

## **LEGAL AND CONSTITUTIONAL STATUS OF THE FUNDAMENTAL PRINCIPLES OF STATE POLICY AS EMBODIED IN THE CONSTITUTION OF BANGLADESH**

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### **Introduction**

The Constitution of Bangladesh embodies in its part II certain directions to the State terming them as 'Fundamental Principles of State Policy'. The Constitution itself terms these as 'Principles', not 'laws'.<sup>1</sup> Apart from setting certain ideological objectives, interestingly, this part II contains also the provisions regarding basic necessities which says that 'It shall be a fundamental responsibility of the State to attain, through planned economic growth, a constant increase of productive forces and a steady improvement in the material and cultural standard of living of the people, with a view to securing to its citizens<sup>2</sup> the basic necessities and rights, like food, clothing, shelter, education, medical care, right to work, etc. This part in fact contains certain basic duties of the State and certain basic necessities of the type of economic human rights of the people are dependant on the performance of the above duties properly by the State. With the development of the concept of 'welfare state' in fact this trend has been developed on political grounds to impose more duties on the state without assessing the fact whether the State has the actual ability to perform it or not based on its economic strength. The prime characteristic of these principles is that these are not judicially enforceable and act as guidelines to the state; and many Constitutions of the modern world also contain such principles. An attempt has been made in this article to assess the nature, importance and the enforceability of the Fundamental Principles of State Policy as provided in the Constitution of Bangladesh in the light of different juristic interpretations given by the judiciary.

### **Are these Principles laws?**

Article 7 makes it clear that the Constitution is the supreme law of the land and the same has been made more clear by adding the words '... and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void'. For example, if the parliament enacts any law violating any of the Fundamental Rights enshrined in the

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1. Article 8 of the Constitution of Bangladesh.

2. Article 15, *Ibid*.

Constitution that law will be void. But it appears that the Fundamental Principles of State Policy are not laws in the sense that if the parliament enacts any law violating any of these Principles that law will not be void since these Principles are not judicially enforceable as is mentioned in Article 8(2) of the Constitution. Thus this constitutional position of the Fundamental Principles of State Policy gives rise to a paradox, since these are the parts of the supreme law though they are not laws in themselves.

Let us analyze the issue from jurisprudential perspective. In discussing the nature of law<sup>3</sup> Sir Fredrick Pollock has made the following observations:

"In one sense, we may well enough say that there is no law without a sanction. For a rule of law must at least be a rule conceived as binding, and a rule is not binding when any one to whom it applies is free to observe it or not as he thinks fit. To conceive of any part of human conduct as subject to law is to conceive that the actor's freedom has bounds which he oversteps at his peril."<sup>4</sup> "...On the whole the safest definition of law in the lawyer's sense appears to be a rule of conduct binding on members of a commonwealth as such."<sup>5</sup>

Hedge J. said in his Rau Lectures:

"... the view that the principles were not binding if they were not enforceable by law, originated with John Austin, and Kelsen propounded a similar view. However, Prof. Good heart and Roscoe Pound took a different view. According to them, those who are entrusted with certain duties will fulfill them in good faith and according to the expectations of the community."<sup>6</sup>

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

Hedge J. makes no reference to the exposition of the nature of law by Sir Fredrick Pollock in his *Jurisprudence and Legal Essays* ... However, Sir Fredrick Pollock emphasized the point that the ordinary meaning of law, as given in the *Oxford Dictionary*, (1903) namely, "The body of rules, whether

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3. *Jurisprudence and Legal Essays*, selected and introduced by A. L. Goodheart (1961)
  4. *Ibid.* pp. 13-14
  5. *Ibid.* p. 15
  6. Hedge, *Directive Principles of state policy in the Constitution of India* ("the Rau Lectures"), pp.49-50

proceeding from formal enactment or from custom, which a particular state or community, regard as binding on its members or subjects." our founding fathers did not treat framing of our Constitution as a place where a conflict between eminent jurists should be resolved. They used "law" in its plain ordinary sense of "a rule enacted or customary in a community and recognized as enjoining or prohibiting certain actions and enforced by the imposition of penalties". The juristic analysis of law by Prof. Goodheart and Prof. Roscoe Pound can have no relevance to the society and it is simply not true that persons entrusted with the duty of implementing the directives will strive in good faith to implement them according to the expectations of the community.<sup>7</sup>

Thus, it appears that from this jurisprudential perspective also that the Fundamental Principles of State Policy as embodied in the Constitution of Bangladesh are not laws in the sense of enforcement. Justice Mustafa Kamal rightly commented that these are not laws and to term it as laws will be unconstitutional as he says "It is the Law of the Constitution itself that the fundamental principles of state policy are not laws themselves but 'principles'. To equate 'principles' with 'laws' is to go against the Law of the Constitution itself."<sup>8</sup>

### **Underlying object of incorporation of Fundamental Principles of State Policy in the Constitution**

Certain Directive Principles are embodied in the Constitution of India, which are almost similar in nature to the Fundamental Principles of State Policy as enshrined in the Constitution of Bangladesh. Dr. Ambedkar in his speech delivered before the Indian Constituent Assembly explained the underlying object of the Directive Principles embodied in the Constitution of India.<sup>9</sup> In fact, he described most wonderfully in an elaborate way the underlying philosophy of incorporation of such type of principles in the Constitution as he portrayed that these principles give the direction towards the establishment of economic democracy by setting these principles as the ideals of this Constitution, the hopes and aspirations of the nation to be achieved. Instead of dictatorship the Constitution has established political democracy and there must have an objective set by the Constitution to be achieved by the democratic state. That objective is economic democracy, which is the outcome of the

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7. Seervai, H. M. *Constitutional Law of India*, 4th ed. Universal Book Traders, Delhi, 2002, vol.2, at p. 1929.
  8. *Kudrat E-Elahi V. Bangladesh*, 44 DLR (AD) 319, p. 346 para 84.
  9. Constituent Assembly Debates of India, Vol. III, pp.494-95.

