The Bangladesh Constitutional Framework and Human Rights

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Introduction

The Constitution of Bangladesh is the supreme law of the land, which contains provisions regarding human rights in different forms. The inclusion of human rights in the constitution of a country obviously bears special significance. Such constitutional inclusion provides human rights with a higher degree of protection. It keeps them beyond the reach of easier and frequent changes by the legislature. Constitutional inclusion of human rights standards also 'provides a focus for discussing those issues and their implications within the political system.'[1]

Incorporating certain provisions regarding human rights in the constitution has become an established norm of constitutionalism in the 20th century. Human rights have been incorporated in national constitutions both in justiciable and unjusticiable forms. The Constitution of Bangladesh was adopted in 1972, the middle of the latter half of the 20th century, when the International Bill of Rights has already been adorned by its three stage locket of the Universal Declaration of Human Rights, 1948 (UDHR),[2] International Covenant on Civil and Political Rights, 1966 (ICCPR)[3] and the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR)[4]. At the time of adoption of the Constitution of Bangladesh, 'there was a marked global increase in awareness for the need to protect human rights and fundamental freedoms.'[5] Since the advent of the two Covenants in 1966, very few if any national constitutions have been adopted that have failed to include human rights provisions. The insertion of different human rights provisions into the Constitution of Bangladesh was not a unique event in the context of the development of human rights.

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1 David Feldman, 'Constitutionalism, Deliberative Democracy and Human Rights' in John Morison, Kieran McEvoy and Gordon Anthony (eds), *Judges, Transition, and Human Rights* (Oxford University Press, 2007) 443, 462.

2 GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) ('*UDHR*').

3 Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

4 Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('*ICESCR*').

5 Arjuna Naidu, 'The Protection of Human Rights in Srilanka: Some Lessons for South Africa' (1987) 3 *South African Journal on Human Rights* 52.

The Drafting of the Constitution of Bangladesh

The concept of human rights is deep-rooted in the history of Bangladesh. Bangladesh was born as an independent state through a historic liberation war conducted in exercise of the people's right to self-determination, an important human right recognized in international human rights law.[6] During the British colonial period in India, until 1947, the territory of Bangladesh was a part of the then British colony in the undivided India which was governed by the Government of India Act. In 1947, the British Parliament passed the Indian Independence Act which created 'two Dominions – India and Pakistan – and two Constituent Assemblies for the two Dominions.'[7] Thus, after gaining freedom from the colonial rule in 1947, British India was separated into India and Pakistan: Bangladesh, being a part of then Pakistan, was known as East Pakistan. The first decade of Pakistan (1947-58) was a period of 'change' and 'uncertainty' when 'many of Pakistan's integrating forces collapsed' and the democracy was a 'total failure.'[8] The period between 1958 to 1969 has been identified as a period of 'total political dispossession of East Pakistan and regionalism,'[9] which resulted into the demand for full autonomy of East Pakistan.[10] Due to continued economic and political oppression[11] by West Pakistan over East Pakistan, 'the autonomy movement took the shape of liberation struggles for complete independence.'[12]

Bangladesh declared its independence on 26 March, 1971.[13] The Constituent Assembly, which was composed of the members elected in elections held from 7 December 1970 to 17 January 1971 in the then East Pakistan, proclaimed the Proclamation of Independence on 10 April, 1971 and formed the Government of Bangladesh.[14] The Proclamation of Independence 1971 was the interim Constitution that was given retrospective effect from 26 March 1971 'in due fulfilment of the legitimate right to self-determination of the people of Bangladesh.'[15] While Bangladesh was not at that time a member of the United Nations (UN), the Constituent Assembly of the newly declared state affirmed in its interim Constitution that the state 'undertake[s] to observe and give effect to all

6 Md. Rafiqul Islam, *The Bangladesh Liberation Movement: Its International Legal Implications* (PhD thesis, Monash University, 1983) 48.

7 Mahmudul Islam, *Constitutional Law of Bangladesh* (Mullick Brothers, Dhaka, 2nd ed, 2003) 5.

8 Islam, *The Bangladesh Liberation Movement: Its International Legal Implications*, above n 6, 30.

9 Ibid, 31.

10 Ibid, ix.

11 Ibid, 45-46.

12 Ibid, 47.

13 *The Constitution of Bangladesh* Preamble.

14 *The Proclamation of Independence.*

15 *The Proclamation of Independence.*

duties and obligations that devolve upon' it 'as a member of the family of nations.'[16] It was categorically added in the Proclamation that the newly declared state would 'abide by the Charter of the United Nations.'[17] The provisions of the interim Constitution obliged the newly declared state to observe all of the Charter commitments, like a member of the UN, including the commitments regarding human rights.

The liberation war continued for nine months. At the end of the 'historic struggle for national liberation'[18] against Pakistan, Bangladesh achieved victory on 16 December 1971. The Provisional Constitution of Bangladesh Order, 1972 was issued on 11 January, 1972 introducing a parliamentary form of government replacing the existing presidential form and re-defining the Constituent Assembly.[19] In order to create a Constituent Assembly for the purpose of making a constitution for the newly born country, the "Bangladesh Constituent Assembly Order" (P.O. No. 22) was promulgated on March 23, 1972.[20] The first session of the Constituent Assembly was held on April 10, 1972.

The long history of exploitation and deprivation resulting in economic, social and political injustices during the period of British colonial rule and Pakistani rule motivated the people of Bangladesh towards the inclusion of all fundamental human rights and freedoms in the Constitution. The Constitution Drafting Committee, headed by the then Minister for Law and Parliamentary Affairs, was set up on 11 April 1972.[21] The Constitution Bill was introduced in the Constituent Assembly by the Chairman of the Drafting Committee on 12 October 1972.[22] The Constitution was adopted on 4 November 1972 in the Constituent Assembly and came into force on 16 December, 1972.[23]

Bangladesh became constitutionally obligated to secure all fundamental human rights and freedoms to its citizens. The aspirations of the people of Bangladesh are reflected in the preamble of the Constitution of Bangladesh. The preamble of the Constitution unequivocally affirmed the

16 *The Proclamation of Independence* para 20.

17 ibid.

18 *The Constitution of Bangladesh* Preamble.

19 Section 4 of the Provisional Constitution of Bangladesh Order, 1972 defines the Constituent Assembly as 'the body comprising of the elected representatives of the people of Bangladesh returned to the N.A. [National Assembly] and P.A. [Provincial Assembly] seats in the elections held in December, 1970, January, 1971 and March, 1971 not otherwise disqualified by or under any law.'

20 Abul Fazal Huq, 'Constitution-Making in Bangladesh' (1973) 46 (1) *Pacific Affairs* 59, 60.

21 Ibid.

22 Bangladesh, *Constituent Assembly Debates (GonoParishader Bitarka, Sarkari Biboroni)*, Constituent Assembly, 1972, vol.2, 23.

