
“Status of International Treaty in Bangladesh: Approach of the Supreme Court”.

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Abstract

The procedure of incorporation of international treaties within the domestic level varies from legal system to legal system and state to state. In this regard, pertinent state practice is important. The most significant question is that how provisions of treaty law will apply within the domestic arena of the concerned states after ratification. As far Bangladesh is concern, it has ratified many international treaties (like CRC, CEDAW) and incorporated some of the provisions into domestic law. This study will look into the status of international treaties in Bangladesh. It will point out the procedure of incorporation of treaty and then will focus on how the apex court of the country viewed about the status with regard to the application of the provisions of such treaty within domestic arena.

Keywords: Treaty, International Law, Status. Constitution, Supreme Court

Introduction

Bangladesh has a well- written constitution and follows democratic system of government. It is practicing and performing crucial role in international geo-political arena. Bangladesh is a sovereign and civilized nation in the world and subject of international law as like other sovereign states. Bangladesh is one of the civilized nations in the world and entering into international treaties, conventions, covenants, protocols etc. may it be bilateral or multilateral. Bangladesh also ratified and entered into so many international conventions. This is the question comes in the picture what is the status of those treaties in the domestic legal system of Bangladesh and what are the provisions in the constitution relating to incorporation and how the domestic courts treat these treaties.

The process of implementation of international law at the domestic level varies from country to country. Most of the States do not give primacy to international law over their municipal law. Both international law and domestic law are usually understood as distinct legal system of rules and principles.¹ In the context of Bangladesh, the domestic invocation of international norms has been the seed-bed in the case of Kazi Mukhlesur Rahman v. Bangladesh,² where the appellate Division of the Supreme Court creatively used relevant international law materials

The constitution of Bangladesh points out the approach of the state towards treaty law. Article 25 (1) of the Constitution declares³

¹ Eyal Benvenisti and George W. Downs, National Courts, Domestic Democracy, and the Evolution of International law, European Journal of International Law, Vol.20 No. I p60.

² 26 DLR (1974) AD 44.

³ The Constitution of the People’s Republic of Bangladesh.

The State shall base its international relations on the principles of respect for national sovereignty and equality, non-interference in the internal affairs of other countries, peaceful settlement of international disputes, and respect for international law and the principles enunciated in the United Nations Charter.

Methodology of the study

In dealing with these issues, both primary and secondary sources will be required to review. Pertinent treaties, Conventions, Statutes, Case-laws, will be brought into picture to look at from a scrutinize views. Those primary sources are the core of this research.

Secondly, since there are gaps and complexity in the existing literatures relating to the topics, germane secondary sources including books, journals, articles, online resources, statements, presented papers, documents of relevant international and non-governmental organizations and other materials will be taken into account for proper analysis, comprehensive understanding and consistent conclusion.

In conducting legal research, one has to depend on documentary sources information that already exists in some form e.g. journal articles, case reports, legislation treaties, historical records. The analysis and findings will be conducted by going through all pertinent materials. As the research will be based on documentary sources, it will be doctrinal one.

Procedure of Treaty Incorporation

In Bangladesh, like U.K., making a treaty is an executive act and for its validity approval of Parliament is not necessary.⁴ Though there is an obligation to lay a treaty before Parliament, the High Court Division held that failure to lay a treaty before Parliament will not affect its validity.⁵ 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 provides that all executive actions of the government shall be taken in the name of the President. However, Bangladesh has a parliamentary form of government in which the President is the nominal head of state and the executive powers are performed by the Prime Minister and the cabinet.⁶ The Second Proclamation Order No. IV of 1978 has clarified this function by empowering the Prime Minister and the cabinet to determine the treaty-making policies of Bangladesh.

