CONSTITUTIONALIZATION OF INTERNATIONAL LAW: A COMPARATIVE ANALYSIS BETWEEN BANGLADESH AND INDIA

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Abstract

The central preoccupation of constitutionalism is the relationship between universal human rights, the rule of law, democracy, and judicial review within a liberal democratic constitutional order. Undoubtedly, the political dimension is necessary to understand the relevance of constitutional law in a state. The contents of present constitutional law are becoming more international in various ways because national constitutions have to deal with international and transnational questions being influenced by other constitutions in their history. Conversely, international law has progressed from a law of coordination between states to a law of close cooperation, reaching far into the realm of traditional domestic concerns. It ultimately depends on the national Constitution whether and how particular international treaties and the outcome of these networks enter the domestic legal system and their position in those systems. Constitutionalization of international law can be labelled as a project, i.e. being designed but yet to be accomplished, or a phenomenon already exists and being described. South Asian nations, being part of the larger Global South, have had some difficulty in maintaining their Independence of Constitutions because most of them emerged independently out of colonial regimes or colonial backed autocratic regimes. Despite following the dualistic legal tradition, Bangladesh and India are constitutionally committed to respecting international law in various state affairs. Both states have ratified almost all the core international human rights instruments for protecting and promoting human rights with many national and international legal instruments, but human rights violations are still a big concern in various forms there. The Supreme Court of both the States has utilized the provisions and principles of international instruments in many cases to aid the interpretation of the Constitution and ordinary laws, arguably leading towards the constitutionalization of international law.

Keywords: *Constitutionalization, International Law, Human Rights, Bangladesh, India*

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I. Introduction

More than two-thirds of the world population lives under constitutional democracies, ensuring to a certain extent of human rights protection, the rule of law, judicial review, limited government and separation of powers. Constitutionalization in a general sense is a process of identifying the constitutional trends and challenges in establishing international organizational structures, designing the procedures for standard-setting, implementing reforms and executing the judicial functions in the areas as International Institutions and Competences, Law-making and Constitutionalism, the International Judiciary, membership in the Global Constitutional Community, dual democracy etc. One of the features of this trend is the incorporation of international human rights in the domestic Constitution, often making rights guaranteed by the domestic Constitution identical with rights entailed in international human rights treaties that are the global triumph of rights-based discourse.

Every state is bound by different international global and regional layers of human rights law, and the practice of a state is viewed and scrutinized by different international institutions that might apply different standards. Human rights, undoubtedly, has decreased the traditional divide between international law and municipal law. The various world constitutional systems are often committed to the same basic principles as the US Constitution, especially in the field of human rights because the US Constitution has served as a model for human rights guarantees around the world. In most democratic countries, referring to foreign and international law has become an effective instrument for empowering the domestic democratic processes by shielding them from external economic, political, and even legal pressures.

International law is no longer thought of as a set of rules governing the relations among states. Rather, it increasingly denotes a normative framework that is both constitutive and reflective of the relationship of states inter se and between states, their citizens, and other individuals, and non-state entities, matters once thought to be purely within the domestic/municipal sphere[1]. Customary international law, multilateral and bilateral treaties and agreements in force are regarded as the core of substantive international legal norms[2]. However, one of the significant challenges is incorporating international law into the municipal system because these two legal orders differ due to their standard and conflicting features.

The implementation of international law cannot take place without the effort of States at both the international and domestic levels. Various factors increasingly influence the applications of international law in domestic legal systems. As a result, the intensity of international legal and factual links relevant for national constitutional

[1] A. M. Slaughter & W Burke White, "The Future of International Law is Domestic (or, the European Way of Law)" (2006) 47 Harv. Int'l L. J.327.

[2] V.G. Hegde, "International Law in the Courts of India" (2013) 19 AYIL 63.

law demands a view abroad in constitutional legal understanding and the debates on the constitutionalization of international law because it depends on the national Constitution of the State whether and how particular international treaties and the outcome of these networks enter the domestic legal system and their position in those systems. This is the prevailing perception about international law within various domestic legal jurisdictions[3].

The role of the Judiciary in the interpretation and application of statutes enabling the implementation of treaties is equally important. Similar legal institutions often fulfil corresponding roles in different legal systems, and similar legal problems arise. Citing international law actually bolsters domestic democratic processes and reclaims national sovereignty from the diverse forces of globalization. It is essential to define the ongoing processes of globalization of law and governance as national case law creates more international links because of globalization, whereas international case law of international courts becomes more relevant for national cases.

Bangladesh and India are two South Asian nations with different constitutional cultures differing in ways they give effect to international law. As two legal systems vary in their intrinsic characteristics, the constitutions of India and Bangladesh contain provisions that are found in several provisions indicating their readiness in principle to submit to general international law. Both the Constitutions incorporate a long list of fundamental rights; however, human rights violations still occur in various forms. Bangladesh and India have also ratified all the core international human rights instruments, which remained unincorporated within national laws, leaving their position unclear regarding the domestic application of international law. The Indian Supreme Court has developed its practice consistently, which the Bangladeshi Supreme Court, from its inception, has modestly embraced over the years. Domestic courts of India are using international law through broad interpretations coupled with domestic constitutional and legal provisions[4]. Conversely, the approach of Bangladeshi courts towards international law is far from a monolithic connotation and deserves critical reflection. Domestic courts in Bangladesh and India more or less continue to rely on and decide the cases primarily based on their own laws or constitutions while using international law as a supplementary means to substantiate the arguments[5]. This research is dedicated to analyzing the progress of the Constitutionalization of International law by applying international human rights law principles and its compliance with the Judiciary of Bangladesh and India.

Several authors have noted the trend to the internationalization of constitutional law and comparative constitutional law about how international law has been

[3] Slaughter & White, supra note 1.

[4] Supra note 2.

[5] Soli Jehangir Sorabjee, "Equality in the US and India" in L. Henkin et al, eds, Constitutionalism and Rights: The Influence of the US Constitution Abroad (New York: Columbia University Press1990); P. Chandrasekhara Rao, "The Indian Constitution and International Law" (Leiden, The Netherlands: Brill | Nijhoff. 1995).

constitutionalized. Desierto asserted that international law discourses in the regions of South and Southeast Asia are "thematically *post-colonial* and substantively *development-oriented*"[6]. Justice Powell remarked that until international tribunals command a broader constituency, the Courts of the various countries afford the best means to develop a respected body of international law[7]. The proper sourcing and identification of international legal norms and their application remain a massive challenge in the present context8. It has been declared in Georgetown, Guyana, in 1996 for Commonwealth judges that "*It is the vital duty of an independent and well-qualified judiciary... to apply national Constitutions and develop the common law in the light of the values and principles enshrined in the international human rights instruments and their developing jurisprudence*"[9].

The content in the field of comparative constitutional law has remained remarkably under-explored and under-theorized. When it comes to the case of South Asian nations, the study is even more limited. A systemic discussion of the relationship between the analytical aims or intellectual goals of the field, and the research design and methods of comparison, is urgently required. The problems of context, relativism, and systemic selection biases hindering generalization in comparative constitutional law must be addressed. Despite tremendous scholarly advancements in the comparative study of constitutional law and institutions, explanation-oriented constitutional scholarship, whether based on formal modelling, causal extrapolation, historical narrative, or ethnographies, is not easy to come by. More specifically, comparative constitutional law scholarship often overlooks (or is unaware of) the methodological principles of controlled comparison, research design, and case selection deployed in the human sciences.

