

## Constitution of Bangladesh and Human Rights: A Comparative Study

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**Abstract:** A number of 3 Constitutions have been adopted in Bangladesh till now. First one is the Proclamation of Independence that was adopted on 10 April 1971 with effect from 26 March 1971, the Day of Independence of Bangladesh. Second one is the Provisional Constitution of Bangladesh Order of 11 January 1972. The third or the present one has been being in force since 16 December 1972. Several provisions on human rights are found in the first one and the present Constitution. But many of the rights failed to be incorporated in the present one. These have been shown in the present article and accordingly recommended to be incorporated in the Constitution so that it may gain the quality of a perfect human rights instrument in the world that may become an ideal to be followed by the countries with the aspiration to uphold human dignity through adopting precise human rights provisions in their constitutions.

**Key words:** Human rights, fundamental principles of state policy, socialist and capitalist rights, fundamental rights, Constitution of Bangladesh.

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### I. Introduction

The Constitution of the People's Republic of Bangladesh has a reputation worldwide as a very good written Constitution. The reason, inter alia, is that alongside with appropriate provisions on legislative, executive and judiciary and some other necessary institutions it contains, like the UK, USA and French Constitutions, a detailed and precise provision on human rights. The present Constitution of Bangladesh, popularly called the Original or the 1972 Constitution, came into force on 16 December 1972. Part II and III of the Constitution contain human rights with the titles, accordingly, *Fundamental Principles of State Policy* providing for economic, social and cultural human rights, and *Fundamental Rights* providing for civil and political human rights. In fact the present one is the third Constitution of the country. The first one was the Proclamation of Independence of 10 April, with effect from the day of her Independence 26 March 1971, and the second one was the Provisional Constitution of Bangladesh Order of 11 January 1972. The first one, a two page Constitution later replaced by the second one, a one page constitution, wanted to ensure for the people human rights in three words 'equality', 'human dignity' and 'social justice'. The second one, however, didn't contain provisions on human rights. The policy rights under Part II and the fundamental rights under Part III of the present Constitution, which are actually human rights, owe their origin basically to the Universal Declaration of Human Rights (UDHR) of 10 April 1948.<sup>1</sup> Questions may arise as to what human rights are.

Human rights, which were, in the past, called *rights of man*<sup>2</sup>, in general sense means those rights, which are 'inherent' and 'inalienable' in the nature of an human being and are very necessary for the expression of

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<sup>1</sup> Adopted and proclaimed by General Assembly Resolution 217 (III) of 10 December 1948. It may be mentioned as UDHR in the study.

<sup>2</sup> The term 'rights of man' meant, in the past, that rights might be possessed only by men, not by women. It, though slightly, symbolizes discrimination between men and women. It is Thomas Paine who for the first time used the term 'human rights' in the English translation of the 'French Declaration of Rights of Man and of the Citizen' (the draft of which was written by General the Marquis De Lafayette) that was adopted by the national assembly of France in 1789. It seems that the term 'rights of man' does not include rights of woman and so after the proposal of Mrs. Eleanor Roosevelt the term 'human rights' was accepted in the Universal Declaration on 10 December 1948 in the General Assembly of the United Nations. See: M. Ershadul Bari in Dhaka University Studies, Part F. vol. II(1): June, 1991, p. 19.

humanity and personality/individuality, and without which nobody can live as a human being. These rights are applicable to all human beings irrespective of race, sex, color, language, religion or nationality. Paul Sieghart thinks that 'inherence' and 'inalienability' are two most important characteristics of human rights that have made an obvious distinction thereof from rights in general.<sup>3</sup> In legal sense it may be said that the rights recognized as human rights either in municipal or in international legal instrument(s) are called human rights. International legal instruments of such kind are the Universal Declaration of Human Rights of 1948 (UDHR),<sup>4</sup> the International Covenant on Civil and Political Rights of 1966 (ICCPR)<sup>5</sup> the International Covenant on Economic, Social and Cultural Rights of 1966 (ICESCR),<sup>6</sup> the Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960 (DGICCP),<sup>7</sup> the Declaration on the Right to Development of 1986 (DRD),<sup>8</sup> and municipal legal instruments of such kind are the constitutions of Bangladesh, India, USA, UK, France or any other country. The source of the human rights incorporated in all these international or municipal instruments are, however, the Magna Carta of 1215, the Petition of Rights of 1628 and the Bill of Rights of 1689 of England, the Declaration of Independence of 1776 as adopted by a number of 13 colonial countries of North America, the Bill of Rights as adopted just before it in Virginia, French Declaration of Rights of Man and of the Citizen of 1789 etc. Each provision of these sources is a tragic-heroic history of struggle, blood-shed and sacrifice of lives. These sources entirely influence the happening of the abovementioned international and municipal instruments; but the world-wide wave of human rights in international law began to flow through the adoption of the UDHR by the United Nations because that touched and gave pulsation to almost all the country constitutions adopted after the UDHR of 1948.

