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RESEARCH ARTICLE

Borrowing and Transplant in South Asian Constitutionalism: Comparative Analysis

Güney Asya Anayasacılığında Ödünç ve Nakil: Karşılaştırmalı Bir Analiz

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Abstract

The study at hand posits that the phenomenon of constitutional borrowing and transplant in South Asia is evident in both big-C and small-C constitutional frameworks. This text submits that the demonstration of shared constitutional features encourages borrowing through constitutional similarities. The journey of constitutional formation in South Asia following decolonisation is frequently infused with global commitment to rights. The growing significance of international law and globalisation has contributed to the upsurge of constitutional transplants as a trend in South Asia. The present research illustrates how the rise of judicial activism in favour of welfare for average citizens in South Asia functions as a precursor to the adoption of constitutional borrowing. The assertion is put forth that when extra-constitutionalism takes hold, the constitutional behavioural patterns in this region remain homogeneous. Therefore, lending and borrowing occur in two distinct ways: plausibly and abusively. Several factors, such as colonial legacy, legal education, and the active role of constitutional experts in the workflow of constitution-making, contribute to the increase in constitutional borrowing and transplantation in South Asia. This argument proposes that the consideration of context specificity is imperative in the study of comparative public law and should not be brushed aside. Simultaneously, judicial art that considers globalisation is more beneficial to justice than parochialism.

Keywords

Constitutional Borrowing, International Constitutionalism, Legal Transplant, Public Interest Litigation, South Asia

Öz

Bu çalışma, Güney Asya'da büyük A (big C) ve küçük a (small c) anayasal çerçevelerde anayasal ödünç alma ve nakil olgusunun belirgin olduğunu öne sürmektedir. Metin, ortak anayasal özelliklerin sergilenmesinin, anayasal benzerlikler yoluyla ödünç almaya teşvik ettiğini ileri sürmektedir. Güney Asya'da sömürgecilik sonrası anayasal oluşum süreci, sıklıkla dünya çapında haklara olan bağlılıkla harmanlanmıştır. Uluslararası hukuk ve küreselleşmenin artan önemi, Güney Asya'da anayasal nakil eğiliminde bir artışa katkıda bulunmuştur. Mevcut araştırma, Güney Asya'da ortalama vatandaşın refahı lehine yargı aktivizminin, anayasal ödünç almanın benimsenmesinde nasıl bir öncü işlevi görgüğünü göstermektedir. Anayasa dışılık yerleştiğinde, bu bölgedeki anayasal davranış kalıplarının homojen kaldığı ileri sürülmektedir. Bu nedenle, ödünç verme ve alma, makul ve kötüye kullanılabilir olmak üzere iki farklı şekilde gerçekleşmektedir. Sömürge mirası, hukuk eğitimi ve anayasa yapım sürecinde anayasa uzmanlarının aktif rolü gibi birkaç faktör, Güney Asya'da anayasal ödünç alma ve naklin artışına katkıda bulunmaktadır. Argüman olarak Karşılaştırmalı kamu hukuku çalışmalarında bağlamın özgüllüğünün dikkate alınmasının zorunlu olduğu ve göz ardı edilmemesi gerektiği ileri sürülmektedir. Aynı zamanda, küreselleşmeyi hesaba katan yargı sanatı, dar görüşlülükten daha fazla adalet davasına yarar sağlamaktadır.

Anahtar Kelimeler

Anayasal Ödünç, Uluslararası Anayasacılık, Kanuni Nakil, Kamu Yararı Davaları, and Güney Asya

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Introduction

South Asia, a labyrinthine assortment of multi-ethnic, multi-lingual, and multi-religious heterogeneity, constitutes the world's most colourful place. Unanimity in discerning the contour of this region is hardly possible. Preponderant views suggest India, Pakistan, Bangladesh, Sri Lanka, Nepal, Bhutan, Maldives, and Afghanistan, and some include[1] Burma.[2]

The region is endowed with some commonalities i.e. shared history of people-prone social movements, colonial legal heritage, concurrent constitution making after decolonisation, homogenous constitutional wording, and model and analogous constitutional litigation. These constitutional resemblances compel South Asian states to look into their neighbouring peers and colonial predecessors, which is the result of inter- and intra-regional constitutional borrowing. Initial democracies in this region are often encumbered with similar constitutional predicaments, *including* emergency, subversion of constitutions by usurpers, revulsion to minorities, and stealth theocracy. Such commonality contributes to the inapposite application of constitutional axioms and opportunistic selections indicative of abusive constitutional borrowing in the region.

The wind of globalisation in the post-war era, ubiquity of international law, jurisprudential refurbishment in the 1960s and 1970s in the United States of America (USA) and the United Kingdom (UK) and their metamorphosis from *Laissez faire* to welfare state exerted a monumental influence on constitutional judges who lacked the ability to borrow from global development. Constitutional borrowing is ineluctable for newcomers to the realm of constitutionalism to which most South Asian countries befit. This constitutional cosmopolitanism often results in the constitutional imperialism that emerges from borrowing without context specificity.

In South Asia, constitutional borrowing is mainly two-fold. Borrowing in making the constitution and borrowing in interpretation of the Constitution. The former is accomplished by the constituent assembly, and the latter is spearheaded by the judiciary. Truly, all constitutional similarities are not due to borrowing. All commonly own some inherent rights. Some trans-judicial interactions may occur to demarcate the periphery of common constitutional rights.

I. Overview of the Study

This study examined the extent of constitutional borrowing and transplantation in South Asia. It finds that constitutional borrowing and transplantation are anomalous and lack theoretical underpinnings. Countries in this region borrow without following

1 Kevin Yl Tan and Ridwanul Hoque, 'South Asian Constitutional Foundings: Beyond History' in Kevin YL Tan and Ridwanul Hoque (eds), *Constitutionalism in South Asia* (Hart Publishing 2021) 2.

2 Maneka Guruswamy, 'Constitution Crafting in South Asia: Lesson on Accommodation and Alienation' in David Landau and Hanna Lerner (eds), *Comparative Constitution Making*, (Edward Elgar Publishing 2019) 463.

any rules that often open Pandora's Box , i.e. abusive constitutional borrowing. The study comprises five sections. This one demarcates the purview of the study. The second section scrutinised the theories and found that theories of comparative public law, although amorphous indoctrination exists in some cases, are no longer inchoate. Further, it identifies factors that escalate or delay constitutional borrowing.

The third condition dilates upon borrowing constitutional rights. It deduced that courts extensively borrow in understanding the parlance of rights from the global north and from International law. This shows that Indian judgments impact its neighbouring peers and create intra-regional borrowing.

The fourth probes borrowing and transplanting constitutional ideas and cultures in South Asia. This shows that constitutional ideas, after being borrowed, are refashioned through indigenisation. Constitutional cultures like emergency and minority treatment are imbued with the behavioural patterns of neighbouring countries. This enhances constitutional cultural borrowing. Some factors like colonial heritage, experts' roles, legal education, and constituent assembly are instrumental to borrowing. The last chapter recapitulates the crux points based on which it delineates some guidelines to minimise abusive constitutional borrowing in South Asia.

A lamentable home truth is that scholarship on south Asian comparative constitutionalism and constitutional history, which is a relatively unexplored area,[3] is not inexhaustible, but sparse. Asia, comparatively unheeded, receives less attention than we might expect.[4] Scholars' reticence is also flagrant in historic works on Asian governance and state building.[5] A dearth of literature ensued from various factors. The absence of important debates has made this region neglected.[6] Scholars in this area are seemingly averse to regional comparative studies; rather, they are ardent to delve into their own respective states.[7] The shortage of funds and resources in south Asian law faculties is another predicament.[8] The quality of law schools and legal research is not is markedly robust in some cases.[9] Meagre incentive and little academic recognition fail to rightly embolden researchers to take up cudgels.[10]

3 Sunil Khilnani, Vikram Raghavan, and Arun K. Thiruvengadam, 'Introduction Reviving South Asian Comparative Constitutionalism' in Sunil Khilnani, Vikram Raghavan, and Arun K. Thiruvengadam (eds), *Comparative Constitutionalism in South Asia* (OUP 2013) 3.

4 Mark Tushnet and Madhav Khosla, 'Unstable Constitutionalism' in Mark Tushnet and Madhav Khosla (eds), *Unstable constitutionalism: Law and Politics in South Asia* (Cambridge University Press 2015) 3.

5 Tan and Hoque (n 1) 4.

6 Sujit Choudhry, 'How to Do Constitutional Law and Politics in South Asia', in Mark Tushnet and Madhav Khosla (eds), *Unstable constitutionalism: Law and Politics in South Asia* (Cambridge University Press 2015) 18.

7 Tan and Hoque (n 1) 4.

8 ibid.

9 Daniel Bonilla Maldonado, 'Towards a Constitutionalism of the Global South' in Daniel Bonilla Maldonado (ed), *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia* (Cambridge University Press 2013) 1–10.

10 Khilnani, Raghavan, and Thiruvengadam (n 3) 4.

Some aspects of constitutional borrowings and transplants can be inferred from existing scholarship relating to South Asian constitutionalism, but an elaborate account is yet to be drawn up. This study is destined to address this lacuna by comparatively analyse the constitutional borrowing and transplantation in South Asia.

II. Borrowing and Transplantation: Unravelling Nomenclatures

No one begins writing a constitution from scratch.[11] The migration of constitutional ideas across legal systems is rapidly emerging as a central feature of contemporary constitutional practise.[12] Currently, borrowing is a legitimate and widely accepted part of constitutional lawmaking.[13] The United States' jurisprudential genuflexion towards the ubiquity of trans-judicial dialogical[14] interaction[15] buttresses this thesis. Present 'heydays of comparative constitutional law' witnessed adjoining of 'last bastion of constitutional parochialism', i.e. the US, to the intermingled cosmopolitan comparative discourse.[16] Scholars' recourse to comparative studies premised upon the dictum that more knowledge is generally better than less.[17]

A. Lacuna in Methodological Coherence

The globalisation of modern constitutionalism has rejuvenated the scholarly arena of comparative law.[18] Hirschl argued that such academic euphoria is tainted with a blurred methodological matrix, resulting in incoherent theoretical craftsmanship in comparative constitutional studies.[19] He argues that legal literature on the patterns of constitutional phenomenon and their causes falls short of advancing knowledge by tracing causal links among pertinent variables, let alone contributing to theory

11 Wilktor Osiatynski, 'Paradoxes of Constitutional Borrowing' (2003) 1.2. I.CON, 244–244.

12 Sujit Choudhry, 'Migration As A New Metaphor In Comparative Constitutional Law' in Sujit Choudhury (ed), *The Migration of Constitutional Ideas* (Cambridge University Press 2006) 13.

13 Nelson Tebbe and Robert L. Tsai, 'Constitutional Borrowing' (2010) 108 Michigan Law Review 459, 462.

14 According to the Dialogical model, the constitution culture can be acquainted with the rest by using foreign law and not avoiding judicial self-awareness. Sujit Choudhury, 'How to Do Comparative Constitutional Law in India' in Mark Tushnet and Madhav Khosla (eds), *Unstable constitutionalism: Law and Politics in South Asia* (Cambridge University Press, 2015) 46, 64-65. See Sujit Choudhry, 'Globalisation in Search of Justification: Towards a Theory of Comparative Constitutional Interpretation' (1999) 74 Indiana Law Journal 819.

15 Bryer and Scalia are the protagonists of this jurisprudential drama. While one endorsing the pertinence of foreign judgments as 'relevant and informative' and 'useful even though not binding', the latter, as a quintessence of originalism, could not bolster this comparativist for being repugnant to sovereignty and democracy. See The Relevance of Foreign Legal Materials in US Constitutional Cases: A Conversation between Justice Antonin Scalia and Justice Stephen Breyer' (2005) 3 International Journal of Constitutional Law 519. The Court's overreliance on foreign decisions in *Lawrence* is a harbinger of the erosion of US's exceptionalism. Regarding jurisprudential controversy pertaining to foreign decisions in U.S. see Michel Rosenfield, 'Comparative Constitutional Analysis in United States Adjudication and Scholarship', in Michel Rosenfield and Adras Sajo (eds), *Oxford Handbook on Comparative Constitutional Law*, (Oxford University Press 2012) 38.

16 Ran Hirschl, 'On the Blurred Methodological Matrix of Comparative Constitutional Law' in Sujit Choudhury (ed), *The Migration of Constitutional Ideas* (Cambridge University Press 2006) 39.

17 Mark Tushnet, *Weak Courts and Strong rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press, 2008) 4; Mark Tushnet, 'Some Reflections On Method in Comparative Constitutional Law' in Sujit Choudhury (ed), *The Migration of Constitutional Ideas* (Cambridge University Press 2006) 67.

18 Sujit Choudhury 'Migration As a New Metaphor in Comparative Constitutional Law' (n 12) 1, 25.

19 Ran Hirschl (n 16) 39.

building through the substantiation or refutation of testable hypotheses.[20] The 'lack of methodological rigour' ensued from the failure to deploy social scientific research methods of controlled comparison, research design and case selection necessary to draw causal inferences. He describes four comparative inquiries[21] that may help to come out of mere taxonomical scholarship and craft robust normative claims to understand why migration occurs and how it underlies a coherent epistemological foundation through proper theory-building.

B. Overview of the Methodologies

Tushnet retorts to the accusation concerning the dearth of methodologies by giving an elaborate account by propounding three ways of comparative constitutional law , i.e. normative universalism, functionalism, and contextualism. Contextualism comprises two variants: simple contextualism and expressivism.[22]

1. Normative Universalism

Constitutions everywhere embrace some ubiquitous fundamental principles. This can be evidenced by the pervasive expansion of the idea of human rights and equal treatment. Universalists seek just and good principles that transcend jurisdiction. They researched comparative constitutional law to determine how specific constitutions embodied universal principles. We can better understand the fundamentals by comparing different versions. Using this improved understanding, we might then be able to improve a home system version of one or more principles.[23] Universalism sought to understand how constitutional concepts created in one system might be related to those developed in another, either because the ideas seek to capture the same normative value or because they seek to structure a government to carry out the same functions.[24]

2. Functionalism

Functionalism[25], as Jackson argued, perhaps occupies the position of the most dominant method in comparative constitutional law.[26] It claims that particular constitutional provisions create arrangements that serve particular functions in

20 ibid 40.

21 They are i.e., most similar, most dissimilar, prototypal, and most difficult cases.

22 Mark Tushnet, 'The Possibilities of Comperative Constitutional Law', (1999) 108 The Yale Law Journal, 1225.

23 Mark Tushnet, 'Reflections on Comparative Constitutional Law' in Sujit Choudhury (ed), *The Migration of Constitutional Ideas* (Cambridge University Press 2006) 67.

24 ibid 68.

25 See B. Ackerman, 'The New Separation of Powers' (2000) 113 Harvard Law Review, 633.

26 Vicki C. Jackson, 'Comparative Constitutional Law: Methodologies' in Michel Rosenfield and Adras Sajo (eds), *Oxford Handbook on Comparative Constitutional Law*, (Oxford University Press 2012) 62.

governance systems. Comparative constitutional analysis can help identify such purposes and demonstrate how different constitutional provisions perform the same function in different constitutional systems.[27]

Functionalism resembles universalism in the sense that it keeps the other constitutional systems within its study ambit.[28] Every country is grappling with a set of analogous problems.[29] Functionalism seeks to produce solutions by examining other systems and their operations in the real-world, and it desires to seek the best-suited function that will benefit a particular system.[30] Well-functioning political institutions serving common functions may provide useful insights and an elaboration of functional themes already present in domestic law.[31] Functionalists tend to focus on issues related to government structure.

3. Expressivism and Contextualism

Expressivism, seemingly having a tautological semblance to full-fledged functionalism, emerges from each nation's distinctive history and character.[32] Expressivism takes constitutional ideas to express a nation's self-understanding. This sheds light on the way a nation defines itself and on how nations view constitutional doctrines and institutional arrangements.[33]

Contextualism emphasises the fact that constitutional law is deeply embedded in each nation's institutional, doctrinal, social, and cultural contexts and that we are likely to err if we try to think about any specific doctrine or institution without appreciating how tightly linked it is to all the contexts within which it exists.[34]

4. Bricolage

Bricolage, as a borrowed nomenclature,[35] can be termed the deployment of whatever is available at hand from the analogous constitutional ethos of other nations.[36] Unlike functionalists and expressivists, bricoleurs are not anxious about whether the selection is congruent with the theoretical framework. If there are any procedural constraints, a constitutional ricoeur can rely on adjacent jurisprudential experience. Justice Scalia's

27 Mark Tushnet, '*The Possibilities of Comparative Constitutional Law*' (n 22) 1228.

28 Mark Tushnet, '*Some Reflections on Method in Comparative Constitutional Law*' (n 17) 72.

29 Mary Ann Glendon, 'Rights in Twentieth-Century Constitution's (1992) 59 *U. CH. L. Rev,* 519.

30 Mark Tushnet, *Weak Courts and Strong rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (n 17) 9.

31 Mark Tushnet, '*The Possibilities of Comparative Constitutional Law*' (n 22) 1239.

32 ibid 1270. For an example of an expressivism approach, see Glendon, (n 29) 519,524.

33 Tushnet, 'Some Reflections On Method in Comparative Constitutional Law' (n 17) 79.

34 ibid 76.

