

Application of Fundamental Rights in Bangladesh: Rhetoric and Reality

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Abstract

Rights and freedoms form the bedrock of democracy. The citizens, therefore, have claims upon the state and the state must therefore observe their rights by creating conditions, which would develop their personality and enable them to be at their best so that they may also contribute whatever they can to the social welfare. Fundamental rights give the citizens dignity of life in an atmosphere of freedom and justice beyond the man made fetters that had constricted their physical and mental horizons. Bangladesh has demonstrated favorable elements of democracy; such as high levels of political participation, a plethora of political parties, a growing middle class, a vibrant civil society and periodic elections. Yet the nation has undergone repeated reversals of democratic gains both in civilian and military rule. The polity has suffered from an absence of strong institutions to ensure the rule of law, accountability, and transparency in governance. In spite of ratification of many international human rights instruments, almost every year many people are deprived of to exercise fundamental rights because of political unrest. An independent judiciary and strong democratic institutions are the best guarantee against assaults on the rights of the citizens. This article attempts to explore the fundamental rights incorporated in the Constitution of Bangladesh either maintaining the spirit of international human rights instruments in practice or not.

Keywords: Fundamental Rights, Rule of Law, Democracy, Judiciary, Constitution.

1. Introduction

Magna Carta, named ‘Great Charter of Freedoms’, is one of the most famous documents in the world. This is a charter of rights agreed to by King John of England at Runnymede, near Windsor, on 15th June, 1215. This is the first charter where it is written that nobody can arrest without trial and the king also within the trial. This is one of the most celebrated documents in history. 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

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¹ Al Faruque, Abdullah, *International Human Rights Law: Protection Mechanism and Contemporary Issues*, (Dhaka: New Warsi Book Corporation, First edition, 2012), p.2.

fundamental rights. For this reason, 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 e.g. International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) are 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

2. Objectives of the Study

The broad objectives of this study are to focus on the scenario of application of fundamental rights prevailing in Bangladesh. In particular, this study aims to –

- (i) Analyze the concept of fundamental rights;
- (ii) Find out the avenues to clarify existing domestic human rights law by international human rights law to expand its scope and area of application;
- (iii) Find out which human rights are yet to be incorporated in the Constitution of Bangladesh;
- (iv) Make a suggestion to accommodate and ensure fundamental human rights of the people of Bangladesh effectively.

3. Methodology of the Study

In completion of the study, both the primary and secondary sources have been used. The study is basically literary based with an overall combination of analytical reasoning. The article is based on the Constitution of Bangladesh, diverse relevant laws, research books, articles, web-pages, some institutional works, comments of lawyers, judges and political analysts published in print and electronic media, etc.

² Alam, M. Shah, *Enforcement of International Human Rights Law by Domestic Courts*, (Dhaka: New Warsi Book Corporation, First edition, 2007), p.118.

4. Fundamental Rights of the Constitution of Bangladesh

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 the International standard for the lack of enforcement and monitoring mechanisms. The rights guaranteed by the Constitution under following sub-headings:

- (i) Right to Equality (Articles 27-30)
- (ii) Right to Protection of Law (Articles 31-32)
- (iii) Safeguard as to Arrest and Detention (Article 33)
- (iv) Protection against Forced Labour (Article 34)
- (v) Protection in respect of Trial and Punishment (Articles.35)
- (vi) Right to Freedom (Articles 36-41)
- (vii) Right to Property (Article 42)
- (viii) Protection of Home and Correspondence (Article 43)
- (ix) Right to Enforce Fundamental Rights (Article 44)
- (x) Saving for Certain Laws (Articles 47)

4.1. Right to Equality (Articles 27-30)

The right to equality may be classified as –

- a) Right to equality in broad spectrum
- b) Specific right to equality

4.1. a) Right to Equality in Broad Spectrum (Article 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, Article 26 of the ICCPR also states the similar provision. The African Charter on Human and Peoples' Rights, 1981, a regional instrument, in its Article 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 (Article 1) and American

