Chapter 1

INTRODUCTION

1.1 Introduction

Directive or Fundamental Principles of State Policy as a term of constitutional jurisprudence have not got any universal definition. From the view of Bangladesh Constitution, it might be said that fundamental principles of state policy usually are those principles which behave as fundamental guide to the policy making whether it be social, economic, administrative or maybe international, governance of the united states, making laws and interpreting the Constitution and legislation. Directive Principles of State Policy are available as instructions or guidelines for the governments at the center in addition to states. Though these rules are non-justifiable, they are fundamental from the governance of the region. The idea of fundamental principles of state policy has been taken from the Irish Republic. They were incorporated within our Constitution in order to provide economic justice and also to avoid concentration of wealth from the hands of some individuals. A distinguishing feature of directive principles which is invariably found in all constitutions adopting these principles is that these are not enforceable in a court of law.

The Constitution of Bangladesh embodies in its part II certain directions to the State terming them as 'Fundamental Principles of State Policy'. The Constitution itself terms these as Principles', not 'laws'.' Apart from setting certain ideological objectives, interestingly, this part II contains also the provisions regarding basic necessities which says that 'It shall be a fundamental responsibility of the State to attain, through planned economic growth, a constant increase of productive forces and a steady improvement in the material and cultural standard of living of the people, with a view to securing to its citizens' the basic necessities and rights, like food, clothing, shelter, education, medical care, right to work, etc.

1.2 Objectives

Main Objective

The objective of this study is to analyze the fundamental principles of the state policies & its enforcement mechanism in Bangladesh.

Specific Objectives:

The specific objectives of the study are

1. To analyze the fundamental principles of the state policies & its enforcement mechanism.
2. To assess the views of the fundamental principles of the state policies & its enforcement mechanism in Bangladesh.
3. To suggest policy implications arising out of the study.

1.3 Methodology

I have taken option from my Research and some other advocates to whom I work as an appreciative. As secondary source, acts, journal , newspapers and law reports have been used. Research methods include theoretical procedures experimental studies numerical schemes, statically approaches etc.

It helps us collect samples, data and final a solution to the problem. The functioning of the criminal justice system is wide enough to achieve its goals and objective. It's ultimate goal is undoubtedly to make the society safer for its people and protection of law and right in the process of our justice system.

1.4 Limitation of the Study

Several limitations remain regarding the coverage and comparability of data.

- Lack of time.
- Confidential matters of the organizations.
- Lack of experience.
- As I m a student it is not possible for me to collect all the necessary information.
- There are many primary data but among them a specific amount of data are secret and for that I could not show them in my report.

Chapter 2

CONCEPTUAL ISSUES

2.1 Fundamental Principles of State Policy

Modern states are welfare states and the principal purpose of such a state is public welfare. This trend of public welfare is being, to some extent, reflected in most of the written constitutions of states when they adopt some directive principles in their constitutions. The underlying philosophy behind the adoption of such principles is that they will obligate the state to take positive action in certain direction in order to promote the welfare of the people and achieve economic democracy.

The idea of directive principles in the Constitution was first introduced in the Irish Constitution of 1937. Article 45 of the Irish Constitution provides some principles under the head~ of Directive Principles of Social Policy." Following this Irish example the idea has got place in the Burma (Mayanmar) in 1949 of India in 1950, of Pakistan in 1956 and 1962 and so has been the case of the Bangladesh, Constitution of 1972. The principles have been adopted under the heading of "Directive Principles of state Policy' in the Indian Constitution "Principle of State Policy in the Pakistan Constitution of 1962 and "Fundamental Principles of state Policy" in Bangladesh constitution.

"Directive or Fundamental Principles of State Policy" as a term of constitutional jurisprudence has not got any universal definition. But as the term indicates it means primarily those principles which are considered fundamental in the matters of policy formulating by the government. From the view point of Bangladesh Constitution it may be said that Fundamental Principles of State policy are those principles which act as fundamental guide to the policy making, be it social, economic, administrative or international, governance of the country, making laws and interpreting the Constitution and laws.

2.2 Futures of Directive Principles

'A distinguishing feature of directive principles which is invariably found in all constitutions adopting these principles is that these are not enforceable in a court of law

This non-justifiability of these principles have paved the way for critics to portrait them in variety of descriptions.

First, these are described as 'beau ideal" in the Constitution, i.e., the highest standard of excellence in the Constitution. Because they embody the principles of high ideals like economic emancipation, eradication of poverty, illiteracy etc.

Second, these are described as 'veritable dustbin of sentiment,' for they are the best idealistic words written down in the Constitution without providing anything for their enforcement. They are, therefore, nothing but the mere expression of good sentiment of the Constitution makers.

Third, these are sometimes described as 'decorative in the Constitution.' Tushar Chatterjee a communist member of Indian parliament beanery harsh in assessing the utility of the directives, T1enfed that he could not but feel that these solemn declarations in the Constitution were not directives but mere decorative in the constitution.

Professor K.C. Wheare has described them as 'paragraphs of generation Constitution. He has severely critcised insertion of such decoratives in the Constitution. He has doubted "whether there is any gain, on balance, from introducing these paragraphs. of generalities into a Constitution anywhere at all, if it is intended that the Constitution should command the respect as well as the affection of the people. If the Constitution is to be taken seriously, the interpretation and fulfillment of these general objects of policy will raise great difficulties for courts and for legislatures into conflict and disrepute. If these declarations are, however, to be neglected, if they are to be treated as Swords', they will bring discredit upon the

Professor Ivor Jennings has also questioned the reasonableness of in inserting such directives in a Constitution when he describes them as "the ghost of Sidney and Beatric Webb Stalk through the pages of the text" and "expression of Febian Socialism without socialism."

