Bangladeshi courts provide for freedom of expression is the argument of democracy. The law is considered one of the hallmarks of a republican society and is essential for the development of the individual and of society.

³²Mahmudul Islam(n 17) 330.

³³ *ibid.* See also preamble to Right to Information Act, 2009.

³⁴ Constitution of Bangladesh, Art 39(2)(b).

³⁵ Christiano, "Democracy", (2008) *The Stanford Encyclopedia of Philosophy* (Fall 2008 Edition), Edward N. Zalta (ed.), < <http://plato.stanford.edu/archives/fall2008/entries/democracy/> > Accessed 10

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Sometimes other justifications are also proposed, such as Mill's argument about the "truth" arising through the "dialectical" process of a struggle with the error that error exposes. However, the various types of justification do not seem to affect the reasoning or the balance of the judges.

In *Hamidul Huq Chowdhury* case,³⁶ the court struck down certain enactments that took over the assets of a printing and publishing company that owned printing presses and published several newspapers, namely *Daily Pakistan Observer*, *Daily Purbadesh* and *Weekly Chitrali*, and vested such in the government.³⁷ After finding the acts discriminatory, the court also held that it violated the freedom of press guaranteed in Article 39 of the Constitution, and is essential for free discussion in a democratic society:

‘The vitality and strength of civil and political institutions in a society depends upon such discussions. It rests on the assumption that widest possible dissemination of information from diverse sources would enrich the decision and it is essential for the welfare of the public and it can be achieved by liberty of the press. Any measure to stifle or destroy or to deprive the printing facilities or printing establishments in which newspapers and periodicals are printed and published, owned by a person or a company tantamount to invasion of freedom of press.’

(B) Symbolic speech, hartal and other conducts

The right is not limited to words merely, rather it extends to symbolic speech or conducts that have an expressive content.³⁸ Even omission to do acts, if such omission communicate a message, can be regarded as speech according to *Hartal* cases.³⁹ The Bengali text of the provision as well indicate that the speech is not merely restricted to

³⁶*Hamidul Huq Chowdhury v Bangladesh* 34 DLR (1982) 190

³⁷ *Chowdhury, Democratic Deficit in Bangladesh: A Cause for Concern* (2010) <www.globalindiafoundation.org/democratic%20deficit.pdf> accessed on 25 October 2014

³⁸ “Bangladesh: Government should stop the repression of freedom of expression and release the detained media-professionals,” Asia Human Rights Commission, June 3, 2010,

<<http://www.ahrchk.net/statements/mainfile.php/2010statements/2582/>> in Fahimul Quadir

³⁹ *Mahmudul Islam* (n 17) 332.

spoken or written words, rather encompass very broadly all forms of expression of ones' thoughts and feelings.

(i) The legality of Hartal: Khondaker Modarresh Elahi v Bangladesh⁴⁰

Since there was no previous decisions by superior courts in Bangladesh, the High Court Division, in an example of functionalist comparative law exercise, considered Bharat Kumar Palicha case⁴¹ of India where the Indian supreme court upheld the finding of High Court of Kerala that the calling for and holding of bundh . Holding hartalto be an invitation to abstain from work as an expression of protest, the court considered the long history and practice of it since colonial rule.⁴² It then concluded that a call forhartalper se is not illegal if not accompanied by threat, rather it is an expression of protest guaranteed as a fundamental right. Once it accompanies a threat of violence to enforce it, it would cease to be protected. Making a comparative analysis with Texas v Johnson,⁴³ the flag-burning case in US jurisdiction, the court illustrated that an act which meant to be nothing but an expression of protest is constitutionally protected even though it may hurt the feelings of some people. It also cited Justice Kennedy's observation in the decision that sometimes the court must make decisions that it does not like

In a separate opinion, MA Aziz J, critically analyzed the Bharat Kumar case and disagreed with its approach of 'declamatory relief' and 'encroachment' into domains of the legislative organ of the state. Considering the question of rights of other citizens not agreeing with the hartal, he opined that in a case where two fundamental rights are in conflict with each other it is not for the Court to decide which particular one shall prevail over the other, rather the Parliament, if it so desires can prohibit hartal and only then the court may grant the declamatory relief.⁴⁴ Furthermore, prohibiting

⁴⁰ (2002) 54 DLR 47.

