



## Judicial activism and human rights practice in Bangladesh: An overview

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### Abstract

Human rights are a burning issue in the world and in Bangladesh human rights are violated in many ways that's why judicial activism for these human rights is very important to establishing human rights in Bangladesh. The judiciary needs to play a very effective role to protect and promote human rights and the rule of law in a country through judicial activism or public interest litigation. Delay and disposal of cases is one of the great impediments in the process of ensuring human rights in Bangladesh. Besides, negligence in implementing the verdict of the judiciary and interferences of the executive over the judiciary. The purpose of this paper is to evaluate the role of judicial activism as a golden mean approach of the judiciary in protecting and promoting human rights from illegitimate interferences of government. With this aim, several case studies have been done on verdicts of higher judiciary in Bangladesh.

**Keywords:** Judicial activism, human rights, fundamental rights, Writs

### Introduction

Bangladesh is a Parliamentary Democratic and densely populated country in South Asia. Human rights are part and parcel of a democratic country. In a country, if human rights are violated then the country cannot be developed and the democracy of that country becomes weak. Human rights are violated in every country of the world. But the violation of Human rights is alarming in Bangladesh. That's why there is no doubt that the courts, as state actors, play an indispensable role in providing effective judicial remedies to human rights violations. Violation of human rights is a big concern overall in the world, and for protecting and promoting human rights, many national and international legal instrumentalities have been initiated. Judicial activism is one of them for human rights practice in Bangladesh.

This paper aims to evaluate the role the judiciary plays in ensuring human rights in Bangladesh through judicial activism. The role of the judiciary has many facets such as judicial review, judicial supervision, judicial activisms, and advisory jurisdiction of the judiciary, but the present paper highlighted only judicial activisms.

### Methodology of the Study

It is convenient to use the data collection methods to be able to have an accurate result through analyzing the research area appropriately. In dealing with these issues, necessary data are collected from secondary sources. Secondary data are collected from existing sources such as textbooks, journals, research articles, online resources, statements, leading cases, international conventions, Pertinent treaties, statutes, trade papers, government statistics, newspapers, and so on. Data are to form a major part of the literature review of the work. Most of the data collected here are expected to attain the objectives. It is common thing that there may arise some disadvantages and incompleteness in reaching the findings of the study for the use and analysis of only secondary data i.e. no primary data. The accurate scenario of the existing facts is tried to be reached through the use of secondary data that may help achieve the objectives properly. As much, the research will be based on documentary sources that's why it will be doctrinal.

### Limitation of the study

Although this research has been carefully prepared and has reached its aims, there were some unavoidable limitations. I am still aware of these limitations and shortcomings. First of all, the research work was conducted in a short time. There was not enough time for the researcher to prepare the research. It would have been better if it would have been done in a longer time. However due to some reasons, I was not able to collect some information relating to the international instruments. As this study is fully dependent on secondary data collection that's why it can have some shortcomings. Some intellectuals were not willing to give their opinion. Preparing the research "Judicial Activism and Human Rights Practice in Bangladesh: *An Overview*" might be a very useful tool to collect more information about this particular topic, but it would also be time-consuming.

### Understanding Judicial Activism & Human Rights

Judicial activism is the use of judicial power to articulate and enforce what is beneficial for society in general and people at large. Judicial activism describes judicial ruling which is based on personal or political considerations. It is sometimes used as an antonym for judicial restraint. The question of judicial activism is closely related to constitutional interpretation, statutory construction, and separation of powers.

Judicial activism means the active role played by the judiciary in promoting justice. Judicial Activism to define broadly, is the assumption of an active role on the part of the judiciary. In the words of Justice J.S Verma, Judicial Activism must necessarily mean "the active process of implementation of the rule of law, essential for the preservation of a functional democracy". The term 'judicial activism' refers to cases where the court generates a new legal rule that was previously non-existent, that is to say, the activist judges change the prevailing law, supplement their decisions with obiter dicta, attempt to settle questions of social policy or otherwise extend the judicial remit beyond the settlement of specific disputes. So, when the judiciary acts like a legislature then it is called Judicial Activism". And it has opened the gate for Public

Interest Litigation. PIL was meant to provide redress to downtrodden and marginalized people.

On the other hand, human beings are rational beings. They by virtue of their being human possess certain basic and inalienable rights which are commonly known as human rights. Thus human rights are those rights to which every individual is entitled by virtue of being human. Since these rights belong to them because of their very existence, they become operative with their birth. The idea of human rights is bound up with the idea of human dignity. Chief Justice of India, J.S. Verma has rightly stated that 'human dignity is the quintessence of human rights'. Human rights, being the birthright, are, therefore, inherent in all individuals irrespective of their caste, creed, religion, sex, and nationality. Human rights being inherent they cannot live as human beings without them. We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent, and indivisible.

