Application of Comparative Constitutional Law in the Constitutional Law of Bangladesh: Special Focus on Judicial Transplant

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Abstract

Constitutional law discourse is of significant importance in domestic law jurisprudence as well as the international realm. At the same time, comparative constitutional law adds a new dimension to the discourse. In this modern era, isolation from the influence of comparative constitutional law (CCL) is not possible. Bangladesh is gradually evolving amid this wind of change in the comparative constitutional law domain. Constitutional borrowing and constitutional transplant opened a new doorway for Bangladesh to borrow other countries' concepts of constitutional law, which fit within our cultural relativism. From the beginning of the constitutional journey of Bangladesh, the Constitution of the People's Republic of Bangladesh was influenced by CCL. The constituent assembly followed the current trend of CCL. Moreover, countries like Ireland, the UK, the USA, India, Pakistan, etc., influenced the shaping of the constitutional jurisprudence of Bangladesh. The evolution of concepts like *Locus standi*, legitimate expectation, public interest litigation, writ jurisdiction, public trust doctrine, and judicial activism helped Bangladesh establish the rule of law and provide justice to its people. However, there are practical ramifications to the abusive use of comparative constitutional law.

Keywords

Bangladesh, comparative constitutional law, judiciary, judicial transplant, borrowing, public interest litigation, public law

1. Introduction

Comparative law is the study of different legal systems in the pursuit of a global unification of laws. Comparative law shows similarities and dissimilarities among legal systems. Moreover, comparative law enhances the possibility of contribution from one legal system to another (Sikder, 2017). The liberal democracy creates an optimistic story of comparativism both in the framing and application of CCL in transnational unification (Dixon & Landau, 2021). Constitutional borrowing is the idea that refers to bringing a constitutional principle from one domain for use in another domain (Tebbe & Tsai, 2018). This use can be of three types: reference, reliance, and contrary. These uses are primarily for persuasion. Among the types of constitutional borrowing, judicial transplant refers to the use of foreign judgments, then refers to those, and lastly relies on those judgments (Watson, 1993). The application of comparative constitutional law in Bangladesh relies heavily on constitutional borrowing and judicial transplant. As the constitution is the supreme law of the land, it distributes powers among different organs of the state.

Hence, comparative constitutional law opens a doorway to integrating better approaches from other constitutions. In this modern era, isolation from the influence of comparative constitutional law (CCL) is not possible. Using CCL is essential for development, interpretation, and guidance. The Bangladeshi Constitution is not an exception here. The Constitution of the People's Republic of Bangladesh was adopted on 4th November 1972 (Chakma & Saumik, 2022). Since its inception, the constitution of Bangladesh has relied on CCL on various occasions. Because most of the principles of a 'Good Constitution' were developed before the inception of

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this constitution. So, it was impossible and impractical to draft a de novo constitution (Haque, 2022). On various occasions, the judiciary relied on CCL to interpret orthodox understandings of the constitution and took a forwarding step with modern judicature. Constitutional borrowing enlarged the horizons of CCL.

Now, it can be argued that to be a good constitutional advocate, one must have profound knowledge of CCL. Additionally, a regime has changed through revolution in Bangladesh after 5th August 2024 (Bhuian, 2024). Thinkers of constitutional law provide divergent opinions regarding the Constitution. Some are arguing for necessary amendments to the current constitution. On the other hand, some scholars are advocating for a new constitution (Haque, 2024; Morshed, 2024). In this current situation, the importance of CCL has not diminished but has actually grown. This paper reflects a qualitative study and the central research question is: How has comparative constitutional law enhanced constitutional law jurisprudence in Bangladesh? This paper focuses on the application of CCL to the constitutional law of Bangladesh from the judicial point of view.

2. Use of CCL During the Evolution of the Constitution of Bangladesh

Gonoporishod Bitorko is one of the major events for the genesis of the Bangladeshi constitution. Bangladesh's constitutional journey started in 1972. By that time, most of the modern constitutions had been adopted around the world such as the UK, USA, Russia, France and India. Technically, it was not possible to adopt a novel constitution as most of the mother constitutions had developed constitutional jurisprudence by then. As the global constitutional pool became stronger by a deep understanding of concepts like judicial review, bill of rights, rule of law, etc. DD Basu argued that it is not possible to adopt a totally new constitution; if so, that will be a bad constitution (De, 2020).

The preamble is the pole star of a constitution (*Kesavananda Bharati v. State of Kerala*, 1973). The preamble of the Bangladeshi constitution was influenced by the CCL. As the USA was the first country to insert a preamble in the Constitution (Orgad, 2010), Bangladesh borrowed that idea. In the Constituent Assembly debate, Khondokar Abdul Hafiz pointed out from CCL that either socialist or capitalist, both types of countries have inserted Fundamental principles within their constitution. Capitalist countries like the USA, France, and India and socialist countries like Russia, and Yugoslavia, all have inserted either capitalism or socialism as fundamental principles (Ahmed, 2021). But Bangladesh took a unique stance. Bangladesh made a new model using both democracy and socialism as the fundamental principles in an autochthonous way (Haque, 2021). Thus, this constitution was an embodiment of both types of constitutions, socialism from socialism and democracy from capitalism. Since the inception of our constitutional journey, that is, Gonoporishod Bitorko, the application of comparative constitutional law was inevitable.

3. Borrowing the Constitutional Model of ESC Rights

Bangladesh adopted the International Bill of Rights in its constitution. Part II is composed of economic, social, and cultural rights. The worldwide dichotomy of economic, social, and cultural rights (ESC) *vis a vis* civil and political rights also affected the constitution of Bangladesh. Initially, worldwide ESC rights were enforceable in countries like Germany, Mexico, Finland, the Soviet Union, the Philippines etc. However, they did not adopt the full catalog of ESC rights. The first exceptional stance was taken by Ireland. In the Irish constitution, Article 45, it was stated that the principles enumerated in this article are only for the guidance of the Oireachtas and not only judicial enforceability but also judicial cognizance is also barred by this provision. Later on, in 1950, India adopted the Irish "Non justiciable constitutional principles on ESC Rights" model and made this model popular. Subsequently, Burma, Indonesia, South Africa, and Bangladesh

borrowed this model (Haque, 2012). Thus, the Irish model of ESC rights influenced Bangladesh to make ESC rights non-enforceable nature (The Constitution of the People's Republic of Bangladesh, 1972).