Directive Principles embodied in the Constitution. To quote him:

"I see that there is a great deal of misunderstanding as to the real provisions in the Constitution in the minds of those members of the House who are interested in this kind of directive principle. ... .. By parliamentary democracy we mean "one man, one vote". We also mean that every Government shall be on the anvil, both in its daily affairs and also at the end of a certain period when the voters and the electorate will be given an opportunity to assess the work done by the Government. The reason why we have established in this Constitution a political democracy is because we do not want to install by any means whatsoever a perpetual dictatorship of any body of people. While we have established political democracy, it is also the desire that we should lay down an ideal before those who would be forming the Government. *The ideal is economic democracy*, whereby so far as I am concerned, I understand to mean, "one man, one vote".<sup>10</sup>

Then he posed the question that how can it be achieved? He opined that there are many ways to achieve the goal of economic democracy. To quote him:<sup>11</sup>

There are various ways in which people believe that economic democracy can be brought about; there are those who believe in individualism as the best form of economic democracy; there are those who believe in having a socialistic State as the best form of economic democracy; there are those who believe in the communistic idea as the most perfect form of economic democracy.

Now, having regard to the fact that there are various ways by which economic democracy may be brought about, we have deliberately introduced in the language that we have used in the directive principles, something which is not fixed or rigid. We have left enough room for people of different ways of thinking with regard to the reaching of the ideal of economic democracy, to strive in their own way, to persuade the electorate that it is the best way of reaching economic democracy, the fullest opportunity to act in the way in which they want to act. Sir, that is the reason why the language of the articles in Part IV is left in the manner in which this drafting Committee thought it best to leave it. It is no use giving a fixed, rigid form to something which is not rigid, which is fundamentally changing

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10. Ibid.

11. Ibid.

and must, having regard to the circumstances and the times, keep on changing.

He then summed up describing the value of incorporation of such principles in the Constitution in the following words:

It is, therefore, no use saying that the directive principles have no value. In my judgment, the directive principles have a great value, for they lay down that our ideal is economic democracy. Because we did not want merely a parliamentary form of Government to be constituted through the various mechanisms provided in the Constitution, without any direction as to what our economic ideal, as to what our social order ought to be, we deliberately included the Directive Principles in our Constitution. I think, if the friends who are agitated over this question bear in mind what I have said just now that our object in framing this Constitution is really two-fold: (i) to lay down the form of political democracy, and (ii) to lay down that our ideal is economic democracy and also to prescribe that every Government whatever it is in power, shall strive to bring about economic democracy, most of the misunderstanding under which most members are laboring will disappear."<sup>12</sup>

#### **Utility of the Fundamental Principles of State Policy in the Constitution:**

The utility and the significance of these principles have been aptly described by M.C. Setalvad, former Attorney-General of India, who says that although the Directive principles of State Policy—

"... confer no legal rights and create no legal remedies, they appear to be like an instrument of instructions, or general recommendations addressed to all authorities in the Union reminding them of the basic principles of the new social and economic order which the Constitution aims at building. These fundamental axioms of State policy, though of no legal effect, have served as useful beacon-lights to courts. It has been held in the context of the Directive Principles that legislation making the land resources of the country effectively available to the larger mass of the cultivating community is acquisition of the lands for a public purpose. Restrictions imposed by laws on the freedom of the citizen may well be reasonable if they are imposed in furtherance of the Directive Principles. Thus these principles have helped the courts in exercising their powers of judicial review. They will, therefore, not only form dominating background to all state action, legislative or executive, but also a guide, in some respects, to courts. The directive principles are

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12. Ibid.

but an amplification of the preamble of the Indian Constitution which bases the authority of the Constitution of India of the solemn resolve of the people of India to secure to all its citizens Justice in the social, economic and political fields; Liberty in all spheres; Equality of status and opportunity, and the promotion among them all of Fraternity assuring the dignity of the individual and the unity of the Nation."<sup>13</sup>

Thus 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.
- vi) Utility as the ideology.
- vii) 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,<sup>14</sup> perhaps the first of its kind which embodied such principles, and consequently he tried to give primacy to the Directives in case of its conflict with the Fundamental Rights and for that purpose he brought the following amendments to the draft Constitution of India:

1. At the beginning of cl. 9(2) [now Art. 13(2) ] insert the words "Subject to the provisions of cl. 10" [which emphasized the fundamental nature of directive principles.]
2. To clause 10 *add* the following: "No law which may be made in the discharge of its duty under the first paragraph of this section, and no law which may have been made by the State in pursuance of principles of policy now set forth in chapter III of this Part shall

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13. Mahajan, V. D. *Constitutional Law of India*, Eastern Book Company, Lucknow, 1991, 7th ed., p.368

14. Shiva Rao, *op. cit.* Vol.III, p. 233

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.<sup>15</sup>

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 prevail. Otherwise, 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."<sup>16</sup>

