STATUS OF INTERNATIONAL LAW UNDER THE CONSTITUTION OF BANGLADESH: AN APPRAISAL

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INTRODUCTION

The relationship between international law and municipal law is one of the important issues of the international law that entails theoretical as well as practical implications.[1] This stems from the fact that these two legal orders differ from each other due to their common and conflicting features. Theoretically, the two are different legal orders dealing with two different kinds of subjects and functioning in two different spheres of operation. But relationship between them becomes critically important when international law is applied by a national legal system.

States differ in ways they give effect to international law. Practically, two critical questions are examined in a given situation; whether international rules retain their international character or not when they are applied by the municipal court; and whether international law takes precedence over municipal law or not when they are in conflict with each other.[2] These practical questions are, generally, answered by the constitutional norms of the respective countries. In order to avoid clashes between two legal systems in a given case, many states have constitutional provisions or practices that in some form or other make international law a part of their municipal laws.[3] In this regard, there are three discernible

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1 The expression 'international law' is used here to refer public international law in contrast to private international law and public international law is meant to be customary international law and law of treaty.

2 Reuter, P., International Institutions, New York, 1961, at p. 112.

3 See Levi, W., Contemporary International Law, Boulder, 1991.

trends developed by the constitutions:[4] firstly, some constitutions contain provisions that are often found in the preambles and fundamental principles of state policy where states indicate their readiness in principle to submit to general international law; secondly, some constitutions expressly incorporate general international law into municipal law and leave to the legislators or the courts the duty of harmonising conflicts between international and municipal laws; and thirdly, some constitutions not only incorporate international law into national law but also give it priority over domestic rules in case of conflicts.[5]

This paper is an attempt to analyse the provisions of the constitution of Bangladesh vis-à-vis international law to understand how international law is being treated in our legal system and situate the process in the context of relevant theoretical parameters. We, however, first outline the relevant theoretical issues before we proceed to analyse the two issues indicated above.

As two legal systems differ in their intrinsic characteristics, difficulties may arise when one is applied in the sphere of another. International lawyers and jurists are divided on their approaches to resolve this issue of application of one legal system in the traditional spheres of another. Some, however, hold that contradictions between municipal law and international law are unlikely to be frequent for a number of reasons. First, international customary law develops from the customs of states, making a contradiction unlikely. Secondly, treaties become the laws of the land in accordance with prescribed procedures. In some states, they are even superior to municipal law. Thirdly, the practices of courts in many countries are to reconcile the norms of the two legal systems as much as possible through interpretation.[6]

Others seek to propound theoretical framework to reconcile conflicting norms. 'Monism' and 'Dualism' are these competing theories which are described very often as alternative approaches for application of international law in domestic legal systems.

Protagonists of 'monism' view all laws as a single unity and a unified field of knowledge and international and national laws are both part of a

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4 Janis, M.W., An Introduction to International Law, New Delhi, 1989, at pp. 87-88.

5 First category includes the constitutions of India, Bangladesh Pakistan, France etc. Second category includes the constitution of Philippines, USA, etc. Third category includes constitution of Germany and Italy.

6 Supra note 3, at p. 23. See also, Starke, J. G., Introduction to International Law, New Delhi, 1994.

universal body of rules. They attribute primacy to international law presuming that dominance of municipal law of different countries over international law will lead to international anarchy. Since within a monist framework, international law is a superior norm, it may be directly applied in domestic legal system.

The competing theory of 'dualism' regards international law as a wholly separate and structurally different system. International law, on this view, can not impinge upon states and its proponents hold that before any rule or principle of international law can have any effect within the municipal law, it must be 'transformed' or 'adopted' or 'incorporated' into municipal law by the use of appropriate constitutional machinery. In a dualist system, a nation is responsible to other nations for carrying out mutual obligations but each state determines the means and forms by which it carries out its obligations. This is because rules of international law apply within a state only by virtue of their incorporation into the state's internal law.

Although the debate around 'monism' and 'dualism' continues to act as theoretical foundations for explaining the relationship between international and national laws, these doctrines have assumed important consequences. Monism and dualism are central to state practices concerning treaty implementation and in defining the relevancy of customary law to national legal systems as well as in predicting how particular countries will respond to innovations in international law.

However, the expression 'monism' and 'dualism' are no longer expressed in their pure forms as applications of international law in domestic legal systems are, increasingly, influenced by various factors. Professor Ian Brownlie mentions a number of factors that operate on the relation between international law and municipal law; first is the organisational one, i.e., to what extent are the organs of states willing to apply rules of international law internally and externally. The second factor is the difficulty of proving the existence of particular rules of international law. In case of difficulty, municipal courts may rely on the advice from the executive or existing internal precedents and the result may not accord with an objective appreciation of the law. Thirdly, courts, both municipal and international, will often be concerned with the more technical question as to which is the appropriate system to apply to particular issues arising. The question of appropriateness emphasises the distinction between organisation, i.e. the nature of the jurisdiction as 'national' or 'international'

and the character of the rules of both systems as flexible instruments for dealing with disputes and regulating non-contentious matters.[7]

Thus, the categorisation of legal principle as either monist or dualist is not descriptive enough to provide exhaustive insight into the relationship between international law and domestic law in a particular legal system. As international law expands and domestic legal system becomes more complex, the monist-dualist distinction may become less and less pronounced. However, monist-dualist distinction can be used as a valuable tool to highlight the difference in approaches that a legal system takes to define the relationship between international law and domestic law.

CONSTITUTION OF BANGLADESH AND THE LEGACY OF COMMON LAW

In the sub-continent, courts followed the common law approach to the application of international law into municipal law for obvious reasons. First, the legal system of the sub-continent inherited common law tradition; secondly, courts of the sub-continent never confronted with the issue before de-colonisation. The practice of the colonial period continued after the independence and the political division of sub-continent in 1947. After the emergence of Bangladesh as a sovereign nation, its newly adopted constitution made some specific provisions for international law.

