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Research Monograph
on
Fundamental Principles of State Polices & Its Enforcement Mechanism

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Introduction

The idea of fundamental principles in the constitution was first introduced in the Irish constitution of 1937.Following the examples of Irish constitution the idea was borrowed by Indian and Pakistani constitution and so has been in the case of the Bangladeshi constitution in 1972.

There is no universal definition for fundamental principles of state policy. But the terms indicates those principles which are considered fundamental in the matters of policy formulating by government.

Nature of fundamental principles

- Fundamental principles are described as 'beau ideal'[1]. The highest stander of excellence. Because they embody the principles of high ideals.
- Fundamental principles are described as veritable Dustbin of sentiment[2] for they are the best idealistic words written down in the constitution without providing anything for their enforcement.
- Professor K.C Wheare has described them as paragraphs of generalities into the constitution.
- These principles are also described a moral homily on the one hand, and as a manifesto of aims and aspirations on the other hand[3] for They are all principles relating to economic,social and cultural rights which are not a matter of immediet achievement.

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[1] Kapoor, A. C, select constitutions, 12 ed, p. 93
[2] Krishnamachari,T. T, a member of the indian constituent assembly
[3] Gledhill, alan, Pakistan, (London:stevens and sons Ltd. 1957) p. 145

- The fundamental principles are fundamental in the sense that they oblige all actors within the state - executive, legislature, and judiciary- as well as the citizens. But article 8(2) of the constitution weakens these principles as the article explicitly states that these principles are not judiciary enforceable.

Constitutional Status of the Fundamental Principles of State Policy

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:

i) These Principles shall be fundamental to the governance of Bangladesh,

ii) Shall be applied by the State in the making of laws,

iii) Shall be a guide to the interpretation of the Constitution and of the Other laws of Bangladesh,

iv) Shall form the basis of the work of the State and of its citizens; but

v) Shall not be judicially enforceable.

Significance of fundamental principles

The fundamental principles have a great political importance. Dr. Ambedkar said – "If any government ignores them, they will certainly have to answer before the electorate at the election time".[4]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.

Though a court 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, [5] with reference To the directives so that they do not serve as 'mere homily'[6]. Article 8(2) of the constitution specifically allows the courts to refer to these principles for understanding the meaning of the provisions of the constitution which are doubtful.

The directive principles have idealistic value in the sense that they outline the ideal of a welfare society. We can sum up the utility of the Directive Principles in the

Following points;

i) An instrument of instructions to all authorities within the state.

ii) Useful beacon-lights to courts.

iii) Important tool in exercising power of judicial review.

iv) Utility in interpreting the Constitution.

v) Utility in interpreting other laws.

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[4] Quoted by Mahajan,V. D, the constitution of india 12 ed, p. 185

[5] State of bihar vs Kameshwar AIR 1952 SC

[6] Mahajan V. D the constitution of india, 12 ed p. 185

vi) Utility as the ideology.

vii) Utility as setting the goal

Fundamental principles under the constitution of Bangladesh

The directive principles in the Bangladesh constitution got their place under heading of "fundamental principles of state policy". Articles 8-25 of part II of the constitution contain all the principles. Under article 8 of the original constitution of 1972

1. Secularism
2. Nationalism
3. Socialism
4. Democracy

These four principles were designed to be major fundamental 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. Those principles are included in the constitution throughout Articles 9-25.

Nature and judicial enforceability of the fundamental Principles of State Policy

Article 8(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.

Invalidating a law inconsistent with fundamental principles

The status of fundamental principles of state policy within the fabric of the constitution cane under judicial scrutiny in Kudarat-E-Elahi Panir and others vs Bangladesh. In this case the appelants relying on article 7[7] of the constitution tried to convince the court that a law inconsistent with any of the fundamental principles of state policy is void. To negate the

[7] Sub article 2 of article 7 deals with the supremacy of constitution.

contention, the court interpreted article 7(2) along with article 8(2) in pessimistic approach. However, it may be submitted that the constitution doesn't bar repelling a law conflicting with any of the economic,social and cultural rights placed in Part II.

