

Reasonable Restrictions on Fundamental Rights in Bangladesh:

Balancing Liberty and Social Order

ABSTRACT

This paper examines the concept of reasonable restrictions on fundamental rights in Bangladesh with an emphasis on striking a balance between individual liberty and societal objectives including public order, morality, and national security. Although numerous fundamental rights are guaranteed by the Constitution, these rights are subject to restrictions that are frequently vaguely defined, making implementation difficult. It also highlights a comparative analysis of legal systems in India, the UK, and the US to highlight best practices in ensuring proportionality and judicial oversight. To make sure limitations stay reasonable and justified, it suggests more robust judicial review procedures, independent oversight organizations, and more precise legal rules. Bangladesh can better safeguard individual liberties while upholding social welfare and public order by putting these measures into practice.

INTRODUCTION

The concept of fundamental rights refers to a collection of rights that are guaranteed and recognized by the highest legal authorities, such as the constitution. These rights are aimed at safeguarding the dignity, freedom, and equality of all individuals.¹ Fundamental rights serve as a shield to protect citizens from arbitrary actions or abuses by the state or other public authorities.

Fundamental rights serve various critical purposes. Initially, they protect individuals' autonomy and dignity from unjustifiable intervention by the government or other societal organizations. This protection ensures that every person has the freedom to live a life of their choice with respect, without facing any form of oppression or discrimination. Secondly, they uphold the fundamental principles of a democratic system of government, ensuring that the powerful uphold the values of equality and freedom.

To safeguard morality, public order, and national security, certain limitations might be necessary as absolute freedom can lead to conflict with the interest of collective goods.² Defined as 'reasonable restrictions,' these limitations are intended to create a delicate balance

¹ Preamble, The Constitution of People's Republic of Bangladesh

² Artur Bilgorajski, 'Boundaries and limitations of human rights: A contribution to the discussion' (2023) <<https://bibliotekanauki.pl/articles/21972307.pdf>> accessed 5 October 2024

between preserving social order and safeguarding individuals' freedom. The concept of balancing rights with reasonable restrictions helps to prevent the misuse of freedom, ensures that individual liberty does not jeopardize societal stability or welfare of others.

THE CONSTITUTIONAL FRAMEWORK OF FUNDAMENTAL RIGHTS IN BANGLADESH

The history of fundamental rights in Bangladesh is deeply rooted in the country's struggle for independence and its desire to establish a democratic and just society. Establishing a democratic and inclusive legal framework for the recently established nation was the main goal of the constitution. The Constitution established the foundation for the separation of powers, the rule of law, and the defence of every citizen's fundamental rights.³

According to article 26 of the Constitution of Bangladesh, any law made inconsistent with the provisions of the Constitution, may rendered void. The primary goal of fundamental rights enshrined in the part 3 of the constitution, guarantee individual liberty and social justice.

Like the constitutions of many other nations, the constitution of Bangladesh defines a set of "human rights" as guaranteed by the document by using the technical term "fundamental rights." These are a collection of civil and political rights for Bangladesh that are protected under the Constitution's part 3. The collection of human rights in Bangladesh that are safeguarded by the Constitution by guaranteeing judicial enforcement are found in Articles 26–47A, which are regarded as the ultimate law of the land and have precedence over all other national laws.⁴

The chapter on fundamental rights mostly includes the rights of civil and political nature. Nonetheless, there are certain fundamental rights that fall within the category of economic, social, and cultural rights or fall within both categories of human rights.