⁴¹Bharat Kumar Palicha v State of Kerala AIR 1997 Kerala 291 affirmed in AIR 1998 SC 1984.

⁴² Countries at the crossroads 2011: Bangladesh (Freedom House, 2011) <<https://freedomhouse.org/report/countriescrossroads/2011/bangladesh#.VHF5asl9vIV>> accessed 20 November 2014

⁴³ 491 US 397 (1989).

⁴⁴ Professor Emajuddin Ahamed, Democracy in Bangladesh: Prospects and problems, The Bangladesh Chronicle (Bangladesh, 19 December 2013)

declaring bundh by political parties raise issues of vertical application of fundamental rights. Finally, he held that horntails a political issue supported by the parties in opposition and criticised and opposed by the party in power, and as such its virtue or vice should be decided by political means.

3.1.1 Reasonable Restrictions on Freedom of Speech

As with any right, the right to freedom of expression is not absolute, unfettered or unrestricted.⁴⁵ The constitution itself allowed the limitation of this right subject to fulfilment of the following conditions:⁴⁶

1. The restriction must be reasonable.
2. The restriction must be imposed by a law.
3. The restriction must be only in the interest of the following grounds, namely:
 - a. security of the State
 - b. friendly relation with foreign states
 - c. public order
 - d. decency or morality
 - e. contempt of court
 - f. defamation
 - g. incitement to an offence.

(i) Sedition

<http://www.bangladeshchronicle.net/index.php/2013/12/democracy-in-bangladesh-prospects-andproblems/>>accessed 20 November 2014

⁴⁵ Saha, 'Facebook and freedom of speech', Dhaka Tribune (Dhaka 20 June 2013)

<<http://www.dhakatribune.com/long-form/2013/jun/20/facebook-and-freedom-speech-0>> accessed on 20 November 2014

⁴⁶ Constitution of Bangladesh, Art 39(2).

Section 124A of the Penal Code, 1860 defines the crime of sedition. But the word ‘disaffection’ is explained very broadly as including even disloyalty and all feelings of enmity.

Several major leaders of the British Indian era independence movement, including Gandhi and Tilak, were tried under this provision.⁴⁷ The Privy Council interpreted ‘disaffection’ to mean merely ‘absence of affection’ or ‘bad feeling’ towards the government whether or not it has connection with violence, and rejected the requirement of proximity with violence or acts in breach of peace or public order.⁴⁸ However, such a reading is completely nugatory of the sedition law in view of the constitutional guarantee of freedom of speech and expression.

In Bangladesh, two cases involving two prominent aides and government members of then East Pakistan during the liberation war discussed section 124A. The court said that in order to apply Article 124A of the Penal Code, it is necessary to prove that the accused has provoked hatred or contempt or has excited or attempted to arouse discontent against the government established by law in Bangladesh. In one case, the defendants' speeches urged listeners "to face Indian aggression in a united and bold way", advising them to "maintain the integrity of Pakistan" and "praise the services of the Razakars". However, these statements do not guarantee a conviction under section 124A of the Criminal Code. In the other case, the court agreed that `` if a particular article is accused of seditiousness because it says more than it first appears, it is the duty of the prosecution to prove that, in fact, the guilty meaning or intention are attributes . In this case, although the accused has repeatedly pronounced and attacked referring to "so-called Bangladesh", the prosecutor has not shown that he is referring to the government of the People's Republic of Bangladesh. On the contrary, the impression formed by the court from the speeches is that the defendant took the Indian government as the main target of the attack, and the concept of Bangladesh proposed by the Indian government, and did not direct his criticisms and attacks against the

⁴⁷Lawrence Liang, ‘Free Speech and Expression’ in Sujit Choudhry, Madhav Khosla, and PratapBhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (Oxford University Press 2016).

⁴⁸Emperor v SadashivaAIR 1947 PC 82.

government. of the People's Republic of Bangladesh settled in Mujibnagar in one of his speeches.

3.2 Analysis of a leading case: freedom to publish note-books?

(i) The High Court Division stage: Vindication of Freedom of Speech in *Dewan Abdul Kader v Bangladesh*⁴⁹

The Note Book (Prohibition) Act, 1980 prohibited printing and publishing notebooks, which are annotations, explanations, solutions etc of textbooks of primary schools and secondary schools (up to class 8) published by Bangladesh Curriculum and Textbook Board. The Act was challenged on ground of violating the right to freedom of speech and expression and the freedom of press.

