

Application of Fundamental Rights of Bangladesh Constitution: An Analysis on the Light of International Human Rights Instruments

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Abstract

This paper is an attempt to explore fundamental rights which is incorporated in our constitution on the basis of international human rights law. Bangladesh is a deltaic country situated in the Bay of Bengal having over 160 million of people. 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. The main purpose of this paper is to ensure fundamental rights by imposing the international human rights instruments by the political parties as well as our domestic court.

INTRODUCTION

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.¹

Sometimes human rights are identified with fundamental rights. When certain human rights are incorporated in a constitution of a country and are protected by constitutional guarantees, they are called fundamental rights. In this sense, all fundamental rights are human rights but all human rights are not fundamental rights. While fundamental rights have territorial limitations, human rights have no such territorial limitations and they have universal application. Finally fundamental rights are mainly enjoyed by the citizens but human rights are applicable to all human beings.

However, volume of rights provided in the international Human Rights instruments including Universal Declaration of Human Rights (UDHR) and two 1966 international Covenants on political & civil Rights, and on economic, social and cultural rights e.g. ICCPR and ICESCR is more extensive than the rights guaranteed in part III of the constitution and other relevant laws of Bangladesh. Judiciary has opportunities to illuminate existing domestic human rights law by international human rights law to extend its scope and area of application.²

The fundamental rights, which every citizen is entitled to enjoy, are enshrined in part III of the constitution of Bangladesh. But in some cases it fails to follow International Charter of Human Rights lack of enforcement and monitoring mechanisms also neglected the implementation of Human Rights in Bangladesh.

The rights guaranteed by the constitution under following sub-headings:

- 1) Right to equality (arts. 27-30)
- 2) Right to protection of law(arts.31-32)
- 3) Safeguard as to arrest and detention(art.33)
- 4) Protection against forced labour(art.34)
- 5) Protection in respect of trial and punishment(art.35)
- 6) Right to freedom(art.36-41)
- 7) Right to property(art.42)
- 8) Right to enforce fundamental rights(art.44)
- 9) Saving for certain laws(art.47)

1. Right to equality

The right to equality may be classified as

¹ International human rights law: protection mechanism and contemporary issues by Abdullah Al Faruque, New Warsi Book Corporation, Dhaka, 1st Edition: 2012, p-2

² M. Shah Alam, Enforcement of International Human Rights law by domestic courts, New Warsi Book Corporation, Dhaka, 2007, p.118

- i. right to equality in broad- spectrum
- ii. specific right to equality

i. Right to equality in broad spectrum (art.27):

The right to equality in broad-spectrum signifies the general application of the principles of equality instead of concentrating on any particular aspect of rights. This right is widely recognized by international and regional human rights instruments. Article 7 of UDHR states that, “all are equal before the law and are entitled without any discrimination to equal protection of the law.” Likewise, art.26 of the International Covenant on Civil and Political Rights, 1966 (ICCPR) also states the similar provision. The African charter on Human and Peoples’ Rights, 1981, a regional instrument, in its art.3 also declares that every individual shall be “equal before law” and “entitled to equal protection of law”. In the same way, the American Declaration of the Rights and Duties of Man, 1948 (art.1) and American convention on Human Rights, 1969 arts. 4 & 24 provide the right to equality & right to equal protection of law.

Art.27 of the Constitution of Bangladesh guarantees that “all citizens are equal before law and are entitled to equal protection of law.” This right and protection also guaranteed by the constitution of different countries. In this respect art.14 of the constitution of India declares that the “state shall not deny to any person equality before the law and the equal protection of laws within the territory of India.” Art.25 of the Constitution of Pakistan is very much similar to that of the Constitution of Bangladesh.

‘Equality before law’ means that among equals law shall be equal and shall be equally administered. There shall not be any privilege by reason of birth, creed etc. ‘Equal protection of law’ means that all persons in like circumstances shall be treated alike and no discrimination shall be made in conferment of privileges or imposition of liabilities.

