

# INTERPRETATION OF CONSTITUTIONAL RIGHTS IN LIGHT OF INTERNATIONAL LAW IN INDIA AND BANGLADESH

*Written by Md. Tarik Morshed*

*Lecturer, Khulna University, Khulna-9208, Bangladesh*

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## ABSTRACT

A trend of using relevant norms of international law to interpret the domestic constitutional rights emerged during the last few decades. The norms have been applied in rights adjudication, in particular in the judiciaries of dualist states where international law is not enforceable directly. The courts have borrowed content from international law, where there is a vacuum in domestic materials. They have also used international law to resolve ambiguity in domestic law and to strengthen the reasoning of judicial decisions, even if it is based mainly on domestic materials. However, judiciaries around the globe show different attitudes towards the acceptance and perusal of this tool. Hence, a comparative analysis between two constitutional democracies, namely India and Bangladesh shall have a synergic effect on both. To start with, this article traces the theoretical and practical aspects of using international law in interpreting constitutional rights. Then it proceeds to a comparative analysis of the two democracies based on various pertinent factors. It concludes by focusing on the areas and methods where the two nations can learn from each other.

**Keywords:** Constitutional Rights, Human Rights, Constitutionalization of International Law, Constitutional Borrowing, International Constitutional Right.

## INTRODUCTION

The interdisciplinary exchange between constitutional law and international law, especially in the area of human rights where these two branches significantly overlap, is the most common feature of post-war constitutionalism. Mark Tushnet has confidently claimed this globalization of constitutional law to be inevitable.<sup>i</sup> In recent years, constitutional law borrowed unhesitatingly from international law in two spheres mainly, *firstly* while drafting the text and structure of a new constitution and, *secondly* while interpreting the constitution in an adjudication. In particular, the use of international law in constitutional interpretation has transformed the meaning of constitutional norms. This interpretive endeavor has attracted both accolades and criticisms from judges, politicians, academicians, and beyond.

India and Bangladesh are neighboring states with shared geography, history, and culture. The utility of a comparative constitutional study between the two countries can stem from at least three perspectives. From a historical point of view, the study may track the course of migration of constitutional ideas from one polity in question to another. For example, the doctrine of basic structure migrated from India to Bangladesh through *Anwar Hossain Chowdhury v. Bangladesh*<sup>ii</sup>. The study may also be useful in finding some universal, just, and good principles of constitutionalism. On top of other considerations, as the structure and context of the constitutional provisions of these two states are strikingly similar, one can borrow methods and content from another with a higher degree of persuasive authority.

## NORMATIVE JUSTIFICATIONS OF USING INTERNATIONAL LAW IN CONSTITUTIONAL INTERPRETATION

As constitutions are precise and broadly phrased text, the terms in it allow extensive interpretation. Consequently, when applying the textual rules on particular facts, courts take resort to diverse materials to ascertain their meaning. Specifically, the catalog of rights (e.g. Bill of Rights in the United States (US) Constitution, Chapter II of the Constitution South Africa) tends to be more flexible and ambiguous. For instance, the constitutional ‘right to life’

can be expanded to include diverse meanings if relevant interpretive materials are employed. As most of the constitutions favor no material of interpretation<sup>iii</sup>, there evolved several approaches in this regard. These approaches immensely influence constitutional decision making, more so rights adjudication. The tools used in constitutional interpretation can mainly be divided into two quarters, internal and external. The text and structure (e.g. Interpretation clauses, preamble, and other articles) of the constitution itself are its internal interpretive aids. The external aids, being from beyond the constitutional text, can further be divided into *national* (i.e. other legislations from national *corpus juris*), *foreign* (i.e. the constitutional and ordinary laws of a foreign state), *doctrinal* (i.e. theories and doctrines like separation of powers and rule of law), and *international* (i.e. international legal rules and instruments). These tools differ considerably regarding their authoritativeness and justification in constitutional interpretation.