23 *The Constitution of Bangladesh* Article 153(1).

pledge that the establishment of a society where fundamental human rights and freedoms were secured for all citizens was 'a fundamental aim of the state'. Human rights have accordingly been incorporated into the Constitution in different chapters.

The Legal System of Bangladesh and the Constitutional Structure of the Government

Bangladesh is a common law country. It has a written constitution which is the supreme law of the land. The constitution of Bangladesh explicitly recognizes the supremacy of the Constitution, in contrast to parliamentary sovereignty. Parliament is a creation of the Constitution; it is unicameral and acts under the Constitution. The law making power of the parliament is restricted by the Constitution. The Parliament, known as the 'House of the Nation', has legislative power which is subject to the Constitution.[24] The parliament cannot pass any law, under any circumstance, which violates the basic structure of the Constitution.[25]

The Constitution of Bangladesh establishes a parliamentary form of Government, where the President is Head of the State, while the Prime Minister is the Head of the Executive. The Constitution of Bangladesh explicitly recognizes the principle of separation of power, with an independent judiciary. There are two sets of courts in Bangladesh, higher and lower. At the higher level, there is one court named 'the Supreme Court of Bangladesh.' It has two divisions, the High Court Division and the Appellate Division. The High Court Division has original jurisdiction regarding constitutional and certain other specific matters. The Appellate Division of the Supreme Court of Bangladesh stands at the top of the higher judiciary, with appellate authority. The judgments pronounced by either Division of the Supreme Court are binding on all lower courts. Judicial precedents are recognized by article 111 of the Constitution as good laws. The lower courts consist of separate civil and criminal courts with different tiers, which are accountable to the Supreme Court of Bangladesh. The Supreme Court of Bangladesh is treated as the guardian of the Constitution,[26] as it is the only body with authority to interpret and enforce the constitutional provisions.

The Constitution of Bangladesh in its Article 142[27] provided that the votes of at least two-thirds of the total number of members of parliament are

24 Article 65(1) of the Constitution.

25 Article 7B of the Constitution; *Anwar Hossain Chowdhury v Bangladesh* (1989) 41 DLR (AD) 165 ('*Constitution 8th Amendment Case*').

26 Islam, *Constitutional Law of Bangladesh*, above n 7, 16.

27 Article 142 of the Constitution is as follows:

' Notwithstanding anything contained in this Constitution—

(a) Any provision thereof may be amended by way of addition, alteration, substitution or repeal by Act of Parliament:

(i) no Bill for such amendment shall be allowed to proceed unless the long title thereof expressly states that it will amend a provision of the Constitution;

required for an amendment of any provision of the Constitution. However, new article 7B of the Constitution, inserted by the Constitution 15th Amendment in 2011, recognized the basic structures of the Constitution by declaring them as completely unamendable. It said:

Notwithstanding anything contained in article 142 of the Constitution, the preamble, all articles of Part I, all articles of Part II, all articles of Part III, subject to the provisions of the articles relating to the other basic structures of the Constitution including article 150 of Part XI shall not be amendable by way of insertion, modification, substitution, repeal or by any other means.

The concept of basic structure of the Constitution was first recognized by the *Constitution 8th Amendment case.*[28] In this case, the 8th Amendment of the Constitution, which created six permanent Benches of the High Court Division, was challenged as being unconstitutional. It was argued that the said amendment violated the unity of the High Court Division by creating different permanent benches. In this case, the unity of the High Court Division was considered as a 'basic structure' of the Constitution that was violated by the impugned amendment. The said amendment, in spite of its compliance with article 142, was declared to be *ultra vires* and invalid on the ground of its alleged violation of the 'basic structure' of the Constitution.[29] The concept of 'basic structure' was established in this case by the judiciary. This principle regarding unamendable nature of the basic structure of the Constitution was reaffirmed in the *Constitution 5th Amendment Case.*[30]

Human Rights Provisions in the Constitution of Bangladesh Influence of the International Bill of Rights

Though Bangladesh did not acquire membership of the UN until 1974,[31] both the UN Charter and the International Bill of Rights (comprising the UDHR, ICCPR and the ICESCR) deeply influenced the drafting of the Constitution of Bangladesh. Only a few constitutions in the world have

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(ii) no such Bill shall be presented to the President for assent unless it is passed by the votes of not less than two-thirds of the total number of members of Parliament;

(b) when a Bill passed as aforesaid is presented to the President for his assent he shall, within the period of seven days after the Bill is presented to him assent to the Bill, and if he fails so to do he shall be deemed to have assented to it on the expiration of that period.'

28 (1989) 41 DLR (AD) 165.

29 Ibid.

30 *Khondker Delwar Hossain v Bangladesh Italian Marble Works Ltd., Dhaka* [2010] SC (AD) Civil Petition for Leave to Appeal Nos. 1044 & 1045 OF 2009 (1 February 2010) ('*Constitution 5th Amendment Case*').

31 Bangladesh acquired UN membership on 17 September 1974. United Nations, <http://www.un.org/en/members/.>.

directly endorsed the UDHR[32] and the UN Charter.[33] The Constitution of Bangladesh does not explicitly mention the UDHR or the two covenants. But the Constitution has directly endorsed, under article 25, the principles enunciated in the UN Charter as the principles upon which Bangladesh must base its international relations. Furthermore, the Constitution substantially incorporated various provisions of the International Bill of Rights in different forms in different chapters.

Following the ICCPR and ICESCR model of splitting human rights provisions into two distinct groups, many of the constitutions adopted after 1966 inserted provisions regarding human rights in two distinct places of the constitution and likewise installed two different enforcement mechanisms. For example, it appears that splitting human rights by the UN into two covenants led the constitution-makers of Bangladesh to slot human rights into two different forms: civil and political (CP) rights are immediately realizable and judicially enforceable, while economic, social and cultural (ESC) rights are not judicially enforceable. The Constitution in its Part III on "fundamental rights" incorporated CP rights. ESC rights are incorporated as "fundamental principles of state policy" (FPSP) in Part II of the Constitution.