Despite this constitutional guarantee of the right to equality, fair and impartial application of this fundamental right is sometimes found to be absent and a great number of people in Bangladesh deprived of their constitutional right as well as human right. While prominent human rights defender Adilur Rahman Khan was jailed on politically motivated charges and was denied bail several times and kept in prison.¹ Sometimes some accused are granted bail while others are not granted in the similar circumstances.

The High Court Division observed that “Had they not taken the decision and decided to proceed with appeals, it would have been perpetuating a discriminatory treatment towards the petitioners in clear violation of their fundamental rights of equality before law.”²

ii .Specific right to equality:

The specific right to equality may be explained under following sub-headings:

- a. right to non-discrimination(art.28)
- b. right to equal opportunity in public employment (art.29)
- c. abolition of foreign titles(art.30)

a. right to non-discrimination(art.28):

Art.7 of UDHR, Article 26 of ICCPR, 1966, Article 2 & 3 of the ICESCR, 1966, Article 14 & 16 of the European Convention on Human Rights and Fundamental Human Rights & Fundamental Freedoms, 1950, Article 1 & 2 of the American Convention of Human Rights 1969, Art.2, 18 & 28 of the African Charter on Human & Peoples’ Right 1981 has been reflected has been reflected by the article 28 of our constitution. Similarly Article 15 of the Indian Constitution and Article 26, 27 of Pakistan Constitution deal with the non-discrimination.

The rule specified in Article 27 of the Constitution of Bangladesh is broadly explained in Article 28, which has been introduced to make classification only on ground of religion, race, caste, sex or place of birth parse unreasonable except when a provision is made in favor of women, children and backward section of citizens and article 28(4) states that nothing in this article shall prevent state from making special provision in favor of women or children or for the advancement of any backward section citizens. The crucial word in this Article is discrimination, which means making an adverse distinction with regard to or distinguishing unfavorably from others.

In the case of Dr. Nurul Islam vs. Bangladesh³ the Supreme Court observed that in the absence of any guideline either in act or with rules compulsory retirement is a violation of art.27 and 25 of the constitution. So if any citizen thinks that discriminatory behavior has been made with him and as such his right has been infringed, he may file a writ petition before the High Court Division of the Supreme Court under article.102 of the constitution.

While Bangladesh has a strong set of laws and judicial guidelines to tackle against violence women, implementation remains poor. Violence against women including rape, dowry-related assaults, and other forms of domestic violence, acid attacks and illegal punishment in the name of fatwa religious decree and sexual

¹ www.hrw.org/world-report/2014/country-chapters/Bangladesh, viewed on 15.01.2015.

² Govt. of Bangladesh vs. Hamento Kumar Barmon (civil) 65 DLR (HD)152

³ 33 DLR (AD)201(1981)

harassment continue.

Though the provision against discrimination as to race, sex, language, religion, political opinion etc. guaranteed in our constitution is meaningless if the girls and women of this country kept away from school and colleges on account of sexual harassment in the streets or minorities and indigenous people are deprived of their basic rights.

Leading human rights groups in the country had discussions with doctors to revise medico-legal protocols for the treatment and examination of rape victims to exclude degrading practices like the two-finger test to draw conclusions about a woman's "habituation to sex." Such groups are challenging the practice as violation of the fundamental rights to life and health with dignity in the High Court Division of the Bangladesh Supreme Court.

b. Right to equal opportunity in public employment (art.29):

Art. 21 of UDHR states that everyone "has the right of equal access to public service in his country" which is approved by the art.29 of our constitution. This provision guarantees that there "shall be equality of opportunity for all citizens in respect of employment or office in the service of the republic."

The main object of this Article is to create constitutional right to equality of opportunity and employment in public offices. These equality clauses are at least theoretically sounds better. Though in reality hardly the minorities in Bangladesh are get the benefits of these constitutional guarantees. May be the constitution placed the minorities in a position equal to all other citizens of the state, but that does not necessarily ensure them equal benefits of law and necessary protection and assistance in their development. Rather the highly discriminatory government policy makes the equality clauses into bogus lines.

