


## Application of International Laws in Bangladesh: A Critical Evaluation



Mazharul Islam<sup>1</sup>, Mohammed Tahmidul Islam<sup>2</sup>, Md. Tuhin Mia<sup>3</sup> ,  
Md. Zahidul Islam<sup>4</sup>

<sup>1,2</sup> World University of Bangladesh, Bangladesh

<sup>3</sup> European University of Bangladesh, Bangladesh

<sup>4</sup> Ahmad Ibrahim Kulliyah of Laws International Islamic University Malaysia (IIUM), Malaysia

 [tuhin@eub.edu.bd](mailto:tuhin@eub.edu.bd)

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## Application of International Laws in Bangladesh: A Critical Evaluation

Mazharul Islam, Mohammed Tahmidul Islam, Md. Tuhin Mia and Md. Zahidul Islam

**ABSTRACT.** This article discusses the incorporation and implementation of international laws, specifically international treaties and agreements into the domestic legal system of Bangladesh. The position of international laws in the legal system of Bangladesh and their authority to interpret and challenge domestic laws has been focused upon. To that effect, the constitutional provisions dealing with international law along with various authoritative court decisions have been analyzed. Additionally, status and implementation of customary international laws in Bangladesh have also been absorbed. How the norms of customary international laws are being incorporated and implemented have been discussed in detail. The analytical methods of research have been carried in the piece highlighting judicial decisions and international instruments. This article is based on secondary materials with the key sources including textbooks, reports, journal articles, conference papers, daily newspapers and online documents. The study has also relied on international instruments, domestic laws and decided cases of Apex Court of Bangladesh. The findings show that as a democratic country Bangladesh needs to incorporate for the sake of its own people the provisions of international treaties into domestic laws. This is a gradual but perilous process which would take more than political goodwill to materialize. As a young nation, it still has a long way to go to level its regulations up-to the international standards. The positive indication is that the supreme courts of Bangladesh are increasingly realizing and interpreting international instruments through their decisions pressurizing the government to make positive changes in the legislations.

**KEYWORDS.** Bangladesh, Complexity, Customery International Law, Interpretation, International Law

# Application of International Laws in Bangladesh: A Critical Evaluation

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## Introduction

The People's Republic of Bangladesh is a parliamentary democratic nation situated in South Asia, bordering India and Myanmar. The country has approximately 162 million people living in an area of 143,998 sq km (55,598 sq miles) and about 2.4 million Bangladeshis live abroad.<sup>1</sup> After gaining independence from Pakistan through a nine (9) month long war, Bangladesh adopted its first complete constitution on 4 November 1972 as the supreme law of the land. According to the Article 48 (3) of the constitution of Bangladesh, the President is the head of state which remains a ceremonial post while the Prime Minister is the head of the Government, being in charge of the executive branch under Article 55 (2). The Prime Minister has the power to select other Ministers to run the Government for five years till the next election. The executive power is concentrated on this position where the Prime Minister takes all final decisions on matters of state and government. The framework of the constitution mandates a parliamentary system where the lawmakers are to be directly elected by the people. The constitution also

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<sup>1</sup> World Economic Forum. "*Bangladesh is booming - and its future looks even brighter*". [online] World Economic Forum. Retrieved from <https://www.weforum.org/agenda/2019/10/bangladesh-is-booming/> (accessed March 23, 2021).

provides some fundamental rights for the citizens along with an independent judiciary. The head of the judiciary is the Chief Justice who is appointed by the President under Article 94 (2).

Soon after its independence, Bangladesh made an effort to become part of the international community. To that effect, the attempt to become a member-state of the United Nations (UN) continued till 17 September 1974, when Bangladesh became a full member of the organization. Bangladesh takes a cautious approach when ratifying international treaties. For example, Bangladesh has not consented to the compulsory jurisdiction of the ICJ although it has assented to many human rights treaties like the International Covenant on Civil and Political Rights, 1966 (ICCPR)<sup>2</sup> and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 1990 (CMW)<sup>3</sup>.