32 See, for example, the Constitution of the Republic of Ivory Coast of 1960 (Preamble), the Constitution of the Republic of Senegal of 1963, the Constitution of the Democratic Republic of Sao Tom' and Principe of 1975 (Article 17), the Constitution of Portuguese Republic of 1976 (Article 16), The Spanish Constitution of 1978 (Article 10), the Constitution of Somali Democratic Republic of 1979 (Article 19), the Constitution of the United Republic of Tanzania of 1984 (Article 9), the Political Constitution of the Republic of Nicaragua of 1987 (Article 46), the Constitution of the Republic of Haiti of 1987 (Preamble and Article 19), the Constitution of Afghanistan of 2004 (Preamble), the Constitution of the Republic of Benin of 1990 (Preamble), Fundamental Law of Equatorial Guinea of 1991 (Preamble), the Constitution of Romania of 1991 (Article 20), the Constitution of the Republic of Rwanda of 1991 (Preamble), the Constitution of the Gabonese Republic of 1991 (Preamble), the Constitution of Mali of 1992, the Constitution of Burkina Faso of 1991 (Preamble), the Constitution of the Republic of Burundi of 1992 (Preamble and article 10), the Constitution of the Federal Republic of Comoros of 1992 (Preamble), the Constitution of the Fourth Republic of Togo of 1992 (Preamble), the Constitution of Cambodia of 1993 (Article 31), the Constitution of the Republic of Moldova of 1994 (Article 4), the Constitution of the Republic of Niger of 1996 (Preamble), the Constitution of the Republic of Chad of 1996 (Preamble).

33 See, for example, the Constitution of Bangladesh of 1972 (Article 25), Constitutional Law of the People's Republic of Angola of 1975 (Article 31), the Constitution of the People's Democratic Republic of Algeria of 1989 (Article 28), the Constitution of the Republic of Benin of 1990 (Preamble), Fundamental Law of Equatorial Guinea of 1991 (Preamble), the Constitution of the Federal Republic of Comoros of 1992 (Preamble), the Constitution of the Republic of Ghana of 1992 (Article 40), the Constitution of the Fourth Republic of Togo of 1992 (Preamble), the Constitution of Cambodia of 1993 (Article 31), the Constitution of the Republic of Moldova of 1994 (Article 8), the Constitution of the Republic of Chad of 1996 (Preamble), the Constitution of Afghanistan of 2004 (Preamble).

However, the division into these two chapters is not fully identical with the two sets of human rights in the two covenants. With a few exceptions, the rights inserted in Part III were recognized by the ICCPR. Three provisions of the ICESCR have also been incorporated in that chapter of the Constitution. For example, article 29(1), which speaks for equality of opportunity in public employment, reflecting article 7(c) of the ICESCR, has been guaranteed as a fundamental right within the constitutional framework. On the other hand, the provision regarding participation of the people in the affairs of the Republic through their elected representatives, which has been inserted in the final half of article 11 of the Constitution as an FPSP, was recognized by the ICCPR in its article 25(a). The provision regarding people's right to self-determination recognized by both the ICCPR and ICESCR has been incorporated in the chapter on the FPSP in article 25(b) of the Constitution of Bangladesh.

An Analysis of the Provisions Regarding Human Rights in the Constitution of Bangladesh

The Constitution of Bangladesh contains provisions relating to human rights in three different parts including the preamble. The preamble asserts the pledge to secure fundamental human rights as an aim of the state. Specific human rights are listed in the Constitution either as fundamental rights or as FPSP. Human rights contained in the FPSP chapter (Part II) are not judicially enforceable, whereas the human rights contained in the chapter on fundamental rights (Part III) are judicially enforceable. As it has been mentioned earlier, according to the new article 7B of the Constitution all provisions of all of these three parts fall within the category of basic structures of the Constitution which are completely unamendable.

Provisions Regarding Human Rights in the Preamble: Constitutional Pledge

The preamble of the Constitution of Bangladesh makes a general pledge to establish a society where all fundamental human rights and freedom will be secured for all citizens. It declares:

We, the people of Bangladesh, ... Further pledging that it shall be a fundamental aim of the State to realise through the democratic process a socialist society, free from exploitation-a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens.

It has been noted that '[f]ew constitutions do have such a Preamble'.[34] In *Dr. Mohiuddin Farooque v Bangladesh* (*'Locus Standi Case'*),[35] this distinctiveness of the preamble was explained in the following words that focused on the pledge made therein:

34 *Constitution 8th Amendment Case,* (1989) 41 DLR (AD) 165 , 197 (Chowdhury J).

35 (1997) 49 DLR (AD) 1.

> The Preamble of our Constitution stands on a different footing from that of other Constitutions by the very fact of the essence of its birth which is different from others. It is in our Constitution a real and positive declaration of pledges, adopted, enacted and given to themselves by the people not by way of presentation from skilful draftsmen, but as reflecting the echoes of their historic war of independence.[36]

The pledge made in the preamble has been further avowed as one of the FPSP in Article 11 of the Constitution. It declared a constitutional guarantee of fundamental human rights: 'the Republic shall be a democracy in which fundamental human rights and freedoms ... shall be guaranteed'. Thus, the aim to secure human rights has not remained as a mere pledge in the preamble; it has been further imprinted in the Constitution in a way that imposes a duty on the state specifically to guarantee fundamental human rights.

The term 'fundamental human rights' is not further defined anywhere in the Constitution so as to distinguish a subset of human rights as 'fundamental'. The term 'fundamental human rights', long before its use in the Constitution of Bangladesh, appeared in the preambles of the UN Charter and the UDHR. The preamble to the UDHR says:

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, ... Now, therefore, The General Assembly, Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, ...

This particular recital of the term 'fundamental human rights' in the preamble of the UDHR implies that the rights subsequently included in it are in fact those 'fundamental human rights'. The rights inserted in the UDHR have been further elaborated in the two covenants, ICCPR and ICESCR. Thus it appears that the rights incorporated in the three components of the International Bill of Rights are 'fundamental human rights'. It is submitted that in the absence of any clear constitutional definition of the term 'fundamental human rights', the meaning of this term as has been determined above in the light of international human rights law can be considered to be the meaning of the same term in the preamble of the Constitution of Bangladesh. The preamble of the Constitution thus contain the pledge to establish a society where the fundamental human rights, that is all of the rights contained in the International Bill of Rights, will be secured for all citizens of the state.

Constitutional Status and Enforcement of the Preamble

The preamble of the Constitution of Bangladesh is not a mere introductory note to the Constitution. It is a part of the Constitution, the supreme law of the land. Chowdhury J said in the *Constitution 8th Amendment Case*[37]

36 Ibid [42].

37 (1989) 41 DLR (AD) 165, 197.

that there is no 'anxiety as to whether the Preamble is a part of the constitution or not as it has been the case in some other country.'[38] In the same case, Rahman J termed the preamble as 'the pole star of the Constitution.'[39] In this case, the majority judgment declared the impugned amendment to be void on the ground of violation of a basic structure of the Constitution.[40] Although the new article 7B declared the whole preamble as an unamendable basic structure of the Constitution, the *Constitution 8th Amendment Case* recognized certain parts of the preamble as unamendable basic structure of the Constitution 22 years ago in 1989. In this case, among the three concurring majority judges, Chowdhury J said that the impugned amendment was void for, inter alia, it destroyed the essential limb of the judiciary 'by setting up rival courts to the High Court Division in the name of Permanent Benches.'[41] However, Chowdhury J also considered the whole aim of the state, contained in the preamble, as a basic structure of the Constitution. Chowdhury J observed:

That Constitution promises 'economic and social justice' in a society in which 'the rule of law, fundamental human right and freedom, equality and justice' is assured and declares that as the fundamental aim of the State. Call it by any name- 'basic feature' or whatever, but this is the basic fabric of the Constitution which can not be dismantled by an authority created by the Constitution itself- namely, the Parliament.[42]

Shahabuddin Ahmed J, the second concurring judge, declared the amendment void on the ground of violation of the basic structure of 'oneness of the High Court Division.[43] He did not seem to base his judgment on the preamble.