It should be mentioned that the Proclamation of Independence of 10th April, 1971 which furnished the basis of the constitution of Bangladesh, indicated the willingness of the nation to submit to the obligations under international law. The Proclamation of Independence declared that the elected representatives of the people of Bangladesh would undertake to observe and give effect to all duties and obligations that devolved upon themselves as a member of the family of nations and to abide by the Charter of the United Nations.

The constitution of Bangladesh did not alter the practice regarding international law that prevailed before the independence and provided for the continued operation of the 'law in force' immediately preceding its commencement. Article 149 of the Constitution provides that "Subject to the provisions of this Constitution all existing laws shall continue to have effect but may be amended or repealed by law made under this Constitution." The object of Article 149 is to maintain the continuity of the pre-existing laws even after the commencement of the constitution till they

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7 Ian Brownlie, Principles of Public International Law, Oxford, 1987, at pp. 58-59.

are altered or repealed or amended by a competent authority, provided such laws do not contravene other provisions of the constitution. The question for consideration is whether the common law of England continues to be in force in Bangladesh after the commencement of the constitution by reason of Article 149. This issue should be responded to in light of Article 152 which defines "existing law" as any law in force in any part of the territory of Bangladesh immediately before the commencement of the constitution, whether or not it has been brought into operation. Thus the expression "law in force" used in Article 149 may be interpreted to include the common law of England which was adopted as the law of Bangladesh and enforced by judicial decisions before the constitution came into force. This can also be traced back by the analogy of section 18(3) of the Indian Independence Act, 1947 which preserved that "the law of British India and of the several parts thereof"[8] as it existed before independence subject to any subsequent changes by Indian legislation, will continue to be effective.

CONSTITUTIONAL PROVISIONS

The provisions of the constitution that pertain to international law deal with two main issues: international relations and international treaty. Article 25 contains certain basic principles of customary international law as a Fundamental Principle of State Policy. It provides that Bangladesh 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. The Article further states that on the basis of the above principles Bangladesh shall strive for the renunciation of the use of force in international relations, uphold the right to self-determination and support struggle against imperialism, colonialism or racialism. It is clear that constitutional provision on international law is normative in character and it is the embodiment of principles of *jus cojens*.[9] It reflects, to a large extent, the desire of Bangladesh to become an active member of the international community. This notion is reinforced by the fact that Article 8(2) of the constitution declares that Fundamental Principles of State Policies shall be fundamental to the governance, shall be applied in the making laws, shall be a guide to the interpretation of the constitution and of the other laws of

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8 See, Indian Independence Act, 1947.

9 *Jus cojens* are peremptory norms of international law which are recognised by the international community and from which no derogation is permissible.

Bangladesh. This Article addresses all three organs of the government; the executive and legislature that make possible the invocation and application of international law as well as the national courts and other authorities at the behest of individuals or organisations for interpretation of such international law in the light of the Fundamental Principles.

Contents of the Article reveal that it is not intended to reflect on relationship between municipal law and international law or lay down any provision for situating customary international law in the domestic legal system.

In the absence of any express constitutional provision regarding the place of customary international law in our legal system, some reflections on the practice of other states, in particular, British practice, may help to analyse the issue in depth. In this regard, it would also be pertinent to focus on judicial decisions of our court, if any, to clarify whether the courts adopted any particular theoretical or practical approach on this issue.

EXPERIENCES OF OTHER COUNTRIES

The contention that customary international law takes effect within the sphere of municipal law may be inferred either from direct formulations in the constitution or judicial decisions. For example, Article 9 of the Austrian Federal Constitution, provides that "The generally recognised rules of international law are held to be the component parts of the Federal law". Article 10 of the Italian Constitution of 1947 provides that ". . . the Italian juridical system conforms to the generally recognised principles of international law". Similarly, Article 2(3) of the Philippines provides: "the Philippines ... adopts the generally accepted principles of International Law as part of the law of the nation." Article 25 of the Constitution of Germany provides that "the general rules of the law of nations are part of federal law. They take precedence against domestic law and directly create rights and duties for persons in the country." On the other hand, the constitutions of the Netherlands, Switzerland and the United States contain no reference to customary international law, yet their courts apply it.

Although the United Kingdom does not have a written constitution, the acceptance of customary international rules as part and parcel of the common law have been repeatedly asserted in the judicial decisions from the 18th century onwards. The present position of customary international in U. K. may be surmised in the following manner: whatever has received the common consent of civilised nations, it must also have received the assent of the Great Britain and as such would be applied by the municipal tribunals. However, this principle should be subjected to the following

principles: (i) customary international law would have to be proved by satisfactory evidence to have been recognised and be of such a nature that it could hardly be repudiated by any civilised state, and (ii) statutes have predominance over customary law and a court has to obey the terms of an Act of Parliament even if it involves the breach of a rule of international law. This is so even though there is a presumption in British law that the legislation is to be construed so as to avoid a conflict with international law.

The doctrine of incorporation has become the main approach in Britain in the sphere of customary international law. This was clearly defined by Lord Atkin in *Chung Chi Cheung v. R.*[10] He noted that

> international law has no validity except in so far as its principles are accepted and adopted by our own domestic law ... The courts acknowledge the existence of a body of rules which nations accept among themselves. On any judicial issue they seek to ascertain what the relevant rule is, and having found it they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals.[11]

Since there is no direct formulation in our constitution regarding customary international law, the status may be gleaned from our judicial practice. To gauge the practice, it will need to be examined whether the courts of Bangladesh have adopted the British approach or propounded any other theory regarding the application of customary international law into municipal law. For this purpose, we now discuss the relevant cases in this regard.