After setting the parameters, Naimuddin J proceeded to analyze the objective of the impugned enactment. Rejecting the argument that the enactment was made in the interest of decency and morality, he examined the 'Statement of Objects and Reasons' expressed in the Parliament when this Bill was introduced. The Bill aimed at 'removing a baneful effect which reading of Note Books generally distils in the young mind of the students at their formative stage and which is mostly responsible for the retardation of true pursuit of knowledge and the interest of education.' The HCD, holding that such an object, noble as it may be, does not correspond to the purposes mentioned in clause (2) of Article 39 of the Constitution, the Act strikes at the very foundation of the freedom of press by subjecting it to license and censorship thereby violates the fundamental rights of the Petitioners guaranteed by Article 39 of the Constitution.

(ii) The majority judgement in Appellate Division: insensitive analysis of freedom of speech

On appeal,⁵⁰ the majority of four AD judges reversed the HCD decision, with Latifur Rahman J dissenting. ATM Afzal CJ writing for the majority observed that though

⁴⁹ (1994) 14 BLD 418.

right to freedom of speech expression is a very valuable right, and the fulfilment of the individual and the society as well depends largely upon the cultivation of the said right, and any infringement thereof is permitted only as provisions under Article 39(2), in the present case the right to freedom of speech and expression does not extend to the right of printing and publishing of 'note-books' on 'text-books' prepared and published by the Text Book-Board under statutory authority.

(a) Examining the statute

The court considered the Act and its background. Finding that the Textbook Board was statutorily entrusted with control of textbooks with the aim to achieve improvement in the quality of the textbooks.

It then stated that it said that note-books are in effect 'a merely degenerated presentation of the same text-book, the maintenance of the quality of which is statutorily vested in the Text-Book Board.' Publishing such note book will frustrate the purpose of the law regulating the quality of the text-books by the Text-Book Board and offend the statutory provision. Also, the note books are full of tissues of falsehood, mistake of facts, wrong annotation and incorrect explanation which create confusion and causing serious psychological setback and obstruction in the pursuit of true knowledge.

(b) Freedom of speech cannot be invoked to violate law or rights of others

The court therefore held that there cannot be any right, much less any fundamental right, which will inspire a violation of the law .The basic assumption for the exercise of the right under Article 39 must be that it may not offend any law or any right of other person under the law. The court relied on Jang Bahadur vs. Principal, Mohindra College⁵¹ which held that apart from the attributes enumerated in clause (2) of Article 19 (corresponding to the restrictions mentioned in Article 39(2) of Constitution of

⁵⁰Bangladesh National Curriculum and Text-Book Board v AM Shamsuddin(1996) 48 DLR (AD) 184.

⁵¹AIR (38) 1951 Pepsu 59.

Bangladesh),⁵² the right to freedom of speech and expression is subject to the qualification that the exercise of the right by burgher should not infringe the rights of others. For example, the freedom of movement do entail the right to move and reside and settle in a private property. Similarly, hand-bills that offend the ordinary law of the land could not be permitted by invocation of the right to freedom of speech and expression.⁵³

(c) Freedom of expression does not extend to commercial expression:

The object must be the propagation of the idea. Since a notebook is simply reproducing a textbook in a different way and the motive is none other than profit, the immediate goal is not to convey ideas or information, but to make money at the expense of the council. Commercial advertising, having an element of commerce or commerce, no longer falls under the concept of freedom of vent, since its object is not the extension of ideas - social, political or economic, nor the promotion of literature or human thought. Since freedom of expression is at the heart of the natural right of a freedom-loving organized society to `` impart and acquire information on the common interest ", only when a limitation is imposed that causes the deprivation of that right to society, the expression is part of the guaranteed freedom. It is argued that such a restrictive reading of the speech is not justified considering the wide coverage in the text of the constitution itself.

(d) Freedom of speech do not extend to violating copyright

The court held that the limitations put by the impugned Act on printing, publishing, etc.⁵⁴ of note-books may be construed as reasonable reason able restriction against the possibility of infringement of copyright of the Text-Book Board being infringed as would be permissible under Article 39(2). The court essentially saw the restriction put by the impugned Act as same in effect as an injunction against infringement of copy right of the Board by adaptations from and substantial use of the Board's textbooks

⁵² The Constitution of the People's Republic of Bangladesh, Article 39

⁵³ Use and misuse of defamation law and its impact on journalism' The Daily Star (Dhaka, 26 November 2019)<<https://www.thedailystar.net/round-tables/news/use-and-misuse-defamation-law-and-its-impact-journalism-1832056>> accessed 12 December 2019.

