CHAPTER I

PRIMARY IDEAS OF CONSTITUTIONAL LAW

To have a complete idea about constitutional law one should have a basic knowledge about other general laws in a country. All existing laws of a country may be, for the convenience of study and research, classified into two categories: Public Law and Private Law.

Public Law: Public law determines and regulates the organization and functioning of the state and determines the relationship of the state with its subjects. The test of public law depends upon the nature of the parties in the relationship in question; if one of the parties is the state, the relationship belongs to public law. Thus constitutional law, criminal law, administrative law etc. are the forms of public law. Public law has many branches such as, Constitutional law, Administrative law, Criminal law, Tax law, etc.

For the purpose of this chapter it will be convenient to discuss only two important divisions of public law - constitutional law and administrative law.

Constitutional Law: Constitutional law actually forms the backbone of public law. It is that branch of public law which determines the nature of the state, nature and structure of the government-its powers, functions, division of powers among different constitutional organs, their relationship to each other and above all the relationship between the state and the individuals.

Administrative Law: From a broader point of view administrative law is a part of constitutional law. The difference between the two is really one of practical convenience only. Administrative law is that branch of public law which deals with

how the administration is controlled and made accountable. It determines the powers and duties of administrative authorities, the procedure followed by them in exercising their powers and discharging the duties and the remedies available to an aggrieved person when his rights are affected by an action on the part of such authorities.

It is one of the common features of the continental legal systems[1] that they maintain a distinction between constitutional law and administrative law. Common law legal systems, from the view point of their inherent traits, do not maintain this distinction. But in recent time there has been a growing tendency to draw a distinction between constitutional law and administrative law.

Though the distinction between constitutional law and administrative law is on marginal point, for better understanding of constitutional law a student must keep in mind this marginal distinction. While the constitutional law deals with the basic principles outlining the structure, powers and functions of the principal component organs of the government e.g. the executive, legislative and judiciary and other constitutional bodies like the Election Commission, public Service Commission, Comptroller and Auditor General etc., the administrative law deals in detail with the residual powers and functions of the administrative authorities of various departments of the government. For example, how the composition of the Executive, Legislative and Judiciary would be, what would be their nature, what basic functions they would discharge-all these are subject matters of constitutional law. But the residue powers and functions of all officials of these departments, their duties, their control, their salaries, office agenda, settlement of disputes-etc. are the subject matter of administrative law. According to Maitland,[2] while constitutional law deals with

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1 Continental legal system i.e. civil law system is used as opposed to common law system. Continental legal systems include the legal systems of France, Germany, Italy etc.

2 Constitutional History, 1955, quoted by Takwani, C.K. *Lectures on Administrative Law*, 2nd ed. P.13

structure and the broader rules which regulate the functions, the details of the functions are left to administrative law.

Private Law: Private law is that branch of law which determines and governs the relations of citizens with each other. In the domain of private law parties are private individuals and the state, taking the position of an arbitrator, through its judicial organ adjudicates the matters in dispute between them. Law of contracts, torts, of property etc. are examples of private law.

Substantive Law and Procedural Law

Both public and private law may be substantive law or procedural law. When a particular law defines rights or crimes or any status, it is called substantive law. For example, penal law, law of contract, law of property etc. are substantive laws. When a particular law determines the remedies or outlines the procedures of litigation, it is called procedural law e.g. Civil Procedure Code, Criminal Procedure Code etc. The distinction between the substantive and procedural law is not an easy and clear-cut one. The same law may be procedural as well as substantive.[1]

Nature of Constitutional Law

The above discussion of different national laws may give an impression to the readers that constitutional law has got the same status as other laws; it is not in any way superior to any other law. This is the fact in countries where the constitution is an unwritten one. Where the constitution is unwritten and flexible there cannot be any distinction between fundamental law and ordinary law. In Britain parliament being the supreme law making body and the constitution being unwritten and flexible, parliament can amend any constitutional law by ordinary law making procedure and hence constitutional law exists on the same footing with other laws of an ordinary nature.

On the other hand, where the constitution is written and rigid, the constitutional law has a different nature. Here the constitution is

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1 See, Salmond, *Jurisprudence*, 10th ed, P. 461

considered the supreme or fundamental law of the land. It is supreme law in the sense that on point of status it is placed above all the laws: no law is above the constitution; and all ordinary laws get their validity and force from the constitution; no law can be inconsistent with the constitutional law. According to Gettel "Constitutional law locates sovereignty within the state and thus indicates the source of law."[1] And this is why constitutional law is considered the touch-stone or yard-stick to test the validity of all other laws, be it public or private, substantive or procedural.

Thus if the constitutional law is considered the supreme law of the land, then all laws of a particular country may be classified into two broad categories;

A. Constitutional or Fundamental Law; and

B. Ordinary Law.

All administrative, substantive and procedural laws come under the category of ordinary law. All laws except constitutional law are called ordinary law because they can be made and amended by the ordinary law-making procedure. And secondly, no provision of these laws can be inconsistent with the constitutional law. Constitutional law is considered of special sanctity. It is alterable not by any ordinary procedure but by a difficult procedure like two-thirds majority, three-fourths majority etc.

Definition of Constitution

State is a political organization which is administered by a group of persons known as the government. When we say the government of a state, it means basically the executive, the legislative and the judiciary. But this government cannot run the state according to their whim and caprice. There has to be certain rules and principles on the basis and under the authority of which the government can run the state. This set of principles is called the Constitution. A Constitution is called the governing wheel of the

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[1] Gettel, R.G, *Political Science*, Revised ed, (Calcutta : The World Press Private Ltd. 1950), P.184

state, for without it anarchy would result in the administration of the state. Thomas Paine rightly remarks-"Government without a Constitution is a power without a right." A modern state, therefore, cannot be thought of without a Constitution, be it written or unwritten. But how have the writers defined the term constitution? Like many other terms in political science, the term "constitution" has been variously defined by different writers according to the varying conceptions which they hold as to what a Constitution should be.

Aristotle defines a Constitution as "the way of life the state has chosen for itself". Such a definition is very ancient and no clear characteristics of a Constitution can be found in it.

According to C.F. Strong-"A Constitution may be said to be a collection of principles according to which the powers of the government, the rights of the governed and the relation between the two are adjusted."[1] Strong's definition is more or less a defectless one.

According to Lord Bryce-"Constitution is the aggregate of laws and customs under which the life of the state goes on". This definition by Bryce is a narrower one. Because being influenced by the constitutional system of Britain Bryce has defined Constitution as an aggregate of customs. But it is the fact that except Britain and New Zealand nowhere in the world a Constitution can be found which can be said to be an aggregate of customs.

Some writers have defined Constitution in wider sense. Among them K.C. Wheare, Hood Phillips and Gilchrist are mostly referred. According to them the term "Constitution" is used to denote all written and unwritten principles regulating the administration of the state.

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1 Strong, C.F, *Modern Political Constitutions*, (London : ELBS, 1970), P. 11

Again, some have defined Constitution in narrower sense. Among them are Thomas Paine and De Tocqueville. According to them Constitution means the aggregate of only those written principles which regulate the administration of the state. According to them if the Constitution cannot be produced in a visible document, it cannot be said to be a Constitution at all.[1]

This second group of writers has been found to be wrong. This is because in true sense, Constitution is a body of rules written or unwritten which determine the organization of the state, the distribution of powers within the principal organs of the government and the relation between the government and governed. British Constitution is unwritten but many important parts of it are written e.g. Magna Carta, Bill of Rights, Petition of Rights etc. Similarly though the US Constitution is written, some important governmental matters are unwritten. For example, cabinet system, political party, committee system of the Congress etc. important elements of the US constitutional system are unwritten.

Classification of Constitution

Constitutions are widely classified into ~~two~~ four categories, firstly written and unwritten; and secondly, rigid and flexible.

Written and Unwritten Constitution

A written constitution is one in which the fundamental principles concerning state administration are embodied and which has, as a specific document, been passed by a specific body. So a written constitution can be produced and shown as a single document. The US Constitution, Indian Constitution, Bangladesh Constitution provide examples of written Constitution. On the other hand, where the constitution has not been passed formally as a specific document by a specific body and the fundamental principles concerning state administration exist in political customs,

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1 See, Zink, Harold, *Modern Governments* , 2nd ed. (New York: D. Van Nostrand Company, 1983), P.18

judicial decisions and in some scattered documents, the constitution is an unwritten one. The British Constitution provides the glaring example of unwritten constitution. Views, of course, are expressed by different writers that this classification of Constitution (written and unwritten) is not a scientific one since no Constitution can, in practice, be fully written or unwritten. An unwritten Constitution must have some written elements. Likewise, a written Constitution cannot be fully written; some elements of it exist in unwritten form. For example, British Constitution is unwritten but some important elements of it are contained in written documents like Magna Carta, Bill of Rights, Petition of Rights, Act of Settlement etc. On the other hand, the US Constitution is written but some important constitutional subjects like political party organization, cabinet, committee of the Congress, working procedure of the Congress etc. are not written; they are largely based on political custom or convention. Likewise Bangladesh Constitution is a written one but political party organization, appointment of Chief Justice, formation of coalition government etc. are not written; these are based on convention. This is why it is said that the distinction between written and unwritten Constitution is one of degree rather than of form. C.F. Strong comments that a classification of Constitutions on the basis of whether they are written or unwritten is illusory. It is, of course, sometimes necessary to distinguish between the so-called written and so-called unwritten Constitution, and, whenever we need to do so, we shall refer to the former as a documentary and to the latter as a non-documentary Constitution.[1]

Rigid and Flexible Constitution

The distinction between a flexible and rigid Constitution rests upon the method by which the Constitution may be changed. The Constitution which can be amended by ordinary law making procedure is called a flexible Constitution. Ordinary law-making procedure means making law by simple majority which is possible by a majority of the votes of the members present and voting. All ordinary laws (Acts of parliament) of the country are passed by this process. For example, British Constitution is flexible. This is because there is no distinction between ordinary and constitutional

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[1] Strong, C.F, *Modern Political Constitutions* , Ibid, P.67

law in Britain. The British Parliament is supreme and it can enact or amend any law, be it ordinary or constitutional in nature, by ordinary law making procedure and it never needs to adopt any special procedure.

On the other hand, the Constitution which cannot be amended by ordinary law making procedure but a special procedure (like two-thirds or three-fourths majority) is needed, it is called a rigid Constitution. A rigid Constitution is considered the supreme law and regarded as a sacred document. The parliament cannot amend it going beyond the Constitutional limitation; nor can it make any law contrary to the Constitution. This is why where there is a rigid Constitution; there exists clear distinction between the constitutional law and ordinary law. Constitutional law can be amended only by a special or difficult procedure whereas ordinary law can be made and amended by ordinary law making procedure. So in case of rigid Constitution Constitutional law stands over and above ordinary laws and no ordinary law can be inconsistent with Constitutional law. To quote C.F. Strong 'there are four methods of constitutional amendment in use among states with rigid constitutions; firstly, that by the legislature under special restrictions; secondly, that by the people through a referendum; thirdly, that method peculiar to federal states where all or a proportion of, the federating units must agree to the change; and fourthly, that by a special convention for the purpose'.[1]

For example, the US Constitution is a rigid one. The amendment procedure of the US Constitution is a complicated one. There are two modes of amendment for the US Constitution. The usual and mostly used method is- two-thirds of the both Houses of the Congress (the Senate and the House of Representatives are collectively called the Congress) can propose amendments to the Constitution and if this proposed amendment is consented by the legislatures of at least three-fourths states, then the amendment becomes effective. The most difficult mode is following: The legislatures of the two-thirds states may petition to the Congress to

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1 Strong, C.F, *Modern Political Constitutions,* (London : ELBS, 1970), P. 140

call a convention to propose amendments to the Constitution. When such a request is made by the state legislatures, the Congress calls a National Convention. This Convention passes a resolution for the amendment to the Constitution. If this resolution is ratified or consented by a convention of three-fourths of states, the amendment becomes effective.

Likewise the Constitution of Bangladesh is a rigid one. Under the provisions of the Constitution of Bangladesh normally two-thirds majority in the parliament is essential for making an amendment effective. Again, if the proposed amendment contains any provision of articles 8, 48, 56 or 142, then referendum is essential even after such an amendment bill has been passed in the parliament by two-thirds majority.

