**International Journal of Law**
**ISSN: 2455-2194; Impact Factor: RJIF 5.12**
**Received: 22-04-2019; Accepted: 24-05-2019**
**www.lawjournals.org**
**Volume 5; Issue 4; July 2019; Page No. 103-111**

# The Role of Higher Judiciary in Enforcing Citizens' Rights: Bangladesh Perspective

**Dr. Milan Hossain**
Associate Professor, Department of Law, Britannia University, Cumilla, Bangladesh

**Abstract**
The onerous responsibility of a Judiciary of a country is to protect citizens' rights enshrined in the constitution and under general laws. Bangladesh Judiciary either higher judiciary or subordinate judiciary (lower judiciary) is also discharging its onerous responsibility enshrined in the constitution and under ordinary statutory laws to protect citizens' rights. In the paper, the role of the higher judiciary has been determined in enforcing and protecting citizens' rights in the period (2008-2016) where it is revealed that judiciary has played very positive role in the said period; it is also found that the disposal rate in writ courts were increased in comparing with period of (1972-2007) but it was lesser than filing new cases in the period of (2008-2016).

**Keywords:** higher judiciary, writ courts, Bangladesh, citizens' rights, separation of judiciary

## 1. Introduction

The onerous responsibility of the Judiciary of a country is to ensure her citizens' rights if their rights are affected or taken away by the executive, legislature or any organ of the State, institution or law enforcement agency or even by individual/s. And Bangladesh Judiciary is also assigned same responsibility by the Constitution of the People's Republic of Bangladesh (hereinafter as the Constitution); in order to discharge such responsibility the Judiciary is empowered under Article 102 of the Constitution to examine the activities of the executive and review the laws passed by the legislature whether these laws are inconsistent with the provisions of fundamental rights enshrined in the Constitution and declare the inconsistent laws as void [1]. Under Article 44 of the Constitution, the High Court Division (hereinafter as the HCD) is declared as custodian to protect the citizens fundamental rights enshrined in the third chapter of the Constitution. It is also held in the *Bangladesh v BLAST* [2016] 8 SCOB AD 1 that the Supreme Court is the custodian and protector of the fundamental rights of the citizens. In the case of Professor *Muhammad Yunus v Bangladesh* [2012] 64 DLR (AD)152 it was held that the power of HCD to issue writ under Article 102 can be exercised for the enforcement of fundamental rights as well as of non-fundamental legal rights where the action taken is procedurally ultra vires or where authority being an obligation to act judicially or even quasi-judicially, passes an order which is in violation of the principle natural justice, for safeguarding such fundamental rights of the aggrieved person. It is also opined in the case of *Khondoker Delwar v Italian Marble Works* [2010]62 DLR (AD) 298 that a citizen of Bangladesh is entitled to move the HCD under Article 102 for the enforcement of the rights conferred in Part III. It is apposite to mention that an aggrieved citizen can directly seek the remedy under Article 102(1) of the Constitution if his fundamental rights are infringed but in case of an application under Article 102(2) the petitioner must satisfy the court that there is no other equally efficacious remedy to his grievance [2]. If there is other equally efficacious remedy under general laws, the aggrieved citizens can seek remedies from the concerned authority declared by laws including district civil or criminal courts. Even the HCD cannot give relief to the citizens under article 102(2) if their rights are violated by a private individual. In that case, the subordinate courts can return the rights to the aggrieved citizens. Under article 102(2) the relief is only possible when the citizens' rights are violated by the Government or any of its authorities or any persons who exercising the public duties.

In the case of *Idrisur Rahman v Bangladesh* [2009] 61 DLR 523 the role of judiciary is described in the paragraph no. 208 as under:

'The judiciary stands between the people of the country and the State as a bulwark against Executive pressure, excesses and misuse of power by the Executive.'

In the above case, it is also cited that under the constitutional scheme, the Judiciary has been assigned the onerous task of safeguarding citizens' fundamental rights and upholding the rule of law [3].

In order to discharge the onerous responsibility of protecting and enforcing the rights of the citizens, the Judiciary must be independent, impartial and respected from all organs of the State and departments of the government. Bangladesh Judiciary (particularly judicial magistrate courts) has officially separated from the executive in 2007 by the consequence of landmark judgment known as *Masder Hossain's Case*. The higher judiciary- Supreme Court consisting of two branches High Court Division (hereinafter as HCD) and Appellate Division was separate and independent from the beginning of the birth of Bangladesh. More than 11 (Eleventh years) have gone from the formal separation of the judiciary. Within this period what role the higher has been performing in ensuring and protecting citizens' rights is a matter of research. With a view to

[1] The Constitution of the People's Republic of Bangladesh (hereinafter as the Constitution), a. 26

[2] Concord Pragatee Consortium Ltd v BPDB [2014] 66 DLR 475

[3] Idrisur Rahman v Bangladesh [2009] 61 DLR 523 Para.210

gaining this objective the researcher has analyzed the existing laws and focused upon the comparative analysis of the filing and disposal rate of cases higher judiciary particularly writ benches and recent case laws in the period (2008-2016).

**2. Higher Judiciary and Citizens' Rights**

The judiciary in Bangladesh comprises all courts and tribunals which interpret law, settle legal disputes, enforce citizens' rights and impose penalty to the offenders and uphold the rule of law. In order to analyze the role of the Judiciary in Bangladesh it can broadly be divided into two categories: i) the subordinate judiciary (Lower Judiciary at District level) & ii) the higher judiciary; the higher judiciary having two divisions- a) the High Court Division and b) the Appellate Division [4]. The lower judiciary is of civil, criminal or special or tribunal. In this paper the role of higher judiciary in enforcing and protecting citizens' fundamental and non-fundamental legal rights are determined by analyzing existing statutory laws, case laws and the number of disposal of cases by writ petitions by the HCD during the period (2008 - 2016).