Fourth, these principles are also described as "a moral homily on the one hand, and as a manifesto of aims and aspiration of the other hand",2 for they are all principles relating to

economic, social and cultural rights which are not a matter of immediate achievement. They are goals to which the state has to reach and, keeping in line with the socio-economic progress, the state will implement them step by step. They, therefore, work as programmes of the government.

2.3 Significance of the Directive Principles

When the directive principles are not judicially enforceable it is very natural to comment that they are mere decorative in the Constitution and most of the prominent writers, as mentioned earlier, have strongly criticized their inclusion in the Constitution. But it is not proper to says that they are totally useless. They have

First, directive principles have great political importance. If the government fails to carry out these directives no court can compel the government to implement them. Yet these principles have been declared to be fundamental in the governance of the country and a government which rests oh popular vote can hardly ignore them. “If any government”, as Dr. Ambedker said, “ignores them, they will certainly have to answer before the colectbrate at the election time”. It is, therefore, not correct to criticise these principles as meaningless and useless. The actions of the government under democratic system are subject to scrutiny by the masses and the opposition. If the government, being in favourable situation and proper means to implement these, pursues a policy not in accordance with the principles or fails to implement these, it would be a patent weapon at the hand of the opposition to discredit the government. If the government violates fundamental rights it has to answer before the court but if it neglects directives it has to answer before the highest tribunal—the public opinion which will bring its ultimate fall in the next election. Thus the sanction behind directive principles is a political one which has a greater importance than fundamental rights in respect of keeping a continuing responsible government.

Second, the directives have a great role to play in the interpretation of the Constitution and other laws. Though courts can not declare a law invalid on the ground that it contravenes a directive principle, nevertheless the constitutional validity of many laws can be maintained, as has been done in India,’ with reference to the directives so that they do not serve as ‘mere homily’. Article 8(2) of the Constitution specifically allowed to refer to these principles for understanding the meaning of the provisions of the

constitution which are doubtful or ambiguous. Moreover, like the Magna Carta in England and the Declaration of Independence in. America these directives are behind to influence the judges to a great extent in interpreting the Constitution and law. In interpreting fundamental rights the expressions like ‘public interest’, ‘public purpose’, ‘reasonable restriction’ etc. may be explained by the courts in the light of and paying due emphasis on these directives since the Constitution holds, them fundamental in the governance of the country.

Third, directive principles have both idealistic and educative value. They have idealistic value in the sense that they outline the ideal of a welfare society. They emphasise, in amplification of the preamble, that the goal of the body polity of the state is a welfare state where it has a positive duty to ensure to its citizens social and economic justice and dignity of individuals. And by the proper implementation of these directives that goal can be realised. They have educative value in the sense that they are permanent reminder for those in power for the time being that the goal of the state is to introduce economic democracy.

2.4 Conventions and Directive Principles

Part III, containing articles from 26 to 44 deals with Fundamental Rights.

Some authors ventures to find similarities between the conventions in British constitutional system and directives in written constitution on the ground that like conventions directives are unenforceable and both are considered as fundamental to the governance of the state.1 Again, sometimes question like — In which sense may conventions of the British Constitution be compared with the fundamental principles of state policy ? – is seen in competitive examinations of the law faculties in Bangladesh. Such a question obviously brings the answerer into a precarious problem, for in true sense conventions of British constitutional system can, in no way, be compared with directives of written constitutions. Directives may have a resemblance with conventions on point of unenforceability or like this. But this resemblance or comparison is a quite different perspective; it has neither any relevancy nor does it bear any significance in the field of constitutional law; it does, in no way, touch the substance or philosophy of the two. Because what are conventions in British constitutional system are like steering wheel of the whole structure of the governmental system without which the British constitutional system would be unthinkable. The directive in a written constitution has nothing to do

with it; they cannot be considered even an appendage to the actual working of the governmental system. Secondly, conventions in constitutional jurisprudence are political practices which develop from long time constitutional activities. Directives, on the other hand, are some principles concerning social, economic and cultural rights which nothing to do with political practice.

2.5 Differences between Fundamental Right and Directive Principles of State Policy

Fundamental Right

1) Part III, containing articles from 26 to 44 deals with Fundamental Rights.
2) The Fundamental Rights can be enforceable by a court against the State.
3) These are primarily aim at assuring political freedom to the citizens by protecting them against the excessive State action.
4) The Fundamental Rights are given a pride of place by the Constitution makers.
5) The chapter of Fundamental Rights is sacrosanct and not liable to be abridged by legislative or executive act or orders, except to the extent provided in appropriate Article in Part III.
6) Fundamental rights occupy a unique place in the lives of civilized society and have been variously described in judgment of the Supreme Court as "transcendental", "inalienable" and "personal".
7) There are negative in character. The State is asked not to do certain things for the people.

Directive Principles of State Policy

1) Part II, containing Articles from 8 to 25, deal with Directive Principle of State Policy.
2) The Directive Principles of State Policy can not be enforceable by any Court.
3) These are aimed at securing welfare, social and economic freedoms by appropriate State action.
4) The Directive Principles are given a place of permanence by the Constitution makers.
5) The Directive Principles of State policies have to confirm and to run as subsidiary to the Chapter of Fundamental Rights.
6) The Supreme Court described the Directive Principles of State policy as "Conscience of our Constitution".