It has, of course, to be taken into account that an unwritten Constitution is in practice flexible but a written Constitution is not necessarily rigid; it may sometimes be flexible in practice though its nature tells it to be rigid. The Constitution of New Zealand is written but it is entirely flexible.[1] It is also the fact that among modern states of any importance there are only two in which Constitution is flexible and these states are UK and New Zealand. And New Zealand is most probably the only state which Constitution is written but flexible.[2]

While discussing Constitutional law in this book I would, off and on, refer to the US Constitution and British Constitution since these two Constitutions in the world are most ancient and developed. Now the smallest Constitution in the world is that of

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1 See Wheare, K.C, *Modern Constitutions*, (London: Oxford University Press, 1975), P. 31

2 See, Strong, C.F, *Ibid*, P. 142. It is noteworthy here that professor Hood Phillips writes in his book that the Constitution of Singapore is written but it is flexible; this information is wrong because Article 5 of the Singapore Constitution states that a bill seeking to amend any provision in the Constitution shall not be passed by parliament unless it has been supported by the votes of not less than two-thirds of the total number of the members thereof. Again, Article 8 provides for referendum for amendment of certain provisions.

United States which was adopted in 1787 and was given effective in 1789. It had only 7 Articles initially. Within 204 years 26 amendments were passed and 20 new Articles have been added. So now the total Articles are 33 in the US Constitution. The largest Constitution in the world is Indian constitution which was adopted in 1949 and became effective in 1950. It had originally 395 Articles and 12 Schedules.

Constitution and Constitutional Law

Is there any difference between the Constitution and Constitutional law? Like the term 'Constitution' it seems that the term 'Constitutional law' may be used in two senses – Constitutional law in strict sense and Constitutional law in general sense. When the term is used in strict sense, it means those provisions of the Constitution which are enforceable by the court of law since law as such in positive sense means those rules which are enforceable in a court of law. In this sense preamble to the Constitution, fundamental principles of state policy etc. are not Constitutional law since the court cannot enforce them although they are inseparable part of a written Constitution. For the same reason none of the non-legal rules or conventions grown out of Constitutional necessity (in case of a written Constitution) are part of Constitutional law.

On the other hand, when the term 'Constitutional law' is used in general sense, it includes all the provisions of the Constitution, be they enforceable in the court or not, plus all other non-legal rules or conventions. Thus when the term 'Constitutional law' is used in strict sense Constitutional law is less than the Constitution itself and when the term is used in general sense, it is more than the Constitution itself.

CHAPTER II

METHODS OF ESTABLISHING CONSTITUTION AND MAKING THE BANGLADESH CONSTITUTION

History shows four methods by which modern states have acquired their Constitution. These are by grant, by deliberate creation, by revolution, and by gradual evolution.[1]

Constitution by Grant

It is a historical fact that most modern states began with autocratic governments in which all political authority and power was vested in the absolute hand of one ruler. Later, either because the ruler believed that the powers of the government and the manner of their exercise should be defined in a more formal way or because of the demands of his subjects and the fear of revolution, the absolute ruler promulgated a formal document in the form of charter or constitution in which he agreed to exercise his powers in accordance with certain rules laid down in it. Such charters or constitutions are called constitutions by grant. For example, charter granted by Louis XVIII in France, by Napoleon, by the emperor of Japan etc. were constitutions by grant. It is to be noted here that professor Garner has described this type of Constitution as octroyed Constitution.[2]

Constitution by Deliberate Creation

Through deliberate creation a constitution may be found in the following two ways:

a) By Constituent Assembly; or
b) By Legislative Assembly[3]

After the establishment of a new state it arranges a Constituent Assembly by the elected representatives with a view to making a

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1 See, Gettel, R.G, *Political Science*, Ibid, P.249
2 Garner, James Wilford, *Political Science & Government*, (Calcutta : The World Press Private Ltd, 1935), P.466
3 Garner, James, *Ibid*, P.467

new Constitution. Such an Assembly makes a new constitution through a long debate and discussion and once it has completed its task, it automatically dissolves. The Constitution of USA is an example of this method. Likewise in 1947 India and Pakistan achieved their long cherished independence and following this they established Constituent Assemblies to frame Constitution. Accordingly Indian Constituent Assembly adopted the Indian Constitution in 1949. Bangladesh through nine months liberation war achieved its independence in 1971 and in 1972 it adopted its Constitution through a Constituent Assembly which will be discussed later on in this chapter.

Again, there are a few examples of written constitutions which have not had their source in Constituent Assemblies, but have emanated from ordinary legislative bodies. For example, the Government of India Act, 1919 and that of 1935 in British India acted as the Constitution of the country. But these two Constitutions were only two simple Acts of the British Parliament. Likewise, the constitutional laws of Austria prior to the present constitution were nothing but statutes enacted by the parliament. The Irish Constitution of 1922 is also an Act of parliament. The Canadian Constitution is also an Act of British Parliament (the British North America Act, 1867).

Constitution by Revolution

Another usual method of establishing a Constitution is by internal revolution. This occurs when people become dissatisfied with the existing form of government and are not able to change it in a legal manner. When a government turns into a tyrannical one and it began its oppression against subjects, the people of the country, finding no legal way out, overthrow the government through revolution unconstitutionally and establish a revolutionary government and this revolutionary government creates a new Constitution.

Again, a government may be overthrown by a military take-over, or by any *coup d' etat* led by any elite class of the society. In such a case the new revolutionary government sometimes creates a new Constitution.

For example, Constitutions were created by such revolutionary methods in the American States; in France after the French Revolution; in Russia in 1917; in Pakistan in 1962 after military take-over in 1958.

Constitution by Gradual Evolution

A Constitution may come into existence as the result of slowly working evolutionary changes. Beginning with an autocratic government, power may pass in fact, though not in law, to persons who represent the people. By long acquiescence and by the growth of political practices the authority of the latter may finally be recognized as legal. A Constitution grown in this a way is said to be the child of evolution. Such a Constitution is largely unwritten and it appears in a series of documents rather than in a single document. The constitution of Britain is the best and, better to say, the only example of this type.

The Background of the Establishment of Bangladesh Constitution

After independence Bangladesh received its new Constitution adopted by a Constituent Assembly. The Constitution was given effective on 16th December, 1972. Before the new Constitution was made effective there was one interim Cnstitution in Bangladesh. It was initially the Proclamation of Independence (10th April, 1971) and later, the Proclamation of Independence along with the Provisional Constitution of Bangladesh Order, 1972.

The Proclamation of Independence

Following the Pakistan army crack-down on March 25, 1971 the declaration of independence of Bangladesh was broadcasted from the *Shadhin Bangla Betar Kendra* (Free Bengal Radio Station) in Chittagong. The declaration was an informal announcement since till then it was East Pakistan and no revolutionary government was formed to turn the so-called East Pakistan into Bangladesh and to give the declaration a legal basis. So from the viewpoint of international law, to legalise the declaration as well as to legalise the independence war of Bangladesh it was essential to form a revolutionary government. Without such a government and a formal declaration there were

some vital issues in question- how could the international community have knowledge about the forthcoming separate entity of Bangladesh? How could Bangladesh which was yet to achieve independence through fighting could seek assistance from India and other international community? and how would the freedom war be administered? With this end in view the Awami League leaders i.e. the elected representatives (MNAs and MPAs) of the erstwhile East Pakistan who could flee to India assembled in Calcutta. With their prompt initiative a formal Proclamation of Independence was drafted and adopted on 10th April, 1971 with retrospective effect from March 26, 1971. Under this Proclamation the representatives constituted themselves into a Constituent Assembly for Bangladesh and declared Bangladesh i.e. the erstwhile East Pakistan as a Sovereign Peoples' Republic. They thereby confirmed the declaration of independence already made on March 26, 1971. And now it remained no longer a mere declaration; it became a formally approved document which acted as an interim Constitution. Under this very Proclamation the Bangladesh Government-in-exile was legalised though it was formed earlier with the leading initiative of Tajuddin Ahmed. The Government-in-exile i.e. the revolutionary government of Bangladesh formally took their oath on 17th April, 1971 at Meherpur in Kustia District[1]. The Proclamation was a Constitution because it outlined the nature of the state, structure of the government etc. The Proclamation declared Bangladesh as a sovereign Pople's Rpublic. It provided for presidential system of government and declared that the President-

(i) shall be the Supreme Commander of all the Armed forces of the Republic.
(ii) shall have power to appoint a Prime Minister and such other Ministers as he considers necessary.
(iii) shall have the power to levy taxes and expend moneys.

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1 For details, See, Ahmed, Moudud, *Bangladesh : The Constituitonal Quest for Autonomy*, (Dhaka: UPL, 1979), PP.264–271
Chowdhury, A.K, *The Independence of East Bengal*, (Dhaka : Jatiya Granthakendra, 1984), PP.270–274.
Ahmed, Moudud,*Bangladesh : Era of Sheikh Mujibur Rahman*, (Dhaka : UPL, 1984), PP.4–7
Talukdar, Maniruzzaman, *The Bangladesh Revolution and its Aftermath*, (Dhaka: UPL, 1988), PP.109–112
Hasan, Moidul, *Mainstream 1971*, (in Bengali) (Dhaka : UPL, 1995), PP. 16–18

(c) shall have the power to summon and adjourn the Constituent Assembly; &

(d) shall exercise all legislative and executive powers of the Republic including the power to grant pardon.

Though the President was empowered with all uncontrolled powers like a dictator, it was nothing unusual or undemocratic since it was a war time- a special circumstances which is met by special laws to enable the government to handle the affairs of the state effectively.

The Proclamation of Independence read with the Provisional Constitution of Bangladesh Order, 1972

On 16th December, 1971 Bangladesh achieved its full formal independence. The Government-in-exile came to Bangladesh on December 22, 1971 and took the administration of the new born state. The State administration was being run according to the Proclamation of Independence. On January 8, 1972 Sheikh Mujib who was till then the President of Bangladesh under the Proclamation was released from Pakistani jail and returned to Bangladesh on 10th January, 1972. The same day, to keep in line with his earlier commitment, Mujib expressed his intention not to act as the President but chose to be the Prime Minister of Bangladesh in line with a Westminster type parliamentary system. Accordingly on 11th January, 1972 as the President of Bangladesh Sheikh Mujib issued the Provisional Constitution of Bangladesh Order whereby the entire character of the government was changed. The Presidential form was substituted by a form aiming at a Westminster type parliamentary system. The reason stated for changing the system was that it was the "manifest aspiration of the people of Bangladesh to establish a parliamentary democracy" and so in order to achieve this objective the new system was introduced. It is to be mentioned here specifically for the purpose of research that someone might comment that the Provisional Constitution of Bangladesh Order, 1972 acted as the second interim Constitution of Bangladesh. But this view seems to be wrong. Because the Proclamation of Independence along with it the Provisional Constitution of Bangladesh Order, 1972 acted as the single interim Constitution of Bangladesh till 16th December, 1972. The

Provisional Constitution of Bangladesh Order, 1972 did not actually supersede the Proclamation of Independence, 1971; nor was the Proclamation formally abolished; nor was the Provisional Constitution Order any formal amendment to the Proclamation. The Provisional Constitution Order changed only the character of the government i.e. from presidential to parliamentary form. A minute perusal of both the documents and the functioning of the then government would necessarily give the idea that both the Proclamation and the Provisional Constitution Order were acting as the Constitution of the country. Because though the Provisional Constitution Order changed the character of the government, it did not tell anything about the legislative power; nor did it give any power to the Constituent Assembly to control the cabinet; nor did it tell anything about the exercise of executive power of the state. All executive and legislative powers were being exercised by the President under the Proclamation in an uncontrolled way. The main provisions of the Order, however, were as follows:

i) There shall be a cabinet of Ministers, with the Prime Minister at the head.

ii) The President shall in exercise of all his functions act in accordance with the advice of the Prime Minister.

iii) There shall be a Constituent Assembly comprising of the elected representatives of the people of Bangladesh who were elected as MNAs and MPAs in the elections held in December 1970, January, 1971 and March, 1971 not otherwise disqualified by or under any law.

iv) The President shall commission as Prime Minister a member of the Constituent Assembly, who commands the confidence of the majority of the members of the Constituent Assembly. All other Ministers shall be appointed by the President on the advice the Prime Minister.