⁵⁴ Amrita Chowdhury, Democratic Deficit in Bangladesh: A Cause for Concern (2010) <www.globalindiafoundation.org/democratic%20deficit.pdf> accessed on 25 October 2014

without its permission. However, the court did not connect the copyright infringement with any of the purposes under Article 39(2), nor addressed the issue of disproportionality of blanket restriction in relation to the objective.

(iii) Dissenting opinion of Latifur Rahman J:

Latifur Rahman J started by agreeing with the majority that the purpose and objective of the Text-Book Board was to improve the quality of text books of primary and secondary stages, and to that purpose it has exclusive authority to prescribe text books in any school. It also holds copyright over its text books.⁵⁵ However, he identified that these findings concern text books, not note books which are not prescribed in schools, and nowhere except in the impugned Act were the note-books proscribed.⁵⁶

He then proceed to examine freedom of speech as contained in Article 39(2).⁵⁷ Holding that restrictions on the right to freedom of speech are enumerated in the Constitution itself, he said that restrictive clauses as mentioned hereinabove are exhaustive and are to be strictly followed and no ground beyond those mentioned in clause (2) can be imported to curtail the freedom of ‘the speech and expression’.

⁵⁵ Bangladesh: Charging Editors Is Dramatic Backslide’ (Human Rights Watch, 20 February 2016) <<https://www.hrw.org/news/2016/02/20/bangladesh-charging-editors-dramatic-backslide>> accessed 2 February 2020.

⁵⁶ Hussain M F Bari & IshratZerin, ‘An overview of the new Contempt of Court Act’ The Daily Star (Dhaka, 19 April 2013) <<https://www.thedailystar.net/news/an-overview-of-the-new-contempt-of-court-act>> accessed 3 January 2020

⁵⁷ The Constitution of the People’s Republic of Bangladesh, Article 39

CHAPTER FOUR

PARAMETERS OF FREEDOM OF SPEECH IN CONSTITUTIONAL LAW OF OTHE STATUTORY PROVISIONS

4.1 The three standards of review

In a very famous footnote in the United States against *Carolene Products Co*, the Supreme Court expressed the idea that different constitutional claims would be subject to different levels of review.⁵⁸ As agreed at the end, there are three key revision standards that consistently reappear throughout United States constitutional law. They are:

(1) the standard of mere rationality; (2) the strict control standard; and (3) the mid-level audit standard.

(A) Strict Scrutiny

The most difficult standard to meet is the "in-depth" review standard. This standard will only be met if government law meets two very strict requirements:

1. Imperative objective: the objective pursued by the government must be "convincing" (not just "legitimate", as in the case of the standard of "mere rationality");
2. Necessary means: the means chosen by the government must be "necessary" to achieve this imperative end.⁵⁹ It is not enough that there is a "rational relationship"

⁵⁸See Erwin Chemerinsky, *Constitutional Law: Principles and Policies* (5th edn, New York: Wolters Kluwer 2015) 789.

⁵⁹ *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council* 425 US 748 (1976).

between the means and the end, which is sufficient under the standard of "mere rationality".

No less restrictive alternatives: In practice, this requirement that the means be "necessary" means that there should be no less restrictive means that equally meet the government's objective.⁶⁰

(B) Mid-level review:

Between these two revision standards is "mid-level" revision:

1. "Important" objective: here the government's objective must be "important" (halfway between "legitimate" and "convincing").
2. "Substantially related" means: And the means chosen by the government must be "substantially related" to the important goal of the government.

4.2 The acceptable parameters of freedom of Speech in USA:

4.2.1 Justifications for free speech

All the philosophical justifications for free speech as featured before, namely, arguments from truth, argument from democracy or arguments from individual autonomy,⁶¹ have been reflected in the constitutional law of the US. However, the predominant theme among them is the centrality of political speech to the core purpose of the First Amendment, not because free speech is inherently more important, rather because the entire system of self-governance and democracy is dependent on free enquiry and free debate.⁶² Thus the First Amendment is 'profound

⁶⁰ A Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (New York: Harper and Brothers 1960).