Convention on Human Rights, 1969 (Articles 4 & 24) provide the right to equality & right to equal protection of law. Article 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 Article 14 of the Constitution of India declares that the equality before law.³ Article 25 of the Constitution of Pakistan is very much similar to that of the Constitution of Bangladesh.⁴ ‘Equality before law’ means that among equals law shall be equal and shall be equally administered. There shall not be any discrimination for 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 rights are sometimes found to be absent and a great number of people in Bangladesh deprived of their constitutional rights as well as human rights. Sometimes some accused are granted bail while others are not granted in the similar circumstances. The Appellate Division observed, “Had they not taken the decision and decided to proceed with appeals, it would have been perpetuating a discriminatory treatment towards the petitioners is clear violation of their fundamental rights of equality before law.”⁵

4.1. b) Specific Right to Equality

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

- (i) Right to Non-discrimination(Article 28)
- (ii) Right to Equal Opportunity in Public Employment(Article 29)
- (iii) Abolition of Foreign Titles (Article 30)

4.1. b) (i) Right to Non-discrimination (Article 28)

Article 7 of UDHR (1948), 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

³ The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

⁴ (1) All citizens are equal before law and are entitled to equal protection of law.(2)There shall be no discrimination on the basis of sex. (3) Nothing in this Article shall prevent the State from making any special provision for the protection of women and children.

⁵ *Government of Bangladesh and Others vs. Hamento Kumar Barmon*, 65 DLR (AD) (2013) 152.

& Fundamental Freedoms (1950), Article 1 & 2 of the American Convention of Human Rights (1969), Articles 2, 18 & 28 of the African Charter on Human & People's Right (1981) have been reflected by the Article 28 of Bangladesh 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. Besides, Article 28(4) of the Constitution of Bangladesh 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. Bangladesh*,⁶ the Supreme Court observed that in the absence of any guideline either in Act or with rules compulsory retirement is a violation of Article 27 of the Constitution of Bangladesh. 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. Though Bangladesh has a strong set of laws and judicial guidelines to tackle violence against women, but implementation level remains poor. Women are facing violence such as rape, dowry-related assaults, acid attacks, sexual harassment and illegal punishment in the name of *fatwa*. It is pertinent to mention that the legality of *fatwa* was first questioned before the High Court Division in *Editor, The Daily Banglabazar Patrika vs. District Magistrate and Deputy Commissioner, Naogaon*⁷ case. The High Court Division in this case declared *fatwa* delivered by any unauthorized person illegal.

4.1. b) (ii) Right to Equal Opportunity in Public Employment (Article 29)

Article 21 of UDHR states that “everyone has the right of equal access to public service in his country” which is approved by the Article 29 of the Constitution of Bangladesh. 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 members of the administrative service and the

⁶ 33 DLR (AD)201(1981)

⁷ 21 BLD (HCD) (2001) p. 45

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 violating the guarantee of Article 29 of the Constitution.⁸ 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 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. It is a matter of pleasure that the Government issued a circular abolishing the quota system for class-I and class-II jobs in the civil service on 4th October, 2018. The public administration ministry issued the circular with immediate effect. According to the circular, the recruitment from grade-9 (class-I) and grade-10 to 13 (class-II) at all government departments, autonomous or semi-autonomous institutions, and various corporations will be based solely on merit.⁹

4.1. b) (iii) Abolition of Foreign Titles (Article 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. Basically, it is done to counter the colonial mentality; hereditary titles of nobility are banned because these are against the principle of equal status of all. However, in this present era of globalization, it is not too logical to take prior approval for the foreign title or award.

4.2. Right to Protection of Law (Articles 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

⁸ *Abdul Mannan vs. Bangladesh* 55 DLR 537

⁹ <https://www.thedailystar.net/country/quota-system-in-bangladesh-scrapped-officially-1642534>, retrieved on 21.12.18

International Covenant on Civil and Political rights states vividly the right to life. According to Article 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, Article 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 High Court Division interprets Article 31 of the Constitution of Bangladesh as “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.”¹⁰ It was held in *Abdul Gafur vs. Secretary, Ministry of Foreign Affairs*¹¹ case, “Right to life means right to repatriation too.” The case of *Dr. Mohiuddin Farooque vs. Bangladesh*¹² 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 observing that the term ‘right to life’ means a meaningful life- a life where men can live with dream and dignity. Here the court showed its adherence to exclude anything which might affect the enjoyment of life. The High Court Division observed, “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.”¹³ Article 31 of the Constitution guarantees protection of life and liberty to every citizen. But in spite of all these documents and decision of the court, right to life in Bangladesh is not fully secured because extra-judicial killing is observed unfortunately in the country.