Under this system Justice Abu Sayeed Chowdhury became the President of Bangladesh and Sheikh Mujib became the Prime Minister.[1]

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[1] For details, see, chapter XXIV of this book and also Ahmed, Moudud, *Bangladesh : Era of Sheikh Mujibar Rahman*, (Dhaka : UPL, 1984), P.8

Constitution Making Process

The Constituent Assembly of Bangladesh Order, 1972

The first step in making the Constitution of independent Bangladesh was the promulgation of the Constituent Assembly of Bangladesh Order on March 22, 1972 as envisaged in the Provisional Constitution of Bangladesh Order, 1972. Under this Order the Constituent Assembly was given only one function to discharge and it was to make a Constitution for Bangladesh. The Constituent Assembly comprised the elected representatives and hence under parliamentary system, it should have been given the power to control the cabinet as well as to make laws for Bangladesh. But it was unfortunate that on the very outset the constitutionalism got a setback in Bangladesh. It is pertinent to note here that when on August 14, 1947 India and Pakistan achieved their independence under the Indian Independence Act, 1947, provisions for the creation of two Constituent Assemblies- one for Pakistan and one for India, were made in the Act. The Act also provided that until new Constitutions were framed, the Constituent Assemblies of both the Dominions would act as central legislatures for both the Dominions. Thus the Constituent Assembly of Pakistan had dual functions-to frame a constitution for Pakistan and to act as the legislature for Pakistan and as a legislature for Pakistan it would make all national laws for Pakistan; it had control over the cabinet; the cabinet was collectively responsible to it; government could not expend any money without the approval of the Assembly. Likewise the Second Constituent Assembly in Pakistan had this dual function which is a must for the development of constitutional government. But in the constitutional history of Bangladesh the Constituent Assembly was not given any legislative power;[1] nor had it any power to control the cabinet; law making power was vested with the President who was to do everything with the advice of the Prime Minister. Thus the Constituent Assembly virtually remained subordinate to the President (in other words, to the Prime Minister), and the government remained unanswerable to any body or forum.[2] It may, therefore, be said that though Sheikh Mujib by changing the

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1 Why was not the Constituent Assembly given law making power? See, PP. 143-144

2 See also Ahmed, Moudud, *Bangladesh : Era of Sheikh Mujibur Rahman,* (Dhaka: UPL, 1984), PP. 8–9

form of government instantly showed his and his party's long-cherished intention to establish a responsible government with a Westminster type parliamentary system, he showed only the shadow, the substance keeping in the other side of the wall. It was not more than a mere expression of his sentiment.

Now we should proceed to see the functioning of the Constituent Assembly on its way to the Constitution making for Bangladesh.

Members of the Assembly

The Constituent Assembly comprised the elected representatives of the people of Bangladesh who were elected as MNAs and MPAs in the elections held in December, 1970, January, 1971 and March, 1971. The total members elected as MNA & MPA were 469 (169 MNAs & 300 MPAs). Among them 12 died in the meantime, 2 became Pakistani citizens, 5 were arrested under the Collaborator's Order, 46 were declared disqualified under the Constituent Assembly (Disqualification of Membership) Order and 1 went to a foreign service. The remaining 403 members manned the Constituent Assembly to the last of its life. Out of them 400 members belonged to the Awami League, one belonged to National Awami Party (NAP) (Suranjit Sen Gupta) and two were independents.

First Session of the Assembly

The Constituent Assembly had its first session on 10th April, 1972. In this session a Constitution Drafting Committee of 34 members was formed under the chairmanship of Dr. Kamal Hossain, the then Law Minister. All but one member (Suranjit Sen Gupta) of this Committee were from Awami League. The Committee was asked to submit its report to the Constituent Assembly with a Bill of the Draft Constitution. The committee had its first meeting on 17th April, 1972. In this meeting a resolution was adopted which invited proposals and suggestions from all sections of the people. In response to this invitation, 98 memoranda were received.[1] The Drafting Committee had 74 meetings to draft

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1 The report of the Drafting Committee does not mention if any of those memoranda was accepted; it says that the memorandas were circulated to members of the committee and the suggestions contained in them were duly considered by the

the constitution and on 10th June it approved the draft Constitution. Then with a view to observing the practical working of the parliamentary constitutional system Dr. Kamal Hossain went to Britain and India. Lastly on 11th October the last meeting of the Committee was held and the full draft Constitution was finally approved.

Second Session of the Constituent Assembly

The Second session of the Assembly commenced on 12th October, 1972. On this day Dr. Kamal Hossain introduced the draft Constitution as a Bill. After seven days general discussion over the Bill commenced on October 19 and continued till November 3. During this long discussion 163 amendments were proposed. Among these 84 amendments were adopted 83 of which were moved by Awami League members and one was by Suranjit Sen Gupta. But most of the amendments were relating to the linguistic errors of the Bill. The Third reading on the Bill was held on November 4 and on this very day the Assembly adopted the Constitution for Bangladesh. It was given effect from the 16th December, 1972 the first anniversary of the 'victory day'.

Salient Features of the Constitution of Bangladesh, 1972

As the original constitution was made in 1972 for Bangladesh, it embodied some fundamental and basic features or characteristics. These features are as follows:

1. **Written Constitution:** The Constitution of the Peoples' Republic of Bangladesh is a written document. It was formally adopted by a Constituent Assembly on a specific day (4th Nov. 1972). It contains 153 articles, 1 preamble and 4 Schedules.

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members in course of their deliberations. (See page 1 of the Report). I asked Dr. Kamal Hossain if any of them were accepted. He told it was impossible for him to recollect after 26 years if any of them were accepted. He advised me to examine those 98 memorandas. I left no stone unturned to find those memorandas but nobody could give me the trace of those. Though a trace was found in the Record Book of the Constituent Assembly, those memorandas could not be found, for parliament building was transferred to the present one and a huge number of documents of the erstwhile East Pakistan Assembly and of the Constituent Assembly of Bangladesh particularly those documents which were not tabled in the Assembly or House have been all heaped up in a store room of parliament and these are yet to be ordered and arranged.

2. Rigid Constitution: The Constitution of Bangladesh is a rigid one since no provision of it can be amended by ordinary law-making procedure; an amendment can be passed only by votes of not less than two-thirds of the total number of members of parliament.

3. Preamble: The Constitution of Bangladesh starts with a preamble which is described as the guiding star of the Constitution. This very preamble contains the legal as well as the moral basis of the Constitution; it also identifies the objectives and aims of the state.[1]

4. Supremacy of the Constitution: Constitutional supremacy has been ensured in the Constitution of Bangladesh. Because article 7(2) provides that "This Constitution is ----- the supreme law of the Republic and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void."[2]

5. Unitary Governmental System: Article 1 of the Constitution provides that Bangladesh is a unitary peoples' republic as opposed to federal republic. Governmental system is a unitary one since all power under the constitution has been centralised to a unitary government; no division of power has been provided for in the Constitution unlike in federal constitutions.

6. Unicameral Legislature: Article 65 of the Constitution provides for a unicameral legislature for Bangladesh. It is only one House to be known as the House of the Nation. Like Indian legislature it is not composed of upper House and lower House. Laws made by the parliament are equally applicable to the whole territory of Bangladesh.

7. Fundamental Principles of State Policy: Article 8 of the Constitution provides for four major fundamental principles of state policy. They are (i) Nationalism, (ii) Democracy, (iii) Socialism;

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1 See, further chapter III
2 See, further chapter IV

and (iv) Secularism. All other principles derived from these four shall also constitute the fundamental principles of state policy.[1]

8. **Fundamental Rights:** Part-III of the Constitution provides for 18 fundamental rights. The enjoyment and enforcement of these rights have been guaranteed in the Constitution. The Supreme Court has been invested with the task to protect these rights. No authority can make any law which is inconsistent with the provisions of fundamental rights and any law so made shall, to the extent of such inconsistency, be void.[2]

9. **Parliamentary form of Government:** The Constitution of Bangladesh provides for a Westminster type of parliamentary system. This form of government, in other words, cabinet form of government means that the government is run by a cabinet of Ministers headed by the Prime Minister and the cabinet as a whole has to be responsible to the parliament and can remain in power so long it enjoys the confidence of the majority members of the parliament. President becomes a titular head : the real executive power is exercised by the cabinet. The 1972's Constitution of Bangladesh provided, more or less, all the trappings of parliamentary form of government.

10. **Independence of Judiciary:** The Constitution of 1972 ensured the independence of judiciary.

Firstly, provision was made that the Chief Justice would be appointed by the President and other justices of the Supreme Court would be appointed after consultation with the Chief Justice (Art. 95). Appointment of subordinate judges and magistrates was also to be exercised with consultation of the Supreme Court.

Secondly, a judge could not be removed from his office except by an order of the President passed pursuant to a resolution of parliament supported by a majority of not less than two-thirds of the total number of members of parliament. Again, the security of tenure of the subordinate judges was vested in the Supreme Court.

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1 See, further Chapter V
2 See, further Chapter VI

Thirdly, it was provided that the remuneration, privileges and other terms and conditions of service of judges could not be varied to their disadvantages and the salaries of the judges were charged upon the Consolidated Fund of the Republic. Again, the control (including the power of posting, promotion and grant of leave) and discipline of persons employed in the judicial service and magistrates exercising judicial functions was vested in the Supreme Court.[1]

Thus the entire judiciary except some aspects of magistrate's courts was made independent.[2]

11. Ombudsman: Provisions for the establishment of an ombudsman were inserted in Article 77. To provide machinery to overview the activities of civil bureaucracy, to eradicate corruption in the administration and to ensure the responsibility of the government in a more specific way the role of an ombudsman like a citizen's defender or watch-dog has been successful in some countries. Though the office has not yet been implemented in Bangladesh, the incorporation in the Constitution of such an office reflected the desire of the Awami League to strengthen the functioning of democracy in the country.[3]

12. Responsible Government was not ensured: Though the 1972's Constitution of Bangladesh provided for the Westminster type of parliamentary form of government it could not ensure, due to some of its repressive provisions, the conditions of responsible government. A cabinet form of government is directly responsible to the parliament in the sense that the cabinet as a whole has to be accountable to the parliament and an individual minister has to be responsible in respect of his departmental administration. In the Constitution of Bangladesh, there is no provision for ensuring the individual responsibility of ministers. Though Article 55(3) provides that 'the cabinet shall be collectively responsible to the

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1 Of course, the independence of lower judiciary as far as it relates to the Magistrate's Courts exercising judicial power was ensured in proper form. See, details, PP. 361-363

2 See, further Chapter XIX

3 See, further Chapter XVIII

parliament', this responsibility cannot be ensured in practice due to the barricade created by Article 70 of the Constitution.[1]

In fine, it can be said that except some weaknesses and drawbacks like the provisions of Article 70, ordinance making power of the President, magistrate's courts, administrative tribunal etc. the Constitution of 1972, to a large extent, reflected the aspirations of the people. It was undoubtedly an improved Constitution to compare with all contemporary Constitutions of the sub-continent since there was no provision in the Constitution for preventive detention, neither was there any provision for emergency and suspension of fundamental rights- two brutal weapons to crush the opposition and perpetuate the rule and thereby creating a stumbling block to the way of developing constitutionalism. The Constitution, therefore, reflected the avowed purpose of its makers to establish constitutionalism in Bangladesh. But the fruits of the healthy Constitution could not be enjoyed by the people of Bangladesh for long. Bangladesh was probably not the right place to have the luxury of such a good Constitution. Only after nine months of its life amendments one after another began to inject in it all the undemocratic provisions which will be discussed in the following respective chapters.

Some Flaws in Constitution Making

1. The Question of Independence of Lower Judiciary Particularly of the Magistrate's Courts.

It is often argued that the original Constitution of Bangladesh ensured full independence of the judiciary. But this is true only in respect of the Supreme Court i.e. the Higher Judiciary but not in respect of the lower judiciary particularly of the Magistrate's Courts. The whole system of magistrates courts along with other lower judiciary have been kept in a dependency syndrome under the control of the executive. However, after 36 years on 1st November, 2007 the sitting caretaker government finally separated the lower

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1 See, further Chapters VIII & IX

judiciary from the clutches of the executive. (see, details, PP. 344-350).