35 See, Claude Levi-Strauss, *The Savage Mind*, (University of Chicago Press) 16-17.

36 Mark Tushnet, 'The Possibilities of Comparative Constitutional Law' (n 22) 1285.

suggestion to the constitutional designer regarding learning from constitutional experience elsewhere is akin to this thesis.[37]

It is proposed that this theoretical framework indicates bridging lacuna under the adroit tutelage of comparative scholars. Although it remains nascent, there is no more elementary. At the same time, in the practical field, these theories are incongruently applied. Borrowers are either hardly mindful of theoretical frameworks or utterly incognisant of these theories, as most of them are not in academia. In some cases, constitutions are an outcome of political compromise and have failed to integrate whole. Then, applying a single theory will not serve this purpose. Sometimes necessity cannot be confined to a single peripheral theory. Bricolage dexterously alleviates these epistemological imbroglios.

C. Defining Metaphors: Borrowing and Transplantation

The history of a system of laws is largely a history of borrowing legal materials from other legal systems.[38] Instances of cross-jurisdictional legal transfer are becoming ubiquitous.[39] It is a central feature of contemporary constitutional practise.[40] The crux of idea is 'seeking to adapt constitutional norms found in others for their own purposes'.[41] Transplant is described as "*importing an idea into a new domain is tempting when the idea possesses a track record of success in the sense that it seems defensible, has proven useful, or, quite apart from its demonstrated utility, enjoys support among specialists or the public.*"[42] The idea was proposed by Alan Watson in *Legal Transplants* (1974).[43] Watson claimed that legal transplants involve transferring rules between legal systems, while refuting the transplant axiom of Legrand, the impossibility of legal transplantation.[44]

There is a schismatic battle among metaphors. Borrowing, allegedly not capturing the full range of uses,[45] is emblematic of ownership and interaction among equals that are subject to return, unscathed, and unaltered, and does not always occur in cross-constitutional transactions. Transplant is allegedly inapposite because the constitutional

37 *Printz v. United States*, 521 US 898, 921.

38 Roscoe Pound, *The Formative Era of American Law* (Brown and Company, 1938) 94.

39 Vlad Perju 'Constitutional Transplants, Borrowing, and Migrations' in Michel Rosenfield and Adras Sajo (eds), *Oxford Handbook on Comparative Constitutional Law*, (Oxford University Press 2012) 1305.

40 Sujit Choudhry, 'Migration as a New Metaphor in Comparative Constitutional Law' (n 12) 16.

41 Rosalind Dixon and David Landau, *Abusive Constitutional Borrowing: Legal Globalisation and the Subversion of Liberal Democracy*, (OUP, 2021) 42 For a detailed definitional discussion, see Tebbe and Tsai, (n 13) 462-66.

42 Tebbe and Tsai, (n 13) 472.

43 *Legal Transplants: An Approach to Comparative Law* (Scottish Academic Press) 1974.

44 P. Legrand, 'What Legal Transplants' in D. Nelken and J. Feest (eds), *Adapting Legal Cultures* (Hart Publishing 2001) 55, 59.

45 Choudhury, 'Migration as New Metaphor in Comparative Constitutional Law' (n 12) 20.

idea is embedded in one culture and cannot be befitted in another culture in *Toto*.[46] Presumably, any hard and fast rule of borrowing is inexistent because of amorphous indoctrination.

Borrowing, transplantation, and migration often overlaps and are used interchangeably because 'constitutional phenomena are so diverse that no single metaphor can aptly capture them all'[47]. Borrowing also includes non-borrowing.

1. Paradoxes of Constitutional Borrowing

Obvious ambivalence is embedded in borrowing that makes it both ineluctable and impossible.[48] Incumbent draughters exigently feel to look to their peers for solutions to common problems with which others are also encumbered. At the same time, adherence to context specificity, a sense of nation pride, and cultural factors create reluctance to give *carte blanche* to unbridled borrowing. The conundrum is aptly depicted as the draughters of the constitutions did not have any doubt that they had to borrow, but they wanted to borrow it by their own way.[49]

American constitutional jurisprudence, torn between exceptionalism and comparativist, is an exponent of this paradox. While Scalia acceded to the pertinence of old English law because it serves as the foundational backdrop of American constitutional design, he vehemently rejected foreign law applications in other cases.[50] Cynicism towards alien transplantation reverberates in the United States. Chief Justice denying borrowing.[51] While another Constitutional Judge of South Africa also advocates constitutional borrowing.[52] This dichotomous paradox occurs when some believe that foreign materials are helpful; others, that their use is obfuscatory and illegitimate.[53]

46 See for 'Mirror theory of law' William Ewald, 'Comparative Jurisprudence (II): The Logic of Legal Transplants' (1995) 43 American Journal of Comparative Law 489.

47 Vlad Perju, (n 39) 1304, 1308.

48 See Osiatynski, (n 11) 244.

49 Ret R. Luidwikowski, 'Constitutional Culture of the New Eastern European Democracies in Constitutional Culture' in Miroslaw Wyrzykowski (ed), *Constitiutional Culture* (ISP 2001) 61.

50 (2005) 3 *Int J Const L* 519, 525.

51 '*If we're relying on a decision from a German judge about what our Constitution means, no President accountable to the people appointed that judge, and no senate accountable to the people confirmed that judge, and yet he's playing a role in shaping a law that binds the people in this country. I think that's a concern that must be addressed.*' *Confirmation Hearing on the Nomination of John G. Roberts, Jr* (13 September 2005)

52 '*If I draw on statements by certain United States Supreme Court Justices, I do so not because I treat their decisions as precedents to be applied in our Courts, but because their dicta articulate in an elegant and helpful manner problems which face any modern court dealing with what has loosely been called state/church relations. Thus, though drawn from another legal culture, they express values and dilemmas in a way which I find most helpful in elucidating the meaning of our own constitutional text.*' Justice Albie Sachs *in S. v. Lawrence, S. v. Negal, S. v. Solberg*, (4) SA 1176, 1223 (South Africa 1997).

53 Michel Rosenfeld (n 15) 40.

D. Abusive Constitutional Borrowing

Authoritarians have adapted by borrowing liberal democracy to advance their own ends.[54] With respect to teleology, abusive Constitutional borrowing is defined as 'abusive constitutional borrowing involves the use of designs, concepts, and principles taken from core aspects of liberal democratic constitutionalism, but which are turned into attacks on the minimum core of electoral democracy'.[55] Abusive borrowing comprises four typologies, albeit not 'hermetically sealed', expected in foregoing paragraphs.

Superficial borrowing that accommodates the form but is devoid of substance is termed as 'sham borrowing'. Another form of selective abusive borrowing is selective borrowing, that is, selectivity in borrowing debarred the adaptation of an integrated package as a whole rather than borrowing in piecemeal accordance with instrumental necessity. Contextual borrowing, shorn of acculturation, denotes importing constitutional norms in a de-contextualised way, being oblivious to the host country's contextual milieu. Anti-purposive borrowing denotes borrowing a form of constitutional norm with an oblique motive and purpose antithetical to, sometimes polar opposite to, the essence of the idea.[56]

E. Facilitating and Retarding Factors in Cross Constitutional Borrowing

1. Time of Constitutional-Borrowing

The borrowing of constitutional norms may be of, *inter alia*, two forms, e.g. rights and constitutional institutions[57]. One possible third is borrowing of constitutional practise and culture without formal means. The formal stage, i.e. constitutional-assembly-stage is susceptible to borrowing.[58] After promulgation, constitutional borrowing occurs through judicial review and constitutional amendment. The practise can be accessed at any time.

2. Universalism and Cultural Relativism Dichotomy

The old debate, one of the oldest legal discussions, often erects stumbling blocks in borrowing. Cultural relativists[59] oppose legal infiltration, while universalists staunchly advocate universal homogeneity.[60] The fear of outsiders' imperialism sometimes acts

54 Dixon and Landau (n 41) 11.

55 ibid 37.

56 Dixon and Landau (n. 41) 43.

57 Osiatynski (n 11) 254.

58 See Yash Ghai, 'The Role of Constituent Assemblies in Constitution Making' (2006) 25.

59 'The arguments for rejection were always the same: "we are different." Osiatynski, (n 11) 259.

60 On this debate, see Jack Donnelly, 'Cultural Relativism and Universal Human Rights' (1984) 6 Human Rights Quarterly, 400.

as a bulwark against wanton borrowing and transplants. For example, the right to same-sex marriage[61] or euthanasia will hardly be borrowed in theocracy.

3. Globalisation

In this era of far-flung globalisation, it has become the 'cliché of our time'. The present interwoven world and transjudicial migration are emboldened by such an upsurge. Globalisation means the lawyers of one country routinely interact with the other nation's legal system.[62] However, the mischievous impact of globalisation arouses cynicism to ponder whether such uniformisation, inspired by the theme of 'civilising mission', is covert imperialism. Some voices tilted towards legal pluralism also.[63]

4. Outsider's Obtrusion

Constitutional transplantation occurs when alien counterparts are opted to design the constitutional tapestry of a certain country. Post-war constitution-making in Japan and Germany witnessed the western legal transplantation, by imposing several conditions on constitutionalism through axis power. Al-Ali showed external influence in the formation of the Iraqi constitution.[64] Bangladesh's constitution-making process is also influenced by 'world's super power and India'.[65] The United Nations (UN) has become a major voice in shaping constitution-making processes and texts.[66]

5. Constitutional Confluence in the Global South

Countries in South Asia belong to the global south. Maldonado showed that constitutionalism in the global south is endowed with distinct assimilative epithets that aggrandise inter-constitutional migration in the global south and borrow from the global north.[67] The low level of legal scholarship, epistemological dependence on the North, and the formalist concept of laws in the global south compels researchers to probe the legal literature of the North. Innumerable instances exist, indicating the inflow of norms from north to south. The major legal systems in the global south are based on continental Europe or Angle-American law.[68] This also increases borrowing and transplant.

61 See Brenda Cossman, 'Migrating Marriages And Comparative Constitutionalism' in Sujit Choudhury (ed), *The Migration of Constitutional Ideas* (Cambridge University Press 2006) 209.

62 Mark Tushnet, 'The Inevitable Globalisation of Constitutional Law' (2009) 49 Virginia Journal of International Law, 985, 993.

63 See, Werner Menski, *Comparative Law in Global Context: The Legal System of Asia and Africa* (Cambridge University Press 2006) 115.

64 See Zadid Al-Ali, 'Constitutional Drafting and External Influence' in Tom Ginsburg and Rosalind Dixon (eds) *Comparative Constitutional Law* (Edward Edgar 2011) 77-95.

65 Ridwanul Hoque 'The Founding and Making of Bangladesh's Constitution', in Kevin YL Tan and Ridwanul Hoque (eds), *Constitutionalism in South Asia* (Hart Publishing 2021) 91, 119.

66 Dixon and Landau (n 41) 9.

67 Maldonado (n 9) 1.

68 ibid 5.

6. Other Factors

A myriad of factors exert an impact on borrowing. Legal education can be one such institution. Halperin showed that persons well versed in English law contributed to 'transplant' English law in India.[69] Wide-ranging internationalisation acts as a conduit for migration within national jurisdiction.[70] Comparative constitutional law academics and experts are important borrowing-promotive factors. Post-colonial countries often borrow from their colonial masters.[71] 'Trans-judicial communication'[72] among judges often facilitates borrowing.[73] The resemblance is 'post-war juridical paradigm', which enhances borrowing though some scholars decried against such 'common model'[74] Citation of foreign judgments through the 'guiding horizon, probative comparison or contrario' can be another medium of constitutional borrowing.[75]

III. The Convergence of Constitutional Rights and Remedies in South Asia

Ours is the age of comparative constitutionalism. Judiciary plays a crucial role in 'constitutional gardening'. The South Asian constitutions incorporate fundamental rights in both justiciable[76] and non-justiciable[77] forms. Infringement of which can be rectified by judicial invocation. Similitudes are abundant in the contents of these rights, and violations are often analogous. Much homogeneity in South Asia compels judges understanding fundamental rights (FR) to look into other's scenario. Sometimes, borrowing emanates from this backdrop.

A. Constitutional borrowing through judicial activism

Judiciary, being the least dangerous state branch with neither sword nor purse, cannot feed people nor give them jobs. However, it can erect a bulwark against state

69 Jean-Louis Halpérin, 'Western Legal Transplants and India' (2010) 2(1) Global Law Review, 14, 28.

70 Haque showed that the drafting of the Bangladesh constitution was influenced by international law. Muhammad Ekramul Haque, 'The Bangladesh Constitutional Framework and Human Rights' (2011) 22 *Dhaka University Law Journal*, 55, 59. See also Mattas Kumm, 'Democratic Constitutionalism Encounters International Law: Terms of Engagement', in Sujit Choudhury (ed), *The Migration of Constitutional Ideas* (Cambridge University Press 2006) 256.

71 ibid 248.

72 Anne-Marie Slaughter, 'A Typology of Transjudicial Communication' (1994) 29 University of Richmond Law Review 99.

73 Gabor Halamai, *Perspective on Global Constitutionalism and the Use of Foreign and International Law* (Eleven International Publishing 2014) 177.

74 Jeffry Goldsworthy 'Questioning the migration of constitutional ideas: rights, constitutionalism and the limits of convergence' in Sujit Choudhury (ed), *The Migration of Constitutional Ideas* (Cambridge University Press 2006) 115.

75 See Tania Groppi and Marie-Claire Ponthoreau, *The Use of Foreign precedents by Constitutional Judges* (Hart Publishing 2013) 431.

76 Part III of the Constitution of India, 1950; Ch.1 of The Constitution of The Islamic Republic of Pakistan, 1973; Chapter II of The Constitution of the Peoples Republic of Bangladesh, 1972; Ch. III of The Constitution of the Democratic Socialist Republic of SRI Lanka, 1978; Chapter 3 of the Constitution of Nepal 2015, Art.8 of The Constitution of The Kingdom of Bhutan, Ch.2 of the Constitution of the Republic of Maldives, 2008; and Chapter 2 of the Constitution of the Islamic Republic of Afghanistan, 2004. For brevity, it is hereinafter called the Indian, Pakistan, Bangladesh, Sri Lankan, Nepal, Maldives, and Afghanistan constitutions.

77 Art.37 of the Indian Constitution, Art. 30 of the Pakistani Constitution, Art.8 of the Bangladeshi Constitution, Art.29 of the Sri Lankan Constitution, Art.55 Of the Nepalese and Maldives constitutions.

lawlessness through the act of vigilant activism. An activist judge[78], primacy over the text's spirit in lieu of clinging to it lexicographically, can loftily borrow from others while understanding the spirit of a constitution. This purpose is to rhyme with global trends, not be captive of past[79] or not being prey to the mechanical interpretation. Cross-country legal comparativist stirs judicial activism.[80]

1. Public Interest Litigation: Extending the Standi

Post-war jurisprudential trajectory abdicated stringent adherence to textualism, and thus, the heydays of judicial conservatism started to dwindle by lowering the standing yardstick, and thus, the efflorescence of Public Interest Litigation (PIL) dawned. America spearheaded this PIL-effervescence in the late-1960s and the 1970s[81] through some benchmark cases like *Brown*[82] and *NAACP vs. Button.*[83] Appreciably, Britain also leaned towards eschewal of orthodox rule of standing.

Initially, this sub-continent, being subsumed under the common law system, adhered to stringent standing doctrine established by some British cases like *Lewisham Union*,[84] *Sidebotham*[85], which required a high threshold of standing to avail court, and the person aggrieved was narrowly construed.[86] Subsequently, in England, a metamorphosis from a limited approach to liberal leadership can be evidenced in the wake of global development.[87] In the 1970s, the English Court liberalised by adopting 'sufficient interest' in famous Balckburn cases.[88] These cases rightly emboldened South Asian Judges who merrily borrowed these contemporaneous developments by renouncing prior judicial rule. Hence, borrowing is of two sorts: the first restrictive rule of standing borrowed from the colonial predecessor and the liberal approach from the global practise.

78 Some epithets of activism appear in Husain's: Waris Husain *The Judicialization of Politics in Pakistan: A Comparative Study of Judicial Restraint and its Development in India, the United States, and Pakistan* (Routledge 2018) 3.

79 Justice Haleem in *Benazir Bhutto case*. PLD 1988 SC 416 at 421.

80 Ridwanul Hoque, *Judicial Activism in Bangladesh, A Golden Means Approach* (Cambridge Scholars Publishing 2011) 237.

81 Dr. Hari Bansh Tripathi, 'Public Interest Litigation in Comparative Perspective' (2007) *NJA Law Journal*, 49, 56.

82 *Brown vs. Board of Education* (1954) 347 US 483, where the segregation of black populace was disavowed.

83 371 US 415.

84 [1897] 1 QB 498.

85 [1880] 14 Ch. D 458.

86 Justice D.A. Desai 'The Jurisprudential Basis of Public Interest Litigation' in Sara Hossaian, Shahdeen Malik, and Bushra Musa (eds), *Public Interest Litigation in South Asia* (UPL 1997) 22. Naim Ahmed, *Public Interest Litigation: Constitutional Issues and Remedies*, (BLAST 1999) 129.

87 M. Amirul Islam, 'A Review of Public Interest Litigation Experiences in South Asia' in Sara Hossaian, Shahdeen Malik, and Bushra Musa (eds), *Public Interest Litigation in South Asia* (UPL 1997) 55, 56.

88 *R v Commissioner of Police, Ex Parte Blackburn* [1968] 2 QB 118, *Blackburn vs. Attorney Genera*l [1971] 1 WLR 1037, R v Police Commissioner, Ex-parte Blackburn [1973] QB 241.