BANGLADESHI JUDICIAL DECISIONS ON CUSTOMARY INTERNATIONAL LAW

International law has a long history of influencing and forming the basis for decisions of national courts. Today, national courts regularly confront issues of international law as a result of the unprecedented increase in activity on the part of international organisations and states' new-found willingness to submit their disputes to international tribunals.

It is generally asserted that national court generally applies its own version of what the rule of international law is, and that, as pointed out by Brierly, ".... however objectively it may try to approach a question which raises as an issue of international law, its views will inevitably be influenced

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10 (1939) AC 160; 9 ILR, p. 264.

11 Quoted from Shaw, M.N., International Law, Cambridge, 1991, at p.111.

by national factors."[12] The question arises whether the same perception is to be applied by our courts about which are principles of customary international law and which are not. It should be mentioned that national courts should not assume the functions of arbiters of issues of international law, partly on account of the evidentiary and jurisprudential difficulties for them in determining such issues and partly on account of apprehension that the judiciary may express a conflicting stand in the municipal spheres and thus create an embarrassment in conducting foreign relations.[13] In case of written constitutions like ours, courts being creatures of the constitution are required to enforce the provisions of the constitution and of other laws enacted in consistence therewith. The court interprets the constitution in case of ambiguity or conflicting legal norms. So it may be helpful to resort to judicial decisions in clarifying the position of customary international law under the constitution.

The higher court confronted with the issue of application of international law for the first time in the case of *Bangladesh vs. Unimarine S. A. Panama*[14] in which the court declared that customary international law is binding on the states and states generally give effect to rules and norms of customary international law. The court cited the rule of immunity of foreign missions, envoys, etc. as good examples of customary international law that would be binding on states. The question arose in this case whether private foreign companies enjoy immunity from arrest and seizes. On this point the court said that, "Immunity is available under Public International Law to persons and properties of classified persons mentioned in the list which is usually filed by foreign missions and international agencies."[15] The next important case with relevance to international law was *Bangladesh and Others vs Somboon Asavhan*,[16] in which the Appellate Division of the Supreme Court held: "It is well settled that where there is municipal law on an international subject the national court's function is to enforce the municipal law within the plain meaning of the statute."[17] The short facts of the case were that the Bangladesh navy captured three Thai Fishing Trawlers on the ground of illegal fishing in the

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12 Brierly, J.L., The Law of Nations, 6th ed., 1963.

13 Chandrasekhare Rao, P., The Indian Constitution and International Law, New Delhi, 1993, at p.186.

14 29 DLR (1977) p. 252.

15 Ibid., at p. 259.

16 32 DLR (1980) p.198.

17 Ibid., at p. 201.

territorial water of Bangladesh. The question arose whether the trawlers were within the territorial waters or inside the economic zone. The court held that

> the point touches international law, since three fishing trawlers are involved and they have been 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.[18]

According to the court, Article 143(1)(B) of the Constitution confers Parliament full competence to legislate on the boundaries of territorial waters and other boundaries of Bangladesh. Accordingly, Bangladesh Territorial Waters & Maritime Zones Act, 1974 lays down specific provision for conservation zone, contiguous zone, continental shelf, economic zone and territorial water.

Thus, it is clear that in case of conflict between statute and customary international law, the court will give effect to the statute. Customary international law can not, on its own, bring about an alteration of, or an addition to, the municipal law; nor can it supersede statute in Bangladesh:

> The trend of Bangladesh court practice is to follow the municipal law when such law on a given subjects exists. This strictness in following the state law imposes a certain amount of responsibility on the law makers not to make laws as would encroach upon the accepted boundaries of the international community."[19]

Customary international law within constitutional framework has been discussed in *Saiful Islam Dilder vs. Government of Bangladesh and Others.*[20] In this case, a writ was filed to stay a Government order of extradition of Anup Chetia, leader of ULFA, an Assamese secessionist movement, to Indian authority. The court examined some customary principles of international law, e.g., extradition and right to self-determination, etc. The petitioner contended that Anup Chatia should not be extradited as he is fighting for right to self-determination which is generally exempted from the extradition treaty. He substantiated his contention by arguing that right to self-determination has been recognised as a principle of customary international law through judicial decisions and its insertion in international

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[18] Ibid., at p. 202.

[19] Hussain, S. M., and Haque, M.M., "Status of International Law in Bangladesh Courts", 7:2 (1984) Law and International Affairs, Dhaka, at p.71.

[20] 50 DLR (1998) p. 318.

human rights instruments and, therefore, the principle is binding on the members of the United Nations. According to the petitioner, Bangladesh is bound to grant Anup Chetia refugee status in accordance with the principle of international law and extradition of Anup Chetia will violate provisions of Article 25 of the constitution.

The petitioner's next contention was that Bangladesh Government has not signed any extradition treaty with India and extradition of Chetia to India in the absence of such a treaty would violate the provision of the Art. 145A of the constitution of Bangladesh.

The court rejected the contention of the petitioner and held, *inter alia*, that The contention that if Anup Chetia is extradited, Government would violate the mandate Art. 25 of the Constitution is totally misconceived.