Bangladesh follows a dualistic common law tradition. This means, international laws need to be incorporated and codified into the domestic legislation in order to give effect within the territory of Bangladesh. Otherwise, national laws shall prevail in its form even though inconsistent with international laws. Most international treaties that have been ratified by Bangladesh are yet to see their full incorporation into national laws. Therefore, it becomes unclear in matters related to international disputes whether any such treaty has any effect upon Bangladesh which has been ratified but not formally incorporated.

## **Membership of International Community**

In the international arena, Bangladesh has put its mark since its independence in 1971. Diplomatically, Bangladesh generally follows the principle of “friendship towards all, malice towards none”. As a member of the Non-Aligned Movement, Bangladesh has not sided with a major world power in global politics. Bangladesh joined the Commonwealth of Nations in 1972 and in 1974 became a member state of the UN.<sup>4</sup> Bangladesh has ever since contributed to the UN goals through various treaty ratifications as well as through sending troops to UN peacekeeping operations in dangerous

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<sup>2</sup> International Covenant on Civil and Political Rights, 1966 (ICCPR), Acceded by Bangladesh on 6 Sep 2000.

<sup>3</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 1990 (CMW), Ratified by Bangladesh on 24 Aug 2011

<sup>4</sup> Dugard, J. (2013). *The secession of states and their recognition in the wake of Kosovo*. Brill.

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conflict zones. Being a Muslim majority country, Bangladesh is also a member of the Organization of Islamic Cooperation (OIC) and keeps good relations with Muslim nations worldwide. Moreover, keeping a close eye on the national and regional interests, Bangladesh has become signatory parties to many important international treaties. It has ratified eight of the nine core human rights treaties including The Convention on the Elimination of All Forms of Discrimination against Women, 1979 (CEDAW) and The Convention on the Rights of the Child, 1989 (CRC). However, the present situation of both women and children in Bangladesh are not favorable and up to the international standard.<sup>5</sup>

## **Status of International Law in Bangladesh**

The status of international law in its application in Bangladesh depends on the political goodwill of the government. The constitution does not specifically provide for any mechanism for treaty-making and adoption of treaties. By interpreting constitutional provisions and through judicial precedents, we can see that the power to get into an international treaty remains on the executive branch while the power to incorporate the rules remains in the hands of the legislative body of the government. Lastly, the power to interpret the rules and to decide on the applicability of an international treaty remains on the judiciary of Bangladesh.

However, many treaty organizations in the past have voiced their concerns over non-application of treaty rules in national laws of Bangladesh. For example, In 1990, Bangladesh ratified The Convention on the Rights of Children, 1989. However, full implementation of the treaty remains unseen till today. The Committee Against Torture (CAT) in the ‘Concluding observation on the initial report of Bangladesh’ reported on 8 August 2019 in point 48 that “...the Committee is concerned that the State party has not outlawed corporal punishment in all settings and that it continues to take place on a broad scale, including in schools...”. The Committee also recommended taking legislative action to address the issue in point 49 (a) that to “Introduce additional amendments in the Children Act, the Penal Code and other national legislation in order to explicitly and clearly prohibit corporal punishment in all settings”.

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<sup>5</sup> Islam, M., Alim, M., Hawlader, S., Mohiuddin, M., & Sarker, A. (2019). Assessment and analysis of the overall situation of women and children: Bangladesh scenario. *Int J Public Admin Policy Res*, 4(1), 26-30.

Point to be noted here is that the Committee Against Torture comprises of 10 independent experts who monitor implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by its state parties and Bangladesh ratified the convention on 5 October 1998. It is yet to be seen how Bangladeshi government implements this recommendation into action.

***a. Constitutional Basis of International Law***

In reference to international law, the constitution of Bangladesh provides two primary articles that contain the basic principle of Bangladesh's international policy and the domestic adoption of international treaties. The constitution of Bangladesh in Article 25 states that:

“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, and on the basis of those principles shall

- (a) strive for the renunciation of the use of force in international relations and for general and complete disarmament;
- (b) uphold the right of every people freely to determine and build up its own social, economic and political system by ways and means of its own free choice; and
- (c) support oppressed peoples throughout the world waging a just struggle against imperialism, colonialism or racialism”.