The PIL of one is not a copy of another country. Each has distinct characteristics. The Bangladeshi PIL is emblazoned with its constitutional autochthony.[89] Pakistan's PIL is imbued with Islamic Social justice[90] which is 'steering force' of its constitutionalism. The Indian PIL is distinguished for its social orientation.[91] However, some commonalities, like common colonial past,[92] similar constitutional wording,[93] analogous constitutional litigation[94], or identical socioeconomic conditions, compel South Asian countries to ponder development elsewhere; thus, borrowing or transjudicial influence escalates. Another noteworthy commonality is that the spate of PIL/activism has reached its zenith after the lifting of an emergency, seemingly for the reclamation of self-legitimisation, in India[95], Pakistan[96] and Bangladesh.[97] It warrants the conclusion that PIL thrives in democracy.

a. India

Primordially, India was in the grip of strict rule of standing derived from English jurisprudence.[98] Influx of PIL in the USA in the 1960s by the Warren Court[99] and liberalisation of standing in England[100] was of inspiration to Indian judges for jurisprudential borrowing across the Atlantic, and hence it might be characterised as 'modified' American PIL.[101] However, Baxi retorted, arguing that distinctive birth history, growth, and its focus on have-nots distinguish it from American PIL. The nomenclature Social Action Litigation (SAL) befits Indians.[102] The grandiose claim is

89 Per Justice BH Chowdhury in *Anwar Hossain.* 1989 BLD (Spl) 1 at 59, Mustafa Kamal J identified its absence of prior negotiation with the colonial master in *FAP-20*, Para 41.

90 In *Bhutto,* PLD 1988 SC 416 at 421, the court stated that the right is also guaranteed under Art. 2A (Islamic principles, Annexe Of Pakistan Constitution). See Faqir Hussain, 'Public Interest Litigation in Pakistan' (1993) PLD Journal 72.

91 Upendra Baxi, Taking Sufferings Seriously: Social Action Litigation in the Supreme Court of India, (1985) 4 Third World Legal Studies, 107. PN Bhagwati, 'Judicial Activism and Public Interest Litigation' (1985) 23 *COLUM. J. TRANSNAT'L L.* 561.

92 Sara Hossaian, Shahdeen Malik, and Bushra Musa (eds), *Public Interest Litigation in South Asia* (UPL 1997) xiii.

93 Justice Maynul Islam Chowdhury*, Maintainability of Writ petition: An Apprisal,* (Universal Book House, 2021), 34, asserts that Article 98 of the Pakistani Constitution is Akin to Article 102(2) of the Bangladeshi Constitution. Justice Naimuddin Ahmed says it is 'verbatim reproduction' of Pakistan Constitution. Justice Naimuddin Ahmed, *Law of Preventive Detention in Bangladesh,* in Hossain, Malik and Musa (eds), Public Interest Litigation in South Asia, (n 86) 115. Similarly, almost the same writs are mentioned in Article 126(3) of the Sri Lankan Constitution and Article 32(2) of the Indian Constitution.

94 One inquisitive mind may see the factual similitude between Indian *Olga Tellis* and *ASK v Bangladesh*; *Bondhu Mukti Morcha* and *Darshn Maish; BNWLA and Vishakha; Maneka Gandhi and HM Ershad.*

95 Upendra Baxi, *The Indian Supreme Court and Politics* (Eastern Bok Company 1980) 126.

96 Maryam S. Khan, 'Genesis and Evolution of Public Interest Litigation in the Supreme Court of Pakistan' (2014) 28. 2 *Temple int. L and Comp. L. J.* 284, 290.

97 For details see below sec. 4.5. Hoque, *Judicial Activism in Bangladesh* (n 80) 204.

98 Desai (n 86) 18; Husain (n 78) 89.

99 P.K. Tripathi, 'Foreign Precedents, and Constitutional Law' (1957) *57 COLUM. L. REV.* 319, 319. Rajeev Dhavan, 'Borrowed Ideas: On the Impact of American Scholarship on Indian Law' *(*1985) 33 AM. J. COMP. L. 505.

100 Ahmed, *Public Interest Litigation: Constitutional Issues and Remedies* (n 86) 110-11.

101 Arun K. Thiruvengadam 'Revisiting The Role of the Judiciary in Plural Societies (1987)' in Sunil Khilnani, Vikram Raghavan, and Arun K. Thiruvengadam (eds), *Comparative Constitutionalism in South Asia'* (OUP 2013) 342, 349.

102 Baxi, 'Taking Sufferings Seriously: Social Action Litigation in the Supreme Court of India' (n 91) 108; Bhagwati (n 91) 569.

counteracted by Agrawala, who insightfully argued that Indian PIL is philosophically no more distinct from American PIL; rather, it resembles and follows American development.[103] Another scholar decried with dismay that India had nothing original, everything is borrowed.[104] Arguably, this U.S.-slanted PIL jurisprudence in India is result of heightened borrowing.

Justice Bhagwati and Iyar[105] stirred the gear by their pro-poverty stances[106] and movement for legal aid. It inaugurated the court's metamorphosis from positivism to activism in the aftermath of an emergency. In relaxation of standing, Indian judges extensively relied on American cases and academic works.[107] In *Dabholkar,* [108]Justice Iyar rests on American cases i.e. *Baker vs. Carr*[109], and Lord Denning's rationale in *the Counsel for the Attorney-General of the Gambia v. Pierra Sarr N. Jie.*[110] Besides, reliance was also placed on English academic work to jettison the stern standing rule. In a 1975 case, a court granted[111] some 'implicit nods' to US development. In the 1970s, the court, while allowing standing to labour organisations[112] or understanding the meaning of aggrieved persons,[113] took recourse to American and English cases and academic works. In *habeas corpus* case, the court relied on various English cases, e.g. *R vs. Speyer*[114] to loosen the grip on the iron rule of standing. In *Rajendra Kumar Chandemal*[115]and, VD Deshpande, challenging[116] illegal incarceration by persons sufficiently interested or allowed. In environmental case[117], courts fervently borrow from overseas jurisdictions, international decisions, and even scholarly works.[118] The Doctrine of Public Trust was borrowed in *M C Mehta v Kamal Nath*[119], relying on

103 S.K. Agarwala, *Public Interest Litigation in India: A Critique* (Tripathi and Indian Law Institute1987) 29.

104 Gobind Das, *Supreme Court in Quest of an Identity* (Eastern Book Company 1987) 33.

105 Some judgments of Iyar J in the mid-70s heralded a forthcoming change. *Bar Council of Maharashtra, v. M.V. Dabholkar (1975), Nawabganj Sugar Mills (1975), 75 Mumbai Kamgar Sabha v. Abdulbhai (1976) and Maharaj Singh v. State of U.P. (1976).*

106 Islam, 'A Review of Public Interest Litigation Experiences in South Asia' (n 87) 61.

107 Arun K. Thiruvengadam, 'In Pursuit of "The Common Illumination of Our House": Trans-Judicial Influence and the Origins of PIL Jurisprudence in South Asia' (2008) 2 Indian J. Const. L 67, 87.

108 AIR 1975 SC 2092.

109 (1962) 369 US, 186.

110 1961 AC 617.

111 *Newabganj Sugar Mills Co., Ltd. Union of India* AIR 1976 SC 1152.

112 AIR 1976 SC 1455.

113 AIR 1976 SC 602.

114 [1916] 1 KB 595.

115 AIR 1957 Madhya Pradesh 60.

116 AIR 1955 Hyderabad 36.

117 Regarding Public Interest Environmental Litigation (PIEL) see Jona Razzak, *Public Interest Environmental Litigation in India, Bangladesh and Pakistan* (Kluwer Law International 2004) 25.

118 See *Andhra Pradesh Pollution Control Board. Nayudu* [2002] 3 LRC 275.

119 (1997) 1 SCC 388.

American scholarship[120] and later indigenised by the right to life.[121]

Contrarily, disavowal of US precedents by Indian courts is not unprecedented, and thus, contrario can be exemplified. Unlike the USA, the Indian PIL is initiated by the judiciary. The American limited-judicial review concept has been rejected by India and Pakistan.[122] Indian judges refused to adhere to US case-laws owing to divergent constitutional texts or discrepant social milieus in myriad cases,[123] for instance, *Mahadeb Jiew v. Dr. Sen reprimanded the*[124] uncritical endorsement of American cases and declined to interpret the women's equality-right view from the American prism.

The phenomenal case *S.P. Gupata*[125] asserts that action inimical to the plurality at large is amenable to review[126] and resembles the line of argumentation in earlier British cases. This voluminous case does not bereft of invoking foreign precedents; rather, it carefully probed them,[127] and domestic cases.[128] An echo of the Bangladeshi Berubari principles[129] can be discerned in this *Judges case.*

Understandably, the Indian people-prone Supreme Court (SC), a social auditor,[130] did not hesitate to adopt a US-leaning activist approach to shield the FR[131] and shifted from '*laissez faire* state to welfare state' with a view to make the 'Supreme Court for Indians'. Appreciably, it became an exponent of ricoeur. People use Indian experiences to migrate across countries in this region.[132]

120 J. L. Sax, 'The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention' (1970) 68 Michigan Law Review 471.

121 *M.I. Builders Private Ltd. v Radhey Shyam Sahu* (1999) 6 SCC 464, 466.

122 Husain, *The Judicialisation of Politics in Pakistan* (n 78) 8.

123 Thiruvengadam, 'In Pursuit of "The Common Illumination of Our House": Trans-Judicial Influence and the Origins of PIL Jurisprudence in South Asia' (n 107) 78.

124 AIR, 1951, Cal. 563.

125 AIR 1982 SC 149.

126 AIR 1982 SC 149 at 188. The court held that a person having sufficient interest can avail the court (para-22) but not a meddlesome interloper (para-17).

127 Manoj Mate, '*Two Paths to Judicial Power: The Basic Structure Doctrine and Public Interest Litigation in Comparative Perspective'* (2010) 12 *San Diego Int'l L.J* 175, 194.

128 *K.R. Shenoy v. Udipi Municipality*. AIR 1974 SC 2177, where a taxpayer was granted standing against a municipality. *J.M. Desai v. Roshan Kumar*. AIR 1976 SC 578 At the very beginning, when Bhagwati J acceded, several foreign authorities were brought to court's account (para-1). Court cited, inter alia, *Queen v. Bowman* [1898] 1 Q.B. 578 (at para-15) and *McWhirter* [1973] Q.B. 629 (at para-21 & 956) to buttress the concept of sufficient interest.

129 Mustafa Kamal J in *FAP-20* case (para 33).

130 *Fertiliser Corp. Kamgar Union v. Union of India* AIR. 1981 S.C. 344.

131 *Hussainara Khatun vs. Home Secretary* (1980) 1-SSC 98 at 108. Where the court found no bar to adopt US-style activism.

132 Tushnet and Khosla, *Unstable Constitutionalism* (n 4) 6.

b. Pakistan

The first follower of the Indian PIL advancements was Pakistan[133] after the restoration of democracy in the 1980s[134] as a ‘post-emergency judicial catharsis’. However, prior to Indian efflorescence, a 1969 case took a more lenient view shunning stern rule endorsing ‘sufficient for maintaining a proceeding’ rule.[135] The PIL came to its culmination after the reinstatement of Chaudhry Chief Justice (CJ) in 2009, following the lawyer movement. It stirred an influx of self-intervention, hyper-activism, judicial populism, and the over-judicialization of mega-politics, which is tantamount to aristocracy.[136] Khan compendiously dilated on the Pakistani PIL itineraries.[137] Earlier she envisaged the Indian influence and selective borrowing by Pakistan in the 1990s. Though[138] jurisprudential resonance and proximities in reasoning give a ‘borrowed favour’ to Pakistani-PIL, there are some distinctively indigenous epithets e.g. Islamic principles.

The open-ended article 184(3) requires the court to entertain ‘question of public importance’, where the root of the PIL lies.[139] English[140] and Indian[141] developments that escalated borrowing also influenced the court. *Benazir Bhutto*[142] hinged on *S.P. Gupta* to allow standing. *Darsha Maish*[143] transplanted the ‘little Indian in large number’ of *S.P. Gupta* by ‘little Pakistanis’. It resembles the Indian *Bondhu Mukti Morcha.* To broaden the scope of the right to life as a right to environment in *Shehla Zia*[144], the court extensively borrowed from Indian jurisprudence, including the concept of establishing a commission to subdue environmental contamination.

c. Bangladesh

Bangladesh, in its incipient stages, optimistically acted as a harbinger of the South Asian PIL by adopting a worthwhile liberal stance in pursuing *Balckburn* cases even before Indian development.[145] *Berubari*[146] bestowed the foothold to a sufficiently

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133 Ahmed, Public Interest Litigation: Constitutional Issues and Remedies (n 86) 17.

134 Sadaf Aziz, *The Constitution of Pakistan: A constitutional Analysis* (Hart Publishing 2018) 133.

135 *Fazle Din case* 21 DLR (SC) (1969)225 Pe Hamoodur Rahman J. This case is characterised as an exception to Ahmed. Ahmed, *J. Public Interest Litigation: Constitutional Issues and Remedies* (n 86) 116.

136 Sanaa Ahmed, ‘Supremely Falliable? Adebat on Judicial Restraint and Activism in Pakistan’ (2015) 9 ICL Journal 213, 238.

137 See Khan, ‘Genesis and Evolution of Public Interest Litigation in the Supreme Court of Pakistan’ (n 96) 284.

138 See Khan, ‘*The Politics of Pubic Interest Litigation in Pakistan in the 1990s’* (n 135) 2.

139 Mohammad Haleem, C.J. *in Benzir Bhutto* PLD (1988) (SC) 413.

140 Ahmed, J. Public Interest Litigation: Constitutional Issues and Remedies (n 86) 117.

141 Thiruvengadam, ‘In Pursuit of “The Common Illumination of Our House”: Trans-Judicial Influence and the Origins of PIL Jurisprudence in South Asia’ (n 107) 95-97.

142 PLD (1988) (SC) 413.

143 PLD 1990 SC 513.

144 PLD 1994 SC 693.

145 ATM Afzal CJ in FAP- 20 case at para-3.

146 (1974) 26 DLR (AD) 44.

interested person and differentiated justifiability from standing.[147] Here, reliance was posited on Pakistani case , i.e. *Mia Fazl Din Lahore Improvement Trust*[148] and English case namely *Blackburn V. Attorney General*[149] to substantiate the liberal construction of 'person aggrieved'. The Court also dexterously demonstrated that the open-textured wording of article 102 accommodates standing in an infringement of fundamental rights that pervades across the country. Seemingly, the court took a textualist stance and bricolage. *Berubari* may outline that the court will remain congruent with the liberal view and herald the spawning of the PIL in Bangladesh.

However, the aborted seed was developed by *Berubari*, and it was nipped in the bud owing to obnoxious constitutional atrophy and de-clothing by military oligarchy after 1975. The court was immersed in orthodox rules during that period of slumber and inertia. Court borrowed English traditional retrogressive ethos of personal grievance to discard vicarious litigation.[150] Even the court declined to follow India because it did not have textual similarity in *Snagabadpatra.*[151]

In hindsight, the court reincarnated moribund *Berubari* in 1997 by *implementing Flood Action Plan Case 20,*[152] which lifted many insurmountable setbacks. Impetus came from neighbouring developments[153] , i.e. India and Pakistan.[154] *The SP Gupta* was seemingly instrumental in underpinning this reasoning.[155] Although the court considers the English,[156] Indian,[157] Pakistani[158], and Sri Lankan[159] developments, it dialogically interprets Art.102 and provides a teleological construction instead of blindly following foreign cases.[160] The court opined that the Constitution should be interpreted in consideration of historic birth, along with the constitutional scheme and objectives. This people-centric, context-specific interpretation resembles expressivism theory. The court rejects, as a negative borrowing, a Philippian case[161] of the standing of an unborn child.

147 Ridwanul Hoque, 'Constitutionalism and the Judiciary in Bangladesh' in Sunil Khilnani, Vikram Raghavan, and Arun K. Thiruvengadam (eds), *Comparative Constitutionalism in South Asia'* (OUP 2013) 312.

148 (1969) 21 DLR (SC) 225.

149 (1971) I WLR 1037.

150 Instances are innumerable. In *Sangbadpatra*, opulent members were rejected. *Dada Match Workers Union* 29 DLR (1977) 674, *Zamiruddin Ahmed vs. Bangaldesh* 34 DLR (1982) 34, Khulna Shipyard Employees Union 30 DLR (1978) 368.

151 12 BLD (AD) (1992) 153.

152 17 BLD (AD) (1997) 1, *FAP-20* is called 'first real PIL'.

153 Hoque, *Judicial Activism in Bangladesh* (n 80) 239.

154 Sumaiya Khair, *Legal Empowerment for the poor and the disadvantaged: Strategies, Achievements and Challenges*' (CIDA 2006) 166.

155 Ridwanul Hoque, 'Taking Justice Seriously: Judicial Public Interest and Constitutional Activism In Bangladesh' (2006) 15(4) Contemporary South Asia, 399, 402.

156 Para-29 gives a comprehensive account of English development that includes *Balckburn* cases.

157 Para 33 considers *the S.P. Gupta* and Para. 35 demonstrate various Indian advancements in PIL.

158 *Benzir Bhutto* and *Shehla Zia* are cited in Para 38.

159 See para-36, 37.

160 Kamal J observed that our constitution is not a mere replica of the Anglo-Saxon Westminster system. (Para 41).

161 *Juan Antonio Oposa vs. Hon'ble Fulgencio S. Factoran* G.R. No. 101083, 224 S.C.R.A. 792 (1993).