> Rather, the Government may take help of Art. 25 for the purpose of extradition of Anup Chetia to Indian authority in order to base its international relations on the principles of 'respect for national sovereignty and equality, non-interference in the international affairs of other countries'.... Article 25(1)(c) enjoins upon state to support throughout the world waging a just war against imperialism, colonialism or racialism. We are afraid to accept the contention that as because Anup Chetia is struggling for "self-determination" for the people of Assam handing over him to India would be violative of Article 25 of our Constitution. The struggle in which ULFA and its Secretary-General Anup Chetia is involved is not in our opinion "waging a just struggle against imperialism, colonialism or racialism". .... Nor can it be said that the right to "self-determination" as canvassed in this petition falls within any of the three expressions viz. "imperialism", "colonialism" or racialism as used in Article 25(1)(c) of the Constitution.[21]

In the case of *M Saleem Ullah vs. Bangladesh*[22] the government decision to participate in the UN sponsored multinational forces to Haiti was challenged on the ground that it violated provisions of Article 25 of the Constitution. The petitioner alleged that the decision is against the Fundamental Principles of State Policy and fundamental rights as envisaged in our constitution. According to the petitioner, operation of multinational force in Haiti is actually a US-led aggression and war in international law and to send troops of Bangladesh to participate in such a war, there must exist a grave emergency in our country, according to the Constitution. Thus, the decision to send troops to Haiti is violative of Article 63 of the constitution as it have been taken without the assent of the Parliament.

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[21] Ibid. at pp. 322-23.

[22] 47 DLR (1995) p. 218

Secondly, decision is violative of Article 141A as it requires that the President of Bangladesh must be satisfied about the existence of a grave situation threatening the economic life of Bangladesh or any part thereof by war or external aggression or internal disturbance to justify deployment or engagement of the armed forces.

The court held that the contention of petitioner is altogether misconceived:

> The decision of the Government to participate in the UN sponsored multinational force to Haiti to help restoration of the legitimately elected government was taken pursuant to the UN Resolution No. 940 and Bangladesh being a member state, has taken the decision on the authority of the constitutional framework and international commitment. The decision is not derogatory to any provision of the Constitution including Art. 7.[23]

Regarding the argument about emergency situation, the court held that "The emergency provision has no relevance here. Sending troops to Haiti by no stretch of imagination does threaten the security or economic life of Bangladesh or of any part thereof."[24]

Further, as for the contention of constitutional validity of the impugned decision:

> Our reading of this sub-article 25(1)(b) vis-à-vis chapter VII of the UN Charter and the Resolution No. 940 does not impress us to hold that there is any infringement of sub-art. (1)(b) of Art 25 in taking decision to participate in UN sponsored multinational force in Haiti and to send troops. Sub-Articles (1)(c) and (2) have no relevancy for our purpose. Rather the decision, in our view, has been taken on the principles enunciated in the UN Charter which is in no way against the Fundamental Principles of State Policy and in accordance with Chap. VII of the Charter of the UN.[25]

From the analysis of the above case it is clear that courts adhered strictly to the constitutional provisions. Article 25 serves for courts as a code of interpretation of principles of international law into law of Bangladesh. Although the constitution and other laws do not stipulate that customary international law would be part of the law of the land, the courts seem to have categorically declared it to be so. It is arguable that when deciding cases involving question of international law which may not be

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[23] Ibid., p.219.

[24] Ibid., p. 223.

[25] Ibid., p. 224.

covered by statute, executive decision, judicial precedent or treaty, the courts have to, because of clear necessity, apply principles of public policy, drawing upon the fundamental principles of state policy enshrined in the constitution.

It, however, may be pointed out that an existing law on the issue, the United Nations (Security Council) Act, 1948 which empowers the government of Bangladesh to undertake any measure, not involving the use of armed forces, in order to comply with the decision of the Security Council, was not invoked in this case. According to the Act, any decision to implement resolution of the Security Council which involves the use of armed forces would require approval of the parliament. Therefore, whether sending armed forces for peace keeping falls under the category of 'involving the use of armed forces' or not was not raised in the case. Arguably, it could have been submitted that peace keeping does not entail use of armed forces in conventional sense and, hence, the sending of armed forces for peace keeping purposes would have required approval by the parliament.

POSITION OF TREATY

In contrast to customary international law, treaties[26] are written norms and thus enter into more direct and precise competition with the main body of municipal law. The method by which treaties become national law is a matter in principle to be determined by the constitutional law of the ratifying state and not a matter of international law. Therefore, different rules apply as to their application within the domestic jurisdiction for jurisprudential and policy considerations. While customary international law develops through the evolution of state practice, international conventions are in the form of contracts binding upon the signatories. In the case of treaties, the states involved may create new law that would be binding upon them irrespective of previous or contemporary practices. Indeed, it seems to turn upon the particular relationship between the executive and legislative branches of government than upon any pre-conceived notions of international law. Louis Henkin succinctly states about application of treaty:

> There is, then, a binding obligation on the parties to a treaty to carry out their undertakings, but how a state does so is ordinarily not a concern of

[26] Article 1(a) of the Vienna Convention on Law of Treaty defines treaty as an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

> international law; the status of treaties in the domestic law of any country is a constitutional, not an international, question. All states have incorporated international law into their legal systems to some extent in some ways, but states differ both as to extent and as to ways. States differ also as to what-if anything-is necessary to make a treaty part of national law and what are the jurisprudential consequences.[27]

APPROACHES OF OTHER COUNTRIES

U.K. and other commonwealth countries adopt, generally, a dualist view where treaty making is regarded as the prerogative of the executive but enabling legislation is required for implementing treaty in domestic legal system. For example, in England, where the Crown is constitutionally authorised to conclude and ratify international agreements without parliamentary participation, the parliament, nevertheless, has the power to incorporate treaties into English law. Incorporation is accomplished by an enabling act of legislation. Thus, in England, the making of treaties is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. There are two rules which are followed in England regarding treaty application: 'constitutional rule' which holds in Britain that in case of conflict statute prevails over treaty and 'rule of construction' where domestic legislation is passed to give effect to an international convention. There is a presumption that the parliament intended to fulfil its international obligations. Regarding application of treaty in municipal sphere, following observation as spelt out by Lord Oliver in the House of Lords decision in *Maclaine Watson v. Department of Trade and Industry*[28] is quite pertinent. He noted that:

> As a matter of the constitutional law of the United Kingdom, the royal prerogative, whilst it embraces the making of treaties, do not extend to altering the law or conferring rights on individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation.[29]

The U.S. Constitution mentions treaties several times and in somewhat different ways. In Article II(2), the president of the United

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[27] Henkin, L., Constitutionalism, Democracy and Foreign Affairs, New York, 1990, at p. 62.