### 1.1. Objectives of the Study

The Constitution of Bangladesh incorporates, as a sequence, the noble provisions and principles of human rights as enshrined in the instruments, municipal or international, e.g. UDHR, ICCPR, ICESCR, DGICCP, DRD and different country constitutions. But whether it has been able to contain all the human rights provisions of the noble instruments and/or whether appropriate and effective measures have been taken for the proper and effective exercise and enjoyment of the rights are a big question. The main objective of the present study is, therefore, to have an idea on the incorporation of human rights, as principle rights or as fundamental rights, in the Constitution of Bangladesh. Alongside with the main one, the auxiliary objectives are, however, as follows:

- (i) to see how the first Constitution of Bangladesh accommodated human rights,
- (ii) to find out which human rights are yet to be incorporated in the Constitution of Bangladesh, and
- (iii) to make a suggestion as to how the Constitution of Bangladesh could be a roll model for other countries in respect of accommodating and ensuring human rights of the people.

### 1.2. Methodology of the Study

Only secondary sources of information or data are used in the study. Primary data are not preferred because of people of Bangladesh being felt no much interested in or concerned to what constitution means by principle rights, fundamental rights or even, in some cases, human rights.

Secondary data are collected from notable authorities on law, different journals, daily newspapers, the Holy Scriptures, the Quran or Hadith, internet etc.

Data are gone through and analysed, keeping in mind the objectives of the study. The analysis is assessed and commentaries made by different authorities addressed and accommodated in preparing the result.

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<sup>3</sup> See: Reba Mondol & Md. Shahjahan Mondol, *Moanobadhikar Aain, Sangbidhan Islam NGO (Human Rights Law Constitution Islam NGO)*, Shams Publications, Dhaka, Second Edition, 2009, p. 2.

<sup>4</sup> Adopted and proclaimed by General Assembly Resolution 217 (III) of 10 December 1948. It may be mentioned as UDHR in the study.

<sup>5</sup> Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966. It entered into force on 23 March 1976 in accordance with Article 49. It may be mentioned as ICCPR in the study.

<sup>6</sup> Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966. It entered into force on 3 January 1976 in accordance with Article 27. It may be mentioned as ICESCR in the study.

<sup>7</sup> Adopted by General Assembly Resolution 1514 (xv) of 14 December 1960. It may be mentioned as DGICCP in the study.

<sup>8</sup> Adopted by General Assembly Resolution 41/128 of 4 December 1986. It may be mentioned as DRD in the study.

## II. HUMAN RIGHTS IN THE FIRST AND THE SECOND CONSTITUTION OF BANGLADESH

The name of the first Constitution of Bangladesh is the Proclamation of Independence of 10 April 1971, having effect from 26 March 1971, the day of Independence of the country. It was adopted at Baidyanath Tala, present Mujib Nagar, of the then Meherpur Sub-Division under Kushtia district at a transitional time when only fifteen days ago the brutal ever genocide had began and imposed on the innocent Bangali people of the eastern province East-Pakistan by the then Government of Pakistan through massive bombing, killing, rape, adding fire and other types of destructions in all the province including Dhaka, the capital city of the province. The peoples' representatives elected in the then East Pakistan as Members of National Assembly (MNA) and Members of Provincial Assembly (MPA) in the 1970 polls gathered at the rendezvous and adopted the two-page Constitution<sup>9</sup> for mainly forming a government<sup>10</sup> and thereby running the country during the Liberation War imposed upon by the Government on 26 March 1971. It was a very crucial moment for the people, for on the one hand Bangabandhu Shaikh Mujibur Rahman, the undisputed leader of the 75 million people, had been arrested in the midnight of 26 March, just after he declared the Independence of Bangladesh, and taken to and imprisoned in West Pakistan, and on the other hand the distressed and endangered people, victimized of the atrocities of the Pakistani army and collaborators of the land, were either fleeing from the country to India or arranging freedom fight against the atrocities. It was almost a miracle and an absurdity to think about a constitution in such a juncture time when there was no certainty of life and shelter for the people. But the people, the successors of the events, are nothing but to be happy to praise the endeavour of the valiant sons of the soil who prudently and courageously adopted a Constitution at Mujib Nagar, and not only adopted but kept therein the provisions of human rights, alongside with rules of functioning of the Government as well as the establishment of the Republic of Bangladesh and the confirmation of the Declaration of Independence made by Bangabandhu Sheikh Mujibur Rahman. According to the Proclamation of Independence the MPAs and MNAs declared and constituted the Republic only *in order to ensure for the people of Bangladesh equality, human dignity and social justice*, which are, in true sense, human rights. Why shouldn't it be? The first speech of Bangabandhu, the first step in Bangladesh i.e. the Declaration of Independence, was for nothing but the establishment of a human right, people's right of self-determination, recognized recently by the DGICCP of 1960 of the United Nations. The Proclamation says, Bangabandhu declared Independence on the very night of 26 March *in due fulfillment of the legitimate right of self-determination of the people of Bangladesh*. It is necessary at the stage to see how the three terms 'equality', 'human dignity' and 'social justice' are human rights. In fact the basic document on human rights, the Universal Declaration of Human Rights of 1948, embodies the ideologies of these three terms. It may be remarked that these three ideals could accommodate themselves not only in the first Constitution, the Proclamation of Independence, but also in the third i.e. the present Constitution of 1972. The aspirations 'equality', 'human dignity' and 'social justice' are found in the UDHR as follows:

**(a) Equality:** The term 'equality' finds recognition as a human right in Articles 2, 7 and 21(2) of the UDHR.

Article 2 of the UDHR says, everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 7 of the UDHR says, all are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 21(2) of the UDHR says, every one has the right to equal access to public service in his country.

**(b) Human dignity:** Articles 1, 6 and 9 of the UDHR provide for the right to human dignity.

Article 1 of the UDHR says, 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 a spirit of brotherhood.

Article 6 of the UDHR says, everyone has the right to recognition everywhere as a person before the law.

Article 9 says, no one shall be subjected to arbitrary arrest, detention or exile.

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<sup>9</sup> The draft was prepared by Barrister M. Ameer-ul Islam.

<sup>10</sup> Under the Proclamation of Independence, the first Constitution of the country, the first Government was formed and took oath on 17 April 1971. It was of Presidential form. It had retrospective effect from and on 26 March 1971, the day of Independence. The first President was Sheikh Mujibur Rahman and the first Prime Minister was Tajuddin Ahmed.

(c) **Social justice:** Articles 23(1), 23(2) and 25(1) of the UDHR provide for the right to social justice.

Articles 23(1) and 23(2) provide that, everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment. Everyone, without any discrimination, has the right to equal pay for equal work.

Article 25(1) says, everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

The Proclamation was in force as the Constitution till 10 January 1972, the day Bangabandhu Sheikh Mujibur Rahman came home from the imprisonment of Pakistan. The next day, 11 January, he, as the President of Bangladesh and being empowered by the Proclamation of Independence, made an order the name of which is the Provisional Constitution of Bangladesh Order, 1972. The Order impliedly came into force as the second Constitution in lieu of the Proclamation of Independence until<sup>11</sup> the present Constitution of the People's Republic of Bangladesh came into force on 16 December 1972. There were no provisions on human rights in the second Constitution, the Provisional Constitution of Bangladesh Order, 1972.

A 34 member committee headed by Dr. Kamal Hossain drafted a constitution that was adopted by the Constituent Assembly on 4 November 1972 and finally it came into force on 16 December 1972 which is functioning till date. Human rights became part and parcel of the present Constitution.

## **2. Human Rights in the Present Constitution of Bangladesh**

The central document on human rights in the world is the UDHR of 1948. It provides a number of 25 human rights, including 19 civil and political and 6 economic, social and cultural rights. Civil and political rights are popularly called bourgeois/ capitalist rights and the economic ones are called socialist, due to their origination and development in, accordingly, capitalist and socialist countries. To make the UDHR-rights of legal binding force in the State-Parties two covenants were adopted by the United Nations General Assembly on 16 December 1966, they are the ICCPR and the ICESCR. They contain principally the UDHR-rights, though there are some exceptions. As the economy of Bangladesh is capitalist, the capitalist human rights are incorporated in Part III of the Constitution as fundamental rights, capable of being judicially enforced under Article 102. Economic, social and cultural human rights, on the other hand, are incorporated in Part II as fundamental principles of state policy, not capable of being judicially enforced as provided by Article 8(2).

### **2.1. Human Rights as Fundamental Principles of State Policy in the Present Constitution of Bangladesh**

Part II of the Constitution, ranging from Articles 8 to 25, contains fundamental principles of state policy. Economic, social and cultural rights of the UDHR are prescribed here mainly in Article 15. Other Articles embodying socialist human rights are 13(b), 17, 19(1) and 23. The aspirations of these Articles are found in the UDHR as follows:

(i) Article 13(b) and (c) of the Constitution admits, accordingly, co-operative ownership and private ownership. According to Article 17(1) of the UDHR everyone has the right to own property alone as well as in association with others.

(ii) Article 15(a) of the Constitution says, it shall be a fundamental responsibility of the State to secure to the citizens the basic necessities of life including food, clothing, shelter, education and medical care. This Constitutional right resembles to Article 25 of the UDHR which says that everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services.