The Constitution empowers the HCD as custodian to protect the citizens' fundamental rights [5]. The same view was held in a recent judicial pronouncement that the Supreme Court is the custodian and protector of the fundamental rights of the citizens [6]. The HCD can grant necessary orders and reliefs for the enforcement of fundamental and non-fundamental rights under Article 102 of the Constitution. The HCD can also apply the power of judicial review conferred upon it by the Constitution to examine the activities of the executive and legislature with a view to ensuring citizens' rights and establishing the rule of law. An aggrieved citizen can seek the enforcement of his infringed fundamental rights in bringing a writ petition before the HCD.

Whenever the rights of a citizen are affected, it is the constitutional mandate upon the court to adjudicate it and enforce it [7]. If it finds that citizens' fundamental rights are infringed, it is the constitutional obligation of the HCD to pass orders for the enforcement of fundamental rights under Article 102(1) of the Constitution. Article 102 empowers the HCD to grant necessary orders and reliefs for the enforcement of fundamental and non-fundamental rights. Article 102(1) particularly confers power upon the HCD on the enforcement of citizens' fundamental rights but in the matter of enforcement of fundamental rights the aggrieved citizen generally has to apply before the HCD. On this point the Constitution declares as under [8].

'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 this Constitution.'

It is apt to state here that the right to move to the HCD for the enforcement of fundamental rights under Article 44 of the Constitution is itself a fundamental right. A citizen should not wait for violation of a fundamental right; he can move to the HCD even when he faces a threat to his right [9]. Even a citizen can bring a petition before the Court under Article 102 for the enforcement of fundamental rights though his rights are not directly and personally affected; where his rights commonly or collectively affected; where the undetermined people are affected, where the undetermined persons are very poor, helpless; where there is public wrongs, injuries or invasion to the fundamental rights of undetermined number of people [10]. actually where a citizen is not personally affected but he is sufficiently interested with the matter in dispute [11]. when a public functionary owing to serve to the people in general but it is not served, the common interest of all citizens are affected and each citizen is deemed as aggrieved [12]. under these circumstances a citizen can bring an action before the HCD in the name of 'public interest litigation'. In the case of *Ekushey Television Ltd.* v *Dr. Chowdhury Mahmood Hasan* (2003) 55 DLR (AD) 26, para 34 observed:

The nature of the public interest litigation (called PIL hereinafter) is completely different from traditional case which is adversarial in nature whereas PIL is intended to vindicate rights of the people. In such a case benefit will be derived by large number of people in a contrast to a few. PIL considers the interest of others and therefore, the court in public interest litigation acts as the guardian of all the people whereas in a private case the court does not have such power. Therefore, in public interest litigation the court will lean to protect the interest of the general public and the rule of law vis-à-vis the private interest.

In connection to the PIL the Supreme Court held in *Kazi Mukhlesur Rahman* v *Bangladesh* (1974) 26 DLR (AD) 44:

Public interest litigation means the legal action initiated in a court of law for the enforcement of rights and interest of citizens in general or a section thereof. The judiciary is to play a vital and important role not only preventing and remedying abuse and misuse of power but also to eliminate injustice. It must not be forgotten that the cause of justice cannot be allowed to be thwarted by any procedural technicalities. An action may be maintained for judicial redress brought before it by a citizen provided from such action the State will be benefited.

In a public interest litigation, the right of a citizen is not directly or personally affected but he can take action on behalf of undetermined number of people if he has sufficient interest in the dispute matter; he will have *locus standi* if he initiates to vindicate the cause of the people in general or that of a group in the society who are for some reasons not in a position to vindicate their cause before the court. On the contrary, the court is under constitutional obligation to adjudicate the matter brought before it for ensuring and enforcing citizens' rights and establishing the rule of law. In case of public interest litigation, the court is under obligation to inquire the motive of the applicant whether the applicant brought it for bad intention or not before the court instead of affected people; if the motive is to serve the interest of somebody than the interest of common people, the court should declare that applicant has no *locus standi*

[4] Supra Note 1, a. 94.
[5] Id, a. 44.
[6] Bangladesh & ors v BLAST & ors [2016] 8 SCOB AD 1.
[7] Mahmudul Islam, Constitutional Law of Bangladesh (3rd edn, Mullick Brother 2012).
[8] Supra Note 1, a.102.
[9] Supra Note 8.
[10] Dr. Mohuuddin Farooque v Bangladesh [1997] 49 DLR (AD)1.
[11] Nasiruddin v Secretary, LGRD [1999]51 DLR (AD) 213.
[12] Mrs. Parvin Akter v Rajuk, [1998]18 BLD 117, para 15.

though it is a public interest litigation [13].

When a matter of infringement of a citizen's fundamental right is brought before the Court, it is the obligation of the Court to grant necessary reliefs but the decisions of the HCD are not final as the aggrieved citizen can appeal under the Constitution, Article 103; to grant relief for the enforcement of citizens' fundamental rights is not discretionary of the Court but it is obligatory. In a case the Appellate Division (AD) gave an *obitur dictum* that when any violation of fundamental rights enshrined in the Constitution was alleged as the only ground and no violation of legal right or any provision of law protecting citizen's right was raised, only then resort may be taken to fundamental rights to protect any citizen of such right [14]. In case of clear and blatant violation of fundamental rights, the Court may grant compensation to the victim citizen [15]. In a recent leading case the HCD opined that the court is competent to award compensation for infringement of fundamental rights by colourable exercise of power by police under section 54 & 167 of the Code of Criminal Procedure [16]. In the mentioned case the detenu is directed to be set at liberty within three hours and the District Magistrate is to pay him a compensatory cost of Taka 5,000 for the whimsical exercise of power curtailing the liberty of a person.

