Judicial Enforceability of Fundamental Principles of State Policy in Bangladesh Constitution: An Appraisal

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Letter of Transmittal

05 September 2023

To,

Md. Deedarul Islam Bhuiyan

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Subject: Submission of LLM Thesis.

Dear Sir,

With due respect and humble submission, I am submitting herewith three hard copies and a soft copy of my thesis titled "***Judicial Enforceability of Fundamental Principles of State Policy in Bangladesh Constitution: An Appraisal****"* for your kind perusal and consideration.

I would humbly request you to accept and evaluate my thesis hereby submitted. I shall always be obliged to provide any necessary clarification and assistance for the proper understanding of the thesis.

Sincerely Yours,

……

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Abstract

The protection of economic, social and cultural (ESC) rights by the constitution is one of the most common features of the modern world. In most cases, these rights though incorporated in the constitution are termed as 'principles' making them unenforceable by the judiciary. There is debate about whether these rights should be given the same status as civil and political rights. The constitution of the People's Republic of Bangladesh also contains ESC rights terming as fundamental principles of state policy in part two and these rights cannot be enforced judicially according to Article 8 (2). They will be fundamental in governing the state of Bangladesh. The state shall apply them while making laws and the court shall take them as a guide while interpreting the constitution and other domestic laws. Despite the bar by the constitution, the Supreme Court of the country while enforcing fundamental rights is enforcing rights which are predominantly economic, social and cultural. In recent years, activism from the Supreme Court has been noticeable as to indirect enforcement while enforcing 'rights to life' and 'right to protection of law and liberty'. The judiciary is considered the protector and promoter of an individual's human rights in a civilized society. If the hands of the judiciary are tied tightly, the government might not take any action that will go against their interest but should be taken to protect citizen's basic human rights. This thesis paper aims to investigate how much the Supreme Court of Bangladesh has applied Fundamental Principles of State Policy in its judicial decisions to explore and evaluate the narratives by the courts, and to get a brief illustration of the long judicial practice, from the past stretching up to present and perhaps in the future concerning enforcement of economic, social and cultural rights in Bangladeshi courts. The paper will examine the appropriateness of extending the meaning of fundamental rights to cover fundamental principles and enforcing them indirectly.

Declaration

I do hereby declare that I have prepared this thesis titled "***Judicial Enforceability of Fundamental Principles of State Policy in Bangladesh Constitution: An Appraisal***" in accordance with the partial requirement for the completion of the degree of Master of Laws and I affirmed that this is my work except the cases where I have mentioned. This thesis is not submitted anywhere for publishing or other purpose in the past and I further declare that, this thesis is free from plagiarism.

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……..

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Certificate of the Thesis Supervisor

The undersigned certify that the research paper entitled **"Judicial Enforceability of Fundamental Principles of State Policy in Bangladesh Constitution: An Appraisal"** a study has been carried out by Md. Abdullah Al Noman (Student ID: **LLM2203027003**) under my constant supervision as per the rules regulation stipulated by the Sonargaon University in the partial fulfilment of the requirement of the degree of LL.M.

Signature of the supervisor

…….

Md. Deedarul Islam Bhuiyan

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List of Abbreviations

AD	Appellate Division
ASK	Ain O Shalish Kendra
BELA	Bangladesh Environmental Lawyer's Association
BLD	Bangladesh Legal Decisions
CP	Civil and Political rights
DLR	Dhaka Law Reports
ESC	Economic Social and Cultural rights
FPSP	Fundamental Principles of State Policy
HCD	High Court Division
IL	International Law
HR	Human Rights
UDHR	Universal Declaration of Human Rights
ULFA	United Liberation Front of Asom (Assam)
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
UN	United Nations
UNGA	United Nations General Assembly
AIR	All Indian Report
SA	South Africa
CJ	Chief Justice
CC	Constitutional Court

CHAPTER 1

Introduction and Research Approach

1.1 Introduction

Human rights are those rights which are inherent to human beings. These rights are universal, inalienable, protected by international and domestic law and cannot be taken away from anyone. These rights are not dependent on anyone's mercy or charity. The Universal Declaration of Human Rights was adopted by the United Nations General Assembly on 10 December 1948. The Universal Declaration of Human Rights consists of 30 articles, including a preamble, guaranteeing civil and political economic, social and cultural rights. Although it is not a legally binding treaty, all UN member states are committed to its implementation. The constitution of the People's Republic of Bangladesh is the supreme law of the land which contains in part two and part three both ESC rights and CP rights. The rights enshrined in the Constitution are called constitutional rights. The 18 rights guaranteed in Articles 27 to 44 of the Constitution of Bangladesh in Part III are called fundamental rights, which are civil and political in nature and are enforceable through the courts as per Article 44 of the Constitution. If these rights are violated, the state is obliged to provide remedies. The second part of the Constitution of Bangladesh contains economic, social and cultural rights and this part is titled 'Fundamental Principles of State Policy'. According to Article 8(2) of the Constitution, these rights enumerated in Part II are not enforceable through courts. Bangladesh has ratified most of the international human rights instruments but it is with a reservation of domestic implementation. In spite of this, the Supreme Court of Bangladesh has taken an optimistic approach to the positive implementation of these principles. The court has interpreted human rights which are enforceable in line with the economic, social and cultural rights of citizens. The Supreme Court has clearly denied judicial enforcement of FPSP in Kudrat E Elahi Panir v Bangladesh.[1] The court also observed that a law cannot be declared unconstitutional or void even if that law stands in contrast with FPSP. Article 8 (1) empowers the court to interpret the Constitution and other laws in conformity with fundamental principles.[2] There are a number of decisions where the court has extended the meaning of the right to life which appears indirect

[1] Kudrat-E-Elahi Panir and Others v Bangladesh 44DLR (AD) 319
[2] The constitution of Peoples Republic of Bangladesh, Article 8 (1).

enforcement of FPSP. This thesis paper aims to examine the justiciability of fundamental principles of state policy under the constitution of Bangladesh. In doing so, provisions in the constitution and other statutory will be examined. Thereafter, this paper will have a close look at the approach of the judiciary. How the judiciary has responded in the judicial enforcement of these rights.