The members of the administrative service and the members of other services of the Republic have been appointed on the basis of the same competitive examination and there has not been any different procedure in appointing them and the members of the other services cannot be treated differently from the members of the administrative service without violating the guarantee of article 29 of the constitution.¹

The requirement in the civil service of the Republic based on existing 55% quota system as opposed to merit is directly contradictory to Article 27 and 29 which respectively guarantees equality before law and equality of opportunity in public employment. Although Article 28(4) allows some special provision for women, children, and backward section of citizens, the 55% quota is totally unfair, unjust and unreasonable. To some extent, it amounts to a mockery to merit and the principle of equality and non-discrimination. Therefore, the existing unfair and unreasonable quota system is against the concept of Human rights.

c. Prohibition of Foreign titles (art.30):

Article 30 provides that no citizen shall, without the prior approval of the President, accept any title, honor, award or decoration from any foreign state.

It is not needed to prohibit the foreign title because, all human beings are born free and equal in dignity and rights .They are endowed with reason and conscience and should act towards one another in the spirit of brotherhood . So every person shall have the right to move freely throughout in the world. The present civilization is not closed in any special territory. In this present era of information and technology, all types of works have fallen into the same boundary. Thought of people are not limited. As this is the time of globalization, the problem and solution of all people should be solved in the same way. And that's why it is not necessary to prohibit the foreign title.

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

Article 31 deals with the protection of law to be enjoyed by the citizens and persons residing in Bangladesh and in particular in respect of life, liberty, body, reputation and property. According to article 32, no person shall be deprived of life or personal liberty.

The International Covenant on Civil and Political rights states vividly the right to life. According to art.6 of the ICCPR "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." Article 3 of UDHR states, 'Everyone has the right to life, liberty and security of person.' Article 2 of Convention for protection of Human Rights and Fundamental Freedoms states that everyone's right to life shall be protected by law. Likewise, art.21 of the Constitution of India provides that there shall not be any deprivation of life or personal liberty except according to procedure established by law. American Constitution also mentioned prohibition on all deprivation of life, liberty or property."

The Court interprets art.31 of the constitution.... "Protection of life means that one's life cannot be endangered by any action which is illegal, but it does not mean protection of an illegal action of any person."²

The case of Dr. Mohiuddin Farooque vs. Bangladesh is the most striking example of the illuminating interpretation of right to life. In this case, the court gives an extended and more liberalized interpretation by

¹ Abdul Mannan vs. Bangladesh 55 DLR 537

² Giasuddin vs. Dhaka Municipal Corporation & others, 49 DLR

observing that the term ‘right to life’ means a meaningful life- man can live with dream and dignity. Here the court showed its adherence to exclude anything which might effect the enjoyment of life. The Court observed that

“articles 31 & 32 of our constitution protect right to life as fundamental right .It encompasses within its ambit, the protection and preservation of environment, ecological balance free from pollution of air and water, sanitation without which life can hardly be enjoyed. Any act or omission contrary thereto will be violative of the said right to life.”¹

Art.31 of the constitution guarantees protection of life and liberty to every citizen. The term cannot be confined only to taking away of life, but mean something more than mere animal existence. The inhibition against its deprivation extends all those limbs and faculties by which life is enjoyed.²

But in spite of all these documents and decision of the court, right to life in Bangladesh is not fully secured. There is no day when one or more persons are not killed. The most strange thing that the right to life has been infringed by the members of law enforcing agencies like police, BGB and ansar. The Rapid Action Battalion (RAB)-a force comprised of military and police continued to carry out extra-judicial killings. The government continued to persecute 17 year old boy, Limon Hossain whom RAB officials shot and maimed.

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

The Universal Declaration of Human Rights provides safeguard as to arrest and detention in art.9 which states that no person “shall be subjected to arbitrary arrest, detention or exile.” Art.9 of the ICCPR also states about the safeguard as to arrest and detention.

In this regard, art. 33 of the constitution of Bangladesh provides four constitutional safeguards to a person who has been arrested .However the said constitutional protections are not to be applicable to any person who is arrested or detained under any law providing for preventive detention.