The spike of borrowing came into being through environmental degradation cases and extended right to life[162] jurisprudence. The court borrowed the jurisprudence Doctrine of Public Trust (DPT) from Indian cases and scholarly works.[163] Each of the four cases[164] regarding DPT referred *to MC Mehta, and* two of them [165] rested on Prof. Sax's article.[166] In *the Turag River case, Kamal* J demonstrates the constitutional provisions along with eleven laws embracing DPT and foreign referrals for persuasive value that indicates the court's functionalist approach.

Indubitably, PIL-jurisprudence in Bangladesh has been ameliorated and influenced by the development of elsewhere, notably Indian developments in the 1980s, by which it emancipates itself from tentacles of rigid textualism that the court inherited from its anterior legal predecessor i.e. Britain. The court also imbibed English liberal jurisprudence to widen the scope of public interest in the text. In a 1994 case,[167] the court defined 'public interest' based on English cases[168] and found no other concomitant text.

It cannot be gainsaid that Indian development exerts a monumental degree of influence in the furtherance of the Bangladeshi PIL, but a modicum of truth lies if one hegemonically claims 'PIL in Bangladesh is the fruit of Indian development'[169] where *Berubari* precedes *Judges' case*. Instances are abundant where the court rejects an Indian position. In a series of case[170], court relinquishes, as a contrario, the Indian subjective satisfaction test for preventive detention. Bangladeshi-PIL is not a mere post-emergency offspring, nor did it undergo a protracted birth like India, albeit a full-fledged PIL came to fruition after lifting the emergency.

d. Sri Lanka and Nepal

The Indian constitutional law is a source of borrowing for Sri Lanka[171] and has persuasive value for judges.[172] Samararatne found that Indian jurisprudence is

162 Muhammad Mahbubur Rahman, 'Right to Life in the constitution of India, Pakistan, and Bangladesh: an Appraisal', (2006) 17 Dhaka University Studies, 145.

163 See Md Azhar Uddin Bhuiyan, 'The Doctrine of Public Trust: Its Judicial Invocation in Bangladesh and the Future Potentials' (2021) 9 Jahangirnagar University Journal of Law, 89.

164 (2011) 16 BLC 386, (2010) 18 BLT 323, (2010) 22 BLC 48, (2019) WP 13989/2016.

165 *Alam, F.* (2010). 18 BLT 323, Human Rights & Peace for Bangladesh v Bangladesh (2019). WP No. 13989/2016.

166 Bhuiyan, 'The Doctrine of Public Trust' (n 163) 94.

167 AR Shams-ud-Doha vs. Bangladesh 46 DLR (1994) 405.

168 The court relied on two British cases, (1894) 1QB 133 and (1957) 2QB 169.

169 Thiruvengadam, 'In Pursuit of 'The Common Illumination of Our House: Trans-Judicial Influence and the Origins of PIL Jurisprudence in South Asia' (n 107) 97-102.

170 *Aruna Sen vs. Bangalesh* (1975). Interestingly, the court relied on the dissenting opinion of Lord Atkin in *the case of Liversidge. Parvin vs. Bangladesh* (1988) 40 DKR (AD) 178 at 183; *Abdul Latif Mirja, 31* DLR (AD) 1979, 1.

171 Gary J. Jacobsohn and Shylashri Shankar, 'Constitutional Borrowing in South Asia: India, Sri Lanka, and Secular Constitutional Identity' in Sunil Khilnani, Vikram Raghavan, and Arun K. Thiruvengadam (eds), *Comparative Constitutionalism in South Asia'* (OUP 2013) 182.

172 *Seneviratne and Another v University Grants Commission and Another* [1978-79-80] 1 Sri LR 182 (SCSL) 188.

instrumental to Sri Lankan public law development in three ways 1) direct borrowing 2) reinforcing reasoning by referral, and 3) creeping influence.[173]

Like other countries, Sri Lanka initially advocated stringent standing rules.[174] In a 1982 case[175], the court adopted a sufficient interest role in accordance with English law. Then, recourse to Indian cases reinforced it. In a 2007 case[176], the Court invoked *S.P. Gupta* to ingrain the judicial review power. Environmental cases are filled with Indian references. In a Public interest environmental litigation (PIEL) case[177], the court fortifies its reasoning by resorting to Indian environmental cases[178] to accede to public interest. The court adjudged reliant on famous Indian *cases, namely, Bandhu Mukti Morcha* and *S.P. Gupta, to engraft liberal* standing rule.[179] In dealing with the Directive Principles,[180] environmental litigation,[181] and equality cases, the court tailored its reasoning by borrowing from Indian jurisprudence. In *the habeas corpus* case[182], the court exclusively relied on *Sebastian M Hongray v. Union of India*[183] to award costs to the petitioner. Arguably, the textual assimilation of the two countries escalates the borrowing.

Article 126 of the Sri Lankan Constitution is narrower than that of India. The court can only indict if a violation occurs due to executive or administrative action. The court is also precluded from reviewing the legislature. This narrow-textual wording resulted in rejecting the Indian position as a contrario. In a 2016 case[184], the court declined to be guided by the widened standing rule of India due to fundamental differences and a particularist stance.

The plethora of Indian citations by Sri Lankan courts warrants the fateful conclusion that the hegemonic influence of Indian jurisdiction pervades its neighbouring territories.[185]

173 Dinesha Samararatne, 'Judicial Borrowing and Creeping Influences: Indian Jurisprudence in Sri Lankan Public Law', (2018) 2(3) The Indian Law Review, 205.

174 *Neviille Fernando Case 2, Sri*. L.R.214, rejected the vicarious standing of a shareholder.

175 *Wijesiri v Siriwardene* [1982] 1 Sri LR 171 (SCSL).

176 *Senarath v Kumaratunga* [2007] 1 Sri LR 59 (SCSL).

177 *Sugathapala Mendis and Another v. Chandrika Kumaratunga and Others* [2008] 2 Sri LR 339 (SCSL).

178 (1995) 5 SCC 647 (SCI), *AP Pollution Control Board v. Nayudu* (1999) 2 SCC 718 (SCI).

179 *See Azath Salley v. Colombo Municipal Council* [2009], 1 Sri LR 365 (SCSL).

180 Article 129 of the Sri Lankan Constitution prevents it from being enforceable. Enforcement of which was sought in *the case of Environmental Foundation Limited et al. v. Attorney General* [1994] 1(1) SAELR 17. See also *Seneviratne and Another v University Grants Commission and Another* [1978-79-80] 1 Sri LR 182 (SCSL) 188. Where the court relied on *Keshavananda* to consider the position of the Directive Principles.

181 *Found. Ltd. v. Land Commun'r (The Kandalama Case),* (1994) 1(2) *South Asian Environmental Law Reporter* 53, which was decided after Indian endorsement of right to environment is a FR in *RLEK v. State of U.P*., AIR 1987 SC 2426.

182 *Leeda Violet v Vidanapathirana OIC*, Police Station, Dickwella and Others [1994] 3 *Sri LR* 377.

183 AIR 1984, SC. 1.

184 *Ceylon Electricity Board Accountants' Association v Minister of Power and Energy and Others* (SCSL 3 May 2016).

185 Rehan Abeyratne, 'Rethinking Judicial Independence in India and Sri Lanka' (2015) 10 Asian Journal of Comparative Law, 99, 133.

Nepal, having the most progressive South Asian constitution,[186] was fraught with tumultuous political upheavals and ardently availed comparative modalities in constitutionalism.[187] Nepal adroitly indigenised imported ideas and transplanted them into autochthonous jurisprudence. In the 1965 case, a[188] court allowed a challenging election procedure. However, in the Ambassador *Appointment case*[189], the Court adopted a rigid test of the PIL. The court reversed the decision by widening the standing in a series of cases.[190] In a myriad of cases, i.e. challenging women's equality[191], marital rape[192], homosexuality[193], and cow-slaughter[194], courts have delved into comparative law. Although Nepal is a beginner on PIL journey, the euphoria of PIL in adjacent jurisdictions has influenced Nepal.[195]

The upshot of the above discussion is that the orthodox stringent standing rule was adopted in South Asia from Britain. Afterwards, India allowed the inflow of American liberal stance, and others followed Indian PIL. PIL sometimes acted as a way to address prior constitutional mayhem during an emergency. Courts are inclined to keep doors ajar for impoverished multitudes and hence depart from strict adversarial adjudication. Menski rightly opines that the South Asian PIL is legally more entrenched than the right-based-American one for its duty-based ramification.[196]

B. Horizontality of the right side

Horizontality[197] of human rights has turned out to be a progressive trend in global practises, of constitutionalism[198], though not homogeneously adhered. Traditionally, courts were used to remain vigilant only against state actors and gave cold shoulder towards horizontality of rights.[199] However, the ubiquity of right protection exhorts

186 Islam, 'A Review of Public Interest Litigation Experiences in South Asia' (n 87) 65.

187 Mara Malagodi, 'Constitutional Developments in a Himalayan Kingdom*'* in Sunil Khilnani, Vikram Raghavan, and Arun K. Thiruvengadam (eds), *Comparative Constitutionalism in South Asia'* (OUP 2013) 87.

188 *Banarasi Mahato v. Election Officer of Dhanusha & Others*, NKP 154 (SC 2022 BS).

189 *Adhikari v. Secretariat of the Council of Ministers*, NKP, 821 (SC 2048 BS) (1991 AD).

190 *Bal Krishna Neupane v. HMG, Ministry of Water and Power Resources*, and in *Bal Krishna Neupane v. PM Girija Prasad Koirala and Others.*

191 *Sapana Pradhan-Malla for the FWLD v. Ministry of Law and Justice*, 5 Sarvocca Adalat Bulletin, 1, Asoj 16–30, 2053.

192 *Meera Dhungana v. Ministry of Law and Justice* NKP 2052 (1995) Vol 5, 462.

193 *Tara Devi Poudel v. Cabinet Secretariat*, NKP 2058 Vol 43 No. 7/8, 375.

194 Unequal Citizens (The World Bank: Kathmandu 2006) 43.

195 Tripathi, 'Public Interest Litigation in Comparative Perspective' (n 81) 65.

196 W Menski, AR Alam and MK Raza, *Public Interest Litigation in Pakistan*, (Platinum Publishing Ltd 2000) 114-16.

197 Mark Tushnet, *Weak Courts and Strong rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (n 17) Ch. 7.

198 Ridwanul Hoque, 'Horizontality of Fundamental Rights in Bangladesh' (2021) 32(1) Dhaka University Law Journal 55, 71.

199 Age-old reluctance is reflected in court's numerous decisions e.g. in India *Zee Telefilms vs. The union of India* (2005) 4 SCC 649, and in Sri Lanka *Rienzie Perera v University Grants Commission* [1978-80] 1 Sri LR 128.

to lean towards horizontality,[200] 'one of the most important and hotly debated in comparative constitutional law'[201]. South Asia is not an exception to this global practise[202] though remained noticeably unnoticed for a while[203]. The cases of South Asia showed that the concept of horizontality remained quiescent before global trends.[204] This preparedness to align with global trends indicates trans-judicial migration.

1. India

India, having the oldest constitution in the region, acted as a torch bearer of horizontality in this region.[205] Adjacent jurisdictions cited India as having greater persuasive value.[206] India moved from its limited ability to pursue private action to horizontal protection.[207] In a 1995 case, the Court affirmed its authority to issue appropriate directions to a State or private employer to ensure that the right to life is meaningful.[208] Other jurisdictions borrowed this jurisprudence, as the next section shows.

2. Bangladesh

Originally, the constitutional provisions of Bangladesh's carters for horizontal application.[209] But the practise was not in vogue.[210] Some decisions indicate that

200 This global practise is evident from the wide-ranging acceptance of horizontality, e.g. Ireland, Canada (*Dolphin Delivery case* [1986]), Germany (*Luth Case*, 1958), and South Africa (*Du Plessis vs. De Klerk*, 1996), UK. USA clings to verticality. For a comparative discussion, see Mark Tushnet, 'The Issue of State Action/Horizontal Effect in Comparative Constitutional Law' (2003) 1 International Journal of Constitutional Law 79.

201 Stephen Gardbaum, 'The "Horizontal Effect" of Constitutional Rights' (2003) 102(3) Michigan Law Review 387.

202 For instances of horizontal effects, to which I will soon come, see AIR 1982 SC 1473, 34 BLD 2014 HCD 129, 1 *Sri LR* 2005 167.

203 Rehan Abeyratne, 'Ordinary Wrongs as Constitutional Rights: The Public Law Model of Torts in South Asia' (2018) 54 Texas International Law Journal 1, 5.

204 Constitutional provision of Bangladesh originally carter for horizontal application (see Constitution of Bangladesh, HCD is empowered to 'give such directions or orders to any person or authority' for breach of fundamental rights (Article 102(1). But the practise was not in vogue. Contrarily, in Sri Lanka, fundamental rights infringed by 'executive or administrative action' is amenable to court's scrutiny Article 126(2).

205 Article 32 of the Indian Constitution is reticent about who can file a writ. Article 226 also empowered the court to issue writ against 'person' also.

206 *Liberty Fashion* (note 216 below) cited Indian cases AIR 1989 SC 16 and AIR 1995 SC 922.

207 See Jeewan Reddy and Rajeev Dhavan, '*The Jurisprudence of Human Rights*' in D M Beatty (ed), Human Rights and Judicial Review: A Comparative Perspective (Martinus Nijhoff 1994) 175, 194.

208 AIR 1995 (SC) 922, See also *the Board of Control for Cricket in India case* AIR 2015 SC 3197, which argued that when fundamental rights are at stake, authority loses relevance.

209 Constitutionally, the HCD is empowered to 'give such directions or orders to *any person* or authority' for breach of fundamental rights under Article 102(1). (Emphasis mine). See also Justice Moyeenul Islam Chowdhury, *Maintainability of Writ Petition: An Apprisal* (Universal Book House 2021) 62-71. Hoque 'Constitutionalism and the Judiciary in Bangladesh' (n 147) 309.

210 *Sultana Nahar v Bangladesh* [1998] 18 BLD 361 (HCD), the court refused to take responsibility for the private parties' committing illegality. However, in another case, *Zakir Hossain vs. GrameenPhone (2003)*, the judicial review of private bodies was extended. In a 2006 case (58 DLR HCD 117), the court found that a private person could be charged with the violation of fundamental rights. Even a prominent constitutional lawyer has opined that. See Mahmudul Islam, *Constitutional Law of Bangladesh* (3rd edn, Mullick Brothers 2012) 608. Islam also argued for the reviewability of private authority in *Abdul Hakim* para 3.

lukewarm application was undercurrent before the 2014 decision.[211] The court boldly endorsed horizontality in *Moulana, MD. Abdul Hakim v Bangladesh*[212]*, where* private bodies were brought within the frontier of judicial review for actions of public nature. Court heavily relied on the English *Datafin Test*.[213] Interestingly, court found that horizontality is constitutionally embedded but then also cited a bunch of 'common law pronouncements'[214] for making it more persuasive. Judicial review in Bangladesh having 'firm common law-base' and hence it ardently stretches its gazes towards other common law jurisdictions to remain in harmony with contemporaneous developments. Indubitably, it enhances borrowing.

This newly defined public authority is an epitome of constitutional borrowing.[215] This borrowing is approvingly quoted in subsequent judgments.[216]

3. Sri Lanka

In Sri Lanka, fundamental rights infringed by 'executive or administrative action' is amenable to court's scrutiny.[217] Sri Lanka has a common trajectory of judicial stalemate towards private actions and the gradually leaning towards horizontality.[218] Sri Lanka adopted 'function test' applied in *Rajaratne* to determine whether a company serves public purposes.[219] Seemingly, the Court's wide interpretation of 'state action' indicates the application of 'indirect horizontality', as in the earlier stages of Bangladesh. In a 2005 case, private entities that discharge public functions were subject to a writ of certiorari.[220]

211 See Hoque, 'Horizontality of Fundamental Rights in Bangladesh' (n 198) 58 calling it 'indirect horizontality'. A 1984 case court brought a private body, namely, Grameen Phone, under judicial scrutiny for incurring extra-charge. 55 DLR 2003, 130.

212 34 BLD 2014 HCD 129. It is the first decision to hold a private party's action, has some pubic ramifications, and is amenable to judicial review.

213 *R v Panel on Takeovers and Mergers, ex parte Datafin* [1987] QB 815 court also cited another English case, R v Disciplinary Committee of the Jockey Club, ex parte Aga Khan [1993] 1 WLR 909.

214 *Abudl Hakim,* para 25.

215 See Ridwanul Hoque, 'The 'Datafin' Turn in Bangladesh: Opening up Judicial Review of Private Bodies' Admin Law Blog, 25 October 2017 https://adminlawblog.org/2017/10/25/ridwanul-hoque-the-datafin-turn-in-bangladeshopening-up-judicial-review-of-private-bodies/#_ftn9 accessed 20 March 2023. See for changing nature of public authority Ridwanul Hoque and Emraan Azad, Judicial Review of State Contracts: Piercing the Narrow Divide Between 'Pure and Simple' and 'Statutory Or Sovereign' Contracts (2017) 28 Dhaka University Law Journal 35-41.

216 *Liberty Fashion Wears Limited vs. Bangladesh Accord Foundation and Ors.* 69 DLR (2017) 519. In this case, judicial review was expanded to include private authorities acting in the public realm. The argument was underpinned by *Abdul Hakim*. The court observed, 'thus it is not necessary for the impugned act or order to be done or made by a public functionary or statutory body or local authority for Article 102(1) to be attracted.' The court also cited *Datafin* and two Indian cases. This may be referred to as supportive borrowing.

217 Article 126(2) of Sri Lankan Constitution.

218 See, for an analysis, Mario Gomez, 'The Modern Benchmarks of Sri Lankan Public Law' (2001) 118, South African Law Journal 581.

