

Influence of Comparative Constitutional Law on the Development of Constitutional Law in Bangladesh

Md. Nazmul Hasan Sarker*

Abstract

With the fall of the empires and rise of the nations started in the earlier part of the 21st century, the study of law, politics and sociology started to get a new dimension. Newly formed nations started to shape their political identity through their own sovereign legal entity. No comparative legal studies by judges, legal professionals and Constitutional scholars have ever been made in so many countries before and the area was never institutionalized to share ideas, coordinate collaborative and activities with new regional or international organizations. The cruel history of the nine-month long bloodshed with the Pakistani rulers in 1971 gave a new country named Bangladesh in the history of nations where a country got its independence by a unilateral declaration of independence (UDI). Soon after independence our brave forefathers gave ourselves an autochthonous Constitution which is regarded an excellent masterpiece in the museum of Constitutions. This sovereign document was the brainchild of the Constitution framing committee headed by Dr. Kamal Hossain, which came into force on 16th December 1972. In the process of making the masterpiece and later for the interpretations the framers, Jurists and Judges thoroughly grasped the influence of comparative Constitutional law. This paper aims at exploring the scope of comparative Constitutional law in the development of the Constitution of Bangladesh with a special emphasis on how they have been influenced the courts to interpret Constitutional law just not in between the lines but in global context which ultimately added more feathers to the culture of our Constitutional law.

Keywords: Constitution, Comparative Constitutional Law, Constitutional borrowing, Bangladesh, Fundamental rights, Basic structure.

1. Introduction

Comparative Constitutional law (CCL) is an area of legal research that looks at and analyzes the Constitutional trends of one country with other legal systems to find similarities, dissimilarities, and practices of how these fundamental legal structures are created and run with a view to adopting the best practices. This is a comparative method which offers insightful information on how other legal systems deal with key issues linked to the state affairs such as individual's rights, democracy, the separation of powers, and the rule of law within their realm of Constitutional structure. Thus, comparative Constitutional law works like a bridge between different legal systems and supplements the pores of one polity with the best practices of another. The issue has never been so widespread ever to contribute to our collective knowledge of how Constitutions are formed and how they function. Aristotle compared the Constitutions by classifying them as early as 330 B.C.¹

* Lecturer & Coordinator, Department of Law, EXIM Bank Agricultural University Bangladesh (EBAUB)

¹ Sunil Khilnani, Vikram Raghavan, and Aun K. Thiruvengadam, "Comparative Constitutionalism in South Asia" *Journal of the Indian Law Institute* 55, No. 3 (2013): 381

There were later other initiatives in this regard which draw the history of comparative Constitutional law. On 16 December 1971, the people of Bangladesh succeeded in obtaining their long-awaited independence following an awful genocide and a nine-month long war. When the elected representative successfully gave us the Constitution just within a year of the independence, on 4 November 1972 they adopted it, the Constitution was considerably more prominent and one of the most unique of its kind. It is generally recognized that a historic struggle to secure this achievement has played a key role in the independence of our people over the years. This Constitution has been in effect from the 16th day of December, 1971 and to date it has been amended 17 times, of which several were challenged and struck down. It compiled a huge pile of customs and norms of Constitutional law over the years.² In modern times, Constitutional borrowing is not only carried out in the authoring phase of the Constitution but can take a comparative approach and provide the courts with suitable solutions in interpreting the laws. The guardian of the Constitution of Bangladesh, the Supreme Court likewise made observations very frequently relying on very cautious comparison, a brief account of which is discussed further in this paper. They have tremendous consequences for both public and private life for Constitutional concerns. Since comparative laws are now becoming significant, knowing the origins of the comparative components is now very essential to help us understand modern interpretations more well.

More than fifty years have passed since the incorporation of the Constitution of Bangladesh. It is a matter of regret that a little study has been done in order to explore the jurisprudential basis of this sacred document which has adopted the hybrid model of borrowing for which it has a collection of the best practices of different polities all over the world. This paper is a little triumph to explore the jurisprudential and ideological foundation of the Constitution of Bangladesh.

2. Objectives of the Study

The major objective of this research is to find out the influence of comparative Constitutional law in the evolution of the Constitution of Bangladesh throughout its amendments and judicial developments. With this aspect this paper is an attempt to achieve the following objectives:

- i) To evaluate the legal framework of comparative Constitutional law.
- ii) To evaluate the historical basis of the Bangladesh Constitution.
- iii) To examine the aspects of the elements of comparative Constitutional law present in the current sphere of our Constitutional arena.
- iv) To reevaluate the existing regional and international legal instruments as to how they were injected in present Constitutional culture.