This Article showcases the official policy of Bangladesh when dealing with matters of international impacts. Bangladesh is constitutionally obligated to respect other nation's internal matters. However, Bangladesh is also constitutionally mandated to support people's right to self-determination through just wars. Respect towards free choice of nations and national sovereignty is the main theme of this Article. So far, Bangladesh's foreign policy reflects these mandates as seen by its international involvements. In Article 145A of the constitution of Bangladesh, it has been stated that

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“All treaties with foreign countries shall be submitted to the President, who shall cause them to be laid before Parliament: Provided that any such treaty connected with national security shall be laid in a secret session of Parliament”.

According to this Article, the power to ratify an international treaty lies on the President and the parliament only has the power to ‘discuss’ on the content and merit of such treaty. Therefore, the parliament does not have power to implement international treaties in Bangladesh. On the other hand, the treaty adoption process is an executive one rather than a legislative action in Bangladesh. Formally, the President holds the power to enter into an international treaty. However, if we look at Article 48 (3), we can see that

“In the exercise of all his functions, save only that of appointing the Prime Minister pursuant to clause (3) of article 56 and the Chief Justice pursuant to clause (1) of article 95, the President shall act in accordance with the advice of the Prime Minister: Provided that the question whether any, and if so what, advice has been tendered by the Prime Minister to the President shall not be enquired into in any court”.

Therefore, the President although formally has the power to ratify an international treaty cannot do so without the advice of the Prime Minister in Bangladesh. The Second Proclamation order no. IV of 1978 has clarified that the treaty-making policies of Bangladesh shall be decided by the Prime Minister and the cabinet of Ministers. Also, Bangladeshi courts follow the principle that when there is an explicit law existing on a matter of dispute in Bangladesh, it shall prioritize that law over any international legislation. In this way the court reduces the possibility of deviation from governmental policies of Bangladesh. The Appellate Division of the Supreme Court in the case of *Bangladesh v. Sombon Asavhan [1980] 32 DLR (AD)* stated 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”. The court further held that

“[T]he point touches international law since three fishing trawlers are involved and they are captured from a place over which Bangladesh claims sovereignty. We are

relieved from entering into long discussion of diverse laws, conventions, rules and practices of international law since there is [a] complete code provided by our municipal law”.<sup>6</sup>

Therefore, judicial precedent also solidifies the standpoint of administering domestic regulations in lieu of international ones whenever possible.

### ***b. Application of International Treaties and Agreements***

The process of ratification of an international treaty and its legislative approval in Bangladesh does not have clear inference in Bangladeshi constitution. In Article 145A, the constitution of Bangladesh only provides for the power of the parliament to ‘discuss’ on an international treaty without defining the meaning of such ‘discuss’. However, courts in Bangladesh follow the ‘dualist theory’ while applying international law within their jurisdiction. According to this theory, international law is not directly applicable unless those laws are integrated into the domestic legislation.<sup>7</sup> Additionally, courts do not enforce treaty obligations even if they are signed and ratified if they do not form part of the ‘corpus juris’ (body of law) of the state.

In the case of *Chaudhury and Kendra v Bangladesh and others*, the High Court Division of the Supreme Court of Bangladesh recalled article 16 of the Universal Declaration of Human Rights, 1948 (UDHR), under which men and women of full age have the right to marry regardless of religion, race or nationality etc. Although the constitution in part III has incorporated the provisions of the UDHR, the Court repeated its restrictive approach that it will not look at international instruments even if ratified by Bangladesh unless these are incorporated into the national laws of Bangladesh. The High Court Division of the Supreme Court of Bangladesh held 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

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<sup>6</sup> Beringmeier, M. (2018). *The International Crimes Tribunal in Bangladesh: Critical Appraisal of Legal Framework and Jurisprudence*. BWV Verlag.

