Research Monograph

On

" The Constitutional Enforcement of the Fundamental Principles of State Policies: Bangladesh Perspective"

A Research monograph submitted for the partial fulfillment of the award of the degree of LL.M
Faculty of Arts and Humanities, Department of Law.

Submitted By:

Md. Mezbaul Islam

ID: LLM2201025017

Batch-25, Program: LL.M

Faculty of Arts and Humanities

Department of Law

Sonargaon University (SU)

Submitted to:

Md. Sagor Hossain

Lecturer, Department of Law

Faculty of Arts and Humanities

Sonargaon University

Sonargaon University (SU)

Date of submission: 05 January 2023

Letter of Transmittal

05 January 2023

To,

Md. Sagor Hossain

Lecturer Department of Law

Sonargaon University

Subject: Submission of research monograph.

Dear Sir,

It is a great pleasure to submit my research paper on **—The Constitutional Enforcement of the Fundamental Principles of State Policy: Bangladesh perspective.** I have given my best efforts to finish the research with relevant information that I have collected from various source.

I have concentrated my best effort to achieve the objectives of the work and hope that my endeavour will serve the purpose. I shall be highly grateful and obliged if you kindly accept my research and evaluate it with your sagacious judgment.

Sincerely yours,

……..

Md. Mezbaul Islam

ID No. LLM2201025017

Program LLM

Department of Law

Sonargaon University

Acknowledgement

I am deeply gratitude to Almighty Allah for providing me everything that required for completing my research work.

I am thankful to **Md. Sagor Hossain** to allow me and support to prepare this research.

I also want to thank my friends as well as well wishers to me for their motivation from the beginning of my research work.

……..

Md. Mezbaul Islam

ID No. LLM2201025017

Department of Law

Sonargaon University

Declaration

I do hereby declare that the research monograph entitled **—The Constitutional Enforcement of the Fundamental Principles of State Policy: Bangladesh perspectives.** Submitted to the Department of Law in Sonargaon University in the fulfilment of the requirements for the decree of LLM is carried out by me under the guidance and supervision of **Md. Sagor Hossain,** Department of Law. Research method and approaches strictly have been followed during undertaking the work. The work I have presented does not breach any copyright. I further undertake to indemnify the University against any loss or damage arising from breach of the foregoing obligations.

……..

Md. Mezbaul Islam

ID No. LLM 22010250217

Department of Law

Sonargaon University

Certificate of the thesis supervisor

The undersigned certify that the research paper entitled **— The Constitutional Enforcement of Fundamental Principles of State Policy: Bangladesh perspective ‖,** a study has been carried out by **Mezbaul Islam** (Student **ID No. LLM2201025017**), under my constant supervision as per the rules regulations stipulated by the Sonargaon University in the partial fulfilment of the requirements for the degree of LL.M.

Signature of supervisor:

……

Md. Sagor Hossain

Lecturer Department of Law

Sonargaon University

Content of Table

Chapter I

1. **Abstract 06**
2. **Introduction**
3. **The Enforcement of Fundamental Principles of State Principles 08**
4. **4Courts role as to Interpretation of the Fundamental Principles of State Policies 10**

Chapter II

5. **No discrepancy between 'Principles' and 'Laws' 11**
6. **interpretation of the clause "shall not be judicially enforceable" 11**
7. **Invoking in Practice 12**
8. **Rabeya Bhuiyan v. Bangladesh 13**
9. **Impact of the Judgment 13**
10. **DrMohiuddinFarooque v Bangladesh &Ors 15**
11. **Bangladesh v. Winifred Rubi and Others 15**
12. **12. Rabeya Bhuiyan v. Bangladesh 15**

Chapter III

13. **STATUS OF THE PRINCIPLES UNDER JUDICIAL SCRUTINY 16**

Kamal J concurring with Shahabuddin CJ based his reasoning on the following two points: 17

Thus we can sum up the utility of the Directive Principles in the Following points 17

14. **He concluded his observation about article 31C with the following words 21**
15. **Kudrat E-EfaJii V. Bangladesh, 44 DLR (AD) 319 26**
16. **An analysis of judgement 31**

Chapter IV

17. **Comparative Case Law From India 33**
18. **CONCLUSION 36**
19. **Reference 36**

1. ABSTRACT

There is a struggle throughout the world on the issue of justiciability of socio-economic rights. It is forcefully argued that socio-economic rights should be given the same status as that of civil political rights. Ensuring the judicial enforcement of socio-economic rights has been considered a Prime issue in this regard. In Bangladesh, Part II of the Constitution embodies the socio-economic rights as "Fundamental Principles of State Policy" whereas "Fundamental Rights" consisting of Civil Political rights find place in Part III. Article 8(2) of the Constitution makes the Principles and thereby the socio-economic rights judicially non-enforceable. This provision came under judicial consideration in Kudrat-e-Elahi v. Bangladesh case. The Appellate Division relied on non-enforceability criteria (in article 8(2)) to hold that a law cannot be repealed only on the ground of inconsistency with fundamental principles. This article attempts to submit the opposite.

Keywords: Civil Political Rights, Economic Social Rights, Fundamental Principles of State Policy, Fundamental Rights, Judicial enforcement.

2. INTRODUCTION

The Constitution of Bangladesh (1972) creates a dichotomy between civil and political rights and economic, social and cultural right by making the former enforceable by the court and the latter non- enforceable.

Economic, social and cultural rights are included in Part II of the Constitution as "fundamental principles of state policy" (articles 8 to 25). These include the equal rights of women, principles of ownership, provision of basic necessities of life including food, clothing, shelter, education and medical care, and worker's rights. Article 8(2) explicitly states that these principles are not judicially enforceable. It reads as follows:

"The principles set out in this part shall be fundamental to the governance of Bangladesh, shall be applied by the state in making of laws, shall be a guide to the interpretation of the constitution and of the other laws of Bangladesh, and shall form the basis of the work of the state and of its citizens, but shall not be judicially enforceable."

Part III of the Constitution embodies the 'fundamental rights', encompassing mainly civil and political rights (articles 26 to 47). Unlike Part II, the rights in Part III are justiciable. Citizens have the right to approach the High Court Division to redress any infringement of the rights (article 44). Again the Constitution provides that laws inconsistent with the rights shall be void to the extent of such inconsistency (article 26) there being no such provision regarding the principles in part II.

The status of the fundamental principles of state policy (FPSP) within the fabric of the constitution has come under judicial scrutiny in Kudrat-E-Elahi Panir and Others v Bangladesh 44DLR (AD) 319 where the appellants relying on article 7 of the Constitution tried to convince the court that a law inconsistent with any of the FPSP is void. Article 7 deals with the supremacy of the Constitution, and sub section 2 provides that "if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void". To negative the contention, the Court interpreted article 7(2) along with article 8(2) in a pessimistic approach. This article is an attempt to prove into the worth of such non-liberal literal interpretation of the constitution and intends to submit that the constitution doesn't bar repelling a law conflicting with any of the ESC rights placed in Part II.