7) These are positive in character. The State is directed to take certain positive steps for the welfare and advancement of the people.[1]

Finally in above discussion we understand that the genesis and objectives underlying part II and part III have common desideratum in responding to the social consciousness rest with the constitution making force. While fundamental rights focus on interests of personality, the Directives principles look on to the welfare of society. Judicial remedies for fundamental rights and non justiceable of directive principles are the deliberate strategies of the constitution. The dichotomy between part II and part III and the supremacy of former over the latter a theory based on formalistic and too textual an interpretation.

2.6 Directive Principle under the Constitution of Bangladesh

Unlike other written constitutions the directive principles in the Bangladesh Constitution have got their place under the heading of "Fundamental Principles of State Policy". Articles 8—25 of part 11of the Constitution contain all the principles. Under article &of—the original Constitution of 1972 (i) Secularism, (ii) Nationalism, (iii) Socialism; and (iv) Democrats four principles were ~ principles and all other principles derived from these four as set out in part II were to constitute the whole body of fundamental principles of state policy. Articles 9, 10, 11 & 12 elaborated those four major principles. But during the first martial law regime a drastic change was made in these four major principles. Under this change the term 'socialism meaning economic and social justice' was substituted for the principle Socialism and the almighty Allah' was substituted for the principle 'secularism'. The elaboration under articles 9, 10, 11 & 12 were omitted and some new principles have been introduced in the place. Article 8, however, as it stands now deals with the following four major fundamental principles: (i) Absolute trust and faith in the Almighty Allah, (ii) Nationalism, (iii) Democracy; and (iv) Socialism meaning economic and social justice.

Fundamental Principles – Where to be applied

[1] [http://www.preservearticles.com/201012301972/difference-between-fundamental-right-and directive-principles-of-state-policy.html, last visited on 10 January 2019].

According to Article 8(2) the fundamental principles shall be applied in the following spheres:

(i) they shall be fundamental in governance of the country;
(ii) they shall be applied in making laws;
(iii) they shall be a guide to the interpretation of the Constitution and of the other laws of Bangladesh; and
(iv) they shall form the basis of all works of the state and of its citizens.

But they shall not be enforceable in a court of law.

Short Description of the Fundamental Principles

All the fundamental principles as set out in the Constitution may, for the convenience of study, be classified into following four groups.

2.7 Implementation of Fundamental Principles in Bangladesh

32 years have passed since we achieved our independence. But none of fundamental principles have been implemented to its full swing. Rural electrification, promotion of cottage industries, separation of judiciary from the executive, eradication of poverty and unemployment, population control— all these are yet to be done. It, however, would be wrong to say that nothing has yet been achieved. To some extent rural electrification, communication development, women education etc. have been done. State has also passed law fixing a ceiling for the land to be possessed by an individual; it has made primary education free and compulsory; laws have been made as regards prohibition of intoxicating drinks and drugs. Much effective work, however, had not been done. It cannot be denied, however, that the problems like eradication poverty, achieving full employment, equitable distribution of national wealth, raising living standard are colossal, indeed, and no government whatever be its complexion can achieve miracles. Several decades may take to achieve the goals set forth in the fundamental principles.

Chapter 3

FUNDAMENTAL PRINCIPLES UNDER THE CONSTITUTION OF BANGLADESH

3.1 Governance in Bangladesh

- Bangladesh is one of the more successful developing countries in terms of accelerating growth, making growth pro-poor and improving the indicators of social progress.
- Over the past 10 years, the country has also managed to make progress in governance indicators; however global indicators suggest that improving governance should remain a key priority for the full realization of development aspirations.
- The World Bank's Country Assistance Strategy (CAS) has identified governance as the fourth pillar of priority and offers a range of support to improve the quality of governance.

Bangladesh is one of the more successful developing countries in terms of accelerating growth, making growth pro-poor and improving the indicators of social progress. Over the past 10 years, the country has also managed to make progress in governance indicators; however global indicators suggest that improving governance should remain a key priority for the full realization of development aspirations. This includes the effectiveness of government, the transparency of authorities, and stability of political situations.

The country's Gross Domestic Product (GDP) grew at an average 6 percent a year in the last decade; but recent work on the potential for economic growth indicates that 7.5 percent or higher would be needed for Bangladesh to be a middle income country by 2021. The key question here is: how can improving governance start to catch hold and help boost the prospects for even higher rates of economic growth? And, can continued economic growth be achieved without improving governance?

Recognizing the cross-cutting importance of governance in the overall development of Bangladesh, the World Bank's Country Assistance Strategy (CAS) has identified

governance as the fourth pillar of priority and offers a range of support to improve the quality of governance.

Presently, efforts underway on governance in Bangladesh are centered on three main themes:

1) Efforts are underway to improve core governance systems in areas such as public procurement, financial management, fiscal reporting, and watchdog institutions. The strategy is to enhance accountability by strengthening 'core' governance institutions including the Comptroller and Auditor General, Public Accounts Committee, Bangladesh Bank, Public Service Commission, Securities and Exchange Commission and the courts. One of the largest public financial management trust funds, Strengthening Public Expenditure Management Program (SPEMP) has been supporting the public financial management reforms successfully introducing multi-year budgeting, strengthening financial management systems and improving auditing capacity. The Bangladesh Local Governance Support Project (LGSP) has been supporting union parishads, the lowest tier of elected local government in Bangladesh, in providing services that meet community priorities. The project will focuses on capacity building, particularly regarding financial management and procurement.
2) Giving citizens greater access to public documents, the Right to Information (RTI) Act was passed in 2009 in a bid to increase transparency and change the culture of government officials and their interaction with citizens. The World Bank is working with Government of Bangladesh to develop a program for supporting several agencies to strengthen their compliance with the RTI Act and its rules and regulations on proactive disclosure.
3) The World Bank is also supporting catalytic reforms, through the development of a national identification database in Bangladesh. This will be a great national asset that can provide a platform for reducing fraud, and ultimately improving service delivery. The Bangladesh Identification System for Enhancing Access to Services (IDEA) Project supports the National Identification Wing in this ambitious ID card scheme.