The third concurring judge, Rahman J, declared the amendment void on the ground of violation of the basic structure of the 'rule of law' engraved in the preamble of the Constitution. He observed:

In this case we are concerned with only one basic feature, the rule of law, marked out as one of the fundamental aims of our society in the Preamble. The validity of the impugned amendment may be examined, with or without resorting to the doctrine of basic feature, on the touchstone of the Preamble itself.[44]

38 The status of the constitutional preamble is controversial in India. It was held in *Re Berubari Union & Exchange of Enclaves* ([1960] AIR SC 845), in India, that the preamble of the Constitution is not a part of the Constitution. Subsequently, the Indian Court changed its position and recognized the preamble as a part of the Constitution in *Kesavananda Bharati v State of Kerala* [1973] AIR SC 1461.

39 (1989) 41 DLR (AD) 165, 274.

40 A.T.M. Afzal J dissented.

41 (1989) 41 DLR (AD) 165, 232.

42 Ibid 221-22.

43 Ibid 264.

44 Ibid 272.

He found that the impugned amendment impaired the rule of law contained in the preamble:

The impugned amendment is to be examined in the light of the Preamble. I have indicated earlier that one of the fundamental aims of our society is to secure the rule of law for all citizens and in furtherance of that aim Part VI and other provisions were incorporated in the Constitution. Now by the impugned amendment that structure of the rule of law has been badly impaired, and as a result the high Court Division has fallen into sixes and sevens-six at the seats of the permanent Benches and the seven at the permanent seat of the Supreme Court.[45]

Thus, it appears that Rahman J treated the 'rule of law' contained in the preamble as a basic structure of the Constitution and declared the Amendment as void as it violated this basic structure. It is submitted that if one part of the preamble, for example, concerning the 'rule of law',[46] is a basic structure of the Constitution, then the concept of 'fundamental human rights and freedom' enshrined in the same manner in the same paragraph of the preamble also seems to be entitled to be another basic structure of the Constitution.

It is clear from the above discussion that two of the three concurring majority judges indicated that the preamble, or at least part of it, was part of the unamendable basic structure of the Constitution.

The preamble protected fundamental human rights as a constitutional pledge where the securing of all fundamental human rights has been set as an aim of the state. The *Constitution 8th Amendment Case* arguably elevated 'fundamental human rights' to a higher constitutional status. This part of the preamble is not only enforceable by law but constitutes an important basic structure of the Constitution of Bangladesh. It is now settled law in Bangladesh that according to new article 7B of the Constitution, the whole preamble is a basic structure of the Constitution. The pledge made in the preamble to secure fundamental human rights for all citizens is elaborated in two chapters, namely, the FPSP and the fundamental rights.[47]

Fundamental Rights (Part III of the Constitution)

The Constitution of Bangladesh in its part III contains a set of judicially enforceable fundamental rights, which include equality before law,

45 Ibid 274.

46 Ibid.

47 However, in spite of the above observations from the Appellate Division in the *Constitution 8th Amendment* case, the High Court Division in a subsequent case of *Aftab Uddin v Bangladesh* made a negative comment regarding enforceability of the preamble. ((1996) 48 DLR 1). The Court said that '[i]t is true that the Preamble to the Constitution is not enforceable.'(Ibid 11). The High Court Division did not substantiate this sentence. It is submitted that this particular comment made by the High Court Division in disregard of the earlier Appellate Division Judgment does not have legal authority.

principles of non-discrimination, equality of opportunity, right to protection of law, protection of right to life and personal liberty, safeguards as to arrest and detention, prohibition of forced labour, protection in respect of trial and punishment, freedom of movement, freedom of assembly, freedom of association, freedom of thought and conscience, freedom of speech, freedom of profession or occupation, freedom of religion, rights to property, protection of home and correspondence and the right to enforce fundamental rights.

The chapter on fundamental rights basically includes the rights of CP nature. However, there are certain fundamental rights that fall within the category of ESC rights or fall within the both categories of human rights. The provisions regarding prohibition of forced labour (Article 34(1)), freedom of association (Article 38) including the right of forming trade unions, freedom of profession or occupation (Article 40) and rights to property (Article 42(1)) are rights with significant ESC aspects that have been incorporated as fundamental rights. In fact, human rights cannot be so easily divided into watertight compartments.

The rights in Part III are guaranteed either in absolute terms or subject to different restrictions. For example, 'equality before law' under article 27 of the Constitution is an absolute fundamental right, while 'freedom of movement' under article 36 has been granted '[s]ubject to any reasonable restrictions imposed by law in the public interest', and the rights to property under article 42 have been made '[s]ubject to any restrictions imposed by law.' Some fundamental rights belong to citizens only;[48] while certain others belong to citizens and non-citizens alike who reside within the territory of Bangladesh.[49]

Constitutional Status and Enforcement

Part III sets express restrictions on law-making power. Article 26 declares all existing laws inconsistent with any fundamental right to be void to the extent of inconsistency, and prohibits the state from making any law inconsistent with any provision of that part.[50] The use of the term 'state' instead of merely 'parliament' is significant as the term clearly includes the legislature, executive and all other statutory authorities.[51] Thus, it does

48 For example, freedom of assembly guaranteed under article 37 of the Constitution.

49 For example, right to protection of law guaranteed under article 31 of the Constitution.

50 Article 26 of the Constitution reads as follows: '(1) All existing law inconsistent with the provisions of this Part shall, to the extent of such inconsistency, become void on the commencement of this Constitution.

(2) The State shall not make any law inconsistent with any provisions of this Part, and any law so made shall, to the extent f such inconsistency, be void. ... '

51 Article 152 of the Constitution defines the term 'state' that includes 'Parliament, the Government and statutory public authorities'. The term 'statutory public authority' has been further defined to mean 'any authority, corporation or body the activities

not only restrict the lawmaking power of the legislature, but it imposes equal restriction on the executive and other statutory authorities.