However, the functionalism of the Irish model in Bangladesh is different. Because their constitution barred cognizance of ESC rights. So, there is no scope for judicial interpretation or hearing. However, the door for judicial interpretation is open in Bangladesh.

4. Borrowing of Foreign Legal Doctrines and Principles

4.1 Adoption of Liberal View of Locus Standi

Locus standi means the right to appear before the court. In a legal proceeding, a person's jurisdiction to appear before the court is cautiously granted. Everyone cannot invoke the court's jurisdiction; rather, the applicant needs to be interested in the subject matter (Tokar, 1984). *Locus standi* is a Latin term often used in courts of the United Kingdom and the USA that refers to standing to sue in a court of law (*Government of Malaysia v Lim Kit Siang*, 1988). This is the right of a person or group of people to initiate legal proceedings in the court, and the court will decide whether the applicant has the right to appear before the court or not (Bari & Bari, 2012). The classical thought of locus standi was to limit access to the court only to the directly aggrieved person. It was a tool to remove unwanted litigation in both civil and criminal matters (Bari & Bari, 2012).

Initially, the idea of locus standi in Bangladesh was the traditional one. Kazi Mokhlesur Rahman case was the first case to deal with the locus standi of an aggrieved person before a court of law in Bangladesh. In this case, Kazi Mokhlesur Rahman questioned 'the Delhi treaty', which was made to exchange the enclaves of Bangladesh and India. But Kazi Mokhlesur Rahman was not a resident of that area. So, the respondents argued that he was not an aggrieved person in the eyes of the law and had no locus standi. According to Article 102 (2)(a) of the Constitution of Bangladesh, a legal proceeding can be initiated "on the application of any person aggrieved". So, he is not an aggrieved person before the court. However, the court granted his locus standi with reference to comparative constitutional law. The court took a case from the respondent's argument, namely, (*Maganbhai Ishwarbhai Patel v Union of India*, 1969). In para 15, it was stated that

> Some persons moved to the high court being aggrieved on the dividing Rann between India and Pakistan. However, none of them was a resident of that place except one Madhu Limaye who had attempted to penetrate the Raan. Though his connection was temporary, the court decided to hear him.

In para 16, (*Mia Fazl Din Lahore Improvement Trust*, 1969), the case of Pakistan was referred where CJ. Hamoodur Rahman coined the idea of 'sufficient interest', stating:

> a right considered sufficient for maintaining a proceeding of this nature is not necessarily a right in the strict juristic sense but it is enough if the applicant discloses that he has personal interest in the matter which involves loss of some personal benefit or advantage or the curtailment of a privilege or liberty of franchise.

Here CJ. Hamoodur Rahman argued that a person need not have a strict juristic right to be an aggrieved person; rather, if he can show that he lost his personal benefit or liberty or liberty of franchise, then he had sufficient interest in the subject matter. The Bangladeshi court also stated that a person's ability to obtain a hearing is what determines their locus standi, not the court's ability to hear them.

Firstly, this idea of sufficient interest was evolved by Lord Danning in Blackburn's case which was a paradigm shift in the traditional thinking of *Locus standi.* Moreover, in para 17 of Kazi Mukhlesur Rahman case, the court also referred English (*Blackburn V. Attorney. General*, 1971) case, where Lord Denning did not rule out Mr. Blackburn on the ground of locus standi, rather Blackburn was ruled out because it would affect treaty treaty-making power of Her Majesty.
Lastly, the court clarified the Locus standi of Kazi Mokhlesur Rahman, arguing that his locus standi is granted for the special nature of the suit.

a. Kazi Mokhlesur Rahman's freedom of movement under Article 38 is being violated. The rights attached to the citizen are not local.
b. This case involves an international agreement affecting the territory of Bangladesh.

So, the court relied on these foreign judgments to enlarge the locus standi of an aggrieved person. Through the Kazi Mukhlesur Rahman case, the court took a great leap towards liberalizing Locus standi.

Later on, Dr. Mohiuddin Farooque vs Bangladesh case of 1994 took Bangladesh to the same height as the international trend of liberalization of Locus standi. Locus standi in the global west started its journey in the hands of Mr. Blackburn, evolving the concept of sufficient interest. Later, this concept received progressive interpretation in the court of the United Kingdom, where judicial review can be entertained not only from an applicant but also from applicants claiming citizen standing to question the legality of illegal acts conducted by executive or public authority (Bari & Bari, 2012). Thus, these types of suits were entertained for the purpose of greater good. In Mohiuddin Farooque vs Bangladesh, Justice Lutfar Rahman argued

> When a person approaches the Court for redress of a public wrong or public injury, though he may not have any personal interest, must be deemed to have 'sufficient interest' in the matter if he acts bona fide and not for his personal gain or private profits or for any oblique considerations. In such a case he has locus standi to move the High Court Division under Article 102 of the Constitution.

The High Court Division of Bangladesh followed the same footsteps as the Superior courts of UK. As Justice Lutfar Rahman recognized the locus standi of a bona fide applicant, applied for a greater interest, i.e. to redress public wrong or public injury.

4.2 CCL Enlarged the Scope of Public Interest Litigation

Public interest litigation (PIL) refers to the litigation lodged by citizens or organizations for a public cause (Ahmed, 1998). PIL opens a doorway to the social justice system that the orthodox court system could not achieve. Additionally, it creates an avenue for the backward section of the country to realize their human rights collectively (Deva, 2009).

Warner Menski argued that law is not a dead thing; rather, it's a lived reality because its existence needs to be connected with the socio-political context of a country. That's why concepts like PIL emerged. However, the existence of law itself is problematic because if it serves the interests of one particular group, then others may feel aggrieved. Thus, a balance must be maintained among lawyers, jurists, and common people (Menski, 2002).

In Bangladesh, the concept of public interest litigation expanded due to progressive judicial interpretation of comparative constitutional law. According to Article 102(1),

> The High Court Division on the application of any person aggrieved, may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate

> for the enforcement of any of the fundamental rights conferred by Part III of this Constitution.