But these amendments were neither considered nor accepted.<sup>17</sup> Then naturally a question arose : Is there any justification of incorporation of these unenforceable principles in the Constitution? Interestingly Sir B. N. Rau made a wonderful reply to it and the comment made by him regarding the Directive principles incorporated in the Constitution of India is worth mentioning here:

"... certain lawyers object to the Part in the draft Constitution dealing with 'Directive Principles of State policy', on the ground that since the provisions in the Part are not to be enforceable by any court, they are in the nature of moral precepts; and the Constitution, they say, is no place for sermons. But it is a fact that many modern constitutions do contain moral precepts of this kind, *nor can it be denied that they may have an educative value.*"<sup>18</sup>

Thus it has been emphasized that these principles though unenforceable by the court yet have an educative value generally, which may inspire all authorities in the State to reach the ultimate goal of economic democracy. Sir B. N. Rau whose draft of the Constitution (of India) formed the basis of discussion in the drafting Committee and in the Constituent Assembly admitted that once his amendments had been rejected, directive principles

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15. Ibid. p. 226

16. Ibid.

17. Ibid. p. 326

18. Rau Benegal Sir, *India's Constitution In the Making*, 2nd revised and enlarged edition, at pp. 388-393.

had no legal force but had moral effect by educating members of the Government and of the Legislatures.<sup>19</sup>

### **Relationship between fundamental rights and fundamental principles of state policy**

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

#### *Comparison with the provisions of the Indian Constitution*

*Earlier view:* In case of conflict between fundamental rights and the principles of state policy, fundamental rights shall prevail as it has the primacy over the latter.<sup>20</sup>

*Recent view:* Should avoid any conflicting interpretation between these two and should try to give effect to both as much as possible adopting the principle of harmonious construction.<sup>21</sup> Fundamental rights and the principles of State policy are supplementary and complementary to each other and fundamental rights must be construed in the light of the principles of State policy.<sup>22</sup>

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

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

20. *Madras V. Champakam Dorairajan*, AIR 1951 SC 226

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

22. *Unni Krisnan V. A.P.*, AIR 1993 SC 2178, para 141



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. 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 by the 42nd Constitution Amendment Act the scope of primacy was extended to all principles laid down in Part IV, but this extension was further declared as void for being unconstitutional by the majority decision of the Supreme Court in 1980 in the case of *Minerva Mills V. Union of India*,<sup>23</sup> so that article 31C now remains at its pre 1976 form which gives shield to articles 39(b) and (c) instead of including all Directive Principles. This part of article 31C was held as valid by the Supreme Court of India<sup>24</sup> and the latter part of this article was declared void as unconstitutional by the same case<sup>25</sup> on the ground of taking away the power of judicial review, but interestingly yet the text has not been changed due to technical legal difficulty and the earlier text<sup>26</sup> still remains in the Constitution though that has been declared void by the highest court.<sup>27</sup> In deciding the validity the court opined that there is no disharmony between these two as they supplement each other in aiming at the same target of bringing about a social revolution to establish a welfare state, which is envisaged in the preamble as the ultimate spirit of the Constitution, and it is also the duty of the court to interpret the Constitution so as to ensure the implementation of the Directive Principles.<sup>28</sup> 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—

"...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

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23. AIR 1980 SC 1789

24. In *Kesavananda V. State of Kerala*, AIR 1973 SC 1461

25. *Ibid.*

26. *Article 31C of the Constitution of India: "Notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing [all or any of] the principles [laid down in Part IV] shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by 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: ..."*

27. *Supra* note 13.

28. *Ibid.*

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".<sup>29</sup>

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 as bad for the reason that what was intended to be subsidiary by the Constitution-makers has been made dominant."<sup>30</sup>

Probably being inspired by this spirit in favor of the Directives the law makers subsequently in 1976 by the 42nd Amendment to the Constitution gave primacy to all Directive principles over the fundamental rights which amendment was not upheld by the Supreme Court as constitutional.<sup>31</sup>

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.

#### *Distinction between fundamental rights and fundamental principles of state policy*

Following points of differences between fundamental rights and fundamental principles of state policy may be mentioned here:

- i) *As regards judicial enforceability:* Fundamental rights are judicially enforceable,<sup>32</sup> though the fundamental principles of state policy cannot be enforced in the courts.<sup>33</sup>
- ii) *As regards requirement of legislation for the implementation:* Fundamental rights will be enforced and be implemented directly

29. Ibid.

30. Ibid.

31. In *Minerva Mills Ltd. V. India*, AIR 1980 SC 1789

32. See Articles 26 and 44 of the Constitution of Bangladesh.

33. See Article 8 of the Constitution of Bangladesh.

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.

- 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 of a 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:

- 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.

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 any 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. 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 negated 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<sup>34</sup> as an example. In this case, the Appellate Division in fact did not enforce articles 9 and 11 (two fundamental principles of state policy), 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<sup>35</sup> may be a classic illustration on the point that every effort made by the court does not amount to judicial enforcement. In this case,<sup>36</sup> the term "public purpose" used in the Fundamental Principles of State Policy has been defined in narrow sense and it was held that the requisition of a property for a private school does not serve the "public purpose" and was void. The Appellate Division observed:

"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 this 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."<sup>37</sup>

Was the reaction of the Appellate Division towards/about the judgement delivered by the High Court Division, in which the later gave an

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34. 44 DLR (AD) 319

35. 1981 BLD 30

36. Ibid.

37. *Bangladesh Vs. Winifred Rubie*, 1982 BLD (AD) 34, 37

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). I think Mr. Mahmudul Islam, the former Attorney General of Bangladesh, rightly criticized in his book<sup>38</sup> 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."<sup>39</sup>

Thus it may be commented here that the High Court Division did not violate the prohibition of article 8(2), rather it has exercised the power of interpretation as mandated by the same article, and this interpretation seems to be done within the boundary demarcated by article 8(2) which does not amount to judicial enforcement.