### 2.1 Higher Judiciary: Fundamental and Non-Fundamental Legal Rights

The Constitution confers the power of judicial review under Article 102(2) upon the HCD to examine the activities of the executive and legislature with a view to ensuring citizens' rights and establishing the rule of law. The HCD may grant necessary orders on the application of an aggrieved citizen when his fundamental and non-fundamental rights are affected subject to exhaustion of alternative efficacious remedies available to him. It is also stated in earlier section that when any question of violation of fundamental rights raised as the only ground and no violation of legal right or any provision of law protecting citizen's right was alleged, only then resort may be taken to fundamental rights to protect any citizen of such right [17]. And in case of only violation of fundamental rights, the court grants remedies under Article 102(1) a of the Constitution and for violation of non-fundamental right or any provision of the constitution or provision of law protecting citizen's right, the remedies are available in Article 102(2) subject to the exhaustion of alternative efficacious remedies to him by any law. But in case of enforcement of fundamental rights under Article 102 (1), no need to exhaust the efficacious remedy and an application can be directly entertained by Article 102 (1).

An aggrieved citizen can seek remedies under Article 102(2) in the form of writ [18]. petitions which is historically originated and developed in the British Legal System. It was exercised and issued by the Crown by virtue of prerogative and known as prerogative writs e.g. the writ of *habeas corpus*, *mandamus*, *prohibition*, *certiorari*, *procedendo*, and *quo-warranto*.

In Bangladesh, the Constitution empowers the HCD under Article 102 to issue the writs on the petitions made by the aggrieved citizens. It is apt to state that the term writ or different forms of writ are not directly used in the Constitution; they are used technically. If the language of article 102(2) is analyzed, five types of writ viz. the writ of *habeas corpus*, *mandamus*, *prohibition*, *certiorari*, and *quo-warranto* are found which the High Court Division may, on the application of any person aggrieved, make an order in response as under:

1. directing a person performing any functions in connection with the affairs of the Republic or of a local authority ---- this order refers as writ of *mandamus;* [19].
2. to refrain from doing that which he is not permitted by law to do or to do that which he is required by law to do---- this order is writ of *prohibition;* [20].
3. declaring that any act done or proceeding taken by a person performing functions in connection 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---- this order is known as writ of *certiorari;* [21].
4. directing that a person in custody be brought before it so that it may satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner---- this order is writ of *habeas corpus;* [22]. and
5. requiring a person holding or purporting to hold a public office to show under what authority he claims to hold that office---- this order is writ of *quo-warranto.* [23].

### i. Writ of Mandamus

*Mandamus* means 'we command'. By this writ the higher judiciary directs a person holding office of a public nature to do something, which he is bound by law but abstains from doing. Article 102(2)(a)(i) of the Constitution empowers the HCD to issue a writ of mandamus to compel a person performing functions in connection with the affairs of the Republic or of local authority. But this article does not require that the applicant for mandamus must have a specific legal right; it only requires the applicant to be an aggrieved citizen [24]. It may issue where there is a violation of legal right or of legal duty by a person performing functions in connection with the affairs of the Republic or of local authority.

*Mandamus* may issue on the government for the following purposes established by the judicial pronouncements:

a. to take necessary measurements to prevent adulteration of food; [25].
b. to direct the governmental authority in taking steps for installation of speed governor in in all the public transports to ensure safety of the people; [26].
c. to establish vacation court in every district; [27].
d. to compel the government to hold the commission for

[13] Supra Note 8 at 851.
[14] Chairman RAJUK v Abdur Rouf Chowdhury [2009] 61 DLR (AD) 28.
[15] Supra Note 8.
[16] Korban v Bangladesh [2003]55 DLR 194.
[17] Chairman RAJUK v Abdur Rouf Chowdhury [2009] 61 DLR (AD) 28.
[18] A writ literally means a written order. It refers a written command, precept, or formal order issued by a court, directing or enjoying the person or persons to whom it is addressed to do or refrain from doing some act specified therein.

[19] The Constitution, a. 102(2)(a)(i).
[20] ibid.
[21] ibid, a. 102(2)(a)(ii).
[22] ibid, a. 102(2)(b)(i).
[23] ibid, a. 102(2)(b)(ii).
[24] Supra Note 8.
[25] Human Rights for Peace for Bangladesh v Bangladesh, 2010 BLD 125.
[26] Bangladesh v Ministry of Home Affairs [2008]16 BLT 264.
[27] Monzil Morshed v Bangladesh [2008]16 BLT 327.

inquiry into violation of human rights; [28].
e. to direct police to prosecute an offender against law or
f. to record FIR start investigation; [29].
g. to pay leave salary, allowance, or future salary;
h. to restore seniority of a government servant, or
i. to direct the government to realize arrear telephone bills from the members of the parliament etc.

No mandamus can issue to give direction for implementation of recommendation or decision of inter-ministerial correspondence in writ jurisdiction due to inter-ministerial communications being as merely policy guidelines but not creating any rights [30]. Such writ cannot be issued to compel the government to implement its policy nor can it be issued merely on consideration of equity [31]. Nor mandamus can issue for restoration to office in Private Corporation [32].

**ii. Writ of Prohibition**

Prohibition means 'to forbid' from doing something. Article 102(2)(a)(i) of the Constitution confers the power to the HCD to issue a writ of prohibition. Such writ can issue where a tribunal proceeds to act (a) without or in excess of jurisdiction, (b) in contravention of some statute or the principles of common law, (c) in violation of principles of natural justice, (d) under a law in which itself is ultra vires or unconstitutional, or (e) in contravention of fundamental rights. Such writ also lies against judicial and quasi-judicial bodies [33].