⁶¹ See Chapter III, Section 3.2 (B) above.

⁶² Allan Ides and Christopher N May, *Constitutional Law: Individual Rights* (6th edn, Wolters Kluwer 2013) 336.

national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open.⁶³

4.2.2 Methodology of freedom of speech analysis

(A) Meaning of speech, pure speech and symbolic speech

Speech literally includes the spoken and the printed word. But in general, a wide variety of expressive conduct or activity is also included. The court has sometimes drawn a distinction between pure speech and symbolic speech (or expressive conduct), but both are guaranteed the same First Amendment protection.⁶⁴ The Supreme Court first gave First Amendment protection to symbolic speech in *Stromberg v California* (1938), where it ruled that a California law prohibiting display of red flag was unconstitutional.⁶⁵

(B) Content-neutral and content-based restriction

When the government "limits" freedom of expression, its reasons can be classified into two broad classes.⁶⁶ The first is that the government limits the speech according to its content, that is, the ideas or information it contains or its general theme. The second reason for the abbreviation has nothing to do with the content of the speech; rather, the government tries to avoid some evil that is unrelated to the content of the speech, but government regulation has the accidental by product of interfering with particular communications. Therefore, the two types of constraints are:

(a) Restriction based on content or point of view: a government action that overloads the expression is "content based" if the government aims at the "communicative

⁶³New York Times v Sullivan 376 US 254, 270 (1964).

⁶⁴ Aides and May (n 62) 339.

⁶⁵ American Declaration of the Rights and Duties of Man (1948) art 4; American Convention of Human Rights (1969) ('ACHR') art 13

⁶⁶ Cheryl Saunders 'The Use and Misuse of Comparative Constitutional Law' (2006) 13 Indiana Journal of Global Legal Studies 37, 65.

impact" of the expression.⁶⁷ If the government action is "content-based," the action will generally be subject to strict scrutiny and the action will generally be cancelled. The fear is that if content-based regulation is allowed, the government will target specific messages it deems unfavourable.

(b) Content neutral restriction: On the other hand, if government action is "content neutral", government action is subject to a much simpler test to satisfy and will generally be valid. This type of restriction is also called a restriction of time, place and form, since the restriction does not refer to the content of the speech.

(C) The doctrine of breadth

A law is "too broad" if it prohibits speech that might be prohibited by the constitution, but it also prohibits speech protected by the First Amendment.⁶⁸ Excessive doctrine allows a litigant to prevail if he can prove that the statute, applied in accordance with its terms, would violate the protected First Amendment rights of people who are not now in court. The doctrine allows a litigant to enforce the rights of third parties, thus creating an exception to the rules of legitimacy.

(D) Rule of Preventive Restriction

Historically, courts have been more suspicious of previous restrictions than other government restrictions on expression. It is because the previous restriction prevents the word from being born. Limiting pre-emptive restriction is at the heart of First Amendment protection of press freedom in the United States.

There is a distinction between previous restraint and subsequent punishment. The latter does not occur before speech and, as such, is not subject to rigorous scrutiny as a preventive restriction.

(i) Famous case

The deal became official in **Near v Minnesota**. The Supreme Court has repealed a Minnesota law that authorized government officials to stop publishing any "malicious, scandalous and defamatory newspaper."⁶⁹ The court called the law "the essence of censorship". The same was true in the Pentagon Papers cas

⁶⁸ Hussain M F Bari & IshratZerin, 'An overview of the new Contempt of Court Act' The Daily Star (Dhaka, 19 April).

⁶⁹ Lawrence Liang, 'Free Speech and Expression' in Sujit Choudhry, Madhav Khosla, and PratapBhanu Mehta (eds), The Oxford Handbook of the Indian Constitution (Oxford University Press 2016).

(ii) State security and preventive restriction

A very limited exception was allowed for state security objectives. The ban on posting wartime departure dates and troop positions qualified for this "troop transport exception".

(iii) Censorship in schools

In the Hazelwood case, the court upheld a public school principal's decision to remove a controversial issue from the school's magazine and ruled that such a review can be made.

