

Remedies Against the Violation of Constitutional Rights: A Critical Study of *Locus Standi* Perspective

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Abstract:

Constitution is the highest law of Bangladesh. Hopes and expectations of the people have been reflected here. Bangladesh Constitution directs the citizens to observe and to uphold the Constitutional provisions and to protect public property. Simultaneously it imposes some restrictions that any citizen of the country cannot seek remedy against the violation of Constitutional provisions. There are some provisions of the Constitution namely the fundamental rights, for the remedies for whose violation locus standi is strictly followed. Even in the case of the violation of other provisions of the Constitution the rule of locus standi is also applied. As a result, general people (specially the conscious citizens) cannot observe their duties properly. In this article, an attempt has been made to clarify the violation of the Constitutional rights and other Constitutional provisions and to find out the problems of enforcement mechanism and to make suggestions.

1. Introduction

There is a maxim '*ubi jus ibi remedium*' (i.e., wherever there is a right there is a remedy). Right and remedy are two sides of the same coin and they cannot be dissociated from each other. This theory has been adopted by our legal system. Besides as a modern welfare state, it is essential to ensure citizen's rights through court. Right means an interest recognised and protected by a rule right and rule of right means a principle judicially

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enforced. This right is also called legal rights. Without ensuring such rights, it is not possible to create a civilized state. Sometimes the people's necessary rights are recognised by the state constitution. These are called fundamental rights. Generally, essential rights are considered as fundamental rights. In our country the High Court Division of the Supreme Court is the only authority which gives remedy under its writ jurisdiction against the violation of such rights on the basis of aggrieved party's petition. When other Constitutional provisions are violated, there is another barrier for seeking remedy in this regard. In this case, the Court considers the petition on the basis of aggrieved party's petition expect in the cases of the writ of *Habeas Corpus* and *Quo Warranto*. At present, in the cases of Public Interest Litigation (PIL) and Social Action Litigation (SAL), *locus standi* is applied more progressively. So it is impossible to provide absolute remedy for the violation of the Constitutional provisions. In this article, an attempt has been made to criticize the present state of our Constitutional and other principles against the violation of the Constitution narrating various grounds and to give some suggestions for ensuring Constitutional provisions relaxing the doctrine of *locus standi*.

2. Violation of Fundamental Rights and Violation of the Constitution

The rights which are recognised by the Constitution are called fundamental rights. In the Constitution of the People's Republic of Bangladesh, these rights have been recognised. Some of these rights are given below:

- (i) All citizens are equal before law and are entitled to equal protection of law.¹
- (ii) Right to protection of law.²
- (iii) Right to life and liberty.³

1 Article 27 of the Constitution of the People's Republic of Bangladesh. This article provides the equality provision, which is one of the main principles of Rule of Law. Equality means enjoyment of all rights without discrimination anyone on the grounds of religion, colour, caste, sex or place of birth etc.

2 Article 31 of Bangladesh Constitution provides that every citizen or any person for the time being within Bangladesh shall enjoy the protection of law and to be treated in accordance with law. This article also provides that without due process of law no action shall be taken against the life, liberty, body, reputation or property of any person.

3 Article 32 of the Constitution of the People's Republic of Bangladesh, 1972.

- (iv) Safeguards against unlawful detention.⁴
- (v) Prohibition of forced labour.⁵
- (vi) Right to protection in respect of trial and punishment.⁶
- (vii) Freedom of movement.⁷
- (viii) Freedom of assembly.⁸
- (ix) Freedom of association.⁹
- (x) Freedom of thought and conscience and speech.¹⁰
- (xi) Freedom of profession or occupation.¹¹
- (xii) Freedom of religion.¹²
- (xiii) Right to property.¹³
- (xiv) Protection of home and correspondence.¹⁴
- (xv) Right to enforcement of fundamental rights.¹⁵

When the government or any other person violates any of the above rights, it is called violation of fundamental rights. But the term 'Violation of Constitution' is used in broader sense. Constitution provides not only the fundamental rights, but also provides the functions of the various

4 Article 33 of the Constitution of the People's Republic of Bangladesh, 1972.

5 Article 34 of the Constitution of the People's Republic of Bangladesh, 1972.

6 Article 35 of the Constitution of the People's Republic of Bangladesh, 1972. This article provides that (a) no man shall be converted by the enactment of later (b) no person shall be prosecuted and punished for the same offence more than once (c) trial should go through independent and impartial court (d) accused shall not be compelled to be a witness against himself (e) no person shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment.

7 Article 30 of the Constitution of the People's Republic of Bangladesh, 1972.

8 Ibid., Article 37.

9 Ibid., Article 38.

10 Ibid., Article 39.

11 Ibid., Article 40.

12 Ibid., Article 41.

13 Ibid., Article 42.

14 Ibid., Article 43.

15 Ibid., Article 44.

departments of Government. When any of the provisions of the Constitution is violated, it is called violation of Constitution. In this sense, violation of the Constitution includes the violation of fundamental rights.