The Constitution of India embodies certain Directive Principles which are similar to our FPSP, but Indian Constitution does not contain any such provision which empowers these Principles to act as a guide to the interpretation of the constitution and of other laws, in spite of this fact certain case laws are found in India which give the guidelines regarding how can these principles be used to interpret the Constitution and other laws.<sup>40</sup> But the Indian Constitution provides that 'it shall be the duty of the state to apply these principles in making laws.'<sup>41</sup>

### *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

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38. Islam Mahmudul, *Constitutional Law of Bangladesh*, 2nd ed. Mallick Brothers, Dhaka, 2003, p.57.

39. Ibid.

40. see the cases *Mumbhai V. Abdulbhai*, AIR 1976 SC 1455; *Bhim V. India*, AIR 1981 SC 234; *Excel Wear V. India*, AIR 1979 SC 25

41. Article 37 of the Constitution of India.

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.

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

*Kudrat E-Elahi V. Bangladesh*<sup>42</sup> 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. In this case,<sup>43</sup> 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, 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 Article 7(2) of the Constitution. It appears that the petitioners in this case<sup>44</sup> 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.<sup>45</sup> The High Court Division in this case unanimously held that the Upazila Parishad

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42. 44 DLR (AD) 319

43. *Ibid.*

44. *Ibid.*

45. *Ibid.* at p. 324 para 6.

was not Local Government as the Upazila was not an administrative unit, but the judges differed as to the inconsistency of the said ordinance with the Constitution. Here two contrary opinions are found:

1. ***Fundamental Principles 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: 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).

In the above case<sup>46</sup> 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 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 Government, namely the Upazilla Parishad. 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

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46. Ibid.

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 measures 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".<sup>47</sup>

Shahabuddin CJ then explained the reason for not making these Principles as judicially enforceable. In his words:

The reason for not making these principles judicially enforceable is obvious. They are in the nature of People's programme for socio-economic development of the country in peaceful manner, not overnight, but gradually. Implementation of these Programmes 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.<sup>48</sup>

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

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47. *Ibid*, pp. 330-331.

48. *Ibid*.



7(2) of our Constitution. Article 7(2) makes void any law inconsistent with any provision of the Constitution besides fundamental rights. 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 Article 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-General argues 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 inconsistency with any provision of the Constitution including a fundamental principle.

25. 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 fundamental 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 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.

26. 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(f) 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.

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 Afzal J. in the following words:<sup>49</sup>

58. Naimuddin J. in his judgment found that the Upazilla Parishad was not a local Government institution within the

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49. *Ibid.* pp. 339-340 paras 58 & 59.

meaning 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 Article 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 real question thus;

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

59. Then the finding was made that the repealing Ordinance was not violative 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 question 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 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.

In concurring with the judgment delivered by the learned Chief justice, Mustafa Kamal J. posed the following question:<sup>50</sup>

Is the Repealing Ordinance/Act inconsistent with Articles 9 and 11 of the constitution and if so, can it be declared void on that ground under Article 7(2) of the Constitution?

Then he summarized the submission of the lawyers of the petitioners regarding above question in the following words:<sup>51</sup>

Mr. Amirul Islam submitted that the Repealing Ordinance/Act is liable to be declared void wholly, first, for being violative of the Preamble of the Constitution and secondly, for being

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50. Ibid, p. 341.

51. Ibid, p. 341 para 63.

inconsistent with Articles 9 and 11. He submits that the Fundamental Principles of State Policy may not be "judicially enforceable" but inconsistency therewith renders a law liable to be declared void under Article 7(2), there being a distinction between "enforceability" and "inconsistency". Dr. Kamal Hossain submits that a law which negates a clear directive of the Fundamental Principles of State Policy is liable to be declared void as being inconsistent with the constitution. The learned Attorney-general submits that a law is not liable to be declared void on the ground of inconsistency with the Fundamental Principles of State Policy, that Article 8(2) of the Constitution is an exception to Article 7(2) and that to declare a law as void is another way of enforcing a different state of things so that there is no real distinction between "enforceability" and "inconsistency".

Finally, Justice Mustafa Kamal negated above contention and said that these principles may be enforced through the public opinion. He replied the above question through the following stages of observations.<sup>52</sup> Firstly, he confirmed that these principles are not laws. In his words:

Article 7(2) provides that this Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic, and if any other law is inconsistent with this Constitution that other law, to the extent of the inconsistency, be void. (Underlines are mine). Therefore, this constitution taken as a whole is a law, albeit the supreme law and by 'any other law' and "that other law" the Constitution refers to the definition of "law" in Article 152(1), including a constitutional amendment. It is the Law of the Constitution itself that the fundamental principles of state policy are not laws themselves but "principles". To equate "principles" with "laws" is to go against the Law of the Constitution itself. These principles shall be applied by the State in the making of laws, i.e., principles of policy will serve as a beacon of light 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. Not being laws, these principles shall not be judicially enforceable.<sup>53</sup>

Then he compares the provisions regarding the status of these 'principles' with the provisions describing the status and impact of the 'fundamental rights' and sorted out the finding that unlike fundamental rights there is nothing mentioned in the Constitution, which says that any law enacted

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52. Ibid, pp. 346-347.