A subset of fundamental rights, protected under Articles 32, 33, 34, 35, 41, and 44, are guaranteed to all people residing in Bangladesh, regardless of nationality. Another set of rights

³ Ridwanul Hoque, 'Founding Constitution and our state of democracy' (*The Daily Star*, 6 November 2018) <<https://www.thedailystar.net/law-our-rights/news/founding-constitution-and-our-state-democracy-1656550>> accessed 5 October 2024

⁴ Rumana Islam, 'Human Rights in the Constitution of Bangladesh' (*The Daily Star*, 4 November 2022) <<https://www.thedailystar.net/supplements/50-years-our-constitution-original-ideals-vs-reality/news/human-rights-the-constitution-bangladesh-3160256>> accessed 5 October 2024

are guaranteed exclusively for the citizens of Bangladesh, which includes Articles 27, 28, 29, 30, 31, 36, 37, 38, 39, 40, 42, and 43.⁵

Nevertheless, not every one of these rights is absolute; some are bound by certain limitations. The absolute rights guaranteed in Articles ensures that Parliament cannot impose any restrictions over the enjoyment of these rights except as provided in the Constitution. Certain rights, including those protected by Articles 36, 37, 38, 41, and 43, may be subject to reasonable restrictions imposed by the Parliament in accordance with the guidelines outlined in the Constitution.⁶

GROUND OF REASONABLE RESTRICTIONS ON FUNDAMENTAL RIGHTS IN BANGLADESH

While the Constitution lacks a definitive delineation of the expression "reasonable restriction," it does establish in article 39(2) that restrictions can be legally imposed under various circumstances. Article 39(2) of the Bangladesh Constitution states that restrictions can be legally imposed under various circumstances that include safeguarding national security, fostering friendly relations with foreign states, maintaining public order, upholding standards of decency and morality, and addressing contempt of court, defamation, or incitement to commit an offence.⁷

In addition to fostering social interaction and intellectual self-expression among citizens, the freedoms of speech, expression, and the press guaranteed by Article 39 are essential for maintaining the nation's unity and advancing democratic and secular principles, which in turn increase production. The Indian Supreme Court, in *Romesh Thappar vs Madras*,⁸ stated that freedom of speech is essential for the development and functioning of democracy.

The ICCPR also allows for restrictions to protect national security, public order, or the rights and reputation of others. Concerning a limitation on the right to freedom of expression under article 19(3) of the ICCPR, a three-part test is used to assess whether such a limitation is

⁵ The Constitution of People's Republic of Bangladesh, p 3

⁶ Rumana Islam, 'Human Rights in the Constitution of Bangladesh' (*The Daily Star*, 4 November 2022) <https://www.thedailystar.net/supplements/50-years-our-constitution-original-ideals-vs-reality/news/human-rights-the-constitution-bangladesh-3160256> accessed 5 October 2024

⁷ The Constitution of People's Republic of Bangladesh

⁸ *Romesh Thappar vs Madras*, AIR [1950] SC 124

justified: (i) the limitation must be provided for in law; (ii) it must pursue a legitimate aim; and (iii) it must be necessary for a legitimate purpose.⁹

Dr Kamal Hossain, citing examples from socialist and democratic states and the UN Charter, provided that no country can guarantee fundamental rights without incorporating reasonable restrictions defined by law.¹⁰ The freedom to assemble, take part in nonviolent public gatherings and processions, and carry arms is guaranteed by Article 37 of the Constitution. To maintain public health or order, the government may, nevertheless, impose reasonable restrictions on certain types of gathering under Article 37. In evaluating whether limitations on these rights are fair, the court emphasizes that it is critical to show a direct link between the conduct that are prohibited and threats to public order.

In the case of *Oali Ahad V. Government of People's Republic of Bangladesh*¹¹ exemplifies the importance of this delicate equilibrium, particularly in the context of public gatherings and assemblies. The High Court Division (HCD) of Bangladesh tresses the need to balance the fundamental right to assemble and to maintain public peace.

Numerous religious and nonreligious figures have occasionally delivered numerous speeches and fatwas about the Ahmadiyya community, which has aided in dehumanizing those who adhere to this belief system and inciting hatred and violence. In the case of *Tayeeb (Md) and others v. Government of the People's Republic of Bangladesh*,¹² the Supreme Court of Bangladesh ruled that fatwas are not illegal.