Most post-World War II history associates comparative constitutionalism with waves of new constitutions being drafted and adopted by the decolonization on the one hand and the opening of East Europe. Constitutions of South Asian nations reflect on the aspiration of people for freedoms and self-governance with constitutional democracies. As comparative law allows us to contextualize our analysis, the comparison of Bangladesh and India on their progress towards Constitutionalization of International Law would help reveal choices aspects of our own legal system that appear simply to be 'natural' or 'necessary' practices. It is a good source of expanded horizons and cross-fertilization of ideas across legal systems. This comparative analysis would compare the different levels of activity carried out within the countries, especially within Bangladesh and India's Judiciary. This paper concentrates on a comparative analysis on applying international law to protect human rights in domestic courts of Bangladesh and India. The first part of the study outlines the Bangladeshi and Indian

[6] Desierto, Diane A. "Postcolonial International Law Discourses on Regional Developments in South and Southeast Asia" (2008) 36:3 International Journal of Legal Information 387.

[7] Eyal Benvenisti, "Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts" (1993) 4:2 Eur J Int'l L 159.

[8] V.G. Hegde, "Indian Courts and International Law" (2010) 23:1 Leiden Journal of International Law 53.

[9] Secretariat, Commonwealth. "Developing Human Rights Jurisprudence", 1998, Vol. VII, p. xi.

legal context and constitutional provisions for applying international law. The second part focuses on critical cases to protect human rights in Bangladesh and India in recent years. The progress would be argued as the constitutionalization of international law there. The specific focus of the study will be on the higher Judiciary and, where necessary, to lower Judiciary as well.

III. Status of international law in the municipal system of Bangladesh and India

International law does not by itself prescribe how it should be applied or enforced at the national level; instead, national constitutions prescribe and determine the status of customary and treaty law within the domestic legal border[10]. Theoretically, the two are different legal orders dealing with two different kinds of subjects and functioning in different spheres of operation. Whenever the question of the relationship between domestic legal order and international law arises, it is conventional to identify whether the concerned domestic jurisdiction follows the monist or the dualist model[11]. The monist models consider international and municipal law as part of the same system where international law is prior to municipal law hierarchically. Alternatively, the dualist models treat international and municipal law as part of two distinct systems prioritizing municipal law[12]. While this classification helps indicate the nature of the relationship between domestic and international legal regimes, it is often more complex than what the monist-dualist binary framework can meaningfully inform[13]. Also, the classification of a State as monist or dualist does not significantly assist in describing its constitutional approach to international obligations in determining how its courts will approach complex questions arising in litigation involving questions of international law[14]. It is one of the critical issues of international law entailing theoretical and practical implications and becomes critically important when a national legal system applies international law.

The constitutions of Bangladesh and India are both autochthonous in nature. The Indian Constitution has been the only one to survive various onslaughts without a break in the application, albeit with almost 100 constitutional amendments, whereas

[10] Eileen Denza, "The Relationship between International and National Law" in Malcolm Evans (ed), International Law 3rd edition (Oxford University Press 2018) 411.

[11] Borhan Uddin Khan and Muhammad Mahbubur Rahman, "Glimpses of international law discourse." in Mohammad Shahabuddin (ed.), Bangladesh and International Law 1st edition (Routledge, 2021) 15.

[12] Louis Henkin, "International Law: Politics and Values" (1995) 18 Developments in International Law 64.

[13] Janne E. Nijman and André Nollkaemper eds. New Perspectives on the Divide Between National and International Law (Oxford: Oxford University Press, 2007); OWADA, Hisashi. "Problems of Interaction Between the International and Domestic Legal Orders" (2015) 5:2 Asian Journal of International Law 246.

[14] Nijman and Nollkaemper Ibid. p. 418.

Bangladesh has endured several phases of constitutional suspension or repeal. In order to avoid clashes between the two legal systems, Bangladesh and India have constitutional provisions or practices that, in some form or other, make international law a part of their municipal laws. Bangladesh constitution contains provisions found in the preambles and fundamental principles of state policy indicating its readiness in principle to submit to general international law[15]. India also determines the proper incorporation procedure by articulating provisions in their pertinent Constitution. Both the States give effect to international law by accepting international treaties, practising international customs and following general principles of international law.

A. Bangladesh's domestic legal order vis-à-vis international law

In the current world order, international law has the emancipatory potential to address various challenges that many post-colonial states like Bangladesh often face. In 1971, Bangladesh emerged as a new member of the international society with a notable presence at the international stage and involved in various international law issues, e.g. the right to self-determination, genocide and crimes against humanity, citizenship, state boundaries, and natural resources[16]. After securing statehood and recognition by the international community, primarily through the attainment of membership of the United Nations (hereinafter UN) in 1974[17], and joining all of the major international organizations, Bangladesh has gone on to plan its distinct framework of engagement with international law based on its history and its geopolitical, economic, and security interests[18]. The successful engagement with international law was certainly constructive and beneficial for the people of Bangladesh as it has contributed to the development of international law in some areas[19]. However, how prosperous and constructive Bangladesh has been in dealing with various international law regimes in the subsequent years remains unclear[20]. As a dualist country, Bangladesh has been following the common law doctrines, theories, and traditions for long. As a country with a dualistic common law tradition, Bangladesh requires the transformation of treaties (bilateral or multilateral) to attribute them with statutory effect within the domestic legal framework[21]. It is significant to note here that the adoption of the Constitution of Bangladesh was influenced by the flow of the decolonization movement all over the

[15] Shiekh Hafizur Rahman Karzon and Abdullah Al Faruque "Status of international law under the constitution of Bangladesh: an appraisal." (1999) 3(1)Bangladesh Journal of Law 25.

[16] Mohammad Shahabuddin, "Introduction or a prelude to stories of an ambivalent relationship" in Mohammad Shahabuddin (ed.), Bangladesh and International Law 1st edition (Routledge, 2021) 1.

[17] Admission of the People's Republic of Bangladesh to membership in the United Nations, GA Res. 3203 (XXIX) UNGA 17 September 1974.

[18] Farhaan Uddin Ahmed, "Framework of engagement with international law" in Mohammad Shahabuddin (ed.), Bangladesh and International Law 1st edition (Routledge, 2021) 26.

[19] Supra note 11.

[20] Ibid.

[21] Emraan Azad, "Customary international law" in Mohammad Shahabuddin (ed.), Bangladesh and International Law 1st edition (Routledge, 2021) 61.

colonized world. Therefore, it is desirable that the Constitution reaps benefits from the international human rights regime and global principles of constitutionalism[22]. Human rights entered the national law of Bangladesh through constitutional rights and matched human rights requirements. Bangladesh has ratified/acceded to eight-core international human rights treaties and other human rights treaties. Notably, the Constitution uniquely places the Supreme Court as its guardian, proclaiming the latter's functional independence and ensuring its authority to enforce the Constitution as a normative order[23]. Before focusing on the approach of the Court, the relevant provisions of the Constitution of Bangladesh needs to be analyzed. The general practice of Bangladesh is that unless and until it is incorporated into domestic legislation, treaties are not automatically part of the municipal law of Bangladesh[24]. In domestic courts, the judges and lawyers of Bangladesh rarely hold any fearless attitude and approach to apply the principles and provisions of international law[25].