[28] AII ER (1989) 3, 523, 531

[29] Ibid., at pp. 544-45; Quoted in Shaw, M. N ., International Law, at p.115.

States is granted the "Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur." Article III(2) extends the judicial power of the United States "to all Cases, in Law and Equity, arising under this Constitution, the Law of the United States and Treaties made, or which shall be made, under their authority." Article VI (2) instructs that the "Constitution, and the Laws of the United States which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding."

Probably, the most significant difference between the constitutional rules of the United States and those of other states, especially those in common law tradition, has to do with self-executing and non self-executing treaties. Under present practice of U.S., non-self executing treaties require implementing legislation. To determine 'self-execution', U. S. courts look at a number of factors, including intent implied or expressed in the treaty itself. When that language is sufficiently precise and indicates that no further government action is needed to apply the treaty norms, a U.S. court will be willing to conclude that the treaty is self-executing.

In civil law countries the authority for the incorporation of treaty rules into municipal law is usually to be found in explicit constitutional provisions. For example, Article 55 of the French Constitution of 1958 reads that "treaties or international agreements regularly ratified or approved have, from the date of their publication, an authority superior to municipal law on the basis of reciprocity by the other state." Article 55 also imposes a condition of reciprocity, i.e., the French courts will not apply a treaty in French municipal law if it is not in force in the municipal law of the other party. Furthermore, there are constitutional limits on the French executive power to conclude international agreements. Article 52 of the constitution reads that "the President of the Republic negotiates and ratifies treaties" but Article 53 provides that treaties regulating certain subject matters may not be ratified or approved except by statutory enactment. Such parliamentary approval is needed for treaties that modify French municipal law or that affect the financial commitments of the state, as well as for matters of considerable international importance such as treaties of peace, commerce, or concerns relative to international organisations.[30] Another limit on the French executive freedom to conclude treaties is found in Article 54 of the Constitution which prohibits

[30] Supra note 4, at pp. 81-82.

the government from ratifying or approving treaties that violate the constitution, unless the constitution is first amended.

Some states adopts extreme monist view, such is the Constitution of Netherlands, which expressly provides that certain treaties are directly applied and in such cases these treaties are deemed superior to all laws, including constitutional norms.[31]

Constitutional Provisions on Treaty in Bangladesh

Article 145A of our Constitution provides for law of international treaty. It provides that "All treaties with foreign countries shall be submitted to the President, who shall cause them to be laid before Parliament."[32] Thus, the provision relating to treaty in our constitution is vague. This ambiguity and vagueness raise a number of questions: first, how treaty is enforced and given effect in municipal law? Secondly, what is the status of treaty under the legal system of Bangladesh? Furthermore, can treaty contravene the constitution; can they supersede earlier acts of Parliament; can they be superseded by later acts of Parliament? Is the executive power of treaty making is subject to constitutional limitations or circumscribed by other conditions? These are unresolved issues that need attention to clarify the position of treaty in our domestic legal system.

Since the making of a treaty is an executive act as distinct from a legislative act, the President of Bangladesh enjoys the power to enter into treaties with foreign states. Article 48(2) provides that the President shall, as the Head of State, exercise the powers and perform duties conferred and imposed on him by the constitution and by any other law. Though in theory the power to make treaties is vested in the President, in practice the President does not negotiate and conclude treaties himself. Article 55(4) provides that all executive actions of the government shall be expressed to be taken in the name of the President. The Prime Minister and the Cabinet determine the treaty-making policies.[33] However, it should be mentioned that in parliamentary form of government, the President is the nominal head of the state and all executive powers are performed by the Prime Minister and Cabinet in practice.

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[31] Jackson, J. H., "Status of Treaties in Domestic Legal Systems: A Policy Analysis", 86 (1992) The American Journal of International Law, 312.

[32] This article was inserted by the Second Proclamation Order No. IV of 1978. Prior to this Proclamation, there was no treaty constitutional provision on treaty matters.

[33] Rule 4(ii) read with rule 16 (xi), Rules of Business, 1996.

Although it apparently seems that the executive is vested with the power to enter into treaties yet this power is not absolute. Treaty-making power of the executive is limited both by internal and external factors. A treaty that is valid and binding under international law may nevertheless be invalid under the constitutional law of a country because the treaty is inconsistent with a provision of our constitution which is a written one. Supremacy of the constitution, doctrine of basic structure and principles of judicial review are characteristic features of our constitution. This raises some inter related questions: can the executive enter into any treaty that violates the principle of supremacy of the constitution or doctrine of basis structure? Or can parliament implement such treaty? According to the principle of judicial review, the answer will be a negative one and the executive treaty making power is subject to implied limitations. The judiciary may intervene on the executive treaty making power and implementing power of parliament by dint of the principle of judicial review. For example, the President can not enter into a treaty which effects a change in the form of government as set up by the constitution. Further, a treaty entered into by the President, the provisions of which contravene the provisions of the constitution and corresponding legislation, shall be void as the executive and legislative powers are subject to the provisions of the constitution.[34] In such cases, only amendment of the constitution duly made can validate such a treaty.