53. Ibid. para 84.

violating these 'principles', will be void. To quote him:

There the Constitution rests. It does not say, as it says in Article 26 in respect of fundamental rights:

"26(1). All existing law inconsistent with the provisions of this Part shall, to the extent of such inconsistency, become void on the commencement of this Constitution.

(2) The State shall not make any law inconsistent with any provisions of this Part, and any law so made shall, to the extent of such inconsistency, be void.

(3) .....

there being no specific provisions in the Constitution providing laws inconsistent with fundamental principles of state policy to be void, the learned Counsels for the appellants have fallen back upon Article 7(2) and have urged for acceptance of an interpretation which will bring Fundamental Principles of State Policy at par with fundamental rights in so far as voidability is concerned. The submission is unacceptable, because, first, the makers of the Constitution did not lack in expression if they so meant it. Provisions analogous to Article 26 could have been inserted in Part II as well. The omission is deliberate and calculated. Secondly, Article 8(2) proclaims the fundamental principles of state policy as "principles", not "laws" and that is the mandate of this Constitution. Article 7(2) cannot be interpreted to mean that if any other law is inconsistent with the "principles" mentioned in part II then that other law to the extent of the inconsistency, will be void. The Constitution is the supreme law and if the supreme law prescribes "principle" not "laws", and directs the use of these principles in certain specific manner, then the other law cannot be made void on the ground of inconsistency with these principles. It is argued that Article 9 and 11 are provisions of the Constitution and if any other law is inconsistent with these provisions, then it will be void. Article 7(2) says "this Constitution", not "provisions of the Constitution", which expression the Constitution uses in some other places. The use of the words "this Constitution" and not "provisions of the Constitution" is also deliberate.<sup>54</sup>

He then raised the issue that 'what will happen if the Parliament makes any law violating any of the Fundamental Principles of State Policy embodied in the Constitution?'. He gives answer to this important question in the following words, which is self-explanatory:

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54. Ibid. para 85.

A hypothetical question has been posed. Parliament passes a law which glaringly violates and flouts a fundamental principle of state policy, and if its *vires* is challenged solely on the ground of inconsistency with that principle and on no other ground whatsoever, will High Court Division declare the law void? It is a madness scenario. The learned Counsels could not show any such legislation in this sub-continent, but suppose, Parliament is struck with madness, is the High Court Division in its writ jurisdiction the only light at the end of the tunnel? What does public opinion, political party and election do if Parliament goes berserk?<sup>55</sup>

Latifur Rahman J. replied the above contention made by Amirul Islam in the following words:<sup>56</sup>

Mr. Amirul Islam while arguing wanted to make a distinction between these two terms "void" and "enforceable" as contained in our Constitution. But it appears to me that in the context of the present case, the distinction between the terms "void" and "enforceable" are not of much importance as Article 8(2) of the Constitution clearly contemplates that the fundamental principles of State Policy are not enforceable in a court of law and the appellants have no justiciable rights in their favour. The distinction as drawn by the learned Advocate is only superficial and indirectly he is seeking for enforceability which is precluded by this Article. Further, there being no violation of law, such a declaration that the Repealing law is void under Article 7(2) of the Constitution cannot be sought for.

... Thus I hold that Articles 7(2) and 8(2) co-exist harmoniously and the learned Advocate in an indirect manner is only trying to get a declaration of voidability which is not contemplated under the Constitution.

Lastly, Justice Latifur Rahaman denied the opinion of Justice Naimuddin in favour of enforceability of the FPSP and also criticized him in the following words:<sup>57</sup>

Before parting with the case, I need to say a word as to the interpretation of Articles 7(2), 8(2) and 9 of the Constitution by Naimuddin Ahmed J. The learned Judge in his judgment observed as follows:

"Consequently, if it is found that the impugned repealing Ordinance is violative of Article 9 of the Constitution it is liable

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55. Ibid. para 86.

56. Ibid, p. 351

57. Ibid, p. 354 para 114.

to be struck down as void in view of article 7(2) of the Constitution".

This observation cannot hold good in interpreting the Constitutional provisions as indicated herein above. I must say that in dealing with Constitutional Provisions the court is not allowed to take hypothetical questions as has been posed by the learned Judge and has answered them like an academician. The learned Judge has made some quotations from Text Books on various Constitutional law of some renowned scholars. Abstract theoretical questions are not to be decided by any court as those are of only academic importance. It is no doubt true that these fundamental principles of State Policy as contained in our Constitution have been declared "to be fundamental to the governance of Bangladesh, shall be applied by the State in making of the laws", but we will normally hold that the State will not make a law contrary to the fundamental principles of State policy, the Government will have to answer and face the people who elect them. So, by taking a hypothetical question and on an interpretation of Article 9, the learned Judge ought not to have ventured to strike down the Repealing Ordinance as void under Article 7(2) of the Constitution in the face of clear constitutional mandate of Article 8(2).

Let me now quote Justice Naimuddin Ahmed's observation,<sup>58</sup> which is the only elaborate judicial authority in favour of the enforceability of the Fundamental Principles of State Policy:

55. Let us, therefore, first of all see whether Article 7(2) of the Constitution is in conflict with Article 8(2) of the Constitution. We have already observed that the Fundamental Principles of State Policy embodied in Part II of the Constitution shall not be judicially enforceable. The crux of the question is in interpreting the words, "shall not be judicially enforceable."<sup>59</sup>

He identifies three probable situations that may be envisaged in the context of the Fundamental Principles of State Policy as embodied in Part-II of our Constitution.<sup>60</sup>

First, the Government may not implement the Fundamental Principles by legislative enactment or executive action.