(iii) Article 15(b) of the Constitution recognizes the right to work. It provides that it shall be a fundamental responsibility of the State to secure to the citizens the right to work, that is the right to guaranteed employment at a reasonable wage having regard to the quantity and quality of works. The origin of the right is well found in Article 23(2) of the UDHR that provides that everyone, without any discrimination, has the right to equal pay for equal work.

(iv) Article 15(c) of the Constitution provides that it shall be a fundamental responsibility of the State to secure to the citizens the right to reasonable rest, recreation and leisure. It resembles to the right given in

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<sup>11</sup> The Provisional Constitution of Bangladesh Order, 1972 turned the Government into one of Parliamentary form instead of Presidential form providing in article 7 for the arrangement of a Constituent Assembly member commanding the confidence of the majority of the members of the Assembly to be the Prime Minister. Ultimately it was Bangabandhu Sheikh Mujibur Rahman who could command so and became the Prime Minister under the first Parliamentary form of government of Bangladesh.

Article 24 of the UDHR which provides that everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

(v) Article 15(d) of the Constitution provides that it shall be a fundamental responsibility of the State to secure to the citizens the right to social security, that is to say, to public assistance in cases of undeserved want arising from unemployment, illness or disablement, or suffered by widows or orphans or in old age, or in other such cases. Articles 22 and 25(1) of the UDHR provide for almost the same. Article 22 says that everyone, as a member of society, has the right to social security; and Article 25(1) says that everyone has the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

(vi) Article 17 of the Constitution arranges for free and compulsory education to all children. Article 26(1) of the UDHR says similarly that everyone has the right to education; education shall be free, at least in the elementary and fundamental stages and elementary education shall be compulsory.

(vii) Article 19(1) of the Constitution provides for equality of opportunity to all citizens. This is a reflection, though slightly, of Article 21(2) provision of the UDHR which says that everyone has the right to equal access to public service in his country.

(viii) Article 23 of the Constitution says that the State shall adopt measures to conserve the cultural traditions and heritage of the people, and so to foster and improve the national language, literature and the arts that all sections of the people are afforded the opportunity to contribute towards and to participate in the enrichment of the national culture. Article 27(1) of the UDHR says in the same line that everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

There is no internationally recognized definition of fundamental principles of state policy. Generally they form part of a state-constitution as a guideline. They are considered and applied by the state while making laws, they remain fundamental to the governance of the state as well as to the interpretation of the constitution and other laws and finally they form the basis of the work of the state and of its citizens. But they cannot be judicially enforceable. Such non-enforceability by the court is the basic feature of fundamental principles of state policy. So one may ask as to how these are enforced.

## **2.2. Enforcement of Fundamental Principles of State Policy in Bangladesh**

The reason behind the non-enforceability of the policy-rights, or the economic, social and cultural human rights, by the court is that the state has to have ample wealth and capability to do the same. Enjoyment and implementation thereof cannot be ensured on a single day, rather within a targeted time and by means of achieving step-by-step development by the best use of internal resources and foreign aids. The alternative name, therefore, of such rights is 'programme rights'. The fundamental rights, i.e. the civil and political rights, like the right to life, right to freedom of speech, right to purchase and sell property etc. are capable of being enforced immediately by means only of a constitutional declaration, as is done through Part III of the Constitution; but this cannot be the same in respect of principle rights, like the right to reasonable rest, recreation and leisure [under Article 15(c) of the Constitution], right to free and compulsory education (Article 17), right of all citizens to equal opportunity (Article 19) etc.

Though not by the Judiciary it is the ardent responsibility of the State to ensure and enforce the policy-rights by some other means. What *some other means* include are the Executive consisting of various Ministries or Directorates or branch organizations of the Government, or a considerable number of municipal or international non-governmental organizations, or private or individual institutions or efforts. A welfare state or welfare government like the Government of Bangladesh keeps always conscious of the policy rights of the people, e.g.:

- (i) 10 taka kg rice programme<sup>12</sup> of the present 14-Party Alliance Government for the acute needy people,
- (ii) arrangement of worm clothes for the poor people suffering cold in the northern districts like Rangpur, Dinajpur etc. on the initiative of the Government or different volunteer organizations coming from different corners of the country,
- (iii) Text Book Festival on every first January initiated by the Government under which text books are given to primary and high school students,<sup>13</sup>
- (iv) free medical treatment in the public medical hospitals situated in towns and villages, and
- (v) establishment of residences for needy and poor people in different places of the country, particularly when they get victimized of natural disasters like cyclones or spates.

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<sup>12</sup> Running in Bangladesh as an effort of the Government to provide food to selected class of poor people. Price of medium quality of rice, the main food of the people of the country, is taka 35 at least.

<sup>13</sup> The festival happened in 2017 also. It has been observed since a couple of years ago.