The World Bank has undertaken a series of analytical reports to investigate the impact of governance issues in service delivery. A new financing proposal using a Program for Results instrument is also under preparation to support the government's Enabling Open

Government Program (EOGP) to improve the management of core public services. In light of the low revenue base, strengthening domestic tax mobilization is also a major objective of this program. The Governance Team also supports the World Bank's advisory work to help teams involved in investments in the infrastructure sectors and private sector development efforts. These includes investments in health, education, sanitation, local government strengthening and safety net approaches, which are central to meeting the Millennium Development Goals (MDGs) and improving the quality and efficiency of social service provision to the poor. Through the provision of the DFID financed Joint Technical Advisory Program (JOTAP) a rich set of activities and studies have been undertaken to develop the advisory work, including:

- Bangladesh Poverty Assessment: Assessing a Decade of Progress in Reducing Poverty, 2000-2010
- Climatic Variability and Occupational Diversification in Bangladesh
- Steering Bangladesh in the right direction: A report based on Bangladesh Youth Leadership Summit 2011
- Best practice spectrum renewal and pricing: A review of international best practices and the lessons for the Government of Bangladesh

3.2 Law Making Process

Among various functions of legislature, law making is a lengthy and to some extend complex process. Ceremoniously it is initiated as a form of Bill by the executive or individual member (for Private Bill) in the house as it mentioned earlier. Before submitting a Bill in the parliament, it follows some pre legislative procedure like; drafting, policy development and cabinet approval .These all pre legislative activities are involved in Pre Legislative Phase. In the house, a Bill passes through three distinct stages which are known as Legislative Phase. In parliamentary parlance these three stages usually known as *first reading* (the title of the bill is announced), *second reading* (discussion on the principles of the bills takes place) and *third reading* (motion is moved to pass the bill**)** respectively[2]. A new stage in the legislative phase, called the committee stage, is also now frequently referred to in many parliaments. This stage came into existence in Bangladesh when the seventh parliament set up a special committee, composed of members belonging to both ruling and opposition parties, to review all bills

[2] Jahan and Amundsen, 2012

referred to the JS[3].There is a another phase named Post Legislative Phase which involve the ascent of President and the publication of gazette notification. Considering the above mentioned procedures it is seen that the law making process of Bangladesh devised into three broad phases: Pre Legislative Phase, Legislative Phase and Post Legislative Phase.

Article 80 of the Bangladesh Constitution, 1972 provides that every proposal in the Parliament for making a law shall be made in the form of a Bill and When a Bill is passed by the Parliament it shall be presented to the President for assent. The Parliament can make any law which is not inconsistent with the Constitution since any law inconsistent with the Constitution, to the extent of inconsistency, is void[4].

3.3 Interpretation of Constitutional of Other Laws

Now here before going to the crux of this work, I would like to define some established rules for constitutional interpretations.

Originalist: An originalist is a person who believes that the meaning of the constitution does not change or evolve over time, but rather that the meaning of the text is both fixed and knowable. An originalist believes that the fixed meaning of the text should be the sole guide for a judge when applying or interpreting a constitutional provision.

Textualist: A textualist is an originalist who gives primary weight to the text and structure of the Constitution. The text means what it would have been understood to mean by an ordinary person at the time it was written. Textualists often are skeptical of the ability of judges to determine collective "intent."

Intentionalist: An intentionalist is an originalist who gives primary weight to the intentions of framers, members of proposing bodies, and ratifiers.

Pragmatist: A non-originalist who gives substantial weight to judicial precedent or the consequences of alternative interpretations, so as to sometimes favor a decision "wrong" on originalist terms because it promotes stability or in some other way promotes the public good.

Natural Law Theorist: A person who believes that higher moral law ought to trump inconsistent positive law.

[3] Ahmed, 2002

[4] Article 7(2), the Constitution of Bangladesh, 1972

Equitable interpretation: It means decisions taken on the basis of an innate sense of justice, balancing the interests of the parties, and what is right and wrong, regardless of what the written law might provide. It is often resorted to in cases in which the facts were not adequately anticipated or provided for by the lawgivers.

3.4 Shall of the Basic of State and Citizen

Bangladesh emerged as a sovereign nation on 26 March 1971, the day on which it declared itself as an independent country.[5] The declaration of independence was followed by a 9- month-long bloody war, and the country became physically liberated from Pakistan on 16 December 1971. The people of Bangladesh through the Constituent Assembly, which comprised all elected representatives of people who were elected for the national parliament and Provincial Legislative Assembly through 1970-1971 elections under the Pakistani regime,[6] constituted the new sovereign nation and adopted for themselves the Constitution (hereafter 'Constitution') on 4 November 1972.[7] Bangladesh began its journey with the constituent citizens who were the 'residents' of the then East Pakistan. Unlike in India (see Jayal 2016: 164-168), however, there was no debate in the Constituent Assembly regarding the nature of, or the criteria for, Bangladesh citizenship.