It is to be noted that the original constitution, enacted in 1972 is silent in the matter of preventive detention. The framers of the constitution carefully avoided such type of black provision & the original art.33 did not leave any scope for preventive detention. Afterwards, by the constitution (2nd amendment)Act 1973 the provision of preventive detention is inserted by art.33 which provides that the safeguards as to arrest and detention will not be applicable to persons arrested or detained under any law providing preventive detention. Thereafter, Special power Act, 1974 was enacted.

It is true that most of the developing countries used the preventive detention as a weapon to dominate, crash the opposition and to perpetuate rule. When a person comes within the satisfaction of the government authority that a person is going to commit prejudicial acts³, he may be detained by preventive detention to defend him from doing that act. The court presumed that many times detaining authority violates fundamental rights to satisfy the government by the following ways:-

Firstly, in Bangladesh without trial six months detention can confer to the detainee. This is a bad process because now here in the world such a long period is not found anywhere. In India, this time is three months⁴ and in Pakistan the initial period of detention is three months⁵.

Secondly, in democratic countries preventive detention is a method resorted to emergencies like war. But there is no specification in our constitution and can be resorted to in times of both peace and emergency.

Thirdly, we have not a fixed maximum period of detention not in our constitution or in any other statutory act like Special Powers Act, 1974.

Fourthly, in Bangladesh a large number of political workers and leaders are detained without trial through the preventive detention under the Special Powers Act, 1974 and known as a ‘Black Law’.

Fifthly, police officer after arresting any person prays before Magistrate court for remand and in maximum cases police gets remand and starting bodily, mentally torture which is a violation of International Human Rights Law.

Sixthly, if any person is actually criminal that he or she would be arrested under the general law and Magistrate can punish him or her but if it is happen then he or she must bring before Magistrate within 24 hours. But not to bring within 24 hours before Magistrate, a suspected is arrest under the Special Powers Act, 1974. Because by this a person without bring before Magistrate can put in prison month after month.

Therefore, the provision allowing preventive detention in peace time under Article 33 is against the concept of Human Right (39 of UDHR) and the power of the police to arrest under section 54 of the Code of Criminal Procedure, in the view of the High Court Division, is to a large extent inconsistent with provisions of

¹ 48 DLR(HCD)(1996)438

²(Saiakh Abdur Rahman & others vs. state) 15 BLT (AD)326

³ Section 2(f) of the Special Powers Act, 1974

⁴ Article 22(4) of Present Indian Constitution

⁵ Article 10(7) of Present Pakistan Constitution

part III of the constitution.¹

4 Protection against forced labour (art.34):

Article 4 of Convention for Protection of Human Rights & Fundamental Freedoms, art.6 of American Convention on Human Rights & art.8 of ICCPR declare that No one shall be required to perform forced or compulsory labour .The UDHR does not directly states about the forced labour but it declares, "No one shall be held in slavery and servitude; slavery and slave trade shall be prohibited in all their forms.

In spite of this provision Bangladesh has long had notoriously poor workplace safety, with inadequate inspections and regulations. This issue was spotlighted when Rana Plaza building, which housed five garment factories, collapsed. The building had been evacuated the day before due to cracks in the structure, but the workers had then been ordered back to work. More than 1,100 workers died. Workers in Bangladesh faced poor working conditions, low wages and excessive hours: they are indirectly forced to work on a bare minimum wages.

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

Article 35 guarantees a cluster of rights in respect of trial and punishment. Clause (1) provides protection against ex-post facto laws, clause (2) provides guarantee against double jeopardy, clause (3) provides speedy and fair trial, clause (4) grants privilege against self incrimination and clause (5) prohibits torture and cruel, inhuman or degrading punishment. Clause (6) provides that nothing in clause (3) or clause (5) shall effect the operation of any existing law, which prescribes any punishment or procedure for trial. ²

In different international, regional and constitutional documents, this right has been preserved carefully.

Article 5 of the UDHR states, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". In the similar language art.7 of ICCPR, art.3 of The European Convention on Human Rights and Fundamental freedoms hold the same opinion regarding this right. Many Regional Instrument like the American Declaration, American Convention, African Charter or the Convention are against torture and other cruel, inhuman or degrading treatment or punishment have been reflected in the constitution by the article 35.