The duties of the state regarding human rights recognized as fundamental rights are immediately enforceable by individuals. Articles 44(1) and 102(1) provide that an individual person who feels aggrieved can move to the High Court Division for enforcement of any of his or her fundamental rights guaranteed in the Constitution. Under article 102(1), the said rights can be enforced against any person including the persons who are 'performing any function in connection with the affairs of the republic'. The court is empowered to give any direction or order as it thinks 'appropriate for the enforcement of any of the fundamental rights conferred by Part III of this Constitution'.

The prerequisite for enforcing any fundamental right under article 102(1) is that the application has to be made by 'any person aggrieved'. The Supreme Court as early as in 1974, shortly after the adoption of the Constitution of Bangladesh, liberally interpreted the meaning of that phrase. The Court, in *Kazi Mukhlesur Rahman v Bangladesh*[52] expanded the scope of 'any person aggrieved'. In admitting the *locus standi* of the petitioner, the Court said:

If a fundamental right is involved, the impugned matter need not affect a purely personal right of the applicant touching him alone. It is enough if he shares that right in common with others.[53]

The judgment remained unnoticed until 1997 when the Appellate Division finally relied on it in *Locus Standi Case.*[54] In the words of Kamal J, a member of the Appellate Division:

What happened after Kazi Mukhlesur Rahman's case in Bangladesh was a long period of slumber and inertia owing not to a lack of public spirit on the part of the lawyers and the Bench but owing to frequent interruptions with the working of the Constitution and owing to intermittent de-clothing of the Constitutional jurisdiction of the superior Courts.[55]

In spite of the precedent of *Kazi Mukhlesur Rahman,* when the *'Locus Standi Case'* was heard first before the High Court Division, the High Court Division did not allow the *locus standi* and construed the literal construction and narrower meaning of the term 'aggrieved' to include only that person who was personally aggrieved. However, the Appellate Division granted the *locus standi* saying that the High Court Division was 'wrong' in not allowing the *locus standi,* and remitted the case back to the High

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of or the principal activities of which are authorised by any Act, ordinance, order or instrument having the force of law in Bangladesh'.

52 26 DLR (SC) 44.

53 Ibid, cited in *Locus Standi Case* (1997) 49 DLR (AD) 1, 11 [32] (Kamal J).

54 (1997) 49 DLR (AD) 1.

55 Ibid 12.

Court Division for hearing.[56] Thus, *Kazi Mukhlesur Rahman* was finally endorsed in *'Locus Standi Case'*. The eventual impact of the *'Locus Standi Case'* judgment is that it has accelerated public interest litigation in Bangladesh.[57] Public interest litigation (PIL) is 'a type of litigation where the interest of the public is given priority over all other interests with an aim to ensure social and collective justice, the court being ready to disregard the constraints of the adversary model litigation.'[58] The general rule of locus standi that a person must be personally aggrieved to file litigation is not applicable in PIL. It was established in *'Locus Standi Case'*[59] that in Bangladesh, PIL, which is about any public wrong or injury, can be filed by any person of the society on behalf of the public at large or a community, rather than only by a person who is personally aggrieved. PIL standing would be granted also in cases of 'breach of public duty or for violation of some provision of the Constitution or the law.'[60] It is worth mentioning here that the PIL is not only restricted to cases where violation of any fundamental right is found; PIL can be filed for violation of any constitutional provision.

During the time of emergency declared under article 141A, the right to enforce the fundamental rights in any court may be suspended under article 141C of the Constitution. Article 141C(1) says:

While a Proclamation of emergency is in operation, the President may, on the written advice of the Prime Minister, by order, declare that the right to move any court for the enforcement of such of the rights conferred by Part III of this Constitution as may be specified in the order, and all proceedings pending in any court for the enforcement of the right so specified, shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order.

It appears that the fundamental rights do not disappear even during the period of emergency. However, the right to move to the court for their enforcement can be removed for a limited period of time.

Human Rights as the FPSP (Part II of the Constitution)

ESC rights have been recognized as FPSP in Part II of the Constitution of Bangladesh. The Constitution incorporated these rights in the form of their corresponding duties on the state. That is, they are expressed in the language of State duties rather than in the form of individual human rights.

56 Ibid 16.

57 Naim Ahmed, *Public Interest Litigation* (Bangladesh Legal Aid and Services Trust, Dhaka, 1999) 45.

58 Ibid 51.

59 (1997) 49 DLR (AD) 1.

60 Ibid 4 [8] (*Afzal CJ).*

Constitutional Status and Enforcement

The FPSP have a significant role to play in the making and interpretation of laws and the governance of the country, but they have not been made judicially enforceable.[61] The Constitution itself terms them as principles, though Article 7 declares the whole Constitution to be the supreme law of the land. However, the state is constitutionally obliged to implement the FPSP by following the directions given in the principles themselves. Generally speaking, the state cannot be held liable, on the application of aggrieved persons, for non-implementation of the FPSP, unlike the fundamental rights in Part III. Nevertheless, it has been observed by the highest judiciary that the lack of judicial enforceability does not mean that the state can ignore implementation of these FPSP for an indefinite period of time.[62]

International Human Rights Obligations and their Effect on Bangladeshi Law

Apart from its constitutional obligations regarding human rights, Bangladesh now incurs obligations under international human rights law with regard to human rights. It acceded to the ICCPR in 2000 and the ICESCR in 1998, and therefore it has obligations to implement the rights recognised in those treaties. Apart from treaties and conventions, customary international law also acts as a significant source for human rights obligations for Bangladesh.

Treaties are not self-executing in Bangladesh. Ratification or accession to international treaties is not sufficient to oblige the Government of Bangladesh under its domestic law to perform the obligations arising out of those treaties. Until they are incorporated into the domestic legal system of Bangladesh, the state remains responsible only under international law. The Constitution of Bangladesh makes no express commitment regarding application of international law (including international human rights law). However, the Proclamation of Independence of 1971, which was the interim Constitution of Bangladesh, explicitly affirmed the commitment to perform all obligations that Bangladesh incurred as a member of the international community. It declared:

We further resolve that we undertake to observe and give effect to all duties and obligations that devolve upon us as a member of the family of nations and to abide by the Charter of the United Nations.

The UN Charter contains some important provisions regarding human rights. Thus, the interim Constitution through the above declaration ultimately recognized those human rights along with a commitment to perform related obligations. Unfortunately, no such comparable provision

61 See *The Constitution of Bangladesh* art 8(2).

62 See *Masdar Hossain v Bangladesh* (1998) 18 BLD (HCD) 558 (Md. Mozammel Hoque J).

is found in the present Constitution of Bangladesh. However, 'respect for international law and the principles enunciated in the United Nations Charter' have been declared by the Constitution to be one of the principles on which the 'state [should] base its international relations' in Article 25. It appears that obligations under international law have been endorsed by the Constitution of Bangladesh only in the matters relating to Bangladesh's relationship with other states, not for any other matter.