4.2.3 Types of Speech: Unprotected and Less Protected

Not all types of speech qualify for protection under First Amendment. While the 'political speech' category was certainly protected, on the other hand certain other categories are traditionally held by courts to be prescribe able because they fall outside the First Amendment umbrella and are entitled to no protection.⁷⁰

(a) Some sexually oriented speech: the Court has indicated that some types of sexually oriented speech, although protected by the First Amendment, are deemed to be of "low value," and thus are more susceptible to government regulation.⁷¹

(A) Commercial Speech

Laws regulating commercial speech are now measured under Central Hudson test,⁷² a four part test modified from the middle level scrutiny:

(i.) Whether the speech is misleading or related to unlawful activity. If not, the government may regulate it if the following three standards are satisfied:

(ii) The government interest is substantial,

(iii) The regulation must directly advance that interest, and

⁷⁰ Mark Tushnet, 'Some Reflections on Method in Comparative Constitutional Law' in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press 2006) 67-83.

⁷¹ Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights Comparative Constitutional Law* (Princeton University Press 2008) 3.

⁷² *Central Hudson Gas & Electric v Public Service Commission* 447 US 561.

4.2.4 Forum of speech

The discussion on content-based and content-neutral regulation assumes a public forum where First Amendment applies fully. However, not all forums are public in nature, and the protection of First Amendment may vary according to forum.⁷³

(i) Public forums⁷⁴

(a) Traditionally public: The "real" public forums are: (1) streets; (2) sidewalks; and (3) parks. Furthermore, the places where a public meeting of the government takes place are probably real public forums.

(b) Designated Public: There are also "designated public" forums. These are places where the government has decided to open the place for particular purposes of open expression. The rules are essentially those of true public forums, except that the government can decide at any time to close the forum.

(ii) Non-public forums:⁷⁵

Other public places are "non-public forums." Here, government regulation merely has to be rationally related to some legitimate governmental objective, as long as alternative channels are left open. (Examples: airport terminals, jails, military bases, courthouses, schools used after hours, and governmental office buildings.)

In general, a speaker does not have any First Amendment right of access to another person's private property to deliver his message. Thus there is no First Amendment right to speak in a private shopping cent.

⁷³ Aides and May (n 62) 424.

⁷⁴ Emanuel (n **Error! Bookmark not defined.**) 465.

⁷⁵ *ibid.*

CHAPTER FIVE

LESSONS FROM THE COMPARATIVE EXERCISE

5.1 Methods of Comparative Constitutional Law

The value, or the ‘why’, of comparative constitutional study as a law (as opposed to comparative studies by political scientists of government and polity) becomes more clear by elucidating the methods employed in the field of comparative constitutional law. A scholar may value the knowledge gathered through the study as sufficient incentive. However, others might have an ‘instrumental interest’ in knowing whether and how such exercise can improve domestic constitutional law.⁷⁶

Subsequently, he distinguished normative universalism, functionalism and contextualism as the methods of ‘doing’ comparative constitutional law.⁷⁷ Some other methodological categories identified by other scholars include classificatory and historical approaches.⁷⁸

(A) Functionalism

The functionalist approach tries to see how constitutional ideas developed in one system might be related to those in another because they effort to organize a government to carry out the same tasks.⁷⁹ For example, every government needs in place mechanism for declaration of war or dealing with domestic emergencies. By examining the different ways in which different democratic countries nations organize the processes of going to war and declaring emergencies can help us determine good and bad practices.⁸⁰ Both the universalist and functionalist methods are criticized as

⁷⁶Mark Tushnet, ‘Some Reflections on Method in Comparative Constitutional Law’ in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press 2006) 67-83.

⁷⁷Tushnet, ‘Some Reflections on Method in Comparative Constitutional Law’ (n 76).

⁷⁸ Vicki C Jackson, ‘Comparative Constitutional Law: Methodologies’ in Michel Rosenfeld and AndrasSajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 54, 55.

⁷⁹Tushnet, ‘Some Reflections on Method in Comparative Constitutional Law’ (n 76) 68.

⁸⁰Tushnet, ‘Some Reflections on Method in Comparative Constitutional Law’ (n 76) 72.

operating on too high a level of abstraction.⁸¹ They fail to consider the complex practical ramifications of the theoretical ideals or functions that they seek to establish.