3. The Enforcement of Fundamental Principles of State Principles

An overview of how economic, social and cultural rights are recognized in national constitution finds that there are three main approaches[1]. First, these are recognized as justiciable rights. Second, they are recognized in a separate "Bill of Rights", while third they are recognized as DPSP or FPSP.[2]

It must also be understood that in some instances, Courts are better equipped than legislatures to assess complex evidence; particularly in relation to the effects of policies on disadvantaged groups who may have been ignored by the legislators. It has also become clear that social and economic rights claimants do not move towards the courts for some kind of superior expertise in social and economic policy. Rather, they rely on the traditional competence of courts to provide affair hearing and to review facts and to evaluate government decisions or policies against the requirements of law.

Courts of Bangladesh have also been encouraged to give effect or enforcement of certain Fundamental Principles of State Policies, through being obliged by seeing the international responses towards the enforcement of Fundamental Principles of State Policies. The question arises then when it's been asked by the nation that why these Fundamental Principles of State Policies are not given the right of enforcement through the judiciary under the supreme law of the country; likewise In the midst of the severe political, economic and social challenges that our country continues to face, where should we place human rights in the development discourse? These are some of the questions that arise whenever one brings up the controversial issue of socio-economic rights and their place in human rights discourse.

Although human rights have become a salient feature in international plane in recent years, speaking about food, housing, health and similar matters in rights language still often encounters resistance or causes confusion. There are a number of reasons why attempts to litigate economic,

[1] M. Ssenyonjo, Economic, Social and Cultural Rights in International Law, Diamond Publishers, 2009, P- 152

[2] Hans M. Haugen, Human Rights Principles- Can They be Applied to Improve the Realization of Social Human Rights?, Max Plank Yearbook of United Nations Law, Koninklijke Brill N.V, Volume 15, 2011, P- 425; Source:

social and cultural rights may not result in judicial enforcement and why, even if enforcement is achieved in formal terms, this may not necessarily protect or fulfill the right in practice. In Bangladesh context evaluating empirically the impact of social rights litigation is challenging and has rarely been done in a systematic fashion. Bridging the gap between justifiability of civil and political rights and that of ESC rights is key if both sets of rights are to be considered on an equal footing.[3]

Arguably, Bangladesh Constitution generates a dichotomy between civil and political rights and economic, social and cultural right by crafting the former enforceable by the court and the latter non-enforceable.

Economic, social and cultural rights are included in Part II of the Constitution as "fundamental principles of state policy" (articles 8 to 25). These include the equal rights of women, principles of ownership, provision of basic necessities of life including food, clothing, shelter, education and medical care, and worker's rights.

Article 8(2) explicitly states that these principles are not judicially enforceable. It reads as follows:

"The principles set out in this part shall be fundamental to the governance of Bangladesh, shall be applied by the state in making of laws, shall be a guide to the interpretation of the constitution and of the other laws of Bangladesh, and shall form the basis of the work of the state and of its citizens, but shall not be judicially enforceable."

Part III of the Constitution embodies the 'fundamental rights', encompassing mainly civil and political rights (Articles 26 to 47). Unlike Part II, the rights in Part III are justiciable. Citizens have the right to approach the High Court Division to redress any infringement of the rights[4]

[3] Towards Judicial Enforcement of Socio-Economic rights, Mohammad NayeemFiroz, The Independent. http://www.theindependentbd.com/index.php?option=com_content&view=article&id=226110:towards-judicial-enforcement-of-socio-economic-rights&catid=169:op-ed&Itemid=201

[4] News, Article 44, Constitution of the Peoples Republic of Bangladesh.

4. Courts role as to Interpretation of the Fundamental Principles of State Policies

The status of the Fundamental Principles of State Policy within the framework of the constitution has come under judicial scrutiny in *Kudrat-E-ElahiPanir and others v Bangladesh* [5]where the appellants relying on article 7 of the Constitution attempted to convince the court that a law inconsistent with any of the FPSP is void. Article 7 deals with the supremacy of the Constitution, and clause 2 provides that

"*if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void*".

Under the said case a challenge to Ordinance No. XXXVII of 1991[6] was made, which abolished the elected Upazila Parishads (the third tier of local government) and vested in the government all rights, powers, authorities and privileges of Upazila Parishad. The appellants, some chairman of dissolved Upazila Parishad, unsuccessfully challenged the law in HCD and then obtaining appeared before the Appellate Division by leave to appeal.

One of the main grounds was that the Ordinance being inconsistent with Article 9 and 11 as well as it runs against the sprite of the Constitution and becomes void by the operation Article 7(2). It was clearly against the gist of Articles 9 and 11. But the problem was that Articles 9 and 11 are in the Part II containing the Fundamental Principles[7].

In the main judgment of the said case the court held that, those articles are not judicially enforceable as they are located in Part II of the Constitution. It was contended by Shahbuddin Ahmed CJ in the judgment that,

"if the State does not or cannot implement these principles the Court cannot compel the State to do so and other such fundamental principles also stand on the same footing"[8]

With concurrence of the contention of Shahabuddin Ahmed CJ, Mustafa Kamal J stated two points of that case; these are as follows:

1. there lies a specific provision in the Constitution in relation to Fundamental Rights and their inconsistency with other laws.[9]

[5] Kudrat-E-ElahiPanir and Others v Bangladesh, 44 DLR (AD) 319
[6] That subsequently became See Annexure A for deta.
[7] See Annexure A for detail
[8] Supra Note 77, Para 22
[9] The Constitution of the People's Republic of Bangladesh, Article 26

2. Article 7(2) of the Constitution only says or is only applicable when any law is inconsistent with the Constitution. And the Constitution itself recognizes Part II as 'Principles' not as 'Laws'. Equating 'laws' and 'principles' will go against the laws of the constitution.[10]

Although, the Court was not willing to accept the enforceability of the FPSP by the judicial system in the judgment of the said case but many of the logical points in this regard can be showed which in reality proclaims the judgment of the said case to be reconsidered.[11]

Some of those logical points are enumerated below:

5. **No discrepancy between 'Principles' and 'Laws'**

The Constitution of the Peoples Republic of Bangladesh does not necessary provides any discrepancy or distinction between the 'principles' and 'laws'. Moreover, under Article 7 of the constitution it starts the line with the term "this constitution"; which specifically indicates constitution does differently equates between 'laws' and 'principles'.

6. **nterpretation of the clause "shall not be judicially enforceable"**

In harmonious meaning it should mean that, the Court cannot compel the State to take progressive measures. But if the State becomes destructive of these principles, then the court can and should always pin down such kind of retrogression.[12]

In this regard, Justice BadrulHaiderChowdhury of the Appellate Division of the Supreme Court in *Anwar Hossain v Bangladesh*[13]has stated that,

"Though the Directive Principles are not enforceable by any Court, the principles therein laid down are nevertheless fundamental in the Governance of the Country and it shall be the duty of the state to apply these principles in making laws. It is a protected article (article 8) in our Constitution and the legislature cannot amend this article without referendum. This alone shows that the executive cannot flout the Directive Principles. The endeavor of the Government must be to realize these aims and not to whittle them down[14]*"*

---

[10] Supra Note 77, Para 84

[11] Supra Note 30, P- 133.