The government is not judicially compelled to comply with the economic rights of the kind but it does it on its own initiatives for it receives vote and get elected by the people with the promise to do it. Government is actually made by the people for the systematic satisfaction of these rights all over the world through modern age. Bangladesh is no exception to it.

### **2.3. Human Rights as Fundamental Rights in the Present Constitution of Bangladesh**

Among a number of 18 fundamental rights guaranteed in Articles 27-44 under Part III of the Constitution of Bangladesh 17 are taken from the Universal Declaration of Human Rights of 1948. A number of 6 out of them are applicable to and enjoyable by all persons, citizen or non-citizen, living or staying within the jurisdiction of the country. The rest 12 are for the citizens only. The six fundamental rights showing the resemblance to Articles of the UDHR are as follows:

- (i) Right to life and personal liberty save in accordance with law (Constitution Article 32, and UDHR Article 3),
- (ii) Right to safeguard as to arrest and detention (Constitution Article 33, and UDHR Article 9),
- (iii) Right not to be subjected to forced labour (Constitution Article 34, and UDHR Article 4),
- (iv) Right to protection in respect of trial and punishment (Constitution Article 35, and UDHR Article 10),
- (v) Right to freedom of religion subject to law, public order and morality (Constitution Article 41, and UDHR Article 18), and
- (vi) Right to enforcement of fundamental rights (Constitution Article 44, and UDHR Article 8).

The fundamental rights, 12 in number, applicable to and enjoyable only by the citizens of the country only, are, with resemblance to Articles of the UDHR, as follows:

- (i) Right to equality before law and to equal protection of law (Constitution Article 27, and UDHR Article 7),
- (ii) Right not to be discriminated against on ground of religion, race, caste, sex or place of birth (Constitution Article 28, and UDHR Article 7),
- (iii) Right to equality of opportunity in public employment (Constitution Article 29, and UDHR Article 21.2),
- (iv) Right not to accept any title, honour, award or decoration without the prior approval of the President of Bangladesh (Constitution Article 30, from outside the UDHR),
- (v) Right to protection of law and to be treated in accordance with law (Constitution Article 31, and UDHR Article 7),
- (vi) Right to freedom of movement subject to reasonable restrictions imposed by law (Constitution Article 36, and UDHR Article 13),
- (vii) Right to assembly subject to reasonable restrictions imposed by law [Constitution Article 37, and UDHR Article 20(1)],
- (viii) Right to form associations or unions subject to reasonable restrictions imposed by law [Constitution Article 38, and UDHR Article 20(1)],
- (ix) Freedom of thought and conscience as well as right to freedom of speech and expression and freedom of press subject to reasonable restrictions imposed by law (Constitution Article 39, and UDHR Article 18),
- (x) Right to enter upon lawful profession or occupation subject to any restrictions imposed by law [Constitution Article 40, and UDHR Article 23(1)],
- (xi) Right to acquire, hold, transfer or dispose of property subject to any restrictions imposed by law (Constitution Article 42, and UDHR Article 17), and
- (xii) Right to be secured in home and to privacy of correspondence and other communication subject to reasonable restrictions imposed by law (Constitution Article 43, and UDHR Article 12).

### **2.4. Enforcement of Fundamental Human Rights in 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 presence of the two methods in the Constitution seems to be in line with the provision of Article 8 of the UDHR that runs: *Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the Constitution or by law.* American Declaration of Independence of 1776 also gives a guideline to such enforcement of fundamental rights: *“that all men are created equal; that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and pursuit of Happiness. That to secure these rights, Governments are instituted among Men,*

*deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it and to institute a new Government.*

(1) **Judicial review:** Article 26 of the Constitution deals with Judicial Review. Article 26(1) tells about Judicial Review of all *existing law*; and Article 26(2) about any new *law*. *Existing law* means and includes those laws which Bangladesh inherited<sup>14</sup> on 26 March 1971 as well as made before the commencement of the Constitution on 16 December 1972; whereas new *law* means and includes those laws which the Parliament of independent Bangladesh made or makes on or after the commencement of the Constitution. Article 26(1), says that *all existing law inconsistent with provisions of this Part shall, to the extent of such inconsistency, become void on the commencement of this Constitution*. Article 26(2), on the other hand, runs: *The State shall not make any law inconsistent with any provisions of this Part, and any law so made shall, to the extent of such inconsistency, be void*. But how shall it be void? It is the High Court Division of the Supreme Court of Bangladesh that declares it, after review, void. It follows that the Article imposes an embargo on the Parliament in case of making any whimsical law going against the fundamental human rights given in Part III. It's a control of the Parliament by the Court so that it cannot make any such arbitrary law which it is not ascribed or desired by the will of the people to do. The same rule necessarily applies in regard to making any Ordinances, Orders, Rules, Regulations, Bye-laws, Notifications or other Legal Instruments, because these are within the ambit of the definition of law under Article 152 of the Constitution.