However, a fatwa shall be null and void if it violates national laws or has an impact on rights or reputation that are safeguarded by those laws. As a result, any fatwa issued that threatens to infringe the fundamental rights of the Ahmadiyya people or dehumanizes them is illegal and nullified.¹³

Particularly regarding the freedoms of assembly, speech, and expression, Bangladesh's legal system permits the legitimate imposition of restrictions on fundamental rights. But these

⁹ International Covenant on Civil and Political Rights, 1966

¹⁰ Noor Afrose, Tarazi Mohammed Sheikh, 'Reasonable Restrictions: Article 39 of the Bangladesh Constitution and Global Standards' (*The Daily Star*, 7 July 2023) <https://www.thedailystar.net/law-our-rights/news/reasonable-restrictions-article-39-the-bangladesh-constitution-and-global-standards-3363091> accessed 6 October 2024

¹¹ *Oali Ahad V. Government of People's Republic of Bangladesh* [1974] DLR 26

¹² *Tayeeb (Md) and others v. Government of the People's Republic of Bangladesh* [2015] 67 DLR (AD)

¹³ Rafid Azad Saumik, 'Freedom of religion of the Ahmadiyya community' (*The Daily Star*, March 10, 2023) <https://www.thedailystar.net/law-our-rights/news/freedom-religion-the-ahmadiyya-community-3267566> accessed 6 October 2024

impositions must be imposed in a fair, reasonable, and non-arbitrary manner and must be consistent with constitutional values.¹⁴

BALANCING LIBERTY AND SOCIAL ORDER

Serving as both the guardian of the Constitution and the defender of individual rights, the judiciary is essential to maintaining fundamental rights. The judiciary has guaranteed complete protection of human dignity by not only upholding the rights stated in the Constitution but also extending these rights to encompass unnumbered ones.

As important as fundamental rights are to the individual liberty, they can be restricted when their exercise jeopardizes public safety, health, or order. For example, when it comes to hate speech or encouragement to violence, the right to free speech may be restricted to keep one's freedom from affecting others' or undermining the rules of discipline.

Article 27 of the Constitution of Bangladesh guarantees the right to equality and article 28 forbids discrimination based on gender, race, sex, caste, and religion. Sometimes restrictions are required to preserve vulnerable groups of society and to promote equality. For instance, the practice of positive discrimination, which is also referred as affirmative action, generally involves taking specific measures to help groups of people who are or have experienced discrimination for them to have equal access to opportunities as the public. This is done to promote greater equality.¹⁵

A social order cannot exist only based on rights without corresponding duties. Reasonable restrictions serve as a reminder to people that their rights come with responsibilities to society. The freedom of expression, for instance, must be used responsibly to avoid hurting other people or disturbing the peace.

The judiciary's role is essential in preventing restrictions from unduly liberty. Courts have the authority to decide whether a restriction is "reasonable" by determining if it is proportionate, has a justifiable purpose, and is required for legislative functions. By doing this, restrictions are kept from becoming arbitrary. Reasonable restrictions seek to safeguard individual freedom

¹⁴ Noor Afrose, Tarazi Mohammed Sheikh, 'Reasonable Restrictions: Article 39 of the Bangladesh Constitution and Global Standards' (The Daily Star, 7 July 2023) <https://www.thedailystar.net/law-our-rights/news/reasonable-restrictions-article-39-the-bangladesh-constitution-and-global-standards-3363091> accessed 6 October 2024

¹⁵ Aranna Hossain Sakib, 'Positive Discrimination and Right to Equality in Bangladesh' (*NilsBangladesh*, 11 November, 2021) https://nilsbangladesh.org/positive-discrimination-and-right-to-equality-in-bangladesh/#_edn2 accessed 6 October 2024

while also advancing communal well-being, upholding social order, and avoiding violations of rights. The smooth operation of a democratic society, where the demands of the state and the individual must coexist peacefully, depends on this equilibrium.