The use of international law in interpreting constitutional rights can be justified from at least four frames of reference. Firstly, international laws create top-down obligations to implement their rules in the domestic sphere. The International Covenant on Civil and Political Rights (ICCPR) enjoins the states to:

*.....take the necessary steps, in accordance with its constitutional processes and with the provisions of the present covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the present Covenant. (Emphasis added)<sup>iv</sup>*

The International Covenant Economic, Social and Cultural Rights (ICESCR), though in a passive tone, also requires the State parties to undertake ‘all appropriate means’ to facilitate the realization of rights.<sup>v</sup> Moreover, the Cultural, Economic and Social Rights (CESR) Committee has regarded the ‘effective remedy’ sanction as a general principle of international human rights law.<sup>vi</sup> Most of the major international human rights instruments, along with these two, have similar requirements in their respective implementation clauses.<sup>vii</sup> Thus, it is imperative on the court of member states to respect the provisions of international law while interpreting constitutional rights. Again, Article 13 of the Draft Articles on State Responsibility specifically enjoins that “every state has duty to carry out in good faith its obligation arising from treaties and other sources of International law, and it may not involve provisions in its

Constitution or its laws as an excuse for failure to perform this duty”. Secondly, the concerned constitution or its founding document can justify the use directly or indirectly. For example, the reference of international law in the drafting process or foundational instrument of the constitution shall influence the use by an originalist judge. A textualist, on the other hand, shall find a reference of international law in the text of the constitution convincing. Again, a purposive interpreter shall delve into the similarity between human rights norms and constitutional rights in their texts and contexts. Thirdly, if the constitutions being compared share similar problems, backgrounds and constitutional text, the normative justification of borrowing from one another becomes stronger. Finally, as Glensy puts it<sup>viii</sup>, the trend is warranted by some pragmatic considerations also. To name a few, globalization, expansion of the judicial horizon, impact on the rest of the world, and increasing self-awareness are some of them.

However, as pointed out by Vicki C Jackson<sup>ix</sup>, there are some competing notions including national exceptionalism, democratic deficit, and popular sovereignty that preclude the use of international norms. National exceptionalism holds the view that every nation is distinct culturally and should not import legal norms from others. For example, Thomas J expressed his exceptionalist view by commenting against ‘foreign moods, fads, or fashions on Americans’ in *Foster v. Florida*.<sup>x</sup> According to the critiques from the democratic quarter, the underlying democratic mandate of people is the basis of the obligatory nature of law. They oppose the use of international law by highlighting the apparent undemocratic processes through which one state becomes the party to a treaty.<sup>xi</sup> Again, the advocates of popular sovereignty state that as the constitution is the highest expression of sovereignty, it cannot be compromised by importing elements from external sources. These assumptions or anxieties have been ironically termed as ‘Ostrich Response’ by some commentators.<sup>xii</sup>

## CONSTITUTIONAL AND JUDICIAL ATTITUDE OF INDIA AND BANGLADESH

### A. *International Law and the Text of Constitution*

Unlike the Constitution of the Republic of South Africa, there is no provision in the constitutions of India and Bangladesh that directs the use of international law in interpreting the bill of rights contained therein.<sup>xiii</sup> Nevertheless, both of them referred to international law in their constitutions, foundational instruments, and processes. The Proclamation of Independence of Bangladesh resolves to ‘undertake to observe and give effect to all duties and obligations that devolve upon us as a member of the family of nations and under the Charter of United Nations’(UN).<sup>xiv</sup> The Constituent Assembly debate also cites international law as a source of its constitutional design, both directly and indirectly.<sup>xv</sup> In *Bangladesh v. Sheikh Hasina*<sup>xvi</sup> the Supreme Court points out:

*The inclusion of bill of rights in our Constitution is influenced by the international bill of rights and as a result we find most of the rights mentioned in the declaration and the covenants have been incorporated in some form or other in Part III of the Constitution and some have been recognized in Part II.*

Article 11 of the Constitution declares the Republic as a democracy ‘in which fundamental rights and freedoms and respect for the dignity and worth of human person shall be guaranteed’. Again, Article 25 of the Constitution affirms the “respect for international law and the principles enunciated in the United Nations Charter”. At this point, as both of them (arts. 11 and 25) are Fundamental Principles of State Policies (FPSPs) and Article 8(2) regards them as aids to interpretation, international law can justifiably be used as an interpretative aid.<sup>xvii</sup>

The Constitutional Assembly debates of India make the direct reference of international law at least two times.<sup>xviii</sup> Moreover, the Indian counterpart of Article 25 of the Constitution of Bangladesh, Article 51 dictates the state ‘to endeavour to foster respect for international law and treaty obligations in the dealings of organized peoples with one another’. As the Directive Principles of State Policy (DPSPs) had been designed to be non-justiciable interpretive aid to the Constitution, international law can be used in its interpretation. This view is supported by *Kesavananda Bharati v. State of Kerala*<sup>xix</sup> and *Minerva Mills Ltd. v. Union of India*<sup>xx</sup>.