The Supreme Court of Bangladesh enlarged the term “any person aggrieved” in the case Kazi Mukhlesur vs Bangladesh for locus standi, and later on in *Mohiuddin Farooque case* for borrowing the concept of public interest litigation.

In the (*Mohiuddin Farooque vs. Bangladesh*, 1997) case, Mohiuddin Farooque solicited for the cause of people in the Tangail area regarding the Flood Action Plan (FAP20). He argued that the FAP20 plan is an anti-environmental project, and the lives of many people are at stake. Thus, being aggrieved, Mohiuddin Farooq lodged a writ petition on behalf of those people. The court relied on the concept of “public interest law” to grant Mohiuddin Farooq locus standi.

In para 28, the Court stated that in 1960, under-represented clients’ interest was protected in the USA by “Public International Law”. Later, this public interest law turned into the concept of ‘Public Interest litigation' (PIL). In para 29, the Court showed the development of England regarding the PIL case. Mr. Raymond Blackburn was granted locus standi in four Blackburn cases, though those cases were not concerning him but for the general public. It was determined that locus standi is acquired by anybody with a "sufficient interest" in the issue at hand.

In para 30, the court also summarized the development of Locus standi in Bangladesh, mentioning the Kazi Mokhlesur Rahman case.

In para 33 court referred to the Indian SP Gupta case (*SP Gupta and others V. President of India*, 1982), which clarifies that it will be the court’s discretion to decide the sufficient interest of a person and there is no strait-jacket formula for delimiting it. Because the socio-economic condition of a society changes due to the course of time, and the very definition of social justice will change due to complex social modules.

The court in paragraphs 35 to 38 talked about India, Pakistan, and Sri Lanka’s development of public interest Litigation. In the case of India,

> It recognised public-spirited individual, class action, persons in a representative capacity, associations, registered or unregistered. and individual environmental lawyer or a conglomerate of lawyers- in fact anyone acting bona fide and espousing the causes of the poor and the disadvantaged who are neither aware of their rights nor the capacity to approach the courts, to have "sufficient interest" to maintain an application under Article 32 or 226 of the Indian Constitution.

However, Sri Lanka found difficulty in adopting Indian jurisprudence because of Article 17. However, their later development of public interest law regarding environmental norms was promising.

In *Benazir Bhutto vs Federation of Pakistan case* (*Benazir Bhutto vs Federation of Pakistan, 1988*) Supreme Court of Pakistan held that “power under Article 184 (3) cannot be said to be exercisable only at the instance of an ‘aggrieved party’ in the context of adversary proceedings. The procedure available in public interest litigation can be made use of.”

In the present situation, the court decided that it would be unconstitutional to construe the phrase “any person aggrieved” under article 102(1) as referring solely to specific individuals and omitting to take into account people as a unified and collective entity.

These foreign judgments improved the concept of PIL in Bangladesh. CCL opens a doorway for global unification in Bangladesh in the advancement of Public Interest Litigation. Thus, a public-spirited individual or consolidated persons can bring a suit for the disadvantaged or downtrodden people in the public interest under Article 102(1) to vindicate a cause of the rule of law or to enforce constitutional rights (Yeh & Chang, 2015).

4.3 Use of Suo Moto Rule by the Judiciary

Suo Moto is a Latin word. The English meaning of the term suo moto is 'on its own motion' (Rosales, 2024). Generally, a legal proceeding must be started by the person having an interest in the subject matter. But suo moto is an exception to such a rule. Suo moto power is the inherent right of courts to begin legal proceedings without having an application from the interested party (Kapasia, n.d.). As guardians of the constitution, the higher courts need to assume a leading role in addressing situations that jeopardize constitutionality, without holding off until all procedural requirements are met. The concept of suo moto writ, or considering any issue on one's own initiative, arose with that ideology (Urmy & Ahade, 2020). A fundamental component of judicial activism is the use of suo moto jurisdiction by Bangladeshi courts. Bringing suo moto rule in the courts was possible because of the enlargement of locus standi and incorporation of public interest litigation through progressive interpretation of CCL. After the Mohiuddin Farooque case, now not only an aggrieved person can sue, but also a lawyer, organization, public-spirited person, and even a judge can bring litigation.

The idea of suo moto rule was first rooted in the USA through the Marbury vs Madison Case (*Marbury v. Madison*, 1803). In this case, Mr. Marbury did not intend to access the legality of the Judiciary Act but CJ. John Marshall suo moto declared the Judiciary Act ultra vires, considering its constitutionality.

The Indian judiciary as a guardian of their constitution, started applying suo moto rule before Bangladesh. In accordance with Article 32 of the Indian Constitution, any person whose fundamental rights are violated may petition the Supreme Court to have such rights upheld. HCD may issue directives, orders, or writs for the enforcement of fundamental rights in accordance with Article 226 based on the application (Tiwari, 2023). Using these provisions, the Supreme Court of India started to treat newspapers, letters, postcards or telegrams as an application within the meaning of Article 226(1).

The suo moto rule was initially applied in 1992 by a Bangladeshi court to overturn a prisoner's conviction who had been imprisoned for 12 years since he was nine years old. Since then, courts have employed the "Suo Moto Rule" for a variety of reasons, but less frequently than courts in India and Pakistan (R, 2021).

In 2011, the appellate division of the Bangladesh Supreme Court treated a newspaper item as a form of 'application' and suo moto lodged a writ petition in the Tayeeb vs Government of People's Republic of Bangladesh case (*Tayeeb vs Government of People's Republic of Bangladesh*, 2015). As under Article 102(1), an application is a prerequisite to lodge a legal proceeding for infringement of fundamental rights. In this instance, a fatwa issued by Haji Azizul Haq led to a woman called Shahida being compelled to wed her cousin Shamsul. As before, one year his husband Saiful out of anger pronounced the word 'Talak'. This incident came to a national daily, The Daily Banglabazar Patrika and the judges took suo moto action afterwards.