CHALLENGES IN IMPLIMENTING REASONABLE RESTRICTIONS

The enjoyment of one's rights in society is contingent upon the enjoyment of others' rights, hence it is impossible to see the enjoyment of rights in an absolute sense. The exercise of fundamental rights may be subject to restrictions when it comes to the larger good of the public welfare. Article 29(2) of the Universal Declaration of Human Rights, 1948 states that in the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality public order and the general welfare in a democratic society.¹⁶

Nonetheless, the ambiguity of the legal system presents a significant obstacle to implementing appropriate restrictions on fundamental rights. There is no clear definition of reasonable restrictions in the Constitution.¹⁷ It can be challenging to pinpoint the precise boundaries of allowable restrictions when regulations are ambiguous or overly broad since they frequently allow for arbitrary interpretation and application. For example, subjective definitions of concepts such as "public order," "decency," or "morality" may result in inconsistent legal application.

The possibility for authorities to abuse restrictions is a serious obstacle as well. The 'July Uprising' makes it clear that the previous government of Bangladesh had a history of employing its political activists improperly and working with law enforcement agencies to suppress rather than safeguard the populace.¹⁸ The repression of free speech and expression, the disrespect for fundamental rights guaranteed by the constitution, the marginalization of suggestions for reforming governance from civil society, and the denial of encouraging rivalry between the ruling party and the opposition politically.

¹⁶ Universal Declaration of Human Rights, 1948, article 29(2)

¹⁷ Noor Afrose, Tarazi Mohammed Sheikh, 'Reasonable Restrictions: Article 39 of the Bangladesh Constitution and Global Standards' (*The Daily Star*; 7 July 2023) <https://www.thedailystar.net/law-our-rights/news/reasonable-restrictions-article-39-the-bangladesh-constitution-and-global-standards-3363091> accessed 6 October 2024

¹⁸ Mir Aftabuddin Ahmed, 'When rule of (no) law reigns supreme' (*The Daily Star*; August 3, 2024) <https://www.thedailystar.net/opinion/views/news/when-rule-no-law-reigns-supreme-3668286> accessed on 7 October, 2024

As a fundamental right, freedom of expression is acknowledged in Article 39 of the People's Republic of Bangladesh Constitution. But alongside the mentioned promise, it offers a lengthy list of restriction grounds. A common criticism of this proliferation of restrictions on free speech is that it does not adhere to international norms and instead produces an excessive number of exceptions to the rule.

Article 37 guarantees the freedom of assembly, participation in public gatherings and processions, and non-violent, non-armed assembly for all citizens. Only law enacted to protect the public's health or order has the authority to restrict this liberty.¹⁹ Restrictions on this right must be reasonable, and the authority to impose them cannot be used arbitrarily.

On several instances, government officials restricted freedom of movement on the pretext of public safety, which may not have satisfied the law's other requirements or the reasonableness standard. For instance, on July 18, 2024, students led a peaceful assembly when the police opened fire on them. Many students were also taken into custody. The police's actions do not adhere to the legal standards for reasonableness or other requirements for restricting fundamental rights.

RECOMMENDATIONS FOR LEGAL REFORMS

All around the world, nations struggle to strike a balance between fundamental rights and reasonable restrictions for the sake of morality, public order, and national security. Making cross-border comparisons can shed light on potential improvements Bangladesh could make to its legal system.

Since Bangladesh is a dualist nation, treaties do not automatically take effect here. According to dualism, international and national law are two completely distinct legal systems. A rule of domestic law that permits the application of an international standard determines the legitimacy of international law in a dualist domestic system. Until international treaties are integrated into Bangladesh's domestic legal framework, the government of Bangladesh is not required by domestic law to fulfil the responsibilities resulting from their ratification or accession.

