

# Accommodating International Human Rights Law Principles in the Judicial System: Prospective Development of Bangladeshi Domestic Courts

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## Abstract

The unambiguous incorporation of international human rights into many national constitutions demonstrates that legal systems throughout the world are becoming increasingly open to customary international law. Although there is still much disagreement on the "universality" of human rights, most courts across the globe accept the more easily defensible IHRL principles, such as the right to life and freedom and the prohibition of torture. The propensity of national courts, especially in dualist systems like Bangladesh's, to view international human rights legislation as being purely 'inspirational' or 'persuasive' remains, even though international law-based judicial thought and activity appear to be on the rise. This paper puts out this argument against the background of recent developments in the use of IHRL principles in Bangladeshi courts. The paper also attempts to evaluate the judicial standpoint, both progressive and conservative, in referencing IHRL by briefly referencing prevailing theories impacting the domestic implementation of international law, discussing the status of IHRL in the Constitution of Bangladesh, and looking at relevant case law.

Keywords: Judiciary of Bangladesh, human rights, domestic court, international human rights law, IHRL principles

## Introduction

Due to the inherent shortcomings of international law in terms of appropriate enforcement, the issue of domestic applicability of International Human Rights Law (hereinafter referred to as 'IHRL') has long been the topic of significant controversy. Indeed, many nations' track records fall short of the required degree of observance when it comes to the topic of conformity with IHRL. This is primarily attributable to preconceived notions about the relative importance of international law and the national legal system.<sup>1</sup> There are, without a doubt, differences between international law and the national legal system. However, these differences are often overstated, leading to divergent perspectives on the relationship between the two and the extent to which national courts may draw on, describe, and implement principles of international law.<sup>2</sup> The traditional barrier between international law and the national legal system has been greatly dissolved by the fact that international law, although primarily concerned with the legal interactions between sovereign nations, also confers rights and duties on people, as with human rights. That is why it is crucial to

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<sup>1</sup> Steven Wheatley, *The Idea of International Human Rights Law* (Oxford University Press 2019).

<sup>2</sup> Jan Klabbers, *International Law Documents* (Cambridge University Press 2016).

understand how laws in one jurisdiction could influence a court's rulings in another. There is no doubt that the extension of international law in human rights has been the most consequential since the end of World War II.<sup>3</sup> Many country constitutions now include explicit language enshrining fundamental human rights concepts, as the relevance of international human rights has trickled down to national legal systems. However, nations have traditionally been reluctant to accept and adapt to concepts of international law on the questionable justification that they would jeopardize sovereignty and territorial integrity and state sovereignty.<sup>4</sup> This stance is grounded in the notion of self-government, which holds that individuals should have the freedom to make informed, deliberate choices about their lives rather than being forced to conform to the will of others. In the context of national rights law, self-governance would mean that citizens have the last say over what kinds of ostensible human rights the world recognizes.<sup>5</sup> Since the normative generalization of human rights is enshrined in a set of persuasive international norms in the contemporary world, it is only through the unique characteristics of national actions that this universality may be realized.

### **Competing Theories on the Application of International Law in the National Legal System**

Principles of international law, whether originated from custom or treaty, are usually recognized as normative in nature and obligatory upon nations. However, debates continue to ascertain the extent to which these standards may be applied. The two main approaches to understanding how international law is implemented in the national legal systems are monism and dualism.<sup>6</sup> According to the monism theory, both international law and national law originate from the same underlying body of law, with the former being essentially a more developed and developed version of the latter. Therefore, monism theorists argue that international law should be directly applied by domestic courts inside state territory and that, in the event of a dispute between international law and domestic law, the former should take precedence. While opinions about international law's superiority over national law may differ, there is widespread agreement that the two systems belong in the same hierarchical legal order and must be prioritized accordingly.<sup>7</sup> The practical implication of this is that domestic courts should give international law precedence over domestic legislation in cases where the latter conflicts with national rights and duties. On the other hand, according to proponents of the dualism theory, international law and national law are two separate but equal systems with their own unique features, application processes, and means of enforcing compliance. International law, according to

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<sup>3</sup> Scott Sheeran and Nigel S Rodley, *Routledge Handbook of International Human Rights Law* (Routledge 2014).

<sup>4</sup> Olivier De Schutter, *International Human Rights Law* (Cambridge University Press 2010).

<sup>5</sup> August Reinisch, Ralph Janik and Florentina Simlinger, *International Law in Domestic Courts* (Oxford University Press 2018).