Article 6(1) of the original Constitution of Bangladesh stated that 'the citizenship of Bangladesh shall be determined and regulated by law'.[8] Article 6(2), however, characterised the collective nationality of the people as Bangalee. After an intervening change in 1978,[9] the amended Article 6(2) now provides that the 'people of Bangladesh shall be known as Bangalees as a nation and the citizens of Bangladesh shall be known as

[5] The Proclamation of Independence Order 1971, promulgated by the Constituent Assembly of Bangladesh on 10 April 1971 (with effect from 26 March 1971). See the Seventh Schedule to the Constitution, as below n 3

[6] See the Proclamation of Independence Order 1971, and the Constituent Assembly of Bangladesh Order 1972

[7] The Constitution of the People's Republic of Bangladesh (effective 16 December 1972).

[8] 4 See also art. 152(1) of the Constitution that defines a citizen as 'a person who is a citizen of Bangladesh according to the law relating to citizenship'.

[9] The first military regime extra-constitutionally amended the Constitution to characterise the citizens of Bangladesh as Bangladeshis via the Second Proclamation (Fifteenth Amendment) Order, 1978 (Second Proclamation Order No. IV of 1978), which was later affirmed by the Constitution (Fifth Amendment) Act 1979

Bangladeshis'.[10] It thus seems that Bangladesh sees the 'institution of citizen' both 'as legal status' and 'as collective identity'.

The Bangladesh citizenry has a constitutionally entrenched participatory role in the governance and affairs of the Republic,[11] which is a democracy based on universal adult franchise. The Constitution also imposes a protective duty on the state vis-à-vis the citizenship (the 'existential aspect of citizenship': Irving 2016). It both entitles citizens to a number of civil and political rights and subjects them to a duty to observe the Constitution and the laws and to perform public duties.[12] 'Citizenship' is a condition precedent for them to exercise voting rights and to run as candidates in general elections,[13] to obtain passports,[14] and to access basic state services.

3.5 Principles Laws

Article 7 makes it clear that the Constitution is the supreme law of the land and the same has been made more clear by adding the words'... and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void'. For example, if the parliament enacts any law violating any of the Fundamental Rights enshrined in the Constitution that law will be void. But it appears that the Fundamental Principles of State Policy are not laws in the sense that if the parliament enacts any law violating any of these Principles that law will not be void since these Principles are not judicially enforceable as is mentioned in Article 8(2) of the Constitution. [15] Thus this constitutional position of the Fundamental Principles of State Policy gives rise to a paradox, since these are the parts of the supreme law though they are not laws in themselves.

[10] See the Constitution (Fifteenth Amendment) Act 2011 (Act XIV of 2011), sect. 6.

[11] See arts. 11 and 59 of the Constitution that provide for, respectively, 'effective participation by the people through their elected representatives in administration at all levels' and local government bodies composed of elected representatives at all administrative units.

[12] See, e.g., art. 21(1) of the Constitution: 'It is the duty of every citizen to observe the Constitution and the laws, to maintain discipline, to perform public duties and to protect public property'.

[13] See art. 122(2) of the Constitution and sect. 7(1) of the Electoral Roll Ordinance 1982.

[14] The Bangladesh Passport Order 1973 (President's Order No. 9 of 1973).

[15] Article 8 of the Constitution of Bangladesh.

Let us analyze the issue from jurisprudential perspective. In discussing the nature of law[16] Sir Fredrick Pollock has made the following observations:

> "In one sense, we may well enough say that there is no law without a sanction. For a rule of law must at least be a rule conceived as binding, and a rule is not binding when any one to whom it applies is free to observe it or not as he thinks fit. To conceive of any part of human conduct as subject to law is to conceive that the actor's freedomhas bounds whichhe oversteps at his peril."[17] "...On the whole the safest definition of law in the lawyer's sense appears to be a rule of conduct binding on members of a commonwealth as such."[18]

Hedge J. said in his Rau Lectures:

> "... the view that the principles were not binding if they were not enforceable by law, originated with John Austin, and Kelsen propounded a similar view. However, Prof. Good heart and Roscoe Pound took a different view. According to them, those who are entrusted with certain duties will fulfill them in good faith and according to the expectations of the community."[19]

In this connection Seervai commented rejecting the above contention made by Hedge J.:

> Hedge J. makes no reference to the exposition of the nature of law by Sir Fredrick Pollock in his Jurisprudence and Legal Essays.... However, Sir Fredrick Pollock emphasized the point that the ordinary meaning of law, as given in the Oxford Dictionary, (1903) namely, "The- body of rules, whether proceeding from formal enactment or from custom, which a particular state or community, regard as binding on its members or subjects." our founding fathers did not treat framing of our Constitution as a place where a conflict between eminent jurists should be resolved. They used "law" in its plain ordinary sense of" a rule enacted or customary in a community and recognized as enjoining or prohibiting certain actions and enforced by the imposition of penalties". The juristic analysis of law by Prof. Goodheart and Prof. Roscoe Pound can have no relevance to the society and it is simply not true that

[16] Jurisprudence and Legal Essays, selected and introduced by A. L. Goodheart (1961)

[17] Ibid. pp. 13-14

[18] Ibid. p. 15

[19] Hedge, *Directive Principles of state policy in the Constitution of India* ("the Rau Lectures"), pp.49-50

persons entrusted with the duty of implementing the directives will strive in good faith to implement them according to the expectations of the community.[20]