[12] Justice GolamRabbani, GonoProjatontriBangladesherShognbidan: Sohoj Path, Samunnoy, Dhaka, 2008, P-38

[13] Anwar Hossain v Bangladesh, 1989 BLD (Spl) 1

[14] Ibid, Para 53

An interpretation of constitution that allows repealing laws inconsistent with the fundamental principles will be in template harmony with the vision and mission of the Constitution enshrined in the Preamble.[15]

7. **Invoking in Practice**

Some other prominent cases of Bangladesh dealing with the issues of FPSP are mentioned underneath:

8. ***ASK and ORS V Government OF Bangladesh and ORS[16]***

In Dhaka city, a large number of inhabitants of bastis, or (informal settlements,) were evictedwithout notice. Their homes were demolished with bulldozers. Three non-governmental organisations concerned with human rights and upholding the rule of law, and two slum dwellers in Dhaka filed a writ petition under Art 102 of the Constitution, challenging the Government's demolition of 'Basties' (slum-dwellings) in Dhaka and the eviction of their inhabitants. The petitioners alleged that implementing the project, without proper notice or provision of alternative housing, would, inter alia, violate the fundamental rights to equality, life, liberty and livelihood (Articles 27, 31 and 32 of the Constitution) of hundreds of thousands of people as well as principles contained in the Fundamental State Policy in the Constitution. The Supreme Court recognized that such inhabitants are often the victims of misfortune and natural calamities, migrants who earlier fled from rural areas where profession, food or shelter were scarce. Slum dwellers also contributed significantly to the national economy. The Court believed, however, that some dwellers took to crime.

In this The Court held some logical points, these are given underneath:

Even though in the circumstances the slum dwellers could not be properly notified of the planned evictions, respect for human dignity requires that they must be undertaken in the spirit of the Constitution and under a specific rehabilitation programme. The Government may proceed with the eviction process but it should be done in stages and with reasonable notice. A master plan or pilot project to rehabilitate slum dwellers in phases, taking account of the availability of other housing, should be undertaken. Otherwise, the total eviction of one slum may simply cause another to develop. Slum dwellers should be given the option of returning to their home villages, or leading

[15]M Jashim Ali Chowdhury, DoesInconsistency with Fundamental Principles invalidate a Law? BRAC University Journal, Vol V No 1, Dhaka 2008, PP.(72-75)

[16] ASK and ORS V Government OF Bangladesh and ORS (Writ Petition No. 3034 of 1999); (1999) 2 CHRLD 393

an urban life. If they choose to stay in urban areas, they should be provided with loans for constructing houses, food, and in some cases vocational training. Special arrangements should be made for vulnerable population groups such as the sick and elderly, including the provision of food, shelter and medical facilities.

9. **Impact of the Judgment**

In terms of rehabilitation, the Government has occasionally made land temporarily available for evictees, for example, when it had an urgent need for squatters' land for a building site. But it remains limited to getting temporary protection. There is no recognized right to shelter. As observed by Dr. Kamal Hussain who was central in the above mentioned case,

"all we have is a protection against some forcible evictions. But this temporary reprieve can be used to pursue other alternatives."

After getting the first judgment, whereby the court recommended that rehabilitation programmes should be made available, the judges suggested that we pursue the executive branch of the Government: they're the ones that will give you land.

10. ***DrMohiuddinFarooque v Bangladesh &Ors***[17]

A consignment of powdered milk imported by a respondent company exhibited a radiation level above the acceptable limit in some (but not all) of the examinations conducted by various government testing bodies. The petitioner, who was the Secretary General of the Bangladesh Environmental Lawyers Association (BELA), argued that the actions of the relevant government officers in not compelling the importer to send the consignment back to the exporter had violated the constitutional right to life of the people of the country, including himself, who were potential consumers of such goods.[18] He sought an order directing that measures be taken to send the consignment back. The exporter had already initiated a civil suit against the Government in a lower court seeking a re-examination of the consignment and a declaration that an order sending it back was illegal.

The Supreme Court of Bangladesh considered Indian Supreme Court decisions and held that the right to life is not limited to the protection of life and limb but also includes, amongst other things, the protection of the health and normal longevity of an ordinary human being. Even though the

[17] Dr Mohiuddin Farooque v Bangladesh &Ors 48 DLR(1996) (HCD) 438; (1996) 2 CHRLD 107

[18] Constitution of the Peoples Republic of Bangladesh, Article 31 and Article 32

directive principle.[19] of raising the level of nutrition and improving public health cannot be enforced, the State can be compelled by the courts to remove any threat to public health unless such a threat is justified by law. The Court made specific directions for the better implementation of radiation standards and ordered the Government to properly contest the suit filed by the exporter challenging the return of the consignment so that the matter can be properly adjudicated.

In denying the relief sought but issuing specific directions to improve testing procedures, it was held by the court that:

1. The right to life is not limited to the protection of life and limb necessary for the full enjoyment of life but also includes, amongst other things, the protection of the health and normal longevity of an ordinary human being (various Indian Supreme Court decisions considered).
2. Health and the normal expectation of longevity can be threatened by man-made hazards, including the consumption and even marketing of food or drink injurious to health.
3. The state can be compelled by the courts to remove any threat to public health, unless such a threat is justified by law, even though its primary obligation under Art 18 of the Constitution, as a Fundamental Principle of State Policy, to raise the level of nutrition and improve public health cannot be enforced.
4. 4. The Government's enactment of the *Nuclear Safety and Radiation Control Act 1993* and publication of the *Import Policy Order 1993-95* show that it was conscious of the threat posed to the life of people in Bangladesh by the consumption of foods containing an excessive level of radiation and was, by providing for radiation testing, taking steps to control any risk. Nevertheless, the confusion which has led to the present situation was created by the actions (and inaction) of officers of the various testing bodies.
5. It is not considered advisable, however, to give any direction to the importer to send back the consignment in question as the relief sought by the petitioner is under judicial consideration by the court below in the separate suit brought by the exporter. The Government is directed to contest the suit in the lower court by filing a written

[19] Ibid, Article 18

statement and producing relevant evidence so that the matter can be properly adjudicated.

Therefore, to avoid confusion and to ensure enforcement of the right to life, specific directions should be given to the testing bodies for the better implementation of the provisions of the Import Policy Order in regard to radiation levels in food. Until foolproof effective methods are evolved by the authorities, the testing bodies are directed to follow the procedures set out in the present judgment.

11. ***Bangladesh v. Winifred Rubi and Others***[20]

In this case a question arose as to whether land requisition for a private school was for 'public purpose' and there also arose an incidental question as to whether a private school which charges a very high tuition fees could be regarded as acting in furtherance of State Policy relating to Education as contained Article 17 of the Constitution.[21] The Appellate Division of the Bangladesh Supreme Court held that such an incidental inquiry was 'unwarranted by law in the Constitution on the ground that, the Constitutional mandate provides in the Chapter on Fundamental Principles of State Policy that these are not enforceable in Court of law'.

12. ***Rabeya Bhuiyan v. Bangladesh***[22]

In this case the Appellate Division of Supreme Court of Bangladesh held that the failure to ensure the access to arsenic free and safe drinking water constituted a violation of rights to life as guaranteed by Articles 31.[23] and 32[24] of the Constitution, read together with Articles 15 and 18l[25]; which provides for State obligation to ensure basic necessities and improve public health. This case is an excellent example of 'rights-linked' perception and enforcement of socio-economic principles under Articles 15 and 18 on the basis of their constitutive and instrumental relevance with judicially enforceable fundamental rights to life under Article 32 of the Constitution. Tafazzal Islam, J. was quite vocal on the point of this relevance, as His Lordship observed- "hygienic

[20] Bangladesh v. Winifred Rubi and Others, 34 DLR (AD) 164
[21] See Annexure A for details.