### **The relationship between human rights and judicial activism**

Human rights are constitutionally recognized in our country which are known as fundamental rights. The Court has extensively used its judicial activism in the protection and preservation of human rights. Human rights and judicial activism have a strong, mutual, and complex relationship. The term judicial activism can be traced back to the case of *Marbury v. Madison (1804)* decided by Chief Justice Marshall of the USA. He observed that "it is for the court to say what the law is". A law repugnant to the Constitution is void. If there was a conflict between a law made by Congress and the provisions in the Constitution, it was the duty of the court to enforce the Constitution and ignore the law. Thus, he laid down the foundation of two concepts—judicial review and judicial activism. Simply put, judicial activism depicts the proactive role played by the judiciary in ensuring that the rights and liberties of citizens are protected. Through judicial activism, the court moves beyond its normal role of a mere adjudicator of disputes and becomes a player in the system of the country, laying down principles and guidelines that the executive must carry out. The theory of judicial behavior advocates the basing of decisions not on the judicial precedents but on achieving what the court perceives to be for the public welfare, or what the court determines to be fair and just on the facts before it.

### **Legal basis of judicial activism for human rights in Bangladesh**

The concept of Human Rights first revealed in the Universal Declaration of Human Rights (UDHR) in 1948 by UNO where 25 human rights are entitled to as human rights. And Bangladesh is the signatory country of UDHR. That's why Bangladesh is bound to maintain this international convention under "Jus cogens" and "Pacta sunt servanda". Human rights are stipulated in the Constitution of Bangladesh, written in 1972. In particular, the part III of the Constitution stipulates eighteen fundamental rights of which 17 are taken from the Universal Declaration of Human Rights (UDHR).

Therefore, the constitutional obligations made a platform for the Bangladesh Government to ratify the core international human rights conventions and treaties for the protection and promotion of human rights. It enables the Government of

Bangladesh to translate international agreements into domestic law. It obliges all branches (i.e. Executive, Legislative, and Judiciary) of Government to respect and ensure the rights it enunciates.

### **Ensuring Human Rights by Judicial Activism**

Article 44(1) of the Bangladesh Constitution provides that the right to move the Supreme Court for enforcement of any of the fundamental rights is itself a fundamental right. Art. 44(2) enables parliament to confer the jurisdiction to enforce fundamental rights on any other court, but such conferment cannot be in derogation of the power of the Supreme Court under Art. 102(1) which means that such other court may be given concurrent, but not exclusive, power of enforcement of fundamental rights. The Court must always have the power of enforcement of fundamental rights.

There are eighteen Human Rights that have been enumerated in the constitution commencing from Articles 27 to 44 as fundamental rights. All of these rights are civil and political rights. These 18 fundamental rights may be firstly divided into two groups:

- a. Rights granted to all persons-citizens and non-citizens alike. These are six rights enumerated in Articles 32, 33, 34, 35, 41 and 44 of the Constitution.
- b. Rights granted to citizens of Bangladesh only, these are 12 rights enumerated in Articles 27, 28, 29, 30, 31, 36, 37, 38, 39, 40, 42, and 43.

Now I am going to briefly discuss Human rights and Judicial Activism in Bangladesh

Article, 26 Provides that all existing laws inconsistent with the fundamental rights as provided in part III shall to the extent of the inconsistency become void on the commencement of the constitution and the state shall not make any law inconsistent with those rights. In our jurisdiction, the case of *Anwar Hossain v. Bangladesh*, popularly known as the constitution (Eight Amendment) case has also expressed the same view.

Article 27 guarantees every citizen's right to equality before the law and the equal protection of the laws. In *Dr. Nurul Islam v. Bangladesh*, article 27 of the constitution which speaks of entitled to equal protection of law interpreted by R. Islam, J.

In the case of Equality of Opportunity in Public Employment *Bangladesh v. Azizur Rahman*, a case interpreting Article 29 of the constitution, Equal opportunity is held at paragraph 44 of that case.

No personal shall be deprived of life on personal liberty save by the law. In the case of *Islam Mahmud v. Bangladesh*, H.M.Habibur Rahman, j. says about the Protection of the Right to life and personal liberty & held that the detaining authority must have some jurisdictional facts for detaining an individual since the detaining authority is curtailing the liberty of a citizen by detaining him on preventive detention; it is exercising a non-judicial authority. To curtail fundamental rights of personal liberty enshrined in the constitution it is essential that the detaining authority.

