

CONSTITUTIONALIZING THE INSTITUTIONAL AUTONOMY AND ACADEMIC FREEDOM OF THE UNIVERSITIES

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ABSTRACT

Autonomous universities and their academic freedom did not get expression recognition in the Constitution of Bangladesh. While the Constitution broadly recognizes the citizens' freedom of thought, conscience, and speech and, also that of the Press, omission of the universities needs careful reconsideration. Decline of the universities' institutional autonomy and impairment of their faculty members' academic freedom have shaken the morale of the university teachers and students in Bangladesh. This paper therefore argues that a constitutional reading of the institutional autonomy and academic freedom of the universities is a call of the time and it is possible. Building on the U.S. Supreme Court's interpretative recognition of the universities' academic freedom and autonomy under the cloak of its Free Speech jurisprudence, this paper argues that Bangladesh Supreme Court's fundamental rights and Basic Structure jurisprudences could offer a similar protection to our demoralized academia. For the judiciary to do this, the legal academics in Bangladesh may need to perceive the universities as vital "fourth branch" constitutional institutions on the first place.

I. INTRODUCTION

Autonomous universities and their academic freedom did not get its due recognition in Bangladesh's constitutional discourse. While the Constitution has expressly recognized the citizens' freedom of thought, conscience, speech, and press,¹ freedom of the academia is not mentioned expressly. Bangladesh, however, is not an exception in this regard. This is rather the case with majority of the written constitutions around the world. Except in a few jurisdictions, some of which are mentioned in Part 4 of this paper, courts and legal scholars would defend the institutional autonomy of universities and academic freedom of their faculty members under the cloak of freedom of speech, thought, conscience and press. This indirect line of justification is, however, proving inadequate recently. Rise of nationalist, populist, and authoritarian regimes across the Europe,

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¹ Article 39, the Constitution of the Peoples' Republic of Bangladesh.

America, Asia and elsewhere and their hostility to objective truths, dissenting voices, and politically inconvenient research findings have jeopardized the academic freedom and administrative autonomy of the universities.² Likewise, the contemporary developments in Bangladeshi universities are troublesome. Declined autonomy of the universities, restricted academic freedom, shaken morale of the university teachers, sheer politicization of the profession and scandalization of the highest university offices e.g., the Vice-Chancellors, are deeply frustrating.³

Given the context, this paper explores some plausible ways of recognizing the academic freedom and institutional autonomy of the universities in Bangladesh's constitutional discourse. Part 2 of the paper sets out a general linkage between the quality of democracy and the freedom of the academia. In Part 3, we analyze Bangladesh's 1973 and post-1973 laws relating to the public, so-called "government"⁴ and private universities of Bangladesh. In this Part, we try to explain how the public, government and private universities differ in their structural design and philosophical foundations. A factually grounded analysis of the university *statutes in action* reveals how their practical operation affects the academic freedom and autonomy of the universities adversely.

Part 4 then explores the way the courts, particularly the U.S. Supreme Court, have interpretatively recognized the institutional autonomy of the universities and freedom of the academia as a constitutional principle. We rely on the U.S. jurisprudence for two reasons. First, the depth and richness of the U.S. precedents help us make a feasible argument for implied or interpretative recognition of academic freedom within constitutional framework. Secondly, the U.S. Constitution's similarity with the Bangladesh Constitution in not expressly recognizing the universities and their academic freedom makes the choice sensible. Based on the U.S. judicial interpretation of academic freedom under the umbrella of free speech right, we argue that there are several interpretative avenues available in Bangladesh as well. We project the freedom of speech, right to life and liberty jurisprudence of Bangladesh Supreme Court as potential avenues of the proposed interpretative recognition. As part of the arguments, we also rely on some doctrinal literature that emphasize the need for clearer

² Ignatieff, M., "The role of universities in an era of authoritarianism", *University World News*, April 13, 2018, available at <<https://www.universityworldnews.com/post.php?story=20180413093717351>> (Last visited on June 20, 2021).

³ Bay, B., "Universities can be saved only by unadulterated autonomy": Interview with Professor Emeritus Serajul Islam Choudhury, *The Daily Star*, October 05, 2019, available at <<https://www.thedailystar.net/opinion/interviews/news/universities-can-be-saved-only-unadulterated-autonomy-1809370>> (Last visited on June 20, 2021)

⁴ Choudhury, A.M., Governance of Universities in Bangladesh, *The Daily Sun*, April 13, 2017, available at <<https://www.daily-sun.com/arcprint/details/219200/Governance-of-Universities-in-Bangladesh/2017-04-13>> (Last visited on June 20, 2021).

constitutional recognition of the academia within the framework of “Fourth Branch”, “Fourth Estate” or “Integrity Institutions”. We suggest that express judicial recognition of the universities within the Fourth Branch discourse could invite a Basic Structure shield to the academic freedom and potentially offer a judicially enforceable constitutional protection for the government-stricken universities of Bangladesh. Part 5 concludes the paper.

II. LINKING THE DEMOCRACY AND FREEDOM OF THE ACADEMIA

Democracy’s relationship with academic freedom is direct and mutually reinforcing. Relation between the two is as old as the days of the Greek stoic scholars who used to inspire their disciples to question the quality of governance outside the ivy-coated walls of the governors’ palaces.⁵ Modern discourse of academic freedom, however, took its shape in the premises of the fifteenth century German universities.⁶ Philosopher Humboldt defended the liberty and solitude of the universities so that they keep imparting new thoughts and ideals.⁷ German higher educational institutions drew scholars from across the world who later carried the message to their respective homes.⁸ The American Association of University Professors adopted its Principles of Academic Freedom in 1915.⁹ The idea comprised two key elements - freedom of the faculties, students and researchers as well as the freedom of the institution from state intervention.¹⁰ The academia exerted significant influence in America’s racial transformation. During the Civil Rights Movement of 1960s, America’s segregated education system got serious legal attention. Racial diversity and inclusion in higher education institutions was a central battleground for racial equality and justice.¹¹ In the Europe, prior to the Renaissance, the universities were subordinate to the Churches and were not allowed to disseminate radical or dissenting ideas that could conflict the church.¹² Post-renaissance emancipation of the universities

⁵ Bobzien, S., *Determinism and Freedom in Stoic Philosophy*, Clarendon Press, 2001.

⁶ Shils, E., “The Modern University and Liberal Democracy”, *Minerva*, 1989, pp. 425-428, at p.426.

⁷ Paulsen, F., *The German Universities and University Study*, New York. C. Scribner's sons, 1906, at p. 17-18.

⁸ Finkin, M.W., “On Institutional Academic Freedom”, 61 (1983) *Texas Law Review*, pp. 817-885, at p. 821-824.

⁹ Hofstadter R., & Metzger, W.P., *The Development of Academic Freedom in the United States*, New York: Columbia University Press, 1955, at p. 367

¹⁰ Metzger, W.P., “Profession and Constitution: Two Definitions of Academic Freedom in America”, 66 (1988) *Texas Law Review*, pp. 1265-1322, at p. 1269-70.

¹¹ Williamson-Lott, A. J., “The Battle over Power, Control, and Academic Freedom at Southern Institutions of Higher Education, 1955–1965”, 2013, *The Journal of Southern History*, pp. 879-920 at p. 880.

¹² Grendler, P. F., “The Universities of the Renaissance and Reformation”, 2004 *Renaissance Quarterly*, pp. 1-42.