2. Administrative Tribunal

Following the system of French specialised court of *Tribunaux Administratif* most of the developing countries have set up separate administrative court or tribunal to settle administrative disputes and service matters. The main argument behind establishing such a separate court is that in developing countries it is not possible to achieve objectives, if administrative disputes and service matters are subjected to judicial review. For this reason in the then Pakistan establishment of separated administrative courts were demanded and the Law Reform Commission 1967-70 was asked to give report on the matter. Before going to discuss the substance of the report first I would like to discuss the provisions inserted by the constitution-makers in relation to administrative tribunal. The constitutional provisions as to administrative tribunals are following:

i) Parliament may by law establish one or more administrative tribunals to exercise jurisdiction in respect of service matter and the acquisition, administration, management and disposal of any property vested in or managed by the government [Art. 117(1)].

ii) Where any administrative tribunal is established no court shall entertain any proceeding or make order in respect of any matter falling within the jurisdiction of such tribunals [Art. 117(2)].

iii) Parliament may, by law, provide for appeals from, or review of, decisions of administrative tribunals (ibid).

iv) No writ will lies in the High Court Division under Article 102 against any administrative tribunal [Art. 102(5)].

Draw-backs:

1. The Constitutional plan of administrative tribunal has been designated as a deviation to a fundamental principle of common law jurisprudence. According to common law jurisprudence as opposed to civil law jurisprudence all courts and tribunals in a country are subordinate to one Supreme Court or High Court. But as the provision goes, administrative tribunals in Bangladesh are

not subordinate to the High Court Division. According to Articles 117(2) and 102(5) all administrative tribunals are outside the ambit of judicial review by the Supreme Court. Though it may be contended that under the doctrine of convergence[1] judicial specialisation is taking place in a rapid way in many common law countries, it is very much difficult to find out even a single instance except in some dictatorial constitutions where total specialisation has taken place negating the minimum jurisdiction of the Highest Court of the land. Neither in Pakistan Constitution (Art. 212) nor in Indian Constitution (Art. 323A) are administrative tribunals exempted from the power of judicial review by the Supreme Court. In both the Constitutions the right to special leave to appeal by the Supreme Court against any decision of the administrative tribunal is granted. But in Bangladesh Constitution the whole plan has been designed so that a parallel Supreme Court may be established for services and property matters of the Republic.

2. The whole Constitutional plan for administrative tribunal as has been designed by the Constitution-makers seems to have gone against the concept of rule of law. Because since the Constitution has envisaged completely a separate hierarchy of administrative tribunals, it was an imperative duty on the Constitution-makers to outline in the Constitution the conditions of services and of appointment of persons who are to chair these tribunals and also the conditions of ensuring their independence and impartiality so that the government by simple majority cannot make undemocratic law relating to administrative tribunals or administrative appellate tribunal to use the whole machinery in their favour frustrating the pious purpose behind them.

It is worthy to note here that in Pakistan, as mentioned earlier, the Law Reform Commission, 1967 was asked to give report on the establishment of administrative tribunals. The Commission gave its interim report in 1967 and final report in 1970. In it the Commission says-

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[1] **Doctrine of Convergence:** It is a developing doctrine under comparative law. It means that the two judicial system i.e. civil law system and common law system are coming nearer to each other. Common law is taking many elements of civil law system. Similarly civil law system is taking many elements, though not fundamental ones, of common law system.

(i) "..... Those who advocate curtailment of the power of the judiciary to review administrative actions appear to be oblivious of the fact that in a welfare state the rule of law is the basic requirement, so as to serve as a check on arbitrary executive action and to achieve a balance between collective requirements and individual rights..... In a true welfare democratic state, review of administrative actions of the executive by some independent organ of the state is a must....."

(ii) "The system of *'Council d' Etat'* and *'Tribunaux Administratif'* owes its existence to peculiar conditions prevailing in France. This system is totally different from the common law system with which we are familiar."

(iii) "The success of an institution like the *'Council d' Etat'* in France primarily depends on the availability of really intelligent, experienced and independent civil servants to serve as its member which we lack in our system."[1]

Lastly the Commission recommended that the Administrative Tribunal should not be kept outside the ambit of judicial review and it should be presided over by retired judge of the Supreme Court or High Court who should have the same security of office as a serving judge. However, our Constitution-makers did not take a look at this report.[2]

It is, however, fortunate that Justice Sahabuddin Ahmed while acting as interim President made an amendment to the Administrative Tribunal Act, 1980 by an Ordinance and inserted there a provision (sec. 6A) that appeal against the decision of the Administrative Appellate Tribunal shall lie to the Appellate Division of the Supreme Court. But this is an amended provision of an ordinary law which can be repealed any time by the government. So Constitutional changes should be made to the following effect:

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1 The Report of the Law Reform Commission 1967-70 Chapter XXVII

2 I asked both Dr. Kamal Hossain and Barrister Amir-Ul Islam whether they considered the report while drafting the constitution. They told that they had no knowledge of it.

i) It should be provided in the Constitution that appeal from the Administrative Tribunal shall lie to the HCD of the Supreme Court.

ii) The Administrative Appellate Tribunal should be abolished.

iii) It would be a better step to establish a Bench in the High Court Division to be known as the Administrative Bench abolishing the Administrative Appellate Tribunal.

3. Article 70: Anti-Hopping Laws

Considering the past experiences of political defections in the erstwhile East Pakistan provisions for prevention of floor-crossing as inserted in Article 70 has been salutary howsoever undemocratic they may be. For the purpose of establishing stable parliamentary democracy in Bangladesh a provision like this is unavoidable. These provisions would certainly strengthen the fabric of parliamentary democracy in Bangladesh by curbing unprincipled and unethical political defections and side swapping. However, in providing for prevention of floor-crossing the Constitution-makers seem to have done more than what was necessary. Anti-hopping laws are essential only for the stability of the government and that can better be ensured if these laws are imposed when the cabinet faces a no-confidence or confidence motion. But as the provision goes in Article 70, no member of the ruling party can exercise his democratic right to dissent even when the government passes an undemocratic law. Article 70 undermines the whole spirit of responsible government and leads to elected dictatorship in Bangladesh. It is important to note here that the report of the Constitution Drafting Committee shows that there were as many as six notes of dissent and four of them had opinion against and as to amendment of the provisions of Article 70. But none of dissenters suggested for a compromising process whereby both the floor-crossing can be prevented and the spirit of responsible parliamentary government can be sustained. Also an interview with Barrister Amir-Ul Islam gives the idea that the Constitution-makers had neither knowledge of, nor could they contemplate the compromising process.[1]

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[1] For details of anti-hopping laws and compromising process. see, Chapter VIII

4. The Issue of Bangalee Nationalism

The issue of 'Bangalee nationalism' in the sense of citizenship, in other words, the concept that 'citizens of Bangladesh shall be known as Banglees as inserted in Article 6 of the Constitution is a matter absolutely out of constitutional consideration. It is difficult to find a democratic constitution except the Bangladesh one where such specification as to nationalism in the sense of citizenship is incorporated. Both from the viewpoint of national law and international law the national identity as far as it relates to the matter of citizenship of the people of a particular state is determined by the adjective term of the name of that very state whatever might be the other facts or history as to their nationalism. For instance, the national identity of the people of Pakistan is Pakistani though there are many other communal and religious nationalisms like Punjabi, Muslim, Baluchi etc. Likewise, the national identity of the people of India is Indian though there are many other communal nationalisms like Sheikhs, Tamil, Hindus, Muslim, Bangalee, Tribal people etc. If any communal or cultural or linguistic heritage-based nationalism is imposed over all the people of a state as their national identity from the viewpoint of citizenship, there might occur unnecessary chaos between the majority communal group and minority communal group or groups. And such has been the case of Bangladesh. The Constitution-makers inserted a communal and discriminatory nationalism 'Bangalee' in the Constitution which has been an imposed nationalism particularly over the tribal people of Bangladesh against their will. Till now since independence this issue of 'Bangalee' nationalism has been one of fundamental points of difference and divergence between mainstream political forces in the country and I am confident that this trend concerning this issue will continue forever. If any historical trace or fact is attached to the word 'Bangalee', it should be a matter of our cultural or linguistic heritage under the domain of sociology. One of Mujib's close associates told me that the Chittagong Hill Tract Problem was made more aggravated when Mujib imposed 'Bangalee nationalism' over the tribal people who are in no sense Bangalee but necessarily Bangladeshi.

5. Women Members' Reserved Seats

Though the concept of reserved seats for women is not undemocratic, the Constitution has not incorporated the provisions in line with democratic spirit. The provisions come out as a 'vote bank' or 'backdoor democratic' system (See details in Chapter XVII).

CHAPTER III

PREAMBLE TO THE CONSTITUTION

The US Constitution adopted in 1787 for the first time contained a preamble and thenceforth most of the new countries with written constitution are adopting a preamble to their constitutions.

What is Preamble

Generally preamble is an introductory paragraph or part in a statute or other document setting forth the grounds and intentions of it. Not only a Constitution but also most of the statutes contain a preamble. The preamble to an Act contains in a nutshell its ideals and aspirations[1]; in other words, it sets out the main objectives which legislation is intended to achieve. It is a key to the intention of the maker of the Act.[2] Likewise the preamble to a Constitution is its philosophy because it contains those ideals and principles on the basis of which the whole structure of the Constitution is erected. But though in case of ordinary statutes much importance is not always attached to the preamble, extreme importance is always attached to a preamble in a constitutional statute. The preamble to a Constitution serves the following three main purposes:

(i) It indicates the source of the Constitution i.e. the legal and moral basis of the Constitution.

(ii) It expresses in a nutshell the ideas and aspirations of the objectives of the Constitution.

(iii) It works as the guiding star for the interpretation of the Constitution.

Preamble and the Operative Part of the Constitution

Sometimes it is argued that the preamble is not included in the operative part of the Constitution. It is not an integral part of the constitution in the folowing senses.

Firstly, if it were dropped from the constitution, the operative part of the Constitution would, in no way, be hampered.

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1 Per Subba Rao C.J. in *Golaknath* V. *State of Punjab* AIR 1967 SC 1643

2 Sikri, C.J. in Kesavananda Bharati Case AIR (1973) 4 SCC 225

Secondly, it is not necessary that every statute or Constitution should begin with a preamble. The Government of India Act, 1935 though it was the second Constitution of the British India, had no preamble.

Thirdly, the preamble of a Constitution is neither regarded as the source of any substantive governmental power nor does it by itself import any limitations on the exercise of powers not expressly or impliedly prohibited by the Constitution.[1]

It was opined by the Supreme Court of USA that a preamble is not an operative part of the Constitution. It indicates only the general purposes for which the people ordained and established the Constitution. It has never been regarded as the source of any substantive power conferred on the government of the USA or any of its departments.[2] Similarly, the Supreme Court in India has laid down in some cases that the preamble is not an operative part of the Constitution and hence it can never be a source of power. It has limited application and can be resorted to where there is any ambiguity or where the object or meaning of any enactment is not clear. Where the enabling part i.e. the operative part of the Constitution is explicit and unambiguous, the preamble cannot be resorted to, to control, qualify or restrict. In other words, where the language or provisions of the operative part are clear, full effect should be given to the operative part, even though those provisions appear to conradict the terms of the preamble.[3] Also in *Powell V. Kempton Park Race Course Co.* Lord Halsbury L.C. said-"Two propositions are quite clear : one that a preamble may afford useful light as to what the statute intends to reach ; and another, that if an enactment is itself clear and unambiguous, no preamble can qualify or cut down the enactment.[4]

Recent Views on Preamble

Thus the earlier view was that the preamble was not any operative part of the Constitution. But some recent judgments have given a quite different view. In *Kesavananda Bharti's* case the

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1 In Berubari's case AIR 1960 SC 845

2 Jacobson V. Massachusetts (1905) 197 US 11

3 Berubari's case . AIR 1960 SC 845
Golaknath V. State of Punjab. AIR 1967
Re Kerala Education Bill case AIR 1958 SC 956

4 1899 AC 143

Indian Supreme Court held that the preamble is a part of the Constitution. Though in an ordinary statute not much importance is attached to the preamble, all importance has to be attached to the preamble of a Constitution. Sikri C.J. said-'it seems to me that the preamble of our Constitution is of extreme importance and the Constitution should be read and interpreted in the light of the grand and noble vision expressed in the preamble'. According to the judgment of this case the view taken in Berubari case was, therefore, wrong.

Whether Preamble can be Amended ?

This question was raised for the first time before the Indian Supreme Court in *Kesavananda Bharati's* case. It was argued that since the preamble was a part of the Constitution it could be amended like any other provisions of the Constitution. The court held that since the preamble is a part of the Constitution it can be amended subject to this condition that the 'basic features' in the preamble cannot be amended. The court said,

> "The edifice of our Constitution is based upon the basic elements mentioned in the preamble. If any of these elements are removed the structure will not survive and it will not be the same Constitution or it will fail to maintain its identity. The preamble declares that the people of India resolved to constitute their country into a Sovereign Democratic Republic ..... An amending power cannot be interpreted so as to confer power on the parliament to take away any of these fundamental and basic characteristics of policy".[1]

It is pertinent to mention here that the Supreme Court of Bangladesh also held in the 8th Amendment case that preamble is a part of the Constitution and it is a basic structure of our Constitution.[2] It is also noteworthy that though the Supreme Court held that the parliament cannot amend any basic structure of the constitution like the preamble, this very preamble was altered by the martial law administrator and was later validated by the parliament.