**iii. Writ of Certiorari**

*Certiorari* means 'be certified' of the proceedings of any lower court or tribunal to be investigated by the superior court. Article 102(2)(a)(ii) of the Constitution empowers the HCD to issue writ of certiorari with a view to declaring an act done or proceeding taken by a person performing functions in connection with the affairs of the Republic or of a local authority to be without lawful authority and of no legal effect. Simply stating that the HCD can interfere when the person proceeded against has done an act without lawful authority. But this article does not permit the HCD to interfere on the ground of error of law on the face of record [34]. Under Article 102(2)(a)(ii) of the Constitution, an order can be passed against any authority, irrespective of the nature of the function, if he is performing the function in connection with the affairs of the Republic or any local authority.

**iv. Writ of Habeas Corpus**

*Habeas Corpus* means 'have his body' i.e.to have the body before the Court. Article 102(2)(b)(i) of the Constitution provides to the HCD the power and obligation to issue a writ in the nature of habeas corpus when a citizen is detained without any lawful authority and in an unlawful manner [35]. Such writ is available against any wrongful detention whether by a public functionary or by a private person [36]. It lies against all illegal detention by public functionaries involve infringement of fundamental rights guaranteed in Articles 31-33 of the Constitution. It is also maintainable against a private individual when the question of illegal custody is involved [37]. A habeas corpus proceeding is not maintainable if the person concerned has been released. Such writ will not be maintainable where the detention order has been passed but the person concerned has not been detained [38].

**v. Writ of Quo Warranto**

*Quo Warranto* means 'by what warrant or authority'. Article 102(2)(b)(ii) confers the power upon the HCD to issue the writ of quo warranto requiring a person holding or purporting to hold a public office to show under what authority he claims to hold that office. Such writ will lie against speaker, chief justice or a judge of the HCD, ministers, members of parliament, chairman of municipality, members of the municipal board, administrator of municipal corporation appointment by the government, chief engineer of Municipal board, member of bar council, chairman or member of union parishad, member of senate or syndicate of a university, Dean of a faculty in a university, Chief Metropolitan Magistrate, government pleader or against the members of civil service [39].

In order to bring a petition under Article 102(1) & 102(2) (a) of the Constitution a citizen must be aggrieved one. And Article 102(2) requires that an affected citizen must exhaust the alternative efficacious remedy available before him. Therefore, it is relevant to explain in reference to judicial pronouncements who is an aggrieved person and whether he exhausts the alternative efficacious remedy available before him before made the petition before the HCD under the said article:

**(a) Aggrieved person**

Article 102 requires that the petitioner seeking enforcement of fundamental rights or constitutional remedies must be a person aggrieved [40]. The Constitution does not define the terms. The terms are defined in several judicial pronouncements. In case of *Nasiruddin* v *Secretary, LGRD* (1999) 51 DLR (AD) 213 it was observed that the aggrieved person means a person who even without being personally affected has sufficient interest in the matter in dispute. When a public functionary owing to serve to the people in general but it is not served, the common interest of all citizens are affected and each citizen is deemed as aggrieved [41]. Under Article 102(2) an application for mandamus, prohibition or certiorari are required to be brought by aggrieved persons but under the same article viz. Article 102(2)(ii) of the Constitution, the applicant does not require to be an aggrieved one in bringing a writ for *quo warranto* [42].

Any person may apply where the public interest is related with the matter [43]. For the same reason, an application for habeas corpus can also be made by any person who needs not be a 'person aggrieved'. It is pertinent to state here that

---

[28] Asaduzzaman v Bangladesh, 2009 BLD 643.
[29] Hasuba Begum v Ministry of Home Affairs, 2010 BLD 481.
[30] Aminullah v Bangladesh [2008] 13 BLC 224.
[31] Md. Abdul Bari v Bangladesh 2010 BLD 465.
[32] Shahidul Islam v Bangladesh [2008] 60 DLR 710.
[33] Supra Note 8.
[34] ibid.
[35] Dr. Shipra v Bangladesh (2009)14 BLC 561.
[36] Supra Note 8.
[37] Bangladesh Jatiyo Mahila Ainjibi Samity (BJMAS) v Ministry of Home Affairs and Others, 2008 BLD, 580.
[38] Mohammad Ali v BD [1995] 47 DLR 350.
[39] Supra Note 8.
[40] Bangladesh Sangbadpatra Parishad v Bangladesh [1991] 43 DLR (AD) 126.
[41] Mrs. Parvin Akter v Rajuk, (1998) 18 BLD 117, Para.15.
[42] Bangladesh v Md. Aftabuddin, 2010 BLD (AD) 1.
[43] Supra Note 8.

for the enforcement of all fundamental rights the application has to be filed by an aggrieved person and apparently when the detention of a person is challenged as violative of fundamental rights guaranteed under Article 32 or 33 of the Constitution, the application has to be filed by an aggrieved person. On the contrary, any person can file a writ petition if violation of fundamental right is not alleged or involved [44].

**(b) Exhaustion of efficacious remedy**

The rule of exhaustion of alternative remedies is a rule of the court where it requires that in order to entertain writ petitions; an affected citizen has to satisfy the court that he/she exhausted the alternative efficacious remedies. Under Article 102 (2) of the Constitution, it is a requirement that the applicant has to exhaust efficacious remedy available to him by any law in order to make an application before the HCD for judicial review of any action taken by a person holding office of a pubic nature whereas in case of enforcement of fundamental rights under Article 102 (1), no need to exhaust the efficacious remedy and an application can be directly entertained before the Court. Under Article 102(2) of the Constitution, writ will be maintainable for enforcement of non-fundamental rights subject to exhaustion of statutory remedies. Better explanation was established in several judicial pronouncements. As for examples, thus when a contract incorporates provision of arbitration, writ will not lie in respect of such contract for non-exhaustion of the remedy provided in the contract; the petitioner can take recourse to resolution of the dispute by arbitration [45]. If there is any illegality in convicting a person, the remedy is by way of appeal or revision provided by the statute and not by way of writ. But where there is no provision of appeal or revision for illegal conviction, the detenu may bring it before the HCD in the form of writ [46]. Where there is special provision for appeal against judgment and decree of the Artha Rin Adalat, no writ petition lies under Article 102 maintainable unless the judgment is without jurisdiction [47]. Where it is claimed by the petitioner that he has executed an enforceable agreement, his relief lies in a suit of lower judiciary for specific performance and not in writ jurisdiction [48].