1. International law and the Bangladesh Constitution

The Proclamation of Independence[26] positively stated that Bangladesh would "observe and give effect to all duties and obligations... as a member of the family of nations and under the Charter of United Nations"[27], although it was not at that time a member of the UN[28]. The Constitution of the People's Republic of Bangladesh was adopted on 4th November 1972 and given effect from 16th December 1972 that has been a revolutionary document based on the supreme sacrifices of the people who liberated Bangladesh[29]. At first, the preamble of the 1972 Constitution indicates the state's obligation towards international law in the phrase "to make a full contribution towards international peace and cooperation in keeping with the progressive aspirations of mankind". The significance of the preamble is immense as it is part of the basic structure of the Constitution, and in the case of amendment, it has to pass a rigid procedure. The Constitution refers to the application of international law under Article 25 (applicability of customary international law) and 145A(concerning Treaties and Conventions). It has charted a distinct approach to international law based on its

[22] Ridwanul Hoque, "Constitutionalism and the Judiciary in Bangladesh". Sunil Khilnani in et al. eds Comparative Constitutionalism in South Asia, (Oxford University Press, New Delhi 2013) 303. The known sources of inspiration were the constitutions of the UK, USA, India, and Ireland. Bangladesh adopted the model of constitutionalism that was a mix of the colonial British and American traditions.

[23] Ibid.

[24] Christine Richardson and Md Mostafa Hosain, "Application of International Law in Bangladesh: An analysis of the Supreme Court Judgments" (2015) Jagannath University Journal of law 1.

[25] M. Shah Alam, "Enforcement Of International Human Rights Law By Domestic Courts: A Theoretical And Practical Study" (2006) 53:3 Netherlands International Law Review 399.

[26] The interim Constitution of Bangladesh 1971.

[27] The Proclamation of Independence, para. 20.

[28] Muhammad Ekramul Haque, "The Bangladesh Constitutional Framework and Human Rights" (2011) 22(1) Dhaka University Law Journal 56.

[29] S. Malik. "Laws of Bangladesh" A. M. Chowdhury and F. Alam eds, Bangladesh: On the Threshold of the Twenty-First Centur (Asiatic Society of Bangladesh: Dhaka, 2002) 434.

history and geopolitical, economic, and security interests, extrapolated prima facie from Article 25 entitled "Promotion of International Peace, Security and Solidarity'[30]. As a structure of engagement with international law, Bangladesh has been consistently practising with precise reference to three principles – non-alignment, multilateralism, and Third World resistance[31]. The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States[32] complementing the UN Charter has been the primary source of inspiration and subject matter for the norms and principles enunciated in Article 25[33]. This article is the most pertinent provision dealing with international law but non-justiciable according to Article 8(2) of the Constitution[34]. However, principles enshrined in Article 25 are fundamental to the governance and law-making of the state and a guide to the interpretation of the Constitution and other laws[35]. This provision is generalized and largely unspecific and inclined to differing arguments regarding the appropriate theory of domestic application of international law. It contains principles of international law, including "*respect for national sovereignty and equality, non-interference in the internal affairs of other countries, peaceful settlement of international disputes and the principle of respect for and promotion of the right of self-determination of oppressed people*"[36]. As none of these provisions stipulates that international law would be part of the law of the land, be it based on custom or treaty[37], the classical dualist approach equally applies to international treaties and customary international law. The Constitution of Bangladesh recognizes international human rights norms like most other national constitutions drafted in the post Universal Declaration of Human Rights (hereinafter UDHR) period[38]. Together with the fundamental rights, they provide a reservoir of legal resources drawn upon by the Court and other institutions of governance to bring about social change39. These are incorporated in the Constitution under part II "Fundamental Principles of State Policy"[40] which includes economic, social, and cultural rights that

[30] Supra note 18.

[31] Ibid.

[32] "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations" GA Res. 2625 (XXV) UNGA 1970.

[33] Ibid.

[34] Article 8 (2) provides that the principle set out in Article 8-25 are not judicially enforceable.

[35] Ridwanul Hoque and Mostafa Mahmud Naser, "The Judicial Invocation of International Human Rights Law in Bangladesh: Questing a Better Approach" (2006) 46(2) Indian Journal of International Law 151.160.

[36] Ibid.

[37] Shiffat Sharmin and Sajeda Akther, "Problems of Implementation of International Law within Domestic Jurisdiction: Seeking Ways to Enforce International Human Rights Norms in State Territories" (2002) 5 Chittagong University Journal of Law 91, 96; Borhan Uddin Khan, "The ILO Conventions on Freedom of Association: Review of Its Implications in Bangladesh" (2002) 6, nos. 1and 2 Bangladesh Journal of Law 24.

[38] S.M. Solaiman, "International Charters on Human Rights and their Implementation: The Bangladesh Perspective" (1996) 1 Chittagong University Studies (Law) 77.

[39] K. Hossain, 'Interaction of Fundamental Principles of State Policy and Fundamental Rights', in S. Hossain et al, (eds), Public Interest Litigation in South Asia: Rights in Search of Remedies (University Press Limited: Dhaka, 1997) 43.

[40] The Constitution of the People's Republic of Bangladesh, Part II, Articles 8-25.

are not judicially enforceable[41] and part III "Fundamental Rights"[42] that are judicially enforceable and include almost all civil and political rights recognized by the international bill of human rights. Despite the constitutional recognition of international human rights norms, there remains a lack of human rights culture in Bangladesh[43]. The Courts can take into account the UDHR and its two covenants, namely, the International Covenant on Civil and Political Rights (hereinafter ICCPR), and the International Covenant on Economic, Social and Cultural Rights (hereinafter ICESCR), to aid the legal interpretation of the fundamental rights as enumerated in the Bangladesh Constitution[44]. For that reason, the application and interpretation of article 25 by the Court would lead towards the constitutionalization of international law in Bangladesh. It is very significant to observe how the Court considers such a provision as this article is not enforceable by any court of law.

The fundamental provision regarding adoption and codification of international treaties is laid down in Article l45A that provides – "*All treaties with foreign countries shall be submitted to the President, who shall cause them to be laid before Parliament*"[45]. It is further stipulated that any such treaty connected with national security shall be laid in a secret session of Parliament as this discussion is fruitful to identify potential problems at the domestic level"[46]. The provision requires a treaty to be put forward to Parliament only for discussion, not ratification[47]. Though there is an obligation to lay a treaty before Parliament, the High Court Division in a case held that failure to lay a treaty before Parliament does not affect its validity[48], implying that treaty-making is an executive and not legislative act in Bangladesh[49]. The President is conferred the power to enter into treaties with foreign nations50. Therefore, making a treaty in Bangladesh is an executive act, and approval of Parliament is not necessary for its validity[51]. It can also be asserted that there is no dominating trend in the approaches

[41] Borhan Uddin Khan "Fifty Years of the Universal Declaration of Human Rights" 1998 Institutional Development of Human Rights in Bangladesh (IDHRB) Project. Ch. 15.

[42] Supra note 39, Part III, Articles 26-47A.

[43] Mohammad Shahabuddin, "Human Rights and the Law", in Ali Riaz and Mohammad Sajjadur Rahman eds. Routledge Handbook of Contemporary Bangladesh, (London: Routledge, 2016) 283.

[44] Mahmudul Islam, Constitutional Law of Bangladesh (3rd revised ed. Dhaka Mullick Brothers 2012) 127.

[45] Article 145A was substituted by section 43 ofthe Constitution (Fifteenth Amendment) Act 2011 (Act XIV of 2011).

[46] The provision was substituted by section 20 of the Constitution (Twelfth Amendment) Act 1991 (Act No. XXVIII of 1991).

[47] Supra note 15.

