A TALE OF TWO WORLDS: JUDICIAL INVOCATION OF INTERNATIONAL LAW IN INTERPRETING CONSTITUTIONAL RIGHTS IN THE UNITED STATES OF AMERICA AND BANGLADESH

Md. Johir Uddin Shohag*

ABSTRACT

Trapezium model, instead of previous pyramid model, based on the commonality of rights across the globe, is much more functional. Ronald Dworkin's moral reading might open up a wide horizon and encourage the rights-based dialogue between different legal orders on the basis of commonality. At inception of Bangladeshi constitutionalism, it is observed that a sense of judicial alienation and relief in avoiding judicial invocation of international law in interpreting constitutional rights. Sovereigntist approach was the dominant trend at this stage. At the turn of the century, the court showed more receptive approach through Hussain Muhammad Ershad vs Bangladesh. Later the principle of international law as an aid to interpretation has been recognised. The US judiciary was inconsistent in judicial invocation of International law like Bangladesh. Recently their trends are more consistent than ever before. But they did not provide methodological and jurisprudential sophistication and justification in this regard. It raises a bundle of questions and concerns i.e. of democracy, sovereignty and separation of powers in both the countries. Some internal and external factors, e.g. stability of constitutionalism, work behind the similarities and dissimilarities of them.

I. INTRODUCTION

"Two general tendencies are at work in many fields of human endeavor, including politics, government, and law. On the one hand, there are the forces of globalism, internationalism, and interdependence among nations. On the other hand, there are the forces of localism pulling us toward our communal, even tribal, roots. This distinction is familiar enough, but in most discussions these forces are seen as antithetical to each other."[1]

During the destruction and devastation of World War II, humanism was forgotten for a few years. When people came to their senses, they tried to overcome the trauma and tragedy of the war. The Universal Declaration of Human Rights (henceforth the UDHR) was adopted to mitigate the menace and

* **Md. Johir Uddin Shohag**, LL.B. (Hons.) and LL.M. (University of Dhaka), is a Lecturer, Department of Law, Daffodil International University.

[1] Breyer, S., "America's Courts Can't Ignore the World" (October 2018), available at: <https://www.theatlantic.com/magazine/archive/2018/10/stephen-breyer-supreme-court-world/568360/> (Last visited on May 30, 2021).

misery of the war and unfold a future with humanity and human rights and a future without worrisome wars. Most of the post-World War II and postcolonial constitutions incorporated human rights in their constitutions.[2] Different jurisdictions have oriented themselves differently to international law. Monism i.e. the international law as a hierarchically superior system to the domestic constitutional regime is hardly accepted worldwide.

Mohammad Shahabuddin identified a paradox in human rights discourse in Bangladesh.[3] It not only offers a *necessary language* for curbing the coercive power of the state but also shapes a hegemonic discourse to undermine democratic resistance.[4] As an inheritor of European enlightenment and humanism i.e. as a part of the 'wider civilization',[5] human rights was never a hegemonic discourse in the United States, neither does it undermine democratic resistance.

For Bangladesh, hegemony does also work in a different way. The use or non-use of international law in the United States attracts a good global audience. But the scenario in Bangladesh even does not attract an Asian audience. In 2000, the year of openness in Bangladesh towards the judicial invocation of international law, the Asian Yearbook of International Law did not mention this development in its volume 9 (2000)[6] and volume 10 (2001-2002).[7] In these two volumes, the state practices of international law in India, Pakistan, Nepal and Sri Lanka were discussed. But Bangladesh was missed out. In volume 10, Bangladesh appeared for different reasons, not for the cases where international law was used as an aid to interpretation.[8] In the Western fairy tales,[9] Cinderella is a hard-

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2 The trend of constitutionalism across the globe in the post-WWII is liberal democratic constitutionalism. Dieter Grimm classified the constitutions of the world into five categories: i) Liberal Democratic Constitutions, ii) Non-liberal Democratic Constitutions, ii) Liberal Non-democratic Constitutions, iv) Social Welfare Constitutions, and v) Socialist Constitutions; See Grimm, D., "Types of Constitutions", in Rosenfeld, M. & Sajo, A. (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford, 2012, pp. 98-132 .