3. Judicial Remedy for Violation of the Constitution

It is necessary to know the doctrine of *Locus standi* before discussing the remedies for violation of the Constitution. *Locus standi* asks the question whether the petitioner is entitled to invoke the jurisdiction of the court. The general answer is that only the aggrieved party can go to the court for remedy. As a general rule, in order to have *Locus standi* to file a petition, the petitioner should be an 'aggrieved person'. According to the traditional theory, only a person whose right has been infringed can apply to the court.¹⁶ Bangladesh Constitution also provides some rules regarding writ remedies. These are:

(A) In case of the violation of fundamental rights, the rule is that only 'aggrieved person' can apply against such violation. Article 102(1) of the Constitution of the People's Republic of Bangladesh provides-

"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 fundamental rights conferred by part III of this Constitution."

Beside the above, there are some other grounds where the *Locus standi* rule has also been relaxed. Viz.,

(i) Public Interest Litigation (PIL)

It is the litigation where the interest of the public is given priority over all other interests with an aim to ensure social and collective justice.¹⁷ When public is affected in general or their rights are injured, any person of the society or any person may apply to the court for remedy. PIL is brought before the court for promoting and vindicating public interest which demands that violations of

16 C.K Takwani, *Lectures on Administrative Law*, (3rd edition), (Lucknow: Eastern Book Company), p. 294.

17 Naim Ahmed, *Public Interest Litigation- Constitutional Issues and Remedies*, (Dhaka: BLAST, 1999), p.51.

Constitutional or legal rights of a large number of people who are poor, ignorant or in socially or economically disadvantaged position should not go unnoticed and unredressed.

(ii) Social Action Litigation (SAL)

In SAL the petition is for the enforcement of the specific rights of determinate class or group of people who are primarily injured by the impugned action. The injury suffered by members of this class is direct and redress is sought on their behalf because they are unable to approach the court on account of indigence, illiteracy or social or economic disability for e.g., prisoners, workers in stone quarries or inmates of care centers or mental homes.

(B) In the cases of non-fundamental rights some rules have been incorporated in the Bangladesh Constitution. Five kinds of writ have been developed in this regard. Bangladesh Constitution does not mention specific writ, but nature of various kinds of writs have been described, viz., *writ of Mandamus*, *writ of Certiorari*, *writ of Prohibition*, *writ of Habeas Corpus* and *writ of Quo-warranto*. In the cases of writ of *Mandamus*, *Certiorari* and *Prohibition*, *Locus standi* is absolutely followed. The rules are given below:

(i) *Writ of Mandamus*

On the application of the any person aggrieved the High Court Division may make an order directing a person performing any functions in connection with the affairs of the Republic or of a local authority to refrain from doing that which he is not permitted by law to do or to do that which is required by law to do.¹⁸

(ii) *Writ of Prohibition and Certiorari*

On the application of any person aggrieved the High Court Division may make an order directing that any act done or proceeding taken by a person performing functions in connection

18 Article 102(2)(a)(i) of the Constitution of the People's Republic of Bangladesh, 1972.

with the affairs of the Republic or of a local authority has been done or taken without lawful authority and is of no legal effect.¹⁹

(C) In the cases writ of *Habeas Corpus* and *Quo-Warranto* the *locus standi* rule has been relaxed. These rules are discussed below:

(i) *Writ of Habeas Corpus*

On the application of the any person the High Court Division may make an order directing that a person in custody be brought before it so that it may satisfy that he is not being held in custody without lawful authority or in an manner.²⁰

(ii) *Writ of Quo-warranto*

On the application of any person the High Court Division may make an order requiring a person holding or purporting to hold a public office to show under what authority he claims to hold that office.²¹

4. Evaluation of the present state of writ remedies in Bangladesh

Writ remedy is the fountain of justice. The Crown of England used it in the interest of justice. In Bangladesh, writ plays a vital role in upholding the people's rights and liberties. Bangladesh Constitution provides the safeguards against the violation of the Constitution. As a modern welfare state, it was positive initiative to provide such safeguards in Bangladesh Constitution. Besides, rights are one of the main objects of a welfare state. According to the Bangladesh Constitution the High Court Division of the Supreme Court is entitled to give such remedies. But the Constitution of the People's Republic of Bangladesh bears some deficiencies, viz.,

1. If the state fails to maintain the provisions of part II of the Constitution (Article 8- 25), such violations will not be entertained by the Court.²²