In this case, the court relied on Indian judgments like Sheela Bose vs Sate of Maharashtra (*Sheela Bose vs Sate of Maharashtra*, 1983) and Mukesh Kumar V. State of M.P (*Mukesh Kumar V. State of M.P*, 1985). In para 323 the court explained how an Indian court extended the jurisdiction of the court under Article 32 by saying,

> *"not only from associations or organizations or individuals interested in a common cause or an advocate, even journalists but also on the basis of letters written by such persons containing a complaint of maltreatment of under-trial prisoners or women in police custody."*

Moreover, State of W.B. V. Sampal Lal (*State of W.B. V. Sampal Lal*, 1985), State of H.P. V. Parent of Student Medical College (*H.P. V. Parent of Student Medical College*, 1985), and Malik Brothers V. Narendra Dadich (*Malik Brothers V. Narendra Dadich*, 1999) were referred to as examples of easing procedural restrictions and giving the poorer segments of society simple access to justice.

4.4. CCL in Public Trust Doctrine and Legal Personality of River

Every legal system around the world provides specific & limited responses if a problem arises. Whereas environmental problems are limitless, legislative & administrative actions always fall short compared to those concerns. Moreover, inconsistencies with law and administrative orders are the reason why people in general have to go to the court to ensure the safety of the environment. Hence, public trust doctrine plays a vital role in filling up the lacuna & claim judicial redress (Sax, 1970).

In principle, the public may freely enjoy public trust lands, waterways, and natural resources for a wide range of acknowledged public purposes, even though the precise extent of the public trust doctrine on which lands and uses are protected varies in each state ("PUBLIC TRUST DOCTRINE," n.d.).

According to Article 18A

> The State shall endeavor to protect and improve the environment and to preserve and safeguard the natural resources, bio-diversity, wetlands, forests and wildlife for the present and future citizens.

Therefore, the state did not acquire ownership of Bangladesh's natural resources under the constitution. Rather, the people of Bangladesh are owners of those resources and the state only takes care of it & protects it as a trust (*Human Rights and Peace for Bangladesh v. Bangladesh & Others*, 2019). Hence, a state cannot sell, mortgage, or lease a public property. Thus, the very doctrine of public trust has been embedded in Article 18A of the Constitution. Here, State's obligation is to protect, improve, preserve & safeguard the environment & natural resources throughout inter generations. Interestingly, Article 18A is in part II of the constitution. That is prima facie non enforceable in nature. However, through progressive judicial interpretation, the judiciary has removed such non-enforceable barriers in cases of reasonable grounds. Furthermore, the United Nations Human Rights Council officially acknowledged the right to a healthy environment on October 8, 2021, with resolution 48/13 (NYU, 2023).

The Turag River case is one of the instances where the public trust doctrine and legal personality of a River were mentioned. As we can see from the above discussions, a river can also be termed as a trust property to the government on behalf of the people.

The administration of Bangladesh could not protect the Turag River. The Daily Star published an article titled "Time to declare Turag dead" on November 6, 2016. Based on this report, a writ petition was filed by an NGO named Human Rights and Peace for Bangladesh. This writ was filed against the government as a PIL within the ambit of Article 102 to question the legality of structural development along the bank of Turag River i.e., earth filing, encroachment etc. (Mundi,2019).

On page no 81, the court talked about the origin of the public trust doctrine. The genesis of the public trust doctrine was in Roman law. According to the Roman Act, the River, Sea beach, forest, and air belong to everyone, otherwise to none.

Later on in Magna Carta 1215, chapters 16 & 33, the doctrine of public trust was included by mentioning

> All kydells [weirs] for the future shall be removed altogether from Thames and Medway, and throughout all England, except upon the seashore. (This seemingly narrow provision was subsequently held in English courts to provide protection from obstruction of all navigable rivers, clearing the streams for the free passage of both people and fish).

The court also referred to English case laws on page no. 82. *Gann v Free Fishers of Whitstable* (*Gann v Free Fishers of Whitstable*, 1865). In the present case, the court granted the crown ownership of all navigable river beds, estuaries, and sea arms. But it was only for the benefit of its subjects as the subjects are the real owners and the crown was only a mere trustee.

In *Tito v Waddell* the court clarified how the Crown can be treated as a trustee (*Tito v Waddell*, 1977). As per court,

> *If money or other property is vested in the Crown and is used for the benefit of others, one explanation can be that the Crown holds on a true trust for those others.*

Hence, the Crown can be treated as a trustee.

Court also referred to prominent judgments of the Indian Supreme Court. Firstly, in *Shri Sachidanand Pandey and another v. The State of West Bengal and others* Justice Chinnappa Reddy gave a poetic judgment. Mr. Reddy referred to a reply of Indian Chief of Seattle against White chief of Washington's regarding the offer to buy land. That message is even relevant for current environmental protection. As our lands are sacred to us, we care for our nature. In this case, the allotment of a zoological garden for turning it into a five-star hotel was questionable. Thus, the court termed that zoological garden as a public trust, mentioning Article 48A (*Shri Sachidanand Pandey and another v. The State of West Bengal and others*, 1987).

Another landmark case, *Metha v Kamal Nath* was referred. In this case, forest land was leased to the Motel by the Ministry of Environment and Forests. But the court argued the necessity of keeping the beauty of nature intact without alteration (*M.C. Mehta v. Kamal Nath*, 1997). Moreover, in para 25, the court referred to Professor Sax.

According to Professor Sax, the government has three types of restrictions in use of public trust property. Firstly, public trust property not only needs to be used by the general public but also needs to be made available. Secondly, it may not be sold, and thirdly, the property must be maintained.

Lastly, the court invalidated both the lease document for a 27.12 bigha area in favor of the firm and the previous approval, which was given by the Ministry of Environment and Forests. It was mandated that the Himachal Pradesh government assume control of the region and return it to its original natural state. The court ordered the hotel to cover the expense of compensating for the restoration of the ecosystem and environment in accordance with the Polluter Pay Principle (Sengupta, 2022).

Bangladesh relied on these foreign judgments and created a commission for the unwanted use or alteration in rivers. Though there is no term mentioned called public trust in the constitution of Bangladesh, however, the wording of Article 18A helped interpret and incorporate the public trust doctrine. The court used bricolage here.

In the same Turag River case, the court pronounced Turag River as a legal personality. Anything that the law assigns personality to for valid and sufficient grounds, aside from human beings, might be considered a juristic person. Laws have established a variety of juristic persons, depending on what a society needs in order to function. These individuals are arbitrary inventions of the law (William, 1966).