There are other limitations imposed not by municipal law but by the rules of international law. One such limitation is contained by the Charter of the United Nations. Article 103 of the Charter provides "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." Moreover, Article 53 of the Vienna Convention on the Law of Treaties states:

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law ... a peremptory norm of general international law is a norm accepted and recognised by the

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[34] Article 7(2) provides "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."

Article 26(2) provides that "The state shall not make any law inconsistent with any provisions of this Part, and any law so made shall, to the extent of such inconsistency, be void."

> international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

The cumulative effect of the above provisions is that a treaty will be void and unenforceable if it is inconsistent and in conflict with the UN Charter and Vienna Convention. It is also a recognised principle that a state ordinarily may not rely on its own domestic law as grounds for repudiating an international legal obligation. In this regard, Article 46 of the Vienna Convention on the Law of Treaties, 1969 provides:

> A state may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
>
> A violation is manifest if it would be objectively evident to any state conducting itself in the matter in accordance with normal practice and in good faith.

The expression 'manifest violation' is not defined by the Convention. Therefore, it is for the state party to determine what amounts to manifest violation. In our context, it may be argued that 'manifest violation' should connote violation of certain basic norms of the constitution as mentioned above.

ENFORCEMENT OF TREATY

Enforcement of treaty in the domestic legal system may involve one or all of the three processes: ratification, legislative approval and implementing legislation. These expressions connote different meanings.

RATIFICATION

Ratification is the process of expressing willingness of the state to be legally bound by the provisions of a treaty. According to Oppenheim:

> Ratification is the term for the final confirmation given by the parties to an international treaty concluded by their representatives, and is commonly used to include the exchange of the documents embodying that confirmation.[35]

Article 1(a) of the Vienna Convention of Law of Treaties, 1969 defines ratification as the international act whereby a state establishes on the international plane its consent to be bound by a treaty. The

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[35] Oppenheim, Treaties on International Law, 8th ed., London, at p. 896.

Constitution of Bangladesh, unlike the French and the American Constitutions, does not contain any express provision pertaining to ratification of treatise. Therefore, in the absence of any clear provision of law on the subject, we have to go by inferences, circumstances and precedents to ascertain the relevant legal propositions. An analysis of a number of treatises entered into by Bangladesh since the commencement of the constitution, the practice in the United Kingdom and other commonwealth countries like India, Australia, Canada and Sri Lanka and the provisions on the subject contained in Federal Constitutions of other countries such as the United States may indicate that treatise in Bangladesh, irrespective of their nature and character unless otherwise provided in certain exceptional circumstances, require ratification.

Legislative Approval

Legislative approval may be needed either before or after ratification of a treaty. The requirement of legislative approval depends upon the nature of treaty itself and for this purpose many jurists classify treaties into four broad category: (a) treaties with purpose and substance outside the sphere of national law, such as alliances, peaceful settlements of international disputes; (b) treaties affecting the administrative sphere of rights and duties of various public authorities and not relating to individuals; (c) treaties relevant to relations between public authorities and individuals; and (d) treaties concerned with relations between individuals or other subjects of private law.[36]

Thus, constitutions of many states require for certain classes of treaties the approval of the legislature before the executive may ratify or accede to those treaties. The requirement is, in principle, independent of the need for implementing legislation; the respective classes of treaties can not be ratified or acceded to unless they are approved by the legislature, whether or not they require implementing legislation. If they do, this requires separate action by the legislature. The 'legislative approval' is sometimes confused with the 'legislative implementation' of treaties. The distinction between the two processes has been classified lucidly by Kelsen in the following words:

> Many constitutions provide that all or certain treaties must be approved by the legislative organ in order to be valid. Such approval is not transformation; it is the participation of the legislative organ in the

[36] Supra note 31. See also Robertson, A. H. (ed), Human Rights in National and International Law, New York, 1968.

> conclusion of the treaty, which is nothing other than participation in the creation of international law.[37]

Thus, passing of legislation is distinct from legislative approval. The legislative 'approval' of treaties is also different from their 'ratification'. According to Schwarzenberger:

> Ratification of a treaty under international law must be distinguished from the approval which, under the municipal laws of the contracting parties, may have to be given by specified constitutional organs, such as a parliament or senate, before the executive may proceed to ratification of the treaty on the international level.[38]

Constitutions requiring legislative approval differ from each other as regards the classes of treaties for which this requirement prevail.[39] The constitutions of Austria[40] and Germany[41] contain explicit reference to the types of treaties which may be concluded without parliamentary approval as executive agreements, whereas in countries like France[42] and Italy[43] only certain types of treaties need to be submitted to parliamentary approval.

However, absence of provisions for legislative approval of treaty may be explained by the fact that first, modern legislative bodies are busy with their enormous amount of state activities; secondly, the present volume of international intercourse makes it impossible to submit all treaties concluded by a given state for the approval of its parliament.

The Bangladesh Constitution does not contain any express provision requiring legislative approval of treaties. It merely provides that treaty shall

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37 Kelsen, H., Principles of International Law, London, 1966, at p. 466.

38 Schwarzenberger, G., A Manual of International Law, (5th edn), Quoted in Varma, P., "Position relating to Treaties under the Constitution of India", 17:1(1975) Journal of the Indian Law Institute, 155.

39 See also, Towards Wider Acceptance of UN Treaties, A UNITAR Study, New York, 1971.

40 Art. 66 (2) of the Federal Constitution of Austria.

41 Art. 59 (2) of the Basic Law.

42 Art. 53 lists the following types of treaties as requiring legislative approval: peace treaties, commercial treaties, treaties or agreements relative to international organisation, those that imply a commitment for the finances of the state, those that modify provisions of a legislative nature, those relative to the status of persons; those that call for cession, exchange or addition of territory may be ratified or approved only by law. They shall go into effect only after having been ratified or approved.