219 *Rajaratne v Air Lanka Ltd. and Others* [1987] 2 Sri Lanka L.R.

220 *Harjani v. Indian Overseas Bank* [2005] 1 Sri LR 167.

Constitutional provisions of other countries in the region , i.e. Pakistan,[221] Nepal,[222] the Maldives, and Bhutan reveal[223224] horizontality is textually existent or the provisions are silent. This textual reticence can be used in favour of horizontality to better protect the FR.

The discussion reveals that no one contemplates horizontality from the constitutional outset but then turns to it, through vicissitudes, commonly. The global tradition exerts some impact on this journey, showing that the right-protection mechanism can be borrowed or migrated.

C. Public Law Compensation

Constitutional courts in South Asia are endowed with power to give 'order/ direction'[225] in case of violation of fundamental rights, including compensation. This is a 'common law remedy' travelled to the states with a British law nexus.[226] South Asian judiciaries like India, Pakistan,[227] Sri Lanka[228], and Bangladesh[229] are familiar with public law compensation or 'constitutional tort'. Courts look to their peers to determine the yardstick of compensation in similar cases that heighten borrowing, as the following paragraphs show.

Rudul Shah[230], the first landmark decision in this field, can be characterised as a normative progenitor of compensation jurisprudence in India, was followed by *Nilabati Behera*.[231] Adjoining jurisdictions ardently invoked this justice-enhancing jurisprudence. In *Bilkis Akhter*[232], the earliest compensation case, the Bangladeshi court hinged upon the brethren judiciary, particularly India[233] and Pakistan[234], as well

221 Article 199 (1)(a)(c) direction can be given to any 'authority or person' for enforcing a fundamental right.

222 Article 144 of Nepal Constitution (2015) 'institution and individual' inter alia, can be ordered for enforcing FR.

223 Said nothing about whom the constitutional court can adjudicate.

224 The same is true of the Maldives.

225 Art. 102(1) of the Bangladesh Const., Art 32(2), 226 of the Indian Constitution, Art. 184(3), 199(1) (c) of the Pakistan Constitution, art 144(1) of the Nepal constitution, and Art 21(10) of the Bhutan Constitution. Article 126(3), (4) art 144(b)(1) of the Maldives constitution, where constitutional compensation is explicitly mentioned.

226 There are three countries in this region that were not colonised: Bhutan, Nepal and Afganistan.

227 Mazharuddin vs. Pakistan (unreported case).

228 Dehapriya v Municipal Council, Nuwara Eliye [1996]1 CHRLD 115.

229 *Rustom Ali v the State,* 5 CLR AD 2017 154, Sifat Mahmud v Bangladesh. 5 CLR 2017 HCD 276. It is now claimed that public law compensation is a 'new normal', but development elsewhere has been instrumental to this normalcy.

230 (1983*) 3 SCR* 508.

231 (1993) *2 SCR* 581.

232 (1997) 17 BLD (HCD) 395. The court referred to Pakistani cases *Roushan* (18 DLR SC 214), Begum *Aga Krim Shorish Ashmiri*, (21 DLR SC 1), and the Sri Lankan case *Amaratunge vs Police Constable* (1993). Another notable compensation case is *Mohammad Ali vs. Bangladesh*. (Compensation for illegal search). Reliance on *Rudul Shah* was also placed on Z.I Khan Panna case (2017) 37 BLD (HCD) 271 along with other Indian cases.

233 *Rudul Sah v. State of Bihar and Others,* AIR 1983 SC 1086; *Bhim Shingh*, *M.L.A. v. State of Jammu and Kashmir* (1986) AIR SC 494; *Rural Litigation and Entitlement Kendra v. The State of U.P*. (1991) AIR SC 2216; *Smt. Nilabati Beharav State of Orissa* (1993) AIR (SC) 1960; *Paschim Banga Khet Mozdoor Samity v State of West Bengal* AIR 1996 SC 2426.

234 *Government of East Pakistan v. Rowshan Bijaya Shaukut Ali Khan* 18 DLR 1966 SC 214; *Government of West Pakistan v. Begum Agha Abdul Karim Shorish Kashmiri* (1969), 21 DLR(SC) 1.

as some 'foreign jurisprudence' without any demurring because of the novelty of the issue. The award of damages *Rudul Shah,* on which Bangladesh judges have relied repeatedly[235], underlies its reasoning. It is a shining example of borrowing.

In its appeal, the[236] court conducted a tour d'horizon of foreign judgments[237], including *Rudul Shah*, on compensation. Interestingly, the court's justification for its following Indian jurisprudence was the resonance of textual parlance between Article 102(1) of the Bangladeshi Constitution and articles 32 & 226 of the Indian Constitution.[238] It is implied that textual resemblance can be a means of borrowing. It is noteworthy that some form of abusive selective borrowing is flagrant in the judgement as it discarded the compensation claim by ascribing unnecessary qualifier like 'appropriate case' exceptional cases borrowing from Indian cases like *M.C. Mehta*[239] turned his deaf ear towards other liberal developments thereon.

Likewise, in *the CCB Foundation case,*[240] *Rudul Shah*, *Nilabati Behera*, and three other Indian cases were referred to reach a decision regarding compensation. Although the court referred *to Bilkis,* which suffices for deciding *CCB*, it could not resist itself from citing foreign judgement to escalate its reasoning. This wanton Indian referral lacks proper reasoning, as the court copied paragraph-by-paragraph without explaining how it was pertinent to the case. Sometimes the orgy of foreign reference and overreliance may abridge a court's ingenuity of reasoning. Bangladeshi public law jurisprudence is rekindled through peer jurisdiction, and India is undoubtedly the 'most important comparative jurisdiction for Bangladesh' in this realm.

D. Borrowing from International Laws

1. India

Art.51(c) of the Indian Constitution entrusts the state to 'foster respect for international law' (hereinafter IL). SCI is receptive to international law[241], but in cases of inconsistency, courts take a dualist approach.[242] The 2014 case upheld the interpretation of the constitution in consonant with the UN Charter.[243]

235 Taqbir Huda, 'Fundamental Rights in Search of Constitutional Remedies: The Emergence of Public Law Compensation in Bangladesh' (2021) 21 Australian Journal of Asian Law, 27, 35.

236 *Bangladesh vs. Nurul Amin*, (2015) 3 *CLR-AD* 410.

237 Abeyratne, 'Ordinary Wrongs as Constitutional Rights: The Public Law Model of Torts in South Asia' (n 203) 15.

238 ibid.

239 (1987) AIR SC 1086.

240 70 DLR (2018) 491.

241 Lavanya Rajamani, 'International Law and the Constitutional Schema' in Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta (eds), *The Oxford Handbook of The Indian Constitution* (OUP 2016) 143, 144.

242 *Justice K. S. Puttaswamy and Anor v. Union of India* (2017) 15.

243 *National Legal Services Authority v Union of India* (2014) 5 SCC 438, 486.

SCI observed in *Vishaka and Others v State of Rajasthan*[244], that the absence of domestic law on sexual harassment can be addressed by international convention. The Court describes guidelines following the Convention on the Elimination of All Forms of Discrimination against Women.

(CEDAW), which exemplifies borrowing from the IL. Jurisprudential support for compensation in *Nilabati Behera v Union of India*[245] emanates from article 9(5) of the International Covenant on Civil and Political Rights (ICPPR).[246] Customary law, which is congruent with domestic law, is seen by the court to be incorporated into domestic law.[247]

2. Pakistan

Art.40 Of the Pakistani constitution to promote international peace and friendly relations. Ratification of principal human rights treaties[248] compels countries to borrow rights contents. *The Federation of Pakistan v Shaukat Ali Mian*[249] decided in favour of IL in domestic adjudication, if not incongruent with domestic law. A similar tone was previously echoed in *the M/S Najib Zarab Limited v Government of Pakistan*[250] case urging compliance with the IL.

In the vehicular pollution case, international environmental conventions served as the guiding horizon for the court.[251] *Shela Zia*[252] considered international environmental law, i.e., the 1992 Rio Declaration, because at that time no environmental provision was enshrined. The court found that the declaration has persuasive value.[253] Thus, environmental jurisprudence from IL.

244 (1997) 6 SCC 241.

245 (1993) SCR (2) 581.

246 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

247 *People's Union for Civil Liberties v. Union of India* (AIR 1997 SC 568.

248 Ahmer Bilal Sofi, 'Pakistan' in Simon Chesterman, Hisashi Owada, and Ben Saul (eds), *The Oxford Handbook on International Law in Asia and the Pacific* (OUP 2019) 590.

249 *PLD 1999 SC 1020.*

250 *PLD 1993 Karachi 96*.

251 *Syed Mansoor Ali Shah v Government of Punjab, PLD 2007 Lahore* 403.

252 1994 SC 693.

253 Ibid Para-9.

3. Bangladesh

Bangladesh is constitutionally obliged to act in conformity with international law.[254] Even its first Constitution, i.e. the Proclamation of Independence, was resolved to comply with international law.[255] Borrowing from the IL in Bangladesh is a two-fold transaction: 1) borrowing in the constitution, and 2) borrowing by the court.

The International Bill of Rights deeply influenced the drafting of the 1972 constitution.[256] Its enforceable and non-enforceable bifurcation of rights stems from the International Covenant on Economic, Social, and Cultural Rights (ICESCR) dichotomy.[257] Dr. Hossain, chair of the drafting committee, was well-conversant in the IL.[258] Constitution 1972 heavily borrowed concepts, words, and phrases from International Human Rights Law.[259]

Bangladesh belongs to the dualism, but[260] this stereotypical division is seemingly diluted. The invocation of international law by top Bangladeshi courts is spawning,[261] markedly in international human rights law,[262] to ascribe expanded meaning to fundamental rights.[263] *Bangladesh v. Unimarine S.A. Panama*[264] has directly complied with customary international law.[265] *HM Ershad*[266] established that a court's invocation of an IL, although not directly enforceable, is not precluded unless state law runs to its counter. The Bangladesh National Woman Lawyers' Association (BNWLA)[267] bridged the legislative gap by resorting to CEDAW and has formulated guidelines for sexual harassment that resemble *Vishakha*. The court extensively borrowed definition and

254 Art.25 Of the Constitution to respect the IL and principles enunciated in the UN Charter. See Kamal Hossain and Sharif Bhuiyan, 'Bangladesh', in Simon Chesterman, Hisashi Owada, and Ben Saul (eds), *The Oxford Handbook on International Law in Asia and the Pacific* (OUP 2019) 604; Sumaiya Khair, 'Bringing International Human Rights Home: Trends and Practises of Bangladeshi Courts' (2011) 17 Asian Yearbook of International Law, 47-84; Sheikh Hafizur Rahman Karzon and Abdullah Al Faruque, 'Status of International Law under The Constitution Of Bangladesh: An Appraisal' (1999) 3(1) Bangladesh Law Joournal, 23.

255 Karzon and Faruque, 'Status of International Law under the Constitution of Bangladesh: An Appraisal' (n 253) 26.

256 Abdul Halim, '*GonoPorishod Bitorko'* (Constituent Assembly Debate) (CCB Foundation 2014) 480, Constituent Assembly discussed the relevance of the UDHR.

257 Haque, 'The Bangladesh Constitutional Framework and Human Rights' (n 70) 60.

258 Hoque, 'The Founding and Making of Bangladesh's Constitution' (n 65) 114.

259 Justice Habibur Rahman, 'Our Experience with Constitutionalism' (1998), Bangladesh Journal of Law, 115, 117.

260 Haque, 'The Bangladesh Constitutional Framework and Human rights', (n 70), 70. Muhammad Ekramul Haque, Current International Legal Issues: Bangladesh, (2017) 23 Asian Yearbook of International Law 3, 15.

261 Shaheed Fatima, 'Using International Law in Domestic Courts – Part I: Domesticated Treaties' (2003) 8 Judicial Review 81; Abdullah Al Faruque, 'Judicial Invocation of International Law' in Mohammad Shahabuddin (ed), *Bangladesh and International Law*, (Routledge 2021) 37.

262 See Ridwanul Hoque and Mostafa M. Naser, 'The Judicial Invocation of International Human Rights Law in Bangladesh: Questing a Better Approach' (2006) 46 Indian Journal of International Law 151, 160.

263 Haque, 'Current International Legal Issues: Bangladesh' (n 259) 4.

264 29 DLR 1977 AD 252.

265 Emraan Azad, 'Customary International Law', in Mohammad Shahabuddin (ed) *Bangladesh and International Law* (n 261) 61.

266 21 BLD (AD) (2001) 69.

267 Two thousand and nine 14 BLC 694.

jurisprudence from the IL. *Nurul Islam v Bangladesh*[268] demarcates the contour of right to life based on UN Charter and World Health Organisation resolution. As a contario, Mia J in an International Crimes Tribunal (Bangladesh) case[269] refused to be guided by international criminal law developed by the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY). This IL-friendly approach escalates borrowing in many cases[270] and fortifies interactions with international law.

4. Nepal

International law is predominant in the formation of the Nepalese legal system.[271] Nepalese human rights cases are rife with IL-references.[272] In *Sunil Babu Pant v Nepal Government*[273], SC cited several international conventions observing that Nepal should 'internalise international practise' and neglecting it will be internationally censured.[274] In numerous cases[275], the Court bridged the domestic gap through the International Human Rights Law that resulted in the domestication of IL and constitutional borrowing in Nepal.[276] Multitudinous referrals to CEDAW in Gender equality and violence cases also exemplifies borrowing.[277]

5. Sri Lanka

Article 27(15) of the Sri Lankan Constitution fosters respect for IL.[278] Sri Lanka is an adherent of dualism.[279] In *Weerawansa v The Attorney General* SC, the right to life

268 52 DLR (2000) 413.

269 *Bangladesh vs. Abdul Qader Molla* LEX/BDAD/004/2013 although Chowdhury J found persuasive value in both.

270 *Bangladesh v Somboon Asavaham* 32 DLR (AD) (1980) 194 (Bar and fetter is violative of IL) *State v Md. Roushan Mondal*. 26BLD (HCD) (2006) 549(How to treat children charged with criminally. The court relied on CRC and other IL); *Bangladesh Legal Aid and Service. Trust v. Bangladesh,* Writ Petition No. 8283 of 2005 (Mandatory death penalty is at odds with international law), *Saiful Islam Dildar v. Bangladesh and others*, 50 DLR (1998) 318. (Extradition of Anup Chetiya) *M. Saleem Ullah v. Bangladesh*., 47 DLR (1995) 218 (International legal ramification of Troops in Haiti). *Bangladesh v. Golam Azam,* 46 DLR (AD) (1994) 194 (defining citizenship borrowing from Convention on the Reduction of Statelessness, 1961).

271 Pratyush Nath Upreti and Surrya Sybedi, 'Nepal', in Simon Chesterman, Hisashi Owada, and Ben Saul (eds), *The Oxford Handbook on International Law in Asia and the Pacific* (OUP 2019) 635.

272 Geeta Pathak, *'*Paradigm Shifts in Internalisation of International Law: A Case Study of Growing Human Rights Jurisprudence in Nepal*',* (2018) 6(2), Kathmandu School of Law, 12-40.

273 (Writ No. 917) 2008 Nepal Judicial Academy Law Journal, 261.

274 ibid 280-81.

275 *Mira Kumari Dhungana and Others v. Ministry of Law Justice and Parliamentary Affairs and Others* NKP (2052) 468, *Sapna Malla Pradhan and Others v. Office of the Prime Minister and Others* NKP (2065) 917.

276 Pathak, 'Paradigm Shifts in Internalisation of International Law: A Case Study of Growing Human Rights Jurisprudence in Nepal' (n 271) 2012.

277 See *Advocate Jyoti Paudel et. al. v. Nepal Government*, WN WO-0424, 2064 cited in Some Landmark Decision of Supreme Court, vol.2, 2010, p.561(Court directed to implement and enact law according to CEDAW), *Reena Bajracharya and Others v. Royal Nepal Corporations, Cabinet Secretariat and Others*, NKP 2057 BS (2002), p. 376 (where discrimination to female air is invalidated resorting to CEDAW and other Int. instruments).

278 See also art. 13(6) word 'general principle of law recognised by community of the nation' indicates IL.

279 Ministry of Foreign Affairs Legal Adviser's Division, 'Guidelines relating to the Conclusion of International Agreements' (February 1971), later reissued as SP/CSA/07 (3 July 2007) by the Office of the Secretary to the President.

was construed in light of the ICCPR.[280] In *Tikiri Banda Bulankulama*, the Supreme Court availed of international environmental principles , i.e. pre-cautionary principle.[281] The court borrowed the definition of torture, which embraces both physical and mental aspects, from the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).[282]

Sometimes extreme legal pluralism gives a sceptical eye to IL.[283] Consequently, the country may leans more to non-borrowing of IL rather to borrowing, especially when it underwent diabolical carnage and depredation of Human Rights (HR) by its champions themselves.

IV. The Migration of Constitutional Ideas and Culture

A. Constitutional Unamendibility

A constitutional amendment can be unconstitutional despite its procedural compliance with the amendment procedure. It is not a new concept in public law.[284] In South Asia, migration of ‘Basic Structure Doctrine (BSD)’ or constitutional entrenchments is multifarious. It migrates from other region that is called here ‘inward migration’. Second, both borrower and borrower of BSD can be South Asians, which is called intra-regional migration. Third, BSD migrates outward from this region that is called here ‘outward migration’. The developmental trajectory of unconstitutional constitutional amendments is not within the purview of this study.[285] There are some ‘commonalities in terms of accepting’ BSD in South Asia, which may be evidence of borrowing.[286]

1. India

Textually, the power to amend the constitution is seemingly untrammelled in the Indian constitution in Art. Three hundred and seventy[287], and unamendability was

280 *Weerawansa v The Attorney General and Others* (2000) 1 Sri LR 387.