Article 35(1) of the constitution envisages the prohibition on conviction or sentence under an "ex post facto law" not trial of the offence alleged to have been committed or the procedure to be followed in the investigation, inquiry in respect of an offence alleged to have been committed.³

Article 35 (2) prohibits trial and conviction of a person twice for the same offence-From the above provisions it is abundantly clear that a person once tried and convicted by a court of competent jurisdiction for a particular offence shall not be tried and punished for the second time for same offence . The appellant upon conviction by a special Martial Law Court though having no jurisdiction, had already served out the most part of the sentence and was then released on amnesty. The apex court held it inappropriate and against the interest of justice to reopen and restart the case afresh after lapse of long period and in that view set aside the order of the Session Judge.⁴

Art.35 (4) - Protection against self incrimination:

In *BLAST vs. Bangladesh* it has been held that remand for the purpose of interrogation is not necessary except for extorting information from an accused by physical torture or other means, but such extortion of information is contrary to the mandate of article 35(4) interrogation of the accused , if necessary , may be done in the jail custody ; as is the present practice prayer for police remand and grant of it is unconstitutional being violative of the fundamental rights ensured by the constitution.⁵

The Government of Bangladesh violating the Constitution and all other international instrument. In spite of constitutional and statutory prohibitions, torture by the police and jail authority has not been stopped in Bangladesh. Almost everyday it is known through dailies and human rights journal the sad incidents of torture , degrading punishment and inhuman treatment.⁶

6. Right to Freedom

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

a. Freedom of movement, of assembly and of association (art.36-38):

Art. 13 and 20 of UDHR state, "Everyone has the rights to freedom of movement, residence within the borders

¹ *BLAST vs. Bangladesh*, 55 DLR 363

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

³ *Tarique Rahman vs. govt. of Bangladesh*, 63 DLR.

⁴ *Mohammad Ullah vs. Session Judge, Noakhali & others.* (12 MLR)

⁵ 55 DLR

⁶ *Deputy Commissioner ,Satkhira vs. Bangladesh*

of each state, peaceful assembly and association. No one may be compelled to belong to an association.”

Similarly, arts. 12,21 &22 of ICCPR,art.15 & 16 of American Convention on human rights,arts.10,11 & 12 of African charter on human & peoples’ right has been stated about the right to freedom of movement,of assembly and of association which have been reflected in our constitution by the article 36,37 & 38.

Freedom of Assembly. The constitution guarantees that every citizen shall have the right to move freely throughout Bangladesh (art.36) but many members of the political party has been detained everyday which is rendered meaningless.

In disposing of a public interest litigation challenging the holding of hartals (general strikes), the High Court observed that if hartals lead to violence, death, and damage to the life and property of the citizens such actions would be punishable by the law of the land. However, hartals per se, enforced through persuasion, unaccompanied by threats, intimidation, force or violence, are a democratically recognized right of the citizens to freedom of assembly guaranteed under article 37 of the constitution.¹

Every citizen shall have the right to assemble peacefully (art.37) is another constitutional guarantee but citizens are prevented from assembling. British imperial power enacted Section 144 in 1898, a device to keep the natives from becoming restless. After more than a century, government continues to take recourse to this instrument of oppression that violates the constitution.

Every citizen shall have the right to form association (article 38) is yet another fundamental right which is being denied. The ‘association’ have formed with civil society is indirectly threatened by the Govt. The Government was increasingly hostile in 2012 to civil society groups. Civil society and human rights defenders reported increased governmental pressure and monitoring.²

b. Freedom of thought and Conscience and of speech (article 39):

Articles 18 & 19 of the UDHR set out freedom of thought, conscience opinion and expression ,Likewise ,article 19 of the ICCPR includes freedom of thought and conscience ,again articles 9 & 10 of the Convention for protection of Human Rights and Fundamental Freedom guaranteed this right.