[22] Rabeya Bhuiyan v. Bangladesh, 59 DLR 176
[23] Right to Equal PSee Annexure A for details.
[24] Right to Life, Liberty and Security
[25] See Annexure A for details

environment is an integral facet of right to healthy life and it would be impossible to live with human dignity without a humane and healthy environmental protection[26].

13. STATUS OF THE PRINCIPLES UNDER JUDICIAL SCRUTINY[27]

The above mentioned case concerned a challenge to Ordinance No. XXXVII of 1991 (that subsequently became Act No. II of 1992) which abolished the elected Upazila Parishads (the third tier of the local government) and vested in the government all rights, powers, authorities and privileges of the dissolved Upazilla Parishads. The appellants, some chairmen of dissolved Upazilla Parishads, unsuccessfully challenged the law in the High Court Division and there after obtaining leave to appeal appeared before the Appellate Division of the Supreme Court of Bangladesh.

The Ordinance was challenged on two grounds. First, it violates article 59 of the constitution. Article 59 provides that local government in every administrative unit shall be entrusted to bodies composed of elected representative of the people. Article 152(1) of the Constitution defines administrative unit as 'a district or other area designated by law for the purposes of article 59'. The court rejected the contention holding that though all the local government institutions must conform to article 59, the Upazilla was never designated to be an administrative unit for the purpose of article 59. Hence the abolition of Upazilla didn't attract the mischief of article 59 (Kamal Mustafa, 1994:131).

Second, the appellants argued that the Ordinance being inconsistent with articles 9 and 11 runs against the spirit of the Constitution and becomes void by the operation of article 7(2). Article 9 emphasises on maintaining democratically elected local government institutions. The State shall encourage local government institutions 'composed of representatives of the areas concerned' with special representation given to peasants, workers and women. Article 11 affirms the democratic nature of the state, in which fundamental human rights and freedoms and respect for the dignity

[26] Ibid, P-184
[27] 44 DLR (AD) 319

and worth of the human person are guaranteed and the effective participation of people through their 'elected representatives' in administration at all levels is ensured.

In the main judgement Ahmed Shahabuddin CJ held that articles 9 and 11 being located in Part II of the constitution are not judicially enforceable. If the State does not or cannot implement these principles the Court cannot compel the state to do so and other such fundamental principles also stand on the same footing (para 22 p. 331).

13.1 Kamal J concurring with Shahabuddin CJ based his reasoning on the following two points:

First, while there is a specific provision in the Constitution dealing with laws that are inconsistent with civil and political rights (article 26), there is no specific provision on laws that are inconsistent with fundamental principles of state policy. To him the omission is deliberate and calculated because provisions analogous to article 26 could have been inserted in part II as well.

Second, under article 7(2), any law that is inconsistent with the Constitution shall be void to the extent of the inconsistency. Kamal J observed that the Constitution itself in article 8(2) recognises that fundamental principles of state policy are not laws but "principles" that have to be applied by the state when making laws. And to equate "principles" with "laws" is to go against the law of the Constitution itself (para 84 p. 346). So article 7(2) cannot be interpreted to mean that if any other law is inconsistent with the "principles" mentioned in part II then that law to the extent of the inconsistency will be void (para 85 p. 346). He fears that such interpretation would bring "the Fundamental Principles of State Policy at par with Fundamental Rights in so far as voidability is concerned (para 85 p. 346)."

Interestingly, though the court declined to strike down the Ordinance for inconsistency with fundamental principles of state policy, it used articles 9 and 11 as touchstone to interpret article 59 to hold that designating administrative units and forming elected local governments are the constitutional obligations of the state. Accordingly it ordered the Government to designate all the local government areas as administrative unit within four months and then to replace all non-elected persons by elected representatives within six months from the date of the judgment (Judgment on July 30 1992). Unfortunately the order is yet to be executed.

13.2 Thus we can sum up the utility of the Directive Principles in the Following points:[28]

a. An instrument of instructions to all authorities within the state.
b. Useful beacon-lights to courts.
c. Important tool in exercising power of judicial review.
d. Utility in interpreting the Constitution.
e. Utility in interpreting other laws.
f. Utility as the ideology.
g. Utility as setting the goal.

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,'4 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:

h. 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 of principles of policy now set forth in chapter III of this Part shall be void merely on the ground that it contravenes the provisions of (cl.) 9, or is inconsistent with the provisions of chapter III of this Part."

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

'… to make it clear that in a conflict between 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

[28] Ibid Bangladesh Vs. Mini rd Cubic, 1982 BLD (AD) 34, 37

prevail. Theories, it would be meaningless 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.""[29]

But these amendments were neither considered nor accepted.'7 Then naturally a question arose : Is there any justification of incorporation of these unenforceable principles in the Constitution? Interestingly Sir B.

Mahajan, V. D. Constitutional Law of lndia, Eastern Book Company, Laucknow, 1991, 7th ed., p.368 14. Shiva Rao, op. cit. Vol.III, p. 23

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 'o be enforceable by any court, they are in the nature of moral value, precepts; and the Constitution, they say, is no place for sermons. But it is a fact that many modern constitutions do contain moral precepts of this kind, nor can it be denied lint they may hone nit educative.[30]

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[31]. 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..[32]

[29] Ibid. p. 226
[30] Ibid
[31] Ibid. p. 326
[32] Iiau Benegal Sir, Ind in's Constitut ion in the Mnking, 2nd revised and enlarged edition, at pp. 388-393

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 Fundamen.ta1 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) expre.«sly 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 of the Judicial Constitution Judicial 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.'[33]

Recent arises: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.[34] Fundamental rights and the principles of State policy are supplementary and complementary to each ether and fundamental rights must be construed in the light of the principles of State policy."

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 amended article 31C (inserted in 1972 by the Constitution Twenty-Fifth Amendment Act) contains this theme to a limited extent.[35] Thus this Article 31C gave primacy to articles 39(b) and (c) [two Directive Principles] over the fundamental rights contained in articles 14 and 19, and subsequently in 1976

[33] Seervai H. M., Const it tfonnl Lou› of India, 4th ed. Silver Jubilee Edition, Universal Book Traders, Delhi, 2002, vol. 2, p. 192

[34] Madras V. Clinnipakani Dora ira)on, AIR 1951 SC 226

[35] C.B. Boarding fr Lodging V. Mysore, AIR 1970 SC 2042, 2050; be Kerala Education Bill, AIR 1958 SC 995; tlnni Krisnan V. A.P., AIR 1993 SC 2178

by the 42nd Constitution Amendment Act the scope of primacy[36] 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,2" 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. [37]

This part of article 31C was held as valid by the Supreme Court of India2' and the latter part of this article was declared void as unconstitutional by the same case25 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 text2' still remains in the Constitution though that has been declared void by the highest court.27 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 tne Directive Principles.28 Justice Mathew goes one step further awarding a higher and significant status to the Directive Principles in the whole constitutional scheme, as he said that[38]—

"…in building up a just social order it is some times imperative that the Fundamental Rights should be subordinated to Directive Principles…Economic goals have an uncontestable claim for priority over ideological ones on the ground that excellence comes only after existence. It is only if men exist that there can be Fundamental Rights"[39]

14. He concluded his observation about article 31C with the following words:

"… if Parliament, in its capacity as amending body, decides to amend the Constitution in such a way as to take away or abridge a Fundamental Right to give priority value to the moral claims embodied in Part IV of the Constitution, the Court can not adjudge the constitutional amendment

[36] Tlnni Krisnan V. A.P., AIR 1993 SC 2178, para 141
[37] AIR 1980 SC 1789
[38] In Kesava nandaa V. Stale o/ Kerala, AIR 1973 SC 146
[39] Ibid

as bad for the reason that what was intended to be subsidiary by the Constitution-makers has been made dominant."[40]

"Not withstanding anything contained in Article 13, no Inn› giving effect to the policy of the State tournedos securing [all or any of] the principles [laid down in Part IV] shall be deified to be void on the sound that it is it consistent with, or takes unsay or bricks my of tile right Is conferred Article 14 or Article 19…, [and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy: …"[41].