Implementation of International Human Rights Law into the Domestic Law

There are two theories regarding the relationship between international law and national law: monism and dualism. According to the monist theory, international law and national law 'are concomitant aspects of the one general system—law in general',[63] and in case of a conflict between the two, 'international law is said to prevail'.[64] Dualism treats international law and national law as 'two entirely distinct legal systems'[65] that are applied by two different types of courts respectively, international and national courts.[66] The application of the latter theory may give rise to a situation where 'a government may be behaving perfectly lawfully within its own territory, even though its conduct may entail international responsibility.'[67]

Two other doctrines deal with the application of international law in the domestic legal sphere: 'incorporation' and 'transformation'.[68] The doctrine of incorporation implies 'automatic adoption' of international law by municipal law,[69] which suggests that 'a rule of international law becomes part of national law without the need for express adoption by the local courts or legislature'.[70] In contrast with this, the doctrine of transformation 'stipulates that rules of international law do not become part of national law until they have been expressly adopted by the state.'[71]

Article 152 of the Constitution gives the definition of "law" in Bangladesh, and it does not include international law. Nor does the Constitution of Bangladesh say anything about the methodology of incorporation of international law in the domestic jurisdiction. Neither monist nor dualist theories have been adopted explicitly in the Constitution. However, the

63 I. A. Shearer, *Starke's International Law* (Butterworths, 11th ed, 1994) 63-4.

64 Martin Dixon, *Textbook on International Law* (Oxford University Press, 6th ed, 2007) 88.

65 Shearer, above n 63, 64.

66 Dixon, above n 64, 90.

67 Ibid 89.

68 Ibid 94.

69 Ibid.

70 Ibid.

71 Ibid 95.

Constitution unequivocally declares itself to be the supreme law of the country,[72] and the Constitution vested the law making powers primarily in the parliament,[73] and partially in the President[74] and the Supreme Court of Bangladesh.[75] If the provisions regarding law-making are considered en bloc, it appears that unless a provision, whether international law or any other law or rule, becomes a law of the country by one of those three authorities, that provision does not acquire the status of law in Bangladesh. The approach of the Constitution of Bangladesh towards the relationship between international law and national law is therefore dualist. The Constitution of Bangladesh does not recognize international law as a part of national law, so international law, to be applied in the domestic legal sphere of Bangladesh, has to be transformed into the domestic legal system through one of the above mentioned three law making authorities. Thus, the possibility of application of international law in the national law of Bangladesh reflects the doctrine of transformation. Unless the provisions of international law are specifically adopted by the appropriate legislative authority or judicial process, they will not be binding in the domestic legal jurisdiction of Bangladesh. Similarly, the Constitution of Bangladesh has maintained a silence about the application of customary international law, so, customary international law also has to be transformed in the same way as the treaties in order to be applicable in the domestic legal jurisdiction of Bangladesh.[76]

All of the existing constitutional provisions regarding human rights were incorporated in the Constitution when it was first adopted in 1972, long before the accession of Bangladesh to the Covenants on human rights. Since the accession of Bangladesh to the ICCPR and the ICESCR, no provision in those treaties has been incorporated further in the constitutional law of Bangladesh. However, as has been already pointed out, the constitutional provisions regarding human rights at the time of adoption of the Constitution were made in line with the International Bill of Rights.

Ratification of an International Treaty: Power and Procedure

Articles 145 and 145A of the Constitution deal with the provisions regarding the making of contracts and deeds and the formalities regarding international treaties. Under article 145(1), the power to make any

72 *The Constitution of Bangladesh* Article 7(2).

73 Ibid art 65(1).

74 Ibid art 93.

75 Ibid art 111.

76 It can be argued that customary international law is applicable even in a dualist country irrespective of its incorporation into the municipal law. (See Scott L. Porter, 'The Universal Declaration of Human Rights: Does It Have Enough Force of Law to Hold States Party to the War in Bosnia-Herzegovina Legally Accountable in the International Court of Justice' (1995-1996) 3 *Tulsa Journal of Comparative & International Law* 141, 152-155.) However, this debate is beyond the scope of my thesis.

contract or deed on behalf of the state is vested in the executive authority of the state, and any such contract or deed 'shall be expressed to be made by the President' and 'shall be executed on behalf of the President by such person and in such manner as he may direct or authorise'.[77] However, this power lies ultimately in the hands of the Prime Minister, as the executive power under which such contract or deed can be made lies in the Prime Minister as article 55(2) clearly mentions that '[t]he executive power of the Republic shall, in accordance with this Constitution, be exercised by or on the authority of the Prime Minister'. Again, the President of Bangladesh has to act 'in accordance with the advice of the Prime Minister' in the exercise of all of his functions except the appointment of the Prime Minister and of the Chief Justice.[78]

Thus, an international treaty can be ratified in exercise of the executive power of the Prime Minister but that shall be expressed to be made in the name of the President. There is no legal requirement to discuss an international treaty in the Parliament before ratification. Nevertheless, there is a constitutional requirement under article 145A that, after ratification, an international treaty has to be submitted to the President and ultimately has to be laid before the Parliament.[79]

The requirement to place a treaty before the Parliament is a mere constitutional formality. The parliament does not have to discuss or to decide anything about any treaties laid before it. It is worth mentioning here that articles 145 and 145A deal with the procedural formalities regarding contracts, deeds and international treaties, but they are totally silent about the application of such treaties in domestic law.

Role of the Supreme Court in the Protection of Human Rights

The Supreme Court of Bangladesh is empowered to enforce human rights that are incorporated in Part III of the Constitution as fundamental rights. The court also can enforce the constitutional pledge relating to human rights that is embedded in the preamble. The court also has limited powers regarding the human rights incorporated in Part II of the Constitution.

Can the court judicially recognize or enforce international human rights law directly or indirectly? International human rights law may be divided in two to determine its relevance in the domestic legal system—the first category includes the conventions or treaties that have been ratified or acceded to by Bangladesh and the second category consists of all other international instruments to which Bangladesh has not yet become a

77 See *The Constitution of Bangladesh* art 145(1).

78 Ibid art 48(3).

79 About international treaties Article 145A of the Constitution of Bangladesh says: 'All treaties with foreign countries shall be submitted to the President, who shall cause them to be laid before Parliament: provided that any such treaty connected with national security shall be laid in a secret session of Parliament.'

party. The latter instruments do not give rise to any specific treaty obligations. But the first category of international instruments gives rise to specific treaty obligations under international law. However, there is no law in Bangladesh according to which the courts can enforce those obligations in the domestic jurisdiction. As explained above, international human rights law does not become strictly binding, and thus enforceable, by the courts of Bangladesh unless transformed into the domestic law.