Approach of the Supreme Court towards International Treaties

As a general principle, courts in Bangladesh will not enforce treaties and conventions, even if ratified by the state that is not part of the *corpus juris* of the state. They must be incorporated in the municipal legislation. However, the court does utilize international conventions and covenants as an aid to interpretation of the provisions of Part III of the Constitution, particularly to determine the rights implicit in the instrument, like the right to life and the right to liberty, but not enumerated within the Constitution. The first case to deal with this issue was *Kazi Mukhlesur v. Bangladesh*⁷ where the Court did examine the treaty-making power of the executive under the Constitution of Bangladesh. According to the Court, the executive power of the Prime Minister shall be exercised in accordance with the Constitution by Act of Parliament under Article 143(2) of the Constitution, which imposes limitations on

⁴ Islam, Mahmudul; Constitutional Law of Bangladesh, 3rd Edn, published by Mullick Brothers (2012), at 1026.

⁵ Major (Retd) Akhtaruzzaman v. Bangladesh, W. P. No.3774 of 1999 (unreported); at 1026.

⁶ Sheikh Hafizur Rahman Karzon and Abdullah Al-Faruque, 'Status of International Law under the Constitution of Bangladesh: and Appraisal' (1999) 3(1) Bangladesh Journal of Law 23.

⁷ 26 DLR (1974) 44

its treaty-making power, particularly when boundary settlement is involved. Article 143(2) of the Constitution provides: ‘Parliament may from time to time by law provide for the determination of the boundaries of the territory of Bangladesh and of the territorial waters and the continental shelf of Bangladesh.’ The Court pointed out that treaties signed and ratified by the Bangladesh government require implementing legislation or constitutional amendment to be applied within its domestic jurisdiction if the treaty ‘(i) involves alteration of the existing laws; (ii) confers new powers on the executive; (iii) imposes financial obligation upon the citizens; [or] (iv) involves alienation or cession of any part of the territory of Bangladesh.’⁸

The practice of the Supreme Court of Bangladesh is that it doesn’t directly apply provisions of international law. But if there is any lacuna in the domestic law or gap, under such circumstances, the Court may take recourse to such international instruments for the purpose of formulating guidelines. Moreover, it can take provisions of international treaties, covenants, declarations and conventions as an aid to interpret domestic laws particularly provisions of part III of the Constitution. The separate opinion of Justice BB Roy Chowdhury in the case of *Ershad v. Bangladesh and ors*,⁹ has clarified and specified the approach of Bangladesh to apply international treaty in deciding cases. It was held, “Although universal human rights norms, whether given in the UDHR or in the Covenants, are not directly enforceable in national courts, they are enforceable by domestic courts if such norms are incorporated into the domestic law.” The approach of the Court further strengthened in the case of *BNWLA v. Government of Bangladesh and others*,¹⁰ where the Court vehemently declared “our courts will not enforce those Covenants as Treaties and Conventions even if ratified by the State, as they are not part of the *corpus juris* of the State unless those are incorporated in the municipal legislation.” It has been decided in the case of *H.M. Ershad v. Bangladesh*, 2001 BLD (AD) 69, it is held: “The national courts should not Straightway ignore the international obligations which a country undertakes. If the domestic laws are not clear enough or there is nothing there in the national courts should draw upon the principles incorporated in the international instruments.” The High Court Division of the Supreme Court of Bangladesh held in the case of *BNWLA v. Government of Bangladesh*¹¹ that “where there is a gap in the municipal law in addressing any issue, the courts may take recourse to international conventions and protocols on that issue for the purpose of formulating effective directives and guidelines to be followed by all concerned until national legislature enacts laws in this regard.”

The separate opinion of Justice BB Roy Chowdhury in the case of *Ershad v Bangladesh and others*,¹² has clarified the approach of Bangladesh. It was held that “national courts should not ignore the international obligations which a country undertakes. National courts should draw upon the principles incorporated in the international instruments if the domestic laws are ambiguous or absent.” It is now an accepted rule of judicial construction to interpret municipal law in conformity with international law and conventions when there is no inconsistency between them or there is a void in the domestic law.¹³ In the same case, it was emphasized that “Protection from sexual harassment and right to education and work with

⁸ Sheikh Hafizur Rahman Karzon and Abdullah Al-Faruque, ‘Status of International Law under the Constitution of Bangladesh: and Appraisal’ (1999) 3(1) Bangladesh Journal of Law 23, 45.