## 3. Disposal of Writs by the Courts During the Period (2008-2016)

It is earlier stated that if the fundamental rights or even non-fundamental rights of citizens (subject to exhaustion of efficacious alternative remedy) are infringed by the State herself or any governmental institutions or law enforcement agencies or government employees while discharging their duties, the aggrieved citizens can seek enforcement of their rights through the writ petitions from the HCD under Article 102(1) & (2) of the Constitution. Therefore, it is the research question what performance has been shown by the higher judiciary in regards enforcement of citizens' rights? In doing so, a yearly based data in the period (2008-2016) regarding filing and disposal of writs by Writ Courts are analyzed:

[44] ibid.

[45] Nazrul Islam v Bangladesh [2006] 58 DLR 431.

[46] Rajab Ali v East Pakistan [1958] 10 DLR 385.

[47] Edruk Ltd v Bangladesh [2009] 14 BLC 102.

[48] Abdul Wadud v Nazmul Hossain [2009] 14 BLC 14.

**Table 1:** Number of Filing and Disposal of Writs by Writ Courts during the Period (2008-2016)

| Year | Filing New writs | Disposal of Writs | Remarks |
|---|---|---|---|
| 2008 | 11,402 | 8915 | Disposal < Filing |
| 2009 | 8,848 | 6370 | Disposal < Filing |
| 2010 | 10,175 | 7303 | Disposal < Filing |
| 2011 | 11,421 | 10924 | Disposal < Filing |
| 2012 | 17,876 | 8028 | Disposal < Filing |
| 2013 | 12,958 | 7473 | Disposal < Filing |
| 2014 | 12843 | 8688 | Disposal < Filing |
| 2015 | 14,284 | 13457 | Disposal < Filing |
| 2016 | 16,965 | 9857 | Disposal < Filing |

***Source***: Annual Reports, 2008-2016, HCD, Supreme Court of Bangladesh

From the above yearly basis comparative data, one thing is revealed that the number of disposal of writs is lesser than number of filing writs in each year particularly from the year-2008 to year- 2016. This analysis was confined only between new filing and disposing of writs in the mentioned period. In the previous years (1972-2007) 126,175 writs were instituted but among them 86024 writs were disposed of. As a result, in the said period, 40,151 writs were pending for disposal where Supreme Court Annual Report 2016 reveals that at the end of year-2007, total pending writs has stood as 40,980 (Forty Thousand Nine Hundred Eighty). In contrary, in the period (2008-2016)116472 writs were filed but only 81015 writs were disposed of. Accordingly, in this period new 35457 writs stand as pending. However, if consider total pending writs column of Supreme Court Annual Report 2016, the total number of pending writs stand as 69,326 (Sixty Nine Thousand Three Hundred Twenty Six) at the end of year-2016. Therefore, in the period (2008-2016) new pending writs stand as (69326-40980) =28346 (Twenty Eight Thousand Three Hundred Forty Six). The scenario can be conveniently shown in figure as under:

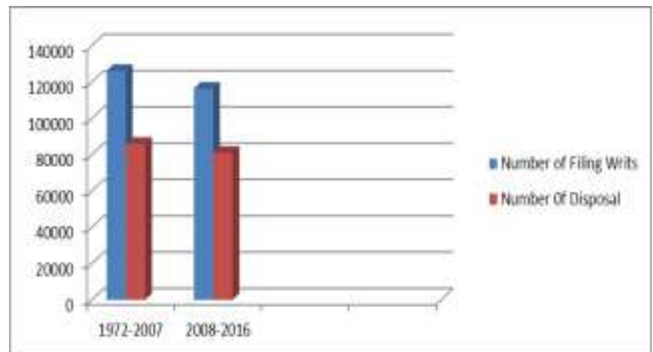


**Fig 1**

In the pre-separation period (1972-2008), on an average 3505 writs were filed and about 2390 writs were disposed of per year whereas in the research period 12941 writs were filed and 9558 writs were disposed of per year. In the pre-separation period total judges of the High Court Division including writ benches was 1117 and on an average there were 31 judges per year whereas in the research period total judge was 815 and about 91 judges per year [49]. As a result, it is revealed that in the research period the filing and pending rate of writs, both per year were thrice where the number of judges was thrice but disposal rate per year was

[49] Annual Report,2016, HCD, Supreme Court of Bangladesh.

four fold in comparing with the pre-separation period (1972-2008). Therefore, the disposal rate was increased in the research period in comparing with the pre-separation period (1972-2008).

**4. Citizens' Rights: Case Laws and Case Study in the Period (2008-2016)**

The onerous responsibility of the judiciary is to protect and enforce citizens' rights and upgrade the rule of law. And judiciary is discharging such functions by exercising its extraordinary power –judicial review for the examination of the functions of the government or its different organs or any persons involved with public functions. The relevant cases discharged by the Judiciary in the period (2008-2016) have been selected and studied in order to determine the role of judiciary in enforcing citizens' rights as under:

In the case of Professor *Muhammad Yunus v Bangladesh* [2012] 64 DLR (AD)152 it was held that the power of HCD to issue writ under Article 102 can be exercised for the enforcement of fundamental rights as well as of non-fundamental legal rights where the action taken is procedurally ultra vires or where authority being an obligation to act judicially or even quasi-judicially, passes an order which is in violation of the principle natural justice, for safeguarding such fundamental rights of the aggrieved person.