(B) Classification approach

Similarly to the work generally done in comparative law regarding the classification of different legal systems into "families" of law, etc., several contemporary works on comparative constitutional law have inquired the importance of the different "families" of constitutional law, in particular the division between civil and common law legal method and between "centralized" or "decentralized" constitutional control.⁸² The classification scholarship can look back historically or intellectually; And you can also worry about defining a comparatively stable framework for classification and analysis. However, the classification scholarship can also look to the future, interested in identifying and analyzing new phenomena.

5.2 Constitutional Text

(A) Approach to restriction

Both the countries guarantee the right in its constitutional text. However, while the USA declares it as in absolute terms, relegating the task of delimiting the parameters to the Congress, the Supreme Court and the President, the Constitution of Bangladesh allows only specified grounds as the only gateway restriction.⁸³ Bangladesh here follows the ICCPR (art 19) model of declaring the right and delimiting the permissible restrictions.⁸⁴

(B) The textual formulation

Bangladesh follows the most common wording of declaring freedom of expression as a right. The form of the First Amendment to the United States Constitution, which is published as a limitation on government ("Congress will not pass any law ... restricting free speech") is far less common.

(C) Terminology

⁸¹ *ibid.*

⁸² David Smith, "Time line: a history of free speech". The Guardian (London, 02 Feb2006) <<http://www.theguardian.com/media/2006/feb/05/religion.news>> accessed 13 November 2014.

⁸³ Sujit Choudhry, 'Migration as a New Metaphor in Comparative Constitutional Law' in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press 2006) 1.

⁸⁴ Tom Pendergast, Sara Pendergast and John Sousanis (eds), *Constitutional Amendments: From Freedom of Speech to Flag Burning* (UXL 2001) 13

The term used in the US constitution is "free speech". In US constitutional law, the term is broadly defined as an incorporation of other First Amendment rights besides speech, such as religion, the press, and the assembly. However, in the constitution of Bangladesh, the terms "speech" and "expression" are used interchangeably in the sense of the former.

5.3 Doctrinal Structure: Categories and Balance

Bangladesh follows the second approach, albeit less diligently. Current jurisprudence uses a form of reasonableness test, which is not as strong as proportionality or as specific as the categorical approach. This, while allowing considerable flexibility, is to the detriment of conceptual clarity and the construction of content within the right to freedom of expression. Bangladesh could instead use a proportionality test, but this would limit the use of US constitutional doctrines.

5.4 The application of the Parameters of the USA freedom of expression in Bangladesh

Therefore, although the Bangladeshi legal system may draw clues from the specific tests mentioned in the previous chapter concerning commercial speech, incitement to illegal activity or seditious language, hate speech, obscenity and defamation or there the discourse has a much wider scope than that of Bangladesh. Therefore, tests have limited and potentially conflicting utility in the national context here.

5.5 Development of the auto chthonian case law

To conclude, the case law of the constitutional parameters of freedom of expression in the United States contains important lessons for Bangladesh in terms of developing indigenous evidence and content to protect a fundamental human right essential for democracy. While the details of the rules and categories may not be easily transferable due to the huge differences in legal culture, the seeds of US experiences can be used to cross-fertilize similar (but not the same) evidence in Bangladesh's constitutional law. The role of the judiciary would be fundamental in this sense.

CHAPTER SIX

FINDINGS AND CONCLUSION

6.1 Findings of the Study

Comparative study or exercise requires the use of materials from different jurisdictions. In contemporary scholarship and practice of constitutional law, the growth in use of comparative materials exemplifies the phenomenon of migration of constitutional ideas across various legal systems. Such migration happens in all stages of constitutional practice: in constitutional design and making, as well as in constitutional interpretation.⁸⁵

The parameters of freedom of speech in Bangladesh and in the USA are very different due to difference in the legal context and culture itself. Some significant lessons from the comparative exercise is presented below, following a functionalist approach bordering on bricolage in its methods, and universalism in its aspiration.

Both the countries guarantee the right in its constitutional text. However, while the USA declares it as in absolute terms, relegating the task of delimiting the parameters to the Congress, the Supreme Court and the President, the Constitution of Bangladesh allows only specified grounds as the only gateway restriction.⁸⁶ Bangladesh here follows the ICCPR (art 19) model of declaring the right and delimiting the permissible restrictions.

Bangladesh follows the most common wording of declaring freedom of expression as a right. The form of the First Amendment to the United States Constitution, which is published as a limitation on government ("Congress will not pass any law ... restricting free speech") is far less common.