281 *Banda Bulankulama, Tikiri. v.* Secretary, Ministry of Industrial Development (2000) 4.

282 See Amrith Perera, ‘Sri Lanka’ in Simon Chesterman, Hisashi Owada, and Ben Saul (eds), *The Oxford Handbook on International Law in Asia and the Pacific* (OUP 2019) 670.

283 See Veronica Taylor, ‘Afghanistan’ in Simon Chesterman, Hisashi Owada, and Ben Saul (eds), *The Oxford Handbook on International Law in Asia and the Pacific* (OUP 2019) 680.

284 Ridwanul Hoque, The Politics of Unconstitutional Amendments In Bangladesh, in Abeyratne and Bui (eds) *The Law and Politics of Unconstitutional Constitutional Amendments in Asia* (Routledge 2022) 210.

285 See for details, Yaniv Roznai, *Unconstitutional Constitutional Amendments: the Limit of Amendment Power*, (Oxford University Press 2017); Richard Albert and Bertil Emrah Oder (Eds), *An Unamendable Constitution? Unamendability in Constitutional Democracies* (Springer 2018).

286 Haque, M.E, The concept of ‘basic structure’: A constitutional perspective From Bangladesh, (2005) 16(2) Dhaka University Law Journal, 123.

287 Choudhry, ‘How to Do Constitutional Law and Politics in South Asia’ (n 6) 20.

rejected earlier according to British law.[288] The concept of immutable provision evolved through a perplexing itinerary of trichotomous constitutional battle among the judiciary, executive, and legislature through[289] *Shankari Prashad*, *Sjjan Singh*, *and Golak Nath, and* finally endorsed in *Keshavananda* by a 7:6 split,[290] subsequently applied in *Indira Gandhi* and *Minerva Mills* more explicitly[291] that 'simultaneously become the hero and villain' in Indian constitutional firmament.[292]

German Basic Law contains an eternity clause in its Art. 79.[293] Germany affects the incorporation of BSD in India in a varied manner.[294] In 1966, German scholar Conrad vehemently argued in favour of incorporating implied limitations into the Indian constitution.[295] The lawyer, Mr. Nambyar, used his thesis to form arguments and persuade the court to adapt the BSD in India.[296] Roznai claimed that BSD 'migrated from Germany to India'.[297] Germany was not the only impetus; court was also imbued with a 1963 Dhaka High Court case[298] where the origin of the doctrine was established[299] and a Sri Lankan case[300]. Sikri Chief Justice relied on Justice Holmes' reasoning in *Towne vs. Eisner*[301] and the observed constitution are to be contextually construed.

This indicates that the BSD can be an example of the adaptation of a foreign concept. Therefore, in India, two types of borrowing is evident, i.e. inward and intra-regional.

288 Roznai, *Unconstitutional Constitutional Amendments* (n 284) 42. Before the BSD, sovereignty was prevalent in British Parliamentary sovereignty, and this concept is also a transplanted concept as this study will demonstrate.

289 Thiruvengadam, 'Revisiting the Role of the Judiciary in Plural Societies (1987)' (n 101) 348.

290 For a splendid itinerary of this journey, see Mate, 'Two Paths to Judicial Power: The Basic Structure Doctrine and Public Interest Litigation in Comparative Perspective' (n 127) 175.

291 For a detailed discussion of BSD in *India, see* Sudhir Krishnaswamy, *Democracy and Constitutionalism in India: A study of Basic Structure Doctrine*, (Oxford University Press 2009). *For the underlying politics of BSD in India,* see Surya Deva*, '*Constitutional Politics Over (Un)Constitutional Amendments The Indian Experience' in Abeyratne and Bui (eds) '*The Law and Politics of Unconstitutional Constitutional Amendments in Asia* (n 284) 189-209.

292 Chintan Chandrachud, 'Constitutional Falsehoods: The Fourth Judges Case and the Basic Structure Doctrine in India*'* in Abeyratne and Bui (eds) '*The Law and Politics of Unconstitutional Constitutional Amendments in Asia* (n 284) 150.

293 The German Constitution made Federalism, democracy, and the socialist Republican character of the state unamendable. Federal Constitutional Court of Germany held 'there are constituent principles so basic, so elementary' that are not even constitutionally amendable. (1951) 1 BverfGE 14, 32. See Vicki Jackson and Jamal Green, 'Constitutional Interpretation in Comparative perspective: Comparing Judges or Court?*'* in Ginsburg and Dixon (eds.), *Comparative Constitutional Law* (n 64) 607.

294 Roznai claimed 'it migrated from Germany to India.' Roznai, *Unconstitutional Constitutional Amendments* (n 285) 42.

295 Justice Mustafa Kamal wrote, '… his views on the limitation of amending power was considered and noted by the majority Judges in Keshavananda'. Justice Mustafa Kamal, *Bangladesh Constitution: Trends and Issues* (Dhaka University Publication Bureau 1994) 107.

296 Granville Austin, *Working a Democratic Constitution. History of the Indian Experience* (Oxford University Press 1999) 199-201, Khanna J, a majority judge, put reliance on his work.

297 Roznai, *Unconstitutional Constitutional Amendments* (n 285) 42.

298 *Muhammad Abdul Haque v Fazlul Quader Chowdhury* (1963) 15 DLR Dacca 355. Khilnani, Raghavan, and Thiruvengadam, 'Reviving South Asian Comparative Constitutionalism' (n 3) 7. This case was also referred to in *Sajjan Singh* AIR 1965 SC 845 case.

299 Haque, 'the concept of 'basic structure': A constitutional perspective From Bangladesh', (n 284) 124.

300 *Liyanage v. The Queen* [1967], AC 259. Five judges were relied upon, Sikri C.J., Shelat & Grover JJ. and Hegde & Mukherje J.

301 245 US 418.

2. Pakistan

The BSD in Pakistan has been shrouded in equivocation in its earlier stages.[302] Presumably, the revulsion to adapt resulted from its putative Indian origin. However, the Supreme Court of Pakistan has asserted the essence of this doctrine.[303] Lately, Pakistan has accepted it, albeit disavowed earlier,[304] the existence of some salient constitutional features[305], but the Supreme Court of Pakistan has never struck down any constitutional amendment duly promulgated by parliament.[306] Thus, after borrowing the doctrine lukewarmly exists here, not robust, doctrine like India and Bangladesh. This is termed a thick version of BSD.[307] This shows that after borrowing an idea, its rigour can escalate or diminish.

3. Bangladesh

BSD, after being acceded to India, migrated to neighbouring countries, most notably to Bangladesh[308], which endorsed BSD in the famous *Eight Amendment case*[309], which expressly referred to the Indian *Kesavananda* case.[310] In *Anwar Hossain* court was reminiscent of those Indian precedents that recognises the judicial independence as a basic principle.[311] After reading the argument, one may have contended that he was hearing Bangladeshi *Keshavananda* because the court's conclusion was greatly informed and influenced[312] by it. Even the minority judge endorsed the minority judge's reasoning.[313] The court took recourse to comparative public law.[314]

302 Obscurity is evident from the language of court like 'there may be a basic structure' (PLD 1997 SC 426, PLD 2005 SC 719). See also Matthew J Nelson, 'Amending the Constitutional Standards of Parliamentary Piety in Pakistan? Political And Judicial Debates' in Abeyratne and Bui (eds) *The Law and Politics of Unconstitutional Constitutional Amendments in Asia* (n 284) 111.

303 *Fazlul Quader Chowdhury v Muhammad Abdul Haque (*1963) PLD SC 486.

304 PLD 1998 SC 1263, 1313.

305 *District Bar Association Rawalpindi v Federation of Pakistan* PLD [2015] SC 401. Where the court observes some basic and salient features of the constitution. See also *Mahmood Khan Achazai v. Federation of Pakistan* PLD 1997 SC 426, *Nadeem Ahmed v. Federation of Pakistan* (2010), which discussed inalterability.

306 Nelson, 'Amending Constitutional Standards of Parliamentary Piety in Pakistan? Political And Judicial Debates' (n 284) 111.

307 Ridwanul Hoque, 'Implicit Unamendability in South-Asia: The Core of the Case for The Basic Structure Doctrine', (2018) 3 Indian Journal of Constitutional & Administrative Law, 23.

308 Roznai, *Unconstitutional Constitutional Amendments* (n 285) 47. On the development of BSD in Bangladesh, see Ridwanul Hoque, 'Eternal Provisions in the Constitution of Bangladesh: A Constitution Once and for All?' in Albert and Oder (eds) *Ius Gentium: Comparative Perspectives on Law and Justice* (Springer 2018).

309 1989 BLD (Spl.) 1. It was a 3:1 decision. AD invalidated a constitutional amendment that dismantled the oneness of the HCD and was anathema to the basic unitary character of the state (Per BH Chowdhury and SA Ahmed) and for violating the perambulatory text 'rule of law' (MH Rahman J). For a splendid summary, see Justice Mustafa Kamal, *Bangladesh Constitution: Trends and Issues* (n 294) 95-106.

310 Roznai, Unconstitutional Constitutional Amendments (n 285) 47.

311 Halamai, *Perspective on Global Constitutionalism* (n 73) 56.

312 Hoque 'Constitutionalism and the Judiciary in Bangladesh' (n 147) 316.

313 ATM Afjal J in para 584 quoted Khanna and concurred with him.

314 Hoque, *Judicial Activism in Bangladesh* (n 80) 115.

Unlike India, the BSD faces no attack to be undone by parliament or seen as cops by judges. This indicates that the transplant was deeply entrenched in Bangladesh. Bangladesh's move from implicit unamendibility to explicit unamendability, as enshrined in Article 7B,[315] divulges that an idea can be expanded after borrowing. BSD is instrumental to overjuddcialization of politics.[316] Using this doctrine Supreme Court 'struck down 4 of 16 constitutional amendments'.[317] In determining the contours of the BSD, Indian jurisprudence serves as a light source for Bangladesh.

A heated debate arose from the 2015 Honduran case,[318] which was created by the invalidation of the original constitution resorting BSD in *16*th *Amendment Case*.[319] Compared with the two South Asian jurisdictions, Yap and Abeyratne theoretically defended it.[320]

They showed *that Siddiqui* did not invalidate the original constitution. 15th amendment of the Constitution, as a fresh constitutional settlement, is a dismemberment[321] that redeems constituent power. 16th Amendment is repugnant to that, and so can be vitiated.

B. Minority, Stealth Theocracy, and Secularism

South Asia, the most colourful place for its multi-ethnic, multi-religious, multi-lingual diversity,[322] is fraught with rivalry because of its heterogeneous ethnicity.[323] The constitutional behaviour of minority protection is influenced by the neighbouring jurisdiction and thus, what is called here, 'implicit constitutional cultural borrowing' occurs. There is a commonality in the treatment of minorities in this region. In India,[324]

315 Hoque commented on it as a 'stark deviation from global practises of designing constitutional entrenchment clauses' Ridwanul Hoque 'Eternal Provisions in the Constitution of Bangladesh: A Constitution Once and for All?' in Albert and Oder (eds), *An Unamendable Constitution? Unamendability in Constitutional Democracies'* (n 284) 197. This can be an instance of 'abusive borrowing'.

316 Ridwanul Hoque, 'Judicialisation of Politics in Bangladesh' in Tushnet and Khosla (eds), *Unstable Constitutionalism* (n 4) 261, 278.

317 Hoque, 'Eternal Provisions in the Constitution of Bangladesh' 129.

318 David E. Landau, Rosalind Dixon, and Yaniv Roznai, 'From an Unconstitutional Constitutional Amendment to an Unconstitutional Constitution? Lessons from Honduras', (2019) 8 *Global Constitutionalism*, 40.

319 *Bangladesh v. Asaduzzaman Siddiqui*, 10 ALR 2017 AD 2 2017.

320 Po Jen Yap and Rehan Abeyratne, 'R.J. Judicial self-dealing and unconstitutional constitutional amendments in South Asia', (2021) 19 ICON, 127. See M.A. for their reply. Sayeed and Lima Akter, 'Constitutional dismemberment and the problem of pragmatism in Siddiqui: A reply to Po Jen Yap and Rehan Abeyratne' (2022) 20 I.CON, 890.

321 Richard Albert, 'Constitutional Amendment and Dismemberment' (2018) 43 Yale J. Int'l L. 1.

322 Deepika Udagama 'The Democratic State and Religious Pluralism' in Sunil Khilnani, Vikram Raghavan, and Arun K. Thiruvengadam (eds), *Comparative Constitutionalism in South Asia'* (OUP 2013) 146.

323 Burhan Uddin Khan and Muhammad Mahbubur Rahman, *Protection of Minorities, Regimes, Norms and issues in South Asia* (Cambridge Scholars Publishing 2012) ch 5.

324 Fundamental rights are guaranteed regardless of religion, race caste sex or place of birth (Articles 14, 15). In addition to scheduled castes and backward sections being protected Article 15(4), establishing educational institutions for minority Art 30(1) and limited self-governance Art. 244 are recognised.

Pakistan,[325] Bangladesh,[326] Sri Lanka,[327] Nepal,[328] Bhutan[329], and the Maldives, minority rights are[330] either constitutionally dealt with or general protection is given by majority.

Sri Lankan constitutional jurisprudence is imbued with India[331], which is a constitutionally secular state. Constitutional adjudication on abridging the religious practise of minority underpins its argument by quoting Indian judgement by describing it as of 'decisive importance'.[332] By relying on Indian judgments[333], a restricted view of freedom of religion was construed, although both countries defended secularism.[334] The European Court of Human Rights (ECtHR) decision was also mentioned.[335] One diplomat stated that Sri Lanka borrowed Indian jurisprudence selectively to buttress its position.[336] Constitutional marginalisation of minority is evident in Sri Lanka's 1972 and 78 Constitutions, unlike its earlier Soulbury Constitution.[337] Likewise, Pakistan also did the same to the religious minority through constitutional amendment.[338] While making of the constitution of Bangladesh, the special indigenous status of the Chittagong Hill Tract people was summarily rejected.[339] Arguably, it transpires that intolerance towards minority can be influenced by other states, and foreign decisions are admittedly cited to substantiate it. It epitomises the migration of constitutional culture.

The concept of state religion is not inconsistent with intentional legal standards.[340] However, in secularism, theocracy[341] lurks behind the veil, though it has a basic

325 In addition to FR, art. Thirty six explicitly states the protection of a minority although it provides no constitutional definition.

326 In addition to general constitutional provisions, no extra guarantee is provided.

327 In addition to general equal protections, no special protection is provided. See on disenfranchising minorities, Roshan de Silva-Wijeyeratne, 'Dominion Status and Compromised Foundations: The Soulbury Constitution and Sinhalese Buddhist Nationalist Responses to the Founding of the Ceylonese State, 1931–1956' in Kevin YL Tan and Ridwanul Hoque (eds), *Constitutionalism in South Asia* (Hart Publishing 2021) 143.

328 Article 51 (j) (8), (10) gives special protection to 'indigenous ethnic groups and the Madhesi community, but these state policies are judicially unenforceable by art.55.

329 General protections with majority.

330 Officially, there is no minority and constitutionally recognised citizenship belongs to Muslims only (art.9).

331 Jacobsohn and Shankar, 'Constitutional Borrowing in South Asia: India, Sri Lanka, and Secular Constitutional Identity' (n 171) 181.

332 In *the case of Natalie Abeysundere v. Christopher Abeysundere and another* (1997), who ruled on the Indian *Sarla Mudgal* case.

333 *Rev. Satainislaus v The state of Madhhaya Pradesh* (1977), AIR SC 908.

334 Abeyratne, 'Rethinking Judicial Independence in India and Sri Lanka' (n 185) 101.

335 *Kokkinakis v. Greece* (17 EHRR: 397; 260-A Eur. Ct. H.R. (Series A). Where the court dealt with the issue of Proselytism. This is cited in Sri Lankan anti-conversion law case, SC Determination No. 2–22/2004. It is said that the use was utilitarian, without carefully examining jurisprudence in its entirety. Udagama 'The Democratic State and Religious Pluralism' (n 322) 170.

336 ibid.

337 Abeyratne, 'Rethinking Judicial Independence in India and Sri Lanka' (n 185) 112.

338 Constitutional 5th Amendment declared Ahmadyas a non-Muslim. Aziz, *The Constitution of Pakistan* (n 134) 219.

339 Hoque, 'The Founding and Making of Bangladesh's Constitution' (n 65) 112.

340 Udagama 'The Democratic State and Religious Pluralism' (n 322) 151.

341 See Ran Hirschl, *Constitutional Theocracy* (Harvard University Press 2010) 52.

structure,[342] and this secular-theocracy-blended-culture travelled throughout this region. One commented that gradually most of the countries in this region have settled for adopting a state religion or have a primacy for a particular religion.[343] The religion status of this region is split into two streams: secularism and state religion. Sri Lanka[344] constitutionally accords primacy to Buddhism, Pakistan[345], and the Maldives[346] to Islam. By contrast, India,[347] Nepal[348] and Bhutan leaned to secularism. Bangladesh uniquely embraces both state religion and secularism.[349]

Constitutional religion-neutrality or equality is textually protected, but states showed predilection religion which can be termed stealth theocracy.[350] This constitutional culture, i.e. anti-pluralist majoritarianism, travels throughout the region.