<sup>6</sup> Stefan Kadelbach, Thilo Rensmann, and ER Rieter, *Judging International Human Rights: Courts of General Jurisdiction as Human Rights Courts* (Springer 2019).

<sup>7</sup> Helmut Philipp Aust and Georg Nolte, *The Interpretation of International Law by Domestic Courts* (Oxford University Press 2016).

dualism theorists, governs interactions between nations on a global scale, while domestic law determines citizens' legal protections and responsibilities.<sup>8</sup> According to this theory, domestic courts inside a state have no jurisdiction over matters of international law unless those laws have been formally integrated into domestic law.

The theories of incorporation and transformation allow national judicial organs to make use of international law. Unless specifically prohibited by a legislation or judicial decision, the theory of incorporation states that a rule of international law automatically becomes part of the national law without being accepted by the legislature or local courts. If a domestic court determines that an applicable international rule of law exists, the theory of incorporation will allow the court to automatically apply that rule.<sup>9</sup> As an expression of the monist approach, this self-executing method allows courts to give effect to an international commitment directly, without the need for intervening legislation. However, just because a norm of international law has a direct effect, it does not mean that a court would apply it without regard to domestic law or that it will take precedence over domestic law. To put it another way, the implementation of an international commitment does not depend on local or national legislation making that responsibility part of domestic law.<sup>10</sup> In contrast, the comprehensively dualist theory of transformation necessitates that the state explicitly accepts the standards of international law through suitable legislation. Thus, under this approach, domestic courts cannot apply a rule of international law unless it has been intentionally incorporated into the national legal system. As national legal systems are increasingly forced to deal with rising complexities caused by globalization, it is arguable that attempts to address issues regarding the enforcement of international law based only on the above-mentioned theories might be problematic.<sup>11</sup> Instead, the binding character of customary or treaty rules and the duties incurred by states must be considered. States Parties are legally obligated to carry out their commitments under a treaty after it has entered into force. A state cannot claim that it is not obliged by a treaty because it does not comply with its own national legal system, nor can it use this as an excuse for not carrying out its obligations under the agreement. The absence of legal adaptation in the national legal system was not an excuse for Britain to violate its neutrality commitments during the American Civil War, as demonstrated in the *Alabama Claims Arbitration (1872)*.<sup>12</sup> In other words, a state must carry out its responsibility under a binding international obligation whether its domestic law enables it to do so. The state is required under international law to enact any new laws or changes to existing laws that are needed to bring them into compliance. This is founded on the rule of law known as the

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<sup>8</sup> Benedetto Conforti and Francesco Francioni, *Enforcing International Human Rights in Domestic Courts* (Martinus Nijhoff Publishers 1997).

<sup>9</sup> Orna Ben-Naftali, *International Humanitarian Law and International Human Rights Law* (OUP Oxford 2011).

<sup>10</sup> Andrea Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (Oxford University Press 2016).

<sup>11</sup> Oleksandr Gaydulyn., 'General and Special Theories of Law in International Legal Discourse' [2021] Law Review of Kyiv University of Law 312.

<sup>12</sup> *Alabama Claims Arbitration (1872)* 1 Moore Intl Arbitrations 495.

presumption of international legality, which states that domestic law should be construed in harmony, to the extent practicable, with international law and comity.

## **Accommodation of International Law Principles in the Constitution of Bangladesh**

The right to self-determination was at the heart of Bangladesh's fight for independence in 1971, which is widely regarded as the starting point for human rights activity in the country. A UN membership application was submitted by the newly independent nation less than a year after it declared its independence. Bangladesh ratified the UDHR in 1948 after it joined the United Nations on September 17, 1974. By signing, or ratifying, an international convention, a country shows that it accepts and will abide by its terms. Bangladesh has either signed up to or approved nearly every major international human rights treaty. The Constitution of Bangladesh, which was enacted in 1972 and has been revised on several occasions, protects citizens from violations of their civil and political liberties. It forbids discrimination and forced labor, guarantees everyone's equal protection under the law, and protects people's lives and freedoms.<sup>13</sup> The citizens of Bangladesh still have rights even if they have been arrested, charged, tried, and sentenced to jail time. There are further protections for the rights to freedom of thought, conscience, and the press, as well as freedom of assembly, commerce, and religion, as well as the right to a safe and private home.