1.2 Aim and Objective of This Work

Article 8 (2) of the Constitution of Bangladesh puts a bar on the judicial enforcement of the FPSP. Meaning that no one can take any legal action against the Government to realize rights enshrined in the second part of the constitution of Bangladesh. This thesis paper aims **firstly**, to investigate how much the national courts of Bangladesh have applied Fundamental Principles of State Policy in its judicial decisions and to explore and evaluate the narratives by the courts, and **secondly**, to get a brief illustration of the long judicial practice, from the past stretching up to present and perhaps in the future concerning enforcement of economic, social and cultural rights in Bangladeshi courts. The study should not be seen as the end of a process, but rather as a beginning.

1.3 Research Questions

Given the background in the above, this thesis paper will investigate the answers to the following three questions.

1. How the Supreme Court of Bangladesh has enforced the Fundamental Principles of State Policy in the past and present and will enforce them in the days ahead?
2. How much is it appropriate to extend the meaning of fundamental rights so as to cover fundamental principles and enforce them indirectly?
3. How far is it effective and useful to enforce indirectly the rights that are economic, social and cultural in nature when they are not enforceable by direct provision of the constitution?

1.4 Methodology

In completing the thesis, the author has resorted to doctrinal research methodology. This author gives importance to legal resources, especially decisions of the Supreme Court of Bangladesh. The main focus of this qualitative research is to investigate the judicial custom and practice, i.e., how the judgments were, how they are now and how they will be. Like 'pure doctrinal research', it upholds that law (here, case law) is what law says it is. Moreover, an endeavour is evident for turning the qualitative data into quantitative ones with a view to making a clear illustration.

1.5 Thesis Structure

This thesis paper is divided into five chapters. The first chapter gives the background of the thesis. Then, it describes the aims and objectives of this paper. The research questions, methodology, structure of the thesis and importance and contribution of this have been given in this chapter.

The second chapter of the thesis provides a theoretical foundation of the discourse on the fundamental principles of state policy. The genesis, meaning, and utility of FPSP and how they appear in the constitution of Bangladesh. The next part of this chapter discusses the debate between fundamental rights and fundamental principles.

Chapter 3 focuses on the decisions of the Supreme Court regarding the enforcement of fundamental principles. This chapter presents an examination of the decisions of the court in the present and past. The last part presents a comparative analysis of the status of FPSP in India, Nepal and South Africa.

Chapter 4 examines the method of interpretation of the court in enforcing fundamental principles indirectly. Then, approach of the court in extending the meaning of right to life has been examined by the author. The appropriateness of enforcement through interpretation and their significance has been discussed in the later part of the chapter. The last part of chapter four discusses the ways these principles may be enforced otherwise than by the judiciary.

The final chapter gives an overview of the possible future approach of the court. How the court should approach in the opinion of the author. The second part discusses the answer to the question of whether these principles should be made enforceable. And finally, the thesis ends by way of a conclusion.

CHAPTER 2

Mapping out the context and theoretical foundation

2.1 Genesis and Meaning of FPSP

Human rights refer to rights to which a human is entitled just because of his being human. These rights are universal rights which apply to all human beings regardless of colour, race, religion and nationality. The history of human rights is traceable to the ancient period of mankind. The formal recognition of human rights comes with the Universal Declaration of Human Rights (UDHR) which was adopted in 1948. Soon after that, in 1966 another two important human rights documents were adopted by the states committed in protecting human rights. The first one is the International Covenant on Civil and Political Rights (ICCPR) and the second one is the International Covenant on Economic, Social and Cultural Rights (ICESCR). The constitution of the Peoples Republic of Bangladesh contains provisions of human rights which are similar to these international human rights instruments.[3] Part three of the constitution of Bangladesh contains provisions of human rights which are similar to those of ICCPR. These human rights are enforceable through the courts as per Article 44 of the Constitution. If these rights are violated, the state is obliged to provide remedies. Part two of the constitution contains fundamental rights similar to the rights contained in the ICESCR of 1966.[4]

The constitution of Bangladesh terms ESC rights as Fundamental Principles of State Policy.[5] The Indian constitution contains similar ESC rights provisions but they are termed as directive principles. Both the constitution terms these rights as principles. In the eye of the law, the principles of a statute do not have a similar stand with a law. A law can be enforced by judicial mechanism which is not possible in the case of principles. Article 8 provides that these rights will be fundamental in governing the state of Bangladesh. While making laws state will apply these principles. In interpreting the Constitution and other domestic laws, these principles will act as guidance but these principles are enforceable by the court. Dr Ambedkar, the chairman of the constitution-making committee of India explained the underlying object of the insertion of

[3] Muhammad Ekramul Haque, "The Bangladesh Constitutional Framework and Human Rights", Dhaka University Law Journal 22(1) (2011): 55-78

[4] A multilateral treaty adopted by UNGA on 16 December 1966

[5] Supra note 3

principles in the constitution.[6] He said that these principles would be useful to establish economic democracy. A democratic country by the exercise of its democratic power wants to achieve a goal. As per Dr. Ambedkar, the goal is economic democracy which will be achieved by the fundamental principles or directive principles.[7]

2.2 Nature and Utility of Directive Principles

The principles enunciated in the second part of the constitution can be characterized in two ways. **Firstly**, non-enforceability of those principles. This means that if any principle of the second part of the constitution is not implemented or not obeyed by the state, none can enforce these principles through the judiciary. If these rights or principles are made enforceable by the judiciary, they will impose a positive obligation to which the state must comply. In enforcing those principles, the state needs financial resources. In that consideration, the maker of the Constitution did not give teeth to these principles. They left it to the public opinion rather than to court premises. **Secondly**, the principles will be fundamental in the governance of the state of Bangladesh. These principles shall be applied by the state while making the domestic laws. The fundamental principles are directive in nature. The purpose of these policies is to make a society where citizens will enjoy a prosperous economic and social life. People are empowered to enforce these principles through their voting rights. When a government implement the principles of this part, the people will praise it and on the contrary, poor implementation of these principles will give a negative impression which will ultimately affect the results of election in a democratic country. Thus, these principles put the government under pressure.[8]

As fundamental principles are not judicially enforceable, it is said by many experts that they are not law and as a result, the state has not to face any consequences for non-observance of those principles. This principle provides important guidance to all authorities whether public or private in their activities. While giving a judgment, the domestic court can resort to these principles. If any action of government or any public authority goes against the FPSP, the court can declare that action as ultra vires to the constitution by resorting to its power of judicial review. While interpreting the other parts of the constitution, these principles will guide the interpreting authority.