Nevertheless, the courts in Bangladesh at different times have taken notice various provisions of international human rights law. While the Courts are not explicitly empowered to apply provisions of international law, they are not barred from applying the provisions of international law provided there is no conflict with domestic laws.[80]

The Constitution by its article 25 plainly endorsed the application of the principles of the UN Charter in matters relating to international relationships of Bangladesh. On the basis of this constitutional mandate, the courts tested the validity of certain governmental actions concerning international relations in light of the UN Charter. For example, in *M Saleem Ullah v Bangladesh*,[81] the court held that the decision of the Government of Bangladesh to send troops to the UN Mission in Haiti was in conformity with Chapter VII of the UN Charter.[82]

In *Locus Standi Case*,[83] Dr. Mohiuddin Farooque, the General Secretary of the Bangladesh Environmental Lawyers Association (BELA) appealed before the Appellate Division against the decision of the High Court Division to refuse him *locus standi* in the writ petition filed to declare 'all the activities and implementation of FAP-20 [Flood Action Plan-20]' as unlawful and 'to be of no legal effect'. The Appellate Division set aside the decision of the High Court Division and sent it back to the same court for hearing on merit. To grant the *locus standi* in favour of the General Secretary of BELA, ATM Afzal CJ in the Appellate Division relied on, *inter alia*, 'Principle 10' of 'the Rio Declaration on Environment and Development'. He observed that '[p]rinciple 10 ... seems to be the theoretical foundation for all that have been vindicated in the writ petition and also provides a ground for standing.'[84] Here, the Appellate Division

80 M. Shah Alam, 'Enforcement of International Human Rights Law by Domestic Courts: A Theoretical and Practical Study' (2006) *Netherlands International Law Review* 399, 425.

81 47 DLR (1995) 218.

82 Ibid 224

83 (1997) 49 DLR (AD) 1.

84 Ibid 6. 'Principle 10 of the Rio declaration says: 'Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. State shall facilitate and encourage public awareness and participation by making information widely

relied on a principle embodied in an international declaration as one of the grounds for the decision without even investigating the status of that declaration in the municipal law of Bangladesh. In fact, the declaration relied on has not been incorporated in the municipal law of Bangladesh.

In the same case, B. B. Roy Choudhury J, another member of the Appellate Division, in arriving at the same decision, described the nature of certain FPSP with reference to article 1 of the UDHR, using it as an aid to interpret the constitutional provisions in order to liberalize the *locus standi* for the institution of suits involving public welfare. He observed:

They firmly recognize human sensitivity for fellow-citizens and State human responsibility for protection of human rights enshrined in Article 1 of the Universal Declaration of Human Rights (to which Bangladesh is a signatory) that "all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood".[85]

It was held in this case that an organization that had been working for the protection of public interest regarding environment had *locus standi* to file a writ petition in the matters relating to environment, though the person concerned was not aggrieved directly. The Court relied on international declarations, namely the UDHR and the Rio Declaration, to reach this conclusion.

The High Court Division continued its venture of applying international law in *Professor Nurul Islam v Bangladesh,*[86] where it relied on resolutions adopted by the World Health Organization (WHO) regarding tobacco control. The petitioner sought enforcement of the existing laws regarding tobacco in order to prohibit advertisements regarding tobacco and tobacco related products. The Court ultimately decided the case on the basis of article 31 on the right to life and issued directions for banning the advertisements regarding tobacco and tobacco related products. In arriving at its final decision, the Court cited the WHO resolution in support of its stand taken against the advertisements of tobacco. The Court observed:

In view of the resolution of the World Health Organisation and admitted bad effects as aforesaid in the matter of advertisement, promotion of tobacco based products and the provision in Article 25 of our Constitution, we are of the view that the government should have taken appropriate steps for banning/restricting advertisement etc. as was provided by Ordinance No 26 of 1990.[87]

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available. Effective access to judicial and administrative proceeding, including redress and remedy, shall be provided

85 Ibid 24.

86 (2000) 52 DLR 413.

87 Ibid 421-22.

2. The local laws, *both constitutional and statutory*, are not always in consonance with the norms contained in the international human rights instruments. The national courts, should not, I feel, straightway ignore the international obligations, which a country undertakes. If the domestic laws are not clear enough or there is nothing therein the national courts should draw upon the principles incorporated in the international instruments.
3. But in the cases where the domestic laws are clear and inconsistent with the international obligation of the state concerned, the national courts will be obliged to respect the national laws, but shall draw attention of the lawmakers to such inconsistencies.
4. In the instant case the universal norms of freedom respecting rights of leaving the country and returning have been recognized in Article 36 of our Constitution. Therefore there is full application of article 13 of the Universal Declaration of Human Rights to the facts of this case.

Thus, he advocated application of international obligation in the domestic jurisdiction in two situations: first, where the domestic law is unclear or silent on a point, and secondly, if the domestic law is in consonance with international obligations. Application of international obligations is barred in only one situation: when domestic law is clear on a point but is inconsistent with international obligation, domestic law will be applied in disregard of international obligation. However, in such a case, the court is advised to draw the attention of the lawmakers to the said inconsistencies between domestic law and international obligation, with a view to prompting legislative change. This judgment is significant as it has, to a limited extent, created room for application of international obligation in the domestic jurisdiction.

One remarkable feature of the above obiter is that it recognized the use of international law in the interpretation of constitutional provisions of Bangladesh. Thus, it has created a scope for development of the constitutional law of Bangladesh in the light of international law.

In 2009, in *BNWLA v Bangladesh*,[96] the Court reiterated the view regarding the use of international law in interpreting municipal and even constitutional laws:

The international conventions and norms are to be read into the fundamental rights in the absence of any domestic law occupying the field when there is no inconsistency between them. It is now an accepted rule of judicial construction to interpret municipal law in conformity with international law and conventions when there is no inconsistency between them or there is a void in the domestic law.[97]

96 (2009) 14 BLC 694.

97 Ibid 700-701

The above judicial observation made clear the following two principles. First, all municipal laws would be interpreted in conformity with international law and conventions if there is no inconsistency between international law and the domestic law. Secondly, if there is any lacuna in domestic law then that should be filled in by the provisions of international law.[98] The term 'municipal law' or 'domestic law' used above includes the Constitution of Bangladesh, thus endorsing the similar view from *Hussain Mohammad Ershad.* Therefore, these cases recognize the use of international law in the interpretation of constitutional provisions of Bangladesh. This view creates scope for development of the constitutional law of Bangladesh in the light of international law.