² Shyamali Ghosh, "Constitutional Changes in Bangladesh: Process of Political Development," *India Quarterly* 42, No. 4 (October-December 1986):391.

3. Research Methodology

The researcher mainly followed the qualitative approach of research. This study is based on various kinds of primary and secondary sources of data which have been collected mainly from various journals, research papers, case laws and opinions of intellectuals. A number of data are also recollected from concerned books. This paper tries to discuss a comparative study relying on the materials by analysis, and exploration of concepts from other offline and online sources too.

4. Understanding the Concept

The history of comparative Constitutional law can be traced back to as early as the time of Aristotle. In his famous book *politics* Aristotle drew the political cultures of the Greek city states for the analysis and understanding a better political culture. In today's era of globalization, the study of comparative law transcends national boundaries, giving rise to the emerging field of comparative Constitutional law. Comparative Constitutional law, which emphasizes both similarities and variations, offers a full understanding of how countries assemble their governments, safeguard basic rights, and negotiate the intricate balance of power within their legal systems. Fundamentally, comparative Constitutional law is the meticulous examination of a polity's Constitution, which forms the cornerstone of that nation's judicial and political structure. Beyond a purely textual approach, CCL approaches the underlying ideologies, historical contexts, and cultural norms that shaped the creation and understanding of these fundamental works. Legal academics and practitioners may learn a lot about good Constitutional procedures by looking at how other nations handle issues like the rule of law, individual rights, and organizing governmental institutions. Through this perspective, nations may share their achievements and failings with one another, promoting an international conversation on Constitutional ideas. Comparative Constitutional law is significant on several levels. CCL is the way to improve legal professionals' capacity to assess critically their own Constitutional frameworks. Scholars can evaluate the advantages and disadvantages of their own legal systems by examining the various techniques used by other countries in a similar circumstance.³ An excellent case study in the arena of comparative Constitutional law is the Constitution of Bangladesh. It was drafted in the wake of a struggle for independence, embodied the country's dedication to democracy, egalitarian society, social justice, and basic human rights. It pictured how a nascent nation attempted to combine the challenges of nation-building with its inhabitants' ambitions by comparing its Constitutional struggle to similar ones. The example of Bangladesh highlights the importance of comparative Constitutional law in determining a nation's course of future. Assessing the principles adhere to universal Constitutional standards by looking at the Bangladesh Constitution's provisions on religious freedom, the separation of powers, and the rights of marginalized people shows the maturity it got with the use of CCL.

³ Ghosh, *Constitutional Changes in Bangladesh*, 392.

5. Scope of Comparative Constitutional Law in Bangladesh

The influence of comparative Constitutional law in Bangladesh Constitution can be traced from the very inception of it. Since the construction of the Constitution despite the requests of wisdom and prudence is not only an engineering design, the preparation and the resulting Constitution are a matter of historical conditions. The drafters of this Constitution have looked into a really wide variety of Constitutional materials. Such materials ranged not only from written to unwritten form, but also from common law to civil traditions. Words, phrases, and concepts of our Constitution were heavily borrowed from Constitutions of other countries and international human rights instruments.⁴ There are also some other facts, which have been established as Constitutional law in our country afterwards. A brief account is given as follows:

5.1 Ideology of the State and Rights of the Citizen

Comparative Constitutional law has been very helpful in understanding how democratic values are established and how basic rights are protected. The founders of the Bangladesh Constitution were influenced by a number of Constitutional models that placed an emphasis on democratic representation, power separation, and checks and balances. The government's structure, which clearly distinguishes between the executive, legislative, and judicial departments, shows the impact of democratic frameworks from nations like India, the United States, and France.⁵ Additionally, Fundamental Principles of State policies (FPSPs) and fundamental rights incorporated in part-II and Part-III respectively gained support of international human rights standards. The influence of the Universal Declaration of Human Rights (UDHR), International Covenant of Economic, Social and Cultural Rights (ICESCR) and International Covenant on Civil and Political Rights (ICCPR) is clearly seen in the Constitution of Bangladesh.⁶ The whole skeleton of the Bangladesh Constitution were developed using a comparative review of Constitutions that uphold rights of the people such as freedom of expression, freedom of religion, and equality before the law. The incorporation of these principles not only ensured the establishment of an egalitarian society for its citizens irrespective of their social, religious and other identical backgrounds it cemented the foundation for a healthy structure of proper distribution of power among the organs of the state.