Furthermore, Article 253, along with the Seventh Schedule to the Constitution, justifies the use.

### ***B. Methodological Justification of Using International Law***

Kirby J's use of international law<sup>xxi</sup> in constitutional interpretation attracted the attention of judges, academia, and beyond. It has been mainly because, unlike his predecessors, he offered methodological justifications of his use. Though the use of international law is extensive in India, the judges rarely engage themselves in providing justifications. In *Vishaka v. State of Rajasthan*, the court adopts a pragmatic and purposive approach by stating:

*Any International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee. (Emphasis added)*<sup>xxii</sup>

It can be inferred that the persuasive impulse was so compelling that the judges borrowed the ideas of international law without question. However, in his opinion in *Gramophone Company of India v. Birendra Bahadur Pandey*, Reddy J held an exceptionalist view that “national courts are organs of national states and as such cannot be held to be bound by international law”.<sup>xxiii</sup>

In Bangladesh, only a handful of judgments provided methodological arguments in this regard.<sup>xxiv</sup> Most of them have recourse to either originalist or internationalist viewpoints. In *Dr. Shipra Chaudhury and another v. Government of Bangladesh and others*<sup>xxv</sup> (2009) 38 CLC (HCD) the court seems to have taken an originalist and textual viewpoint as it argues:

*The framers of the constitution were particularly impressed by the formulation of the basic rights in the Universal Declaration of Human Rights. If we make a comparison of Part III of the Constitution with the Universal Declaration of Human Rights (UDHR) we shall find most of the rights enumerated in the Declaration have found place in some form or other.*<sup>xxvi</sup>

*Bangladesh v Sheikh Hasina*<sup>xxvii</sup> also appears to support the originalist proposition. Other cases that offer justifications mainly rely on the ‘top-down’ international obligation, after blending it with dualism.

### ***C. Treatment of International Treaties and Customs***

Monism and dualism are two theories regarding the application of international law in the municipal arena. Monism holds that a treaty becomes the part of a municipal system and thereby enforceable in the national court immediately upon its ratification. Conversely, dualism claims that only ratification is not sufficient to make a treaty part of *corpus juris*, it needs legislative incorporation to be so. The engagement of international law with constitutional interpretation depends immensely on the theory a state subscribes to. A dualist judiciary is more likely to use international law as an interpretive aid, as a monist judiciary can enforce the same rule directly.

As observed in *Jolly George Verghese v. Bank of Cochin*<sup>xxviii</sup> and *State of West Bengal v. Kesoram Industries*<sup>xxix</sup>, India follows dualism in the treatment of international law. The court can have a look into international conventional law when it is necessary.<sup>xxx</sup> It requires the absence of domestic law on a specific topic to take resort of international law (if that international law is “not inconsistent with the fundamental rights and in harmony with its spirit”) in constitutional interpretation.<sup>xxxi</sup> However, in some recent cases, the Supreme Court has slightly diverted from dualism. At first, the court enforced a provision of the International Covenant on Civil and Political Rights (ICCPR) which had no implementing legislation in *People's Union of Civil Liberties v. Union of India*.<sup>xxxii</sup> In *Union of India v. Azadi Bachao Andolan*<sup>xxxiii</sup>, the Court introduced the theory of self-executing treaties, prevalent in the USA, by holding that implementing legislation is only required when a treaty deals with the rights of the citizens.

Bangladesh also follows the dualist proposition mostly.<sup>xxxiv</sup> In *BNWLA v. Government of Bangladesh and others*, the Court opined that the Court will not enforce a treaty unless it has been incorporated in the municipal legislation.<sup>xxxv</sup> However, international law can be used in the interpretation of constitutional or ordinary legislation where there is a ‘gap’ or ‘ambiguity’

in the national law.<sup>xxxvi</sup> In *Bangladesh v. Sheikh Hasina*, the Court summarizes the position of international law in constitutional adjudication:

*'The Courts would not enforce international human rights treaties, even if ratified by Bangladesh unless these were incorporated in municipal laws, but they would have looked into the ICCPR while interpreting the provisions of the Constitution to determine the right to life, liberty, and other rights (Para 86). (Emphasis added)*

Both in India and Bangladesh it is a settled principle that customary international law is part of *corpus juris*, provided they are not inconsistent with the municipal law.<sup>xxxvii</sup> However, where there is an unambiguous municipal law that conflicts with international law, the Court shall give effect to the former.<sup>xxxviii</sup> However, it should be noted that the Court in Bangladesh revolved around the debates on direct enforcement of customary international law without exploring its interpretive prospect. Exceptionally, in *Mohammad Salimullah v. Union of India*<sup>xxxix</sup>, customary international law was given a detailed consideration in the interpretation of constitutional rights.