Thus, it appears that from this jurispruciential perspective also that the Funciamental Principles of State Policy as embociied in the Constitution of Banglaciesh are not laws in the sense of enforcement. Justice Mustafa Kamal rightly commented that these are not laws and to term it as laws will be unconstitutional as he says" It is the Law of the Constitution itself that the fundamental principles of state policy are not laws themselves but 'principles'. To equate 'principles' with 'laws' is to go against the Law of the Constitution itself."[21]

3.6 Educative value of the Fundamental Principles of State Policy inserted in the Constitution

The insertion of the Fundamental Principles of State Policy bears great educative value, though these are not judicially enforceable, strictly speaking. It is worth mentioning here that Sir B. N. Rau in fact was in favour of the enforcement of the Directive principles as embodied in the Constitution of India. Mr. Rau talked to the President Valera in Dublin and discussed about the working of the directive principles under the Irish Constitution,[22] perhaps the first of its kind which embodied such principles, and consequently he tried to give primacy to the Directives in case of its conflict with the Fundamental Rights and for that purpose he brought the following amendments to the draft Constitution of India;

1. At the beginning of cl. 9(2) [now Art. 13(2)] insert the words

"Subject to the provisions of cl. 10" [which emphasized the fundamental nature of directive principles.] 2. To clause 10 *add* the following: "No law which may be made in the discharge of its duty under the first paragraph of this section, and no law which may have been made by the State iii pursuai-ice of principles of policy now set forth in chapter III of this Part shall be void merely on the grouiid that it contravenes the provisions of (cl.) *9,* or is inconsistent with the provisions of chapter III of this Part.[23]

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[20] Seervai, H. M. Constitutional Law of India, 4th ed. UniversalBookIraders,DeIhi, 2002, vol.2, at p. 1929.

[21] *Kudrat E-Elahi* V. *Bangladesh,* 44 DLR (AD) 319, p. 346 para 84.

[22] Shiva Rao, *op. cit.* Vol.III, p. 233

[23] Ibid. p. 226

Mr. Rau further clarified the object of these amendments in the following words:

> "... to make it clear that in a conflict betv/een the rights conferred by Chapter II (Fundamental rights) which are for the most part rights of the individual and the principles of policy set forth in Chapter III which are intended for the welfare of the State as a whole, the general welfare should prevail. Otherwise, it would be meaniiigless to say, as clause 10 does say that these principles are fundamental and that it is the duty of the State to give effect to them in making laws."[24]

But these amendments were neither considered nor accepted.[25] Then naturally a question arose : Is there any justification of incorporation of these unenforceable principles in the Constitution? Interestingly Sir B. N. Rau made a wonderful reply to it and the comment made by him regarding the Directive principles incorporated in the Constitution of India is worth mentioning here:

> "... certain lawyers object to the Part in the draft Constitution dealing with 'Directive Principles of State policy', on the ground that since the provisions in the Part are not to be enforceable by any court, they are in the nature of moral precepts; and the Constitution, they say, is no place for sermons. But it is a fact that many modem constitutions do contain moral precepts of this kind, *nor can it be denied that they may have an educative value."*[26]

Thus it has been emphasized that these principles though unenforceable by the court yet have an educative value generally, which may inspire all authorities in the State to reach the ultimate goal of economic democracy. Sir B. N. Rau whose draft of the Constitution (of India) formed the basis of discussion in the drafting Committee and in the Constituent Assembly admitted that once his amendments had been rejected, directive principles had no legal force but had moral effect by educating members of the Government and of the Legislatures.[27]

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[24] Ibid.

[25] Ibid. p. 326

[26] Rau Senegal Sir, *India's Constitution In the Making,* 2nd revised and enlarged edition, at pp. 388-393.

[27] Seervai H. M., *Constitutional Law of India,* 4th ed. Silver Jubilee Edition, Universal Book Traders, Delhi, 2002, vol. *2,* p. 1927

3.7 Relationship between fundamental rights and fundamental principles of state policy

Obviously the Fundamental Principles of State Policy are not judicially enforceable whereas the fundamental rights are enforceable in the courts as mentioned by articles 8 and 26. It seems to give higher legal status to the fundamental rights in comparison with the Fundamental Principles of State Policy. But on the other hand article 47(1) incorporates an interesting and significant provision regarding the relationship between these two. It provides that no law shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges, any of the fundamental rights, if Parliament in such law (including, in the case of existing law, by amendment) expressly declares that such provision is made to give effect to any of the fundamental principles of state policy set out in part II of this Constitution. This provision seems to give higher legal status to the Fundamental Principles of State Policy in comparison with the fundamental rights. So I think it will not be wise to term any of these two as superior to another, because, it seems that the Constitution has maintained a balanced relationship between these two.

Comparison with the provisions o f the Indian Constitution

Earlier view: In case of conflict between fundamental rights and the principles of state policy, fundamental rights shall prevail as it has the primacy over the latter.[28]

Recent view: Should avoid any conflicting interpretation between these two and should try to give effect to both as much as possible adopting the principle of harmonious construction.[29] Fundamental rights and the principles of State policy are supplementary and complementary to each other and fundamental rights must be construed in the light of the principles of State policy.[30]

The original Indian Constitution does not contain any provision like our article 47(1), but the theme of this particular provision is in fact found in certain case laws in India and the an\ended article 31C (inserted in 1972 by the Constitution Twenty-Fifth Amendment Act) contains this theme to a limited extent. Thus this Article 31C gave primacy to articles 39(b) and (c) [two Directive Principles] over the fundamental rights contained in articles

[28] *Madras V. Champakam Dorairajan,* AIR 1951 SC 226

[29] *C.B. Boarding & Lodging V. Mysore,* AIR 1970 SC 2042,2050; *Re Kerala Education Bill,* AIR 1958 SC 995; *Unni Krisnan V. A.P.,* AIR 1993 SC 2178