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58. In *Ahsanullah, Pearul Islam, Shamsul Karim, Kudrat-E-Elahi Panir Vs. Bangladesh, through the Secretary, Ministry of Local Government, Rural development and Co-operative (Local Government Division), Government of Bangladesh, Bangladesh Secretarial, Dhaka and others*, 44DLR (1992) pp. 188, 190-192.

59. *Ibid.*, para 55.

60. *Ibid.*, para 64.

Secondly, a legislative act or an executive action may not conform to the Fundamental Principles.

Thirdly, there may be a legislative act or an executive action in clear violation of the Fundamental Principles.

Then he felt no hesitation in negating the possibility of judicial interference in the above first two situations. In his words:

In the first contingency the Court has no jurisdiction to direct the legislature to enact laws or the executive to act for implementing the Fundamental Principles and in the second contingency also the court cannot intervene and say that the legislative act or the executive action is invalid not being in conformity with the Fundamental Principles and also cannot issue directions to make them in conformity with those principles.<sup>61</sup>

But what about the above third circumstance, i.e., if any legislation is enacted which clearly violates any of the Fundamental Principles of State Policy enshrined in the Constitution of Bangladesh –will the judiciary be able to declare it as void? Or is the court still unable to interfere on the belief that these are not judicially enforceable? To answer this question he made the following long observation:

A plain reading of the provisions of clause (2) of Article 8 of the Constitution shows that the Principles set out in Part II of the Constitution shall not be enforced judicially meaning that if the executive or the legislature does not implement any of the provisions of this Part, the Court cannot direct for enforcement of these Principles. Does it mean that the executive or the legislature can act in flagrant contravention and violation of the principles set forth in Part II of the Constitution? To cite only few examples, ... .. Article 10 provides that steps shall be taken to ensure participation of women in all spheres of national life, Article 17(a) enjoins the State to adopt effective measures for extending free and compulsory education, Article 18(2) enjoins the State to adopt effective measures to prevent prostitution and gambling and Article 24 enjoins the State to adopt measures for protection of all monuments. In the face of the above provisions can any law be enacted prohibiting women from participating in any sphere of national life and keeping themselves shut inside the kitchens, prohibiting introduction of primary education except on payment, introducing prostitution and gambling throughout the country and for

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61. Ibid.



pulling down all monuments all over the country? In my view, the answer is emphatically in the negative, because, the mischief of Article 7(2) of the Constitution will be attracted notwithstanding clause 2 of Article 8 of the Constitution which simply enjoins that the provisions of Part II are not enforceable by any Court but do not provide the *raison detre* for their contravention. What clause 2 of Article 8 says is that the Fundamental Principles cannot be enforced by issuing *mandamus* on the other two organs of Government and it does not give a constitutional right to an individual to seek enforcement of the principles laid down in Part-II of the Constitution if the legislative or the executive organ of the State does not act for implementation of the provisions of Part-II of the Constitution. But it does not mean that since the Court cannot compel their enforcement, the executive and the legislature are at liberty to flout or act in contravention of the provisions laid down in Part-II of the Constitution. In this connection, the observation made by his Lordship Badrul Haider Chowdhury, CJ (as he was then) in the case of Anwar Hossain Vs. Bangladesh, reported in the Special Issue of BLD. 1989 may be referred to:

"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 in our Constitution and the legislature cannot amend this Article without referendum. This alone, shows that the directive principles cannot be flouted by the executive. The endeavour of the Government must be to realize these aims and not to whittle them down."<sup>62</sup>

To these words, it may be added that if the Government fails to implement the Fundamental Principles embodied in the Constitution, the Court cannot compel the Government to act and at the same time it means that the Court has the power to intervene when the Government flouts and whittles down a provision embodied in this Part because Article 7(2) is specific in declaring that any law inconsistent with any provision of the Constitution shall be void to the extent of the inconsistency. Article 8(2), by making the provisions of Part II unenforceable by the Courts, has simply given the legislature the liberty to defer their implementation but that does not mean that the said Article has vested the legislature with power to flout those provisions and enact laws in clear violation of those provisions.

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62. Ibid., para 66.

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. It also appears to me that there is no conflict between these two Articles, Article 7(2) being the constitutional yardstick to test the validity of all laws passed by Parliament and Article 8(2) being merely a prohibition against enforcement of the provisions of Part II of the Constitution. The constitution-makers were conscious that implementation of the noble principles laid down in part-II may not be possible in the prevailing socio-economic condition of the country and as such, they very wisely enacted Article 8(2) making these principles unenforceable through courts, but, that, by no means, implies that the constitution-makers intended to circumvent the mandate of Article 7(2) and permit the legislature to enact laws in violation of those principles.<sup>63</sup>

In view of the above, I find great force in the following observations made by Dr. MC Jain Kagzi in his *The Constitution of India Volume 2, Fourth Edition, Page 938*, "The declaration that the directives are 'not enforceable by any court' do not provide the *raison d' eter* for their disregard. Axiomaticity, a clear violation of the Directives might make a law unconstitutional. What is said in Article 37 is that the Directives cannot be enforced by, and through judicial process, if not implemented. Any non-implementation of the Directives violates no individual constitutional right, and affords no basis for litigation and legal remedy. This only means that the State cannot be legally forced to carry them out, if it cannot do. This is not to say that it can throw them to the winds, and can enact laws openly in opposition to them. The first cannot be objected to, but the latter cannot be permitted. A Court can, in a fit case, unambiguously declare a law bad as being manifestly opposed to the fundamental principles of governance of the country and, therefore, unconstitutional. The Directives are legal norms, although they are not enforced by the Court action at individual initiative. Their non-application through legislation might be a non-act which provides no cause of action. But any legislation in opposition to them and in derogation to them is violative of the mandate of Article 37. The legislation can, in a fit case, be impugned on the ground of legislative contravention of the Article 37 directive. If applied, law may be rendered unenforceable even if not *void ab initio*".<sup>64</sup>

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63. Ibid., para 67.