19 Ibid., Article 102(2)(a)(ii).

20 Ibid., Article 102(2)(b)(i).

21 Ibid., Article 102(2)(b)(ii).

22 Ibid., Article 8(2).

2. In case of the violation of fundamental rights, only the aggrieved person can go to the High Court for remedy.²³ But our socio-economic condition is not so appreciable that a poor, illiterate citizen can easily seek remedy to the High Court from remote areas. In most of the cases, the people of Bangladesh accept it unwillingly. Though very recently Public Interest Litigation (PIL) has been developed for upholding the rights of the distressed people. But there is a limitation to file a public interest case. Generally the Court entertains PIL when a collective right is violated. Besides, in that case the Court considers the petitioner's status, track record etc. Theoretically Kazi Mukhlesur Rahman's case was the first Public Interest Litigation in Bangladesh.²⁴ Kazi Mukhlesur Rahman was an advocate and came to the Court as a citizen against the Indira-Mujib Treaty(1974) regarding the exchange of the southern half of South Berubari Union No. 12 and adjacent enclaves on the grounds of unlawful cession of the state territory. Generally Mr. Rahman had no *locus standi*, but the Court granted on the ground that he agitated a question affecting a constitutional issue of grave importance posing a threat to his fundamental rights that pervade and extend to the entire territory of Bangladesh.²⁵ In that case, the Court went very close to the doctrine of Public Interest Litigation. Similarly, the 8th Amendment Case was also entertained and *locus standi* was relaxed there though great public interest litigation was not involved.²⁶

Dr. Mohiuddin Farooque as well as his organisation BELA was the pioneer for introducing PIL case in our country. The mentionable number of PIL cases had been filed by him.²⁷

Nowadays, the High Court Division entertains PIL tremendously. But it is ineffective to ensure individual rights.

23 Ibid., Article 102(1).

24 *Kazi Mukhlesur Rahman v. Bangladesh and others* 20 DLR (SC) 44.

25 Naim Ahmed, op. cit., p. 22.

26 41 DLR (AD) 165. Advocate Anwar Hossain filed a writ petition against the decentralisation of higher judiciary i.e., Article 100 of the Constitution was challenged as ultra vires. The Court by a majority judgement of three against one declared that the basic structure of the Constitution cannot be altered and as such amendment was void.

27 *Dr. Mohiuddin Farooque v. Bangladesh and others*, 17 BLD (AD) 1.

3. Seldom, the High Court Division interferes itself (*sua motto*) as the Judges of the High Court Division take oath for preserving, protecting, defending the Constitution.²⁸ But the Judge's *sua motto* initiative is not enough to protect all citizens' rights.

From the above discussion, it is clear that *locus standi* is the bar in invoking writ jurisdiction by a citizen against the violation of the Constitution. But Constitution is the most precious public property and it is the duty of every citizen to protect it. Such citizens' rights have been bolstered up by several laws. Viz.,

- (i) Under section 44 of the Code of Criminal Procedure, 1898, every person aware of the cognizable offences committed or likely to be committed has a duty to forth with give information to the police or the Magistrate and under section 150 of the Police Code upon receipt of such information have to prevent commission of cognizable offence and take appropriate action. In this case, question of *locus standi* is not arisen.
- (ii) Under section 190(1) of the Code of Criminal Procedure, a Magistrate can take cognizance upon information from any person, upon his own knowledge or upon suspicion as to commission of any cognizable offence. Question of *locus standi* is not also arisen here.
- (iii) Article 21(1) of the Constitution of the People's Republic of Bangladesh stipulates that it is the duty of every citizen to observe the Constitution and the laws, to maintain discipline, to perform public duties and to protect public property.

As per constitutional and other legal framework, every citizen of this Republic is the protector, observer and maintainer of its Constitution and laws. On one hand, the state imposes such duties upon people, on the other hand the Constitution strictly applies the doctrine of *locus standi*. But if it is required to go to the Court for upholding the Constitutional provisions, they cannot do that as they wish. Most of the cases, they are to be aggrieved personally. Bangladesh is third world developing county. Its literacy rate is not satisfactory. Most of our people do not know their rights, let alone the procedures of establishing such rights. So in Bangladesh context, *locus*

28 Third Schedule, para 6 (Article 144 of the Constitution of the People's Republic of Bangladesh, 1972.

standi should be relaxed. In this regard, an Indian Supreme Court case may be mentioned. In that case, the Court states, 'where a legal wrong or a legal injury is caused to a person or to a determinate class of persons is by reason of poverty, helpless or disability or socially or economically disadvantaged position, unable to approach the Court for relief, any member of the public can maintain an application seeking judicial redress for legal wrong or injury caused to such person or determinate class.'²⁹

5. Conclusion

Constitution is the most precious public property and it is the duty of every citizen to protect it. According to the Bangladesh Constitution when any provision of this Constitution is violated, judicial remedy (writ remedy) is available on the basis of some restrictions. Except writ of Quo-Warranto and writ of Habeas Corpus, *locus standi* principle is strictly applied. But in the cases of Public Interest Litigation and Social Action Litigation, any person can apply on behalf of the disadvantaged classes of people. But in Bangladesh, it has not yet been taken liberally and it is not applicable to establish individual's rights. Bangladesh is lagging far behind compared to Pakistan and India. Reasons amongst others may be the attitude of looking at things and interpretation of the Constitutional expression *locus standi* and person aggrieved. A citizen of Bangladesh will not be able to perform his duties which is imposed by the Constitution if the *locus standi* and 'person' aggrieved' are not interpreted in a broader sense. So, establishing the rule of law, it needs to remove the obstacle of *locus standi* in the case of violation of the Constitution.

29 S.P. Gupta v. Union of India, AIR 1982 SC 149, para 17.