[30] *Unni v. Krisnan A.P.,* AIR 1993 SC 2178, para 141

14 and 19, and subsequently in 1976 by the 42nd Constitution Amendment Act the scope of primacy was extended to all principles laid down in Part IV, but this extension was further declared as void for being unconstitutional by the majority decision of the Supreme Court in 1980 in the case of Minerva Mills V. Union of India,[31] so that article 31C now remains at its pre 1976 form which gives shield to articles 39(b) and (c) instead of including all Directive Principles. This part of article 31C was held as valid by the Supreme Court of India[32] and the latter part of this article was declared void as unconstitutional by the same case[33] on the ground of taking away the power of judicial review, but interestingly yet the text has not been changed due to technical legal difficulty and the earlier text[34] still remains in the Constitution though that has been declared void by the highest court.[35] In deciding the validity the court opined that there is no disharmony between these two as they supplement each other in aiming at the same target of bringing about a social revolution to establish a welfare state, which is envisaged in the preamble as the ultimate spirit of the Constitution, and it is also the duty of the court to interpret the Constitution so as to ensure the implementation of the Directive Principles.[36]

[31] AIR 1980 SC 1789

[32] In *Kesavananda V. State of Kerala,* AIR 1973 SC 1461

[33] Ibid.

[34] *Article 31C of the Constitution of India: "Nohvithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing, Article 14 or Article 19*

[35] Supra note 13.

[36] Ibid.

Chapter 4

SOME CASE STUDIES ON THE FUNDAMENTAL PRINCIPLES

Separation of Judiciary in Bangladesh- Masdar Hossain Case's Directions:[40]

Facts :

It is found that the first attempt was taken in 1976 by a Law Committee of Justice Kamluddin Hossain, who made a recommendation for the separation of the subordinate judiciary on the criminal side in three stages. In 1990 the separation of the judiciary was one of the commitments in the manifesto of the three-party alliance but no steps were taken by the governments of 1991 and 1996 except spoiling their tenure. It was Masdar Hossain, a district judge along with another 441 judicial officers who brought a writ petition in 1995 to the HCD, which is known as the *Masdar Hossain* case. In this case the petitioners claimed inter alia: i. inclusion of judicial service in the name of BCS (Judicial) under the Bangladesh Civil Services (Re-organization) Order, 1980 is ultra vires the Constitution; ii. Chapter II of Part VI of the constitution has already separated the lower judiciary from executive where necessary amendments of article 115 may be required for full separation; iii. judges of the subordinate courts being presiding officers cannot be subject to the jurisdiction of the administrative tribunal of the executive. The court gave a landmark judgment in 1997 declaring 12 historical directions, with a view to giving implementation of the separation of judiciary from the executive. The AD of the SCB reversed the decision of the HCD upholding the 12 directions of the HCD in 1999 in a reply to the appeal of the government:

Judgment :

In the mentioned case, the AD of the SCB declared and directed the government to implement the 12 directions where they are as under:

1. The judicial service is a service of the Republic within the meaning of Article 152(1) of the Constitution, but it is a functionally and structurally distinct and separate service from the executive and administrative services of the Republic.
2. The word ―appointment‖ in Article 115 means that it is the President who under Article 115 can create and establish a judicial service and also a magistracy exercising judicial functions, make recruitment rules and all pre appointment rules

etc., but Article 115 does not contain any rulemaking authority with regard to other terms and conditions of service and Article 133 and Article 136 of the constitution and the Services (Reorganization and Conditions) Act 1975 have no application to the above matters in respect of judicial functions.

3. The creation of BCS (Judicial) Cadre along with other BCS executive and administrative cadres by Bangladesh Civil Service (Re-organisation) Order 1980 with amendment of 1986 is ultra vires the Constitution, whereas Bangladesh Civil Service Recruitment Rules 1981 are applicable to the judicial service.
4. The nomenclature of the judicial service shall follow the language of the Constitution and shall be designated as the Judicial Service of Bangladesh or Bangladesh Judicial Service. A Judicial Services Commission shall be established forthwith with majority of members from the senior judiciary of the Supreme Court and the subordinate courts for recruitment to the Judicial service on merit, with the objective of achieving equality between men and women in the recruitment.
5. Under Article 133 law or rules relating to posting promotion, grant of leave, discipline (except suspension and removal), pay, allowances, pension (as a matter of right not favour) and other terms and conditions of service, consistent with Articles 116 and 116A shall be enacted separately for the judicial service.
6. It is also directed to establish a separate Judicial Pay Commission forthwith as a part of the Rules to be framed under Article 115 to review the pay, allowances and other privileges of the judicial service. The pay etc. of the judicial service shall follow the recommendations of the Commission.
7. It is declared that in exercising control and discipline of persons employed in the judicial service and magistrates exercising judicial functions under Article 116, the views and opinion of the SC shall have primacy over those of the Executive.
8. The conditions of judicial independence in Article 116A, elaborated in the judgment, namely (1) security of tenure, (2) security of salary, pension and other benefits and (3) institutional independence from the parliament and the executive shall be secured in the law or rules made under Article 133 or in the executive orders having the force of rules.
9. The executive Government shall not require the SCB as to seek their approval to incur any expenditure on any item from the funds allocated to the Supreme Court in the annual budgets.