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1 AIR (1973) SCC 225

2 See, for details, Chapter XXI

Significance of the Preamble

The preamble is a part of the Constitution but it is not necessarily the part of the enacting or operative part of the Constitution, and the court cannot enforce it directly. The preamble, therefore, bears no legal significance. But it has other important significance which is sometimes more than the legal importance.

First, it is the preamble which identifies the legal source or base of the Constitution. Legal base of the Constitution means wherefrom the validity and power of the Constitution is derived.

Second, it indicates the moral basis or the philosophy of the Constitution. The logic which works behind obeying a Constitution as the supreme law is its moral philosophy.

Third, the preamble works as a guiding star for the whole nation. Because it is pledged in the preamble that all governmental works would be administered in conformity with preamble and taking it as a pole star.

Fourth, the preamble has a great interpretative significance. Where any operative part of the Constitution is ambiguous the preamble can be resorted to clarify that part or wordings.

The Preamble or the Philosophy of the Bangladesh Constitution

The preamble of the original Constitution of 1972 was amended by the Martial Law Administrator and then validated by the 5th Amendment of the Constitution. From this amended preamble we get the following features of it:

1. It identifies the legal basis of the Constitution.

> "We, the people of Bangladesh ..... in our Constituent Assembly, do hereby adopt, enact and give to ourselves this Constitution."

These words mean that people is the source of all supreme power ; people are the real makers of this Constitution. The members of the Constituent Assembly were all peoples' representatives. The preamble, therefore, indicates that the legal basis of our Constitution is the people-the ultimate source of all power.

2. It identifies the moral basis of the Constitution.

As the Constitution of Bangladesh has been adopted and accepted by the people of Bangladesh and as it is the reflection of the aspirations of the people of Bangladesh, it is also the duty of this very people to obey it. Again, as the supreme law of the land the constitution is the basis of law and order in the country. If it is violated, then the whole governmental order will be collapsed. It is, therefore, the moral duty of the people to obey this Constitution. This moral basis of the Constitution has a clear recognition in the preamble-

> " ..... it is our sacred duty to safeguard, protect and defend this Constitution and to maintain its supremacy as the embodiment of the will of the people of Bangladesh....."

To elucidate the legal and the moral basis of our Constitution it is pertinent to mention here two illustrations. It is said in the preamble of the Indian Constitution -" We, the people of India ..... in our Constituent Assembly do hereby adopt, enact and give ourselves the Constitution." The preamble of Indian Constitution, therefore, indicates the people of India both as the legal and moral basis of the Constitution. But in fact the legal basis of the Indian Constitution is the Indian Independence Act, 1947 and not the people of India. Because India achieved its independence by the operation of that Act. Again, there was no universal suffrage in the election of the Constituent Assembly. The people of India, therefore, had neither direct nor indirect involvement in the making of the Constitution.

Likewise the US Constitution was adopted in the Philadelphia Conference in 1774 which was represented by the owners of the government debentures, land lords, money-lenders, shipping business men and owners of slave trade. No labour-representative neither any representative of the cultivators was invited in that Conference. But the Conference adopted the Constitution declaring "We the people of United state ..... do ordain and establish this Constitution for the USA."

To compare the Bangladesh Constitution with the above mentioned two Constitutions it may be said that there is no doubt as to the source of the Bangladesh Constitution. It is certainly the people of Bangladesh. Because the people of Bangladesh have achieved their independence through a nine-month bloody struggle and the Constitution was made and adopted by the representatives who were directly elected by the people. It is, of course, sometimes argued that the members of the Constituent

Assembly were MNAs and MPAs of the erstwhile Pakistan; they were not elected to act as representatives in the Constituent Assembly of Bangladesh and no election was held after independence. However, a closer look may outweigh this argument. Though the members of the Constituent Assembly were not elected after the independence, they were elected as MNAs and MPAs for the autonomy of the erstwhile East Pakistan; it was their party (Awami League) which led all the movements since the creation of Pakistan and the people of Bangladesh fought the bloody independence war in response to the call for independence by this very party. And it was, therefore, the only party which could, after independence, command the landslide support of the people and it undoubtedly would have been the fact had any fresh election been held after independence.

3. It identifies the goal of the State.

The Preamble states:

> "..... it shall be a fundamental aim of the state to realise through the democratic process a socialist society, free from exploitation - a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens."

How far have the Objectives enshrined in the Preamble been maintained in Bangladesh

To see how far the objectives enshrined in the preamble have been maintained and ensured we have to examine the conditions of the following concepts which are components of an exploitation-free society- the ultimate goal of the state.

Rule of Law:

The provisions of the original Constitution of 1972 were more or less conducive enough to ensure rule of law in Bangladesh. But only after nine months of its adoption preventive detention, emergency etc. black provisions were inserted in the Constitution through the Second Amendment arresting all the possible way to ensuring rule of law. Then in 1975 by the 4th Amendment multi-party democratic system was buried and one party dictatorial presidential system was introduced

undermining, better to say, uprooting the spirit of constitutional supremacy, judicial independence, rule of law and democracy.

In 1991 the 12th Amendment of the Constitution was passed reverting the governmental system from presidential to parliamentary and the first 12 years of the second parliamentary democracy has been completed. But rule of law still remains a far cry. Because all the black provisions of the Constitution like emergency, preventive detention, ordinance-making power of the president, involvement of the executive in the judiciary, Article 70, CAG's dependence upon the executive etc., as they stand now, are insurmountable stumbling block against the ensuring rule of law.[1]

Fundamental Rights:

The Constitution provides for 18 fundamental rights and also their better protection has been ensured in the Constitution. But due to poverty and the absence of any legal aid most of the poor people cannot enjoy their rights and also preventive detention, emergency provisions etc. act as a threat towards the enjoyment of fundamental rights.

Political, Economic and Social Equality:

Not only in the preamble but in the chapter of 'Fundamental Principles of State Policy' a large number of social and economic rights have got their Constitutional recognition. But without a reasonable economic equality among people no social or political equality can be ensured. 32 years have passed since Bangladesh achieved independence but economic inequality rather than equality is reigning the majority life of the people. No government took stern measures to control the high growth rate of population and the rate of literate people is going down to compare with the growth rate. But there will be no political equality unless and until the people are educated and politically conscious.

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1 For Rule of Law, see, Chapter XX
For Emergency, see, Chapter XV
For Preventive Detention, see, Chapter XVI
For Ordinance Making Power, see, Chapter XIV
For Article 70, see, Chapter VIII
For more understanding of this chapter, see, also Chapter XXIV

Supremacy of the Constitution:

The 4th para of the preamble states-

" ..... it is our sacred duty to safeguard, protect and defend this Constitution and to maintain its supremacy as the embodiment of the will of the people of Bangladesh ....."

But facts substantiate that our political leaders did not perform this sacred duty. On 15th August, 1975 Sheikh Mujibur Rahman was assassinated and Khandaker Mustaque Ahmed came to power declaring Martial Law. The Constitution which is the supreme law of the nation was kept in subordination of the martial law proclamation. And for the second time martial law was declared in 1982. This time the Constitution was suspended. Nowhere in the Constitution is the term "martial law" available; nor has anybody been given any power to suspend the Constitution. But even then martial law was imposed twice unconstitutionally undermining the supremacy and philosophy of the Constitution as enshrined in the preamble, and for this the then leaders in power are mostly responsible for they come to power taking their solemn oath that they will maintain the supremacy of the Constitution. But when they began, violating their affirmation, to abuse their Constitutional power, the political instability follows and it ultimately paves the way for military intervention. In this regard it is pertinent to mention the judgment of Fazle Munim J. in *Hlima Khatun* V. *Bangladesh.*[1]

> "What it appears from the Proclamation of August 20, 1975 is that, with the declaration of Martial Law .... the Constitution of Bangladesh ... (has been made) subordinate to the Proclamation and any regulation or order as may be made by the president in persuance thereof .... Under the Proclamation ... the Constitution has lost its character as the supreme law of the country. There is no doubt, an express declaration in Article 7(2) of the Constitution to the following effect," 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 such inconsistency be void." Ironically enough, this Article, though it still exists must be taken to have lost some of its importance and efficacy. In view of .... the Proclamation the supremacy of the constitution .... is no lager unqualified."

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[1] 30 DLR (SC) 207

CHAPTER IV

CONSTITUTIONAL SUPREMACY

Two types of supremacy are found in the constitutional systems in different countries. One is parliamentary supremacy and the other is constitutional supremacy or judicial supremacy.

Parliamentary Supremacy

The term Parliamentary supremacy means that parliament is supreme over the Constitution. It is also called legislative supremacy because the legislature is not a body created by the constitution ; neither the power of the legislature is limited by the Constitution ; the legislature exercises an unlimited and supreme power in law-making. Such legislative supremacy is possible only where the Constitution is unwritten and flexible. The British Constitutional system has this legislative supremacy. Three intrinsic features of parliamentary supremacy are following :

i) There is no law which parliament cannot change or modify.

ii) There is no distinction between constitutional law and ordinary law.

iii) There is no body which can declare the law passed by parliament illegal or unconstitutional.

Constitutional Supremacy

The term constitutional supremacy means that the Constitution is supreme over the parliament and the parliament can exercise its functions being only within the bounds of the Constitution. Constitutional supremacy is possible only where the Constitution is written and rigid.

The object of making the Constitution written and rigid is to limit the powers and functions of the government and the legislature. In most cases of written Constitutions a declaration is made in the Constitution that the Constitution shall be the supreme and fundamental law of the land and no other law can be inconsistent with it. The American Constitution makers were the

first to designate their Constitution as the "Supreme Law of the Land"[1] and this designation has resulted the doctrine of Constitutional supremacy. The founding fathers of American Constitution had the painful experience that even a representative body might be tyrannical and there should be a law superior to the legislature itself and that it was the restraints of this permanent written law that could only save the people from the fear of absolutism and autocracy.

This constitutional supremacy is also called judicial supremacy in the sense that the judiciary i.e, the highest court of the land is supreme over the legislature. Because the judiciary is invested with the power to examine the validity and constitutionality of any legislation made by the parliament and can declare a law void on the ground of inconsistency with the Constitution.

As to the doctrine of constitutional supremacy Professor Wade says that 'in a constitutional system which accepts judicial supremacy legislation may be held invalid on variety of grounds : for example, because it conflicts with the separation of powers where this is a feature of the Constitution or infringe human rights guaranteed by the Constitution or has not been passed in accordance with the procedure laid down in the Constitution.' Professor Hood Philips says that 'to say that a Constitution is supreme is to describe its relation to the legislature's power to alter the Constitution is either limited or non-existent.' Actually a Constitution with constitutional supremacy not only defines the power of the legislature ; it defines and establishes the principal organs of the state ; it is the source of their authority. It prescribes the manner in which and within which their functions are to be exercised. The three organs of the state cannot do anything beyond the constitutional limitations. If any organ does anything in violation of the constitutional limitations then it is the court which can declare the action null and void and this paramount power of the court is given by the Constitution itself. Thus the Constitution has a sanctity

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1 The Constitution of USA, Art. VI

over everything in the realm. It is why this position is called constitutional supremacy.

Characteristics of Constitutional Supremacy

The doctrine of constitutional supremacy as contradistinguished form the parliamentary supremacy has following characteristics:

i) The Constitution is written.
ii) The Constitution must be rigid.
iii) There must be, in the Constitution, either express or implied declaration that this Constitution shall be the supreme law and any other law inconsistent with this Constitution shall be void.
iv) The parliament is created by the Constitution itself and it exercises its legislative power being within the bounds of the constitutional limitations.
v) There is distinction between constitutional law and ordinary law.
vi) There is an independent body (court) created by the constitution to examine the constitutionality of legislation made by the parliament and any action done by the executive.

How can the Supremacy of the Constitution be Maintained

Constitutional supremacy is never a matter of conventional sanction as is the case of parliamentary supremacy in Britain. Constitutional supremacy depends on the fulfillment of the following conditions:

The Constitution must be written:

If the Constitution is not written, the distinction between the fundamental law and ordinary law will be impossible; no restriction can be imposed on the parliament's legislative power and as a result constitutional supremacy will not be possible.

