

“Constitutional Transplantation of the Indian Judicial View: Introducing Suo Moto Writ in Bangladesh”

**Amena Jahan Urmy
Teaching Assistant,
Bangladesh University of Professionals
Dhaka, Bangladesh*

***Abue Jawfore Taufique Ahamed Ahade
Bangladesh University of Professionals
Dhaka, Bangladesh*

Judiciary is empowered with the power to interpret the legislations of a state to ensure administration of justice. Moreover, in most of the countries judiciary are recognized as the protector of the constitutions. Thus when the question arises as to the upholding rule of law by scrutinizing the constitutionality of any act by allowing writ petition, it becomes something of a severe importance. In other words, upholding the constitution of a country for the benefit of the people by the higher courts should be prioritized over any procedural rigidity. As a protector of the constitution, the higher judiciary should play a key role by taking the matters which are detrimental to the constitutionality without waiting for the procedural aspects to be fulfilled. With that philosophy, the idea of suo moto writ or taking any matter into account by own initiative emerged. The practice of suo moto writ started in India before Bangladesh. The interpretation given by the Indian judiciary heavily impacted the introduction of suo moto writ in Bangladesh by way of constitutional transplantation.¹

Though the essence of filing writ seems identical in myriad countries now-a-days, but the course of doing it is different. If we sheds light on the Constitution of India, *Article 32* of the constitution of India, addressed by Dr. Bhim Rao Ambedkar as the ‘heart and soul of the Constitution’ states that on violation of anyone’s fundamental rights enumerated in there, he has right to move the Supreme Court for the enforcement of his fundamental rights.² *Article 226(1)* of the same, empowers High court to issue direction, order, or writs for enforcement of fundamental rights or any other rights under its own local jurisdiction.³

With that very intention, newspaper, letters, postcards, telegrams are all treated as applications by the Supreme Court of India without the requirement of any supporting affidavit as prescribed

¹ Professor Dr. Muhammad Ekramul Haque, “Analysis of Tayeeb Case and Constitutional Transplantation” Comparative Constitutional Law Lecture, 1 April 2020, Bangladesh University of Professionals

² The Constitution of India 1950, Art 32

³ Yogesh Sharma, 'the difference between Article 32 and Article 226 of the Indian constitution' (lawcirca, 18 June 2019) <<https://lawcirca.com/what-is-the-difference-between-article-32-and-article-226-of-the-indian-constitution/>> accessed 10 May 2020

in the concerned Rules and the honorable Supreme Court of India is entitled to initiate a writ by itself or make a suo moto writ. The reason behind such flexible approach of the Court is that the true spirit of law is well-known and admired by the learned judges. They were not only acknowledged with the context and drive of the Fundamental Principles of State Policy and the Fundamental Rights protected in the respective Constitutions, but also comprehended the said rights are not restricted only to a few well-off aggrieved who are capable to bear the expenses of the learned Advocates and present the 'perfect' applications before it. The hallowed provisions of the Constitution are not that much bigoted rather offers the door to apply equally to the underprivileged, down-trodden uneducated mass which encouraged the practice of suo moto writ in India since ages.

In a couple of cases i.e. **Sheela Bose V. State of Maharashtra**⁴ and **Mukesh Kumar V. State of M.P.**⁵, the extension of jurisdiction of Indian Supreme Court is exercised where petitions under Article 32 of the Constitution is entertained in the following way-

'not only from associations or organizations or individuals interested in a common cause or an advocate, even journalists but also on the basis of letters written by such persons containing a complaint of maltreatment of under-trial prisoners or women in police custody.'

Similar view was taken in **State of W.B. V. Sampal Lal**⁶, **State of H.P. V. Parent of Student Medical College**⁷ and **Malik Brothers V. Narendra Dadich**⁸ where the Court further observed in order to ensure easy access to justice to the feebler portions of society and to fight against manipulation and injustice and to safeguard the under-privileged segments irrespective of their social and economic identity, to redress public injury, administer public duty, guard social rights, maintain public interest and rule of law; supple attitude towards procedural technicalities should not be a matter on which objection might be raised. These views impacted largely the practice in Bangladesh as well.