64. Ibid., para 68.

Fully agreeing with the views expressed above I, therefore, hold that the directives in Part-II of the Constitution are as important and as relevant as any other provision of the Constitution for the purpose of attracting the operation of Article 7(2) of the Constitution. As such, an enactment made by Parliament in opposition to, and in derogation of, the principles laid down in Part II of the Constitution is violative of the mandate provided in Article 7(2) of the Constitution and, therefore, void.<sup>65</sup>

Then he expressed the opinion directly that a law should be struck down as void if that contravenes any of the fundamental principles of state policy. In his words:

In such circumstance, to my view, a legislative act which is in direct contravention of any provision of Part II of the Constitution calls for intervention by the Court and is liable to be struck down as void in spite of the provisions laid down in Article 8(2) of the Constitution that the provisions of Part-II of Constitution are not judicially enforceable. Clause 2 of Article 8 of the Constitution is not really in conflict with clause (2) of Article 7 of the Constitution.<sup>66</sup>

Finally, he added:

"... had the Upazila Parishads been found to be Local Government institutions within the meaning of Article 9 of the Constitution the impugned repealing Ordinance would be in contravention of the said Article and would be liable to be struck down to the extent of the inconsistency by operation of clause (2) of Article 7 of the Constitution."<sup>67</sup>

Thus, it appears that in answering the above third question Naimuddin J in the high Court Division in fact ultimately goes in favour of judicial enforceability of the Fundamental Principles of State Policy though in a different way, though this has been overruled subsequently by the Appellate Division.

***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 Officer-in-Charge, Gopalganj and others*,<sup>68</sup> Badrul Haider Chowdhury J. clearly

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65. *Ibid.*, para 69.

66. *Ibid.*

67. *Ibid.*, para 83.

68. 41 DLR (AD) 1989 (30)

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."<sup>69</sup>

Shahabuddin J. in the same case focused on the utility of the Fundamental Principles of State Policy in the making of law and negated 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."<sup>70</sup>

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

In *Saleemullah V. Bangladesh*,<sup>71</sup> 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.<sup>72</sup> 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 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

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69. Ibid, p. 37 para 12 .

70. Ibid, p. 48 para 40.

71. 47 DLR 218

72. Ibid., page 224.

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."<sup>73</sup>

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?

***Aftabuddin V. Bangladesh and others, 48 DLR 1***

In *Aftabuddin V. Bangladesh and others*,<sup>74</sup> 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."<sup>75</sup>

Thus, it shows that Naimuddin Ahmed J. deviated from his earlier opinion<sup>76</sup> 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 Fundamental Principles of State policy 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 the 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 pledge contained in the third paragraph of the preamble

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73. Ibid.

74. 48 DLR 1

75. Ibid., p. 11 para 45.

76. Supra note 58.

presupposes an independent judiciary 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 116A is, therefore, a step to realize the principle enshrined in Article 22."<sup>77</sup>

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

It was argued in *Dr. Mohiuddin Farooque V. Bangladesh*<sup>78</sup> 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 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."<sup>79</sup>

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,<sup>80</sup> 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 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.

77. 48 DLR pp. 11-12 paragraphs 45,46.

78. 49 DLR (AD) 1

79. *Ibid.*, p. 9 para 25.

80. *Ibid.*

Latifur Rahman J. in this case<sup>81</sup> 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 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 Constitution in a manner in which social, economic and political justice can be advanced for the welfare of the state and its citizens."<sup>82</sup>

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

In *Saiful Islam Dilder V. Government of Bangladesh and others*<sup>83</sup> the Court observed:

"True, that fundamental principle of state policy, here Article 25, can not be enforced by Court, nevertheless the fundamental 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."<sup>84</sup>

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81. Ibid.

82. Ibid., pp. 18-19 para 72.

83. 50 DLR (1998) 318.

84. Ibid., p. 322 para 6.

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<sup>85</sup>, the Court in response to this argument observed that the said extradition does not go against Article 25, one of 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.<sup>86</sup> 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?

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

In Masdar Hossain<sup>87</sup> 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:

"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 been taken to separate the judiciary from the executive organs of the State."<sup>88</sup>

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'.<sup>89</sup>

Though in India also the Directive Principles are not judicially enforceable, interestingly, the Supreme Court issued a number of directions to the Government and administrative authorities to take positive action to remove the grievances which have been caused by non-implementation

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85. Ibid.

86. Ibid.

87. 20 BLD (AD) (2000) p. 142.

88. Ibid., *Per* Latifur Rahman, J agreeing with Mustafa Kamal, C.J., para 75.

89. Ibid. p.147, para 85



of the Directives.<sup>90</sup> The Constitution of Pakistan is rather very particular about the meaning, impact and consequence of certain principles, which are not judicially enforceable. Article 30(2) of the Constitution of Pakistan says—

"The validity of an action or of a law shall not be called in question on the ground that it is not in accordance with the Principles of Policy, and no action shall lie against the State or any organ or authority of the state or any person on such ground."