According to the ruling in the case of *Hussain Muhammad Ershad v. Bangladesh and others*,²⁰ courts were not prohibited from applying international law provisions as long as there was no

¹⁹ The Constitution of People's Republic of Bangladesh

²⁰ *Hussain Muhammad Ershad v. Bangladesh* [2001] 21 BLD

conflict with domestic laws, even if they were not required to do so. This legal method is a prime example of how Bangladesh's legal system might be adapted to international norms.

The Indian Constitution offers strong safeguards for fundamental rights, it also imposes appropriate limitations on them. In several cases, the Indian judiciary has persisted in expanding the scope of public order. The Court expanded the definition of "public order" in *Baragur Ramachandrappa v. State of Karnataka*²¹ by prohibiting the publication of the book 'Dharmakaarana,' noting the novel's potential to offend some communities.

Nevertheless, public order, security, and morality are not precisely defined in the constitution of Bangladesh; instead, the laws provide a subjective definition that is open to interpretation and could lead to inconsistent legal implementation. To prevent arbitrary imposition and possible abuse by authority, Bangladesh can incorporate the Indian Constitution's clear definitions of public order, security, and morality into its own constitution.

A three-part test is used by the UN Human Rights Committee, which oversees the implementation of the ICCPR, to determine whether a restriction on the right to freedom of expression under article 19(3) of the ICCPR is justified.²² While article 39 and the ICCPR both acknowledge the necessity of reasonable restrictions, they differ in their application and interpretation. It is important to note that our Constitution does not specifically include this test. To help legislators and judges decide whether restrictions on rights are warranted, Bangladesh can borrow this three-step test to enhance clarity and precision, mitigating the risk of abuse and arbitrary enforcement.

The United States Supreme Court created one of the most speech-protective legal standards in the world in the case of *Brandenburg v. Ohio*²³, holding that the government cannot censor speech unless it is intended to provoke immediate criminal activity. To guarantee that the government cannot restrict free speech in the absence of a strong state interest, the U.S. Supreme Court applies strict scrutiny to statutes that restrict speech. Because of this balance, both public interests and individual liberty can be protected without going too far.

In addition to defending the rights outlined in the Constitution, the judiciary has expanded these rights to include unnumbered ones, ensuring the protection of human dignity. By using judicial review, the judiciary can protect people's fundamental rights by overturning laws or

²¹ *Baragur Ramachandrappa v. State of Karnataka* [2007] AIR SCC 11

²² International Covenant on Civil and Political Rights, 1966

²³ *Brandenburg v. Ohio* [1969] 395 US 444

government actions that are thought to be unlawful. Strengthening judicial review procedures is necessary to guarantee that laws that impair fundamental rights are thoroughly examined.

CONCLUSION

The saying "excess of everything is bad" limits the intelligence of people of all ages. It has been repeatedly noted how a small number of people abuse the excess of rights in their possession to undermine the society for which these rights were originally established.

It is not feasible to see the enjoyment of rights comprehensively since it depends on the enjoyment of others' rights in society. The constitution's guarantees of civil freedoms imply that a well-organized society upholds public order; without these liberties, the excess of unchecked excesses would be lost.

When fundamental rights are inserted into a constitution, they lose their significance if the constitution does not provide for a simple and efficient process for enforcing them. Additionally, this simple and efficient enforcement need to be available against both the legislative and executive branches. It goes without saying that the court has the authority to decide whether the restrictions are reasonable. It is now established that limitations imposed under the constitution or laws must be close to the goal the legislature is trying to accomplish to be deemed legal.

In the future, Bangladesh should make sure that these limitations are applied equitably by establishing independent oversight organizations to keep an eye on whether the requirements for enforcing them are being met, bolstering judicial review of any restrictions, and updating its legal framework to make it clear what precisely qualifies as reasonable restrictions. Bangladesh will retain welfare benefits for her society and promote democratic ideals through these reforms, which aim to strike a fair balance between maintaining public order and protecting civil liberties.

While reasonable restrictions are required, they must be properly drafted and implemented in accordance with human rights and constitutional principles to avoid causing undue interference with personal liberties.