The term used in the US constitution is "free speech". In US constitutional law, the term is broadly defined as an incorporation of other First Amendment rights besides

⁸⁵ Ms. Amrita Chowdhury, *Democratic Deficit in Bangladesh: A Cause for Concern* (2010) <www.globalindiafoundation.org/democratic%20deficit.pdf> accessed on 25 October 2014

⁸⁶ Sujit Choudhry, 'Migration as a New Metaphor in Comparative Constitutional Law' in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press 2006) 1.

speech, such as religion, the press, and the assembly. However, in the constitution of Bangladesh, the terms "speech" and "expression" are used interchangeably in the sense of the former.

Bangladesh follows the second approach, albeit less diligently. Current jurisprudence uses a form of reasonableness test, which is not as strong as proportionality or as specific as the categorical approach.⁸⁷ This, while allowing considerable flexibility, is to the detriment of conceptual clarity and the construction of content within the right to freedom of expression. Bangladesh could instead use a proportionality test, but this would limit the use of US constitutional doctrines.

Freedom of expression is the freedom to express opinions and ideas without limitations or hindrances.⁸⁸ It is one of the essential human rights. However, frequent assaults on exercise of this right from governments around the world pose a difficult challenge. The judicial organs of different jurisdictions in exercise of their authority to enforce human rights has developed a robust interpretation and detailed content of this right in response to such challenge. Bangladesh being a new country with chickened history of constitutionalism, is in a fit position to learn from the experiences of other jurisdictions to develop the content of the right to freedom of speech in its jurisdiction. The constitutional law of the USA provides the useful metric for such comparative exercise due its long history, detailed rules-based analysis and interpretation, as well as parameter-setting jurisprudence.

Therefore, although the Bangladeshi legal system may draw clues from the specific tests mentioned in the previous chapter concerning commercial speech, incitement to illegal activity or seditious language, hate speech, obscenity and defamation or there the discourse has a much wider scope than that of Bangladesh. Therefore, tests have limited and potentially conflicting utility in the national context here.

6.2 Conclusion

Free speech in the United States is generally protected by the First Amendment to the United States Constitution. However, there are many exceptions to this general rule, including Miller's obscenity test and more regulation of so-called commercial speech, such as advertising. Other restrictions or regulations include copyright, fighting words,

⁸⁷ Erwin Chemerinsky, *Constitutional Law: Principles and Policies* (5th edn, New York: Wolters Kluwer 2015)

⁸⁸ *ibid*

campaign funding laws, libel, and some neutral content laws that affect speech. The current application of freedom of expression is generally seen as positive, although there are occasional problems, particularly with freedom of the press.

In its free speech jurisprudence, the US Supreme Court has favoured the possibility of allowing the greatest possible expression. Rather than letting people seethe with anger or wander into blind ignorance, it is believed that they should be encouraged to express their ideas and hopefully good ideas triumph over bad ones. However, advertising good ideas continues to be debated, as mass publishing in the United States is dominated by companies that favour certain points of view. Another policy is that allowing criticism of the government, its policies and its officials will promote good governance, because if a policy is ineffective or an official is corrupt, some activist or It is believed that the reporter will eventually unmask him. In practice, however, it is often impossible to denounce corruption, abuse and ineffective policies, as the US government does not enforce transparency and openness as in the Nordic countries of Europe. The judicial development of the First Amendment right in the USA is thus a potent source for transplantation, borrowing, and cross fertilization in Bangladesh context.

Bangladesh follows the second approach, albeit less diligently. Current jurisprudence uses a form of reasonableness test, which is not as strong as proportionality or as specific as the categorical approach. This, while allowing considerable flexibility, is to the detriment of conceptual clarity and the construction of content within the right to freedom of expression. Bangladesh could instead use a proportionality test, but this would limit the use of US constitutional doctrines.

The study presented the different parameters of US and Bangladesh freedom of speech doctrine in order to facilitate comparison. It did not detail on philosophical justifications for the freedom of speech, which potentially has some relevance in the development of parameters. The study also did not attempt to compare the differing extra-legal (political, economic and cultural) contexts of these two jurisdictions, and its potential impact on such comparative exercise. The study aims to present a comparison of the parameters of the freedom of speech in both jurisdiction with a view to facilitate further development of the content of freedom of speech in Bangladesh.

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