[6] Seervai, H. M. Constitutional law of India,4thed. Universal Book traders, Delhi, 2002, vol.2, at p. 1929.
[7] B. R. Ambedkar was the chairman of the drafting committee of Indian constitution in 1947.
[8] ibid

2.3 FPSP in the Constitution of Bangladesh

The Fundamental Principles of State Policy are ideological pillar of the state as well as a sign of the glorious achievements of the nation. The original constitution of 1972 and the present one after the fifteenth amendment of the constitution, the four fundamental principles of governance of the Bangladesh state are nationalism, democracy, socialism and secularism. These ideological pillars have inspired our freedom fighter to sacrifice their life. They dreamt to establish a society where there will no poverty and hunger. The original constitution has reflected the desire of freedom fighters. Article 13 provides a mandate for the emancipation of peasants. The State has committed itself to the implementation of economic, social and cultural rights, which, according to Article 15(a), provides for the provision of basic necessities of life, including food, clothing, shelter, education and medical care, to citizens. These rights are commonly known as 'basic needs'. There are some other important rights in this part such as equal opportunity, right to work, separation of judiciary etc.

Article 10 has the mandate for establishing a society which will be free of exploitation. The state will eradicate the exploitation of man by man. A socialist economic system will be established in terms of economy. There will be an equal opportunity for all citizens according to Article 19. Men and women will enjoy equal opportunity a fundamental human right recognized all over the world. The state is under an obligation to remove all types of inequality from economic and social life. The peasants and workers are the main steering force of our economy. Article 14 of the constitution provides a constitutional obligation for the state to emancipate them from exploitation. The constitution declares work as a right and duty. Article 20 considers work as a matter of respect and confirms that payment will be provided according to the nature of and ability to work. The state will take measures to prevent the enjoyment of unearned money. The agricultural revolution and development of rural areas are seen as principles of state policy in Article 16. Rural electrification, industrialization and improved communication systems are the mandates of this Article. Improved public health, nutrition and morality come as fundamental principles under Article 18. Article 18A provides provisions for the protection and preservation of the environment as a duty of the state. In the fulfilment of the constitutional obligation of part two, the state has taken different kinds of initiatives which show a positive approach to the state.

Article 8 postulates that the principles of part two of the constitution shall have the following five usages.[9] **First**, these principles will be fundamental in governing the state of Bangladesh. **Secondly**, when the state is to make any domestic law, these principles will be applied there. Meaning that the law will be in conformity with these principles. **Thirdly**, while the court will interpret the Constitution, these principles will guide them. **Fourthly**, the state shall base its work on these principles. And **finally**, the last part says that these principles of state policy cannot be judicially enforced.

2.4 Fundamental Rights Versus Fundamental Principles

The constitution of Bangladesh contains both provisions of fundamental rights and fundamental principles of state policy. Part three contains fundamental rights which put limitations on the power of the government. The government cannot make any law in contravention of the provisions of part three. According to Article 26, if any is made which is not consistent with the provisions of fundamental human rights, then that law will be void. In contrast to that, fundamental principles of state policy guide the government in making laws. Both sets of rights have equal relevance and they cannot bypass one another. There is a popular perception that FPSPs are useless and the reason behind this argument is the non-justiciability. But what must be considered is that these are guiding principles to all activities of the state and these are the ideals which we want to achieve at the end of the day. Article 47 (1) of the constitution makes a somewhat clear conflict between these two sets of rights. In fact, this article provides a harmonious solution between the two. It declares that if parliament makes any law in violation of or for inconsistency with the fundamental rights, if the parliament makes it clear that, the inconsistent law has been made to implement any of provisions of the Part Two i.e., fundamental principles of state policy.[10] A plain reading of this Article suggests that fundamental principles of state policy stand higher than fundamental rights. But in regard to enforceability, it seems that fundamental rights stand higher than fundamental principles. But while considering both sides, it seems that the Constitution itself has maintained a balance between these two sets of rights[11].

[9] The Constitution of Bangladesh, Art. 8
[10] Muhammad Ekramul Haque, "Justiciability of Economic, Social and Cultural Rights under International Human Rights Law", Dhaka University Law Journal 32(1) (2021): 39-53
[11] ibid

If the state authority wants to enforce any of the fundamental rights, it can enforce them directly but in contrast, fundamental principles of state policy cannot be enforced directly rather the state has to make a new law incorporating the rights that are mentioned in the part of fundamental principles. The parliament cannot make any law which are inconsistent with the fundamental rights but it has no such limitation with regard to the fundamental principles.

2.5 The Role of the Judiciary in Protecting Human Rights

The proclamation of independence of Bangladesh, the very first constitution of Bangladesh, contains an international obligation to follow the United Nations Charter.[12] The same undertakings are seen in the preamble and Article 25 of the present constitution. Thus, it can be assumed that our state has an obligation to promote human rights. The constitution contains human rights of both CP and ESC nature although those are not equally enforceable. Part II (ESC rights) are seemingly not enforceable as Article 8(2) states:

> *"The principles set out in [Part II] shall be fundamental to the governance of Bangladesh, … but shall not be judicially enforceable."*[13]

On the other hand, unlike Part II, Part III (CP rights) enjoy layers of protection. According to Article 44(1), if there arises any infringement of the guaranteed rights of Part III of the constitution, then it will prompt the rise of the aggrieved person's option to look for a legal remedy[14]. It was argued by Mahmudul Islam, one of the leading constitutional scholars in Bangladesh, that although the wording of Art 102(1) seems permissive since it states the HCD 'may give' such directions or orders necessary to enforce fundamental rights, the power of the HCD to enforce fundamental rights is not discretionary.[15] Rather, when the violation of a fundamental right becomes apparent, the court comes under a 'constitutional obligation to grant necessary relief'. Crucially, however, Art 102(1) itself (and the Constitution more broadly) leaves undefined what remedy would be 'appropriate' to enforce fundamental rights.[16] Therefore, the Constitution entrusts the HCD to