<sup>7</sup> Shelton, D. L. (2011). International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion (Introduction). *INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS: INCORPORATION, TRANSFORMATION, AND PERSUASION*, Dinah Shelton ed, 2013-61.



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formulating effective directives and guidelines to be followed by all concerned until national legislature enacts laws in this regard”<sup>8</sup>.

This decision of the Court proves that if there is no national legislature to deal with any issue, international conventions and protocols on that issue may be taken which implies that there is no bar to direct application of international law to resolve any case. Moreover, the guidelines that were provided by the Supreme Court on the basis of provisions of UDHR have immense value and importance. In this regard, the Appellate Division of the Supreme Court of Bangladesh in *Kazi Mukhlesur Rahman v Bangladesh and Another*<sup>9</sup> decided on the matter of national boundary delineation that in order to fully give effect to an international treaty in Bangladesh, it is not only necessary to be ratified by the President through the assent of the Prime Minister but also to be agreed upon and made into a law by the parliament as mandated by Article 143 (2) of the constitution of Bangladesh, which states that “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”. Therefore, it is within the power of the executive branch of the government to ratify an international agreement and the legislature to incorporate that agreement into domestic laws. This is the general principle of international treaties in Bangladesh. This view has been reflected in the case of *Hussain Muhammad Ershad v State and others [2001] 21BLD AD*. In its decision, the Appellate Division held that

“True it is that the Universal Human Rights norms, whether given in the Universal Declaration or in the Covenants, are not directly enforceable in national courts. But if their provisions are incorporated into the domestic law, they are enforceable in national courts. The local laws, both constitutional and statutory, are not always in consonance with the norms contained in the international human rights instruments. The national courts should not, I feel, straightaway ignore the international obligations, which a country undertakes. If the domestic laws are not clear enough or there is nothing therein the national courts should draw upon the principles incorporated in the

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<sup>8</sup> *Chaudhury and Kendra v Bangladesh and others*, [2009] 29 BLD (HCD)

<sup>9</sup> *Kazi Mukhlesur Rahman v Bangladesh and Another*, [1974] 26 DLR (AD)

international instruments. But in the cases where the domestic laws are clear and inconsistent with the international obligations of the state concerned, the national courts will be obliged to respect the national laws, but shall draw the attention of the law makers to such inconsistencies”.

Thus, national legislation is a fundamental prerogative for the enforceability of an international convention in Bangladesh. Bangladesh has ratified many international human rights conventions but the nation is yet to incorporate them fully into domestic laws. Due to socio-cultural constraints the rights of women and children and ethnic and religious minorities along with the rights of people with disabilities and different sexual preferences are not being realized up to the global standards. Bangladesh still faces international pressure to incorporate domestic laws to address these issues properly.

## **Status of Customary International Law in Bangladesh**

Customary international law is the component of international law which refers to the international obligations deriving from established and recognized international practices rather than the obligations arising from codified treaties and conventions. Customary international law is the result of consistent adherence by states as legal obligations. Which means, in order to call an international practice a customary international law, the act must be consistent and well-established and it must also be regarded by its state parties not to be merely discretionary but as legally binding upon them. However, there are certain international rules that are called ‘jus cogens’ or peremptory norms which are laws that are universally recognized and followed by the international community and deviation from which is strictly forbidden for all nations.<sup>10</sup> For example, states cannot condone by any means crimes against humanity, genocide, apartheid, slavery and torture.

The Constitution of the People’s Republic of Bangladesh does not provide specific provisions regarding the status of customary international law. However, it is generally accepted that customary international law is

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<sup>10</sup> Danilenko, G. M. (1991). International jus cogens: issues of law-making. *Eur. J. Int'l L.*, 2, 42.

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enforceable in Bangladesh if such law is not contrary to any domestic law. Domestic courts have applied customary international law in cases such as *Bangladesh v Unimarine S.A. Panama*.<sup>11</sup> This was the first case before the Supreme Court on the application of customary international law and it was held that rules of customary international law are binding on states (such as rules of immunity of foreign missions) and generally, states give effect to these rules of customary international law through domestic legislation.