[48] Maior (Retd) Akhtaruzzaman v. Bangladesh, 1999 W.P. no. 3774 (unreported).

[49] Bianca Karim and Tirza Theunissen "Bangladesh" in Dinah Shelton, (ed.) Intemational Law and Domestic Legal systems: lncorporation, Transformation, and Persuasion (Oxford University Press Inc. New York, 201l) 100.

[50] In particular, Article 48(2) of the Constitution of Bangladesh provides that the President shall, as head of state, exercise and perform duties conferred and imposed on him by the Constitution and by any other law. Article 55(4) of the Constitution of Bangladesh provides that all executive actions of the govemment shall be taken in the name of the President.

[51] Supra note 43, p. 1026.

of the legislature and the government towards international law that can be characterized as a unique and consistent Bangladeshi approach[52].

B. India's domestic legal order vis-à-vis international law

India has been a significant contributor to the field of international law. India is also traditionally a dualist country in its engagement with international law[53]. In the absence of clear legislation or enactment, the touchstone of consistency lies within the constitutional guarantees. In India, complexity arises as the Constitutional provision does not provide specific clarity on incorporation. Here comes the significant role of the domestic Court, which has to face difficulties and complex problems, including the status of treaties ratified by States but not incorporated, or not ratified but signed or ratified but contrary with domestic laws or contrary with the Constitutional provisions. In the same way, complexity arises concerning customary international law, general principles of law and other sources. The effectuation of international law in India is facilitated by incorporating treaties into the internal law through legislation and incorporating specific rules and principles of internationa1law into the Indian common law by the Indian courts following the Commonwealth practice. Even when a treaty has not been expressly incorporated into the Indian law, the courts may, as far as possible, interpret the Indian statute law in harmony with the principles embodied in the treaty, thereby avoiding gaps in the implementation of international treaty obligations undertaken by India.

1. International law and the indian Constitution

The Indian Constitution was adopted on 26th November 1950. It was being debated in the period that saw the birth of the UN and the framing of the UDHR. This is because the text of the Constitution does not clearly express how the new state would interact with the emerging international order or how the norms of international law ought to have an effect within the state[54]. Originally, the Indian constitutional framework provided a flexible basis for the application and use of international law due to the socio-political context of India as a developing country[55]. Its Constitution is a comprehensive document containing provisions relating to fundamental rights granted to individuals in Part III (dealing with fundamental rights) and directions to the Indian state about certain policy adherences in Part IV (Directive Principles of State Policy). There are mainly three provisions, namely Articles 51, 253, and 246 in the Indian Constitution, dealing with the creation and observance of international law obligations. The drafting of Article 51 was inspired by the Havana Declaration of 30th

[52] Supra note 11.

[53] Aparna Chandra, "India and international law: formal dualism, functional monism" (2017) 57 Indian Journal of International Law, 25.

[54] Ibid.

[55] Supra note 8.

November 1939, adopted under the umbrella of the International Labour Organization[56]. It referred to the promotion of international cooperation and the imperative need to achieve international peace and security by eliminating war as an instrument of national policy and some imprints of the language of the UN Charter. Article 51 is a general provision promoting "international peace and security" followed by the Indian commitment to "*maintain just and honourable relations between nations*"[57]. It mixes up between foreign policy goals and elements of international law. The promotion of international peace and security is undoubtedly an admirable goal of any foreign policy[58]. This directive is judicially non-enforceable; however, the principles are fundamental in the governance, and the state also must apply these principles embodied in the Directives in making laws[59]. The soft constitutional mandate in Article 51 is clear from its references to such phrases as "*the State shall endeavour to and foster respect for international law*" as Article 37 of the Constitution requires that these mandates, including international legal obligations in Part IV, would have to be implemented through appropriate legislations over entering into and implementing international obligations to the Union Legislature (Parliament)[60].

India follows the common law tradition and requires the legislative transformation of treaty obligations while directly incorporating rules of customary international law[61]. The Constitution provides an implementation mechanism through Article 253, which *inter alia,* vests the power to make laws implementing international instruments in the Parliament to which India becomes a party[62]. Parliament is also competent to participate in international conferences, associations and other bodies and implement decisions made therein[63]. Article 253 should be read along with Article 73 of the Constitution, which says the Union Executive can act on all matters even in the absence of legislation[64]. In Article 246, this legislative power is specified through three different

[56] This declaration was adopted by the representatives of the governments, employers and work-people of the American Continent at the Second Conference of American States Members of the International Labour Organization held in Havana on 21 November-2 December 1939.

[57] Constitution of India, article 51 states that the 'state should endeavour to (a) promote international peace and security, (b) maintain just and honourable relations between nations, (c) foster respect for international law and treaty obligations in the dealing of organized people with one another; and (d) encourage the settlement of international disputes by arbitration').

[58] V.S. Mani, "Effectuation Of International law In The Municipal legal Order: The Law And Practice In India" (1995) 5 Asian Yearbook of International Law 145.

[59] Article 51 is in Part IV of the Constitution, dealing with Directive Principles of State Policy ("DPSP").

[60] Supra note 52.

[61] Ibid.

[62] Article 253 (providing that "notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body").

[63] Article 246, Entry 13, Union List.

[64] Article 73 has been interpreted by the Indian Supreme Court in Ram Javaya Kapur v State of Punjab, AIR 1955 SC 549, to hold that the Executive can exercise power over matters in the Union List even in the absence of legislation to the effect as long as it does not act in violation of any law.

lists, namely Union List, State List and Concurrent List, which outline the areas of their respective dominance[65]. States have no authority to undertake directly any international obligations or to implement such obligations *sans* the concurrence of the Central Government[66]. The Indian constitutional scheme under Articles 73 and 253 recognizes that making a treaty is an executive act while demarcating a line between the formation of a treaty and its performance. However, while performing its obligations, legislative action would be required if it involves an alteration of existing domestic law.

IV. Constitutionalization of international law

Constitutionalization should be appreciated against a verticalization of substantive law background and international law's deformalization and fragmentation. One of the features of constitutionalization is the emergence of trans-governmental networks consisting of various international organizations and disaggregated components of the state, which interact and cooperate concerning a particular area. This interaction would be horizontal (between different international organizations with a functional overlap) and vertical (between the international organization and the state). One area where Constitutionalization and trans-governmental cooperation are clearest perhaps is the regime of international human rights law. It is one of the rare regimes where states have accepted the compulsory and subsidiary jurisdiction of international bodies granting exceptional rights for individuals to bring cases against them. Most national courts, seeking to maintain the vitality of their national political institutions and to safeguard their domestic status vis-a-vis the political branches, cannot ignore foreign and international law. Domestic courts contribute to their further domestication in engaging with international legal rules promoting the implementation of international law that traditionally has a weak enforcement mechanism[67]. Today, national courts regularly confront international law issues due to the unprecedented increase in the activity of international organizations and human rights NGOs. The increasing use of international law in domestic courts has been described as "globalization of judgments"[68]. As International law addresses the rights, obligations, and concerns of non-state actors like individuals, corporations, and non-governmental organizations, it is increasingly invoked by the non-state entities before domestic courts[69]. In particular, international

[65] The subject matters covered under these Lists are provided in the Seventh Schedule of the Indian Constitution.

[66] Supra note 52.

[67] Tzanakopoulos, Antonios & Christian J Tams. "Introduction: Domestic Courts as Agents of Development of International Law" (2013) 26:3 Leiden Journal of International Law 531-540.