[12] The Proclamation of Independence of the 10th April, 1971, Paragraph 14
[13] The Constitution of Peoples Republic of Bangladesh, Art. 8(2)
[14] Ibid, Art. 44(1)
[15] Mahmudul Islam, Constitutional Law of Bangladesh (3rd ed, Dhaka: Mullick Brothers 2012) p. 607
[16] This can be contrasted with remedies for judicial review of matters other than fundamental rights under art 102(2), which for its part defines five types of remedies the HCD may order if 'no other equally efficacious remedy is provided by law'. These are commonly known as orders in the nature of prohibition, mandamus, certiorari, habeas corpus, and quo warranto.

determine constitutional remedies for the violation of the constitutionally guaranteed fundamental rights.[17]

[17] Supra note 33, p. 618

CHAPTER 3

Judicial Enforcement: The Past and The Present

Article 8 (2) of the constitution clearly depicts that principles enunciated in part two of the constitution are not enforceable by the judiciary. Besides this restriction, there are some other reasons for which judicial enforcement is not possible. The rights are economic and social in nature. Enforcement of economic rights requires the financial capability of the state. Thus, when a state is not economically efficient, it is not wise to make the state bound to implement these principles. The constitution itself terms these fundamental rights provisions as 'Principles' and the duty of a court is not to enforce the principles. It can only enforce the law by its judicial scrutiny. If the judiciary tries to enforce this principle, then this attempt will obviously violate the clear mandate of Article 8 (2) of the Constitution.

3.1 The Initial Conservative Phase

The question of judicial enforcement of fundamental principles was discussed elaborately in the famous case of **Kudrat-E-Elahi Panir and Others v Bangladesh.**[18] In this case, the petitioner tried to convince the court that if a law is not consistent with fundamental principles, then that law is to be declared void for the inconsistency. Thus, they attempted to enforce fundamental principles. In this case, the petitioner challenged the Ordinance No. XXXVII of 1991 which was promulgated to abolish Upazilas Parishad. The petitioner submitted before the court that this ordinance is against the constitutional spirit of people's representation in the local government as provided by the Articles of 9, 11, 59 and 60. But the court did not agree with their submission stating that Articles 9 and 11 stand in part two of the constitution which are not judicially enforceable. The then chief justice Shahabuddin Ahmed held that when the state cannot enforce a principle, the court cannot make the state bound to enforce it.[19] Justice Mustafa Kamal made a distinctive discussion between fundamental rights and fundamental principles. He mentioned that fundamental rights are enshrined in part three of the constitution and they are enforceable by the judiciary. And according to Article 26 if any law is not consistent with these fundamental rights, then that law will be void. But there are no such mentions regarding the fundamental principles.

[18] Kudrat-E-Elahi Panir and Others v Bangladesh 44DLR (AD) 319.
[19] ibid

Thus, if the state makes any law violating or inconsistent with fundamental principles, there is no mention in the constitution that, that law will be void. The framers of the Constitution did it intentionally according the Justice Mustafa Kamal.[20] He further mentioned that there is a distinction between principles and law. Article 7 of the Constitution provides that this constitution is supreme law if any law is inconsistent with this constitution, the law as to the inconsistency will be void. But part contains principles, not law. That is why inconsistency with fundamental principles does not vitiate a law. The apex court in this case completely denied enforcing fundamental principles.

Despite the non-enforceability of fundamental principles, they have some other values. For example, these principles are fundamental to the governance of Bangladesh according to Article 8. In this regard, Badrul Haider Chowdhury in the case of **Anwar Hossain v Bangladesh**[21] held that the state is to apply these principles at the time of making new law. These principles cannot be amended without a referendum. Thus, it is noticeable that the state cannot ignore these principles. The actions of the government must comply with them and not go against them.

In the case of **Bangladesh v. Winifred Rubi and Others**[22], the question of requisition of land for a private school is covered by public purpose. Another question was that if a private school charges high tuition fees, then can it be said that the school is acting for the purpose of public policy of education under Article 17 of the constitution? The HCD observed that the requisition of land for a private school does not serve the public purpose. When the case was presented before the Appellate Division, it was observed that the scrutiny of the HCD was unwarranted by law as education matters are under part two of the constitution which is not enforceable by the court.

M. **Saleem Ullah v. Bangladesh**[23], In this case, the petitioner submitted that sending troops from Bangladesh to join the United Nations peacekeeping mission is a violation of Article 25 of the constitution. The court held that the decision to send troops was not in violation rather it is a compliance with the said Article.

[20] Ibid p. 341
[21] Anwar Hossain v Bangladesh, 1989 BLD (Spl) 1
[22] Bangladesh v. Winifred Rubi and Others, 34 DLR (AD) 164
[23] M. Saleem Ullah v. Bangladesh 47 DLR (1995) 218

In **Saiful Islam Dilder v. Bangladesh**[24], the extradition of ULFA[25] leader, Anup Chatia was the issue of this case. The petitioner contended that if the government extradited Anup Chatia to the Indian government, that action would violate Article 25 of the constitution. The court replied that the extradition will not violate the provision of Article 25 which is one of the fundamental principles of state policy.

In the case of **Sheik Abdus Sabur v Returning Officer**[26] the Appellate Division of Supreme Court observed that provisions of encouraging local government are in part two of the constitution which is not enforceable by the judiciary. According to Justice Shahabuddin Ahmed, though FPSPs are not enforceable by the court, they must be applied by the state when making laws.

3.2 The Recent Liberal Approach

In the cases as discussed above it is noticeable that the Supreme Court of Bangladesh has taken a conservative approach towards the judicial enforcement of fundamental principles. But at the same time, there are decisions where the approach of the court seems to be in favour of judicial enforcement though they are indirect way. The court did not submit it expressly that it is going to enforce a FPSP in part two of the constitution. The court has interpreted fundamental rights in a harmonious way that indirectly gave the force of judicial enforcement of fundamental principles.