## **Application and Constitutional Basis of Customary International Law**

In general, Bangladeshi courts follow the principle of resorting to national law with similar rules rather than international law when dealing with an international matter. Where there is a clear domestic regulation on a disputed matter, the court will always resort to that instead of international law.<sup>12</sup> On this perspective, Article 25 of the constitution of Bangladesh in its clause a, b and c provides approval of the application of ‘jus cogens’ in Bangladesh.

Therefore, international customary law has been recognized as enforceable in Bangladesh through Article 25 by declaring that Bangladesh would enunciate the use of force, uphold the people’s right to free choice and support people waging just wars on the basis of national sovereignty, equality, non-interference, peaceful settlements of disputes and respect for international law and the UN Charter. These norms are usually binding on states as part of customary international law regardless of national integration. In *M. Saleem Ullah v Bangladesh*<sup>13</sup> the High Court Division of the Supreme Court of Bangladesh provided judgment on the basis of article 25 and ‘jus cogens’. It was contended by the petitioner that Bangladesh participating in an operation of multinational force to Haiti as per UN Resolution No. 940 was a US-led war of aggression and was a violation of non-aggression principle of Bangladeshi constitution as well as of customary international law. The Court held that such an operation does not fall within

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<sup>11</sup> *Bangladesh v Unimarine S.A. Panama* [1977] 29 DLR

<sup>12</sup> Alam, M. S. (2006). Enforcement of international human rights law by domestic courts: A theoretical and practical study. *Netherlands International Law Review*, 53(3), 399-438.

<sup>13</sup> *M. Saleem Ullah v Bangladesh*, [1995] 47 DLR (HCD) 218

the purview of an aggression as it was pursuant to a UN resolution and thus it does not break any constitutional provision.

When there is conflict between customary international law and domestic legislation, Bangladeshi courts will always follow domestic laws. In the case of *Bangladesh v Sombon Asavhan*, the Appellate Division of the Supreme Court of Bangladesh held that “It is well settled that where there is municipal law in an international subject the national court’s function is to enforce the municipal law within the plain meaning of the statute”. Brief fact of the case is that the Bangladeshi Navy captured three Thai fishing trawlers as they were fishing inside the territorial waters of Bangladesh violating the Bangladesh Territorial Waters & Maritime Zones Act, 1974. When question arose whether the travelers were inside the territorial water or the economic zone.

Therefore, codified national law will always supersede customary international law in Bangladesh as seen in many decisions by the Supreme Court of Bangladesh. Thus, the responsibility to adhere to international standards falls upon the legislators while enacting domestic laws. The power to decide whether an international customary law is applicable in Bangladesh or not falls upon the Supreme Court of Bangladesh and the Court always seeks out domestic laws on the matter of dispute first before resorting to international law. If the court finds any inconsistencies between the national law and international law, it decides on the basis of national law and points out the inconsistencies to the legislators for future amendments.

## **Hierarchy of International Law in Domestic Legal Order**

The constitution of Bangladesh does not specifically state where in the hierarchy of laws international law falls, however; in Article 7 (2) of the constitution says that “This Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic, and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void”. This Article puts the constitution over all laws applicable in Bangladesh, even international laws. So, in case any conflict arises between the constitution and international law, the constitution will get preference. However, on the issue of relationship between international and national law, the Supreme Court has provided specific guidelines in the case of *Hussain Muhammad Ershad v Bangladesh*.