Probably being inspired by this spirit in favor of the Directives the law makers subsequently in1976 by the 42nd Amendment to the Constitution gave primacy to all Directive principles over the fundamental rights which amendment was not uphold by the Supreme Court as constitutional.'[42]

However, the present Indian provision is narrower than that of Bangladesh in the sense that Indian article 31C gives shield to two Principles only, whereas article 47(1) of the Constitution of Bangladesh extends this shield to all Fundamental Principles of State Policy generally. Again Indian one is narrower from another aspect that article 31C speaks about only two fundamental rights embodied in article 14 and 19, whereas article 47(1) of the Constitution of Bangladesh talks about all fundamental rights generally.[43]

Distinction between fundatnental rights and fundamental principles of State policy
Following points of differences between fundamental rights and fundamental principles of state policy may be mentioned here:[44]

i) As regards judicial enforceability: Fundamental rights are judicially enforceable, 2 though the fundamental principles of state policy cannot be enforced in the courts.'

[40] Article 31C of the Constitution of lndin.'
[41] Ibid
[42] Supra note 13.
[43] Ibid
[44] In Minerva Mills Ltd. V. India, AIR 1980 SC 1789

ii) As regards requirement of legislation for the implantation:Fundamental rights will be enforced and be implemented directly[45]In the form they are mentioned in the Constitution. Whereas, for the implementation of the fundamental principles of state policy new legislation is required in conformity with the policy. Thus, state policy can only be implemented through another new legislation.[46]

iii) As regards taking away legislative power: The fundamental principles of state policy does not restrict the legislative power, rather that merely formulates certain policies to be followed by the legislature. But the fundamental rights inserted in the Constitution of Bangladesh take away certain legislative power imposing the restriction explicitly in Article 26 that no law in violation of these rights can validly be passed.

iv) As regards violation and declaration ofa law as void: The court can not declare a law as void on the alleged ground of violation of any of the fundamental principles of state policy. Whereas any law passed violating any of the fundamental rights will be declared by the competent court as null and void.

Constitutional Status of the Fundamental Principles of State Policy incorporated in the Constitution of Bangladesh. The first postulate is that these are mentioned in the Constitution of Bangladesh as principles , not as laws, and in fact whole part II wherein these principles are embodied deals only with principles, not laws.

However, the status and the functions of these principles are clearly mentioned in article 8(2) of the Constitution of Bangladesh, they are as follows:

a. These Principles shall be fundamental to the governance of Bangladesh,
b. Shall De applied by the State in the making of laws,
c. Shall be a guide to the interpretation of the Constitution and of the other laws of Bangladesh,
d. Shall form the basis of the work of the State and of its citizens; but

[45] See Articles 26 and 44 of the Constitution of Bangladesh.
[46] See Article 8 of the Constitution of Bangladesh.

e. Shall not be judicially enforceable.

The points (iii) and (v) above require further explanation and these have become subject to many judicial pronouncements

Acting as a guide to the interpretation It speaks about the role of these Principles as a guide to interpret the Constitution and as well as of the other laws of Bangladesh. Thus its role has been widened beyond the Constitution by empowering it to act as a guide to interpret all laws of type in Bangladesh. What is the Meaning and impact of acting as 'a guide to the interpretation'? It means to interpret the Constitution and other laws in conformity with these Principles. But obviously in the name of interpretation a completely new meaning can not be awarded to any clear provision of the Constitution or of any other law. This task of interpretation must be done with utmost good care so that ultimately let it not amount to enforce these Principles in the name of interpretation. Similarly, if the principles are used by the courts merely to interpret as mandated by the Constitution that can not be restricted in the name of judicial enforcement. [47]

Thus every effort made by the judiciary should not be termed as enforcement of that very thing. In this connection 'judicial enforcement' and 'judicial interpretation' must be distinguished with proper care. The earlier one is negatived by article 8(2) and later one has been permitted by the same. This issue can be made clear taking the case of Kudrat-E-Elahi V. Bangladesh as an example. In this case, the Appellate Division in fact did not enforce articles 9 and 11 (two fundamental principles of state policy)[48], rather interpreted articles 59 and 60 in conformity with the above two articles and this is a classic illustration where the highest court used the fundamental principles of state policy as a guide to the interpretation of the Constitution as mandated by article 8(2) of the Constitution. Again the judgment pronounced by the High Court Division in the case of Winifred Rubie V. Bangladesh may be a classic illustration on the point that every effort made by the court does not amount to judicial enforcement. In this case,36 the term "public purpose" used in the Fundamental Principles of State Policy has been defined in narrow sense and it was

[47] 44 DLR (AD) 319
[48] 1981 BLD 30

held that the requisition of a property for a private school does not serve the "public purpose" and was void. The Appellate Division observed:[49]

"As for the State policy of education it is unfortunate that the learned Judges have taken upon themselves as enquiry which is neither warranted by law in the Constitution by the arguments of the parties. It is for tlus reason that the constitutional mandate provides in the chapter on directive Principles of State Policy that these are not enforceable in the Court of Law.[50]

Was the reaction of the Appellate Division towards/about the judgement delivered by the High Court Division, in which the later gave an interpretation of the term 'public purpose', justified? The answer to this question is dependent on the result of a query: did the High Court Division enforce the Fundamental Principles in the name of interpretation of the term 'public purpose' violating the prohibition made by article 8(2)? Or that was an interpretation of a term made in conformity with the Fundamental Principles of State Policy as mandated by article 8(2)[51]. I think Mr. Mahmudul Islam, the former Attorney General of Bangladesh, rightly criticized in his book3' the above observation made by the Appellate Division. To quote him—

"… in order to find the meaning of 'public purpose' in relation to education, the High Court Division was not only entitled, but was also under constitutional obligation, to consider whether the requisition of property for a school of the type involved could be said to serve a public purpose when article 17 mandates the State to adopt effective measures for the purpose of establishing a uniform, mass-oriented and universal system of education.[52]

Thus it may be commented here that the High Court Division did not violate the prohibition of article 6(2), rather it has exercised the power of interpretation as mandated by the same article, and

[49] Ibid Bangladesh Vs. Mini rd Cubic, 1982 BLD (AD) 34, 37

[50] Islam Mahmudul, constitutional Low of Bangladesh, 2nd ed. Mallick Brothers, Dhaka, 2GG3, p.57.
[51] Ibid.
[52] Ee the cases Muinbliai V. Abdiilblm I, AIR 1976 SC 1455; Bhini V. India, AIR 198'• SC 234; Excel Wear V. India, AIR 1979 SC 25

this interpretation seems to be done within the boundary demarcated by article 8(2) which does not amount to judicial Enforcement.[53]

Fundamental and judicial enforceability of the fundamental Principles of State Policy Article 7 (2) of the Constitution of Bangladesh makes clear the nature of the Fundamental Principles of State Policy in the way that however important these principles are these will not be judicially enforceable Which says:

"The principles set out in this Part shall be fundamental to the governance of Bangladesh, shall be applied by the State in the making of laws, shall be a guide to the interpretation of the Constitution and of the other laws of Bangladesh, and shall form the basis of the work of the State and of its citizens, but shall not be judicially enforceable."