Upon the implementation of the Constitution, any pre-existing legislation that conflicts with the requirements of basic rights is unconstitutional and unenforceable under Article 26 of the Constitution of the People's Republic of Bangladesh. Also, Article 26(2) removes the legislature's authority to adopt a legislation that violates the basic rights, rendering such laws null and invalid to the degree of their incompatibility. Article 26 thus does not render such legislation unconstitutional and unenforceable at their conception but rather at the time the Constitution takes effect. The principles of eclipse and severability form the basis of Article 26 in the Bangladeshi Constitution.<sup>14</sup> A statute that is initially legitimate but later becomes unconstitutional and unenforceable because it conflicts with a constitutional provision is said to be eclipsed in the sense that it does not die but instead lies dormant until the conflicting provision is no longer in effect. If only a portion of a multi-part statute is found to be in conflict with the Constitution, only that portion will be voided; the rest of the law will remain in effect. It is called the doctrine of severability for this reason. Article 26, therefore, recognizes that the remainder of the legislation shall be lawful as passed while proclaiming that a law contradictory with the basic rights shall be invalid.

The Constitution also lays out the guiding principles of state policy, including the need for the state to provide things like women's full participation in national life, unrestricted and mandatory education, public health, equal rights of opportunity, employment as a right and responsibility, rural growth and advancement of local government organs, and

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<sup>13</sup> Bangladesh, *Constitution of the People's Republic of Bangladesh* (The Government of Bangladesh 1972).

<sup>14</sup> Shariful Islam, *Human Rights and Governance: Bangladesh* (Asian Legal Resource Centre 2013).

compliance for international law. The Supreme Court has, on several instances, supported these fundamental principles in defending the economic and social rights of individuals, despite the fact that they are technically unenforceable.<sup>15</sup> The Constitution appears to have a positive stance on human rights and civil freedoms; yet, it does not fully define the place of international law in the domestic legal system, nor does it explicitly mandate or encourage the national legal system to draw on IHRL principles when deciding cases.

Again, the vagueness of Article 25's reference to adherence to international law has led to conflicting views on whether international law principles should be applied in domestic situations. To bring these two schools of thought together, it could be argued that Article 25 of the Constitution explicitly recognizes that the Fundamental Principles of State Policy are foundational to the governance of Bangladesh and its law-making process, as well as a guide to the understanding of the Constitution and other laws, despite the fact that they are not justiciable.<sup>16</sup> From this, it follows that the judiciary is allowed to make use of international law in its interpretation and implementation of domestic law to the fullest degree permitted. Treaties are another area where the Constitution's stance is not entirely clear. The President of Bangladesh is required under Article 145A of the Constitution to submit all treaties with foreign governments to Parliament for review. Any such treaty pertaining to national security shall be tabled in a closed session of Parliament, as provided for in a proviso to this article.<sup>17</sup> There is a lot of room for interpretation in these sections; for example, what kinds of treaties would be included by Article 145A, and what steps must be taken before a treaty may be ratified to bind the state according to the Constitution? There is no provision in the Constitution regarding the procedure for ratifying international agreements. It might be argued that Article 145A merely discusses the President placing treaties before the Parliament but makes no mention of the act of ratification itself. It is also unclear if the phrase 'laying' has been used interchangeably with 'ratification'. In the *Kazi Mukhlesur Rahman v. Bangladesh*, the Court clarified that treaty creation is an executive act and that ratification, provided a Treaty has mechanisms for ratification, likewise falls within the range of the executive authority of the State.<sup>18</sup> While treaties may technically fall under the purview of the Executive, in practice they are chosen by the Prime Minister and the Cabinet. Article 55(2), (4) of the Constitution makes this clear, stating that the Prime Minister, or someone acting on his or her behalf, shall exercise the executive power of the Republic, however, all executive actions of the Government shall be acknowledged to be performed in the name of the President. In addition, the Prime Minister's Cabinet must review and approve any proposed agreements, protocols, or treaties under the Rules of Business of the Government, 1996.

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<sup>15</sup> Mst Marifa Akter and Wayej Kuruni, *Challenging Human Rights in Bangladesh* (2017).

<sup>16</sup> Azizur Rahman Chowdhury and Jahid Hossain Bhuiyan, *An Introduction to International Human Rights Law* (Brill 2010).

<sup>17</sup> Arafat Hosen Khan, *The Constitution of Bangladesh* (Routledge Chapman & Hall 2022).

<sup>18</sup> *Kazi Mukhlesur Rahman v. Bangladesh and others*, 26 DLR (1974) (SC) 44.