In India, the court called Hindutva a way of life[351] even though previously it found that Hindutva was antithetical to secularism.[352] The court also found *that bhumi pujuan*[353] or enchanting "om" [354]are not religious acts; rather, they are secular. Sri Lanka's Supreme Court's jurisprudence on religion follows India quite closely, both in terms of defining secularism in a manner that favours the majority faith.[355] To prohibit Muslim speakers from Azan,[356] the Sri Lankan court cited from Indian jurisdiction.[357] Like India, the court defined the constitutional contours of religion from a majoritarian prism.[358] Pakistan's Supreme Court found Islam as a salient feature of the constitution.[359]

342 Justice Sikri in *Keshavananda.*

343 Udagama 'The Democratic State and Religious Pluralism' (n 322) 154.

344 Article 9 of the Sri Lankan constitution placed Buddhism at the top of the priority. In contrast, in *Trustees, Kapuwatta Mohideen Jumma Mosque v. OIC Weligama*, SC Application No.38/2005 (FR), the court held that Sri Lanka is a secular state.

345 Article 2 of the Convention (state religion).

346 Article 10 (state religion), art.109 (President shall be Muslim), Article 149 (Judges must be Muslim).

347 Preamble to the Constitution, S.R. Bommai vs. The union of India (1994).

348 Art. Twenty six granted freedom of religion. It omitted its earlier 'Hindu-state-provision' of 1990 constitution.

349 Art. 2A (State religion) aa. 8, 12 (secularism). In a 2015 case (*Tayeeb case*), the court brought equilibrium between these two.

350 See Yvonne Tew, 'Stealth Theocracy' (2018) 58 Virginia Journal of International Law, 31.

351 *Prabhoo v. Prabhakar Kasinath Kunte* (1995 SCALE 1).

352 *S.R. Bommai v. The union of India*, 3 SCC 1 (1994).

353 Writ Petition (PIL) No. 2 of 2011, High Court of Gujarat, 10 February 2011.

354 Pratap Bhanu Mehta 'Passion and Constraint: Courts and the Regulation of Religious Meaning' in Rajeev Bhargava, (eds), *Politics and Ethics of the Indian Constitution* (Oxford University Press 2009) 311, 336.

355 Abeyratne, 'Rethinking Judicial Independence in India and Sri Lanka' (n 185) 124.

356 *Ashik v. Bandula and Ors* (2007) 1 SRI LNKA L REP. 191.

357 The Indian decision on using drums by church (AIR 2000 SC 2773.) was referred by Sri Lankan court.

358 Tew (n 350) 77.

359 (PLD 2015 SC 401). Matthew J Nelson (n 302) 111 describes Islamization and shariatization. See Mohammad Waseem, 'Constitutionalism and extra-constitutionalism in Pakistan' in Mark Tushnet and Madhav Khosla (eds), *Unstable constitutionalism: Law and Politics in South Asia* (Cambridge University Press 2015) 124, 149. The author claimed that Pakistan was imbued with the example of Turkiye and Iran.

Bangladesh is also lumbered with this debate[360] and creates ambivalence by its juxtaposition of secularism and state religion in its constitution.[361]

These examples demonstrate that religio-political constitutional cultural can be borrowed. The features of stealth theocracy are seemingly predominant here.

C. Colonial Continuum in Decolonised Era, Legal Education and Expert Role in Transplant Facilitation

Colonial rule is a significant factor in legal transplantation.[362] The South Asian states underwent the scourge of colonialism except Nepal, Bhutan and Afghanistan. In de-colonised era, nascent democracies borrowed the cornucopia of constitutionalism based on the unwritten British constitution[363] e.g. Westminster-model.

The Government of India Act, 1935, was instrumental in the making of the Indian and Pakistan constitutions[364] and influential in transplanting the Westminster model,[365] colonial courts, and the executive structure.[366] Although Eurocentric legal heritage has been transplanted from different continents, it[367] would be myopic to conclude that their constitution is a replica of colonial one. They borrowed a bill of rights, popular sovereignty from America and France,[368] an Irish model of the directive principle of American[369] judicial review was also transplanted[370], and Parliamentary Sovereignty was rejected.[371] Bangladesh, which emerged after the sanguinary liberation war,[372] inherited all pre-existing laws.[373] While marshalling its constitutional array, it took

360 Interestingly, a balance was stroked by *Tayeeb* case where court found the legislation shall preclude religious practise in case of conflict. In other cases, religious practise shall have primacy. Bangladeshi Secularism has no anathema to religion, Kamal Hossain, *Bangladesh: Quest for Freedom* (UPL 2013) 142.

361 Hoque, 'Unconstitutional's Politics Amendments In Bangladesh' (n 283) 224.

362 Jean-Louis Halpérin, *Western Legal Transplants and India* (n 69) 14.

363 Text of Speech by Ivor Jennings given in Nepal on 'Constitutional Experiences in Asia' c.1958, C16.9, ICS 125, Sir Ivor Jennings Papers, University of London.

364 Guruswamy, 'Constitution Crafting in South Asia: Lesson on Accommodation and Alienation' (n 2) 465.

365 For Pakistan, see Sadaf Aziz, 'From Nation to State: Constitutional Founding in Pakistan*'* in Kevin YL Tan and Ridwanul Hoque (eds), *Constitutionalism in South Asia* (Hart Publishing 2021) 64.

366 Valentina Rita Scotti 'India: A 'Critical' Use of Foreign Precedents in Constitutional Adjudication*'* in Groppi and Ponthoreau (eds), *The Use of Foreign precedents by Constitutional Judges* (n 75) 74.

367 Section 18(3) of the Indian Independence Act, 1947, enjoins the continuity of previous Indian and Paksitan laws. Unstable 125,128,157.

368 Charles O. H. Parkinson 'British Constitutional Thought and the Emergence of Bills of Rights In Britain's Overseas Territories', Kumarasingham (eds), *Constitution-making in Asia: Decolonisation and state-building aftermath of the British Empire* (Routledge 2016) 41.

369 Tan and Hoque, 'South Asian Constitutional Foundings: Beyond History' (n 1) 4.

370 Husain, *H. The Judicialization of Politics in Pakistan* (n 78) 14.

371 A. *K. Gopalan v. State of Madras,* [1950] 3-AIR. 2, 34 The Court found that India followed the American model and shunned Parlimantary sovereignty.

372 See Richard Sission and Leo E. Rose, *War and Secession: Pakistan, India and the creation of Bangladesh*, (University of California Press 1990) 235.

373 It was established by Laws Continuance Enforcement Order, 1971. Muhammad Ekramul Haque, 'Formation of the Constitution and the Legal System in Bangladesh: From 1971 To 1972: A Critical Legal Analysis' (2016) 27 Dhaka University Law Journal, 41, 44.

recourse to Indian, American, British, and vicariously Irish experience.[374] Bangladesh took 'inspiration from wisdom of its past'[375].

The Westminster model was also adopted in the Sri Lankan 1948 constitution,[376] under the aegis of Ivor Jennings.[377] Though Nepal was never colonised[378], it was influenced by English jurisprudence through Jennings' involvement in the 1959 constitution[379] and neighbouring Indian experts[380] in 1951 constitution. This results in the Westminster model adoption[381] and non-justiciable Directive Principles.[382] The Nepalese legal system is an admixture of common and civil law.[383] Likewise, India exerts its influence in Bhutan's 2008 constitution by evolving its senior advocate.[384]

The colonial impact over the Maldives was negligible, but[385] Jennings' assistance in drafting the 1953 constitution, although having no knowledge about whom he was drafting,[386] was instrumental to adoption of the Westminster model.[387] Afghanistan faced no coerced colonial borrowing, and its 1931 constitution[388] is a conglomeration of foreign constitutional concepts, i.e. French, U.S., Türkiye and Iran.

Colonial continuity leads to the transplant of draconian anti-constitutional ideas in South Asia like emergency and preventive detention.[389] Sometimes this civilising-mission-mentality leads to constitutional imperialism.

In the 1950s, South Asian constitutions were drafted under the auspices of Ivor Jennings' tutelage. His engagement in Sri Lanka (1941-55), Pakistan (1954-55), Maldives (1952-53), and Nepal (1959) was instrumental to the establishment of

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374 Hoque, 'The Founding and Making of Bangladesh's Constitution' (n 65) 114.

375 BH CHowdhyry in *8th Amendment Case* (para. 53)

376 Roshan de Silva-Wijeyeratne '*Dominion Status and Compromised Foundations: The Soulbury Constitution and Sinhalese Buddhist Nationalist Responses to the Founding of the Ceylonese State, 1931–1956'* (n 338) 147

377 Hoque, 'The Founding and Making of Bangladesh's Constitution' (n 65) 112.

378 Mara Malagodi, 'The Locus of Sovereign Authority in Nepal', in Mark Tushnet and Madhav Khosla (eds), *Unstable constitutionalism: Law and Politics in South Asia* (Cambridge University Press 2015) 49.

379 Bipin Adhikari, 'Constitutional Foundings in Nepal: Experience with Changing Parameters' in Kevin YL Tan and Ridwanul Hoque (eds), *Constitutionalism in South Asia* (Hart Publishing 2021) 154, 160.

380 Malagodi, 'Constitutional Developments in a Himalayan Kingdom' (n 187) 91.

381 Malagodi, 'The Locus of Sovereign Authority in Nepal' (n 378) 69.

382 ibid 68.

383 Pathak, 'Paradigm Shifts in Internalisation of International Law: A Case Study of Growing Human Rights Jurisprudence in Nepal' (n 271) 26.

384 Winnie Bothe, 'Making Bhutan's Constitution: Institutionalising a 'Traditional' Monarchy' in Kevin YL Tan and Ridwanul Hoque (eds), *Constitutionalism in South Asia* (Hart Publishing 2021) 183.

385 Shamsul Falaah, 'Towards a Maldivian Nation-State: The Constitutions of 1932 and 1968', in Kevin YL Tan and Ridwanul Hoque (eds), *Constitutionalism in South Asia* (Hart Publishing 2021) 204.

386 ibid 223.

387 ibid 228.

388 Ebrahim Afsah, 'Afghanistan: An Aborted Beginning' in Kevin YL Tan and Ridwanul Hoque (eds), *Constitutionalism in South Asia* (Hart Publishing 2021) 249.

389 Baxi, Upendra Baxi, *Modelling 'Optimal' Constitutional Design for Government Structures in Comparative Constitutionalism in South Asia*, (OUP 2013) 29.

Eastminster. The Constituent Assembly of Bangladesh was also benefited by British expert,[390] foreign visit by draughters.[391]

Indian legal education imbibes English,[392] and likewise, legal training of Bangladeshi Judges is heedless of uncritical adherence to western theories.[393] Persons engaged in the constitution of India and Pakistan were well-versed in English law, and most of them were educated in Oxbridge and from renowned Inns.[394] English learning middle class was at the forefront of these two countries' anti-colonial movements, as shown by Prof. Razzaq.[395] Dr. Hossain, protagonist of Bangladesh constitution-making, was educated in Oxford and well conversant in English law. These backgrounds compel, consciously or sub-consciously, people to look or borrow from English law.

E. Emergency: Constitutional Nihilism

Emergency is a constitutional aberration that subverts *supreme lex* by keeping it in abeyance. The concept of emergency was inherited from colonial intruders who used it as a tool to consolidate their oppressive rule.[396]

In South Asia, the emergency has a long constitutional pedigree. Bangladesh's democracy was eclipsed by an extra-constitutional takeover for four states[397] that thought the emergency was unthought-of in the original constitution.[398] Sri Lanka has been encumbered with an almost 'permanent state of emergency since 1971'.[399] India underwent a third emergency in 1975-77. Pakistan is an epitome of an emergency-infested 'praetorian state'; lifted its last emergency in 2007, enduring the scourge of 33 years of military rule.[400] Emergency can be characterised as colonial borrowing, and its characteristics functionally resemble one another. In emergencies, some commonalities in South Asia, discussed below, from which one may deduce, might have some form of constitutional cultural borrowing.

390 Halim, *'GonoPorishod Bitorko'* (n 256) 423.

391 Khanna showed B.N. Rao, an Indian construction manufacturer, visited Ireland and met the attorney general. H.R. Khanna, *Making of Indian Constitution*, (Eastern Bok Company, 1981) 77 Dr. Hossain visited London to take experience (Constituent Assembly Debate-CAD, Halim, 'GonoPorishod Bitorko' (n 256) 214.

392 Sathe, S.P., *Judicial Activism in India* (Oxford University Press 2003) 42.

393 Hoque, *Judicial Activism in Bangladesh*, (n 80) 217.

394 Mohammad Ali Jinnah (Lincoln's Inn) and Mohandas K. Gandhi (Inner Temple), and Jawaharlal Nehru (Inner Temple). (Husain 2018:26).

395 Gayantaps Abdur Razzaq, Political Parties in India, (UPL 2022) 97-102.

396 Anil Kalhan, 'Constitution and Extra constitution: Colonial Emergency Regimes in Post-Colonial India and Pakistan' in Victor V. Ramraj, Arun K. Thiruvengadam (eds) '*Emergency Powers in Asia Exploring the Limits of Legality'* (Cambridge University Press 2010) 91, and Ahmed, *Bangladesh: Emergency and Aftermath 2007-2008*, (University Press Ltd 2014) 56.

397 Ridwanul Hoque 'The Emergency and Judiciary's Politics In Bangladesh' (2009) 2 NUJS L. Rev. 183, 186.

398 Ahmed, *Bangladesh: Emergency and Aftermath 2007-2008* (n 396) 56. The Constitution (Second Amendment) Act of 1973 incorporated emergency provisions, i.e. Articles 141A, 141B & 141C.

399 Abeyratne, 'Rethinking Judicial Independence in India and Sri Lanka' (n 185) 128. Articles 15 & 155 of the Sri Lankan Constitution.

400 Ahmed, *Supremely falsifying? Adebat on Judicial Restraint and Activism in Pakistan* (n 136) 222.

1. Judicial Passivity and Attempt to Kerb the Court's Jurisdiction

One of the vicious quagmires in the midst of an emergency is judicial oversight of the megalomaniac executive. Judiciary is torn between the horns of dilemma regarding whether to wage war of attrition with the regime or accept the fact for the sake of institutional integrity.[401]

During the extra constitutional regime, the tight-lipped senior judiciary shunned [its] responsibility of upholding justice[402] can be termed judicial escapism[403], which egregiously permits the exclusion of judicial review,[404] refusing bail petitions, confirming detention orders,[405] or glorification of martial law.[406] This executive-minded judicial nonchalance, being shorn of vigilance, endorsed executive orders; administered 'harsh or unjust laws'[407] that is antithetical to constitutionalism.[408] During the 2007 emergency in Bangladesh, some laudatory assertions[409] existed, but executive actions went unheeded under the pretext of not intervening in the trichotomy of power. Notably, AD acted as a defender of the executive[410] rather than protecting HR. Even the unconstitutionality of some draconian emergency provision went unnoticed by it.[411] These are examples of a mixed bag of assertion and passivity or submissivity[412]. Attempt to kerb by appointing Chief Justice (CJ) superseding seniority[413] or abridging the tenure of CJ by General Ershad[414] was also evidenced.

In Sri Lanka, the emergency state evidenced the promulgation of detention laws,[415] exclusion of the reviewability of emergency declarations, and restriction[416] on fundamental rights.[417]

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401 This dilemma also reverberates in the words of MH Rahman in *8th Amendment case* Para- 488. Kamal, Bangladesh Constitution: Trends and Issues (n 294) 57-60.

402 Ridwanul Hoque (n 29) 309.

403 ibid 326.

404 *Halima Kahatun vs. Bangladesh* (1978) 30 DLR (AD) 207. *Jamil Huq*, 34 DLR (AD) 125.

405 *Ahmed Nazir vs. Bangladesh* (1975) 27 DLR 1975 (HCD) 259. See Shahdeen Malik, *Bangladesh*, in *Preventive Detention and Security Law*, 41-57.

406 *State vs. Abedin J* (1980) 32 DLR (AD) 110.

407 *Halima Khatun vs. Bangladesh* (1978) 30 DLR (SC) 207.

408 See S. H. Karzon and A. A. Faruque, 'Martial Law Judiciary and Judges: Towards an Assessment of Judicial Interpretation' (1999) 3(1) Bangladesh Journal of Law, 23.

409 *Adv. Sultana Kamal and ORs v Bangladehs* (2008). *Saleem Ullah vs. Bangladesh* (2008), *Moyezuddin Sikder vs. State* (2007) 59 DLR (HCD) 287, where the court found that the right to bail cannot be curtailed even in an emergency. It was regrettably turned over by AD.

410 Moudud Ahmed, *Bangladesh: Emergency and Aftermath 2007-2008* (n 396) 170.

411 In one decision, AD shockingly precluded the bail-granting power of court, including SC, if arrest was under emergency provision (60 DLR AD 42).

412 Hoque, 'The Emergency and The Politics of Judiciary In Bangladesh' (n 397) 201.

413 M. Ehteshamul Bari, The Independence of Judiciary *in Bangladesh: Exploring the Gap Between the Theory and Practise,* (Routledge 2021) 99.

414 Sara Hossain, 'Confronting Constitutional Curtailments: Attempt to Rebuild Independence of Judiciary in Bangladesh' in Paul R. Brass (eds), *Routledge Handbook of South Asian Politics* (Routledge 2010) 193.

415 Prevention of Terrorism Act No. 48 (1979).

416 *Yasapala v. Wickremasinghe and Others* (1984).