5.2 Incorporation of Basic Structure Doctrine

*Anwar Hussain Chowdhury Vs. Bangladesh*⁷ otherwise popularly known as the 8th Amendment is a well-known ruling on the Constitutional record of Bangladesh. This is the first ruling, in which a parliament's amendment to the Constitution was declared void by the Supreme Court of

⁴ Justice Muhammad Habibur Rahman, "Our Experience with Constitutionalism,") *Bangladesh Journal of Law* 2, No. 2(1998):117

⁵ M Rafiqul Islam, "50 Years of Our Constitution: Original Ideals Vs Reality," *The Daily Star*, November 4, 2022, <https://www.thedailystar.net/supplements/50-years-our-Constitution-original-ideals-vs-reality/news/Constitutional-law-bangladesh-3160236>

⁶ Islam, "50 Years of Our Constitution."

⁷ 1989, 18 CLC (AD)

Bangladesh. The key observations made in the verdict is that there are some key elements of the Constitution belong exclusively to the nation, such as, Constitutional supremacy, democratic nature of the state, republicanism, Judiciary's independence from the other two branches, the unitary nature of state and check and balance between the organs through distribution of power. The court made a careful revision of the revised Art. 100, and the court was of the view that the establishment of courts in the divisional level was *ultra-vires* to the spirit of the Constitution. The doctrine was originated from our neighboring India's judiciary where court questioned the Constitutionality of the amendment that reduced the authority of the courts for judicial review. In *Kesavananda Bharati Vs. State of Kerala*⁸ the court overthrew the precedent of *Golak Nath*⁹ and took away the power of the Parliament to modify any or all of the provisions of the Constitution without being checked by judicial review. In the case of *Indira Nehru Gandhi Vs. Raj Narayan*¹⁰ the court ruled that the amendment overstated and damaged certain Constitutional framework. The supreme court was highly inspired by the decisions made by the Indian judiciary for injecting the doctrine originated in India within the legal periphery of our country.

5.3 Development of Judicial Review

Though the phrase Judicial review is not inserted in Bangladesh Constitution in plain words. However, Article 102 of the Constitution empowers the apex court for the revision of public authority's actions. The Constitution also empowers the apex court to check and reverse the authority of the subordinate courts which made it a guardian of the judiciary. In Bangladesh, these provisions have led to substantial legal activity. We have seen the implementation of article 102 in the enforcement of fundamental rights, separation of powers, unlawful martial law declaration and quashing of Constitutional changes. The court issued an order eliminating democratic participation in Upazila Parishads, and assigning all powers to the administration, in *Kudrat-E-Elahi and others v. Bangladesh*¹¹. It reaffirmed that the provision of elected representatives should form the local government authority, as laid down in the Constitution. The Court decided that Constitutional revisions are subject to judicial scrutiny. Bangladeshi courts have adopted the doctrine of legitimate expectation developed in Britain and used in other commonwealth countries such as in the USA in *Marbury v. Madison*¹² was an important U.S. Supreme Tribunal decision, which established in the U.S. the idea of judicial review, i.e. American courts are entitled to strike laws which they deem violating the U.S. Constitution. Decided in 1803, in American Constitutional law, Marbury remains the single most important judgment. The Court's historic decision established, not simply a declaration of political ideas and objectives, that the U.S. Constitution is true legislation and helped create the border of a Constitutionally distinct administration and the judiciary. The principle was a magnificent move

⁸ AIR 1973 SC 1461

⁹ 1967 AIR 1643

¹⁰ AIR 1975 SC 2299

¹¹ 1992 21 CLC (AD)

¹² 5 U.S. (1 Cranch) 137 (1803)

to seek the prevention of unfair use of power and that laws should contain the principles of natural justice making a fair environment for the citizens.

5.4 Opening the Door for PIL Liberalizing the Concept of “*locus standi*”

With *Dr Mohiuddin Farooque v Bangladesh*¹³, our court paved the way for public interest lawsuit by flexibly defining the terms “person grieved” as anybody whose interest, albeit not affected by the issue, is adequate. It was filed in violation of the validity of the Tangail Flood Action Plan (FAP). Following the Court judgment, the Government is amending the project, removing the original design and establishing an environmental impact assessment plan of local public engagement. In deciding this case our judiciary was also highly inspired by the decision of Indian Judiciary and the idea of locus standi and aggrieved person as seen in the UK. As of the decision of *Olga Tellis v. Bombay Municipal Corporation*.¹⁴ In this case, the liberalized position, as described, is an update on the liberalization agenda for *Kazi Mukhlesur Rahman Vs. Bangladesh*.¹⁵ It is a point of pride that the issue of Locus Standi was given a liberal eye on the Constitutional Journey very early in this judgment at a time when the Blackburn cases were just settled in England which laid down the ‘sufficient’ concept and had to continue to take root. The most important statement in this situation was the liberalization move’s springboard, according to the decision uttered:

*“It appears to us that case was found to be a person aggrieved not because he brought any personal grievance before the Court but because, we heard him in view of the Constitutional issue of grave importance raised in the instant case involving an international treaty affecting the territory of Bangladesh and his complaint as to an impending threat to his certain fundamental rights guaranteed by the Constitution, namely, to move freely throughout the territory of Bangladesh, to reside and settle in any place therein as well as his right of franchise. Evidently, these rights attached to a citizen are not local. They pervade and extend to every inch of the territory of Bangladesh stretching up to the continental shelf.”*¹⁶

5.5 Enforcing the Fundamental Principles of State Policy

The legal approach to socio-economic rights enforcement have gone thus far in Bangladesh. The role of the Bangladesh Supreme Court in upholding socio-economic rights is currently being reviewed and is vital if the lessons to be drawn from India and South Africa are to be identified. The status of the Fundamental Principles of State Policy (FPSP) within the framework of the Constitution has come under judicial scrutiny in *Kudrat-E-Elahi and others v Bangladesh*¹⁷ where the appellants relying on article 7 of the Constitution attempted to convince

¹³ 48 DLR (HCD) (1996) 438

¹⁴ (1985) 3 SCC 545

¹⁵ 26 DLR (SC) 44

¹⁶ *Dr Mohiuddin Farooque v Bangladesh*, 48 DLR (HCD) (1996) 438

¹⁷ 1992 21 CLC (AD)

the court that a law inconsistent with any of the FPSPs is void. In *Professor Nurul Islam vs. Bangladesh*¹⁸ it has been successfully implemented with the help of protection of life and limbs required to the full enjoyment of life, the Court concluded that the right to life is protected by articles 31 and 32 of the Constitution encompasses protection of health embodied in Article 18 (1) of Bangladesh Constitution. In opining such, Bangladeshi court were highly inspired by the jurisdictions. Socioeconomic rights have often been united by the Indian Supreme Court with civic and political rights, failing to deliver enough financial resources is not an excuse. services. Some particular socioeconomic rights such as living conditions, right to appropriate housing, right environment and so on, were the cases before the Supreme Court. The cases concerned *Olga Tellis v. Bombay Municipal Corporation*,¹⁹ one of India's earliest and most important socio-economic rights cases before the Supreme Court. We found that for the case of the *Government of the Republic of South Africa, and other vs. Grötboom and Other*²⁰ on many people's shelter problem the concept of reasonability established by the Constitutional Court was widely interpreted. It was noted that the notion of reasonability has to be considered while assessing government activities relating to socio-economic rights. *Minister of Health and others vs. Treatment Action Campaign and others*²¹ is also a historic rule to ensure respect for social and economic rights. It was a question of everyone's access to public health care and children's rights. Another issue was whether it was lawful for the government to create and operate an efficient, comprehensive, progressive HIV prevention program across the country. The above-mentioned cases were the considerations taken into by our apex courts in deciding the fate of the cases where the enforcement of part-II was sought.

5.6 Safeguarding Detention and Arrest

In Bangladesh, the arrest and arbitrary arrest, detention, and custody of tortures by the police for the extraction of confessions or other illegitimate prosecutions were rampant, despite the Constitution guaranteeing the proceedings and substantial guarantees for arrested people or suspects of crime and forbidding torture. The history of this decision was taken in July 1998 when a young university student, Rubel, passed dead in police custody within hours of his arrest in police custody for suspects of crimes.²² Rubel's death was caused by excessive torture during her arrest under Section 54 of the 1898 Criminal Procedure Code. In a bid to avoid arbitrary arrests and custodial torture after Rubel's most tragic death under police custody, the legal rights group, Bangladesh Legal Aid and Services Trust (BLAST), has submitted public interest dispute to court as *Bangladesh v. Bangladesh Legal Aid and Services Trust*.²³ In 2003 the HCD finally published a fifteen-point directive that clearly outlines police arrest power without warrant and

¹⁸ 52 DLR (HCD) 413

¹⁹ 1985 SCC (3) 545

²⁰ 2000(11) BCLR 1169 (CC)