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Hence, domestic laws have supremacy inside Bangladesh and international laws must first be incorporated or codified into national laws to have enforceability in Bangladesh. However, if national laws are unclear on a matter, courts can refer to international norms and customs but where national laws are clear but inconsistent with international laws, the court shall follow national laws and draw the attention of the legislative branch of the government to amend the existing laws. For example, in the case of *State v Md, Roushan Mondal Hashem*<sup>14</sup>, the Court held

“So far as our Children Act, 1974 is concerned, it must be commended as a forward-thinking piece of legislation, which encompasses much of the suggestions and directives of the old and was enacted long before the UNCRC of 1989 ...Bangladesh ratified the UN Convention on the Rights of the Child in August 1990. As a signatory to the Convention Bangladesh is duty bound to reflect the above Article as other articles of the CRC in our national laws. We are of the view that the time is ripe for our legislature to enact laws in conformity with the UNCRC...Let a copy of this judgment be sent to the Ministry of Law Justice and Parliamentary Affairs for recommending legislation in line with the views expressed by us in this judgment.”

Whereas national laws do not provide enough clarification, courts also follow case-laws from other common-law countries such as India, Australia, the UK and the USA. Apart from that, the Supreme Court has the power to interpret laws and it can explain the laws in the light of international conventions of which the nation is a signatory member.

## **Interpretative Authority of International Law**

The Universal Declaration of Human Rights (UDHR) has inspired the incorporation of fundamental rights in part III of the Constitution of Bangladesh. Most rights promulgated in the UDHR found their way into the constitution in part III and some have been recognized in part II. Thus, when interpreting these parts, the Supreme Court looks into the UDHR provisions as guiding principles. Some of the landmark cases where the Supreme Court resorted to international law to interpret constitutional provisions such as in

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<sup>14</sup> *State v Md, Roushan Mondal Hashem*, [2006 ] 59 DLR(HCD) 72

the case of *Bangladesh Legal Aid and Services Trust v Bangladesh*<sup>15</sup>, the Court stated that

“...the failure of the State to take any systematic action to address such incidents of imposition and execution of extra judicial penalties involves a breach of its obligations under the Constitution and international law to ensure the right to freedom from cruel, inhuman and degrading treatment or punishment”<sup>16</sup>

Therefore, according to this judgment, the government of Bangladesh is not only duty bound to follow the constitution, but also must abide by international standards as mandated by the constitution itself. Similarly, in the case of *Bangladesh National Women Lawyers Association v Government of Bangladesh*<sup>17</sup>, the Supreme Court used clear reference to international law concerning sexual harassment while interpreting constitutional rights regarding gender equality. It held that

“The fundamental rights guaranteed in chapter III of the Constitution of Bangladesh are sufficient to embrace all the elements of gender equality including prevention of sexual harassment or abuse. Independence of judiciary is an integral part of our constitutional scheme. 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. Protection from sexual harassment and right to education and work with dignity is universally recognised as basic human rights. The common minimum requirement of these rights has received global acceptance. Therefore, the International Conventions and norms are of great

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<sup>15</sup> *Bangladesh Legal Aid and Services Trust v Bangladesh*, [2009] Writ Petition No. 5863, Writ Petition No. 754, Writ Petition No. 4275

<sup>16</sup> Shelton, D. L. (2011). International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion (Introduction). *INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS: INCORPORATION, TRANSFORMATION, AND PERSUASION*, Dinah Shelton ed, 2013-61.

<sup>17</sup> *Bangladesh National Women Lawyers Association v Government of Bangladesh*, [2008] Writ Petition No. 5916

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significance in the formulation of the guidelines to achieve this purpose.”

From these decisions, it can clearly be inferred that international law has a significant influence in the interpretation of the constitutional provisions of Bangladesh as a source of legal authority.

## **Conclusion**

Bangladesh is relatively a new nation in the world community. Having a dense population with few resources creates challenges that need concentrated efforts from its government. Regardless of the resource constraints coupled with lack of education, Bangladesh is continuing to improve in the Human Development Index (HDI). From 1990 to 2018, Bangladesh’s HDI value increased from 0.388 to 0.614, an increase of 58.3 percent. Nevertheless, Bangladesh needs to incorporate for the sake of its own people provisions of international treaties into domestic laws. This is a gradual but perilous process which would take more than political goodwill to materialize. Bangladesh has also been a proud member of the international community since its independence. It has contributed according to its ability in the development of world peace and prosperity. Marred with poverty and natural disasters coupled with internal instabilities, the progress of this nation has been stifled but these could not stop its path towards growth completely. As a young nation, it still has a long way to go to level its regulations up-to the international standards. However, expecting it to happen overnight might backfire as the socio-political scenario of the nation still remains in the last century. Nevertheless, courts in Bangladesh are increasingly realizing their potentials of judicial interpretation and through their decisions pressurizing the government to make positive changes in the legislative sector of the country.