#### ***D. Treatment of Soft International Law***

Soft international law includes the instruments which are not legally binding, like traditional sources. The courts of India have referred to a multitude of soft international laws, thereby proving their openness in this regard. Of their references, the Second World Conference on Human Rights at Vienna in June 1993, the Fourth World Conference on Women held in Beijing in 1995<sup>xl</sup>, WHO resolution<sup>xli</sup>, Declaration of the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>xlii</sup>, and the UDHR Declaration on the Right to Development<sup>xliii</sup> are worth mentioning. Quite exceptionally, the Supreme Court referred to the European Convention for the Protection of Human Rights and Fundamental Freedoms though India is not a party to it.<sup>xliv</sup>

In Bangladesh, the Court has taken consideration of international soft law instruments, including the resolutions of World Health Organization (WHO)<sup>xlv</sup>, UN General Assembly Resolutions<sup>xlvi</sup>. It has also referred to the General Comments or Recommendations of some treaties.<sup>xlvii</sup>



## CONCLUSION

Though India and Bangladesh hold quite similar attitudes regarding the use of international law in constitutional interpretation, they differ in some areas where they may borrow from each other. Both of them use a multitude of international materials without providing strong methodological justifications for doing so. As a methodological apparatus, they mainly resort to the harmonious construction of international and domestic materials. However, along with this, Bangladesh once used the originalist arguments to validate their use. On the other hand, the novelty of India lies in their putting forward a resistant attitude in using international law in a national court. India adopts the theory of self-executing treaty, and thereby establishes its position as formally dualist, but functionally monist. They also pay detailed consideration to customary international law. Conversely, Bangladesh pursues an all or nothing approach in this regard. The tendencies of these two states along with others imply that the constitutionalization of international law is an irreversible trend. The divergences between the states seem to fade away to converge into a singular point; forming the basis of international constitutional law.

## ENDNOTES

<sup>i</sup> Mark Tushnet, *The Inevitable Globalization of Constitutional Law*, 49 Va. J. Int'l L. 985 (2008).

<sup>ii</sup> 41 (1988) DLR (AD) 165.

<sup>iii</sup> Art. 39 of SOUTH AFRICA CONST. 1996 imposes an obligation on the judges to consult international law while interpreting the bill of rights. Moreover, the same article 'recommends' the use of foreign laws in constitutional interpretation.

<sup>iv</sup> Art. 2, International Covenant on Civil and Political Rights 1966 [ICCPR].

<sup>v</sup> Art. 2, International Covenant on Economic, Social and Cultural Rights 1966 [ICESCR].

<sup>vi</sup> General Comment 9 to ICESCR, Para. 3.

<sup>vii</sup> Art. 2, the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), Art. 3, the Convention on the Rights of the Child (CRC), Art 2, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and implementation clauses of other core human rights treaties.

<sup>viii</sup> Rex D. Glensy, *The Use of International Law in US Constitutional Adjudication*, 25 Emory Int'l L. Rev. 197, 210-34 (2011).

<sup>ix</sup> Vicki C. Jackson, *Transnational Challenges to Constitutional Law: Convergence, Resistance, Engagement*, 35 Federal Law Review 161, 162 (2007).

<sup>x</sup> 537 U.S. 990 (2002).

<sup>xi</sup> John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 Stanford L. Rev. 1175, 1190 (2006).

<sup>xii</sup> See Cindy G. Buys, *Burying Our Constitution in the Sand-Evaluating the Ostrich Response to the Use of International and Foreign Law in US Constitutional Interpretation*, 21 BYU J. Pub. L. 1 (2007).

<sup>xiii</sup> *Supra* note 3.

