

## USING INTERNATIONAL LAW IN NATIONAL COURTS: BANGLADESH PERSPECTIVE

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### ABSTRACT

*The judicial use of international law at national Courts is being increasingly seen and recognised around the world. This practice should not be treated as interference with state sovereignty or national legal system but be perceived liberally. Despite following the dualistic legal tradition, Bangladesh is constitutionally committed to respect international law. Moreover, Bangladesh ratified all the core international human rights instruments most of which, however, remained unincorporated within national laws leaving the country's position unclear regarding domestic application of international law. In 2001, the Appellate Division has pronounced that if no law is found on a disputed matter, the relevant principle of international law should be invoked in order to adjudicate the same. More recently, it has clearly declared the principle that the beneficial provisions and principles of international law can be resorted to and implemented in relevant cases unless they are contrary to the existing national laws. In fact, both divisions of the Supreme Court have already utilised in many cases the provisions and principles of international instruments mainly as an aid to the interpretation of the Constitution and the ordinary laws. The Courts have taken resort to the soft law instruments besides the binding instruments like treaties and conventions. These instruments have often been used with the manifest objective of protecting politico-civil rights of the marginalised sections of the people including women, children, prisoners and stateless persons. Sometimes, the Courts have utilised such instruments even for protecting the citizens' basic socio-economic rights including the rights to housing, health, water and land.*

### INTRODUCTION

Despite the fact that, there are many controversies as to how and when international law can be invoked, the increasing use of international law in domestic adjudication is getting world-wide recognition.<sup>1</sup> More particularly, in this era of globalisation, the state-functions are regulated not exclusively by the

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<sup>1</sup> See details, Fatima, S., *Using International Law in Domestic Courts*, Oxford, 2005.

national laws but also by the principles and norms of international law. As a member of the world community, Bangladesh is constitutionally committed to respect international law in various affairs of the state.<sup>2</sup> It is true that Bangladesh has been following the common law doctrines, theories and traditions for long, and hence, the country's judges and lawyers rarely hold any bold attitude and approach in applying the principles and provisions of international law in domestic Courts.<sup>3</sup> However, it is nearly a settled principle of law in the contemporary world that in the absence of any domestic law or principle on a disputed matter, the relevant principle of international law may be applied by the national Courts. The Appellate Division of Bangladesh Supreme Court has encouragingly pronounced in an age-old case,<sup>4</sup> that the domestic Courts should not ignore the obligations of international laws; if there is no appropriate domestic law in a disputed matter, the Courts should take resort to the provisions and principles of international instruments.<sup>5</sup> In a recent case,<sup>6</sup> the Appellate Division has pragmatically held the principle that unless provisions of international instruments are contrary to the domestic laws, the beneficial provisions of such instruments may be referred to and implemented in appropriate cases. Moreover, the national Courts can take into account the Universal Declaration of Human Rights (UDHR) 1948 and its two covenants, namely, the International Covenant on Civil and Political Rights (ICCPR), 1966 and the International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966 as an aid to the legal interpretation of the fundamental rights as enumerated in the Bangladesh Constitution.<sup>7</sup>

In this study, I shall analyse how the Bangladesh Supreme Court has utilised the international instruments in various cases for protecting the politico-civil rights as well as the socio-economic rights of the citizens. Prior to that, I shall clarify in Bangladesh context some contemporary concepts regarding the application of international law in national Court. In short, this study particularly concentrates on the application of public international law instead of private international law in domestic Courts for protection of the both categories of human rights in Bangladesh.

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<sup>2</sup> See Article 25 of Bangladesh Constitution. See also a recent judgment arrived at *Advocate Md. Salahuddin v. Government of Bangladesh* 63 (2011) DLR (HCD) 80.

<sup>3</sup> Alam S., *Enforcement of International Human Rights law in Domestic Courts*, Dhaka, 2007, at p.100.

<sup>4</sup> *Hussein Mohammad Ershad v. Bangladesh and Others* 21 (2001) BLD (AD) 69.

<sup>5</sup> *Ibid*, Per Bimalendu Bikash Roy Chowdhury, J.at para 2, p. 69

<sup>6</sup> *Anika Ali v Rezwannul Absan* 17 (2012) MLR (AD) 49.

<sup>7</sup> Islam, M., *Constitutional Law of Bangladesh*, 3rd revised ed., Dhaka, 2012 at p.127.

### STATE SOVEREIGNTY AND INTERNATIONAL LAW

The direct application of international law by domestic Courts is traditionally treated to be against the national sovereignty of a state.<sup>8</sup> Accordingly, if any provision or principle of international law is directly invoked by any municipal Court before it is incorporated into national law, this invocation is regarded as interference with the national legal system and the sovereign power of the state. But in the current global legal order, the concept ‘sovereignty’ is not an absolute and strict one rather it is to be liberally perceived under the norms of international law. If we critically analyse, we find that when a state undertakes any obligation under any treaty it auto-limits its sovereignty.<sup>9</sup> Even Article 25 of the Bangladesh Constitution incorporates, *inter alia*, that the state shall base its international relations on the principles of respect for international law and the principles enumerated in the United Nations (UN) Charter.<sup>10</sup> The incorporation of this principle in the national Constitution is, in strict sense, an indirect compromise regarding the state sovereignty.

Sovereignty of a state is generally compromised in three fields: (1) States accept that the international organisations like the UN or the European Union (EU) can take decisions on which a particular state has no absolute and decisive influence; (2) States accept that individuals can go to the regional and international judicial institutions that have jurisdiction on human rights issues; and (3) in the matters of conflict and foreign intervention, states tend to accept infringement on their sovereignty for the protection of individuals from grave human rights violations.<sup>11</sup> Interestingly, even a state itself is to take resort to international law for preserving its sovereignty. A glaring example is the settlement of continental shelf issue between Bangladesh and Myanmar in 2012. For better preserving and protecting its sovereignty over the Bay of Bengal, Bangladesh had to go to the International Tribunal for Law of the Sea which applied the provisions of the United Nations Convention on the Law of the Sea, 1982.<sup>12</sup>

In this age of globalisation, mutual interdependence increases among the states especially for the sustainable solution of their common problems and hence, the understanding and application of the concept of ‘sovereignty’ need

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<sup>8</sup> Supra note 3, at p.12.

<sup>9</sup> Alam, S., *Shomokalin Antorjatik Ain* (Contemporary International Law), Dhaka, 2000 at p. 83.

<sup>10</sup> *Advocate Md. Salahuddin v. Bangladesh* 63 (2011) DLR (HCD) 84.

<sup>11</sup> See Boerefijn, I. and Goldschmidt, J.E (eds.), *Changing Perceptions of Sovereignty and Human Rights: Essays in Honour of Cees Flierman*, Mortsel, 2008.

<sup>12</sup> For an in-depth legal analysis, see Huang, Y. and Liao, X., “Natural Prolongation and Delimitation of the Continental Shelf Beyond 200 nm: Implications of the Bangladesh/Myanmar Case”, *Asian Journal of International Law* (Cambridge Law Journal Series), December, 2013 at pp. 1-27.