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## About the Author(s)

**Dr. Mazharul Islam** completed his Doctor of Philosophy (Ph.D. in Law), Master of Philosophy (M. Phil. in Law) and Master of Laws (LL.M.) from South Asian University, New Delhi, India. He has successfully conducted a research project of the European Commission on ‘Trade and Human Rights’. Additionally, Dr. Islam obtained Post Graduate Diploma (PG.D.) in International law and PG.D. in International Human Rights from Indian Society of International Law (ISIL). He also studied at The Hague Academy of International Law, Netherlands. Dr. Islam worked as a Research Intern at SAARC Secretariat Nepal. He is also an enrolled advocate at Dhaka Judge Court. Dr. Islam is currently teaching at the Department of Law, World University of Bangladesh. His areas of interest include International Law, Trade Law, Refugee Law, Human Rights and Humanitarian Law.

**Mohammed Tahmidul Islam. LLB. LL.M.** is a Lecturer at the Department of Law of World University of Bangladesh. Previously he worked at a corporate law chamber, Sattar & Co. as a Research Associate. He also served as an officer of the City Bank Limited and as a Legal Assistant for the USAID’s Justice for All Program. He received his LL.M degree (Master of Laws) from the University of Dhaka in 2015. In 2014, he was awarded his LL.B degree (Bachelor of Laws) from the University of Dhaka. Mohammed Tahmidul Islam has co-authored a law textbook on International Law titled ‘Lectures on International Law’ which has been published in 2020 by Beacon Publishers, Dhaka. He is experienced in legal practice related to corporate and business law along with legal research and drafting.

**Md. Tuhin Mia** is a PhD Research Fellow, Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia & Lecturer, Department of Law, European University of Bangladesh. Corresponding author email: [tuhin@eub.edu.bd](mailto:tuhin@eub.edu.bd). Some of his works have been published on several journals such as The Role of Community Participation and Community-Based Planning In Sustainable Community Development (Asian People Journal, 2022), Labor Rights of Tannery Workers in Bangladesh: An Overview (Kardan Journal of Economics and Management Sciences, 2022), An Analysis of Regulatory Framework of Child Protection in Bangladesh (Journal of Asian and African Social Science and Humanities, 2022), The Right to Nationality and Repatriation under International Law: A Study on Biharis in Bangladesh (Journal of Indonesian Legal Studies, 2021), Legal Protection of Street children in Bangladesh: with References to International and National Laws ( Journal of Asian

and African Social Science and Humanities, 2021), and Protection of Rights of Migrant Workers in Malaysia under ICRMW (Contemporary Issues in Social Sciences: A Compilation of Short Essays, 2021).

**Md. Zahidul Islam, LLB, MCL, Ph.D.**, is Assistant Professor at IIUM Malaysia. Dr. Md. Zahidul Islam has completed Pd.D, at the Ahmad Ibrahim Kulliyah (faculty) of Laws, International Islamic University Malaysia (IIUM). He received his legal education in Bangladesh and Malaysia. He has achieved valuable experience in research work. Based on research evaluations, he was honored the IIUM Postgraduate Niche Area Scholarship (2013/2014) and President Scholarship (2014/2015). The author has written articles on issues on Human Rights law and media law in local and international journals. He has also attended several local and international Conferences. Currently, He is working as an assistant professor at the Civil Law Department, Ahmad Ibrahim Kulliyah (faculty) of Laws (AIKOL), International Islamic University Malaysia (IIUM). He can be contacted at: [zahidul@iium.edu.my](mailto:zahidul@iium.edu.my)