Thus, article 8(2) fixed four impacts of these Principles and lastly bars clearly the judicial enforcement of these Principles of State Policy. Let us now analyze this issue in the light of different cases decided by the High Court Division and the Appellate Division of the Supreme Court of Bangladesh.

15. Kudrat E-EfaJii V. Bangladesh, 44 DLR (AD) 319[54]

Kudrat E-Elahi V. Bangladesh'2 is an elaborate authority on this issue where the nature and the question of judicial enforceability of these principles have been discussed thoroughly both in the High Court Division and in the Appellate Division. For the convenience of analysis and to get a clear idea about the judicial position regarding this issue the case will be examined here in a detailed manner. [55]

In this case,4' the petitioners before the High Court Division challenged the constitutional validity of the Bangladesh Local Government (Upazila Parishad and Upazila Administration Re-organization) (Repeal) Ordinance, 1991, [56] on the ground, inter alia, that this Ordinance is inconsistent with articles 9, 11, 59 and 60 of the Constitution and as such it is void in terms of

[53] Article 37 of the Constitution of India.
[54] 44 DLR (AD) 319
[55] Ibid.
[56] Ibid.

Article 7(2) of the Constitution. It appears that the petitioners in this case4‘ tried to enforce Articles 9 and 11, two fundamental principles of state policy, judicially enforceable along with Articles 59 and 60, but they could not succeed before the Court. Before the High Court Division, Respondents-State defended the vires of the impugned Ordinance saying that Fundamental Principles of State Policy are not “judicially enforceable”, that these Principles are not laws but are simply guide-lines for the State including Parliament and that even if any law is inconsistent with the **Fundamental Principles that cannot be challenged in court’s** [57]

Court Division in this case unanimously held that the Upazila Perished was not Local Government as the Upazila was not an administrative unit, but the judges differed as to the inconsistence of the said ordinance with the Constitution. Here two contrary opinions are found:

1. Fundamental Principe of State Policy are not judicially enforceable: It was held by one of the judges in the High Court Division that there was not any inconsistency and, even if any, the Repeal Ordinance could not be declared void in view of Article 8(2) of the Constitution, which says that the Fundamental Principles of State Policy are not enforceable by the Court.
2. Judicial enforceability of -fundamental Principles of State Policy: interpretation:Theother judge held that though Fundamental Principles of State Policy are not judicially enforceable but a law which is directly contrary to any Fundamental Principle or which negates such a principle then the law may be declared void in spite of the provision in Article 8(2). Thus this opinion is a new interpretation which is in favour of judicial enforceability of the principles, and this view apparently seems to be in conflicting with the provision of Article 8(2).[58]

In the above case4‘ Shahabuddin, CJ, before the Appellate Division, made the constitutional position of Fundamental Principles regarding their enforceability in clear terms that these are not enforceable. He says in paragraph 22 of the judgment:

The Repeal ordinance has been challenged mainly on the ground of its being inconsistent with Articles 9,11 and 59 of the Constitution. Article 7(2) of the Constitution says that any law

[57] Ibid. at p. 324 para 6.

[58] Ibid

inconsistent with the Constitution shall be void. Learned Counsels for the appellants are seeking a declaration of nullity of the Repeal Ordinance on this ground. A law is inconsistent with another law if they cannot stand together at the same time while operating on the same field. Article 9 requires the state to encourage the local Government institutions but the Ordinance has abolished a local Govemment,namely the Upazila Perished. Similarly, Article 11, they have pointed out, provides that the Republic shall be a democracy in which, among other things, ”effective participation by the people in administration” at all levels shall be ensured; but the Ordinance has done away with such participation in the administration at the Upazilla level. These two Articles as already quoted are Fundamental Principles of State Policy, but are not judicially enforceable. That is to say, if the State does not or cannot implement these principles the Court cannot compel the State to do so. The other such Fundamental Principles also stand on the same footing. Article 14 says that it shall be a fundamental responsibility of the State to emancipate the toiling masses— the peasants and workers— and backward sections of the people from all forms of exploitation. Article 15(a) says that it shall be a fundamental responsibility of the State to make provision of basic necessities of life including food, clothing, shelter, education and medical care for the people. Article 17 says that the State shall adopt effective rñeasures for the purpose of establishing a uniform mass-oriented and universal system of education extending free and compulsory education to all children, for removing illiteracy and so on. All these Principles of State Policy are, as Article 8(2) says, fundamental to the governance of the country, shall be applied by the State in making of laws, shall be guide to the interpretation of the Constitution and of other laws and shall form the basis of the work of the state and of its citizen, but shall not be judicially enforceable”. 4.

Shahabuddin CJ then explained there as no for making these Principles as judicially enforceable. In his words:[59]

The reason for not making these principles judicially enforceable is obvious. They are in the nature of People’s programmed for socio-economic development of the country in peaceful manner, not overnight, but gradually. Implementation of these Programmers requires resources, technical know-how and many other things including mass-education. Whether all these pre- requisites for a peaceful socio-economic revolution exist is for the State to decide.[60]

[59] Bid, pp. 330-331.
[60] Ibid

The lawyers on behalf of the petitioners tried to make the Principles enforceable in the Court at least from a different way though not directly. They contended following an interesting and tricky approach that the state may not enforce the Principles directly, i.e., can not compel the government for the implementation of the policies, but the court can declare a law nullity if it is inconsistent with the Fundamental Principles under Article 7(2). Shahbuddin CJ summarized this contention in his judgment in paragraphs 24, 25 and 26 in the following words:

24. Mr. Amirul Islam contends that Article 13 of the Indian Constitution, corresponding to Article 26 of our Constitution, makes any law inconsistent with any fundamental rights void; but in the Indian Constitution there is no provision like Article.[61].

7(2) of our Constitution. Article 7(2) makes void any law inconsistent with any provision of the Constitution besides fundamentalrights.It is true that Article 8(2) of our Constitution has been couched in stranger language than Article 37 of the Indian Constitution and that Arhcle 7(2) has no corresponding Article in the Indian Constitution. But the basic position is the same in both the Constitutions—namely Principles of State Policy are not judicially enforceable. In view of this position the learned Attorney-Generalargues that the Court cannot declare any fundamental principle void on the ground of inconsistency with a fundamental principle for, in that case declaration of nullity of a law will result in implementation of the fundamental principle by the Court. Mr. Amirul Islam has tried to make a distinction between the concept of enforceability of a provision of the Constitution and the concept of inconsistency between a provision of the constitution and another law and has contended that while the Court cannot enforce a fundamental principle, it can declare a law void on the ground of manifest inconsistence with any provision of the Constitution including a fundamental principle.