## Conservative Approach of Bangladeshi Domestic Courts in Following IHRL Principles

To apply IHRL principles, the court in Bangladesh must show progressive thinking, which is unusual rather than the general practice in the present scenario. Bangladeshi courts often depend on the notion that customary international law cannot override national law, even though this is not explicitly stated in the Constitution and might be interpreted to mean that IHRL can be enforced in any way. Therefore, until the treaty is integrated into the laws of Bangladesh by an Act of Parliament, it is often assumed that the courts have no authority to enforce treaty rights and responsibilities at the behest of a sovereign government or private individual.<sup>19</sup> The Court recognizes and respects international law, although there are several cases that show judicial precedence when it comes to using it. Instead of using customary international law in cases where domestic law is applicable, the court does so in such cases. The case *Bangladesh v. Sombon Asavhan* illustrates this approach by determining whether or not Thai fishing trawlers that were apprehended by the Bangladesh Navy for unlawfully accessing and fishing in Bangladeshi territorial waters were actually within Bangladeshi territorial waters or its exclusive economic zone.<sup>20</sup> The dispute was resolved by the Appellate Division of the Supreme Court on the basis of The Territorial Waters and Maritime Zones Act of 1974 rather than existing international law related to territorial waters. According to the Court, the Parliament passed the Bangladesh Territorial Waters and Maritime Zones Act in 1974 using the authority granted by Article 143(1)(B) of the Bangladesh Constitution, hence the Court must obey the scope of applying the national legal system where it exists. It went on to say that because of this adherence to state law, parliamentarians have a responsibility to avoid passing measures that go against internationally recognized norms.

The High Court Division of the Supreme Court considered the subject of the right to self-determination under customary international law in the case of *Saiful Islam Dildar v. Bangladesh*.<sup>21</sup> Anup Chetia, Secretary General of ULFA, had been wanted for treason by the Indian government, hence a writ was filed questioning the willingness of the Bangladeshi government to extradite him. The Petitioner argued that extraditing Chetia would violate international law's absolute standard of jus cogens, as well as IHRL principles and Article 25 of the Constitution of Bangladesh because Chetia was fighting for the right of self-determination of the people of Assam. The Petitioner went on to claim that the right to self-determination is a globally accepted customary standard that is obligatory on all states since it is a jus cogens of international law and has been integrated into UDHR and the UN Charter. Therefore, the petitioner argued that Bangladesh was obligated to grant Chetia refugee status. Although the petitioner argued that extraditing Chetia would be a violation of Article 25 of the Constitution, the Court, taking a somewhat conservative view of the grounds and the reference to customary international law, ruled against the

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<sup>19</sup> Mohammad Shahabuddin, *Bangladesh and International Law* (Routledge 2021).

<sup>20</sup> *Bangladesh v. Sombon Asavhan*, 32 DLR (1980) (SC) 194.

<sup>21</sup> *Saiful Islam Dildar v. Bangladesh and others*, 50 DLR (1998) 318.

petitioner.<sup>22</sup> The Court's reliance on Constitutional provisions to reject the petitioner's claim is indicative of its unwillingness to employ customary international law for a progressive interpretation of national legislation or to bring about changes in national law.

*Hussain Muhammad Ershad v. Bangladesh* case established that although the UDHR and the Covenants' envisioned IHRL principles are not immediately enforceable in national courts, their provisions are if integrated into the domestic legislation.<sup>23</sup> The Court recognized that domestic laws do not always conform to international human rights agreements, whether those laws are constitutional or statutory. In cases when domestic law is ambiguous or silent on an issue, domestic courts should look to the applicable principles embodied in international instruments rather than ignoring the country's international commitments altogether. When domestic laws are unambiguous but run counter to a country's international commitments, the national courts will nevertheless uphold such laws but bring the contradictions to the notice of legislators. In other similar cases like *Bangladesh v. Sheikh Hasina*, the Supreme Court reached identical conclusions.<sup>24</sup> These cases clearly show that Bangladeshi courts have consistently avoided applying IHRL principles in their decision-making. In fact, the courts' stubborn embrace of the dualist approach to international human rights treaties has largely neglected the potential of international law standards in improving the efficacy of domestic rights adjudication.