43 Art. 80.

be laid down by the President in the Parliament. The expression 'shall' used in the constitution has some element of legal requirement. Despite this, it does not sufficiently indicate whether it requires implementing legislation or merely parliamentary approval. Even if we accept the proposition that legislative approval is required by the constitution, yet it is uncertain what types of treaties shall require such legislative approval. It is for this reason that despite the constitutional provision, none of the treaties except one[44] which Bangladesh has hitherto entered into with foreign countries has been placed before Parliament for approval.

Implementing Legislation

It may be noted that there are few exceptions to the principle that legislation is required to make a treaty part of domestic law. This principle is the counterweight to the executive treaty making power. For, without it the executive would be able to circumvent the legislature and change the law of the land by adoption treaties.

In current practices of different countries, treaty may be implemented in domestic legal system through legislation in the following ways:[45] first, the treaty provisions can be rewritten by the parliamentary draftsman in the form of a statute. Often statutes make no reference to treaty implementation. Sometimes reference to a treaty is made in the long or short title of the Act, with or without scheduling it. Alternatively, the statute may employ its own substantive provisions to give effect to a treaty. Other statutes make no reference in the long title to treaties they implement, but make indirect reference elsewhere. The advantage of refereeing, directly or indirectly, to the treaty which the statute implements is that it puts the judiciary on notice that the treaty as an external aid and may be used to interpret ambiguities in the statute.

Secondly, the treaty itself can be appended to the implementing statutes as a schedule. Quite often the statute simply translates some treaty provisions and schedules the whole treaty. Sometimes the statute will provide that the treaty provisions are to have force of law of the land. Scheduled treaties, by virtue of their location in a schedule, have force of

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[44] Since 1978, no treaty has been laid before the Parliament except the recently concluded Ganges water-sharing treaty with India.

[45] See, Hastings, W. K., "New Zealand Treaty Practice with Particular Reference to the Treaty of Waitangi", 38(1989) International and Comparative Law Quarterly. See also Brownlie, I., International Law, Oxford (ELBS Edition), 1985; Rahman, M.H., The Rallying Power of Law, Dhaka, 1997.

law without the addition of words in the statute to this effect. Scheduling a treaty provides an even clearer signal to the courts that it is available for use as an aid to interpret statutory ambiguities. If, however, a scheduled treaty is deemed to be part of its implementing Act and the implementing Act contains words contradictory to the treaty provisions, the courts are faced with dilemma which is compounded if the treaty provides that its texts, in all language, are equally authentic.

Thirdly, parliament will quite often delegates its legislative authority to the executive, which is then empowered by statute to implement international obligations by way of regulations or orders.

Under the present constitutional arrangement of Bangladesh, the executive exercises unlimited power of treaty-making and treaty-implementation. As far as the question of legislative implementation of a treaty is concerned, the constitution does not make any distinction between self-executing and not self-executing treaties as maintained by American Constitution or other countries. But this does not lead to conclusion that legislature has no role in the treaty making process. As treaty very often creates rights and obligations directly for the citizens, implied conditions of constitution require its legislative implementation. This issue was resolved in the case of *Kazi Mukhlesur Rahman vs. Bangladesh*[46] which was the first reported case on application of treaty in Bangladesh. In this writ petition, the petitioner challenged the constitutional validity of the agreement between Bangladesh and India relating to transfer of *Berubari* enclave which was signed by the Prime Ministers of the two countries. It involved cession of Bangladesh territory. Under the Noon-Neheru Pact of 1958 the southern half of South Berubari Union No. 12 together with the adjacent enclaves became part of the territory of Bangladesh under Article 2(a) of the constitution. Article 14 of the treaty provided that India would retain the southern half of south *Berubari* and adjacent enclaves and in exchange Bangladesh will retain the *Dahagram* and *Angurputa* enclaves. India will lease in perpetuity to Bangladesh an area of 178 meters near '*Tin Bigha*' to connect *Dahagram* with *Panbari Mouza* of Bangladesh. The treaty provided that it would be subject to the ratification by the governments of two countries.

The petitioner argued that the treaty was tantamount to cession of the territory of Bangladesh and would violate the rights of citizens of Bangladesh, particularly the right to movement to anywhere in Bangladesh. More precisely, the petitioner argued that by cessation of the southern half

[46] 26 (1974) DLR (SC) 44.

of Berubari, the petitioner's right to movement to this particular area of Bangladesh was impeded or denied. The court held that the application before the High Court Division was premature and the appeal was liable to be dismissed on that ground alone. However, the judiciary examined, inter alia, the treaty making power of the executive under the constitution of Bangladesh. According to the court, executive power of the Prime Minister shall be exercised in accordance with the constitution which impose limitations on his treaty making power, in particular when settlement of boundary is involved. Clause (2) of the Art. 143 of our constitution says: "Parliament may from time to time by law provide for the determination of the boundaries of the territory of Bangladesh and the territorial waters and the continental shelf of Bangladesh." The Prime Minister can not, therefore, unilaterally determine the boundary of the country. This can only be done by law made by Parliament in that behalf. This is in keeping with the settled principle that Parliament has constitutional control over the executive. The court held that

> Ours is a written constitution. We have already seen that the head of the Executive, namely, the Prime Minister can not unilaterally determine the boundaries of Bangladesh which has to be done by a law of Parliament under Art. 143(2) of the constitution. It can not but be more so when cession of the territory is involved. This limitation on the part of the head of the Executive of Bangladesh is on the face of it such a "manifest and notorious" restriction on his treaty-making power that any such treaty entered into by a foreign state with Bangladesh without the sanction of Parliament of Bangladesh will be ultra vires and can not pass title.[47]

It may be mentioned that southern half of south *Berubari* together with the enclaves formed an inseparable and integrated part of the territory of Bangladesh in view of Article 2(a) of our constitution which defined the territory of Bangladesh. Then the court held,

> There can thus be no escape from the position that though treaty-making falls within the ambit of the executive power under Art. 55(2) of the Constitution, a treaty involving determination of boundary, and more so involving cession of territory can only be concluded with the concurrence of Parliament by necessary enactment under Art. 143(2) and in case of cession of territory by amending Art. 2(a) of the Constitution by taking recourse to Art. 142.[48]

This judgement makes it clear that implementing legislation is a legal requirement for treaty relating to any change of boundary. On similar

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[47] Ibid., at p. 57.