Supporting this view Dr. Kamal Hossain has argued that if a law is directly opposed to and negates any fundamental principle the Court has got power to declare the law void. He has referred to some of the fundament.i principles and tried to show that flouting of these principles may be prevented by the Court by issuing appropriate directions learned Counsel has cited Article 18(2) which provides that the State shall adopt effective measures to “prevent prostitution and gambling” and

[61] Ibid

contends that though the Court cannot direct the State to implement this principle, it can certainly declare a law void if the law provides for encouragement of prostitution and gambling. In support of this argument he has referred to certain decisions of the Indian Supreme Court, which despite the bar to judicial enforceability of directive principle, has issued appropriate directions to the Government to take positive action so as to remove the grievances of people caused by non-implementation of some Directive Principles.

In Comptroller and Auditor General Vs. Jagannath, AIR 1987 (SC) 537, Article 46 was involved. It requires the State to ”promote with special care economic and educational interest of weaker sections of the people”—particularly the Scheduled Caste and Schedule Tribes. Government issued instructions to provide adequate opportunity, special consideration and relaxation of qualification in the cases of candidates from weaker sections of the people for appointment as well as promotion in government services. The Office-Memo containing these Instructions was challenged under Article 226 on the ground of violation of Fundamental right as to equal opportunity for public service. The High Court, in spite of Article 37, which makes directive principles unenforceable, upheld the Office- Memo and dismissed the Writ Petition. In Mukesh Vs. State of Madhyapradesh, AIR 1985 (SC) 1363, Bonded Labour System (Abolition) Act, 1976 came up for consideration. It was a public interest litigation on the allegation that this law was not being implemented to stop exploitation of labour in stone quarries. In Sheela Vs. State of Maharashtra, AIR 1983 SC 378, a petition of complaint of custodial violence to women prisoners in police custody came up before the Supreme Court, which then laid down certain guide-lines for ensuring protection against torture and mal-treatment to prisoners in police custody.

Direction for legal aid, as provided in the directive principle under Article 39-A of the Constitution, was also issued by the Supreme Court. In Laxmi Kant Vs. Union of India, AIR 1987 SC 232, the Supreme Court issued certain directions as to adoption of destitute and abandoned children keeping in view Articles 15 and 39(I) of the Constitution. In all these cases the State and other authorities concerned were themselves proceeding to make necessary legislation for implementing the directive principles, and in some cases they issued directions to appropriate persons to take necessary action. In some of these cases as cited above the authorities, instead of opposing the writ petitions, sought necessary instructions and directions from the Court. In those cases no law was

made in contravention of any directive principles and as such there was no occasion for the Court to declare any such law void.[62]

But Shahabuddin CJ did not settle the issue of enforceability of the Fundamental Principles of State Policy, that may be due to the reason that that was not necessitated to settle the case, as the case was settled on different ground that the Upazilla was not considered as Local Government at all, so no question of violation of the Fundamental Principles of State Policy arose. In fact, though the enforceability of the Fundamental Principles of State Policy has been discussed by the judges, it was not the issue in this case. But Justice Naimuddin Ahmed in the High Court Division decided this issue affirmatively taking it as a hypothesis, which has been criticized in the Appellate Division by ATM AfzalJ. In the following words:

Naimuddin J. in his judgment found that the Upazilla Parishad was not a local Government institution within them of Articles 59 and 9 of the Constitution and as such Article 9 cannot be invoked for declaring the repealing Ordinance/Act void under Article 7(2) on the ground of inconsistency with Article 9. He has not also found that the impugned Ordinance/Act is in conflict with any other provision of Part II of the constitution containing Fundamental Principles of State policy. That being so, it was wholly unnecessary to decide whether in view of the Provision in sub-article (2) of Article 8 that the principles set out in Part II can be declared void under Arhcle 7(2). Having answered this hypothetical question in the affirmative after taking hypothetical facts into consideration in a lengthy discussion, the learned Judge addressed himself to the renJ question thus;

”Consequently, if it is found that the impugned repealing Ordinance is violate of Article 9 of the Constitution it is liable to be struck down as void in view of article 7(2) of the Constitution”.

Then the finding was made that the repealing Ordinance was not violate of Article 9 with which we have agreed. Therefore the broad decision that a law can be declared void in case of a conflict with any provision of Part II of the Constitution was uncalled for and made on hypothetical facts. This, as a rule, the Courts always abhor. The Court does not answer merely academic quashing but confines itself only to the point/points which are strictly necessary to be decided for the disposal of the matter before it. This should be more so when Constitutional questions are involved and the

[62] Ibid. pp. 339-340 paras 58 & 59.

Court should be ever discreet in such matters. Unlike a civil suit, the practice in Constitutional cases has always been that if the matter can be decided by deciding one issue only no other point need be decided.

16. AN ANALYSIS OF THE JUDGEMENT

Though the case concerns only with the people's right to participation, it has a direct impact on the enjoyment of other socio-economic rights as well. The judgement shall facilitate the State in passing laws detrimental to people's right to basic necessaries of life including food, clothing, treatment, housing and education as all those rights are placed in part II of the constitution. Hence, the observations of the court as regards the validity of law contrary to the state principles in Kudrat-E- Elahi require consideration.

Firstly, the interpretation of article 7(2) offered by Kamal J fails to follow the proper tune of the article, as a plain reading of the article leads one to a different conclusion. Article 7(2) declares the Constitution to be the supreme law of the Republic and further proceeds to say that if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void. It is not disputed that "principles" are not "law" in the ordinary sense and it is obvious that 'principles' may not supersede the 'law'. But the term "this Constitution" in article 7(2) includes both the 'laws' and 'principles' embodied in it. Moreover, the principles in Part II are not principles of ordinary weight or principles of any particular organ of the state, of any public corporation promulgated under its plenary or delegated legislative power. They are 'constitutional principles' and article 8(2) itself requires the state to apply these principles when making laws.

Secondly, it may be asked whether article 8(2), by making the provisions of part II unenforceable by the court, has vested the legislature with power to flout these provisions by enacting laws in violation of these provisions. Logically article 8(2) cannot be interpreted as superseding article 7(2) on the yardstick of which all laws enacted by the legislature has to be tested [Huda AKMS, 1997:281]. What is meant by unenforceability is that the directive principles can't be enforced by and through judicial process to compel the state to carry them out, if it can't do. This is not to say that it can throw them to the winds, and can enact laws openly in opposition to them. A court can

unambiguously declare a law unconstitutional as being manifestly opposed to the fundamental principle of state policy (Jain Kagzi Mc, 2004:938).[63]

Thirdly, the article 8(2) has five parts – the principles:

- Shall be fundamental to the governance of Bangladesh;
- Shall be applied by the State in making of laws;
- Shall be a guide to the interpretation of the Constitution and other laws of Bangladesh;
- Shall form the basis of the work of the State and its citizens; and
- Shall not be judicially enforceable.

It seems that while declining to nullify a law on the ground of inconsistency with the principles and using the principles only as an interpretative tool, judiciary is ready to enforce the fifth and third criteria respectively and not the other three criteria set out in article 8(2). It may be asked whether article 8(2) binds the judiciary only and leaves the executive and legislature out of its ambit.