The first instance of granting a river a legal person and living entity was in Colombia. They gave the Atrato River the status of an autonomous entity. The second country to declare the river

as a legal entity was the Indian High Court in *Mohd. Salim –v- State of Uttarakhand and others* (Writ Petition (PIL) No. 126 of 2014). Firstly, the Court declared Ganga and Yamuna as legal entities. Secondly, not only these rivers but also their streams, natural waterways, and tributaries were given the same rights as a legal entity. However, these rivers were granted the right to sue and to be sued. However, they cannot bring any legal claim of their own. Technically it is impossible. That's why three administrators have been given power to look after them as loco parentis i.e., the Chief Secretary of the State of Uttarakhand, the Advocate General of the State of Uttarakhand, and the Director of NAMAMI Gange. They are to provide any assistance in case of protection and preservation of these rivers (Das, 2017).

The third country to declare a river as a legal person was Bangladesh. The Turag River, like all other rivers in Bangladesh, was declared by the court to have "legal person" status. That means River can sue and can be sued in its name. The court noted that the illegal acts "must be stopped and the rivers should be made navigable again for the sake of protection of the river without any further delay," adding that the rivers needed to be protected. The court also established a new commission to serve as guardians ("Bangladesh Case Regarding Rights of Rivers," n.d.). To pronounce this judgment, the court resorted to CCL. The court referred and relied on Colombia and Indian ideas and judgments which paved the way to the court's current standing of the legal personality of the river. Till now, the only parliament to declare its river as a legal person was the parliament of New Zealand (Digest, 2017). In future, Bangladesh may also follow the precedent of New Zealand.

4.5. Judicial Transplant of Public Law Compensation

Generally, people are awarded compensation for civil wrongs. But globally, courts are providing compensation in violation of constitutional rights. As there is no appropriate remedy for tortious liability in the private law of Bangladesh, public law compensation has become a viable option for the aggrieved (Huda, 2020).

Furthermore, whose fundamental rights are being violated cannot get compensation from any supranational courts like the European Convention of Human Rights (ECHR) as Bangladesh is not party to any regional mechanism (Huda, 2020). So, public law compensation is the only way out.

The first case of public law compensation in Bangladesh is *Bilkis Akter vs Bangladesh and others,* where a Bangladeshi court transplanted the idea of public law compensation from two Indian cases namely *Rudul Shah vs. State of Bihar* (*Rudul Shah vs. State of Bihar*, 1983) and *Nilabati Behara Vs. State of Orissa (Nilabati Behara Vs. State of Orissa, 1993).* The high court division took a new interpretation of the term 'appropriate remedy' of article 102(1) that the court can grant compensation as a 'palliative remedy' under this article (*Bilkis Akter vs Bangladesh and others*, 1997). Later on, in the Appellate Division, this case was renamed as *Nurul Amin Vs. Bangladesh*, where the court observed that Bilkis's case was not fit for compensation. However, it did not reject the idea of public law compensation as a constitutional remedy under Article 102(1). Though the jurisprudence of public law compensation is rooted in Bangladesh through Bilkis Akhter vs Bangladesh case, HCD remained reluctant to grant it and started to grant 'token compensation' as a conservative measure from 1997 to 2017.

Subsequently, in *CCB Foundation Vs. Bangladesh and others*, the court awarded compensation to the parents of the deceased child Zihad as a palliative remedy and used Bilkis Akter as a precedent in paragraphs 92 and 93. Both aforementioned Indian cases are also referred to here. The previous reluctance of HCD was finally removed by this case (*CCB Foundation Vs.*

Bangladesh and others, 2017). Later, in the *ZI Khan Panna Case*, the court did not award compensation on a wholesome basis but rather granted compensation to individual complaints (*Z. I. Khan Panna v. Bangladesh & Others*, 2016).

4.6. Borrowing Modern View of Certiorari Writ

Britannica Encyclopedia states, "In common law jurisdictions, a higher court's writ of certiorari is used to have a lower court's decision reviewed. An appellate court may also grant a writ of certiorari to gather data regarding a matter that is currently before it" (Editors, 2025). Initially, in Bangladesh, it was thought that a certiorari writ could only be lodged against a public authority. However, progressive interpretation and use of CCL enlarged its scope.

The meaning of Certiorari is "be certified". The superior court intervenes through a writ of certiorari when a lower court or tribunal acts without jurisdiction, beyond its authority, or fails to exercise its authority. Examples of such instances include when the court decides a case without providing the parties with a chance to be heard, when it transgresses the natural justice principle, or when an error is evident on the record of the procedure (Chowdhury, 2018). The Traditional view of the writ of certiorari, which Bangladesh adhered to since 1972, is that certiorari writ can only be lodged against a statutory body, has been changed because of comparative constitutional law. In *Abdul Hakim Vs. The Government of Bangladesh and Ors* (*Abdul Hakim Vs. The Government of Bangladesh and Ors*, 2015) Supreme Court referred to an English case in para 15 named *Panel on Take-overs and Mergers,* which is commonly known as the Datafin test case.

Datafin test refers to a functional test where the functionality or nature of the function of a body is tested, whether it is conducting a function of a statutory body or not. "If the exercise of its functions has public law consequences, then that may be sufficient to bring the body within the reach of judicial review."Without realizing, we adopted the English version of certiorari writ in article 102(2)(a)(ii). "a person performing functions in connection with the affairs of the Republic," this provision also includes a private body conducting public functions.

Later, in the *Liberty Fashionware case and the AF Shahabuddin vs Bangladesh National Shooting Federation case,* writ of certiorari was granted, considering the functionality of private body. So, Comparative constitutional law enlarged the horizon of certiorari writ in Bangladesh.

4.7. Borrowing the Principle of Legitimate Expectations

Where there are no specific legal rights but an expectation bloomed legitimate and reasonable is termed as a legitimate expectation. Expectations may arise from the past conduct of a party, which must be legitimate and reasonable (*AG of Hong Kong v Ng Yuen Shiu*, 1983). Mere expectations will not fall under this legitimate expectation.