The Constitution must be rigid:

If the Constitution is flexible then it can easily be amended by ordinary law making procedure and there will be no distinction between constitutional law and ordinary law, and it would then ultimately be parliamentary supremacy.

An Independent Judiciary:

An independent judiciary must be created by the Constitution itself and it must be given the status of a guardian of the Constitution and fundamental rights enumerated in the Constitution. Otherwise the test of constitutionality of any law made by the parliament and any action done by the executive will be impossible leading to the total impossibility of constitutional supremacy.

How is Constitutional Supremacy ensured in Bangladesh Constitution

The following points will help clarifying how the constitutional supremacy is ensured in the constitution of Bangladesh.

1. The Constitution of Bangladesh is a written one. It specifically prescribes the manner how the power and functions of the organs of the government will be exercised.

2. It is a rigid Constitution. Because it can be amended only by two-thirds majority (Art. 142). Again, to amend some provisions like the preamble, the form of government (Articles 48 & 56) and Fundamental Principles of State Policy (Art.8) a more stringent method has been provided for. In these cases even after the bill has been passed by two-thirds majority, a referendum is essential. This rigidity, therefore, imposes restriction on the power of the parliament on the one hand and ensures distinction between ordinary law and fundamental law on the other hand.

3. It is the Constitution and not the parliament which is supreme under the Constitution of Bangladesh. This is because, firstly, it is

stated in the preamble that "..... it is our sacred duty to safeguard, protect and defend this Constitution and to maintain its supremacy as the embodiment of the will of the people of Bangladesh."

Secondly, Article 7 states "All powers in the Republic belong to the people, and their exercise on behalf of the people shall be effected only under, and by the authority of, this Constitution. 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 shall, to the extent of the inconsistency, be void."

Thirdly, Article 26 states that "All existing laws inconsistent with the provisions of this part (i.e. fundamental rights) shall, to the extent of such inconsistency, become void on the commencement of this Constitution. The state shall not make any law inconsistent with the provisions of this part, and any law so made shall to the extent of such inconsistency be void.

Fourthly, Article 65 states that the legislative powers of the Republic shall, subject to the provisions of this Constitution, be vested to the parliament.

Thus it is clear that the Constitution declares itself to be supreme over the parliament.

4. The declaration of Constitutional supremacy in the Constitution implicitly presupposes the existence of an independent authority to examine the constitutionality of actions taken by the legislative and the executive. To that end the Constitution of Bangladesh has ensured in Articles 94 and 95 an independent organ–the Supreme Court. Under article 102 the Supreme Court has been empowered to scrutinise the governmental actions done in violation of fundamental rights. Again, under Articles 7 and 26 the Supreme Court exercises the power of judicial review i.e. to examine the constitutionality of any law passed by the parliament. And a glaring example to this is the historic Eighth Amendment

case. In that case the Supreme Court held the Eighth Amendment to the Constitution unconstitutional and invalid.

How far has the Constitutional Supremacy been Maintained in Bangladesh

This aspect has already been discussed in the last part of Chapter III and also see chapter XXIV.

Constitutional Supremacy and Judicial Review

The object of making a Constitution written is to limit the power of the government. The Constitution prescribes the manner in which and within which its functions are to be exercised. It imposes restriction on executive and legislative. In most cases of written Constitution a declaration is made in the Constitution that this Constitution shall be the supreme and fundamental law of the land and no other law can be inconsistent with it. And all organs of the government shall exercise their functions being within the limits of the Constitution. But a question naturally arises as to this constitutional supremacy - who will ensure this constitutional supremacy and how ?

The answer to this question has two dimensions. Firstly, the primary responsibility to maintain constitutional supremacy lies with state-men who under solemn oath of office begin their governmental functions. It is their both moral and legal duty to maintain the constitutional supremacy as they are oath-bound to preserve, protect and defend the supremacy of the Constitution. If they violate their oath and the Constitution they can hardly be, the experience teaches, brought under prosecution and in most cases they are immune, while they are in power, from any proceedings to the court. It is, therefore, their supreme sense of responsibility and moral obligation which can lead them in a right track to maintain the supremacy of the Constitution.

Secondly, the declaration of constitutional supremacy in the Constitution implicitly presupposes the existence of an independent authority to examine the constitutionality of actions done by the

executive and legislative. And this independent authority is the judiciary. The Constitution itself creates an independent judiciary and empowers it to test the constitutionality of every actions taken by the executive and legislative. This is why the judiciary under a written Constitution is called the guardian of the Constitution. The judiciary maintains the constitutional supremacy by its power of judicial review.

Judicial review means that jurisdiction of the court by which the court declares any law made by the legislative inconsistent with the Constitution or with the provisions of fundamental rights and unconstitutional and void. According to Henry J. Abraham "Judicial review is the ultimate power of any court to declare unconstitutional and hence unenforceable (i) any law, (ii) any official action based upon a law, and (iii) any other action by a public official that it deems to be in conflict with the constitution."[1]

The doctrine of 'judicial review' may, for the convenience of research and study in constitutional and administrative law, be used in two senses:

A. Doctrine of judicial review in the sense of constitutional supremacy; and

B. Doctrine of judicial review in the sense of parliamentary sovereignty.

A. Judicial Review in Constitutional Supremacy

As mentioned earlier the doctrine of judicial review in the sense of constitutional supremacy refers to the powers of the judiciary to examine the constitutionality of laws made by the legislatures. This is the primary and strict meaning of judicial review. But from broader and liberal point of view the doctrine includes the following things:

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1 Abraham, Henry, *The Judiciary : The Supreme Court in the Governmental Process*, 5th ed. (London : Allyn and Bacon), P. 175

i) Judicial review of laws made by legislatures ;

ii) Judicial enforcement of fundamental rights enumerated in the Constitution ;

iii) Judicial review of administrative actions under the provisions of the Constitution ;

iv) Judicial review of administrative actions under statutory law ;

v) Judicial review of delegated law.

The last two of these are principally the subject matter of administrative law.

Some aspects of all these will be discussed later under the headings of "judicial review in Britain." and "judicial review in Bangladesh."

Who is to exercise the Power of Judicial Review in a System of Constitutional Supremacy

In a governmental system with constitutional supremacy the Constitution itself creates a body empowering it to decide whether or not particular legislation contravenes the constitution and it is natural to commit this function to the judiciary. And the fact is that in most cases the highest seat of ordinary courts i.e. the Supreme Court exercises this power of judicial review. But this is not the case in everywhere. Somewhere provisions for separate constitutional court is maintained in the Constitution. For example, the Federal Constitutional Court of Germany which is not a necessary part of ordinary court is invested with the power of judicial review.[1] So is the case of Italian Constitutional Court. Again, the French system provides for a peculiar body exercising judicial review. The French Constitution is a written one with constitutional supremacy. But the Supreme Court of France i.e. *La*

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[1] See Article 93 of the Basic Law for the Federal Republic of Germany.

Cour de Cassatio has no power of judicial review.[1] The Constitution provides for a Constitutional Council (article 56) consisting of nine members. This Councii has the power to test the constitutionality of law. Before organic laws (ordinary law) are promulgated, the Council must examine them to ensure that they do not conflict with the Constitution (Article 61). If a law is declared unconstitutional it cannot be promulgated or come into force (Article 62). This device differs from judicial review in the sense that the Council is not a court where judicial review operates *expost facto*. Once the Council declares a law constitutional, it is promulgated or comes into force and no further question as to the constitutionality of that law can be raised. There is no appeal against the decision of the Council which is binding on all public, administrative and judicial authorities. To be mentioned here that the power of judicial review as mentioned under this heading in respect of its operating body refers necessarily to the doctrine of judicial review in strict sense. Because the other elements of judicial review are applied mostly by ordinary courts.

B. Judicial Review in the sense of Parliamentary Sovereignty.

Where there is parliamentary sovereignty, the Constitution is unwritten and there is no distinction between fundamental law and ordinary law. So the court cannot question the constitutionality of law passed by the parliament. Because there is nothing as a touch-stone to test the constitutionality of laws on one hand and on other hand the doctrine of parliamentary sovereignty does not allow anybody to test the legality of law passed by the parliament. In such a system, therefore, there is no judicial review in strict sense. There is judicial review in the following two inferior senses:

i) Judicial review of administrative action under statutory law; and

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1 "In France and other countries following the French tradition, the courts have no power to hold an Act of legislature invalid, though it may violate a fundamental right. In these systems the giving of such power to the courts would be regarded as infringing the doctrine of separation of powers. It would be a usurption by the judicial authorities of a function which does not rightly belong to them. For the question is one between the legislature and the electorate which the courts are considered incapable of settling". Sir Ivor Jennings, *The Law on the Constitution.*, Ibid., P. 258

ii) Judicial review of delegated law.

Of course, in these two inferior senses judicial review is more a matter of administrative law than of constitutional law.

Judicial Review in the USA

The concept of constitutional supremacy was first used in the US Constitution and the doctrine of judicial review was also first introduced in USA.[1] The Constitution does not expressly confer the power of judicial review to the Supreme Court of USA. But the court assumed this power in 1803 in the historic case- *Marbury* V. *Madison.* The ground of such assumption was that the Constitution being the supreme law it should be the duty of the judiciary to see whether the two organs of the government act in accordance with the Constitution. The founders of the Constitution apparently expected the court to exercise it. In the *Federalist Papers* Hamilton said the courts would have authority to void laws contrary to the Constitution.[2] In *Marbury* V. *Madison* Chief Justice Marshal's historic statement was-

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1 Though it is sometimes argued that the concept of judicial review orginated in the USA, the real history of it traces back to the beginning of 17th century of English jurisprudence. It was first asserted by Sir Edward Coke, the Chief Justice of England in 1610 in the celebrated case of Dr. Bonham where he stated emphatically —"That in many cases the common law will control acts of parliament and sometimes adjudge them to be utterly void; for when an Act of parliament is against common right and reason or repugnant or impossible to be performed, the common law will control it and adjudge such Act to be void." But for this bold pronouncement the brilliant Chief Justice was removed from his office. Later on the sovereignty of parliament was affirmed and established by the revolution with the legal consequence that the validity of any law passed by the parliament could not be questioned by any person or body. Thus though Coke lost his cause in England, he won it in America where his idea was accepted and put into operation about two centuries later in the development and adoption of the American doctrime of judicial review.
See further in Pirzada, S. Sharifuddin, *Fundamental Rights and Constitutional Remedies in Pakistan,* (Lahore : All Pakistan Legal Decisions, 1966), P.38–40.

2 Federalist Paper # 78 Ref. Welch, *American Govrnment,* 3rd ed, (New York : West Publishing Company), P. 447

"It is emphatically the province and duty of the judicial department to say what the law is ..... if two laws conflict each other, the court ..... must decide on the operation of each ..... If, then, the courts are to regard the Constitution and the Constitution is superior to an ordinary Act of legislature, the Constitution and not such ordinary Act must govern the case to which they both apply. To decide otherwise would be subversive to the very foundation of all written Constitutions, would force the judges to close their eyes to the Constitution .... all laws repugnant to the Constitution are void and courts as well as other departments are bound by that instrument (Constitution)."[1]

Similarly George With in *Canton* case says-

"If the whole legislature ..... should attempt to overlap the bounds prescribed to them by the people, I, in administering the public justice of the country, will meet the united powers, at my seat in this tribunal ; and pointing to the constitution, will say to them, here is the limit of your authority; and hither shall you go, but no further."[2]

Also in *United States* V. *Butler* the US Supreme Court says-

"The Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down."

Now the doctrine of judicial review is a settled and firmly established principle in the American constitutional jurisprudence. It it is the most awesome and potentially the most effective weapon in the hands of the US Supreme Court by which it plays the role of a guardian of the Constitution.

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1 Pirzada, S. Sharifuddin, *Ibid*, P.42

2 Pirzada, S. Sharifuddin, *Ibid*, P.41

Judicial Review in the UK

UK has no written Constitution. It has a constitutional system with parliamentary sovereignty. Parliament is both a legislative body and constitutional assembly ; hence what parliament enacts is a part of the Constitution. Consequently no distinction is made between fundamental law and ordinary law and the same parliament can change or abrogate any law whatsoever by the same procedure. There is no touch-stone to justify the validity of Acts of parliament, for no law exists in the UK higher than that made by the British parliament. This is why there is no judicial review in strict sense in Britain. Cockburn C.J. in *Exp. Cannon Selwyn* said-

> "No court or judicial body in the country can set aside an Act of parliament on the ground that it is illegal, immoral or unconstitutional as can, easily be made by the US Supreme Court."