### **Progressive Application of IHRL Principles in Recent Cases by Bangladeshi Domestic Courts**

Several cases have developed when the Supreme Court of Bangladesh has explicitly acknowledged IHRL principles and construed state responsibility under it. The Court acknowledged the obligatory nature of customary international law in a recent case, *Bangladesh v. Unimarine S.A. Panama*, and stated that States normally give regard to principles and practices of customary international law.<sup>25</sup> This line of reasoning by the courts has been upheld in subsequent decisions. However, Bangladeshi courts' use of international law is mostly limited to enhancing the decision by providing supplementary judicial views, examining sections of the legislation and the constitution, and so on. This article tries to summarize several instances when domestic courts have taken international law into account while interpreting domestic statutes or constitutions. When hearing cases involving minors and juveniles, the courts in Bangladesh have been praised for their openness to the application of international human rights legislation. Here are some recent cases that show how courts have used IHRL principles to make decisions about children. In *State v. Roushan Mondal Hashem*, one of the leading cases on juvenile justice, the High Court Division engaged in a lengthy analysis of the proper treatment of juvenile offenders and the reasoning for this treatment.<sup>26</sup> According to the Court, a child who participates in

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<sup>22</sup> Kutub Uddin, *Enforcing Economic, Social and Cultural Rights from the Perspective of Bangladesh* (GRIN Verlag 2019).

<sup>23</sup> *Hussain Muhammad Ershad v. Bangladesh*, 21 BLD (AD) (2001) 69.

<sup>24</sup> *Bangladesh v. Sheikh Hasina*, 60 DLR (AD) (2008) 104.

<sup>25</sup> *Bangladesh v. Unimarine S.A. Panama*, 29 DLR (1977) (AD) 252.

<sup>26</sup> *State v. Roushan Mondal Hashem*, 59 DLR (2007) (HCD) 72.

illegal activity should not be labeled a juvenile delinquent. The Court referred to several American scholarship and legislative initiatives on the subject. When a court or state determines that a young person needs care and protection, they are essentially acting in the place of the child's biological parents while also ensuring that the youngster's criminal behavior is dealt with.

The petitioner, a legal aid organization, challenged the indefinite detention of under-trial detainees, including minors, in *BLAST v. Bangladesh*. After reading an article in a national newspaper, the Petitioner filed a petition with the Court on behalf of 155 defendants who had been held in Dhaka Central Jail for five years or more due to the prosecution's inability to present witnesses. The petitioner claimed that this was not an isolated incident, and those other detainees, including women and children, were languishing in prisons across the country.<sup>27</sup> It was argued that the continued detention was in violation of the individual's right to liberty and the right to a fair trial guaranteed by Bangladesh's constitution and the ICCPR, to which Bangladesh is a party. According to data compiled by the Office of the Additional Inspector General of Prisons, out of the total number of inmates now awaiting trial, 214 are minors. The Court noted that under the applicable statutes, minors are entitled to a trial before the Juvenile Courts and that, in this particular case, measures should have been taken to prevent the minors from being tried alongside adults. It urged the relevant law enforcement authorities, prosecuting agencies, and Government Legal Aid Committees to take prompt and necessary efforts to ensure that all minors suspected of crimes are brought to trial as quickly as possible by the Juvenile Courts.<sup>28</sup> In addition, the Court ordered the Government to petition the relevant Courts to dismiss, withdraw, or transfer to certified Homes, as applicable, juvenile offenders who are appropriate for such proceedings. Bail hearings for the juvenile defendants were requested by the government's Legal Aid Committees. The Court further ruled that juvenile detainees should be housed in a secure facility away from adult inmates and that they should be given visits from human rights advocates and representatives of children's groups.

The High Court Division in the case of *Fahima Nasrin v. Bangladesh* cited the UN Convention on the Rights of the Child, 1989 in discussing the detention of juvenile offenders and the option of releasing them to an approved facility. Essentially, it reaffirms the idea that children should not normally be sentenced to incarceration, except in extraordinary circumstances, and then only as a last choice and for the shortest possible term, because it is always feasible to lawfully return a kid from prison to a certified home.<sup>29</sup> The Court reaffirmed that legislation affecting minors is distinct from other legislation since it was passed with the welfare of children in mind. With the child's welfare and best interests in mind always, the Court emphasized the need to avoid punitive measures and instead providing a nurturing environment for growth. The Court in *BNWLA v. Cabinet Division, Bangladesh Secretariat* case noted that domestic labor, with its inherent risks of

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<sup>27</sup> Bangladesh Legal Aid and Services Trust v. Bangladesh, 57 DLR (HCD) (2005) 11.

<sup>28</sup> Noor Mohammad, *Law and Human Rights in Bangladesh* (LAP Lambert Academic Publishing 2012).

<sup>29</sup> Fahima Nasrin v. Bangladesh, 61 DLR (2009) (HCD) 232.

working with dangerous objects and fire as well as working long hours, would be considered hazardous work, especially where children younger than 12 were involved. Bangladesh adopted ILO Convention No. 182 in 2001, and the Court referred to its provisions. In this matter, the Petitioner brought to the Court's notice a newspaper article detailing the abuse of a 10-year-old housemaid by the woman of the house, who tied her up, threw her to the floor, and then shoved the handle of a hot cooking tool (stirrer/paddle) into her anus.<sup>30</sup> The girl was sent to Dhaka Medical College Hospital where her condition was deemed to be life-threatening. The girl whose father put her to work told how she was routinely tortured for the smallest infractions.