Kudrat E-Elahi V. Bangladesh, 44 DLR (AD) 319

Kudrat -E-Elahi Panir and others vs Bangladesh concerned a challenge to ordinance No. XXXVII of 1991(that subsequently became Act No. II of 1992) which abolished the elected upazila parishads and vested in the government all rights , powers, authorities and privileges of the dissolved of the upazila parishads , unsuccessfully challenged the law in the high court division and then appeared before the appellate division by obtaining leave to appeal.

One of the grounds was that the ordinance being inconsistent with Articles 9(as it was before the 15th amendment) and 11 ran against the spirit of the constitution and became void by operation of Article 7(2) . It was crystal clear that the ordinance was against the gist of Articles 9 and 11[8]were in the part II containing the fundamental principles.

In the main judgement Shahabuddin Ahmed CJ held that Articles 9 and 11 being located in part II of the constitution were not judicially enforceable. If the state does not or can not implement these principles the court can not compel the state to do so[9].

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[8] Article 9 as it stood after the martial law amendment emphasized on maintaining democratically elected local government institution. Article 9 and 11 affirms democratic nature of the state , in which fundamental human rights and freedoms and respect for the dignity and worth of human person are guaranteed and effective participation of people through their elected representative in administration at all levels is ensured.

[9] Kudrat-E-Elahi Panir and others vs Bangladesh 44 DLR (AD) 319,para 22

Mustafa Kamal J concurred with Shahabuddin Ahmed CJ on two grounds:

While there is a specific provisions in the constitution dealing with laws that are inconsistent with fundamental rights, [10] there is no specific provisions regarding the laws that are inconsistent with fundamental principles of state policy. To him the omission is deliberate and calculated because provisions analogues to article 26 could have been inserted in part II as well.

Under article 7(2), any law inconsistent with the constitution shall be void to the extent of the inconsistency. Mustafa Kamal J observed that the constitution itself in article 8(2) recognize 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 of the constitution itself[11]. So article 7(2) can not be interpreted to say that if any other law is inconsistent with the principles mentioned in part II then that law to the extent of the inconsistency shall be void[12]. He feared that such interpretation would bring the Fundamental principles of state policy at par with fundamental rights in so far as void ability is concerned. [13]

Here two contrary opinions are found:

1. Fundamental Principles o f 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.

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[10] The constitution of people republic of Bangladesh, article 26
[11] Supra note 9,Para 84
[12] Ibid, para 85
[13] Ibid

2, Judicial enforceability of Fundamental Principles of State Policy:

A new interpretation: The other 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).

Saleem ullah V. Bangladesh, 47 DLR 218

In Saleemullah V. Bangladesh,[14] it was contended that the decision of Then Government to send troops to Haiti to join UN Force in Haiti was In violation of Article 25 of the Constitution. But the High Court Division Held this decision of the government not to be contrary to the Fundamental Principles of State Policy[15] In the concluding paragraph of the judgment The Court says:

"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

[14] 47 DLR 218
[15] Ibid page 224

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."[16]

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?

[16] Ibid

Aftabuddin vs Bangladesh and others, 48 DLR 1

In Aftabuddin V. Bangladesh and others,[17] the High Court Division has Discussed the following two points regarding Fundamental Principles of State policy:

1. Fundamental Principles of State policy are not judicially enforceable:

Naimuddin Ahmed J. observed that—

"It is true that the Preamble to the Constitution is not enforceable. Nor is Article 22, which is enshrined in Part II of the Constitution As Principles of State Policy, in view of Article 8 of the Constitution."[18]

Thus, it shows that Naimuddin Ahmed J. deviated from his earlier Opinion[19] regarding enforceability of the Fundamental Principles of State Policy.