Sometimes questions are posed like- How do the British courts treat the sovereignty of parliament ? or, How far British courts are prepared to test the validity of law made by British parliament ? The answer to these questions can be found in some important judgments of British courts.

Firstly, in the *Prince's* case[1] in 1606 the court decided that in considering the legality of an Act of parliament the court would examine two conditions:

i) The law in question must be entered on the Parliament Roll; and

ii) It must pass both the Houses (House of Lords and Commons) and then receive the Royal Assent.

The court decided that if any of these two conditions were not fulfilled or if any of the three bodies' (Lords, Commons & King)

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1 8 Co. Rep. 1a (1606). Ref. Turpin, Colin, *British Government & the Constitution.*, 2nd ed, (London : Weidenfild and Nicolson, 1990), P.25

approval lacked, the court would not regard it as an Act of Parliament.

Similarly it was held in *Edinburgh & Dalkeith Railway Co.* V. *Wouchope*[1] in 1842 that if an Act was expressed to have enacted by the Queen, Lords and Commons, the courts would not inquire whether it was passed properly following the strict procedure or whether it represented the will of parliament. The famous dictum of Lord Campbell was-

> "All that a court of justice can do is to look to the parliamentary roll ; if from that it should appear that a bill has passed both the Houses and received the Royal Assent, no court can inquire into the mode in which it was introduced into parliament, nor into what was done previous to its introduction, or what passed in parliament during its progress in its various stages through both the Houses."

In this respect Professor Dicey says that the principle of parliamentary sovereignty means that parliament has under the English constitution, the right to make or unmake any law whatsoever; further that no person or body is recognised by the law of England as having a right to override or set aside the legislation of parliament.[2] As Colin Turpin says that the legislative supremacy of parliament was assured by the Glorious Revolution of 1688 which established the primacy of statute over prerogatives. Academic lawyers, drawing on works of political science, embraced it as orthodox doctrine and the courts have pronounced it as law. It is at once historical reality, theory of the constitution and a fundamental principle of the common law. In accordance with this principle the courts hold that statutes enacted by parliament must be enforced and must be given priority over rules of common law, international law, subordinate law and earlier enactments of parliament itself.[3]

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1 (1842) 8 CI & Fin. 710, Source : *Ibid,* P. 25

2 Dicy, A.V , *Introduction to the Study of the Law of the Constitution,* 10th ed., (London : ELBS), P. 39–40

3 Turpin, Colin, *Ibid,* P 25

Secondly, even if an Act of parliament comes into conflict with or is contrary to international law, no court can declare it illegal. This was affirmed in *Chenny* V. *Conn*[1] . The court held-

> "What the statute itself enacts cannot be unlawful ..... It is the law which prevails over every form of law and it is not for the court to say that parliamentary enactment, the highest law in this country, is illegal .... The Finance Act prevails over an international convention (Geneva Convention) ..... and that what parliament enacts can not be unlawful."

Thirdly, no British court can declare an Act illegal even if it comes into conflict with the principle of natural justice. Willes J. in *Lee* V. *Bude & Torrington Rly Co.*[2] said-

> "If an Act of parliament has been obtained improperly, it is for the legislature to correct it by repealing it; but so long as it exists as law, the courts are bound to obey it."

Likewise Lord Reid in *British Railway Board* V. *Pickin*[3] held-

> "In earlier times many learned lawyers seemed to have believed that an Act of parliament could be disregarded in so far as it was contrary to the law of God or the law of nature or natural justice, but since the supremacy of parliament was finally demonstrated by the revolution of 1688 any such idea has become obsolete."

Lord Simon of Glassdale said-

> "If there is evidence that parliament may have been misled into an enactment, parliament might well indeed, would be likely to wish to conduct its own inquiry. It would be unthinkable that two inquiries- one parliamentary and the other forensic- should proceed concurrently."

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1 (1968) I All ER 779 Source: Turpin, *Ibid,* P.24
2 (1871) LR6 CP 576 Source: Turpin, *Ibid,* P.27
3 (1974) AC 765 (HL), source: Turpin, *Ibid,* P.27–27

Fourthly, even if an Act of parliament conflicts with another Act, no court has any power to declare the conflicting Act illegal. It was held in *Vauxhall Estate Ltd.* V. *Liverpool Corporation* that in law-making parliament can neither bind its successors nor bound by its predecessors. If it is found that a present Act is in conflict with a previous one, the relevant provisions must be regarded as impliedly overridden by the inconsistent provisions of the present Act. Similarly it was held in *Godden* V. *Hales*[1]-

> " If an Act of parliament had a clause in it that it should never be repealed, yet without question the same power that made it may repeal it."

It was held by House of Lords in *Duport Steels Ltd* V. *Sirs*[2] -

> "..... it is not for the judiciary to decide whether any changes should be made to the laws as stated in the Acts ..... to meet the judge's idea of what justice requires ..... In controversial matters ..... there is room for differences of opinion, as to what is expedient, what is just and what is morally justifiable. ..... the judges may say so and invite parliament to reconsider its provisions. But he (the court) must not deny the statute ..... Under our constitution it is parliament's opinion on these matters that is paramount."

The above discussion makes it clear that in no way the doctrine of judicial review, as it is understood in its substantive or strict sense, applies to the British constitutional system. And the British courts are in no way prepared to examine the validity of law passed by parliament. But in British system there is judicial review in narrower sense i.e. in the following two senses:

i) Judicial review of administrative actions; and

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1 (1686) 11 St. Tr. 1165, 1197

2 (1980) 1 WLR 142 (HL), Source: Turpin, *Ibid,* P. 47

ii) Judicial review of delegated law.

This narrower sense of judicial review is applicable to all legal systems for the maintenance of rule of law in a society. And in this sense judicial review is principally the subject mater of administrative law. Whereas the judicial review in strict sense is needed for the maintenance of constitutional supremacy. And in this sense judicial review is the subject mater of constitutional law.

Judicial review of administrative action means the power of the superior courts to review the legality and validity of actions and decisions of persons and bodies exercising administrative powers, whether of a legislative, executive or judicial or adjudicatory character.[1] In Britain most of the powers of the government are subject to judicial control because in a society under rule of law bodies performing public functions are subject to judicial review. A person wishing to challenge the validity of an exercise of public power may seek leave in the Queen's Bench Division to bring an application for judicial review. Leave will usually be granted if the applicant has a sufficient interest in the matter, has not been guilty of undue delay and presents an arguable case.[2]

Judicial Review in Bangladesh

Under a written Constitution like that of Bangladesh the doctrine of judicial review can be explained from different perspectives it attaches, particularly both from the view point of constitutional law and of administraive law.

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1 Walker, David M, *The Oxford Companion to Law*, (Oxford : Clarendon Press, 1980), P. 675

2 Application for judicial review is made under order 53 of the Rules of the Supreme Court. A statutory basis for this procedure appears in section 31 of the Supreme Court Act, 1981. It allows an application to cover under one umbrella all the remedies of *Certiorari, Mandamus* and also declaration and injunction.

Firstly, the strict or substantive meaning of judicial review has been ensured in Articles 7, 26 and 102(2) of the Constitution of Bangladesh. Article 7 declares the core of constitutional supremacy. It says -"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 shall, to the extent of the inconsistency, be void." Though the provisions of Article 7 gives an umbrella–coverage of constitutional supremacy to the whole Constitution, Article 26 gives a double sanctity on the provision of fundamental rights. It says-

> "26.(1) All existing law inconsistent with the provisions of this part (Fundamental Right) 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."

Articles 7 and 26, therefore, give the substantive law of judicial review and Article 102(2) gives the implementing law of it, for it provides for the procedure- how a law which is inconsistent with the provisions of the Constitution can be declared unconstitutional by issuing prohibition, mandamus, and certiorari.

Secondly, for the enforcement of fundamental rights specific provisions have been inserted in the Constitution. Part III of the constitution provides for 18 fundamental rights and under Article 102(1) the High Court Division of the Supreme Court can issue direction and orders for enforcement of these rights. It is pertinent to mention here that in Britain there is nothing as fundamental right because it has no written constitution. All rights are ordinary rights which are protected under statutory law and common law; not by any constitutional guarantee like Bangladesh.

Thirdly, administrative actions may be reviewed under constitutional provisions. Because under Article 102(2) of the Constitution the Supreme Court can examine the validity of actions performed by any public officials or bodies.

Fourthly, a large number of administrative actions are reviewed under statutory law. Because constitutional review of administrative actions under Article 102(2) is possible only when "no other equally efficacious remedy is provided by law (statutory law)". Under various Acts of parliament higher courts i.e. the Supreme Court as well as lower courts and tribunals have power to review the administrative actions.

Fifthly, like in Britain judicial review of delegated law is possible in Bangladesh. It is a general rule that a delegated law must not be inconsistent with its parent law. If any delegated law is proved to be inconsistent with the parent act, the court can declare that delegated law illegal and ineffective.

CHAPTER V

FUNDAMENTAL PRINCIPLES OF STATE POLICY

Modern states are welfare states and the principal purpose of such a state is public welfare. This trend of public welfare is being, to some extent, reflected in most of the written constitutions of states when they adopt some directive principles in their constitutions. The underlying philosophy behind the adoption of such principles is that they will obligate the state to take positive action in certain direction in order to promote the welfare of the people and achieve economic democracy.

The idea of directive principles in the Constitution was first introduced in the Irish Constitution of 1937. Article 45 of the Irish Constitution provides for some principles under the heading of Directive Principles of Social Policy." Following this Irish example the idea has got place in the Constitution of Burma (Mayanmar) in 1949, of India in 1950, of Pakistan in 1956 and 1962. And so has been the case of the Bangladesh Constitution of 1972. The principles have been adopted under the heading of "Directive Principles of State Policy" in the Indian Constitution, "Principles of State Policy" in the Pakistan Constitution of 1962 and "Fundamental Principles of State Policy" in Bangladesh constitution.

"Directive or Fundamental Principles of State Policy" as a term of constitutional jurisprudence has not got any universal definition. But as the term indicates it means primarily those principles which are considered fundamental in the matters of policy formulating by the government. From the view point of Bangladesh Constitution it may be said that Fundamental Principles of State policy are those principles which act as fundamental guide to the policy making, be it social, economic, administrative or international, governance of the country, making laws and interpreting the Constitution and laws.

Nature of Directive Principles

A distinguishing feature of directive principles which is invariably found in all constitutions adopting these principles is that these are not enforceable in a court of law. This non-justiciability of these principles have paved the way for critics to potrait them in variety of descriptions.

First, these are described as 'beau ideal'[1] in the Constitution, i.e., the highest standard of excellence in the Constitution. Because they embody the principles of high ideals like economic emancipation, eradication of poverty, illeteracy etc.

Second, these are described as 'veritable dustbin of sentiment,'[2] for they are the best idealistic words written down in the Constitution without providing anything for their enforcement. They are, therefore, nothing but the mere expression of good sentiment of the Constitution makers.

Third, these are sometimes described as 'decoratives in the Constitution'. Tushar Chatterjee, a communist member of Indian parliament being very harsh in assessing the utility of the directives, commented that he could not but feel that these solemn declarations in the Constitution were not directives but mere decoratives in the constitution[3].

Professor K.C. Wheare has described them as 'paragraphs of generalities' into the Constitution. He has severely critcised insertion of such decoratives in the Constitution. He has doubted "whether there is any gain, on balance, from introducing these paragraphs of generalities into a Constitution anywhere at all, if it is intended that the Constitution should command the respect as well as the affection of the people. If the Constitution is to be taken

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1 Kapoor, A.C, *Select Constitutions,* 12th ed, (New Delhi : S. Chand & Co. 1989), P.93 (Part II)

2 Krishnamachari, T.T, a member of the Indian Constituent Assembly. Quoted by Kapoor, A.C, *Ibid,* P.94.

3 Quoted by Kapoor, A.C, *Ibid,* P.101

seriously, the interpretation and fulfillment of these general objects of policy will raise great difficulties for courts and for legislatures into conflict and disrepute. If these declarations are, however, to be neglected, if they are to be treated as 'words', they will bring discredit upon the Constitution also.[1]"

Professor Ivor Jennings has also questioned the reasonableness of inserting such directives in a Constitution when he describes them as "the ghost of Sidney and Beatric Webb Stalk through the pages of the text" and "expression of Febian Socialism without socialism."[2]

Fourth, these principles are also described as "a moral homily on the one hand, and as a manifesto of aims and aspirations on the other hand"[3] for they are all principles relating to economic, social and cultural rights which are not a matter of immediate achievement. They are goals to which the state has to reach and, keeping in line with the socio-economic progress, the state will implement them step by step. They, therefore, work as programmes of the government.