3 Shahabuddin, M., "Human rights and the law", in Riaz, A. & Rahman, M. S. (eds.), *Routledge Handbook on Contemporary Bangladesh*, London & New York, 2016, pp. 283-292 , at p. 290.

4 *ibid.*

5 Larsen, J. L., "Importing Constitutional Norms from a "Wider Civilization": Lawrence and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation", 65 (2004) *Ohio State Law Journal*, pp. 1283-1327, at p. 1323.

6 See Chimni, B.S., Masahiro, M. & Subedi, S. P. (eds.), *Asian Yearbook of International Law*, 9 (2000), Leiden/ Boston, 2004, pp. 223-279.

7 *ibid.*, pp. 167-263.

8 See *Hussain Muhammad Ershad vs Bangladesh,* 21 (2001) BLD (AD) 69 & *Prof. Nurul Islam vs Bangladesh*, 52 (2000) DLR (HCD) 413.

9 See Zipes, J., *Grimm Legacies: The Magic Spell of the Grimms' Folk and Fairy Tales*, Princeton, 2014.

working but neglected girl.[10] Bangladesh was ignored and treated as Cinderella state.[11]

Methodologically speaking, all the cases dealing with international law will not be examined in this paper. International law is a fast growing field of law. Except international human rights law, other international law is beyond its scope. For example, international environmental law has been cited in Human Rights and Peace for *Bangladesh vs Government of Bangladesh (2019)*. But this judgment won't be analyzed in this paper. Moreover, only canonical constitutional cases[12]dealing with international human rights law shall be examined. This paper is neither a citation-study, nor a study of silent dialogues or prudential silences. Rather it is a study of express dialogues or rejection thereof. The aim of this paper is to theorize the trend, typologies of and justification for judicial invocation of international human rights law over the last fifty years (1971-2021) in the United States and Bangladesh.

This paper proceeds in the following manner. In Part II, the nature of international human rights will be revisited and a new theoretical model will be adopted to understand the judicial invocation of international human rights law. In Part III, the nature of constitutional rights will be reviewed. In Part IV, different interpretive techniques will be analyzed and their comparative advantages and disadvantages in using international human rights law in interpreting constitutional rights. Constitutional rights will be related to the nature of international human rights law through some innovative interpretive techniques. International law, constitutional rights and interpretation are jurisprudentially intricately interrelated in this study. Any difference in the understanding of those issues will certainly influence the findings of the study. In Parts V and VI, a study for theorizing the present trend of judicial invocation of international human rights law in constitutional interpretation in the United States and Bangladesh will be conducted. Only jurisprudential understanding of these issues will not suffice. The reasons behind a particular trend in the United States and Bangladesh that has developed over time shall be studied from the perspective of socio-political and legal analysis. In Part VII, the causes of

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[10] The Cinderella State, available at: <https://trove.nla.gov.au/newspaper/article/11395037> (Last visited on June 01, 2021).

[11] The term Cindrella state was borrowed from the Australian context; See Tan, K. Y. & Hoque, R., "South Asian Constitutional Foundings: Beyond History", in Tan, K. Y. & Hoque, R. (eds.), *Constitutional Foundings in South Asia*, Oxford & New York, 2021, at p. 5.

[12] Canon, Professor Jack Balkin and Professor Sanford Levinson argued, has deep canonicity. It means '*the canonicity of certain ways of thinking, talking, and arguing that are characteristic of a culture*'. And in this case, it is a culture of constitutional jurisprudential reasoning; See Balkin, J. M. & Levinson, S., "The Canons of Constitutional Law", 111(4) (1998) *Harvard Law Review*, pp. 963-1024, at pp. 984-985.