The 1956 Constitution of Pakistan also embodied certain directives in the nature of our 'principles' which were not judicially enforceable. Mr. Abul Mansur in the then Pakistan Assembly criticized it highly as a member of the opposition in the parliament during the time of Sahrawardi on the 17th January 1956 in the following words:<sup>91</sup>

"Now, Sir, what is this provision for directive principle which is found nowhere in the world except in India and Ireland? These are the two solitary examples where constitution provides for directive principles. It is preposterous to think that the constitution will give some directives which will not be enforceable in law and which will not be justifiable and will not be effective. If that is so, why should these things be in the constitution at all? It is not a plaything of children. It is a sacred document which shall be preserved in the breasts of the citizens of the state as a sacrosanct provision on which they would rely for protection of their rights—individual, social, collective and political. But they provide at the very beginning that these or such provisions shall not be enforceable in any court of law. If that is so, why do you provide it at all? Leave it to the people."

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90. Comptroller V. Jagannathan, AIR 1987 SC 537. See Basu D.D., *Shorter Constitution of India*, 10th ed., Prentice Hall of India Private Limited, New Delhi, p. 270. Basu cited the following directions issued by the Supreme Court referring different cases:

- To issue a notification under the Minimum Wages Act, for the benefit of bonded and other exploited laborers.
- To set up a joint committee of the Union of India and a State Government concerned as a machinery to supervise and ensure that the poor and needy employers are not exploited by unscrupulous contractors in imposing terms violative of the Directives under articles 38, 41, 42, 43 or the various labor laws.
- To take various steps for extending the benefit of article 39A to all under trial prisoners.
- To lay down procedural safeguards in the matter of adoption of Indian children by foreigners, in view of article 39F.

91. For reference see Bangladesh GonoParishader Bitarka, Sarkari Biboroni, 1972 vol.2 at p. 222.

The Constitution of Lesotho contains in chapter III certain 'Principles of State Policy' which are not enforceable by any court. Article 25 of this Constitution<sup>92</sup> says about the application of these principles of State policy that—

"The principles contained in this Chapter shall form part of the public policy of Lesotho. These principles **shall not be enforceable by any court** but, subject to the limits of the economic capacity and development of Lesotho, shall guide the authorities and agencies of Lesotho, and other public authorities, in the performance of their functions with a view to achieving progressively, by legislation or otherwise, the full realisation of these principles."

The Constitution of the Republic of Liberia contains certain 'General Principles of National Policy' and Article 4<sup>93</sup> says that 'The principles contained in this Chapter shall be fundamental in the governance of the Republic and shall serve as guidelines in the formulation of legislative, executive and administrative directives, policy-making and their execution.'

Suranjit Sen Gupta, a member of the Constituent Assembly in Bangladesh during the debates on the draft constitution termed the Constitution as undemocratic on different grounds, *inter alia*, not making these 'principles' as judicially enforceable.<sup>94</sup> A proposal was raised subsequently in the Assembly to omit the words 'but shall not be judicially enforceable' from Article 8, but the proposal was rejected by the majority.<sup>95</sup>

### **Is it enforceable otherwise than by the judiciary?**

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, 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

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92. The Constitution of Lesotho

93. The Constitution of the Republic of Liberia.

94. Supra note 91, p. 224.

95. Ibid. p.454.

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."<sup>96</sup>

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.<sup>97</sup>

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."<sup>98</sup>

Thus it appears that Granville Austin rightly termed fundamental principles of state policy as 'the conscience of the constitution'.<sup>99</sup> 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<sup>100</sup> though may be considered to be binding by and upon those who operate the constitution.<sup>101</sup> To breach a constitutional convention is to act unconstitutionally but not unlawfully,

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96. Indian Constituent Assembly Debate, Vol. VII, p. 41

97. Jain M.P., *Indian Constitutional Law*, 4th edition reprint, Wadhwa and Company Law Publishers, Agra, Nagpur, India, 2002, p. 736

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

99. Mahajan V. D., *Constitutional Law of India*, Eastern Book Company, Lucknow, 7th ed., p. 366

100. Dicey A. V. 1885, for reference see Hilaire Barnett & Marinos Diamantides, *Public Law*, 2003, p.33.

101. Marshall and Moodie, 1971, pp. 23-24, for reference see Hilaire Barnett & Marinos Diamantides, *Public Law*, 2003, p.33.

since these are non-legal rules.<sup>102</sup> Such breach attracts no legal sanction but instead risks political repercussions.<sup>103</sup> 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 enforceable by 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 tunnel 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.<sup>104</sup>

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 court—rather through the convention'.<sup>105</sup> 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'<sup>106</sup> which should form 'the basis of the work of the State and of its citizens'<sup>107</sup> and 'the endeavour of the government must be to realise these aims and not to whittle them down'.<sup>108</sup> 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.

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102. Hilaire Barnett & Marinos Diamantides, *Public Law*, 2003, p.33.

103. *Ibid.*, p.34.

104. *Kudrat-E-Elahi V. Bangladesh*, 44 DLR (AD) 319, at paragraph 86.

105. Bangladesh GonoParishader Bitarka, Sarkari Biboroni, 1972 vol.2 at p. 455.

106. Article 8 of the Constitution of Bangladesh.

107. *Ibid.*

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