¹⁰ *Giasuddin vs. Dhaka Municipal Corporation and Others*, 49 DLR199

¹¹ (1997) 17 BLD. (HCD) 453

¹² *Dr. Mohiuddin Farooque vs. Bangladesh* 48 DLR(HCD)(1996) 438

¹³ *Ibid.*

4.3. Safeguard as to Arrest and Detention (Article 33)

The UDHR provides safeguard as to arrest and detention in Article 9, which states that no person “shall be subjected to arbitrary arrest, detention or exile.” Article 9 of the ICCPR also states about the safeguard as to arrest and detention. In this regard, Article 33 of the Constitution of Bangladesh provides 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 of 1972 was silent in the matter of preventive detention. Afterwards, by the Constitution (2nd Amendment) Act, 1973 the provision of preventive detention is inserted by Article 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. When a person comes within the satisfaction of the government authority that a person is going to commit prejudicial acts¹⁴, he may be detained by preventive detention to defend him from doing that act. It is presumed that many times detaining authority violates fundamental rights by the following ways:- Firstly, in Bangladesh without trial six months detention can confer to the detainee. This is a bad process because nowhere in the world such a long period is not found anywhere. In India, the tenure is three months¹⁵ and in Pakistan, the initial period of detention is three months.¹⁶ Secondly, in democratic countries preventive detention is a method resorted to emergencies like war. But there is no specification in the Constitution of Bangladesh 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 produces 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 then he

¹⁴ Section 2(f) of the Special Powers Act, 1974.

¹⁵ Article 22(4) of Indian Constitution.

¹⁶ Article 10(7) of Pakistan Constitution.

or she would be arrested under the general law and Magistrate can punish him or her but if it happens then he or she must bring before Magistrate within 24 hours. But if a suspected is arrested under the Special Powers Act, he or she can be 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 part III of the Constitution.¹⁷

4.4. Protection against Forced Labour (Article 34)

Article 4 of Convention for Protection of Human Rights & Fundamental Freedoms, Article 6 of American Convention on Human Rights & Article 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 poor workplace safety. This issue was spotlighted when *Rana Plaza* building, the 400-page report on the collapse of the *Rana Plaza* building in *Savar*, an industrial suburb of Dhaka, the capital, found widespread fault for the April 24, 2013 disaster, which killed 1,127 people.¹⁸ Workers in Bangladesh are facing poor working conditions, low wages and excessive hours. Sometimes they are indirectly forced to work on a minimum wages for overtime.

4.5. Protection in respect of Trial and Punishment (Article 35)

Article 35 of the Constitution of Bangladesh 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) of Article 35 provides that nothing in clause (3) or clause (5) shall effect the operation of any existing law, which prescribes any punishment or procedure for

¹⁷ *BLAST and Others vs. Bangladesh and Others*, 55 DLR (2003) 363.

¹⁸ <https://www.nytimes.com/2013/05/23/world/asia/report-on-bangladesh-building-collapse-finds-widespread-bl>, retrieved on 23.12.2018

trial.¹⁹ In different international, regional and constitutional documents, this right (protection in respect of trial and punishment) has been preserved carefully. Article 5 of the UDHR says, “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” In the similar language Article 7 of ICCPR, Article 3 of The European Convention on Human Rights and Fundamental Freedoms hold the same opinion regarding this right. Many regional instruments 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 of Bangladesh by the Article 35. Article 35(1) of the Constitution envisages the prohibition on conviction or sentence under an “ex post facto law”. It means that a law that retroactively changes the legal consequences of acts committed or the legal status of facts and relationships that existed prior to the enactment of the law. 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.²⁰ Article 35 (4) of the Constitution of Bangladesh says that no person accused of any offence shall be compelled to be a witness against himself. In *BLAST vs. Bangladesh*²¹ case, 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.

¹⁹ Islam, Mahmudul, *Constitutional Law of Bangladesh*, (Dhaka: Mullick Brothers, Second edition, 2003), p-207.

²⁰ *Mohammad Ullah vs. Session Judge, Noakhali*, 13 MLR (AD) (2008) 256.

²¹ *BLAST and Others vs. Bangladesh and Others*, 55 DLR (2003) 363.

4.6. 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 (article 36-38) (b) freedom of thought and conscience, and of speech (article 39) (c) freedom of profession (d) freedom of religion.