A pertinent paragraph from Justice Mustafa Kamal's book under the head *Bangladesh Constitution: Trends and Issues on Kamini Dutta Memorial Law Lectures, 1994* can be mentioned where he mentioned once fortunately, he met with Nasir Aslam Zahid who was the Chief Justice of the High Court of Sindh and who shared his experience of sorting out abundant telegrams and letters desperately praying the Court to make suo moto writs, among them some are considered as usual constitutional petitions where the rests are sent to the appropriate authorities for redress; surprisingly minimum 50 of them are relevant somehow with violation of

⁴ AIR 1983 SC 378,

⁵ AIR 1985 SC 1363

⁶ AIR 1985 SC 195

⁷ AIR 1985 SC 910

⁸ AIR 1999 SC 3211

human rights. With a view to deal with such situation, India planned to institutionalize maintaining such letters and telegrams.

The strife faced while fixing to the text of the Constitution of Bangladesh, that it doesn't entitle the Supreme Court of Bangladesh to entertain suo moto writ in explicit language. In Bangladesh, in order to file an application for a writ, it must go through some traditional requirements which are reckoned in *Article 102* of the Constitution of Bangladesh. Generally, the High Court Division under Article 102 is empowered to make an order for the enforcement of the fundamental rights conferred by Part III of the constitution, but in there, the condition precedent is that based on the application of any person aggrieved, such writ has to be filed.⁹

Restraining this interpretation into textual one, the usual expectation is that an application shall be made by any person 'aggrieved' which is again subject to liberal interpretation mirrored in **Dr. Mohiuddin Farooque V. Bangladesh**¹⁰ case which is famously known as *locus standi case* in Bangladesh. Usually, the application contains the information of the concerned person, his grievance and his prayers; considering those the learned Judges exercise their discretion. On that basis, the validity of telegram, post card and newspaper report as application within the scope of Article 102 of Constitution of Bangladesh was not recognized in which Indian constitutional law principles would be the light to a pave.

Being inspired from the liberal judicial interpretation of Indian Supreme Court, the Supreme Court of Bangladesh utilized the same principle in **Tayeeb Vs. Bangladesh case**¹¹ and pierced the textual rigid interpretation by admitting telegram, post card and newspaper report to be an application for the purpose of Article 102 of the Constitution. Such Constitutional transplantation was made through analyzing the Indian view in the form of expressivism by incorporating it into the constitutional provisions on oath of the Judge and article 102 of the Constitution. According to the expressivist view, constitutions help constituted the nation to varying degrees in different nations offering to each nation's people a way of understanding themselves as political being.¹² In Tayeeb case the above mentioned Indian views, principles have been accepted as a subject to constitutional transplantation which was validated in the following way:

Firstly, it dissected the constitution into its true spirit in respect with Part II (Fundamental Principles of State Policy) & Part-III (Fundamental Rights of the people of Bangladesh of the Constitution) while Article 11 within Part II of the Constitution stipulates that the Republic of Bangladesh shall be a democracy in which fundamental human rights and freedoms and respect

⁹ The Constitution of the People's Republic of Bangladesh 1972, Art 102

¹⁰ 49 DLR (AD) (1997) 1

¹¹ 12ADC (2015)01, 2015(23) BLT(AD)10

¹² Mark Tushnet, 'The Possibilities of Comparative Constitutional Law' [1999] 108: 1225 The Yale Law Journal 1225,1228

for the dignity and worth of the human person, shall be guaranteed. Such republican characteristics upheld as per the will of the people and protect their welfare and interest.

Part III of our Constitution guarantees Fundamental Rights of the people of Bangladesh incorporating, *inter alia*, equality before law (Art. 27), equal rights of women with men [Art. 28(2)], right to protection of law (Art. 31), protection of right to life and personal liberty (Art. 32).

Secondly, the Court considered the oath (or affirmation) of the Judges where they promise to '*preserve, protect and defend the Constitution and the laws of Bangladesh*'. In order to comply with oath, they envisaged that the persons who are unable to file a formal application, cannot be without remedy in vindication of their rights guaranteed under the Constitution and the laws of the land. If so, it would be in total negation of the spirits enshrined in our sacred Constitution. The Judges are bound by their oath to uphold the provisions of the Constitution including the fundamental rights of the people guaranteed therein. The mere procedural veil cannot smog and delude their conscience. That's how they treat a news printed in the newspaper as an application under Article 102 of the Constitution and wave the procedural formalities to protect social rights and vindicate public interest and rule of law treating it as an exceptional case with a view to preventing social injustice in the society.