In *Tayeeb Vs. Government of People's Republic of Bangladesh and Ors* para 41 it has been stated that,

> even without any legal right, in its strict conventional sense, an expectation may be bloomed into a legitimate one, capable of enforcement, although, there is no specific provision for it, still, the will and initiative of the Judges, made it possible from their sense of jurisprudence and justice for the people for whom the bell of justice always tolls. *(Tayeeb Vs. Government of People's Republic of Bangladesh and Ors, 2015)*

This legitimate expectation law was not in our 1972 constitution, but that will be considered under judicial review via article 102(1)(2). Legitimate expectations relate to the aggrieved person but not with relief. Bangladesh borrowed this principle in the Bangladeshi *Soya-Protein case (Bangladesh Soya-Protein Project Ltd. Vs Secretary, Ministry of Disaster Management and Relief, Bangladesh*

Secretariat, Dhaka, 2002) from *Schmidth V. Secretary of State*, where Lord Denning first coined the idea of Legitimate expectations. Initially, legitimate expectations were a rights-based approach. Lord Denning referred case of *Ridge v. Baldwin* and said that while a person is deprived of his liberty or property by a public officer, then a legitimate expectation arises in the mind of the aggrieved person that he will be given an opportunity of being heard, to clarify whether he had a right or not (*Schmidth V. Secretary of State*, 1969). Later in *O'Reilly v. Mackman,* the extent of legitimate expectation broadened. Hall prisoners without having any right to remission of sentence, a legitimate expectation arose in accordance with the general practice that without any disciplinary issue, prisoners' term of sentence will be commuted (*O'Reilly v. Mackman*, 1983). In another Bangladeshi case, *the Government of Bangladesh and Ors. Vs. Md. Jahangir Alam*, based on legitimate expectation, held a hearing for the plaintiffs, though there was no right in a strict legal sense. So, Bangladesh borrowed the idea of legitimate expectations from CCL (*Government of Bangladesh and Ors. vs. Md. Jahangir Alam*, 2012).

5. The Right to Life Model: An Abusive Constitutional Borrowing?

The term "Abusive Constitutional Borrowing" was first coined by Rosalind Dixon (Dixon & Landau, 2021). Abusive constitutional borrowing refers to the adoption of designs, concepts, and principles from key elements of liberal democratic constitutionalism, which are then used to undermine the essential foundations of electoral democracy (Dixon & Landau, 2021). Mainly, the facilitators of abusive constitutional borrowing, such as legislators, executives, constituent assemblies, or judges who borrow foreign democratic ideas but act as authoritarian actors to pursue anti-democratic means. Among these actors, judges frequently use and borrow foreign judgments, principles and ideas, and they have the potential to abusively use borrowed concepts or principles. Bangladesh is not an exception here.

Right can be positive or negative. Positive enforcement refers to the state obligation where the state needs to provide direct assistance to any individual's right, either by financial aid or security (Kovtun & Kovtun, 2023). On the other hand, negative enforcement portrays the state's obligation not to interfere in people's affairs while they are enjoying their rights on their own. Additionally, the state will not make a law that bars the enjoyment of such rights.

Article 8(2) of the Constitution of Bangladesh bars positive enforcement of ESC rights, i.e., when ESC rights are violated, people cannot go to court for money from the government. However, negative reinforcement is permitted. People can ensure their ESC rights with their own money, and the government will not make any laws barring those negative enforcement. Article 7 is the unique feature that protects the negative enforcement of ESC rights.

We brought the Indian "Right-to-life" model to bypass the positive enforcement barrier. However, this borrowing is misused grossly in negative enforcement. For instance, in the *Zulhashuddin Case* (*The Chairman, National Board of Revenue (NBR), Shegunbagicha, Dhaka, Bangladesh Vs Advocate Zulhas Uddin Ahmed and others*, 2010), a provision of the VAT Act was declared ultra vires by impliedly using the right-to-life model. In contrast, that could have been done by using Article 7 of the Bangladeshi constitution.

Justice Naimuddin Ahmed in *Kudrat Elahi Panir case (Kudrat-E-Elahi Panir Vs. Bangladesh, 1992)* rightly sorted that, if the upazila parishad is a local government then that would violate articles 9 and 11 then (Upazila Parishad and Upazila Administration Re-organization) (Repeal) Ordinance, 1991 would be ultra vires to the constitution and Naimuddin would have repealed it under Article 7(2).

The Indian Constitution does not have any provision like Article 7(2). Thus, they solely rely on the right-to-life model. But if we follow their path blindly, we will end up abusing such borrowing. Furthermore, it was unwise of the judiciary to circumvent or disregard Article 7(2), which can offer the people a remedy, in favor of just adopting the foreign right-to-life paradigm. When we borrow, we should consider all the options instead of depending just on the most viable one, which is the right-to-life approach. In addition to Article 7(2), the right to life model might offer an additional remedy. Although the court may have used this model with good intentions, it is important to remember that we have our own remedies at our disposal. As a result, this paradigm may be used abusively.

6. Findings

1. The importance of the application of comparative constitutional law is immense. People are the main focal point of the constitution. Hence, a pro-people interpretation of constitutional law by using CCL is always welcome.
2. Using CCL, we have enlarged many doorways to ensure the rule of law and justice. Arenas are like the constitutional model of ESC rights, *Locus standi,* public interest litigation, judicial review, and so on.
3. In most of the constitutional borrowing, it is to be found that principles can be collaborated with the constitutional texts. That summarizes the well-codified constitutional provisions of Bangladesh.
4. Blind use of comparative constitutional law in the Bangladesh constitutional law may lead to abusive constitutional borrowing. Precautions must be taken before borrowing.
5. Impact analysis of constitutional borrowing can be done to remove abusive borrowing.
6. Over-reliance on CCL may lead to losing our autonomy. Thus, primarily constitutional provisions are to be considered carefully then CCL is to be used for persuasive value.
7. More research-oriented education to be promoted, as the judgments reflect how poorly comparative constitutional law is being inserted in the texts of the judgments. If research-based education is promoted, then appropriate use of CCL can be ensured with progressive interpretation.

7. Conclusion

Comparative constitutional law is now part and parcel of every country's constitution. The application of CCL in the Bangladeshi constitution not only made this constitution progressive but also updated it. Reliance on CCL in Bangladeshi case laws is now an integral part of every case. However, Judges must be cautious about abusive constitutional borrowing which may create suffering and dissatisfaction. To increase the potential of constitutional lawyers, jurists, and scholars, regular study of CCL must be included. Moreover, in this new environment of political change, necessary provisions need to be introduced, like the right to science, the right to academic freedom, etc.