It is now well settled proposition of law that even the HCD can sou moto interfere when it comes to its knowledge that liberty of a citizen had been taken away by the unlawful ground. In such matter court should avoid technicality. When the State does not raise any objection in such circumstances, this court can certainly interfere, when the liberty of a citizen is curtailed and his valuable right of freedom is taken away by the order of the subordinate court. The HCD is empowered under section 491 of the Code of Criminal procedure to set at liberty of the victim who is found to be detained illegally or improperly. Such observation was given in the case of *Emran Ahmed v Bangladesh* [2012] 64 DLR 462

On the contrary, it is held in the case of *Khondoker Delwar v Italian Marble Works* [2010] 62 DLR (AD) 298 that a citizen of Bangladesh is entitled to move the HCD under Article 102 for the enforcement of the rights conferred in Part III. This substitution of article 44, no doubt, was designed to advance the rule of law and the welfare of the people and accordingly it needs to be retained for the interest of justice.

In the case of *Siddique Ahmed v Government of Bangladesh and others* [2013] 65 DLR (AD) 08 it is held that since the vires of Section 3 of the Constitution (Seventh Amendment) Act 1986, was as issue, the writ petitioner rightly invoked the extraordinary powers of the High Court Division. Since no equally efficacious remedy is provided under any other provisions of law, the persons who are aggrieved by the orders of the Martial Law Courts, may in appropriate cases, invoke the extraordinary powers of the High Court Division.

In the case of *RAJUK v A Rouf Chowdhury* [2009] 61 DLR (AD) 28 it was decided that when any violation of fundamental right enumerated in the Constitution was alleged as the only ground and no violation of legal right or law has been alleged whatsoever without reference to the provision of law protecting the right of a citizen, only the resort may be taken to fundamental right to protect any citizen of such rights.

In the case of *Mahbubul Alam v Bangladesh* [2009] 61 DLR 728 it was decided that a person in the service of the Republic who intends to invoke fundamental right for challenging the vires of a law will seek his remedy under Article 102(1) but in all other cases he will be required to seek remedy under Art. 117(2) of the Constitution.

In the case of *Bangladesh Biman Corporation and others v Md. Zahangir Farazi and others* [2013] 65 DLR (AD) 116 it was held that once the inter-ministerial /divisional communications or departmental notes are given effect to by way of communication and the parties, so communicated act on that, a legal right is accrued to them and if that right is infringed or is threatened to be infringed them they may approach a Court of law to protect such right.

In case of *Concord Pragatee Consortium Ltd v BPDB* (2014) 66 DLR 475 it was held that the fundamental difference between two sub-articles of Article 102 of the Constitution is that while Article 102 (1) can be invoked directly if an aggrieved person can make out a case of infringement of fundamental rights, however, in order to qualify to be an applicant under Article 102(2), the aggrieved person must satisfy the court that there is no other equally efficacious remedy to his grievance.

Jurisdiction under Article 102(2), as a whole, is known as an extraordinary jurisdiction and the same is to be availed of only when there is 'no other equally efficacious remedy' available.

It restricts access to judicial review by inserting the terms "if no other equally efficacious remedy is provided by law". With the peculiar jurisdictional restrictions the Supreme Court of Bangladesh did not lag far behind in its bid to reach justice to the poor and the underprivileged in times of their need [50].

It is also held in case of *Golzar Hosain (Md), Advocate v Janata Bank* [2013] 65 DLR (AD) 101 that the power of judicial review under Article 102 cannot be invoked unless it can be shown that the alterative remedy is not efficacious or adequate, the wrong complained of is inextricable mixed up and the vires of the statute or a statutory provision is challenged.

In the case of *BLAST v Bangladesh* [2011] 63 DLR the fact is that the news which were published in different dailies on the imposition of extra judicial punishment by the name of Fatawa across the country upon the women and men in the form of lashing and beating, which are violative of fundamental rights guaranteed in the Constitution under Articles 31, 32, and 35 have been brought in the form of writ partitions before the court by the petitioners namely BLAST, BMP, ASK, BRAC and Nijera Kori to declare the imposition and execution of extra judicial punishment by the name of Fatawa as illegal and violative of fundamental rights and to give directions the respondents to take necessary steps to stop and prevent them. Some news of them is as under:

The petitioners came to know from a report published in "The Daily Prothom Alo" on 24. 5.2009 that a woman of Naogaon village, Daudkhandi Upazila, Comilla had to face 39 lashes by the village elders' salish (arbitration) due to born a child out of wedlock. In consequence of lashes the woman was seriously wounded and was admitted into the Daudkhandi Upazila Complex Hospital.

---

[50] Maulana Syed Rezaul Haque Chadpuri v Bangladesh Jamaat-e-Islam (Spl Original) 66 DLR (2014) 14.

Another report in the Daily Star on 16.8.2009 titled "Fatwa Again" 101 lashes for refusing uncle's sexual advances" stated that a woman was whipped in public following issuance of a Fatwa by a local muezzin.

One report published in the Daily Star on 24.1.2010 under the heading "Village Arbitration- Rapist spared, victim lashed" is a fact of writ petition; a girl of 16 years had to receive 101 lashes in the name of Fatwa after 8 months being raped in Kasba Upazila by village arbitration but amazingly no punishment is given to the rapist, Enamul Mia, 20 years.

Another report was published in the Daily Prothom Alo on 22. 5.2010 where the fact is that the victim had an affair with a hindu boy. A village arbitration consisting of the village elders, and three imams gave order 101 lashes on the victim as per Islami Sharia. The uncle of the victim carried out the lashing of 101 dorra (lashes) and one stage, the victim became unconscious.

In the mentioned case, under the above circumstances, the court declared the imposition and execution of extra judicial punishment by the name of Fatawa as void, having no legal effect without proper lawful authority and violative of fundamental rights enshrined in the Constitution. The Court also gave some directions to be implemented by the government to prevent the imposition and execution of extra judicial punishment by the name of Fatawa from the society.