[68] Reem Bahdi, "Globalization of Judgment: Transjudicialism and the Five Faces of International Law in Domestic Courts" (2002) 34:3 Geo Wash Int'l L Rev 555.

[69] Rabinder Singh, "The Use of International Law in the Domestic Courts of the United Kingdom" (2005) 56:2 N Ir Legal Q 119.

human rights law is invoked by various non-state actors to hold states accountable for violating international legal norms and standards[70]. This is the case about determining the scope of human rights and resolving challenging issues such as determining constitutional remedies through interpretation. Application of international law by the Domestic courts in dispute resolution, either through confirmation or interpretation, has sometimes been described as the 'international judicial function' of the judges[71]. Ordinarily, questions of international law arise primarily at the level of the higher Judiciary on the assumption that it is the higher Judiciary that is taking recourse to international law frequently[72]. Legal institutions of Bangladesh and India fulfil almost similar functions, and the role of the Judiciary in the implementation of international law is vital to evaluate the progress of Constitutionalization of International law there.

The Judiciary of both states can enhance domestic provisions by drawing attention to international instruments by interpreting the Constitutional provisions bringing a dawning jurisprudence of constitutionalization of international law. The application of international law by the courts of Bangladesh and India is influenced by the adhering legal tradition, constitutional provisions on international law, and the degree of receptiveness of its judges towards international law. The question is not about the supremacy of international law over national law but of coexistence and coordination of both. Bangladeshi and Indian Judiciary, though not empowered to make legislations, has interpreted their obligations under international law into the constitutional provisions relating to the implementation of international law in pronouncing their decision in cases concerning issues of international law. As Constitutional provisions on international law has already been discussed, now the judicial stance of Bangladesh and India towards international law, both progressive and conservative, will be discussed to evaluate the progress of constitutionalization of international law.

A. Constitutionalization of international law in Bangladesh

As a dualist country, the approach of Bangladeshi Courts is constrained within its strict common law-based approach of preference of domestic law[73]. Generally, the higher Judiciary of Bangladesh has jurisdiction over questions involving interpretation and application of international law. The Supreme Court of Bangladesh has construed and enforced the principles of international law based on the Constitution as a fundamental charter of social and political values and acts as a pioneer towards the obligation of Bangladesh towards international law, which has been reflected in

[70] Abdullah Al Faruque, "Judicial invocation of international law" in Mohammad Shahabuddin (ed.) Bangladesh and International Law 1st edition (Routledge, 2021) 37.

[71] Antonios Tzanakopoulos, "Domestic Courts in International Law: The International Judicial Function of National Courts" (2011) 34:1 Loy LA Int'l & Comp L Rev 133.

[72] Sunil Kumar Agarwal, "Implementation of International Law in India: Role of Judiciary" (2010) 12 SSRN 1864489.

[73] Supra note 24.

several cases. The limitation of the Court is that it cannot directly rely on international instruments because of the inertia of government to enact legislation complying with its international obligation. Nevertheless, a gradually changing trend reflected in recent case decisions proves that it has been shifting from orthodox dualist reasoning to accommodate international treaty law in the domestic context[74]. Generally, the globalization process and the development of global human rights jurisprudence have positively impacted the Court's changing role. Despite apparent progression in international law-based judicial thinking and action, the tendency by courts, particularly in dualist systems like Bangladesh, regards international human rights law as merely "inspirational" or "persuasive" persists. The courts of Bangladesh also resort to soft law instruments besides binding instruments like treaties and conventions. In order to set in proper perspective its role vis-à-vis the constitutionalization of international law, now we will analyze briefly the position of the Court based on the constitutional provisions.

1. Judicial incorporation of international law in Bangladesh:

The Judiciary could not function in a democratic environment for quite a long time after its independence during several phases of the Bangladesh polity. Therefore, the Bangladeshi Judiciary began to follow active adjudication of constitutional issues only lately. The Supreme Court primarily relies on domestic law; the principles of treaties are not enforced unless they are incorporated into domestic laws, even if ratified by the state[75]. The domestic invocation of international norms has been the seedbed in the case of *Kazi Mukhlesur Rahman v. Bangladesh*[76]*,* on the application of a treaty in Bangladesh where the Appellate Division of the Supreme Court creatively used relevant international law materials[77]. In the case of *Bangladesh v Somboon Asavaham*[78]*,* the Appellate Division of the Supreme Court held – *'It is well settled that where there is municipal law on an international subject the national Court's function is to enforce the municipal law within the plain meaning of the statute*[79]*.* In this case, the Court preferred domestic laws as part of its practice. The voice of the Apex Court was optimistic to apply treaty law to interpret domestic provisions in some cases because when referring to international law in the interpretation of a provision of domestic law, the Courts usually do so without deference to the views of the government or legislature unless this would be necessary[80]. In the *Slum Eviction* case,

[74] Md. Al-Ifran Hossain Mollah, "The Law of Treaties and treaty reservations" in Mohammad Shahabuddin ed., Bangladesh and International Law 1st edition (Routledge, 2021).

[75] Kamal Hossain and Sharif Bhuiyan, "Bangladesh", in Simon Chesterman et al. eds. The Oxford Handbook of International Law in Asia and the Pacific, (Oxford: Oxford University Press, 2019) 604.

[76] 26 DLR [1974] AD 44.

[77] Supra note 34, p. 163.

[78] 32 DLR [1980], p. 198.

[79] Ibid., p. 201.

[80] Ibid.

the High Court Division of the Supreme Court, in addition to the national legislation, made direct reference to Article 25 of the UDHR, Article 11(1) of the ICESCR and General Comment No. 7 of the CESCR[81] while challenging the government's decision of wholesale eviction of slum dwellers[82]. In a separate opinion in the case of *Hussein Mohammad Ershad v. Bangladesh and Others*[83], Justice B.B. Roy Chowdhury viewed that national Courts should not ignore the international obligations the country undertakes and should draw upon the principles incorporated in the international instruments if the domestic laws are ambiguous or absent. The reasons for invocation of international treaties are reflected in *Bangladesh and another v Hasina and another*[84], where it was held that the international bill of rights influences the inclusion of bill of rights in our Constitution. As a result, most of the rights mentioned in the declaration and the covenants is incorporated in some form or other in part III of the Constitution and some is recognized in part II. The courts would look into the ICCPR while interpreting the provisions of the Constitution to determine the right to life, liberty, and other rights.

The approach of the Court was further Strengthened in the case of *BNWLA v.Government of Bangladesh and others*[85], the Court, in that case, took into account provisions of CEDAW and the General Recommendation No. 19 (11th Session, 1992) of CEDAW to form guidelines, where a few guidelines were provided to safeguard against sexual abuse and harassment of women at workplaces and educational institutions. The High Court Division again held in the case *BNWLA v. Government of Bangladesh*[86] that in case of a gap in the municipal law in addressing any issue, the Courts may take recourse to international conventions and protocols on the same to formulate effective directives and guidelines to be followed by all concerned until the national legislature enacts laws in this regard. It was further held that the Court could look into UDHR, ICCPR, ICESCR and other conventions and covenants to assist the interpretation of provisions in Part III of the Constitution, particularly to determine the right to life and right to liberty[87]. In *Dr Shipra Chaudhury & another v. Government of Bangladesh and Others*, it was decided that in case of the absence of any domestic law occupying the field, the international conventions and norms should be read into the fundamental rights when there is no inconsistency between them[88]. The Court explicated that the human rights treaties could be used to aid the interpretation of fundamental rights provisions guaranteed in the Constitution, particularly the rights

[81] On forced eviction.