In the case of *Professor Ghulam Azam v. Bangladesh*, Md. Abdul Jalil, j. ensure Safeguards as to arrest and detention at paragraph 25 of the judgment.

Rights of locomotion is an important part of liberty, the right of a person to move freely to reside where he will and to work where he will is connected with his livelihood and

pursuit of happiness. In the case of *Dr. Mohiuddin Farooque v. Bangladesh and others*, Mustafa Kamal, j. held at paragraph 31 as under: These rights, attached to a citizen are not local. They pervade and extend to every inch of the territory of Bangladesh stretching up to the continental shelf and ensuring Freedom of movement.

Freedom of thought and conscience is essential to the development of human personality and every person should be free in his thought and conscience. In the case of *Bangladesh National Curriculum and Text Board v. A.M Samsuddin and others*, A.T.M. Afzal, c.j. ensure freedom of thought, conscience speech, and press which is held in paragraph 32 of that judgment Violence against women is one of the brutal forms of violation of human rights. It has been happening in various ways in Bangladesh. The judiciary is now very proactive in protesting against extra-judicial punishment and killing through its judicial activism.

In the case of *BLAST and others v. Bangladesh in 2009 (BLAST and Others v. Bangladesh, Writ Petition No. 5863 [2009]. BLAST v. Ministry of Education*, Right to secure life and liberty are inalienable rights of human beings. But these rights are violated in Bangladesh through extra-judicial killing, which is another form of grave violation of the rule of law and human rights. The rule of law does not permit any exercise of power arbitrarily or punish any person without a fair trial by the court. However, persistent abuse of power and authority by the law-enforcing agencies, resulting in extra-judicial killing of citizens in the name of cross-fire/encounter, is giving rise to gross violation of fundamental rights. To combat this problem, the PIL case filed by non-governmental organizations (NGOs) and the High Court take first initiative in the case of *BLAST and Others v. Bangladesh and Others (1998)*, to ensure the right to secure life.

For the protection of prisoners' rights in the case of *Bangladesh Legal Aid Service Trust (BLAST) v. Bangladesh [2005]*, the HCD of the Supreme Court gave a historic verdict on August 3, 2004, to protect rights of over hundreds of women and children prisoners who were under trial for indefinite times in various jails in Bangladesh. Similarly, the violation of fundamental rights of citizens is also a violation of human rights.

In the case, of *Ain O Salish Kendra (ASK) v. Bangladesh*, the court gave a historic verdict to protect the fundamental rights of poor slum dwellers from being evicted suddenly without first being given notice as a matter of constitutional propriety. The Court also gave directions to the Government to provide alternative shelters. In many other PIL cases, the judiciary directed the Government to protect individual rights and uphold the socially vulnerable sections. Thus, judicial activism ensures that human rights can be protected through an impartial and fair justice system and that the power of the state is accountable for its actions.

### Recommendations

We have observed that the constitution of Bangladesh has included all the basic attributes of fundamental rights. But practically sometimes the government is compelled to violate the fundamental rights of the people in Bangladesh due to some unavoidable circumstances. The ruling class should be truly respectful of the fundamental rights of the people. There should not be any international barrier Created by the 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 to respond to these rights in some very rare cases where there is no really no other alternative and which is truly done for the sake of the country's overall benefit with no purpose of self-interest of the ruling party some more restriction and controlling can be developed in the constitution of our country to regulate and prevent the indiscriminate and whimsical violation of the rights by the ruling power furthermore, the consciousness rights. So their rights cannot be violated by the ruling class for their self-interest.

### Concluding Remarks

Through a comprehensive examination and evaluation, it has been ascertained that a significant correlation exists between "judicial activism" and "human rights." The judiciary stands as a crucial pillar of a government, playing a pivotal role not only in establishing the legal framework within a nation but also in ensuring that both public and private entities refrain from any abuse of power or acts of corruption, thereby safeguarding individual rights, freedoms, and possessions. Scrutinizing diverse legal precedents reveals that judicial activism represents a balanced and effective approach in safeguarding various facets of human rights, encompassing fundamental freedoms, the security of life, liberty, and property, as well as the rights of marginalized groups and women, alongside the broader protection of communal interests. These elements collectively underpin the foundation of the rule of law and effective governance within a society. In numerous instances, it has come to light that judicial activism operates as a mechanism wherein the affected party is not required to personally lodge a writ. Rather, any individual or entity retains the prerogative to file a petition on behalf of those whose rights have been infringed upon or in cases concerning matters of public interest. This analysis reveals a multitude of instances where the judiciary in Bangladesh has delivered rulings aimed at preserving and championing human rights through the avenue of judicial activism.

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