In the case of *HRPB v Bangladesh* [2011] 63 DLR the petitioner, Human Rights and Peace for Bangladesh is a non-profit organization which works (a) to uphold the human rights of the citizens, (b) to work for the poor people (c) to give legal support to the helpless people, (d) to work for the protection of the life of the citizens and (e) to build up the awareness amongst the people about their rights. Reports were published in the daily newspapers that Bangladesh is on the risk of earthquake zone, which created threat to the life of the people of the country. So, proper steps to save the life of the citizens are of great public importance and it is the first duty of the state to take proper steps to save the life of the citizens but the governmental authority has yet taken any steps to collect proper equipment to face earthquake even after the continuous news reported in the daily newspapers. The petitioners served a notice on the respondents to take necessary steps including adequate preparation and arranging rescue equipment. And therefore, the petitioner filed the instant writ petition before the court and obtained the Rule Nisi. In this Rule Nisi asking the respondents to show cause as to why the inaction of the respondents to arrange sufficient equipment in the natural disaster in consequence of earthquake should not be declared to be illegal and without lawful authority and why a direction should not be given upon the respondents to arrange sufficient rescue equipment to save the life of the citizens in case of the earthquake.

It is opined by the Court that the government is bound to protect life and property of the people in the discharge of its constitutional obligation; the Government has been directed to make available sufficient necessary equipment for rescue of the citizens soon after occurrence of a severe earthquake. And it is also declared that recent news items published in different national dailies creates great anxiety among the citizens of Bangladesh. Even it is also declared that if further direction is needed, the parties will be at liberty to make applications in the instant rule as this rule nisi will be treated as continuous mandamus.

In the case of *BELA v Bangladesh* [2010] 62 DLR 463 the petitioner, Bangladesh Environmental Lawyers Association (BELA) brought a writ petition under Article 102 of the Constitution to direct the respondents to protect the river Jadukanta (in the mouzas of Puranlaur, Chaliarghat, Lamasram, Purbadoil and Ghagra, Police Station- Thairpur, Distrct-Sunamganj) from the illegal extraction of sands from its bed and banks and to give further directions to initiate legal measures against the illegal and unscrupulous and traders and also to realize compensation from them for causing damages to the river and the villagers of the said villages. The petitioner stated in the petition that the environment and ecology of the country are being continuously endangered and threatened by various activities originating from the public and private affairs. The rivers of Bangladesh were affected largely and the people surrounding it are fallen into the problems and their rights are being violated as a consequence. This scenery is reflected in case of the river Jadukanta. From the immemorial time, the lives of the people of Sunamganj are very closely connected to this river and its resources but due to illegal extraction of sands from the bed of this river the lives of the people are at stake. The surrounding villagers of this river always claim proper management, maintenance and protection of this rivers but the concerned authority fails to do so. Therefore, the matters were brought before the HCD in the form of writ petition. In this case the court recognized the right of the villagers under Articles 31, 32, 42 of the Constitution in the following ways:

Right to protection of law, to life and to hold properties of the villagers are guaranteed by the Constitution and the respondents are duty bound to discharge their duties to ensure those rights of the villagers. This is a fit case for giving direction upon the respondents to stop illegal extraction of sand from the bed and banks of the river and outside the designated area of the Fazilpur Sand Quarry.

Finally, the court has granted remedies sought by the petitioners and gave directions to the concerned authority to protect the river from illegal extraction of sand from its bed and banks and thus to protect the constitutional rights of the villagers.

In the case of *Bangladesh Beverage v Rowshan Akter* [2010] 62 DLR 483 the deceased Mozammel Hossain Montu was husband of the plaintiff-respondent, reporter of Daily Sangbad. He met accidental death on 3.12.1989 consequence of fatal injuries (injured on the head, face and skull was totally broken) at the time of crossing the road in front of Ananda Bhaban, Shantinagar by the minibus of the defendant-appellant being No. Dhaka 6933, rushing from the eastern side- Jonaki Cinema Hall (i.e. coming from wrong side). At the time of the death, the deceased was only about 44 years leaving 2 minor sons, parents, brother, sister, and wife. The Plaintiff-respondent, wife of the deceased brought the claims of TK. 3, 52, 97000 as compensation before the court. The lower court gave judgment on behalf of the plaintiff and the HCD also gave decree to the plaintiff on 11th May, 2010. The defendant-appellant is directed to pay TK. 2,01,47,008 as compensation. And the Court also had shown its anxiety over regular accidental death of the citizens in the Country. The court has shown its anxiety as following ways and gave recognition to the right of life to the citizens:

Life is bundle of incident. Every child is born with expectation of life and with constitutional guaranteed right

of basic requirements for living. Death is inevitable but premature death in whatever form is not expected and cannot be consoled. Accidental death is also a premature death. Government is answerable to all such premature death as Government is to protect the citizen and is responsible for the life of a citizen.

In the case of *Emdadul Haque v DG, Education* [2008] 60 DLR the petitioner is a demonstrator of computer studies in the intermediate level of the Shyampur Degee College, Rangpur. He got appointment letter on 6.12.2003 and joined on 11-12-2003. In September, 2005, he was enlisted in the MPO list and continuously received MPO portion of salary till April, 2008. However, from May, 2008 his name was withdrawn from the MPO list without any notice and he filed a representation to the concerned authority but got no satisfactory reply. By this circumstance, he was compelled to bring a writ petition before the HCD to seek his right. The Court gave decision on behalf of him; the withdrawal of the name of the petitioner from the MPO list without giving any notice and affording an opportunity of being heard to the petitioner is a clear violation of the principle of natural justice; the withdrawal of the name of the petitioner from MPO list has been declared as made or done without any lawful authority and is of no legal effect; the respondents was directed to pay the petitioner the MPO salary from May, 2008.