However, the idea of application of international law in the matters regarding constitutional law of a country is controversial in some countries.[99] For example, in Australia, Kirby J on its High Court supported the idea of using international law to interpret a constitutional provision,[100] while McHugh J, on the same Court, vigorously opposed it.[101] Indeed, Kirby J is the only Australian High Court judge to have adopted this approach so far.

Again, in the USA, though the Supreme Court has relied 'on international law as persuasive authority and use[d] it to support their conclusions'[102] in some cases,[103] the idea of using 'international law in interpreting the

98 See also *Bangladesh Environmental Lawyers Association (BELA), represented by its Director (Programs) Syeda Rizwana Hasan v Bangladesh, represented by the Secretary, Ministry of Shipping* (Writ petition No. 7260 of 2008, Judgment delivered on 05.03.2009 and 17.03.2009, unreported) is a recent case on environmental hazards in the matters regarding ship breaking in the territorial water of Bangladesh. The petitioner argued that since Bangladesh ratified the Basel Convention 1989 on 1 April 1993, it was 'bound to implement the provisions and safeguards contained therein.' The Court decided that the provisions of the Basel Convention were binding on the government authorities concerned, and ordered the Ministry of Environment 'to frame Rules and regulations for the proper handling and management of hazardous materials and wastes, keeping in view', inter alia, 'the Basel Convention, 1989.' It is arguable that the court adopted a monistic technique in applying international law in a dualistic country. For details of this technique, see Melissa A. Waters, 'Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties' (2007) 107 *Columbia Law Review* 628, 699-705.

99 Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A contemporary view* (Lawbook Co, 3rd ed, 2010) 51-56. See also Devika Hovell and George Williams, 'A Tale of two Systems: The Use of International Law in Constitutional Interpretation in Australia and South Africa' (2005) 29 *Melbourne University Law Review* 95.

100 *Newcrest Mining (WA) v The Commonwealth* (1997) 190 CLR 513, 657-61; *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 417-18.

101 *Al kateb v Godwin* (2004) 208 ALR 124, 140.

102 Russell G. Murphy and Eric J. Carlson, '"Like Snow [Falling] on a Branch ": International Law Influences on Death Penalty Decisions and Debates in the United States' (2009-2010) 38 *Denver Journal of International Law and Policy* 115, 141.

103 Daniel Bodansky, 'The Use of International Sources in Constitutional Opinion' (2004) *Georgia Journal of International and Comparative Law* 421.

U.S. Constitution is arguably the most controversial jurisprudential issue in recent years.'[104] The US Supreme Court in its most recent authority recognized a limited applicability[105] of international law in interpreting constitutional provisions.[106]

However, this controversy is beyond the scope of my article, as this idea is not controversial in Bangladesh. It is submitted that one reason behind the willing acceptance in Bangladesh of the use of international law to interpret its Constitution is, in part, due to its later entry into the community of nations, compared to Australia or the US. Bangladesh expressly committed to international law from the moment of its birth as an independent state, which is evident from its declaration in the interim Constitution promulgated during the continuation of the liberation war in 1971.[107] International law was much developed in 1971 when Bangladesh was born. On the other hand, the domestic legal systems of both Australia and the US became highly developed independently without resort to international law, as extensive international law developments, particularly in the area of human rights, came many years after their Constitutions. It is submitted that Australian or US judges are less accustomed to going to international law in order to find a solution instead of justifying or analysing a given situation in the light of their country's own jurisprudence. In the context of their highly developed legal systems, in contrast to Bangladesh, they could afford to more readily ignore international law due to a greater wealth of precedent and pre-existing faith in their own legal doctrines. In contrast, the jurisprudence in Bangladesh has developed after the advent of human rights developments in international law, and Bangladeshi judges have always kept them in mind in developing their jurisprudence, including their constitutional jurisprudence.

Conclusion

The Constitution of Bangladesh created an extensive scope for the protection of human rights. The constitution makers accommodated different types of human rights within the constitutional framework with diversified apparatuses of protection. The human rights provisions of the Constitution of Bangladesh can be distinguished into two types—rights and principles. The rights (largely CP) have been made judicially

[104] Yitzchok Segal, 'The Death Penalty and the Debate Over the U.S. Supreme Court's Citation of Foreign and International Law' (2006) 33 *Fordham Urban law Journal* 142, 142.

[105] This is so when an international law is found to be supportive of the Court's independent rationale. See Chris Jenks, 'Introductory Note to the United States Supreme Court: Graham v. Florida & the federal Court Australia: Habib v. Australia' (2010) 49 *International Legal Materials*, 1029.

[106] *Terrance Jamar Graham v Florida,* [2010] U.S. LEXIS 3881.

[107] *The Proclamation of Independence* para 20.

enforceable, whereas the principles (largely ESC) are not enforceable by law. However, both impose significant constitutional obligations on the state. It is submitted that justiciability is not the sole criterion to assess the magnitude of a constitutional obligation. Non-justiciability of these rights does not automatically degrade their constitutional status so as to make the principles completely valueless.

The Constitution has no explicit provision endorsing the domestic applicability of international human rights law. Nevertheless, the judiciary has developed scope for the recognition of the provisions of international human rights law under certain circumstances. It is commendable that the Supreme Court of Bangladesh has been increasingly recognizing international human rights law. The growing tendency of the highest judiciary in Bangladesh is in favour of applying the norms of international law, evident from the cases cited above. The Supreme Court in the above cited cases has referred to international law to justify governmental action, to create awareness among the governmental authorities about important human rights and sometimes to strengthen its judicial reasoning and analysis. International law, including international human rights law, has in fact the potential to influence and guide the interpretation and proper evolution of different constitutional provisions.

The eventual impact of the judicial observations made by B. B. Roy Choudhury J, in *Hussain Muhammad Ershad,* is that international human rights law can be applied in three possible constitutional situations. The first situation is where a constitutional provision is found to be analogous to international human rights law. It appears that many constitutional provisions regarding human rights are analogous in substance to different provisions of the international bill of rights. Such analogies thus have created scope to apply international human rights law covered by the constitutional provisions. Secondly, if the constitutional law is silent on a point on which a solution has been provided by international human rights law, international human rights law can be applied there to fill that *lacuna.* Thus, constitutional law regarding human rights can be developed further by way of interpretation more in line with international human rights law. The third possible situation is when there is a conflict between municipal law and international law. In that case, though municipal law will be applied, the court will give directions to the legislative authority to remove such anomalies by bringing necessary changes to the municipal law. Such directions are on the judicial record, even if the government does not ultimately comply. Therefore, international human rights law cannot be ignored totally. The venture for incorporation and implementation of different norms of international law and international human rights law by the domestic judiciary can go ahead running on the pioneering wheels of this precedent.