[48] Ibid., at p. 58.

analogy, it may be argued that treaties ratified by the executive require legislative implementation if (i) it involves alteration of the existing laws; (ii) confers new powers on the executive, (iii) imposes financial obligation upon the citizens; (iv) affects the rights of the citizens; and (iv) involves alienation or cession of any part of the territory of Bangladesh.

The requirement of implementing legislation regarding financial obligation can be deduced, at least implicitly, from the provision of Article 83 of the Constitution.[49] In the last two cases, however, ordinary legislation will not suffice and an amendment of the Constitution itself may be the only way out. For example, many international human rights instruments impose state parties to undertake legislative measures or change existing laws to comply with human rights norms.[50] To the knowledge of these authors, very few legislation has been enacted by Parliament to give effect to such convention and treaties.[51]

Effects of Treaty

For the purpose of internal effects of treaty, it may fall either within the category of directly applicable or statute like application, taking into consideration whether an implementing legislation is required or not. Another relevant issue relates to the internal effects of a treaty which is 'directly applicable'.[52] Does it differ from that of 'statute like' application?

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[49] Article 83 provides that 'No tax shall be levied or collected except by or under the authority of an Act of Parliament.'

[50] For example, Bangladesh has ratified International Covenant on Social, Economic and Cultural Rights, 1966 which requires adoption of legislation for implementing obligations under it.

[51] Repression of the Activities against the Safety of Air, 1997 (Act no. XVII) was enacted to implement three international conventions: (i) Convention on Offences and Certain Other Acts Committed on Board Aircraft, 1963, (ii) Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 1971, and (iii) Convention for Suppression of Unlawful Seizure of Aircraft, 1970.

Another two acts, namely, the United Nations (Security Council) Act, 1948 and the United Nations (Privileges and Immunities) Act, 1948 concerned the status of the Security Council resolution and gave effect to the Convention on the Privileges and Immunities of the United Nations Convention, 1946, respectively.

[52] It implies that court in the particular legal system will consider treaty provisions as a source of law, analogously to the way they look at constitutions, statutes or certain other instruments of domestic law.

A crucial issue raised by the direct application of treaties involves the hierarchical status of the treaty norms in the domestic legal system. In some jurisdictions, when there is a clash between directly applied treaty norm and another norm, the treaty norm may prevail. Generally, two question are raised: the status of treaties in national legal system, that is, the question of direct application and the hierarchical status in national legal systems when directly applied treaty norms clash with other norms of the same system. The prevailing practice suggests that most of the treaties which Bangladesh has ratified or acceded to are not transformed into domestic law by implementing legislation and hence they are not directly applicable in our legal system. The question arises: what kinds of treaties would be directly applicable. Is there any determining criteria? In this regard, distinction should be made between bilateral treaty and international or multi-lateral treaty or convention. Thus, a careful reading of Article 145A of the constitution reveals that it is intended to deal only with treaty with foreign countries, e.g., bilateral treaties and not multi-lateral ones with universal applications. Many authors opine that human rights treaties, treaties for membership in an international organisation or economic organisation or other treaties of universal importance will be directly applicable in the domestic legal system. Unlike U.S., treaties are not part of the supreme law or Constitution of Bangladesh. These raise questions as to whether these 'directly applicable' treaties take precedence over statutes or not. Indeed, the constitution is silent about the issue and this remains a 'grey area' of the treaty practice in Bangladesh which would be explored by courts in the appropriate circumstances.

CONCLUSION

The question of status of international law into national legal system and the hierarchical status of the norms so applied are complex and vary from country to country, depending on constitutional and other municipal norms. Foregoing discussion makes it clear that as international law stands today, it does not contain any general rule according to which customary international law and treaty laws are to be supreme in the sphere of municipal law and directly binding on state organ and citizens alike. However, the reality is that in the most states, primacy of international law is solemnly affirmed and this is precipitated by the development of universal or regional organisations and the appearance of certain elements of supra-nationality have occasioned a more widespread entrenchment of international law into the national legal order.

It may be argued that our constitution does not lay down any specific rule of reception or status of international law in our municipal law. Nevertheless, judicial pronouncements and legislative and administrative practices lead to a conclusion that customary international law constitutes part of the domestic legal system of Bangladesh provided that it is not contrary to or contradict provisions of the constitution or statutory laws. So far as customary rules of international law are concerned, the position prevailing immediately preceding the commencement of the constitution continues even after the coming into force of the constitution.

Regarding status of treaty under the constitution of Bangladesh, theoretical approach on the premise of 'monist' or 'dualist' theory will be of little help to the issue at hand. Nevertheless, it may be argued that Bangladesh adhere to 'dualist' line of reasoning relating to the position of treaty. However, in the absence of explicit constitutional provisions, the status of the treaty in the municipal area remains largely unsettled and still evolving. Although the Constitution requires legislative participation in the treaty implementing process, this requirement is hardly maintained in actual practice. This is due partly to the fact that ambiguity exists in the relevant constitutional provision and, partly, for the lack of political willingness or preparedness of the government to carry out the obligations under a treaty.