The non-justiciable barrier of fundamental principles of state policies can be removed by borrowing the South African model (*Minister of Health and Others v Treatment Action Campaign and Others*, 2002). In conclusion, Bangladesh's legal system can be strengthened by the thoughtful and selective application of comparative constitutional law, resulting in stronger safeguards for rights like academic freedom and science. In addition, it will be essential to preserve judicial discretion when it comes to constitutional borrowing to make sure that outside factors support the country's constitutional integrity rather than compromise it.

References

Books:

Dixon, R., & Landau, D. E. (2021). *Abusive constitutional borrowing: Legal globalization and the subversion of liberal democracy* (1st edition). Oxford University Press. https://doi.org/10.1093/oso/9780192893765.001.0001

Watson, A. (1993). *Legal transplants: An approach to comparative law* (2nd ed). University of Georgia Press.

Yeh, J., & Chang, W. (Eds.). (2015). *Asian courts in context*. Cambridge University Press.

Dixon, R., & Landau, D. E. (2021). *Abusive constitutional borrowing: Legal globalization and the subversion of liberal democracy* (First edition). Oxford University Press.

Ali Chowdhury, M. J. (2018). *An Introduction to the Constitutional Law of Bangladesh*. Book Zone Publications.

Salmond, & William, J. (1966). *Salmond on Jurisprudence* (1966th ed.). Sweet & Maxwell.

Ahmed, K. (2021). *Bangladesh Gonoporishod karjobiboroni songbidhan pronoyon bishoyok bitorko (Bengali)*. Pencil Publications.

Case Law:

AG of Hong Kong v Ng Yuen Shiu, 2 AC 629 (PC 1983).

Kesavananda Bharati v. State of Kerala, 4 SCC 225 (1973).

Government of Malaysia v Lim Kit Siang, 2 MLJ 12 (SC 1988).

Maganbhai Ishwarbhai Patel v Union of India, 3 SCR 254 (SC 1969).

Mia Fazl Din Lahore Improvement Trust, 21 DLR 225 (SC 1969).

Blackburn V. Attorney. General, I WLR 1037 (Court of Civil Appeal 1971).

Mohiuddin Farooque vs. Bangladesh, 5 BLT 25 (SC 1997).

SP Gupta and Others V. President of India, AIR 149 (SC 1982).

Marbury v. Madison, 5 U.S 137 (SC 1803).

Tayeeb vs Government of People's Republic of Bangladesh, 67 DLR 57 (AD 2015).

H.P. V. Parent of Student Medical College, AIR 910 (SC 1985).

Malik Brothers V. Narendra Dadich, AIR 3211 (SC 1999).

State of W.B. V. Sampal Lal, AIR 195 (SC 1985).

Kudrat-E-Elahi Panir Vs.Bangladesh, 44 DLR 319 (AD 1992).

Mukesh Kumar V. State of M.P, AIR 1363 (SC 1985).

Sheela Bose vs Sate of Maharashtra, AIR 378 (SC 1983).

O'Reilly v. Mackman, 2 AC 237 (HL 1983).

Gann v Free Fishers of Whitstable, 11 Cas 192 (HL 1865).

Shri Sachidanand Pandey and Another v. The State of West Bengal and Others, AIR 1109 (SC 1987).

M.C. Mehta v. Kamal Nath, 1 SCC 388 (SC 1997).

Schmidth V. Secretary of State (Ch 1969).

Minister of Health and Others v Treatment Action Campaign and Others, 2 CCT8 15 (ZACC 2002).

Bangladesh Soya-Protein Project Ltd. Vs Secretary, Ministry of Disaster Management and Relief, Bangladesh Secretariat, Dhaka, 22 BLD 378 (SC 2002).

Tayeeb Vs. Government of People's Republic of Bangladesh and Ors, 67 DLR 57 (SC 2015).

Abdul Hakim Vs. The Government of Bangladesh and Ors, 67 DLR 83 (SC 2015).
Z. I. Khan Panna v. Bangladesh & Others, 7 SCOB 7 (HCD 2016).
CCB Foundation Vs. Bangladesh and Others, 5 CLR (HCD 2017).
Rudul Shah vs. State of Bihar, 4 SCC 141 (SC 1983).
Bilkis Akter vs Bangladesh and Others, 17 BLD 395 (SC 1997).
Mohd. Salim –v- State of Uttararkhand and others Writ Petition (PIL) No. 126 of 2014.
The Chairman, National Board of Revenue (NBR), Shegunbagicha, Dhaka, Bangladesh Vs Advocate Zulhas Uddin Ahmed and Others, 39 CLC (AD 2010).
Human Rights and Peace for Bangladesh v. Bangladesh & Others, Writ Petition No. 13989 of 2016 (HCD 2019).
Government of Bangladesh and Ors. Vs. Md. Jahangir Alam, 17 MLR 369 (AD 2012).

Journal Articles:

Kovtun, V., & Kovtun, M. (2023). Doctrine Of Positive Obligation of the State In The Context Of The Establishment of A Welfare State. *Social Entrepreneurship: Exercise Of The Constitutional Freedom of A Person for Entrepreneurial Activity.....*, 31.
Sikder, P. K. (2017). *The Role of Comparative Law in the Making of the Constitution of Peoples' Republic of Bangladesh*.
Tushnet, M. (1999). The Possibilities of Comparative Constitutional Law. *The Yale Law Journal*, *108*(6), 1225. https://doi.org/10.2307/797327
De, R. (2020). The Indian Constitution: Moments, epics and everyday lives. *International Journal of Constitutional Law*, *18*(3), 1022–1030. https://doi.org/10.1093/icon/moaa077
Orgad, L. (2010). The preamble in constitutional interpretation. *International Journal of Constitutional Law*, *8*(4), 714–738. https://doi.org/10.1093/icon/mor010
Haque, M. (2012). In Search of Origin of Recognition of Economic and Social Rights as Constitutional Principles: From Ireland to Bangladesh. *Dhaka University Law Journal*, *23*(2), 79–84.
Bari, M. E., & Bari, M. E. (2012). Liberalization of the Traditional Rule of Locus Standi in the United Kingdom and Malaysia: A Comparative Study. *Journal of Malaysian and Comparative Law*, *39*, 23–60.
Deva, S. (2009). Public Interest Litigation in India: A Critical Review. *Civil Justice Quarterly*, *28*(1), 19–40.
Menski, W. (2002). *Public Interest Litigation: Deliverance from All Evils? Bangladesh Journal of Law, 6(1).*
Sax, J. L. (1970). The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention. *Michigan Law Review*, *68*(3), 471. https://doi.org/10.2307/1287556
Deva, S. (2009). Public Interest Litigation in India: A Critical Review. *Civil Justice Quarterly*, *28*, 19–40.
Tiwari, A. R. (2023). The Distinction between Article 32 and Article 226: The Right to Approach the Supreme Court and High Courts for the Enforcement of Fundamental Rights. *Indian Journal of Law and Legal Research*, *V*(Vi), 2144–2150.
Huda, T. (2020). Fundamental Rights in Search of Constitutional Remedies: The Emergence of Public Law Compensation in Bangladesh. *Australian Journal of Asian Law*, *21*(2), 27–46.
Sengupta, A. (2022, January 31). CASE ANALYSIS: M.C. MEHTA V. KAMAL NATH & ORS, 1996 -. *Jus Corpus Law Journal*. https://www.juscorpus.com/case-analysis-m-c-mehta-v-kamal-nath-ors/