(2) **Judicial enforcement:** Article 102(2) under Part VI of the Constitution deals with Judicial Enforcement. It says that *the High Court Division, on the application of any person aggrieved, may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any of the fundamental rights conferred by Part III of the Constitution*. Asking a direction or order for the enforcement of fundamental rights a petition or case has to be filed before the High Court Division. Such petition or case is called writ petition that is lodged under Article 102(2). It is well known that against the judgments, decrees, orders or sentences of the High Court Division appeals may be preferred to the Appellate Division of the Supreme Court. An appeal, therefore, against the orders in any writ petition may be referred to the Appellate Division. Through five kinds of writ such remedy of judicial enforcement is ensured: (A) Writ of Prohibition: Article 102 (a) (i) first portion, (B) Writ of Mandamus: Article 102 (a) (i) last portion, (C) Writ of certiorari: Article 102 (a) (ii), (D) Writ of habeas Corpus: Article 102 (b) (i), and (E) Writ of Quo-Warranto: Article 102 (b) (ii).<sup>15</sup> For the first three writs, prohibition, mandamus and certiorari, the petitioner must be a person aggrieved<sup>16</sup> but for the last two, habeas corpus and quo-warranto, there is no such compulsion, any person may do the same.

For the enforcement of fundamental rights a number of around 75000 writ cases are pending before the Supreme Court till 2016.<sup>17</sup>

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<sup>14</sup> *Existing law* means and includes those laws which Bangladesh inherited on 26 March 1971 as well as made before the commencement of the Constitution on 16 December 1972; whereas new *law* means and includes those laws which the Parliament of independent Bangladesh made or makes after the commencement of the Constitution. It was by dint of the Laws Continuance Enforcement Order of 10 April 1971 made by the then Vice President and the Acting President of Bangladesh Syed Nazrul Islam *that the country inherited all the laws that were in force in Bangladesh (or in the territory that comprises Bangladesh) on 25th March, 1971, the day just before the Independence*. It said, *those laws shall subject to the Proclamation (of Independence of 10 April, declared by itself to be coming into force on and from 26 March 1971) aforesaid continue to be so in force with such consequential changes as may be necessary on account of the creation of the sovereign independent State of Bangladesh formed by the will of the people of Bangladesh*. It also said, *this order shall be deemed to have come into effect from 26th day of March, 1971*. For detail: *History of Bangladesh War of Independence: Documents*, vol. 3, Ministry of Information, Government of the Peoples' Republic of Bangladesh, Dhaka, 1982, p. 7.

<sup>15</sup> For the writ of habeas corpus and quo-warranto it is not necessary that the petitioner should be a person aggrieved.

<sup>16</sup> There is no universal definition of an 'aggrieved person'. To be an 'aggrieved' person one should have *locus standi* [the status of a person in relation to the action taken or proposed to be taken and the relief from the Courts (AIR 1951 Bombay 158)] to challenge a case. Murshed, J. observed in this regard in *Dr. Mahmood v. Dhaka University*, PLD 1970 that *there should be a liberal explanation of the term "aggrieved party", he whose legal right has been infringed and has been prejudiced is an aggrieved person*.

<sup>17</sup>

## 2.5. Human Rights and the Constitution of Bangladesh

All the policy-rights of Part II of the Constitution, including economic, social and cultural ones, or fundamental rights of Part III, including civil and political ones, the straight name of which is *human rights*, have been collected, at root, from the UDHR of 1948 adopted by the United Nations General Assembly. Constitutions of India, Pakistan, Malaysia, Jamaica, Uganda, Kenya, Cyprus, Malta, Republic of Guinea, Ivory Coast, Dahomy, Gabon, Madagascar, Senegal, Mali and Somalia have also adopted human rights from the UDHR. Some Constitutions, however, though they do not mention the UDHR specifically, are slightly influenced by it.<sup>18</sup> Deep inclination and loyalty to the principles of the UDHR are expressed in the Constitutions of some countries like Guinea (1958), Madagascar (1959), Ivory Coast, Mali (1960), Mauritania (1961), Algeria, People's Republic of Congo, Senegal and Togo, Zaire (1967), Upper Volta and Cameroon (1972). Even in the Constitutions of some countries all the human rights and freedoms declared in the UDHR are recognized along with promise of guarantee, e.g. Rwanda (1962) and Equatorial Africa (1968). In the language of M. C. Chagla, the Declaration is *like a brave banner flying from the highest tower in the world which no one can ignore.*<sup>19</sup> Recognizing the influence of the UDHR on the country constitutions and other international instruments Dr. Ambedkar, the Indian Constitution maker, seems to be perfect when he says, The Declaration of the Rights of Man... has become part and parcel of our mental makeup... these principles have become the silent immaculate premise of our outlook."<sup>20</sup> Said Gerad J. Managone, *the standards of the Universal Declaration of Human rights have become a guiding star to international jurisprudence and the high tone of its exhortation continues to influence national policies and their legal applications.*<sup>21</sup> The most meaningful and precise observation regarding the UDHR is of L. B. Sohn who said: *In a relatively short time the Universal Declaration of Human Rights has thus become a part of the constitutional law of the world community; and together with the Charter of the United Nations, it has achieved the character of a world law, superior to all other international instruments and domestic laws.*<sup>22</sup> Bangladesh seems to be in line and even in competition with many countries in the field of adopting all kinds of human rights, socialist or bourgeois, from the UDHR, the central document of the world on human rights, and making arrangement for their implementation and enforcement in the country. But it shouldn't go out of the way that there are two other important human rights.