In **Professor Nurul Islam v. Bangladesh**[27], the High Court Division of the Supreme Court interpreted the right to life in a way to included improved public health and nutrition under Article 18 of the Constitution. As per the court, cigarette and tobacco product is harmful to public health which ultimately affects people's right to life. They issued a ban on the advertisement of tobacco products in print and electronic media. The case seems to be judicial enforcement of fundamental principles of improved health care and nutrition.

[24] Saiful Islam Dilder v. Bangladesh (1998) 50 DLR 318
[25] ULFA stands for United Liberation Front of Asom (Assam) is an armed separatist organization operating in the Northeast Indian state of Assam. It seeks to establish an independent sovereign nation state of Assam for the indigenous Assamese people through an armed struggle. The Government of India banned the organization in 1990 citing it as a terrorist organization
[26] [1988] 41 DLR (AD) 30
[27] 52 DLR 413.

In **Dr. Mohiuddin Farooque v Bangladesh,**[28] the pollution of the environment was the fact in issue before the court. The court has taken a similar approach as in the previous case. While interpreting Article 31 of the constitution, the court includes a pollution-free environment as a right to life under the constitution.

In **Rabeya Bhuiyan v. Bangladesh**[29], the question of providing food under Article 15 and public health came before the court. The court in this case opined that the inability of the state to provide safe water affects the constitutional mandate of the right to life. Justice Tafazzal Islam held that a hygienic environment is a precondition for the right to life and it is not possible to lead a healthy life if the environment is not clean and hygienic. This case is a clear illustration of the enforcement of fundamental principles in an indirect way.

In the case of **Dr Mohiuddin Farooque v Bangladesh & Ors,**[30] the court extended the meaning of the right to life to healthy and nutritious food. In this case, a company imported some powdered milk which contains higher radiation than is accepted by the government. The Bangladesh Environmental Lawyers Association (BELA), challenged the government's action of not sending back milk powder. The court opined that the court cannot enforce Article 18 which provides for action of the government for raising nutrition level and improving public health. But when an action threatens public health, the court can make the state bound to take action to prevent that harmful action. It seems that the court enforces fundamental principles in this case negatively.

National Board of Revenue v Advocate Zulhas Uddin Ahmed[31] is another example where the court is seen taking a positive approach to enforce economic rights. In this case, the petitioner challenged the government's action of adding tax to clinics and hospitals. According to the court, adding tax to health care is against the constitutional mandate of minimum health care under Article 18 of the constitution.

In the case **ASK and ORS V Government of Bangladesh and ORS**[32], some slum dweller was evicted without giving prior notice. The petitioner submits that such a wholesale eviction by the government is against the constitutional provisions of the right to life. The court opined that

[28] 55 DLR 69
[29] Rabeya Bhuiyan v. Bangladesh, 59 DLR 176
[30] Dr Mohiuddin Farooque v Bangladesh & Ors 48 DLR (1996) (HCD) 438; (1996) 2 CHRLD 107
[31] (2010) 5 MLR (AD) 457.
[32] ASK and ORS V Government OF Bangladesh and ORS (Writ Petition No. 3034 of 1999); (1999) 2 CHRLD 393

wholesale eviction without notice and without providing alternative provisions is not acceptable. The eviction might be in several stages and some alternative housing facilities should be given before eviction. It is expected that slum dwellers are given time to leave their village or settle in another place in the city. The court emphasises special arrangements for people who are vulnerable such as children, the elderly, women etc.[33] The approach of the court in this case seems to be positive in the question of enforceability of economic rights. Article 15 provides provisions for housing, education, health etc Judgment in this case shows the court's willingness to enforce fundamental principles.

In **BSEHR v Bangladesh (2001)**[34], the government evicted several sex workers without providing them alternative housing facilities. The eviction affected their livelihood which ultimately hit their right to life. The High Court Division declared the government action of eviction unconstitutional which indirectly seems to be judicial enforcement of Article 15 of the constitution.

In the case of **Human Rights and Peace for Bangladesh v Bangladesh**[35] the High Court Division directed the government to take necessary measures to prevent food adulteration. The court directed the government to take action according to the Pure Food Ordinance 1959. In this case, the court also directed the concerned authority to provide a progress report a regular intervals to the court.[36] In this case, it is noticeable that the court has taken a progressive approach to the enforcement of fundamental principles.

3.3 Overview of Enforcement Status in the Contemporary World

The constitutional provisions of fundamental principles of state policy are similar to those of directive principles of state policy in India. Another similarity between these two countries is that these principles are not justiciable by the judiciary. The Supreme Court of India in many cases resorted to directive principles in interpreting the human rights which are civil and political in nature. In the famous case of **Golaknath v State of Punjab**[37], the court while comparing

[33] Ibid
[34] BSEHR v Bangladesh (2001) 53 DLR (HCD) 63
[35] 30 BLD (HCD) 125
[36] ibid
[37] 1967 AIR 1643

fundamental rights and directive principles termed these two as integrated schemes of the constitution. And they can be interpreted considering the needs of the existing situation. In the case of **Kesavananda Bharati v State of Kerala**[38], the court opined that the directive principles of state policy may be considered supreme over the fundamental rights in some cases. The Indian Supreme Court has given an extending meaning to the right to life according to Article 21 of the Indian constitution. In the name of protecting human dignity, the court has enforced indirectly some economic rights. In **Olga Tellis v Bombay Municipal Corporation**[39], the court observed that the right to life comprises citizens right to livelihood and also extends to the right to work.

In South Africa, the court has taken a positive view on the question of enforcement of directive principles or economic, social and cultural rights. In the case of the **Minister of Health v Treatment Action Campaign**[40], the court opined that the government cannot reserve Nevirapine a drug to treat HIV patients. It was also observed by the court that the government has a constitutional obligation to work for the betterment of public health. The government was directed to ensure an adequate supply of drugs throughout the country.[41] In another case named **Government of the Republic of South Africa v Grootboom**[42], the court criticized the government's action of eviction without providing proper housing. The court in this case implemented directive principles negatively.