In Bangladesh, cases involving women, such as family conflicts, violence against women, etc., are often resolved under the supervision of personal laws, criminal laws, or special laws. In response to activism by women's groups and human rights defenders, the courts have recognized the need for laws and regulations to combat sexual harassment of women and girls in public spaces, the workplace, and educational institutions.<sup>31</sup> Despite almost constant media coverage of sexual harassment of women and girl children in the workplace, educational institutions/universities, and other places, a rule nisi was issued in the case *BNWLA v. Bangladesh*, ordering the Respondents to show cause as to why they had failed to adopt guidelines, or policy, or enact proper legislations to address the issue. For the Court's consideration, the Petitioner presented several events as reported in the media and evidence-based scholarly work on the matter.<sup>32</sup> The Supreme Court of Bangladesh ruled that the Constitution adequately protects fundamental rights, including the right to be free from sexual harassment or abuse. Moreover, international treaties and standards are to be depended upon to complement the basic rights in the lack of any domestic legislation appropriate in a particular scenario. The Court said that it is a well-established principle of judicial construction to fill gaps in domestic law with international law and agreements, provided there is no conflict. The Court emphasized the relevance of international agreements and standards in developing guidelines to handle sexual harassment, and it added that the rights to education and employment with dignity are fundamental human rights that have been universally recognized.

Bangladesh's responsibilities under the UDHR, the ICCPR, the ICESCR, and CEDAW were all reaffirmed by the Court. It also referred back to Article 25 of the Bangladeshi Constitution, which provides, among other things, that the State will base its foreign relations on the principles of respect for international law and the ideals enunciated in the UN Charter. The Court acknowledged that absent incorporation into local legislation, courts in Bangladesh do not often rely on international covenants, treaties, and conventions, even if approved by the State. However, the court can look to these conventions and covenants for guidance when it interprets the Constitution, especially

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<sup>30</sup> Bangladesh National Women Lawyers Association (BNWLA) v. Cabinet Division, Bangladesh Secretariat, 31 BLD 265 Writ Petition No. 3598 of 2010.

<sup>31</sup> Khalid Yahyea, *Human Rights in Bangladesh* (2019).

<sup>32</sup> Bangladesh National Women Lawyers Association (BNWLA) v. Bangladesh, Writ Petition No. 5916 (2008) (or WP No. 5916 of 2008).

when deciding whether a person has a right to life or liberty. To justify its stance, it cited precedents involving the application and interpretation of international legal principles.<sup>33</sup> Finally, the Court concluded that there are insufficient protections against sexual violence and victimization of women in the working environment and educational establishments and issued certain directives in the form of guidelines to be followed by all such institutions until sufficient and effective legislation is enacted.

When deciding cases affecting the right to life, courts in Bangladesh often look to constitutional provisions. There are just a few cases where international law was explicitly cited by the court. For example, tobacco product promotion and advertising were challenged in *Professor Nurul Islam v. Bangladesh*. While the tobacco industry is generally judged to be in compliance with regulatory warnings on billboards and packs, the petitioners had pointed out that the text is sometimes too tiny to be easily seen. Furthermore, they claimed that such messages would have little effect on illiterate rural communities, especially women and children.<sup>34</sup> According to Article 32 of the Constitution, the Court ruled that these kinds of marketing were harmful to people's health and welfare. The judgment of this case concluded that the government was wrong for failing to ban or restrict the promotional activities in question because it was also held that Article 25(1) of the Constitution imposes upon it an obligation to respect international law and the principles enunciated in the UN Charter and the WHO resolution.

The Court, in *BLAST v. Bangladesh* case, considered the Petitioner's argument that, as a signatory to the ICCPR, Bangladesh's provisions should be applied in weighing the death penalty against the Constitution, as well as the submission of the Attorney General, who argued that the provisions of international institutions should not be used to overturn the Constitution.<sup>35</sup> The learned Court concluded that there was minimal tension in this area because Article 35(5) of the Bangladeshi Constitution states that no person shall be subjected to torture or cruel, inhuman, or degrading punishment or treatment, which is nearly identical to Article 5 of the UDHR and Article 7 of the ICCPR. Again, the High Court Division acknowledged in the case *Salma Sobhan v. Bangladesh* that the practice of chaining convicts with bar fetters constituted cruel, humiliating, and inhumane punishment and was therefore a violation of basic rights.<sup>36</sup> The Court's observation in this respect appears to have been heavily influenced by IHRL principles prohibiting torture, even though it made no specific reference to such law.