Though as in the dissenting opinion of *Tayeb* case, Justice Wahab Mia rejected the above constitutional transplantation and opined his view against the majority decision. In the beginning of his dissenting opinion, he opted to dichotomize Article 102 and the term 'application'. He noted down that amid the whole Article 102, several times the phrase 'on the application of any person aggrieved' has been used which emphasized application as a condition precedent. There he also pinned using 'the', a definite article instead of using 'an' as an intention of the constitution frame makers to give stress of the necessity to file application to invoke the jurisdiction of the High Court Division.

For such significant position in Article 102, he felt the necessity to dissect the word 'application' by referring Black's Law Dictionary where the word application means: "1. A request or petition 2. MOTION. He opined the meaning of the word "application" must connote "petition" or "Motion." Because, there cannot be a request to a Court and it is always a prayer, which is made to a Court and request cannot be synonymous to a prayer. For that reason, the rhetoric judgment of construing news published in a daily vernacular, cannot be categorized or grouped within the meaning of "request", "petition" and "motion" at all.

Additionally, Justice Wahab Mia quoted appendix IV as contained in Part I and II of serial (A) of **Supreme Court (High Court Division) Rules, 1973** where he discoursed prima facie inference to be very pertinent that every application under article 102 of the Constitution shall be in the

form of a petition proving clear speculation of forms, particulars and procedures. Referring Article 101 regarding jurisdictional issues of High Court Division he concluded it cannot exercise a jurisdiction unless it is clothed with such power either by any provision of the Constitution or by any other law. In the absence of conferment of power either by such sources, assuming any jurisdiction will be nothing but usurpation of power without jurisdiction. And neglecting the procedures of the above rules, it would rather amount to violation of the judge's oath.

Pointing at the affirmative position of Dr. Kamal Hossain, who is one of the members of constituent assembly in Bangladesh, regarding suo moto writ, he explained that constituent Assembly debates is considered as external aid to interpretation¹³ but not the opinion or interpretation of a person associated with the framing of the Constitution, such opinion shall not fall under originalist approach. He also expressed his disagreement with the reference of Mustafa Kamal, J. in his book under the head *Bangladesh Constitution: Trends and Issues on Kamini Dutta Memorial Law Lectures, 1994*, stating all of the mentioned cases were not "**from writ jurisdiction proper, but emanated from other proceedings**" and mere issuance of suo motu Rule, in some stray cases, cannot be regarded or accepted as the concrete answer.

And he concluded by rejecting the constitutional transplantation on the ground that neither Article 226 and 32 of the Indian Constitution contain the requirement to file any application which is unambiguously proclaimed in Article 102 of our Constitution. Therefore, it shall be of no use to travel to the Indian writ jurisdiction for the jurisprudential idea or support that suo motu rule can be issued even on letters, post card and telegram.

However, according to the majority decision, the Court adopted the liberal judicial interpretation of Indian Supreme Court going beyond the textual interpretation. Such evaluative attitude of the Supreme Courts of Bangladesh toward suo moto writ is a classic form of expressiveness which endured telegram, post card and newspaper report to be an application for the purpose of Article 102 through constitutional transplantation of Indian view. And this practice now not only admired but encouraged to be exercised more by the Supreme Court. Moreover, Rule 10, Chapter 11 A of the High Court Division Rules was amended to facilitate issuing suo motu rulings on the basis of the newspaper reports, letters and notices after the Appellate Division in a majority verdict declared Fatwa as unlawful in a suo motu ruling.

Recently, Chief justice Syed Mahmud Hossain, senior Appellate Division judge Justice Muhammad Imman Ali and five High Court Division judges at a discussion on Saturday urged

¹³ Ram Pal-V-Hon'ble Speaker (2007) 3 SCC 184

their colleagues to issue more rulings suo motu and promote the Public Interest Litigation writ petitions to ensure justice to disadvantage people, women and children.¹⁴

The judgements of the higher judiciary of the Bangladesh are often well researched and based on the instances of study of the comparative constitutional laws. It is more often experienced that transplantation from the Indian constitutions has been made by Bangladeshi court. The Tayeeb case as discussed above also is no exception where the court established the mechanism of suo moto writ in Bangladesh by illustrating the practice of inter alia Indian constitutional practice.

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¹⁴ 'CJ, seven judges for issuing more rulings suo motu' New Age Bangladesh (Dhaka, 5 January 2020)