Article 39(1) talks of fundamental right by which freedom of thought and consciences are guaranteed. However, we look at the Article 70 of our constitution, it says that a member of parliament will lose membership if he votes against his party. Besides this, the same provision does not shine upon the BTV network and this rights are not also properly enforced in Bangladesh. Some Private Television Channels are forcedly stopped by the Government like ETV, Diganta TV, Islamic TV and Channel 1 because they think that it is newsworthy to show what the actual political situation in our country. For example, in May 2010, the Information Minister met the owners of private television channels and suggested that they refrain from broadcasting content critical of the Government. Shortly thereafter, the Bangladesh Telecommunications

Regulatory Commission (BRTC) used a technicality in the communications law to shut down a private television station. In recent years, publishers and editors of a good number of popular newspapers had to appear before the Supreme Court for their alleged contempt of the Court. Frequent attacks on journalists are a serious threat to freedom of expression. According to Odhikar and media watchdog groups, at least four journalists were killed, 118 were injured, two were arrested, 43 were assaulted, 49 were threatened, and 12 had cases filed against them in 2010 alone.³

c. Freedom of Profession and Occupation (article 40):

Article 40 of the constitution of Bangladesh states that every citizen shall have the right to enter upon any lawful profession or occupation and to conduct any lawful trade or business. Article 23 of the UDHR also provides for freedom of occupation. Article 25 of ICCPR states, “to have access, on general terms of equality, to public service in his country.”

The Rural Electrification board took a decision barring all ex-employees of the said board from participating in any tender to be floated by it. The secretary of the Board communicated the said decision under his office order dated 30, 1986-the order of the board is violative of art.40 of this constitution.⁴

d. Freedom of religion (art.41):

Article 18 of the UDHR and article 18 of the ICCPR have the provision of rights to freedom of religion Traditionally, Bangladesh is a moderate Muslim country, wherein every citizen has the constitutional right to profess, practice or propagate any religion, and every religious community or denomination has the right to establish, maintain and manage its institution.⁵ However, although governments publicly support freedom of religion, in recent areas, attacks on religious and ethnic minorities continue to be a problem since religious minorities are often at the bottom of the social hierarchy and, therefore, have the least political recourse.⁶

¹ Abdul Mannan Bhuiyan & another vs. state 60 DLR (AD) (2008) 49, judgment dated 2 December,2007

² www.hrw.org, viewed on 30.01.2015.

³ <http://www.state.gov/g/drl/rls/hrrpt/2010/sca/154478.htm>, viewed on 30.01.2015.

⁴ Abdul Jalil vs. Rural Electrification Board,45 DLR.24,1993

⁵ Article 41 of the Constitution of the People’s Republic of Bangladesh.

⁶ [US Department of State, International Religious Freedom Report, July-December 2010(released on 13 September 2011),at

7. Right to property (art.42):

Article 17 of the UDHR states that everyone has the right to own property and no one shall be arbitrarily deprived of his property. Art.42 of the constitution guarantees that subject to any restriction imposed by law, every citizen shall have the right to acquire, hold, transfer or otherwise dispose of property. The right cannot be affected by administrative order.

The Court declared that if a man's property does not ex-facie answer the description of abandoned property, inclusion of the property in the list of abandoned properties violates the right to property.¹

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

Article 12 states that no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence ...Everyone has the right to the protection of the law against such interference or attacks. Likewise same provision has been incorporated in the art.17 of the ICCPR. The Fourth amendment of the American Constitution provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated....." The amendment recognizes "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."²

Article 43 of the Bangladesh Constitution guarantees the privacy of home and correspondence and communications. It provides that every citizen shall have the right to be secure in his home against entry, search and seizure and to the privacy of his correspondence and other means of communications. In *Malone vs. Metropolitan Police Commissioner*, Megurru vc turned down a complaint against telephone tapping on the ground of absence of any common law right of privacy, but in Bangladesh such telephone tapping will be unconstitutional for violation of the privacy unless a law permits it in any of the grounds of restriction mentioned in article 43.³

9. Enforcement of fundamental rights (art.44):

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 view to enforcing fundamental rights is against the legislature. The supreme court of Bangladesh can exercise this jurisdiction under article 26 & 102 of the constitution.

Judicial enforcement is provided for with a view to enforcing fundamental rights against the executive. 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 constitution.⁴

Though our constitution specifically mentioned the enforcement mechanism of fundamental rights but most of the cases it is not implemented by the executive. It is important to mention here that an unprecedented constitutional violation in respect of fundamental rights of the citizens had been done by the Government.