- xiv The Proclamation of Independence, 1971 Para. 12 (Bangladesh).
- xv MAHMUDUL ISLAM, CONSTITUTIONAL LAW OF BANGLADESH 127 (3d Ed. Mullick Brothers 2012).
- xvi 60 (2008) DLR (AD) 90, Para 82.
- xvii The Fundamental Principles of State Policy (FPSPs) can be used as aids to interpretation, but are not themselves justiciable.
- xviii Constituent Assembly Debate of India (Jul. 27, 2020, 1:34), <https://goo.gl/BstgzT>.
- xix AIR 1973 SC 1461 (India).
- xx AIR 1980 SC 1789 (India).
- xxi See Kirby's advocacy of the use of international law at Michael Kirby, *Domestic Courts and International Human Rights Law-The Ongoing Judicial Conversation*, 6 Utrecht L. Rev. 168 (2010).
- xxii AIR 1997 SC. 3011 (India).
- xxiii Khagesh Gautam, *The Use of International Law in Constitutional Interpretation in the Supreme Court of India*, 55 STAN. J. INT'L L. 27, 39 (2019).
- xxiv Ridwanul Hoque & Mostafa Mahmud Naser, *The Judicial Invocation of International Human Rights Law in Bangladesh: Questing a Better Approach*, 46.2 Indian J. of Intl. L. 151, 180-2 (2006).
- xxv 29 (2009) BLD (HCD) 183 (Bangladesh).
- xxvi *Id.* at 187.
- xxvii 60 (2008) DLR (AD) 90, Para 82 (Bangladesh).
- xxviii 1980 AIR 470 (India).
- xxix 10 (2004) SCC 201 (India).
- xxx P.N. Krishanlal v. Govt. of Kerala, (1995) Sup. (2) SCC 187 (India).
- xxxi Visakha v. State of Rajasthan, AIR 1997 SC 301 (India).
- xxxii AIR 1997 SC 568 (India).
- xxxiii Appeal (Civil) 8161-8162 of 2003 (India).
- xxxiv See Sheikh H. R. Karzon & Abdullah A. Faruque, *Status of International Law under the Constitution of Bangladesh: An Appraisal*, 3.1 Bangladesh J. of L. 1 (1999).
- xxxv BNWLA v. Government of Bangladesh and others, 31 (2011) BLD (HCD) 324 (Bangladesh). The judgment is supported by Chaudhury and Kendra v. Bangladesh and ors, 29 (2009) BLD (HCD) 1 (Bangladesh); Bangladesh v. Sheikh Hasina, 60 (2008) DLR (AD) 90 (Bangladesh).
- xxxvi B. B. Roy Chowdhury J in Ershad v. Bangladesh, 21 (2001) BLD (AD) 69 (Bangladesh), para 3 points out "National Courts should not ignore the international obligations which a country undertakes. National courts should draw upon the principles incorporated in the international instruments if the domestic laws are ambiguous or absent". The same position has been reiterated in 31 (2011) BLD (HCD) 324.
- xxxvii Vellore Citizens Welfare Forum v. Union of India, (1996) 5 SCC 647 (India). Bangladesh v. Unimarine SA Panama, 29 (1977) DLR 252 (Bangladesh), Saleem Ullah v. Bangladesh, 47 (1995) DLR 1995 HCD 218 (Bangladesh).
- xxxviii Saiful Islam Dilder v. Bangladesh, 50 (1998) DLR 318 (Bangladesh).
- xxxix W. P. (C) NO. 793 OF 2017 (India).
- xl Charu Khurana & Others v. Union of India & Others, (2015) 1 SCC 192 (India).
- xli Paschim Banga Khet Mazdoor Samity v. State of West Bengal, AIR 1996 SC 2426 (India).
- xlii Sunil Batra v. Delhi Administration, AIR 1978 SC 1675 1975 (India).
- xliii Murlidhar Dayandeo Kesekar v. Vishwanath Pandu Barde, 1995 Supp. (2) SCC 549 (India).
- xliv Sher Singh alias Partapa v. State of Haryana, 2015 SCC OnLine SC 23 (India).
- xliv Mohiuddhin Farooque v. Bangladesh, 17 (2013) BLD (AD) 1 (Bangladesh) and Prof. Nurul Islam v. Bangladesh, 52 (2005) DLR (HCD) 413 (Bangladesh).
- xlvi State v. Md Roushan Mondal, 59 (2007) DLR (HCD) 72 (Bangladesh), Bangladesh National Women Lawyers Association v. Bangladesh, 61 (2009) DLR (HCD) 371 (Bangladesh).
- xlvi Bangladesh Legal Aid and Services Trust and ors v. Government of Bangladesh, (2011) 31 BLD (HCD) 1 (Bangladesh).