Petitioners in the case *BLAST v. Bangladesh* raised the issue of women being publicly beaten, caned, flogged, etc., in response to fatwas (pronouncements) given by religious/community leaders for allegedly violating societal standards. According to the Court's interpretation of the Constitution and IHRL, the State's refusal to take systematic

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<sup>33</sup> Hee Eun Lee, *Asian Yearbook of International Law, Volume 23 (2017)* (BRILL 2019).

<sup>34</sup> *Nurul Islam v. Bangladesh*, 52 DLR (2000) (HCD) 413.

<sup>35</sup> *Bangladesh Legal Aid and Serv. Trust v. Bangladesh*, Writ Petition No. 8283 of 2005.

<sup>36</sup> *Salma Sobhan v. Government of Bangladesh*, Writ Petition No. 2678 of 1995 (unreported), in Ridwanul, *supra* note 21, at 163.

action to resolve extra-judicial sanctions constitutes a violation of the State's duties. Bangladesh, the Court said, is required by IHRL principles to prevent, prohibit, and punish torture and other cruel, inhuman, and humiliating treatment or punishment because it is an abomination to humanity and a violation of core principles of customary international law.<sup>37</sup> Although the Court acknowledged that national courts cannot implement international law instruments until they are integrated into local laws, it reaffirmed that international conventions and covenants can be utilized to interpret the freedoms guaranteed by the Constitution. As part of its consideration of a citizenship case, the Supreme Court's Appellate Division took an extraordinary approach with its strict adherence to IHRL principles. Although Bangladesh is not a party to the Convention on the Reduction of Statelessness (1961), in *Bangladesh v. Prof. Golam Azam*, the Court did rely on several articles of the Convention in reaching a judgment. From the aforementioned judicial decisions, it is clear that, with limited exceptions, judges of Bangladeshi domestic courts typically apply IHRL principles to examine ambiguities within national laws.<sup>38</sup> As a result, the use of IHRL has been limited to ornamental offerings to their judicial decisions.

### **The Necessity of Guaranteeing that IHRL Takes Systematic Priority over National Legal Framework**

The inability of domestic courts to directly apply IHRL principles is the most significant barrier to its implementation on a national level. Unless governments are bound to follow international law, the question of whether their courts should give direct effect to it is essentially a political and normative option. In the lack of a well-defined integrating mechanism, IHRL retains a tenuous position in Bangladeshi domestic jurisdiction. Very few treaties that have been ratified have been reviewed by Parliament for codification into domestic law, despite suggestions from numerous international treaty authorities.<sup>39</sup> Indeed, the political will of legislators and the independence and goodwill of judges are crucial factors in deciding whether to begin reforms in the field. It has been argued that domestic legislative procedures should be constrained to ensure that all measures required for the application or development of human rights sanctified by international law are included in the final product. States Parties are responsible for ensuring that their domestic courts execute all or at least part of the provisions of a treaty once it has been concluded. Particularly relevant here are human rights treaties, the terms of which are typically reaffirmed in national constitutions and hence are enforceable in national courts.<sup>40</sup> The Committee on Economic, Social, and Cultural Rights has observed that IHRL should have an immediate and direct effect on the domestic legal system of each State party, allowing persons to seek implementation of their rights. The rule of exhausting domestic options emphasizes the need of pursuing solutions inside one's own country. While national

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<sup>37</sup> Bangladesh Legal Aid and Services Trust v. Bangladesh, Writ Petition No. 5863 of 2009, Writ Petition No. 754 of 2010, and Writ Petition No. 4275 of 2010.

<sup>38</sup> Bangladesh v. Golam Azam, 46 DLR (AD) (1994) 194.

<sup>39</sup> David E Guinn, 'Human Rights as Peacemaker: An Integrative Theory of International Human Rights' (2016) 38 Human Rights Quarterly 754.

<sup>40</sup> Kathryn McNeilly, 'Reclaiming the Radical in Universal Human Rights' (2015) 4 International Human Rights Law Review 256.

remedies should be prioritized, it is vital that international processes for the pursuit of individual claims exist and continue to grow.