4.6.1. Freedom of Movement, of Assembly, and of Association (Articles 36-38)

Article 13 and 20 of UDHR utter, “Everyone has the rights to freedom of movement, residence within the borders of each state, peaceful assembly and association. No one may be compelled to belong to an association.” Similarly, Articles 12, 21 & 22 of ICCPR, Articles 15 & 16 of American Convention on human rights, Articles 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 the Constitution by the Article 36, 37 & 38. According to Article 36 of the Constitution of Bangladesh, subject to any reasonable restrictions imposed by law in the public interest, every citizen shall have the right to move freely throughout Bangladesh, to reside and settle in any place therein and to leave and re-enter Bangladesh. Article 37 is another constitutional guarantee, which provides “Every citizen shall have the right to assemble and to participate in public meetings and processions peacefully and without arms, subject to any reasonable restrictions imposed by law in the interests of public order or public health.” Every citizen shall have the right to form associations or unions, subject to any reasonable restrictions imposed by law in the interests of morality or public order as per the provisions of Article 38 of the Constitution of Bangladesh. Sometimes the associations have formed with civil society are indirectly threatened by the Government.

4.6.2. 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, Article 70 of the Constitution is a hurdle for freedom of thought and conscience, and of speech.

4.6.3. Freedom of Profession and Occupation (Article 40)

Article 40 of the Constitution of Bangladesh states that Subject to any restrictions imposed by law, every citizen possessing such qualifications, if any, as may be prescribed by law in relation to his profession, occupation, trade or business 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 that every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions 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 January 30, 1986. The order of the Board is violative of Article 40 of the Constitution.²²

4.6.4. Freedom of Religion (Article 41)

Article 18 of the UDHR and article 18 of the ICCPR have the provision of rights to freedom of religion. In Bangladesh, 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 institutions.²³ However, targeted attacks by extremists on religious minorities and ethnic minorities are still vulnerable and threat for freedom of religion.

4.7. Right to Property (Article 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. Article 42 of the Constitution of Bangladesh guarantees that subject to any restrictions imposed by law, every citizen shall have the right to acquire, hold, transfer or otherwise dispose of property, and no property shall be compulsorily acquired, nationalized or requisitioned save by authority of law. The right cannot be affected by administrative order. The High Court Division declared that if a man's property does not *ex-facie* (on the face) answer the description of abandoned property, inclusion of the property in the list of abandoned properties violates the right to property.²⁴

²² *Chairman, Rural Electrification Board & Anr vs. Abdul Jalil & Anr* 5 BLT (AD)-264

²³ Article 41 of the Constitution of the People's Republic of Bangladesh.

²⁴ *Nurun Nahar vs. Bangladesh* 49 DLR (HCD) (1997) 432

4.8. Protection of Home and Correspondence (Article 43)

Article 12 of UDHR states “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.” Same sort of provision is available in the article 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.”²⁵ 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*,²⁶ Megurruy 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 43.²⁷

4.9. Enforcement of Fundamental Rights (Article 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 is empowered to enforce fundamental rights under Article 102 of the Constitution. Though the Constitution of Bangladesh 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

²⁵ *Silvermen vs. U.S.*, 365US 505, 511.

²⁶ (1979)Ch 344.

²⁷ Islam, Mahmudul, *Constitutional Law of Bangladesh*, (Dhaka: Mullick Brothers, Second edition, 2003), p.279.

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 and Others*,²⁸ the High Court Division directed the Government to amend section 54 & 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*,²⁹ *Madan Mohan* was arrested on 5th July, 1977. 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, 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.

4.10. Saving for Certain Laws (Articles 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. [Article 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 could have been detained without the requirement of suspicion.³⁰ 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

²⁸ *BLAST and Others vs. Bangladesh and Others*, 55 DLR (2003) 363.

²⁹ writ petition no.879 of 1977.

³⁰ [ICTAA 2009 SECTION 8(3), (4), (5)]

persons detained and suspected or charged were specifically denied the right to seek remedies available under the constitution from the Supreme Court of Bangladesh.