[82] Ain o Salish Kendra (ASK) and others v. Government of Bangladesh and Others, 19 BLD (HCD) [1999].

[83] 21 BLD (AD) [2001] p. 69:LLDC 476 BD [2000], para. 3.

[84] 60 DLR (AD) [2008] 90; ILDC 1409 BD [2008]; 8 May 2008, para. 82.

[85] 14 BLC [2009], HCD, para. 45, p. 703.

[86] 31 BLD [2011] HCD, p. 324.

[87] Ibid.

[88] 29 BLD [2009] HCD, para. 27.

implicit in the right to life and liberty[89]. Here, the judgement indicated that the interpretation of fundamental human rights provisions under the Constitution should be given meaning more in harmony with universal human rights norms[90]. In *Tayazuddin and another v Bangladesh*[91]*,* the Court referred to international instruments and based on the jurisprudence from those instruments, where the Court recoursed to the universal human rights norm of the right to life, liberty and security of a person and used Article 3 of UDHR to interpret Article 32 of the Bangladesh Constitution.

As the legal system of Bangladesh is based on common law, customary international law is binding and part of the law of the state if it is not contrary to domestic law[92]. The first case before the Supreme court on the application of customary international law was *Bangladesh v Unimarine S.A. Panama*[93]*,* where the Court held that customary international law is binding on States, and they generally give effect to rules and norms of customary international law. In a writ petition *Saiful Islam Dilder v. Government of Bangladesh*, it was led to stay an executive order extraditing Anup Chetia, the leader of United Liberation Front of Assam (ULFA) and an alleged secessionist from Assam to India[94]. The Court noted that the extradition of Chetia to India would strengthen two countries' relations under Article 25 of the Constitution, requiring the state to promote and respect the principle of sovereign equality and non-interference in international affairs of other countries[95]. In *Bangladesh Legal Aid and Services Trust(BLAST) v Bangladesh* [Fatwa, Case][96], the Court categorized torture and other ill-treatment as a basic principle of customary international law and held that the international legal prohibition of torture or other ill-treatment is obligatory on Bangladesh, and the government must prevent, prohibit and punish torture and other cruel, inhuman or degrading treatment or punishment under international law[97]. In *The Government of People's Republic of Bangladesh v. Abdul Quader Molla,* while dealing with the first appeal against any judgement of the International Crimes Tribunal (ICT), Bangladesh, the Appellate Division of the Supreme Court rejected the direct application of Customary International Law in creating/imposing any criminal liability and penal sanction on an individual[98]. The Court accomplished that the domestic provisions sufficient to create and punish an international crime will be applicable, and there is no option for the application of CIL as the ICT Act provisions completely comply with customary international criminal law[99]. The Supreme Court has referred to the nonbinding instruments in the

[89] Supra note 69.
[90] Ibid.
[91] 21 BLD (HCD) [2001] para. 26:ILDC 479 BD.
[92] Mizanur Rahman, "Paribartansheel Biswey Antorjatik Ain" (in Bangla) (Palal Publications' 2008) P 58.
[93] 29 DLR [1977] 252.
[94] 50 DLR (HCD) [1998] 318.
[95] Ibid.
[96] Writ petition no. 5863 [2009], writ petifion No.754 [2010], writ petirion no. 4275 [2010].
[97] Ibid.
[98] Criminal Appeal Nos. 24-25 [2013], AD 86.
[99] Ibid., Dissenting Opinion of Miah, J. 262.

interpretation and application of domestic law in various instances. In the case of *Dr Mohiuddhin Farooque v Bangladesh*[100], it was held that the right to life protected under the Constitution in Chapter III as a fundamental right was discussed regarding the resolutions of the World Health Organization. Similarly, the Supreme Court has discussed child rights in *State v. Md. Roushan Mondal*[101], by referring to the UN Standard Minimum Rules for the Administration of Justice (Beijing Rules) adopted by the General Assembly Resolution 40133 of 29th November 1985, the UN Guidelines for the Prevention of Juvenile Delinquency[102] and the Guidelines for Action on Children in the Criminal Justice System Recommended by Economic and Social Council resolution 1997/130 of 21st July 1997. In *State v. The Metropolitan Police Commissioner, Khulna*[103] the Supreme Court highlighted the discrepancies between the then Children Act 1974 and the Convention on Rights of the Children (CRC), and asked the government to make compulsory reforms to the relevant law as per its international obligation under the CRC. The Court invoked the Resolutions of the UN and its organs in many cases. In *M. Saleem Ullah v Bangladesh*[104], the Court observed that "*the decision of the government to participate in the UN-sponsored multinational force to Haiti to help the restoration of the legitimately elected government was taken pursuant to the UN Resolution No. 940 and Bangladesh being a member State, has taken the decision on the authority of the constitutional framework and international commitment*"[105]. The Court invoked WHO resolution as a tool to follow by the state in the protection of health in the case of *Professor Nurul Islam v Government of Bangladesh*[106], stating that "*Bangladesh, a Member State of WHO, is merely duty bound to give effect to the WHO resolution'*. In this case, in the absence of domestic legislation, the Court invoked international law and international obligations enunciated in the WHO resolutions as a tool to cast a duty upon the state to take prohibitive measures[107]. The judgement clearly reminds Bangladesh has a constitutional obligation to respect international law and the UN Charter in enacting national legislation[108]. In *BLAST v. Bangladesh*[109], the Court urged to frame a Code of conduct for the law enforcing agencies based on a UN General Assembly Resolution to reduce excesses and abuse of power by the law enforcers[110]. In *State vs. Metropolitan Police Commissioner*[111], the Court stated that '*if*

[100] 17 BLD (AD) [1997].
[101] 26 BLD (HCD) [2006] p. 549.
[102] The Riyadh Guidelines adopted and proclaimed by General Assembly resolution 45/112 of 14th December 1990.
[103] 60 DLR (HCD) [2008] 660.
[104] 47 DLR [1995] p. 218.
[105] 47 DLR [1995] p. 219.
[106] 52 DLR (HCD) [2000] p. 413.
[107] Ibid., para. 9-10.
[108] Ibid.
[109] 4 BLC [1999] HCD 600.
[110] Resolution No. 34/169 1979.
[111] Supra note 101, p. 660.

the beneficial provisions of the international instruments do not exist in our law and are not in conflict with our law, then they ought to be implemented for the benefit and in the greater interests'. Also, in *Anika Ali v Rezwanul Ahsan*[112], the Appellate Division held that the beneficial provisions of international instruments may be referred to and implemented in appropriate cases unless such provisions are contrary to the domestic laws. The Court invoked international human rights law and environmental law principles in *Metro Makers and Developer Ltd. v. Bangladesh Environmental Lawyers Association and Others*[113]. The Court viewed that the right to a healthy environment is now to be found in several regional human rights instruments around the globe and particularly referred to Article 11 of the Additional Protocol to the Inter-American Convention on Human Rights (1994), Article 24(2) of the CRC, and Article 24(1) of the African Charter on Human and Peoples Rights (1981)[114].