In the case of *BLAST & others vs. Bangladesh*, directed the Government to amend s.54 & s. 167 of the Code of Criminal Procedure and made it obligatory to compensate the victims of torture by the perpetrators. Government has not yet implemented those directions instead filed appeal.

In *Madan Mohan VS. Government*⁵, Madan Mohan was arrested on 5.7.77. The High Court Division declared detention illegal and ordered his release. Madan Mohan was released but at the jail gate he was again arrested by serving a fresh order of detention. This was done just to frustrate the High Court Division's order.

Thus purely for political purpose every Government does not implement the decision of the court and violating the constitutional mandate as enshrined in part III of the Bangladesh Constitution.

10. Saving for certain laws (article 47):

Article 47(3) was introduced into the constitution in 1973 and provided that members of armed, defense or auxiliary forces or prisoners of war detained or charged under any law or provision with genocide, crimes against humanity, war crimes or other crimes of international law which was inconsistent and repugnant to the constitution, those laws or provisions could not be challenged as being void or unlawful. [art 47(3)] This amendment had the effect of withdrawing constitutional rights from a particular group of people within Bangladesh society who were not even evicted but at the most were only suspected of such crimes and who

www.state.gov/g/drl/irf/rpt.], viewed on 30.01.2015.

¹ *Nurun Nahar vs. Bangladesh* 49 DLR 432

² *Silvermen vs. U.S.*, 365US 505,511

³ Islam, Mahmudul, *Constitutional law of Bangladesh*, 2nd Edition, Mullick Brothers, Dhaka,2003,p-279

⁴ Md. Abdul Halim; *Constitution, constitutional law and politics*.

⁵ writ petition no.879 of 1977

could have been detained without the requirement of suspicion.¹

These crimes were international crimes which did not previously exist within the Bangladesh Criminal Laws and were being imported to deal with events arising from the war of Independence as part of the doctrine of universality of such crimes.

Under newly introduced constitution Article 47A (1) other guaranteed constitutional rights were also explicitly withdrawn from such people. These were the rights given to every citizen of the protection of the law; the universal right of *nullem crimen sine lege* (no crime without there being a law in force at the time); and the right to an expeditious trial by an independent and impartial court or tribunal. By new article 47A (2) these persons detained and suspected or charged were specifically denied the right to seek remedies available under the constitution from the Supreme Court of Bangladesh.

Reflection of International human rights law in our domestic court:

Observers have rightly pointed out that in many cases our judiciary has referred to international law, both customary and treaty, but failed to base their decisions on international law, although they had immense opportunity to do so.²

Hussain mohammad Ershad v. Bangladesh cited above is one of them. In state vs. deputy commissioner, Satkhira³, The High Court Division referred to Universal Declaration of Human Rights (UDHR) and Convention on the Rights of Children (CRC) not as source of law but as to illuminate constitutional and statutory rights to free a minor boy from custody and torture. Similarly in Salma Sobhan v. Govt. of Bangladesh High Court Division referred to the Convention Against Torture (CAT) to underline practice of chaining prisoners with bar-fetter (danda berri) as cruel and inhuman, and hence violation of fundamental rights.

In Massamat Renu v. Bangladesh the court's issuance of rule nisi on the Government was apparently motivated by art.25(1) of UDHR on right to adequate housing which also means right to be protected from forced eviction, which the petitioner as a slum dweller in Dhaka sought to stop.

Further reflection of the International human rights law can be observed in two women's right related cases, namely Dalia Parvin vs. Bangladesh Biman Corporation⁴ and Shamima Sultana Seema vs. Government of Bangladesh⁵, the High Court Division in upholding women's rights that their rights be not undermined in public and professional activities based its decision solely on constitutional provision while it had great opportunity to base its decision, besides the constitution, although they had a great opportunity to rely on the Convention on Elimination All forms of Discrimination against women (CEDAW) as the convention was already ratified by Bangladesh.

What Bangladesh Government, opposition parties, law enforcing agencies and civil society should do?