417 Art 15 of Sri Lankan Constitution.

Ostrich-like style and judicial surrender during the Indian emergency were also evident.[418] Denial of right to life by court,[419] attempt to oust judicial review,[420] debilitating the court by unexpected appointment[421], rampant detention,[422] mischievous transfers [423] were some features identical to the others. Likewise, the Pakistan Court's flagrant loyalty to military oligarchy is evident in its many decisions.[424] Coterie dismissed sixty recalcitrant appeals judges among an emergency.[425] Military Generals in Pakistan and Bangladesh have attempted to justify usurpations based on religion.[426]

2. Legitimation by the Court

The statement of an emergency by a court is not unprecedented.[427] The Court embarked on this journey by applying the misconstrued Kelsenian theory in *State vs. Dosso*.[428] In a state of emergency, Pakistan SC is accused of acting at the behest of the fourth branch of state.[429] This also migrates to other jurisdictions[430] and ignites extra-constitutionalism thereon.[431] A series of cases shows that Pakistan Court legitimised the usurper on the doctrine of necessity.[432]

It is alleged from the legal quarter of Bangladesh that the judiciary was not only subservient to the usurper, the Trojan horse, but also became a partner to it.[433] It is buttressed by superior court's decision where judiciary found that the supreme law character of the constitution is precluded by martial law,[434] the constitution is

418 Shylashri Shankar, 'Indian Judiciary: Imperium in Imperio' in Paul R. Brass (eds) *Routledge Handbook of South Asian Politics*, 168-69.

419 *ADM Jabalpur* Air Force (1976) SC 11207.

420 The 42nd Amendment Act (1976) though declared unconstitutional in *Indira Gandhi vs. Raj Narain*, at the cost of giving election validity by court. Baxi said, the Court has no other option to validate the election. Baxi, *The Indian Supreme Court and Politics* (n 95) 34.

421 Justice Khanna, a majority judge in *Keshavananda*, was suppressed by the appointment of Justice Beg ibid 33.

422 Care has been taken so that no vestige of liberty may not survive. Sathe (n 392) 101.

423 *S.P. Gupta arose* from this backdrop.

424 For details on the execution of the court see *Pula R Newberg, Judging the State: Courts and Constitutional Politics in Pakitan* (Cambridge University Press 1995) Ch. 6.

425 Osama Siddiq, 'The Judicialization of Politics in Pakistan: The Supreme Court after the Lawyers' Movement' in Mark Tushnet and Madhav Khosla (eds), *Unstable constitutionalism: Law and Politics in South Asia* (Cambridge University Press 2015) 167.

426 General Ziaul Huq Islamised Pakistan, General Rahman and Ershad trod the same path.

427 See Waseem, *'Constitutionalism and Extra-constitutionalism in Pakistan'* (n 370) 124.

428 (1959) 11DLR (SC) 1. Previously, Tamizuddin *Khan* PLD 1955 FC 240 validated emergency.

429 Husain, *The Judicialization of Politics in Pakistan* (n 78) 69.

430 E.g. Uganda, *Uganda vs. Commissioner of Prisions ex-part, Matovu* [1966], 1 EA 514.

431 Ahmed, 'Supremely Falliable? Adebat on Judicial Restraint and Activism in Pakistan' (n 136) 219-20.

432 *Nusrat Bhutto vs. Chief of Army Staff* (PLD 1977 SC 657), *Zafar Ali Shah vs. General Pervez Mosharrf* (1999).

433 See M. Amirul Islam, 'Status of a Usurper: A challenge to the constitutional supremacy and constitutional continuance in Bangladesh' (1997) 2 *Chittagong University Journal of Law*, 1.

434 *Halima Kahatun vs. Bangladesh* (1978) 30 DLR (AD) 207, *Sultan Ahmed vs. Chief Election Commissioner* (1978) 30 DLR (HCD) 291.

subservient to it[435], or the martial law is called the supreme law of the land[436]. Likewise, in India, *ADM Jabalpur* validated the detention under emergency law was legitimate. Here, Khanna J., the lone dissenter, was opposed, but that cost him the deprivation of Chief Justiceship.[437]

3. Robust Resurrection of the Court

The modicum of activism can be manipulated by the moribund judiciary during an abject emergency ambience and is thus tormented by a lack of public confidence. To bury past 'judicial failing during martial law regime', the Bangladeshi judiciary escalated activism to fetter the undeterred executive and regain public confidence.[438] Hoque comparatively commented on post-emergency activism

> '*This post emergency period can to some extent be likened with that of India that gave birth to the most powerful and activist court in the world and also with Pakistani Supreme Court's post-emergency (2009 onward) new activism*.'[439]

Judicial re-emergence through activism in India, a post-emergency phenomenon[440], was a repercussion of past judicial apathy. Seemingly, the quest for 'self-legitimisation' or 'social legitimation'[441] can be seen as populist rhetori'. Chaudhry Court in Pakistan became the most interventionist after the emergency.[442] The court was purported to regain some popular legitimacy or self-legitimation by expanding the PIL in the 1990s inaugurated by *Benzir Bhuto*[443]*, which was* identical to India after 1977.[444]

The preceding discussion indicates that emergency jurisdiction can be borrowed. Instances are numerous where courts have resorted to foreign citation to substantiate their emergency ruining, thus migrating anti-constitutional ideas.

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435 *Khandker Ehteshamuddin* case 33 DLR (AD) 154; see also (1980) 32 DLR (AD) 110.

436 (1978) 30 DLR (HCD) 291, 296.

437 Yap and Abeyratne, 'Judicial self-dealing and unconstitutional constitutional amendments in South Asia' (n 320) 140.

438 Declaring martial law unconstitutional by the 5th and 7th amendment cases can be seen as a volte-face to the judiciary's previous stance on martial law. See Ridwanul Hoque (n 29) 319.

439 Hoque, *Judicial Activism in Bangladesh* (n 80) 204.

440 Baxi 'Taking Sufferings Seriously: Social Action Litigation in the Supreme Court of India' (n 91) 107.

441 See the details of the post-emergency Supreme Court Baxi in *The Indian Supreme Court and Politics* (n 95) 121-245.

442 Siddique, (n 425) 176.

443 PLD [1988] SC 416.

444 *Shirin Munir v Govt of Punjab* PLD [1990] SC 295. *Asma Zilan*i also declared that martial law was illegal when no martial law was in circulation. It seems that judiciaries reprimand martial law when guns are laid down, but among coterie rule, they are tight-lipped. Annulment of martial law amendment by the BDSC was in the AL regime, which was greatly impaired by the emergency.

F. Other Instances of Borrowing and Transplantation

The invocation of comparative constitutional adjudication through trans-judicial communication[445] is spawning in the South Asian constitutional milieu. American judgments were referred to only by earlier SCI, especially in civil liberties.[446] The same is true in Pakistan.[447] Smith's study revealed that this propensity is declining.[448] The court is more leaning to English law than the United States. Empirical case study on 1908 cases capturing 1950-2010 by Scotti portrayed reference to foreign cases was high in 1950-60 s and USA is most cited jurisdiction.[449]

In *the Naz Foundation, court*[450] dialogically considered comparative materials as interpretive apparatus.[451]. *DK Basu v. The state of West Bengal*[452] comparatively dilates on preventive detention and compensation jurisprudence.[453] *Maneka Gandhi*[454] and *Aruna Shaunbag v. The Union of India*[455] can be the best-suited exponent of foreign citation.

Constituent assembly, as a midwife of the constitution, can also play a central role in borrowing from consulting experts or by comparative experience.[456] The Constituent Assembly of Bangladesh extensively considers the constitutions of socialist countries[457] to determine the breadth of their right to property. The Assembly borrowed the

445 A-M Slaughter, 'A Typology of Transjudicial Communication' (1994) 29 University of Richmond Law Review, 99.

446 Tripathi, 'Foreign Precedents and Constitutional Law' (n 99) 334.

447 Husain, *The Judicialization of Politics in Pakistan* (n 78) 3.

448 Adam M. Smith, 'Making Itself at Home: Understanding Foreign Law in Domestic Jurisprudence: The Indian Case', (2006) 24 BERK. J. INT'L L. 218. 24.6% of the referred foreign judgments, of which 22.3% were English, 6.% is U.S.

449 Scotti, 'India: A 'Critical' Use of Foreign Precedents in Constitutional Adjudication' (n 366) 84-94.

450 (2009) 160 DLT 277.

451 Lawrence *v. Texas* [539 U.S. 558 (2003)] was cited along with many other cases from South Africa and Canada and the ECtHR to establish the unconstitutionality of the delegitimisation of anal sex. Choudhury, '*How to Do Comparative Constitutional Law in India*', 46-47.

452 (1996) 1 S.C.R. 416.

453 Anand J's consideration of decisions from the UK [*Miranda v. Arizona* (1966) [United States *v. Ryan* (1965), Trinidad [*Maharaj v. Att'y Gen. of Trin. & Tobago*, [1979] A.C. 385] and New Zealand [Simpson v. Att'y Gen. [1994] 3 NZLR 667 (CA)] evoke Universalist tone. See Sam Halabi, 'Constitutional Borrowing as Jurisprudential and Political Doctrine in Shri DK Basu v. State of West Bengal' (2013) 3 Notre Dame J. Int'l. & Comp. L. 73.

454 AIR 1978 SC 597. Constructing the right to life, encompassing the right to travel, Justice Iyar relied on U.S. academic works and decisions. Bhagwati did not concur with and reject U.S. case laws. It epitomises that cross-judicial fertilisation is not undebated, even between concurring judges. It is submitted that the novelty of issues compels the court to consider foreign precedents.

455 (2011) 4 SSC 454. It allows, albeit passively, euthanasia. Finding no law in this regard, SCI relies on foreign judgements, notably Airedale NHS Trust v. Bland that allows withdrawal of artificial life support at the discretion of the doctor.

456 Ghai, 'Constituent's Role Assemblies in Constitution Making' (n 58) 27.

457 *Halim, 'GonoPorishod Bitorko'* (n 256) 133, 134, 288-292, 355.

unenforceable Fundamental Principle State Policy from Ireland[458] and justified it by reference to the Union of Soviet Socialist Republics (USSR), China, and the German Democratic Republic (GDR)[459]

Abusive borrowing by constitutional courts is not unprecedented. For instance, in scandalising the court, which is borrowed from English Law,[460] the court of India[461] and Bangladesh[462] followed the earliest egregious English practise being unheeded or neglecting the current progressive development thereof.[463] This eschewal of recent development is indicative of two hypotheses: either the senior judiciary is incognisant of the recent development of these obsolete borrowed ideas, or there is partial selection in borrowing ideas that substantiates the court's predestined conclusion. For the first, it results in contextual abusive borrowing that gives a nonchalant shrug to the context; for the rest, it is selective abusive borrowing. Although England shunned it subsequently, the draconian practise, emanates from colonial borrowing is engrafted in decolonised South Asian jurisdiction.

V. Conclusion

The constitution can be seen as a nation's autobiography, sometimes written by taking recourse to experiences from global consciences. This sacred document is not stagnant but is seen as a vivid living tree. The same texts give different meanings with the change in time. These new meanings, ascribed to judicial statemanship, are often ingenuously invented and often borrowed. In this pervasive spread of right conceptions and interconnected judicial knowledge, it is difficult to discern who borrowed from whom. Some sacrosanct rights innately exist in almost all societies, not for borrowing, but because of their inherent sanctity.

458 Art.25 Of the Irish constitution is based on the Directive Principles of Social Policy. See ME Haque, 'In Search of Origin of Recognition of Economic and Social Rights as Constitutional Principles: From Ireland to Bangladesh', (2012) 23(2) Dhaka University Law Journal, 41; ME Haque, 'Legal and Constitutional Status of The Fundamental Principles of State Policy as Embodied In The Constitution Of Bangladesh', (2005) 16 Dhaka University Law Journal, 47. These unenforceable principles are ingenuously enforced by the Court through a negative enforcement doctrine or sometimes under the umbrella of the right to life. The widened construction of the right to life often relied on Indian Judgments. Haque, Muhammad Ekramul Haque, 'Justiciability of Economic, Social and Cultural Rights under International Human Rights Law*'* (2021) 32(1) Dhaka University Law Journal, 39, 51-52.

459 Halim, 'GonoPorishod Bitorko' (n 256) 269.

460 Ehsan A Siddiq 'Scandalising The Court And the Law Of Contempt' in Chowdhury Ishrak Ahmed Siddiky (eds) The Rule of Law in Developing Countries (Routlrdge 2018) 106, 108. Ridwanul Hoque, 'The Province of the law of contempt of court undetermined' (1998) Chitt. University Journal of Law, 181.

461 D.C. Saxena vs. Ho'ble Chief Justice of India, AIR 1196 (SC) 2481. Here Justice Justice Barucha refers to the 1976 judgement of *Attorney General of Canada and Alexander et al*., *In re* 65 DLR (3rd), 1976, 608, in support of the retaining the contempt of scandal. However, he ignored the more recent and much more widely discussed judgement of *R v. Kopyto*, who held that contempt of court does not constitute a reasonable restriction on freedom of speech.

462 Advocate Riazuddin Khan v. Mahmudur Rahman (2011) 63 DLR (AD) 29, Advocate Riazuddin Khan, v. Mahmudur Rahman (2012) 9 App. Div. Cases. 140. To buttress its decision, the court frequently referred to the foundational English case R. v. Almon (1765), a 250-year-old archaic decision that was never delivered by the court and posthumously published by the son of the author judge. See D. Hay, 'Contempt by Scandalising the Court: A Political History of the First Hundred Years2 (1987) 25 Osgoode Hall Law Journal 434, 466.

463 In 2013, contempt of court fell into desuetude in England on the recommendation of the Law Commission, and the resultant abolishment came into force by Parliament. Section 33(1) of the Crime and Courts Act, 2013, states "*scandalising the judiciary (also referred to as scandalising the court or scandalising judges) is abolished as a form of contempt of court under the common law of England and Wales*".

In South Asia, emerging judicial activism endeavoured to confront egregious encroachments by boldly asserting rights. The people-centric stance taken by one court emboldens others to stand with a destitute multitude. Similar reasoning tapestries of Bhagwati and Iyar JJ's (India), Haleem J (Pakistan) and Kamal J (Bangladesh) in PIL cases indicate preparedness from the bench to uphold justice. Such judicial vigilance requires an understanding of prevalent judicial practises. Consequently, courts in South Asia often rely or persuasively mention foreign judgments in constitutional litigation involving PIL, compensation, etc. All mentions are not necessarily borrowing; some are for solidifying the judgement.

Constitutional ideas and practises of one country can influence the others. A complex itinerary of BSD in South Asia states that the same idea can take the taste of borrowing and non-borrowing in the same region. Anti-constitutional culture can creep into democracy from overseas. It transpires that constitutional culture can be transplanted. Colonial nexus, experts' involvement in constitution-making and legal education can stir constitutional borrowing and transplant. American Due process or judicial review from Justice Coke and Marshall's reasoning, as presented in *Dr. Bonham* and *Murbury*, encourages judges to delve into the development thereof. In enforcing economic, social, and cultural rights, the Bangladeshi court, while understanding penumbra rights, often relies on Indian judgement as well as international laws to widen the meaning of the right to life.[464]

Courts' social auditing role and justice-enhancive pro-impoverished mindset are distinct characteristics of this region. But it is still a curious amalgam of judicial vigilance and retrogressive stalemate. Truly, this region receives less attention than it deserves, but it is no more illegitimate children of Anglo-Saxon legal lineage. It generates its own distinctiveness.

This study shows that constitutional borrowing and transplant in South Asia occur in both the big-C and small-C constitutions.[465] Now we will develop some guidelines to check abusive constitutional borrowing, though it is highly unlikely to be completely eliminated.

1. Abusive constitutionalism creeps into democracy by kerbing and packing the court. Despotic rulers often attempt to be legitimised by court. The captured court became their partner. Independent of the judiciary is *sine qua non-to* check abusive constitutional borrowing.

2. Actors who engage in abusive borrowing should be monitored and sanctioned.

464 Muhammad Ekramul Haque, 'Protection of economic, social and cultural rights: a critical analysis of the fundamental principles of state policy in the constitution of Bangladesh' (PhD thesis, Monash University 2017) https://doi.org/10.4225/03/5897e15dd6345 accessed 13 June 2023.

465 See Sultan Babar Mirza, 'The Chaudhry Doctrine: A "small-c constitutional" Perspective' in Moeen H Cheema and Ijaz Shai Gilani (eds), *The Politics and Jurisprudence of the Chaudhry Court 2005-2013* (OUP 2015) 34-39.

3. Democratic institutions are often liable for accompanying usurpers after being captured. The election commission and national human rights commission should be sufficiently robust and independent.

4. The Regional Human Rights Court for South Asia can prevent the subversion of constitutionalism and abusive borrowing. Lamentably, South Asia is shorn of such mechanisms, unlike other regions. A vigilant regional court can act as a watchdog against abusive borrowing. It is suggested that a regional court comprising top court judges from South Asia be established.

5. Regional institutions should not remain quiescent because of the dismantlement of constitutionalism. Vociferous censure and economic sanctions may stop perpetrators. At the same time, it runs the risk of being an abuser. Therefore, power equilibrium should be maintained.

6. Embracing legal realism can be conducive to combating abusive borrowing because it is mindful of constitutional substance and context.

7. Regional legal dialogues can generate awareness against abusive borrowing.

8. Western ideas should not be accepted uncritically. Legal education in this region are replete with western scholarship. Legal literature should be indigenised. Otherwise, the context specificity of the region will evaporate, and contextual ideas will infiltrate.

9. The judiciary's judicialization and politicisation are to be checked.

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