It has been reflected in the judgments of the above-discussed cases that in case of gaps at the domestic level, the Court may recourse to international law and explicitly use international human rights law to fill the gaps or cover up deficiencies to the domestic law or to control executive discretion. Due to being a dualist one, the national courts of Bangladesh had a tendency not to reflect adequately on the values and imperatives of the rights inserted in treaties and instruments. However, Court gradually progressed from direct ignoring of international law in the case of *Bangladesh v Sombon Asavham* to taking into account pertinent rules of international law that could enhance the relevant domestic rule and gradually moved from narrow interpretation of those articles of the Constitutions to broader interpretation to interfere with governmental policies concerning international law. The approach of the Court has been positively shifting towards judicial incorporation, which could be argued as moving towards constitutionalization of international law. As the trend so far has been selective in the implementation of international law by the courts in Bangladesh, the Supreme Court being the guardian of the Constitution, must be more proactive towards applying international law and needs to play a crucial role in the application of international law within the municipal legal order.

B. Constitutionalization of international law in India

Indian Judiciary applies non-domesticated international law obligations in various ways. Since its inception, the courts have been applying international law to fill the gaps in domestic law and policy. It follows the incorporation doctrine allowing courts to enforce international law without any legislative transformation directly unless there is a contrary domestic norm of higher value. Only in recent years has the higher Judiciary in India increasingly invoked a diverse set of international legal norms,

[112] Anika Ali v Rezwanul Ahsan 17 [2012] MLR (AD) 49.

[113] 65 DLR (AD) [2013] 181.

[114] Ibid., para. 68, containing provisions relating to environmental protection and the right to safe environment.

particularly in the field of human rights[115]. The Indian Supreme Court has declared that its tasks encompass the advancement of the human rights jurisprudence[116]. The Indian Courts have usually attempted to balance their approach towards both transformation and incorporation doctrines and have always looked for a more harmonious construction of the provisions to be inclusive of international law. As long as the international treaties and customary norms are broadly consistent with the basic structures of the Constitution, the Indian courts have no hesitation in applying these international legal norms. It would be essential for the Indian Courts to be responsive to the evolution of norms within the global legal framework and the Judiciary. With CHANDRASEKHARA Rao's recommendation that the Judiciary has constitutional duty through Article 51 to apply the principles of interpretation embodied in the VCLT 1969, it has become part of international customary law. It has even stayed clear of an in-depth examination of the Indian statute law and common law against the whole gamut of international law to evaluate how far the Indian law has been able to assimilate the latter into its body juridic. To clarify to the Indian municipal lawyers and Judiciary the various important aspects and concepts of international law relevant to the judicial task of their effectuation into the internal law, Judiciary is cast upon the duty under Article 51 of the Constitution.

1. Judicial incorporation of international law in India:

The Indian Supreme Court had its first formal encounter with international law immediately after its independence when it had to decide the constitutional validity of executive action initiated for territorial adjustments. In 1954, in the case of *Krishna Sharma v. State of West Bengal*[117], the Calcutta high court held that the courts shall try to make a harmonious construction when there is a dispute between domestic law and international law. Supreme Court of India examined the relationship between Articles 51, 73, 246, and 253 first within the constitutional scheme in *Maganbhai Ishwarbhai Patel v. Union of India*[118], where the essential question was about the adjustment of the boundary with another country and whether it could be done through an executive act or required an amendment of the Constitution[119]. While examining this issue, the Supreme Court referred to Article 73 of the Constitution, that the executive power of the Union extended to matters in which the Parliament had the power to make laws[120]. The Court concluded by stating that "*if the rights of the*

[115] Supra note 1; Y.K. Tyagi, "The Conflict of Law and Policy on Reservation to Human Rights Treaties" (2000) 71 British Yearbook of International Law 181.

[116] P. Chandrasekhara Rao, "The Indian Constitution and International Law" (Leiden, The Netherlands: Brill | Nijhoff 1995) 148, citing Ajay Hasia v. Khalid Mujib, AIR [1986] SC 487, 493 and M.C. Mehta v. Union of India, AIR [1987] SC 1086 1089, 1097.

[117] AIR [1954] Cal 591, 58 CWN 659.

[118] AIR. [1969] SC 783.

[119] Ibid.

[120] Ibid.

citizens or others which are justiciable are not affected, no legislative measure is needed to give effect to the agreement or treaty"[121]. The *Maganbhai* decision is crucial as it overruled Supreme Court's own earlier advisory opinion upon reference by the President of India, in *re The Berubari Union and Exchange of Enclaves*[122] where it had stated that a mere executive action is insufficient to alter boundaries. It was about exchanging certain enclaves between India and East Pakistan (now Bangladesh) under an agreement between two prime ministers[123]. In *Jolly George Varghese and Another v. The Bank of Cochin*[124], the Court first attempted to deal with the emerging linkages between domestic law and human rights. It reconciled Article 11 of the ICCPR with Contractual provisions under municipal law to protect the human rights of the civil debtor whose personal liberty was at stake due to judicial process under Section 51 (Proviso) and Order 21, Rule 37, Civil Procedure Code.

The Indian Supreme Court stayed with the transformation doctrine framework for a very long time till 1984. With *Gramophone Co. of India v. Birendra Bahadur Pandey*[125], the Court seemed to have moved to recognize the *incorporation* doctrine, which treats international law as part of municipal law, particularly concerning customary international law. The Court noted that "*the doctrine of incorporation recognizes the position that the rules of international law are incorporated into national law and considered to be part of the national law unless they are in conflict with an Act of Parliament"*[126]. The Court concluded that the national courts would endorse international law but not if it conflicts with national law[127]. The principle articulated was extended to customary international law in 1996 in *Vellore Citizens Welfare Forum v Union of India*[128]. The Court continued with the theme of direct incorporation of international law and held that once the principles are accepted as part of the Customary International Law, there would be no difficulty accepting them as part of the municipal law[129]. The Supreme Court of India in *Peoples' Union for Civil Liberties v Union of India*[130] has accepted that *'the rules of customary international law which are not contrary to the municipal law shall be deemed to be incorporated in the domestic law*.' In 1992, the Court held that India's non-ratification of maritime law treaties did not bar their application as these treaties embodied the unification of maritime rules common to national legal systems and could be seen as part of

[121] Malcolm N. Shaw, International Law, (4th ed. 1997) 129, 151. Treaties concerning relatively unimportant administrative agreements which do not require ratification as they do not purport to alter municipal law need no intervening act of legislation.

[122] 3 S.C.R. [1960] 250 (India).

[123] Ibid. at 16.

[124] AIR [1980] SC 470.

[125] AIR [1984] S.C. 667 (India).

[126] Ibid.

[127] Ibid. at 673.

[128] [1996] 5 SCC 647.

[129] Ibid.

[130] AIR [1997] SC 568.

international common law and thus open to incorporation by Indian Courts[131]. For the first time in this case, the Court rationalized applying treaties that had not been ratified by the country moving towards their judicial incorporation[132]. Along the same lines, in *Nilabati Behera v State of Orissa*[133], the Court referred to Article 9 (5), ICCPR, to decide to grant compensation in fundamental rights violation case ignoring India's specific reservation to that clause[134]. In *State of West Bengal v Kesoram Industries Ltd*[135]*,* the Supreme Court explicitly recognized this practice of bypassing Executive assumption of international obligations by stating that the Supreme Court in a large number of cases interpreted the statutes keeping in view the same even if India is not a signatory to the relevant International Treaty or Covenant. The Court held in *People's Union for Civil Liberties v. Union of India*[136] that the provisions of the ICCPR elucidate and go to effectuate the fundamental rights guaranteed by the Constitution. These can indeed be relied upon by courts as facets of those fundamental rights and enforceable as such[137]. From this case, the Court had started viewing international law as having constitutional status. The Court went a step ahead and formulated certain fundamental principles and guidelines based on available international instruments in *Vishaka v State of Rajasthan*[138]*.* The Court stated that to enlarge the meaning and content thereof and promote the object of the constitutional guarantee, any international convention not conflicting with the fundamental rights and harmonious with its spirit must be read into these provisions[139]. Since this case, the Court has repeatedly reiterated the notion of direct importation of international law into the Constitution[140]. Thus, the Court has signalled the imperative of international law norms in the domestic legal order to disputes before the Court by making international law directly applicable[141].