In fact, state practice shows that national law often treats IHRL differently from other international laws. The Canadian example demonstrates that IHRL is applied differently in Canadian law than in other international laws, such as international trade law, primarily due to the universality of human rights, the establishment of a legal protection instrument within Canadian law, and the presumed priority of human rights over other domains of law.<sup>41</sup> Because they are inherent to the human person, basic rights and fundamental freedoms are recognized as universal under Canadian law. Therefore, it is not accurate to assess the importance of human rights treaties just by considering whether they are legally obligatory for a certain state. Bangladeshi courts may take a similar approach to the Canadian legal system to uphold human rights for Bangladeshi citizens. The Bangalore Declarations 1998, which highlight the commitment of distinguished judges from common law countries to give international human rights rules priority in their domestic adjudications, further, demonstrate the superiority of human rights above other rights. The universality of human rights surpasses national political institutions and is in the hands of the court, as summarized in the Bangalore Declaration 1998. It further emphasizes that a free and well-educated legal profession has a critical role to play in ensuring that national constitutions and ordinary laws are interpreted and applied in a way that is consistent with international human rights treaties and customary international law. Also, important advice for legislators, public officials, and the courts may be found in human rights treaties even in countries where they have not been ratified or integrated into local law.

Nothing prevents domestic courts from using IHRL principles when interpreting domestic rights laws, since international provisions are an expression of a view of humanity committed to by the state and mirrored in national human rights law provisions.<sup>42</sup> As a result, Bangladeshi courts have the latitude to pick and choose from the many different IHRL standards available to them as they relate international law duties to the local legal system. Judicial discretion can be exercised in a number of ways, including through the interpretation of treaties, the establishment of a hierarchical order of treaty obligations, the discovery of customary international law, and the determination of which of these standards is directly applicable within the domestic legal system and how they interact with domestic norms.<sup>43</sup> Although recent judicial decisions in Bangladesh have signaled a change in the country's judicial attitude toward the value of IHRL, the approach of Bangladeshi judges to international sources can still be described as conservative. Many courts ignore the fact that certain human rights are so universally applicable that the

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<sup>41</sup> James W Nickel, 'International Human Rights; International Human Rights Law: Cases, Materials, Commentary' (2016) 34 *Nordic Journal of Human Rights* 67.

<sup>42</sup> Kendall Stiles, *State Responses to International Law* (Routledge 2014).

<sup>43</sup> Elizabeth Salmon, 'Institutional Approach between Ihl and Ihrl' (2014) 5 *Journal of International Humanitarian Legal Studies* 152.

treaties protecting them might be seen as self-executing.<sup>44</sup> Furthermore, considering that the basic rights envisioned in the Bangladesh Constitution effectively reflect numerous IHRL principles, it is a judicial obligation to acknowledge that invoking these universal standards is not only possible but also compulsory.

## Conclusion

An impartial judiciary with the ability to apply international standards by using technical, non-political legal language has the capacity to interpret, implement, and build international norms. But in Bangladesh, judges face a number of limitations that prevent them from making novel use of IHRL principles, especially when doing so would directly contradict the will of the political parties and bureaucratic offices. The judiciary's independence and apolitical standing have been severely compromised by increased politicization in Bangladesh. The strict interpretation of constitutional provisions on the right to life and liberty, freedom of expression, equality before the law, etc., demonstrates judicial respect for the political administration. Citizens' legal rights and protection against the abuse of political and economic power are essential purposes of the judicial system too. Bangladeshi courts have demonstrated vulnerability to partisan political influence throughout the years, leading them to prioritize political interests instead of engaging in constructive legal discourse. As a result, judges render impartial verdicts that are independent of the government's objectives. The intellectual acumen, ingenuity, and forward-thinking of judges play a vital role in expanding judicial discourse. However, these traits can be hindered by political appointments of individuals who lack the requisite qualifications and expertise. A significant portion of individuals may lack comprehension about the utilization of global legal assets, and even if they possess such knowledge, they may exhibit hesitancy in doing so due to apprehension of provoking the political establishment. This has extensive consequences on the procedure and outcomes of case adjudication. Due to the politicization of the judiciary, judicial accountability has decreased, judicial activism has been slowed down, and the public interest has been made useless. It is high time for Bangladeshi Domestic Courts to incorporate international law standards, more specifically, IHRL principles to ensure that Bangladeshi citizens may enjoy universal human rights in every sphere of their lives.

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<sup>44</sup> Mykhailo M Prokhorenko and others, 'Interaction of IHRL and IHL in the Field Human Rights Promotion: International Standards and National Dimension' (2022) 55 *Informatologia* 42 <<https://hrcak.srce.hr/clanak/391554>> accessed 3 May 2022.

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