10. It is declared that the members of the judicial service are within the jurisdiction of the administrative tribunal.

Decision

In order to meet the constitutional mandate under Article 22 of the Constitution and implement the directions of *Masdar Hossain's* judgment, the then caretaker government took the necessary steps to execute the directives of the *Masdar* case and ensure separation of the judiciary, enacting four sets of rules and finally on paper the judiciary was separated from the executive on 1st November 2007:

1. Bangladesh Judicial Service Commission Rules 2007
2. Bangladesh Judicial Service Pay Commission Rules 2007
3. Bangladesh Judicial Service Commission (Constitution of service, appointment on the service and suspension, removal and dismissal from the service) Rules 2007
4. Bangladesh Judicial Service (posting, promotion, grant of leave, control discipline and other condition of service) Rules 2007.

Observation

Masdar Hossain and others, (hereinafter as the Masdar Hossain case) it was opined upon the provisions of the independence of the judiciary affirmed in Article 94(4) and Article 116A as one of the basic pillars of the Constitution which could not be abridged, curtailed or diminished in any manner.[37]

***Saleemullah V. Bangladesh,* 47 DLR 218**

Facts :

Article 7

It proclaims that the Constitution as the solemn expression of the will of the people is the Supreme Law of the Republic and any other law inconsistent with the Constitution is void to the extent of the inconsistency.

The decision of the Government to send troops to Haiti to participate in the United Nations sponsored Multinational Peacekeeping force is quite in consonance with constitutional framework and international commitments and not derogatory to any provision of the Constitution although the fundamental principles of State Policy cannot

[37] Secretary, Ministry of Finance v. Masdar Hossain (1999), 52 DLR (AD) 82.

be enforced in writ jurisdiction under Article 102 of the Constitution but yet it serves as a guide to the interpretation of the Constitution by the Court.

The decision of the Government to send troops to Haiti to take part in the U. N. sponsored Multinational Force being in consonance with the spirit of the fundamental principles of State Policy and being in accord with Chapter -VII of the U.N. Charter, the decision of the Government cannot said to be an infringement on the Constitution.

judgment :

"Rather the decision, in our view, has been taken on the principle enunciated in the United Nations Charter which is in no way against the Fundamental Principles of State policy. The decision of the Government of the People's Republic of Bangladesh is in consonance with the spirit of the Fundamental Principles of State policy and in accordance with Chapter-VII of the Charter of the UN. We fail to understand how the policy decision of the Government taken in pursuant to the UN Resolution and the charter of the UN is an infringement of the Constitution as contended by the petitioner. On reference to this Resolution we find that it speaks about participation of the member states to support action taken by the United Nations acting under Chapter-VII of the Charter of the UN to facilitate the departure from Haiti of the military leadership. It may be observed that although the Fundamental Principles of State policy cannot be enforced in writ jurisdiction under Article 102 of the Constitution but it serves as a guide to the interpretation of the Constitution for the Court. We do not find that the decision of the Government is contrary to the Fundamental Principles of State policy and the Fundamental Rights."

Enforcement :

Thus, it appears that though the Court in this case mentioned clearly that the Fundamental Principles of State policy are not judicially enforceable , but at the same time Court says that the decision was not in contrary to the Fundamental Principles of State policy. This addition weakens the earlier clear stand of the Court regarding non-enforceability of the Fundamental Principles of State policy. Because, what would the Court tell if the decision taken by the government would be found as contrary to the Fundamental Principles of State policy.[38]

[38] 47 DLR 218

Chapter 5

CONCLUSION

5.1 Recommendations

The inter-relationship doctrine between fundamental rights and directive principles of state policy is not only theoretical but also practical and rewarding. Fundamental rights provide for political freedoms to the citizens by protecting them against excessive state action while directive principles are to securing social and economic freedom by appropriated action both are inspiration of reform legislation. The fundamental rights should be interpreted in the light of directive principles to observe the limits set by directive principles in the scope of the fundamental rights.

The judicial attitude has undergone transformation where courts are very active to uphold the fundamental rights enshrined in the constitution thereby interpreting the provisions of part-II i.e. directive principles of state policy. In *Kesavananda Bharati v. State of Kerala*, Hegde and Mukherjee, JJ., observed:

"The fundamental rights and directive principles constitute the conscience of the Constitution…There is no antithesis between the fundamental rights and directive principles…and one supplements the other."

The theme that fundamental rights are but a means to achieve the goal indicated in the directive principles and that fundamental rights must be construed in the light of the directive principles.[39]

[39] M P Jain, *Indian Constitutional Law 1949*, 6th ed. (Haryana: Lexis Nexis Butterworths Wadhwa Nagpur, 2010), p.1492.

5.2 Conclusion

In conclusion it can be said that, it is about 45 years we have achieved our independence and got a sovereign country. But only few limits of the fundamental principle of state policy have been assured completely till today, thought under the fundamental rights the limit seems more extensive. Implementations of vast works are yet to done for the complete implementation of the fundamental principles of state policy. The State has taken significant steps in respect of implementation of most of the fundamental principles of state policy. Some of the fundamental principles of the state have not achieved that envious goal in order to get the targeted human rights protection and the State should ensure complete implementation of those principles. Though the State is striving, much more effective works have not done yet for the complete implementation of the fundamental principles of state policy. In this regard the socio-economic perspective of the Republic cannot be ignored. The fundamental principles of the state policy can never be implemented with a miracle. None knows when the government will achieve the goal of complete implementation of the fundamental principles as there are still some unavoidable problems in the State. However, if the judiciary's hands remain tied in protecting human rights, government might not be willing to ensure the fundamental rights which might go against their own interests.

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