The Court has not only channelled international law through fundamental rights provisions but also resolved the constitutionality of statutory provisions under India's international commitments, e.g. in 1994, in the case *P.N. Krishna Lal v Govt of Kerala*[142] stating that '*…the spirit of the international convention has to be kept in view*

[131] M.V. Elisabeth v Harwan Investment and Trading Pvt. Ltd, AIR [1993] SC 1014.

[132] Since then this decision has been cited with approval in MV Al Quamar v Tsavliris Salvage (International) Ltd, [2000] 8 SCC 278; Liverpool and London S.P. and I Association v M.V. Sea Success, [2004] 9 SCC 512.

[133] [1993] 2 SCC 746.

[134] C. Masilamani Mudaliar v The Idol of Sri Swaminathaswami Swaminathaswami Thirukoli, [1996] 8 SCC 525; Sarbananda Sonowal v Union of India, [2005] 5 SCC 665.

[135] [2004] 10 SCC 201.

[136] [1997] 3 SCC 433.

[137] Ibid. (emphasis supplied).

[138] AIR [1997] S.C. 3011 (India).

[139] Ibid.

[140] Apparel Export Promotion Council v A.K. Chopra, [1999] 1 SCC 759; The Chairman, Railway Board v Chandrima Das, [2000] 2 SCC 465; Kuldip Nayar v Union of India, [2006] 7 SCC 1.

[141] Supra note 52.

[142] [1995] Supp (2) SCC 187.

in considering the validity of the impugned provisions and their applications'[143]. In the clearest example of such use, in *Ashoka Kumar Thakur v Union of India*, the Court framed as a separate issue for deciding the question of whether an Act providing for affirmative action in higher education violates Article 26 of the UDHR. It assumed that technical and professional education shall be made generally available and that higher education shall be equally accessible based on merit[144]. In the *Vellore Citizens Welfare Forum case,* the Supreme Court had no hesitation in holding aspects relating to sustainable development as part of customary international law and considered them part of domestic law[145]. Once these principles were accepted as part of customary international law, the Court concluded that there would be no obscurity in accepting them as part of domestic law[146]. However, the Court did not grant a blanket primacy to customary international law and noted that "…*it is almost accepted proposition of law that the rules of Customary International Law which are not contrary to the municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by the Courts of Law*"[147]. It took more than a decade for the Supreme Court to lay down some basic principles relating to accepting customary international law as part of domestic law done in *M/s Entertainment Network (India) Ltd.v. M/s Super Cassette Industries Ltd*[148]. In *Aban Loyd Chiles Offshore Ltd. v. Union of India*[149]*,* the Supreme Court had to consider the obligations created by the UN Convention on Law of the Sea (UNCLOS)[150] vis-à-vis its compatibility with the Maritime Zones Act, 1976[151], Customs Act, 1962[152], and the Customs Tariff Act, 1975[153]. Here the Court reiterated its position that the treaties/conventions can be looked into and enforced even in the absence of municipal law if they are not in conflict with the municipal law. The Supreme Court is prepared to consider customary international law and all the related interpretations as part of its law as long as it does not conflict with any domestic law.

Regarding the applicability of customary international law, the Supreme Court continues to follow primarily transformation doctrine with some occasional tilt towards incorporation doctrine. Some might welcome India's engagement with international law as indicating a much-needed openness to a progressive body of norms, particularly international human rights. Therefore, the constitutionalization of international law in India is exacerbated by the judicial incorporation of international law through which

[143] John Vallamattom v Union of India, [2003] 6 SCC 611.
[144] [2007] 4 SCC 397.
[145] AIR [1996] S.C. 2715.
[146] Ibid.
[147] Ibid.
[148] [2008] (9) S.C.A.L.E. 69 (India).
[149] [2008] (6) S.C.A.L.E. 128 (India).
[150] Dec. 10, 1982, 1833 U.N.T.S. 397.
[151] 1981, No. 42, Acts of Parliament, 1981 (India).
[152] No. 52, Acts of Parliament, 1962 (India).
[153] No. 51, Acts of Parliament, 1975 (India).

international norms enter the domestic arena, often at a constitutional level. Thus, a survey of Indian jurisprudence indicates the active role being played by the higher Judiciary in implementing India's international obligations that is not quite up to the mark in the case of Bangladesh.

V. Conclusion

The degree of compliance of law can never be hundred percent was recognized by the International Court itself in the Nicaragua Case where the Court ruled that it is not to be expected to apply the rules of international law in the practice of states in question should have been perfect[154]. Our own stories of international law have been of suffering, solidarity, resilience, resistance, and success from the Global South. As a process of constitutionalization, the reconstruction of the current evolution of international law necessitates these global south countries to find a constructive and beneficial way to engage with international law. This Comparative study aims to provide a basis for critical comparison between the legal systems to consider approaches from these two countries to reach an improved normative understanding. If the deficiency in the constitutional system has to be removed, and the state must confer the necessary power to the Judiciary. The judicial function may, in appropriate cases, even justify filling up any gaps in the Constitution or other statutes.

Indian courts have succeeded mainly in opening new windows to welcome international legal norms through creative interpretative techniques, aligning them with fundamental rights. This combination of fundamental rights and international legal norms has produced an exemplary and potent body of jurisprudence, expanding in the process the scope and application of some norms regarding human rights. In both countries, the approach of the Courts towards international law has been consistently evolving. In recent times, the Courts, particularly the Indian Supreme court, appear to be more comfortable with applying international legal norms in the absence of clear domestic law on the subject. Like the Indian Judiciary, the Judiciary of Bangladesh should play a proactive role in implementing international law under treaty law, especially human rights law. Through judicial activism, the Indian Judiciary fills up the gaps in India's municipal law and International law, thereby progressing towards constitutionalization of international law in India, which has not been quite the case with Bangladesh. This strategic judicial activism can be defined as constitutionalization of international law in the municipal system, which would be a better approach for the judges to apply international law into the domestic arena and to interpret domestic law coming out from the strict orthodox dualist approach in line with the developments at the international level. While Lord Denning was ready to

[154] ICJ Rep. [1986] p. 14 et seq., p. 98, para. 196.

change his stance from the transformation to the incorporation doctrine to accommodate quickly to the changing nature of international law in his *Trendtex*[155] decision (as quoted in Gramophone), the Indian courts and the Bangladeshi courts should exhibit flexibility to accommodate evolving and increasingly changing normative structures of international law. Strengthened substantive and procedural human rights guarantees against acts by states would represent a further constitutionalization of international law. Often, the Judiciary is presented with opportunities to play an active role in this regard. In order to expedite the process of constitutionalization of international law, the Courts of Bangladesh are required to review more the text and interpretations of international instruments, e.g. treaties, conventions, and declarations in their decisions. The Judiciary should be more responsible for facilitating action in implementing treaties, the functions of treaty-making and treaty-legislation being constitutionally approved functions.

[155] Trendtex Trading v Bank of Nigeria [1977] 1 QB 529.