In Nepal, the Supreme Court has very small amounts of decisions regarding the judicial enforceability of directive principles. The court is in favour of judicial enforcement of fundamental principles of state policy. In the case of **Surya Prashad Dhungel v. Godawari Marble Industries**[43], the court observed that the government has an obligation to protect the environment and not to detour it further. It suggests the government take initiatives to make people aware of the necessity of a clean environment. In another case, **Yogi Narahari Nath and others v. Rt. Hon. Prime Minister Girija Prashad Koirala,** the court observed that the court can declare a

[38] (1973) AIR SC 1461.
[39] Olga Tellis v Bombay Municipal Corporation [1985] 3 SCC 545, [2.2]
[40] (TAC) [2002] 5 SA 721 (CC).
[41] Ibid
[42] (CCT11/00) [2001] (1) SA 46 (CC).
[43] 25 WN 35, 2049(1992) 114.

government action unconstitutional if the action taken disregards the Fundamental Principles of State Policy.[44]

[44] NKP 2053 (1996) 33

CHAPTER 4

An Appraisal: Enforcement through Interpretation

4.1 Indirect Judicial Enforcement through Interpretation

Article 8 (1) of the Constitution of the People's Republic of Bangladesh mandates that the fundamental principles of state policy will be used as a tool to interpret the constitution and other statutory laws of the country. This Article makes it clear that other laws of the country will be tested by these principles or will be interpreted in conformity with these principles. But while interpreting a law, the interpretation cannot present a new meaning of the law.[45] If a law is clear and straightforward, nothing can be added anew in the name of interpretation. The court is to be careful while it interprets a law so that the interpretation does not appear as an enforcement of fundamental principles.[46] Again, when a court interprets a law in conformity with the principles laid down in part two of the constitution, then that interpretation cannot be termed as judicial enforcement.

The distinction between enforcement and interpretation by the judiciary must be dealt with utmost care. The Supreme Court of Bangladesh has already made several decisions on this point. In the **Kudrat E Elahi Panir vs. Bangladesh**, the court clearly mentioned that fundamental principles are not judicially enforceable.[47] The court gave an interpretation of Articles 59 and 60 taking help from Articles 9 and 11.[48] In fact, this is a clear provision of the constitution that they are not enforceable by the court. As to the interpretation, the court in several cases interprets laws in consonance with the fundamental principles. In the case of **Winifred Rubie V. Bangladesh**, the court interpreted the term public purpose. It was noticeable from this case that when a court interprets a law then that does not necessarily mean that it is a judicial enforcement. In this case, the High Court Division of the Supreme Court held that when land is requisitioned for a private school that charges high tuition fees does not serve a public purpose and such requisition is declared void. Appellate Division denied the observation of HCD on the grounds of non-

[45] Muhammad Ekramul Haque, "Justiciability of Economic, Social and Cultural Rights under International Human Rights Law", Dhaka University Law Journal 32(1) (2021): 39-53
[46] Ibid
[47] 44 DLR (AD) 319
[48] Ibid 32

enforceability of FPSP. Mr Mahmudul Islam does not agree with the observation of the Appellate Division. He mentioned in his book that the High Court Division was entitled to scrutinize the meaning of public purpose and it was a constitutional obligation.[49] Thus, the power of interpretation is different from that of the power of judicial enforcement under Article 8 (2).

Because of having expressed constitutional bar by Article 8 (2), the hands of the judiciary are tied in the question of judicial enforcement of fundamental principles. But at the same time, the power of interpretation of the constitution and other laws is vested by Article 8 (1). There are decisions where the approach of the court seems to be in favor of judicial enforcement though they are indirect ways of interpreting other constitutional rights.[50] The court has interpreted fundamental rights in a harmonious way that indirectly gave the force of judicial enforcement of fundamental principles.

4.2 Extending the Meaning of the Right to Life.

The constitution and other domestic laws will be interpreted in conformity with FPSP according to Article 8 (1) of the constitution. Again, enforcement of fundamental rights by the High Court Division is a fundamental right of the citizen. It is noticeable from a number of judgments of HCD that the court has enforced indirectly FPSP by interpreting fundamental rights. In most cases, the court while interpreting the right to life under Article 32 has indirectly enforced fundamental principles of state policy. The ongoing observation will be cleared if we consider the following observation of the apex court.

In the case ASK and Ors v Government of Bangladesh and Ors, some slum dweller was evicted without giving prior notice.[51] The petitioner submits that such a wholesale eviction by the government is against the constitutional provisions of the right to life. The court opined that wholesale eviction without notice and without providing alternative provisions is not acceptable. The eviction might be in several stages and some alternative housing facilities should be given before eviction. It is expected that slum dwellers are given time to move their village or settle in another place in the city. The court emphasises special arrangements for people who are vulnerable

[49] Islam Mahmudul, Constitutional Law of Bangladesh, 2nd ed. Mallick Brothers, Dhaka, 2003, p.57
[50] Ibid
[51] ASK and ORS V Government OF Bangladesh and ORS (Writ Petition No. 3034 of 1999); (1999) 2 CHRLD 393

such as children, the elderly, women etc.[52] The approach of the court in this case seems to be positive in the question of enforceability of economic rights. Article 15 provides provisions for housing, education, health etc. Judgment in this case shows the court's willingness to enforce fundamental principles.

In Professor Nurul Islam v. Bangladesh, the High Court Division of the Supreme Court interpreted the right to life in Article 32 in a way to included improved public health and nutrition under Article 18 of the Constitution.[53] As per the court, cigarette and tobacco product is harmful to public health which ultimately affects people's right to life. They issued a ban on the advertisement of tobacco products in print and electronic media. The case seems to be judicial enforcement of fundamental principles of improved health care and nutrition.

In Dr. Mohiuddin Farooque v Bangladesh,[54] the pollution of the environment was the fact in issue before the court. The court has taken a similar approach as in the previous case. While interpreting Article 32 of the constitution, the court includes a pollution-free environment as a right to life under the constitution.

In Rabeya Bhuiyan v. Bangladesh,[55] the question of providing food under Article 15 and public health came before the court. The court in this case opined that the inability of the state to provide safe water affects the constitutional mandate of the right to life. Justice Tafazzal Islam held that a hygienic environment is a precondition for the right to life and it is not possible to lead a healthy life if the environment is not clean and hygienic. This case is a clear illustration of the enforcement of fundamental principles in an indirect way.