⁹ Appeal, 21BLD (AD) (2001)69; ILDC 476 (BD 2000), 16 August 2000 paragraph 3

¹⁰ 14 BLC (2009), HCD, paragraph 45, at 703

¹¹ 31 BLD, (2011) HCD, at 324.

¹² Appeal, 21 BLD (AD) (2001)69; ILDC 476 (BD 2000), 16 August 2000 paragraph 3

¹³ 29 BLD 2009 HCD, para 27.

dignity is universally recognised as basic human rights. The common minimum requirement of these rights has received global acceptance. Therefore the international conventions and norm are of great significance in the formulation of the guidelines to achieve this purpose.”¹⁴ In the case of *Bangladesh and another v. Hasina and another*,¹⁵ it was held, “The courts would not enforce international human rights treaties, even if ratified by Bangladesh, unless these were incorporated in municipal laws, but they would have looked into the ICCPR while interpreting the provisions of the Constitution to determine the right to life, liberty, and other rights.” Basically the Court used provisions of UDHR and ICCPR in applying right to life, liberty and other rights mentioned in the Constitution.

In the case of *Bangladesh v. Sombon Asavhan*, the Appellate Division of the Supreme Court held that ‘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’.¹⁶ Therefore, the courts in Bangladesh primarily rely on domestic law, when available, prior to relying on international sources in their decision-making process. Courts tend to interpret narrowly those articles of their national constitutions that import international law into the local legal systems, thereby reducing their own opportunities to interfere with governmental policies in the light of international law.¹⁷

Findings and Recommendation

Firstly, the international treaty ratified by the executive body of Bangladesh which are not the part of domestic legislation unlike USA and others countries who follow monistic approach of international law, they should be followed as monistic approach by Bangladesh.

Secondly, the constitution of Bangladesh should clearly express its view regarding the status of the international treaties for incorporation with our legal system.

Thirdly, our apex court should consider those international treaties relating to international human rights law which are ratified by the state in dealing with domestic legal proceeding.

Conclusion

As a country with a dualistic common law tradition, Bangladesh requires to enact domestic law in order to give effect to international agreements within domestic jurisdiction. Yet most international treaties ratified by Bangladesh have not been incorporated into domestic legislation. As a result, the status of those treaties within the domestic legal order remains in many ways unclear.¹⁸ Therefore, in the absence of comprehensive legislative reform to incorporate treaty provisions or to ensure conformity through amendments of existing law, the status of international treaties in domestic law remains unclear. Moreover, in interpreting domestic law, Courts in Bangladesh mostly rely on international treaties to which Bangladesh is party. Although in some cases they do refer to non-binding international instruments such as guidelines, rules, resolutions, etc. The international conventions and norms are to be read into the fundamental rights in the absence of any domestic law occupying the field when there is no inconsistency between them. It is now an accepted rule of judicial construction to interpret municipal law in conformity with international law and conventions when there is no inconsistency between them or there is a void in the domestic law.

¹⁴ 29 BLD 2009 HCD, para 23.

¹⁵ Appeal judgment, No 46/2008; 60 DLR (AD) (2008) 90; ILDC 1409 (BD 2008); 8 May 2008, at paragraph 86.

¹⁶ 32 DLR (1980) 198 (Supreme Court of Bangladesh).

¹⁷ Benvenisti, Eyed. (1993). ‘Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts’. *European Journal of International Law*. 4 at 161.

¹⁸ Karim, Bianca and Tirza Theunissen, *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion*. Oxford University Press Inc. New York (2011). 99.

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