The two human rights not prescribed in the UDHR, people's right to self determination, and right to development, got recognition in two Declarations, DGICCP of 1960 and DRD of 1986. Of them the first one, self-determination, is normally exercised and practiced by the majority people of a country, when they are 'colonized' or so 'oppressed' as international community recognizes their self-determination claim, e.g. the Bangalee people exercising the right and receiving such recognition and support in 1971 when they seceded from the then Pakistan as a means of exercising the right. No such claim is present in Bangladesh as the ethnic and linguistic majority Bangalee people, i.e. the nation Bangalee,<sup>23</sup> is neither colonized nor oppressed rather dominating the country Bangladesh and naturally recollecting and reconciling the self-determination right as is proved in Article 9 that runs: *The unity and solidarity of the Bangalee nation, which, deriving its identity from its language and culture, attained sovereign and independent Bangladesh through a united and determined struggle in the war of independence, shall be the basis of Bangalee nationalism.* Minority people are also eligible to exercise the right in the limited sense of the term as prescribed in Article 27 of the ICCPR.<sup>24</sup> In this limited sense the right is well recognized in Article 23A of the Constitution that runs: *The State shall take steps to protect and develop the unique local culture and tradition of the tribes, minor races, ethnic sects and*

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<sup>18</sup> For example, France, Federal Republic of Germany, Libya, Eritria, Indonesia, the United States, L-Salvador, Costa Rica, Syria, Cameroon, Central African Republic, Chad, Sudan, Togo, and Upper Volta. U Thant, the then Secretary General of the United Nations, observed in this regard in the Conference of a number of 84 Nations arranged on the occasion of the International Human Rights Year (1968) in Tehran, the capital city of Iran, that till then the number of Constitutions adopting the Universal Declaration was no less than forty three and the examples of legislation expressly quoting or reproducing provisions of the Declaration can be found in all Continents. For detail: Reba Mondol & Md. Shahjahan Mondol, *Moanobadhikar Aain, Sangbidhan Islam NGO (Human Rights Law Constitution Islam NGO)*, Shams Publications, Dhaka, Second Edition, 2009, p. 2. pp. 49-50.

Chagla, M. C., *the Individual and the State*, 1961, p. 10.

<sup>20</sup> Nani Palkivala, *We the People*, 1948, p. 200.

<sup>21</sup> M. Ershadul Bari, *Manabadhikarer Sarvajanan Ghashana (Universal Declaration of Human Rights)*, Dhaka University Journal, vol. 43, June 1991, p. 2.

<sup>22</sup> Sohn L. B., *The Universal Declaration of Human Rights: A Common Standard of Achievement*, Journal of the International Commission of Jurists, 8, 1967, 2, pp. 17-26. Also quoted by Warwick Mckean in *Equality and Discrimination under International Law*, 1983, p. 275.

<sup>23</sup> Article 6(2) of the Constitution.

<sup>24</sup> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

communities. The rest one, right to development, is well prescribed in a number of Articles of Part II of the Constitution, e.g. 10, 13, 14, 15, 16, 17, 18, 19 and 23<sup>25</sup> which is the alternative name of the socialist rights including economic, social and cultural ones. The Government is well concerned of the implementation of the rights, duties and responsibilities prescribed in these various Articles of the supreme law of the land, the Constitution, as is described, for example, in the last portion of the discussion 3.2. above.