In the case of Dr Mohiuddin Farooque v Bangladesh & Ors,[56] the court extended the meaning of the right to life to healthy and nutritious food. In this case, a company imported some powdered milk which contains higher radiation than is accepted by the government. The Bangladesh Environmental Lawyers Association (BELA), challenged the government's action of not sending back milk powder. The court opined that the court cannot enforce Article 18 which provides for action of the government for raising nutrition level and improving public health. But when an

[52] ibid
[53] Professor Nurul Islam v. Bangladesh 52 DLR 413
[54] 55 DLR 69
[55] Rabeya Bhuiyan v. Bangladesh, 59 DLR 176
[56] Dr Mohiuddin Farooque v Bangladesh & Ors 48 DLR (1996) (HCD) 438; (1996) 2 CHRLD 107

action threatens public health, the court can make the state bound to take action to prevent that harmful action. It seems that the court enforces fundamental principles in this case negatively.

In BSEHR v Bangladesh (2001),[57] the government evicted several sex workers without providing them alternative housing facilities. The eviction affected their livelihood which ultimately hit their right to life. The High Court Division declared the government action of eviction unconstitutional which indirectly seems to be judicial enforcement of Article 15 of the constitution.

4.3 Propriety and Significance of Indirect Enforcement by Apex Court

Non-justiciability of FPSP under the constitution is a calculated scheme by the framers of the constitution. There are different reasons behind making these principles non-enforceable by the judiciary. A clear bar is seen in Article 8 (2) and if any attempt is made to enforce these principles, there will be a clear violation of the Constitution. It was endorsed by the Kudrat E Elahi case.[58] The enforcement of these principles is dependent on the policy decision of a political government. But in many cases, it is noticeable that the apex court of Bangladesh has taken an approach to protect ESC rights by interpreting the right to life. The mechanism of public interest litigation is mostly used tool to protect these rights. The apex court in India has paved the way for such indirect judicial enforcement of fundamental principles. They have shown way how to interpret the right to life which otherwise protects economic and social life. Indian judiciary has clearly directed the government to enforce legislation that they already have relating to ESC rights[59]. The court has made its own mechanism to monitor the compliance of court orders by the government. It seems from this observation that the court has done its best to protect these rights. The South African court has adopted a mechanism by which the court can review the policy decisions of the government and whether the policy is in conformity with the directive principles in the constitution. It was held in the Grootboom case that the court cannot give the government suggestions as to better options but it can test the reasonableness of the government decision

[57] BSEHR v Bangladesh (2001) 53 DLR (HCD) 63
[58] Supra note 12
[59] Sheela Barse v Union of India air 1986 sc 1773; cehat v Union of India air 2003 sc 3309

relating to ESC rights[60]. The court has ordered the South African Human Rights Commission to monitor the progress of implementation.

It is noticeable from the above two observations of Indian and South African apex courts that their judiciary has taken a more active role than the Bangladesh Supreme Court in enforcing ESC rights. The unique feature of the Indian and South African courts is that they directed a supervisory mechanism but it is absent in the case of Bangladesh. It is found in many cases that when the Supreme Court gives a direction to the government to take any decision, the government is found callous in implementing those directions. The government authority in many cases evicts slum dwellers or other vulnerable communities forcefully without following the direction of the courts. Considering the economic and social conditions of Bangladesh, the court should make mechanism like South African courts which provides a mechanism for testing the reasonableness of the government actions relating to ESC rights.[61] This model of reasonableness will be more effective than compelling the government to do something that result positive realization of rights under part two of the constitution.

4.4 Enforcement Otherwise Than by the Judiciary

Fundamental Principles in the constitution are the goals that will be the basis of the action of the state and citizens and will motivate them to reach a specific goal on that basis. It can also be termed as a long-term future plan of a state and its citizens. The principles enumerated in Articles 8 to 25 of the Constitution shall be the basis of the policies adopted by the State and the citizens to implement their economic and social activities and fulfil their aspirations.

Political parties have to present their plans in the election manifesto to get support from the people to form the government.[62] They are to present plans to implement fundamental principles. Since the responsibility of implementation of these policies is constitutionally on the people, they also want to choose those parties who include people's aspirations of food, clothing, medical, education, entertainment, compulsory free education, electrification and rural development, equal

[60] Government of the Republic of South Africa v Grootboom [2000] ZACC 2001 (1) SA 46 (cc), 2000 (11) BCLR 1169 (cc) [41].
[61] Nour Mohammad and Sayed MM Hasan, "Judicial Enforceability of Economic, Social and Cultural Rights in Bangladesh: A Critical Evaluation" Asia–pacific journal on human rights and the law 23 (2022) 80–106
[62] Dr Ambedkar, chairman of drafting committee of Indian constitution.

opportunities in employment etc. The voters see promises and their sincerity in implementation. They will vote for a party and will be allowed to form a government that is committed to the fulfilment of fundamental principles.[63]

The constitution of Bangladesh was adopted on 4th November 1972. As a result of continuous development almost five decades after the constitution, about one hundred per cent of the people in the country have come under the power of electricity service. Primary education has been made compulsory for all. Educational equipment and supplies are being provided free of cost. Foodstuffs are being supplied free of cost under VGF cards in limited form. Now, if these facilities could be collected by suing the government, then the government would definitely be in trouble. Because our resources are limited. If all the principles of state policy are to be implemented in all cases, the government will fall into great financial strain. The provisions of Article 22 of the Constitution on the separation of the Judiciary came into effect in 2007. It is expected that other targets will be achieved step by step gaining financial capability. The principles of state policy are not only in the constitution of Bangladesh. In many countries of the developed world, a set of principles of state policy is laid down in the constitution as a symbol of public expectation. In other countries the principles of state policy are called Bill of Rights, Directive Principles etc. but the substance is actually the same. These policies make the political parties morally bound by those who are interested in ruling the country.

