

## DOES INCONSISTENCY WITH ‘FUNDAMENTAL PRINCIPLES OF STATE POLICY’ INVALIDATE A LAW?

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### ABSTRACT

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 The Appellate Division relied on non-enforceability criteria (in article 8(2)) to hold that a law cannot be repealed only on the ground of inconsistency with fundamental principles.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

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

### I. INTRODUCTION

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

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

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

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

The status of the fundamental principles of state policy (FPSP) within the fabric of the constitution has come under judicial scrutiny in *Kudrat-E-Elahi Panir and Others v Bangladesh* 44DLR (AD) 319 where the appellants relying on article 7 of the Constitution tried to convince the court that a law inconsistent with any of the FPSP is void. Article 7 deals with the supremacy of the Constitution, and sub section 2 provides that “if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void”. To negative the contention, the Court interpreted article 7(2) along with article 8(2) in a pessimistic

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approach. This article is an attempt to prove into the worth of such non-liberal literal interpretation of the constitution and intends to submit that the constitution doesn't bar repelling a law conflicting with any of the ESC rights placed in Part II.

## II. STATUS OF THE PRINCIPLES UNDER JUDICIAL SCRUTINY

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

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

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

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

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

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

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

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

### III. AN ANALYSIS OF THE JUDGEMENT

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

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

Secondly, it may be asked whether article 8(2), by making the provisions of part II unenforceable by the court, has vested the legislature with power to flout these provisions by enacting laws in violation of these provisions. Logically article 8(2) cannot be interpreted as superseding article 7(2) on the yardstick of which all laws enacted by the legislature has to be tested [Huda AKMS, 1997:281]. What is meant by unenforceability is that the directive principles can't be enforced by and through judicial process to compel the state to carry them out, if it can't do. This is not to say that it can throw them to the winds, and can enact laws openly in opposition to them. A court can unambiguously declare a law unconstitutional as being manifestly opposed to the fundamental principle of state policy (Jain Kagzi Mc, 2004:938).

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

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

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

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

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

Lastly, the fear of fundamental principles becoming at par with fundamental rights is not a substantiated one. Conversely, the tune is somewhat opposite in the constitution of Bangladesh. The constitution has discarded the supremacy of rights doctrine by inserting article 47(1) (Ahmed Naim 1994:91). Article 47(1) provides that no law shall be deemed to be void on

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

#### IV. COMPARATIVE CASE LAW FROM INDIA

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

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

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

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

Inclusion of the word 'socialist' in the preamble to describe the nature of the statehood of India affirmed and established that Indian's is a socialist

constitution striking a balance between the individual liberty and the social interest (Ahmed, Naim 1994:94).

Article 31C, however, was struck down in *Minerva Mills Ltd v Union of India* AIR 1980 SC 1789 on the ground that giving absolute primacy to one part over the other disturbs the harmony of the constitution and *ipso facto* destroys the basic structure of the constitution (Chandrachud CJ, para 22, 64). Bhagwati J (dissenting), however, maintained that if a law is enacted for the purpose of giving effect to a Directive Principle and it imposes a restriction on a Fundamental Right, it would be difficult to condemn such restriction as unreasonable or not in public interest (para 329 F-H and 330 A-F). Later in *Sanjeev Coke Manufacturing Co v Bharat Coking Coal Ltd* AIR 1982 SC 239 the Court affirmed Bhagwati's dissenting opinion.

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

#### V. CONCLUSION

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

vision and mission of the Constitution enshrined in the preamble.

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