2. Interpretive value of the Fundamental Principles of State policy:

Naimuddin Ahmed J. in the High Court Division observed that—

"But there is no doubt that the Fundantental Principles of State poHcy act as guide to the interpretation of the Constitution and other laws of Bangladesh in view of clause (2) of Article 8 of the Constitution ... Article 22 of the Constitution enjoins the State To ensure the separation of tlie judiciary from the executive Organs of the State. Article 116 has, therefore, to be interpreted In the light of the above provisions. There is no dispute that the

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[17] 48 DLR 1
[18] Ibid p 11 para 45
[19] Supra note 58

Pledge contained in the third paragraph of the preamble

Presupposes an independent]udiciary and unless independence

Of the judiciary is ensured the third paragraph of the Preamble

Cannot be secured. Similarly, although the directive to ensure

Separation of the judiciary from the executive by the State

Cannot be implemented and enforced through Court, Article

116 has to be interpreted in the light of this directive. In this

Connection, Article 116A is relevant. It runs as follows:

"Subject to the provisions of the Constitution all persons

Employed in the judicial service and all magistrates shall be

Independent in the exercise of their judicial functions."

Article 116 A is, therefore, a step to realize the principle enshrined

In Article 22."[20]

Sheikh Abdus Sabur V. Returning Officer, District Education Officer-in Charge, Gopalganj and others, 41 DLR (AD) 1989 (30)

In Sheikh Abdus Sabur V. Returning Officer, District Education Officerin-Charge, Gopalganj and others,[21]Badrul Haider Chowdhury J. clearly mentioned these principles as judicially unenforceable. In his words:

"While our Constitution recognizes the supremacy of the

Constitution, it lays fundamental principles of State policy in

Part II although the principles cannot be judicially enforced."[22]

Shahabuddin J. in the same case focused on the utility of the Fundamental

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[20] 48 DLR pp 11-12 paragraph 45-46

[21] 41 DLR (AD) 1989 (30

[22] Ibid

Principles of State Policy in the making of law and negatived the possibility of judicial enforceability in the following words: "Parliament is a creation of the Constitution itself; the local elective bodies are created by their respective statutes in pursuance of Article 9 of the Constitution, which appears in Part II relating to Fundamental Principles of State Policy. These Principles, though they must be applied by the State in the making of law, are not justiciable in court."[23]

Secretary, Ministry of Finance, Government of Bangladesh vs. Mr. Md. Masdar Hossain & others, 20 BLD (AD) (2000) 104

In Masdar Hossain[24] case though the Court does not seem to enforce the Principle directly but the Court criticized the State for non-implementation Of Article 22 of the Constitution of Bangladesh, one of the fundamental Principles of State Policy, focusing the failure of the state to separate the Judiciary from the executive. The Court observed:

[23] Ibid, p. 48 para 40
[24] 20 BLD (AD) (2000) p. 142.

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[23] Ibid, p. 48 para 40
[24] 20 BLD (AD) (2000) p. 142.

"Article 22 of the Constitution provides that the State shall

Ensure the separation of judiciary from the executive organs of

The State. Though more than 29 years have elapsed since

Making of the constitution and its coming into force no effective

Steps have benn taken to separate the judiciary from the executive

Organs of the State."[25]

In the same case, the Court further adds that 'Article 22 contemplates

Separation of judiciary from the other organs of the State and it is for the

Legislature to decide on this issue'.[26]

Saiful Islam Dilder V. Government o f Bangladesh and others, 50 DLR (1998)318

In Saiful Islam Dilder V. Government of Bangladesh and others[27] the

[25] Ibid. Per Latifur Rahman, J agreeing with Mustafa Kamal, C.J, para 75
[26] Ibid. p.l47, para 85
[27] 50 DLR (1998) 318

Court observed:

"True, that fundamental principle of state policy, here Article

25, can not be enforced by Court, nevertheless the fxindamental

Principles of state policy is fundamental to the governance of

Bangladesh, and serve as a tool in interpreting the Constitution

And other laws of Bangladesh on the strength of Article 8(2) of

The Constitution by the superior Court."[28]

Here the Court made it clear that the Fundamental Principles of State

Policy are not judicially enforceable. But, on the other hand, when the

Learned Advocate relying upon Article 25 of the Constitution contended

That Anup Chetia, if extradited to India the government would violate

The mandate of Article 25[29]the Court in response to this argument

Observed that the said extradition does not go against Article 25, one of

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[28] Ibid., p. 322 para 6.
[29] Ibid

The Fundamental Principles of State Policy. Thus, the Court rejected the

Writ petition relying on, inter alia, that the said extradition does not

Violate Article 25, one of the Fundamental Principles of State Policy.[30]

Then, from this approach of the Court a question may easily be posed;

What would the Court tell if the Article 25 would be violated? Could the

Court decide it differently?