²¹ 2002 (10) BCLR 1033 (CC)

²² Aasha Mehreen Amin, "Remembering Rubel," *The Daily Star*, May 22, 2016, <https://www.thedailystar.net/op-ed/remembering-rubel-1227520>

²³ 8 SCOB [2016] AD 1

magistrates' discretion and authority to retain an arrest person for police custody. The Appellate Division mainly affirmed and requested the appropriate agencies to comply with the principles laid out in the HCD as Bangladesh's *Miranda Safeguards*.²⁴ The most important rules are that the police are now obliged, when arresting, to disclose identification, prepares an arrest warrant, tell the relative or friends of the arrest and in the case of harm during their arrest, to transport the arrest person to a medical practitioner. The rules also compel magistrates to initiate judicial proceedings in the event of a violation of law by the police officer concerned.

5.7 Safeguarding the Environment by Declaring Rivers as Legal Persons

Inspired from a newspaper published in a renowned national daily several individuals submitted a written complaint to the High Court challenging the legality of landfilling, invading and developing constructions along the river's banks.²⁵ The High Court Division declare Turag as "legal entity" in an attempt to prevent pollution and invasion of our rivers, the order included all the other rivers in Bangladesh. Bangladesh was not in first place to pass such a legal principle. The High Court Division got justification from the incidents of Lake Erie's right to "exist, prosper, and evolve organically" which was awarded by the US. Also, several national legislations have also been enacted in recent years to provide Colombia river and forest rights in New Zealand. Before Bangladeshi courts adopted such principles, our neighboring country India's judiciary has adopted such principles to protect its rivers from pollution.

6. Observations from the Study

The Constitution of Bangladesh is a living document and till date have gone through several textual changes as well as several constitutional interpretations have also been brought from the prominent constitutional polities through the implementation of CCL. The followings are the instances of the application of CCL in Bangladesh:

- i) Preamble of the Constitution is added in the Constitution which was firstly done in the US Constitution and was interpreted by the courts of India as an operative part.
- ii) Fundamental Principles of State policy (FPSP) was recognized as a pivotal part of the Constitution, basis of which was drawn from the Indian Constitutions Directive Principles of State Policy and International Covenant on Economic, Social and Cultural Rights (ICESCR).
- iii) Fundamental Principles was given the highest applicability inspired by the principles of International Covenant on Civil and Political Rights (ICCPR) and from the Constitution of India.
- iv) The doctrine of basic structure originated in Indian were adopted by the Supreme Court of Bangladesh even in a better and effective way.
- v) FPSP's are being enforced by the Supreme Court with the influence from the practice of South Africa and thus Public Interest Litigation (PIL) found its base.

²⁴ 384 U.S. 436

²⁵ Tawfique Ali, "Time to declare Turag Dead," The Daily Star, November 6, 2016, <https://www.thedailystar.net/frontpage/time-declare-turag-dead-1310182>

- vi) The Doctrine of Judicial Review, which has been one the most fundamental basis of the US Constitution has also been carefully adopted in our Constitution.
- vii) The Supreme Court of Bangladesh has also protected the rights of individual in arrest and detention by adopting the view of US in Miranda case.

7. Concluding Analysis

The Constitution of the People's Republic of Bangladesh being the supreme legal command of our country is known for its recognition of the historic struggle of the generations in its each page. The people who won our Constitution with the price of their blood, the Martyrs' wish was clearly the driving principle when this Constitution was framed by the constituent assembly. It has also been found that influences from external sources have a major impact on the Constitutional provisions referred to in this Article on the drafting of this Constitution.

It provides evidence of how historical background, regional ambitions, and the lessons discovered from comparative Constitutional law interact with each other to develop a system even better. The fact that this development was influenced by international Constitutional norms highlights the commonality of ideas like democracy, human rights, and the rule of law. The founding fathers of Bangladesh were able to integrate our own identity with universally respected principles of justice and governance via thorough study of Constitutional models from throughout the world. Comparative Constitutional law will definitely continue to be a source of inspiration as Bangladesh develops as a country, ensuring that the Constitution is kept as a living, current expression of the aspirations of the people.

It is true that we are incredibly fortunate to have achieved independence via a historic struggle against the treacherous rulers of our former western counterpart. Many other nations have written their Constitution by a smooth, calm, or formal process, but vis-a-viz to them Bangladesh "earned" sovereignty and given themselves this wonderful piece of holy legal document. With such advancements, as a country, Bangladeshis can be proud of the widespread acceptability of the fundamental values of the Constitution.