It is not possible to seize the seat of power through free and fair elections without a promise to fulfil people's demands, even if it cannot be legally enforced. It can be said that although the people cannot immediately take home the results, indirectly the policies play a role in ensuring the empowerment of the people.

[63] Ibid

CHAPTER 5

Future Approach and Conclusion

5.1 Looking Ahead in the Future

The constitution of Bangladesh does not allow judicial enforcement of fundamental principles as enunciated in part two of the constitution. South Asian countries have economic limitations and a constitutional obligation not to enforce ESC rights. But in many cases, litigants have availed such remedy by way of public interest litigation. As the realization of these economic rights is mostly dependent on the economic capabilities of the state, it will take a long time to realize these constitutional rights making the government legally bound. This will be implemented after achieving after a planned economic growth.[64] The Indian apex court and the supreme court of Bangladesh have a number of decisions which shows the courts positive intention in favour of the realization of ESC rights.

The judiciary is vested with judicial power to ensure justice depending on the existing legal framework. It cannot make any new law as the legislative power is vested with the parliament.[65] The judiciary can test the validity of the law made by the parliament. It can create a mechanism like India and South Africa to promote the enforcement of ESC rights.[66] It can adopt the reasonableness test which has been in South Africa.[67] As Bangladesh is a signatory of ICSECR, the court can take into consideration international obligations and interpret laws relating to ESC rights taking into consideration of socio-economic conditions of the country. Bangladesh is a developing country and with its limited resources, it is not possible to enforce the direction of the court to implement ESC rights provisions. The inability of courts as mandated by the constitution and financial scarcity is the main barrier to enforcing fundamental principles. Rights under the head of fundamental principles are connected with fundamental rights. It is possible for the court to interpret liberally fundamental rights to include fundamental principles. Implementing economic rights requires economic capability. When an implementation does not require any

[64] The Constitution of Bangladesh, Art. 15
[65] Ibid Art. 65
[66] Infra note 67
[67] A mechanism invented by the Apex court of South Africa where the court will scrutinize the government policy if it is taken for progressive realization of ESC rights.

financial requirement, the court should enforce those rights. Where it requires the monetary capability of the state and an economic right has been violated by the state, the court can only declare the voidability of the action. In contrast to that, when there is no necessity for money, the court could direct its implementation and monitor until adequate actions are taken by the government.

5.2 Should They Be Made Enforceable by the Constitution?

Human rights are called universal and inalienable rights of humans. These rights cannot be granted to or cannot be taken away from a human. The rights that are ESC in nature cannot be enforced by the judiciary in many developing countries like Bangladesh. These rights are termed in the constitution as fundamental principles or directive principles of state policy. In some cases, they are considered only as decorative to the constitution. They are used in interpreting the Constitution and other laws. Because of the lack of state resources, the framers of the Constitution left them unenforceable otherwise it would cause a burden on the state.[68] Bangladesh is one of the most densely populated countries in the world. It is difficult to provide all the basic needs to all the citizens. The concept of separation of power requires that the court will not interfere in the activities of the executive government in enforcing rights that are economic, social and cultural in nature. In that sense, the hands of the judiciary are tied. The issue of enforcement comes under judicial scrutiny in the famous case of Kudrat-E-Elahi Panir vs. Bangladesh.[69] The court held that these principles are not enforceable by the judiciary and if any law is made in conflict with these principles cannot be declared unconstitutional. In Anwar Hossain v. Bangladesh,[70] it seems that Justice Badrul Haider Chowdhury changed his view. He said that these principles are necessary in making laws and fundamental principles cannot be changed and will be used in interpreting fundamental rights in part three of the constitution. For example, while interpreting Article 27 of the constitution, Article 19 comes to help interpret equality provisions. In the same way, by interpreting the right to life under Article 31, the provisions of Articles 15 and 18 become

[68] Nour Mohammad and Sayed MM Hasan, "Judicial Enforceability of Economic, Social and Cultural Rights in Bangladesh: A Critical Evaluation" Asia–pacific journal on human rights and the law 23 (2022) 80–106
[69] Kudrat-E-Elahi Panir and Others v Bangladesh [1991] 20 BLC (AD) 319
[70] 41 DLR (AD) 165.

relevant.[71] Thus, it is evident that enforcement of ESC rights is necessary if the court intends to enforce fundamental rights mentioned in part three of the constitution.

If these rights are made enforceable by the judiciary, the executive will be under an obligation to enforce them. The executive authority will ensure appropriate use of available resources. They will maintain an environment conducive to a healthy life.[72] Thus, it is expected that with the passage of time, after being financially capable, the lawmakers and other authorities concerned should reconsider the provisions of non-enforceability of FPSP under the constitution.

5.3 Conclusion

Many developing countries like Bangladesh having financial restrictions are not willing to bear the burden of judicial enforcement of FPSP. This topic of non-enforceability is a matter of debate both in international law and the constitutional law of a country. The ICESCR imposes an obligation on the country which have the financial capacity to enforce socio-economic rights. Many signatory states show their reluctance to the enforcement of these rights because of their financial restraints. Against this backdrop, as the protector and promoter of human rights, the judiciary needs to come forward and assess the liability of the executive government taking into consideration of financial capability of the state. Bangladesh has passed 52 years after its independence. The country has achieved many remarkable things but the achievement in fulfilling the constitutional obligation is not satisfactory. The constitution of Bangladesh was adopted on 4th November 1972. As a result of continuous development almost five decades after the constitution, about one hundred per cent of the people in the country have come under the power of electricity service. Primary education has been made compulsory for all. Educational equipment and supplies are being provided free of cost. Foodstuffs are being supplied free of cost under VGF cards in limited form. Now, if these facilities could be collected by suing the government, then the government would definitely be in trouble. The constitution of the People's Republic of Bangladesh makes ESC rights non-enforceable. The judiciary has made some praiseworthy decisions to protect the rights of citizens which are economic, social and cultural in nature. The

[71] Supra note 68
[72] Ibid

court has interpreted human rights, right to life, and right to protection of life and liberty, in part three of the constitution in a harmonious way that it indirectly gave the force of judicial enforcement of ESC rights. Besides judicial enforcement, public opinion may be an effective mechanism to enforce socioeconomic rights.

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