## 5. **Conclusion**

The constitutional responsibility of Bangladesh Judiciary is to ensure, protect and enforce citizens' rights enshrined in the constitution and under ordinary laws. The higher judiciary of Bangladesh particularly the High Court Division of the Supreme Court of Bangladesh is discharging its responsibility by examining the activities of the government and by reviewing the laws passed by the legislature whether it is inconsistent with provisions of fundamental rights enshrined in the constitution. It works as custodian and protector of the fundamental rights of the citizens. Such positive role has been found in number of judicial pronouncements of the Supreme Court of Bangladesh in the recent years particularly in the period (2008-2016) (which is already discussed in sections 3 & 4). In a recent judicial pronouncement, it is held that the court can certainly interfere when the liberty & the freedom of right of a citizen is taken away by the subordinate court. It is also held that by the section 491 the HCD is empowered to declare liberty of the victim if he/she is found to be detained illegally or improperly [51]. In another case, the court declared the imposition and execution of extra judicial punishment by the name of Fatawa as void, having no legal effect without proper lawful authority and violative of fundamental rights enshrined in the Constitution. The Court also gave some directions to prevent the imposition and execution of extra judicial punishment by the name of Fatawa from the society [52]. In another judicial pronouncement, the higher judiciary declared corporeal punishment viz. caning, beating, and chaining upon children in various educational institutions as absolutely prohibited, inflicting it be deemed as misconduct of the concerned teachers, and gave directions to the concerned authorities of the Government to take necessary steps to prevent the imposition of corporeal punishment by way of framing and adopting and disseminating appropriate guidelines, directions or orders to all concerned authorities [53]. It is true that the judiciary has shown its positive role in number of cases in the period (2008-2016) but the total disposal rate was lesser than filing of cases in the mentioned period (see Table No. 1,). As a result, the number of pending cases has been increased rapidly in in writ courts in the said period. At the end of year-2007 the pending cases were 40,980 in writ courts whereas it as 69,326 in writ courts at the end of year-2016. This comparative data show that decree of overload or backlog of cases which is certainly increasing the suffering of right seekers and making linger of disposal of their cases. It is also found that in the research period the filing and pending rate of writs in the writ courts were thrice per year where the number of judges was also thrice but disposal rate was four folds per year in comparing with the pre-separation period (1972-2008). Therefore, the disposal rate was increased in the research period in comparing with the pre-separation period (1972-2008). As a result, it can be said that in the research period the role of the Judiciary has been strengthened more in protecting citizens' rights in Bangladesh. The Judiciary could dispose of more cases and play more important role if adequate number of judges were employed in the said period according to proportionate of the people in Bangladesh in comparing with developing and developed country on the issue [54].

## **References**


1. Abdul Wadud v Nazmul Hossain, 14 BLC 14, 2009.
2. Aminullah v Bangladesh, 13 BLC 224, 2008.
3. Annual Reports, HCD, Supreme Court of Bangladesh, 2008-2016.
4. Asaduzzaman v Bangladesh, BLD 643, 2009.
5. Bangladesh Sangbadpatra Parishad v Bangladesh 43 DLR (AD) 126, 1991.
6. Bangladesh Jatiyo Mahila Ainjibi Samity (BJMAS) v Ministry of Home Affairs and Others, BLD, 580, 2008.
7. Bangladesh v Md. Aftabuddin, BLD (AD) 1, 2010.
8. Bangladesh v Ministry of Home Affairs 16 BLT 264, 2008.
9. Bangladesh v BLAST 8 SCOB AD 1, 2016.
10. BLAST v Bangladesh 63 DLR 1, 2011.
11. BLAST v Bangladesh 63 DLR 643, 2011.
12. Bangladesh & ors v BLAST & ors 8 SCOB AD 1, 2016.
13. Concord Pragatee Consortium Ltd v BPDB 66 DLR 475, 2014.
14. Chairman RAJUK v Abdur Rouf Chowdhury 61 DLR (AD) 28, 2009.
15. Dr. Shipra v Bangladesh 14 BLC 561, 2009.
16. Dr. Mohuuddin Farooque v Bangladesh 49 DLR (AD)1, 1997.
17. Edruk Ltd v Bangladesh 14 BLC 102, 2009.
18. Emran Ahmed v Bangladesh 64 DLR 462, 2012.
19. Hasuba Begum v Ministry of Home Affairs, BLD 481, 2010.
20. Human Rights for Peace for Bangladesh v Bangladesh, BLD 125, 2010.
21. Idrisur Rahman v Bangladesh 61 DLR 523 Para. 210,


[51] Emran Ahmed v Bangladesh [2012] 64 DLR 462.
[52] BLAST v Bangladesh [2011] 63 DLR 1.
[53] BLAST v Bangladesh [2011] 63 DLR 643.
[54] There are only 10 judges for per million people in Bangladesh where in India 18, in UK 51 and in Australia 41 as per Bangladesh Law Commission.

2009.
22. Korban v Bangladesh 55 DLR 194, 2003.
23. Mahmudul Islam, Constitutional Law of Bangladesh 3rd edn, Mullick Brother 2012.
24. Mrs. Parvin Akter v Rajuk, 18 BLD 117, para 15, 1998.
25. Monzil Morshed v Bangladesh 16 BLT 327, 2008.
26. Md. Abdul Bari v Bangladesh BLD 465, 2010.
27. Mohammad Ali v BD 47 DLR 350, 1995.
28. Mrs. Parvin Akter v Rajuk, 18 BLD 117, Para. 15, 1998.
29. Maulana Syed Rezaul Haque Chadpuri v Bangladesh Jamaat-e-Islam (Spl Original) 66 DLR 14, 2014.
30. Nasiruddin v Secretary, LGRD 51 DLR (AD) 213, 1999.
31. Nazrul Islam v Bangladesh 58 DLR 431, 2006.
32. Rajab Ali v East Pakistan 10 DLR 385, 1958.
33. The Constitution of the People's Republic of Bangladesh
34. Shahidul Islam v Bangladesh 60 DLR 710, 2008.