Dr. Mohiuddin Farooque V. Bangladesh, represented by the Secretary, Ministry o f Irrigation, Water Resources and Flood Control and others, 49 DLR (1996)(AD) 1

It was argued in Dr. Mohiuddin Farooque V. Bangladesh[31] that—

"The Preamble and Article 8 also proclaim 'the principles of

Absolute trust and faith in the Almighty Allah' as a fundamental

Principle of the Constitution and as a Fundamental principle of

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[30] Ibid
[31] 49 DLR (AD) 1

State Policy. Absolute trust and faith in the Almighty Allah

Necessarily mean the duty to protect his creation and

Environment. The appellant is aggrieved, because Allah's

Creations and environment are in mortal danger of extinction

And degradation."[32]

Thus, it appears that an act done contradictory to the Fundamental

Principles of State Policy can make the concerned person aggrieved

Though those Fundamental Principles of state Policy are not judicially

Enforceable. In the same case[33] Dr. Farooque referring Article 21(1) of the

Constitution, one of the Fundamental Principles of State Policy, which is

As follows:

"It is the duty of every citizen to observe the Constitution and

[32]Ibid., p. 9 para 25.
[33] Ibid

The laws, to maintain discipline, to perform public duties and

To protect public property."

Argued that he has this constitutional obligation of performing public

Duties and to protect public property, and he succeeds in proving himself

As an aggrieved person.

Latifur Rahman J. in this case[34] focused on the interpretive value of the

Fundamental Principles of State Policy and also pointed out that the apex

Court of the country has the obligation to interpret the Constitution in

Line of the Fundamental Principles of State Policy as enshrined in the

Same. He observed:

"Part II of our Constitution relates to fundamental principles of

State Policy. Article 8(2) provides that these principles are not

Enforceable in any court but nevertheless are fundamental to

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[34] Ibid

The governance of the country and it shall be the duty of the

State to apply the principle in making the laws. The principles,

Primarily being social and economic rights, oblige the State,

Amongst other things, to secure a social order for the promotion

Of welfare of the people, to secure a right to work, to educate,

To ensure equitable distribution of resources and to decentralize

Power to set up local government institutions composed of

People from different categories of people as unit of self

Governance. A Constitution of a country is a document of social

Evolution and it is dynamic in nature. It should encompass in

Itself the growing demands, needs of people and change of

Time. A Constitution cannot be morbid at all. The language

Used by the framers of the Constitution must be given a

Meaningful interpretation with the evolution and growth of

Our society. An obligation is cast on the Constitutional Court

Which is the apex court of the country to interpret the

Cons titution in a manner in which social, economic and political

Justice can be advanced for the welfare of the state and its

Citizens."[35]

Are these principles judicially enforceable??

The Fundamental principles of State Policy are not judicially enforceable

-but does it mean that these are not enforceable at all even by any other

Means? Does it necessarily imply that the State will not be answerable to

Any authority for the non-implementation of these Fundamental

Principles? Dr. Ambedkar, the chairman of the Drafting Committee of

The Constitution of India, while introduced the draft Constitution,

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[35] Ibid., pp. 18-19 para 72

Wonderfully settled such a point in the following words:

"If it is said that the Directive Principles have no legal force...