Fourthly, by invoking the phrase 'shall not be judicially enforceable', Ahmed Shahabuddin CJ held that if the state 'does not or cannot' implement the principles, the court cannot compel. What is missing in this argument is that though the court cannot compel progression, it can always pin down retrogression. In this regard Justice Badrul Haider Chowdhury of the Appellate Division of the Supreme Court in Anwar Hossain v Bangladesh 1989 BLD(Spl) 1 has stated that:

"Though the directive principles are not enforceable by any court, the principles therein laid down are nevertheless fundamental in the Governance of the country and it shall be the duty of the state to apply these principles in making laws. It is a protected Article (article 8- author) in our Constitution and the legislature cannot amend this Article without referendum. This alone shows that the executive cannot flout the directive principles. The endeavour of the Government must be to realise these aims and not to whittle them down (para 53 p 61)."

Lastly, the fear of fundamental principles becoming at par with fundamental rights is not a substantiated one. Conversely, the tune is somewhat opposite in the constitution of Bangladesh.

[63] Ibid. pp. 339-340 paras 58 & 59.

The constitution has discarded the supremacy of rights doctrine by inserting article 47(1) (Ahmed Naim 1994:91). Article 47(1) provides that no law shall be deemed to be void on.

The ground that it is inconsistent with or takes away or abridge any of the rights guaranteed by Part III which is declared to be enacted to give effect to any of the fundamental principles of state policy set out in Part II. As regards the relative strength of rights and principles, it is pertinent to consult the Indian jurisprudence.

17. COMPARATIVE CASE LAW FROM INDIA[64]

The Indian Constitution is similar to that of Bangladesh in this regard as socio-economic rights are included as directive principles of state policy. In the constitution of India a detailed list of human rights has been incorporated in the form of Fundamental Rights and Directive Principles under Part III and Part IV of the constitution respectively. Despite the classification of the rights and principles, there has been, in practice dynamic interaction between these two parts, which gradually enhanced the status of the principles (Prasad Anirud 1976:85).

Initially the Indian Supreme Court in State of Madras v Champkam Dorairajan AIR 1951 SC 226, 525, MH Quareshi v State of Bihar AIR 1958 SC 731 and Re Kerala Education Bill AIR 1958 SC 956 took the stand that directive principles have to conform to and run subsidiary to the chapter on fundamental rights.

However, in Kesavananda Bharati v State of Kerala AIR 1973 SC 1461 the court held that what is fundamental in the governance of the country cannot be less significant than what is significant in the life of the individual and so rights and principles supplement each other. Mathew J constituting the majority in that case said: considerations of justice, of the common good, or "the general welfare in a democratic society" might require abridging or taking away of the Fundamental Rights (para 1760).

Subsequently the 42nd amendment to the Indian Constitution in 1976 tightened the link between the 'principles' and 'rights' by including the word 'socialist' in the preamble and by amending article 31C to confer primacy of a principle over fundamental rights.[65]

---

[64] 1981 BLD 30

[65] Ibid Bangladesh Vs. Mini rd Cubic, 1982 BLD (AD) 34, 37

Inclusion of the word ‘socialist’ in the preamble to describe the nature of the statehood of India affirmed and established that Indian’s is a socialist Constitution striking a balance between the individual liberty and the social interest (Ahmed, Naim 1994:94).

Article 31C, however, was struck down in Minerva Mills Ltd v Union of India AIR 1980 SC 1789 on the ground that giving absolute primacy to one part over the other disturbs the harmony of the constitution and ipso facto destroys the basic structure of the constitution (Chandrachud CJ, para 22, 64). Bhagwati J (dissenting), however, maintained that if a law is enacted for the purpose of giving effect to a Directive Principle and it imposes a restriction on a Fundamental Right, it would be difficult to condemn such restriction as unreasonable or not in public interest (para 329 F- H and 330 A-F). Later in Sanjeev Coke Manufacturing Co v Bharat Coking Coal Ltd AIR1982 SC 239 the Court affirmed Bhagwati’s dissenting opinion.

The Indian literature can be a source of inspiration for Bangladeshi courts. Since the scheme of the Constitution of Bangladesh relating to the rights and principles is the same as in the Indian Constitution, the same position should obtain under our constitutional dispensation (Islam Mahmudul 2002:56). Moreover whereas the Indian Constitution describes Part IV as “Directive Principles of State Policy”, the Bangladeshi one describes Part II as “Fundamental Principles of State Policy” which may be claimed to be calculated and deliberate. Keeping in mind that the Indian Supreme Court never shrugged its shoulders where it was called upon to give effect to principles (Mehta, PL & Verma N 1994:21), our judiciary is expected to be more enthusiastic than its Indian counter part.

To give the reply to the objection raised by Suranjit Sen Gupta against judicial non-enforceabilityof the’Principles’,in theConstituent Assembly, Dr. Kamal Hossain, the then law minister and the chairman of the Constitution drafting committee said that ‘these are not enforced by the court—rather through the convention’.’ 0° But it is not really clear how will these principles be enforced through the convention? Did he really mean it? Or he tried to say that like the conventions of the British Constitution these principles would be enforced through different mechanisms of constitutionality and public opinion instead of being judicially enforced.

Though these principles are not enforceable by any court, ‘nevertheless fundamental to the governance of Bangladesh” which should form ‘the basis of the work o‘f the State and of its citizens” and ‘the endeavour of the government must be to realise these aims and not to whittle them down.[66]

However, the question ofjudicial enforceability arises specially only when there is a violation of these principles or if the State does not perform its Constitutional obligation properly. Why will the Stateviolate these principles or why will it not perform its obligations following the guidelines provided by the Constitution? It must be remembered that theConstitution though says that these ‘principles”shall not be judicially enforceable’ it does not discharge the State from its Constitutional obligation imposed by these ‘principles’, from the positive approach obligations remain the same whether that is judicially enforceable or not.

[66] Ibid

18.CONCLUSION

Fundamental principles are incapable of judicial enforcement only in the sense that the order, time, place and mode of fulfilling the policies should be left with the executive. At the same time the executive should not be allowed to defy the Constitution by allowing them to flout, ignore, disregard and defeat the fundamental principles of state policy in making laws. Any sort of retrogression is constitutionally unacceptable. An interpretation of the constitution that allows repelling laws inconsistent with the fundamental principles will be in template harmony with the Fundamental Principles of State Policy Vision and mission of the Constitution enshrined in the preamble.

19. REFERENCES

[1] Kamal. Mustafa: Bangladesh Constitution: Trends and Issues, 2nd ed., pp. 176. University of Dhaka, (1994)

[2] Huda. AKMS: The Constitution of Bangladesh Vol1, pp. 554. Rita Court. Chittagong. (1997)

[3] Jain. Kagzi Mc: The Constitution of India, Vol2, 4th Edition, India Law House. (2004)

[4] Ahmed. Naim: Public Interest Litigation

Constitutional Issues and Remedies, pp. 190. BLAST, Dhaka (1994)

[5] Prasad. Anirud: "Human Rights and Socio- Economic justice: A Study with special reference to India" in Civil and Military Law Journal, Vol12 pp. 84-93 (1976)

[6] Islam. Mahmudul: Constitutional Laws of Bangladesh, 2nd ed., pp. 848. Mullick Brothers, Dhaka (2002)

[7] Mehta. PL and Verma Neena: Human Rights under the Indian Constitution: (The Philosophy and Judicial Gerrymandering), pp.187. Eastern Book Corporation. (1999)