The UDHR has no legal enforceability. For the purpose of getting the UDHR-rights legally enforceable two international covenants, ICCPR and ICESCR, were adopted in 1966 by the United Nations General Assembly and opened for signature and ratification by the states. After necessary ratifications they came into force in 1976.<sup>26</sup> Bangladesh has ratified both the covenants.<sup>27</sup> The Covenants contain some additional rights to the UDHR too.<sup>28</sup> It shows that the state-authority of Bangladesh is very positive in regard to the recognition and implementation of human rights as is evident from their adoption in the Constitution along with their mechanism for implementation. It may be more pleasant and interesting to know that though the ICESCR is a socialist covenant and expectantly ICESCR-rights might be included in Part II of the Constitution as policy rights, which are not capable of being judicially enforceable<sup>29</sup> the economy of the country being capitalist, two rights therefrom are taken in Part III as fundamental rights, which is one step forwardness for their capability of being judicially enforceable under Articles 44 and 102 of the Constitution. These are the right to freedom of association (Article 36 of the Constitution, and Article 8 of the ICESCR) and the right to freedom of profession and occupation (Article 40 of the Constitution, and Article 6 of the ICESCR). Instead of such praiseworthy influence of the Constitution by the UDHR and the covenants some important human rights have been forgotten to be included in the Constitution. They are as follows:

- (i) Right to recognition everywhere as a person before law (Art. 6, UDHR, and Art. 16, ICCPR),
- (ii) Right to seek and to enjoy in other countries asylum from persecution (Art. 14.1, UDHR),
- (iii) Right to nationality (Art. 15, UDHR),
- (iv) Right of a person deprived of liberty, i.e. a person arrested, to be treated with humanity (Art. 10.1, ICCPR),
- (v) Right not to be imprisoned for inability to fulfill a contractual obligation (Art. 11, ICCPR),
- (vi) Right of an alien, lawfully in the country, not to be expelled from the country without lawful decision except for national security (Art. 13, ICCPR),
- (vii) Right to prohibition on propaganda for war and advocacy of national, racial or religious hatred (Art. 20, ICCPR), and
- (viii) Right of men and women of marriageable age to marry and to found a family (Art. 23.2, ICCPR), and
- (ix) Right of every child to measures of protection, to be registered immediately after birth, to have a name and to acquire a nationality (Art. 24, ICCPR).

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<sup>25</sup> Article 10 says about State's obligation to ensure socialist economic system for ensuring just and egalitarian society free from exploitation; Article 13 about people's ownership and control of the instruments and means of production and distribution; Article 14 about emancipation of toiling masses like peasants, workers and backward section; Article 15 about a fundamental responsibility of the State to secure for the people the basic necessities like food, clothing, shelter, education and medical care, along with the right to work, to rest, recreation and leisure, to social security in case of undeserved want arising from unemployment, illness or disablement or suffered by widows or orphans or in old age or in like cases; Article 16 about State's obligation to enhance agricultural revolution, rural electrification, development of cottage and other industries as well as improvement of education, communication and public health; Article 17 about State's responsibility to establish a uniform, mass-oriented and universal system of education as well as free and compulsory education to all children; Article 18 about State's primary duty to raise nutrition and improve public health as well as to protect and improve environment and bio-diversity; Article 19 about State endeavour to ensure equal opportunity to all citizens by means of removing inequality between men and women, and of equitable distribution of wealth among citizens, and Article 23 about State's measure to conserve cultural traditions and heritage of the people and so to foster and improve the national language, literature and the arts.

<sup>26</sup> The ICCPR entered into force on 23 March 1976, and the ICESCR on 3 January 1976.

<sup>27</sup> Bangladesh ratified the ICESCR on 5 October 1998 and the ICCPR on 6 September 2000.

<sup>28</sup> The common Article 1 of the ICCPR and the ICESCR provides for the people's right of self-determination which is not present in the UDHR. The ICCPR contains some rights which are not present in the UDHR, viz. the minority rights ensured in Article 27 of the ICCPR, the right of ethnic minority people to enjoy their own culture, the right of religious minority people to profess and practise their own religion, and the right of linguistic minority people to use their own language.

<sup>29</sup> Article 8(2) of the Constitution of Bangladesh.

### III. CONCLUSION

As a great aspiration is expressed in Article 11 of the Constitution that the Republic shall be a democracy in which fundamental human rights and freedoms and respect for the dignity and worth of human person shall be guaranteed, the eight human rights mentioned above that are still not included in the Constitution should be adopted from the UDHR and the ICCPR and incorporated in the Constitution. All these rights bear the quality to be accommodated in Part III as fundamental rights for they should be judicially enforceable. If it is so done by the Government there will be caused no harm to the security of the State, rather the country will go one great step forward, in the stair of respecting human rights and fundamental freedoms, to enhance country's dignity in the world forum. Freedom, justice and peace can only be ensured through the guarantee of human rights and fundamental freedoms. Inclusion of the human rights and freedoms mentioned above can do the same more precisely. Such inclusion of the UDHR-rights and ICCPR-rights may prove again the aspiration of U Thant, the then Secretary General of the United Nations: *It is my sincere belief that our decision today will bring us nearer to the kind of world our organisation is committed to build. I earnestly hope that, by early action, which member-states alone can take, the International Covenants on Human Rights will soon become a living reality.* It may not go out of thinking that the ICCPR and the ICESCR are, after all, the byproducts of the UDHR.

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