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:

1. The Constitution of Bangladesh has no provision for forbidding the arbitrary expulsion of residents and aliens (ICCPR-13) that should be included.
2. 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.
3. There is no direction in the constitutional provision regarding to the workers to join international trade union organizations (ICCPR-8) which may be included in our constitution.
4. Article 33(4)(5) which was inserted by the 2nd amendment must be removed.
5. 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.
6. 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.
7. Penal laws and Code of criminal procedure may be amended, if necessary to award speedy and exemplary punishment for commission of offence against women and children.
8. Bangladesh constitution prohibits a person to be a witness against himself [see art. 35(4)] but under section

¹ [ICTAA 2009 SECTION 8(3), (4), (5)]

²Ridwanul Hoque and Mostafa Mahmud Naser, Indian Journal of International law, vol.40, no. 2, 2006,pp-162-170.

³ 45 (1993) DLR (HCD) 643

⁴ 48 (1996) DLR (HCD) 132

⁵ 57 (2005) DLR (HCD) 201

167 of the Code of Criminal Procedure an accused sometimes is forced to do so. Hence forced confession should be prohibited.

9. Torture, cruel, inhuman degrading treatment is a heinous crime which very often practiced by police, jail authority and other perpetrators. These are prohibited by both international convention and Bangladesh constitution¹.

10. Government has taken step in these respect women and children offenders should be sent to correction centers and not to jail, because there are allegations that women prisoners are sometimes violated in the jails. Human rights of women and children would thereby be protected.

11. It is also recommended that in the course curriculum of school, college and university human rights should be included so that students and teachers will become aware about human rights.

12. Though Bangladesh is a state party to this convention, but it has yet to give separate declaration recognizing the competence of the committee which is mentioned in art.14 of the International Convention on the Elimination of all forms of Racial Discrimination, 21 December, 1965 to receive and consider individual complaints.

13. The most important recommendation for the protection and promotion of human rights is the creation of a sense of accountability in the executives working under Government; they should culture this accountability not only in their works but also in their conscience.

14. Bangladesh should also amend the emergency provisions and preventive detention provisions in order to strike a balance between the needs of state security and those of protecting human rights. It should consider amending Article 46 of the Constitution in order to delimit the power of the parliament by excluding acts of torture and other cruel treatment or punishment from the scope of acts for which public officials can be indemnified.

15. Freedom of expression is one of the corner stone of democracy. The media should be able to act as watchdogs. Indeed a healthy government will encourage the media to provide legitimate criticism and that will raise the country's reputation abroad. Moreover, open criticism will reduce corruption and mismanagement, which are far more harmful to the economy.

16. To maintain and establish the basic democratic fabric and of course freedom of thought and conscience, Article 70 should be amended in such a way that the members of parliament have the right to oppose / support abstain from voting any bill brought before the parliament.

17. Our judiciary is expected to be more enthusiastic in giving effects to civil and political rights by interpreting the fundamental rights within the ambit of international human rights instrument.

18. Bangladesh has ratified important international instruments on human rights. Government should therefore be more serious as regards the implementation of those instruments.

Conclusion

No doubt Bangladesh Constitution contains all the good principles of human rights, these are all fundamental to the development of a human being, but unless the constitutional provisions are properly enforced and if the violators are not properly brought to book no relief will give to the common people of Bangladesh.

The ongoing confrontational politics based on diametrically opposing stands and approaches of the two major political parties, has created a serious stalemate causing threats to democracy and human rights. The political parties are apparently investing their total efforts and time for devising ways and means mainly to go to power. All the political parties, while in power, hardly make any attempt voluntarily to strengthen the bases of democracy and human rights.²

Human rights have emerged to be one of the core fundamental rights since it gives positive rights to citizens of a state as individuals. Individual rights have to be attended as they provide concrete human rights such as right to freedom from torture and inhuman treatment, right to liberty, right to freedom of movement, freedom of speech and more. Most importantly it provides the right to life.

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

¹ [see convention against torture, cruel, inhuman or Degrading Treatment or Punishment, 1984, art. 35(5) of Bangladesh constitution]

² www.financialexpress-bd.com, viewed on 02.02.2015.