Urmy, A. J., & Ahade, A. J. T. A. (2020). Constitutional Transplantation of the Indian Judicial View: Introducing Suo Moto Writ in Bangladesh. *ACCLAIMS*, *11*. http://www.penacclaims.com/wp-content/uploads/2020/07/Amena-Jahan-Urmy.pdf

Tokar, J. J. (1984). Administrative Law Locus Standi in Judicial Review Proceedings. *Manitoba Law Journal*, *14*(2), 209–243.

Newspaper Articles

50 Years of Bangladesh Constitution In a nutshell. (2022, November 4). The Daily Star. https://www.thedailystar.net/law-our-rights/news/50-years-bangladesh-constitution-nutshell-3160281

Tebbe, N., & Tsai, R. (2018). *Constitutional Borrowing*. LawArXiv. https://doi.org/10.31228/osf.io/7pxrg

Das, M. (2017, March 21). Ganga and Yamuna are now legal entities: What does this mean and is it a good move? *The News Minute*. https://www.thenewsminute.com/news/ganga-and-yamuna-are-now-legal-entities-what-does-mean-and-it-good-move-58999

R, M. (2021, June 29). Suo Moto Powers in Writ Jurisdictions: A South Asian Innovation? *Supreme Court Observer*. https://www.scobserver.in/journal/suo-moto-powers-south-asian-innovation/

Haque, Dr. M. E. (2024, September 19). Justifications for a new constitution. *New Age*. https://www.newagebd.net/post/opinion/245570/justifications-for-a-new-constitution

Morshed, M. T. (2024, September 11). Why Bangladesh needs a new constitution. *The Business Standard*. https://www.tbsnews.net/thoughts/why-bangladesh-needs-new-constitution-938946

Bhuian, F. A. (2024, August 12). July Revolution and Gen-Z's march to mass political awareness. *The Daily Star*. https://www.thedailystar.net/opinion/views/news/july-revolution-and-gen-zs-march-mass-political-awareness-3675326

Haque, Dr. M. E. (2022, November 4). Constitutional borrowing and transplants. *The Daily Star*. https://www.thedailystar.net/supplements/50-years-our-constitution-original-ideals-vs-reality/news/constitutional-borrowing-and-transplants-3160266

Chakma, P., & Saumik, R. A. (2022, November 4). 50 Years of Bangladesh Constitution In a nutshell. *The Daily Star*. https://www.thedailystar.net/law-our-rights/news/50-years-bangladesh-constitution-nutshell-3160281

Website

Kapasia, V. (n.d.). Suo Moto Power Of Court. *Legal Service India*. Retrieved September 8, 2024, from https://www.legalserviceindia.com/legal/article-12826-suo-moto-power-of-court.html

PUBLIC TRUST DOCTRINE. (n.d.). *National Working Waterfront Netweork*. https://nationalworkingwaterfronts.com/law-and-policy/public-trust-doctrine/

NYU and the URG Team. (2023). Unpacking the right to a healthy environment. *Universal Rights Group*. https://www.universal-rights.org/urg-policy-reports/unpacking-the-right-to-a-healthy-environment/#:~:text=On%208%20October%202021%2C%20the%20United%20Nations%20Human,to%20a%20healthy%20environment%20at%20the%20global%20level

Digest, E. (2017, March 16). New Zealand River Legally Granted Same Rights as Humans. *Yale Environment 360*. https://e360.yale.edu/digest/new-zealand-river-legally-granted-same-rights-as-

humans#:~:text=New%20Zealand%E2%80%99s%20Parliament%20has%20declared%20that%20the%20country%E2%80%99s,designation%20culminates%20a%20140-year%20campaign%20by%20indigenous%20groups.
Bangladesh Case Regarding Rights of Rivers. (n.d.). Eco Jurisprudence Monitor. Retrieved February 23, 2025, from https://ecojurisprudence.org/initiatives/rights-of-rivers-in-bangladesh/
Editors, B. (2025, January 25). *Certiorari*. Britannica. https://www.britannica.com/topic/certiorari
Rosales, L. (2024, May 16). What Does "Suo Moto" Mean? *My Law Questions*. https://www.mylawquestions.com/what-does-suo-moto-mean.htm
Rosales, L. (2024, May 16). What Does "Suo Moto" Mean? *My Law Questions*. https://www.mylawquestions.com/what-does-suo-moto-mean.htm
Mundi, A. (2019) Rights of Nature Case Study Turag River. http://files.harmonywithnatureun.org/uploads/upload1130.pdf

Class Lectures

Haque, Dr. M. E. (2021, April 1). *Analysis of CCL in Constituent Assembly Debate*. Comparative Constitutional Law Lecture, Bangladesh University of Professionals.

Thesis

Ahmed, N. (1998). *Litigating in the names of the people: Stresses and strains of the development of public interest litigation in Bangladesh* [Doctor of Philosophy, University of London]. https://www.academia.edu/106157146/Litigating_in_the_names_of_the_people_Stresses_and_strains_of_the_development_of_public_interest_litigation_in_Bangladesh