I am prepared to admit it. But I am not prepared to admit it that

They have no sort of binding force at all. Nor am I prepared to

Conceive that they are useless because they have no binding

Force in law.... The Draft Constitution as framed only provides

A machinery for the government of the country. It is not a contrivance to install any particular party in power as has been done in some countries. Who should be in power is left to be determined by the people, as it must be, if the system is to satisfy the tests of democracy. But whoever captures power will not be free to do what he likes with it. In the exercise of it, He will have to respect these instruments of instructions which are called Directive Principles. He can not ignore them. He may not have to answer for their breach in a Court of Law. But he will certainly have to answer for them before the electorate at election time. What great value these directive principles possess will be realized better when the forces of right contrive to capture power.[36]

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[36] Indian Constituent Assembly Debate, Vol. VII, p. 41

Thus it has been made absolutely clear that the judicial enforcement is not the only way to enforce a particular rule, rather public opinion is also an effective mechanism for the enforcement of certain principles and certainly this is in conformity with the idea of popular sovereignty as opposed to Austin's concept of sovereignty. Thus, the accountability to enforce these principles was left to the political process and with the passage of time however greater emphasis has come to be laid on the fulfillment of the goals set out in these principles.[37]

The comment made by Hegde J. of India is also worth mentioning here: "... a mandate of the Constitution, though not enforceable by courts is none the less binding on all the organs of the State. If the State ignores those mandates, it ignores the Constitution."[38] Thus it appears that Granville Austin rightly termed fundamental principles of state policy as 'the conscience of the constitution'.[39]In this connection legal status of the constitutional conventions in the UK is worth mentioning here that these are not in reality laws at all since they are not enforced by the courts[40] though may be considered to be binding by and upon those who operate the constitution.[41]To breach a constitutional convention is to act unconstitutionally but not unlawfully since these are non-legal rules.[42] Such breach attracts no legal sanction

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[37] JainM.P., Indian Constitutional Law, 4 th edition reprint, Wadhwa and Company Law Publishers, Agra, Nagpur, India, 2002, p. 736

[38] Hegde, Directive Principles of State Policy in the Constitution of India ("the Rau Lectures) at p.49

[39] Mahajan V. D., Constitutional Law of India, Eastern Book Company, Lucknow, 7th ed., p. 366

[40] Dicey A. V. 1885, for reference see Hilaire Barnett & Marinos Diamantides, Public Law, 2003, p.33

[41] Marshall and Moodie, 1971, pp. 23-24, for reference see Hilaire Barnett & Marinos Diamantides, Public Laiv, 2003, p.33.

[42] Hilaire Barnett & Marinos Diamantides, Public Law, 2003, p.33.

but instead risks political repercussions.'[43] Thus, Justice Mustafa Kamal rightly observed in the context of the constitutional law of Bangladesh that since the fundamental principles of state policy are not laws to be enforceableby the judiciary, so even if any law is passed by the parliament violating any of these principles, judiciary is not the only light at the end of the turmel to enforce it, and if it really happens so there are many other ways of enforcement except judicial enforcement, like public opinion, political party and election.'[44]

To give the reply to the objection raised by Suranjit Sen Gupta against Judicial non-enforceability of the 'Principles', in the Constituent Assembly, Dr. Kamal Hossain, the then law minister and the chairman of the Constitution drafting committee said that 'these are not enforced by the

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[43] Ibid.,p.34.
[44] Kudrat-E-Elahi V. Bangladesh, 44 DLR (AD) 319, at paragraph 86.

Court—rather through the convention'.[45] 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

mechanism of constitutionality and public opinion instead of being

Judicially enforced.

Conclusion

Though these principles are not enforceable by any court, 'nevertheless

Fundamental to the governance of Bangladesh''[46] which should form 'the

Basis of the work of the State and of its citizens''[47] and 'the endeavour of

The government must be to realise these aims and not to whittle them

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[45] Bangladesh GonoParishader Bitarka, Sarkari Biboroni, 1972 vol.2 at p. 455
[46] Article 8 of the Constitution of Bangladesh.
[47] Ibid

Down'.[48]However, the question of judicial 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 State violate

These principles or why will it not perform its obligations following the

Guidelines provided by the Constitution? It must be remembered that

The Constitution 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.

[48] Per B. H.Chowdhury, J. in Anwar Hossain Chowdhury V. Bangladesh, 1989 BLD (Spl) 1, p.61 para 53.