5. Reflections of International Human Rights Laws in the Domestic Courts of Bangladesh

The Constitution of Bangladesh contains not mere human rights as fundamental rights but also effective measures of implementation thereof as well as the remedy for their infringement. Two ways are there for the enforcement: (i) Judicial Review (effective against the Parliament), and (ii) Judicial Enforcement (effective against the Executive). The application of international instruments including UDHR in the domestic arena has been well announced by the Supreme Court in *BNWLA vs. Government of Bangladesh and others*³¹ case, where it was announced that “It has now been settled by several decisions of this subcontinent that when there is a gap in the municipal law in addressing any issue, the courts may take recourse to international conventions and protocols on that issue for the purpose of formulating effective directives and guidelines to be followed by all concerned until the national legislature enacts laws in this regard (Para 20).” 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.³² *Hussain Muhammad Ershad vs. Bangladesh*³³ cited above is one of them. In *State vs. Deputy Commissioner, Satkhira*³⁴ case, 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 vs. Govt. of Bangladesh* case, the 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 *Massammat Renu vs. Bangladesh* case, the court’s issuance of rule nisi on the Government was apparently motivated by Article 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

³¹ (2001) 40 CLC (HCD)

³² Hoque, Ridwanul, and Naser, Mostafa Mahmud, ‘The Judicial invocation of international human rights law in Bangladesh; Questing a better approach’ *Indian Journal of International Law*, vol.40, no. 2, 2006, pp. 162-170.

³³ 21 BLD (AD) 69.

³⁴ 45 (1993) DLR (HCD) 643.

human rights law can be observed in two women's right related cases, namely *Dalia Parvin vs. Bangladesh Biman Corporation*³⁵ and *Shamima Sultana Seema vs. Government of Bangladesh*,³⁶ 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.³⁷

6. Findings

It is quite evident that the Constitution of Bangladesh has included all the basic attributes of fundamental rights. However, practically sometimes the government is compelled to violate the fundamental rights of the people in Bangladesh due to some unavoidable circumstances. The ruling class should be truly respectful to the fundamental rights of the people. There should not be any international barrier created by government for political interest and to oppress the opposite. It is the responsibility of the government to limit the events to violate the fundamental rights of the people and try their best respond these rights in some very rare cases where there is really no other alternative and which is truly done for the sake of the country's overall benefit with no purpose of self interest of the ruling party.

7. Recommendations

Based on the study the following recommendations are pursued for positive and effective application of fundamental rights in our country:

- (i) The Constitution of Bangladesh has no provision for forbidding the arbitrary expulsion of residents and aliens (Article 13 of ICCPR) that should be included.
- (ii) Special Power Act, 1974 should be repealed.
- (iii) Law enforcing agencies should be made accountable for the commission of any human

³⁵ 48 (1996) DLR (HCD) 132

³⁶ 57 (2005) DLR (HCD) 201

³⁷ Taru, Faizunnessa, 'Application of Fundamental Rights of Bangladesh Constitution: An Analysis on the Light of International Human Rights Instruments' *Journal of Law, Policy and Globalization*, vol.46, no. 1, 2016, pp. 40-48.

rights violation.

(iv) 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.

(v) In the curriculum of school, college and university human rights should be included so that the students will be aware of human rights.

(vi) Though Bangladesh is a state party to International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), but it has yet to give separate declaration recognizing the competence of the committee which is mentioned in Article 14 of the ICERD to receive and consider individual complaints. It is the demand of time to ensure this.

(vii) We have to create 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.

(viii) We should also amend the emergency provisions in order to strike a balance between the needs of state security and those of protecting human rights.

(ix) Media should be able to act as watchdogs to protect human rights.

(x) Article 70 should be amended to maintain and establish the basic democratic fabric and of course freedom of thought and conscience,

(xi) 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 instruments.

(xii) Government should therefore be more serious as regards the implementation of international instruments on human rights.

(xiii) All political parties have to realize the need for unity and solidarity to take positive attitude to fundamental human rights.

8. Conclusion

Freedom, justice and peace can only be ensured through the guarantee of human rights and fundamental freedoms. Human rights have emerged to be one of the core fundamental rights since it gives positive rights to citizens of a state as individuals. The above issues could also be addressed by the parliament to introduce a bill on 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. The state-authority of Bangladesh is very positive in regard to the recognition and implementation of human rights as is apparent from their adoption in the Constitution along with their mechanism for implementation. It is imperative to create more controlling mechanisms in the Constitution to prevent the indiscriminate and whimsical violation of the rights of the people by the ruling power. Furthermore, civil society should play a pivotal role in this regard so that people's rights cannot be violated by the ruling class for their self-interest.