Why Economic Social and Cultural Rights are Enumerated in the Directive Principles of State Policy

It has been almost a common feature of all the constitutions containing directive principles that the part of these directives of the Constitution contains economic, social and cultural rights whereas the part of fundamental rights contains civil and political rights. Economic, social and cultural rights have found their origin primarily in the Socialist and Marxist revolution of the early 20th century. Following the Socialist October revolution this new category of citizens' rights first got their constitutional recognition in the Soviet Constitution of 1918. Thenceforth they are being gradually included in most modern constitutions as 'programme' or

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1 Wheare, K.C, *Modern Constitutions*, (London : Oxford University Press, 1975), P. 47

2 Quoted by Kapoor, A.C., *Ibid*, P. 101.

3 Gledhill, Alan, *Pakistan* , (London: Stevens and Sons Ltd. 1957), P. 145

'manifesto' rights of a promotional nature.[1] They are rights of promotional nature in the sense that their implementation and enforcement depends on the economic progress and availability of resources in the country. If these rights are placed in the part of fundamental rights of the Constitution, then the state would be legally bound to enforce them and the citizens would have a legal right to get them enforced through the courts and it would virtually lead a developing state with limited resources into a precarious problem. This is why all economic, social and cultural rights are placed in the part of directive principle as rights of a promotional nature not with any constitutional guarantee to enforce them immediately but with pledge to take steps to the maximum of available resources with a view to achieving progressively the full realisation of these rights. On the other hand, the enforcement of civil and political rights are not necessarily connected with the economic progress and natural resources; they can be enforced in almost every circumstances.

Distinction between Fundamental Rights and Directive Principles

There are some fundamental distinctions between directives and fundamental rights.

First, when certain human rights are written down in a Constitution, a supreme law, and are protected by constitutional guarantees they are called fundamental rights. Directive Principles, on the other hand, are policies relating to social, economic and cultural rights which are to be followed in governance of the country.

Second, fundamental rights are enforceable in a court of law and they create justifiable rights in favour of individuals. And the courts can enforce them against the government. Again, the courts are competent to declare as void any law that is inconsistent with any of the fundamental rights. The directives, on the other hand, are

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1 Bari, Dr. M. Ershadul, *International Concern for the Promotion and Protection of Human Rights*, (The Dhaka University studies, Part-F Vol. II, No.I. 1991), P.24

not enforceable in a court of law and they do not create any justifiable rights in favour of individuals. The courts cannot compel the government to carry out any of the directives. Again, the courts cannot declare any law void, which is otherwise valid, on the ground that it contravenes any of the directive principles.

Third, fundamental rights are mandatory in nature whereas directives are declaratory in nature as they have expressly been excluded from the preview of the courts.

Fourth, the fundamental rights create negative obligation on the state, i.e., the state is required to refrain from doing something. The directives, on the other hand, impose positive obligation on the state i.e. to implement these principles the state will have to achieve certain ends by its actions.

Fifth, if there is any conflict between directives and fundamental rights, fundamental rights will prevail over the directives.

Sixth, the directive principles may be described as inchoate fundamental rights while the fundamental rights are full-fledged i.e. the former requires legislation to become effective while the latter need not require such legislation. And so long there is no law carrying out the policy laid down in directives neither the state nor an individual can violate any existing law or legal right under the colour of directive principles.

Seventh, fundamental rights are primarily aimed at assuring political freedom to citizens by protecting them against excessive state action while directive principles are aimed at securing social and economic freedoms by appropriate state action.

Significance of the Directive Principles

When the directive principles are not judicially enforceable it is very natural to comment that they are mere decoratives in the

Constitution and most of the prominent writers, as mentioned earlier, have strongly criticised their inclusion in the Constitution. But it is not proper to say that they are totally useless. They have some important significance.

First, directive principles have great political importance. If the government fails to carry out these directives no court can compel the government to implement them. Yet these principles have been declared to be fundamental in the governance of the country and a government which rests on popular vote can hardly ignore them. If any government", as Dr. Ambedker said, "ignores them, they will certainly have to answer before the electorate at the election time".[1] It is, therefore, not correct to criticise these principles as meaningless and useless. The actions of the government under democratic system are subject to scrutiny by the masses and the opposition. If the government, being in favourable situation and proper means to implement these, pursues a policy not in accordance with the principles or fails to implement these, it would be a patent weapon at the hand of the opposition to discredit the government. If the government violates fundamental rights it has to answer before the court but if it neglects directives it has to answer before the highest tribunal- the public opinion which will bring its ultimate fall in the next election. Thus the sanction behind directive principles is a political one which has a greater importance than fundamental rights in respect of keeping a continuing responsible government.

Second, the directives have a great role to play in the interpretation of the Constitution and other laws. Though courts cannot declare a law invalid on the ground that it contravenes a directive principle, nevertheless the constitutional validity of many laws can be maintained, as has been done in India,[2] with reference to the directives so that they do not serve as 'mere homily'.[3] Article 8(2) of the Constitution specifically allows the courts to refer to

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1 Quoted by Mahajan, V.D., *The Constitution of India,* 12th ed, P. 185
2 *State of Biher* V. *Kameshwar* AIR 1952 SC
3 Mahajan, V. D, *The Constitution of India,* 12 ed, (1989), P. 184

these principles for understanding the meaning of the provisions of the constitution which are doubtful or ambiguous. Moreover, like the Magna Carta in England and the Declaration of Independence in America these directives are bound to influence the judges to a great extent in interpreting the Constitution and law. In interpreting fundamental rights the expressions like 'public interest', 'public purpose', 'reasonable restriction' etc. may be explained by the courts in the light of and paying due emphasis on these directives since the Constitution holds them fundamental in the governance of the country.

Third, directive principles have both idealistic and educative value. They have idealistic value in the sense that they outline the ideal of a welfare society. They emphasise, in amplification of the preamble, that the goal of the body polity of the state is a welfare state where it has a positive duty to ensure to its citizens social and economic justice and dignity of individuals. And by the proper implementation of these directives that goal can be realised. They have educative value in the sense that they are permanent reminder for those in power for the time being that the goal of the state is to introduce economic democracy.

Conventions and Directive Principles

Some authors venture to find similarities between the conventions in British constitutional system and directives in written constitution on the ground that like conventions directives are unenforceable and both are considered as fundamental to the governance of the state.[1] Again, sometimes question like- In which sense may conventions of the British Constitution be compared with the fundamental principles of state policy?- is seen in competitive examinations of the law faculties in Bangladesh. Such a question obviously brings the answerer into a precarious problem, for in true sense conventions of British constitutional system can, in no way, be compared with directives of written constitutions.

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1 Tope, T. K, *Constitutional Law of India*, 1st ed, (EBC, India, 1982), P.248
Mahajan V.D, *The Constitution of India*, Ibid, P. 183

Directives may have a resemblance with conventions on point of unenforceability or like this. But this resemblance or comparison is a quite different perspective; it has neither any relevancy nor does it bear any significance in the field of constitutional law; it does, in no way, touch the substance or philosophy of the two. Because what are conventions in British constitutional system are like steering wheel of the whole structure of the governmental system without which the British constitutional system would be unthinkable. The directives in a written constitution has nothing to do with it; they cannot be considered even an appendage to the actual working of the governmental system. Secondly, conventions in coustitutional jurisprudence are political practice which develop from long time constitutional activities. Directives, on the other hand, are some principles concerning social, economic and cultural rights which have nothing to do with political practice.

Directive Principle under the Constitution of Bangladesh

Unlike other written constitutions the directive principles in the Bangladesh Constitution have got their place under the heading of "Fundamental Principles of State Policy". Articles 8- 25 of part II of the Constitution contain all the principles. Under article 8 of the original Constitution of 1972 (i) Secularism, (ii) Nationalism, (iii) Socialism; and (iv) Democracy- these four principles were designed to be major fundamental principles and all other principles derived from these four as set out in part II were to constitute the whole body of fundamental principles of state policy. Articles 9, 10, 11 & 12 elaborated those four major principles. But during the first martial law regime a drastic change was made in these four major principles. Under this change the term 'socialism meaning economic and social justice' was substituted for the principle 'Socialism' and 'absolute trust and faith in the almighty Allah' was substituted for the principle 'secularism'. The elaboration under articles 9, 10, 11 & 12 were omitted and some new principles have been introduced in the place. Article 8, however, as it stands now deals with the following four major fundamental principles: (i) Absolute trust and faith in the Almighty Allah, (ii) Nationalism, (iii) Democracy; and (iv) Socialism meaning economic and social justice.

Fundamental Principles- Where to be Applied

According to Article 8(2) the fundamental principles shall be applied in the following spheres:

(i) they shall be fundamental in governance of the country ;

(ii) they shall be applied in making laws ;

(iii) they shall be a guide to the interpretation of the Constitution and of the other laws of Bangladesh; and

(iv) they shall form the basis of all works of the state and of its citizens.

But they shall not be enforceable in a court of law.

Short Description of the Fundamental Principles

All the fundamental principles as set out in the Constitution may, for the convenience of study, be classified into following four groups:

A. Fundamental Principles Relating to Economic Ideal

1. Eradication of social and economic inequality [Art.19(2)]
2. Equitable distribution of wealth among citizens (ditto).
3. Uniform level of economic development throughout the Republic (ditto).
4. Rural electrification (Art.16).
5. Development of cottage and other industries (ditto).
6. Improvement of education (ditto).
7. Improvement of communication (ditto).
8. A constant increase of productive forces through planned economic growth (Art. 15).
9. A steady improvement in the material and cultural standard of living of the people (ditto).
10. To secure the basic necessities of life including food, clothing, shelter, education and medical care (ditto).
11. To ensure the right to a guaranteed employment at a reasonable wage (ditto).

12. To secure the right to reasonable rest, recreation and leisure (ditto).
13. To secure the right to public assistance in cases of undeserved want arising from unemployment, illness or disablement or suffered by widows or orphans or in old age, or in other such cases (ditto).
14. For economic development state will ensure three types of ownerships: state ownership, co-operative ownership and private ownership (Art. 13).
15. Right to be paid on the basis of the principle- "form each according to his abilities to each according to his work (Art. 20).

B. Fundamental Principles Relating to Social Ideal

1. Raising of the level of nutrition and the improvement of public health (Art.18).
2. Prevention of consumption, except for medical purposes or for such other purposes as may be prescribed by law, of alcoholic and other intoxicating drinks and of drugs which are injurious to health (ditto).
3. Prevention of prostitution and gambling (ditto).
4. Free and compulsory education for all children (Art. 17).
5. Removing illeteracy (ditto).
6. Emancipation of peasants and workers from all forms of exploitation (Art.14).
7. To ensure equality of opportunity to all citizens (Art. 19).

C. Fundamental Principles Relating to Legal and Administrative Reforms

1. Separation of judiciary from the executive (Art. 22)
2. Conserving the cultural traditions and heritage of the people (Art. 23).
3. Improving the national language, literature and the arts (ditto).

4. Protection against disfigurement, damage or removal of all monuments, objects or places of special artistic or historic importance or interest (Art. 24).
5. Promotion of local government institutions (Art.9).
6. Participation of women in all walks of national life (Art.10).

D. Fundamental Principles Relating to International Relations

International relations of our state shall be based on the following principles as enunciated in article 26:

1. Respect for national sovereignty and equality.
2. Non-interference in the internal affairs of other countries.
3. Peaceful settlement of international disputes.
4. Respect for international law and the principles enumerated in the UN Charter.
5. Renunciation of the use of force in international relations and general and complete disarmament.
6. Respect and support for the right of every people freely to determine and build up its own social, economic and political system by ways and means of its own free choice.
7. Support for the oppressed peoples throughout the world waging a just struggle against imperialism, colonialism or racialism.
8. To consolidate, preserve and strengthen fraternal relations among Muslim countries based on Islamic solidarity.

Implementation of Fundamental Principles in Bangladesh

32 years have passed since we achieved our independence. But none of fundamental principles have been implemented to its full swing. Rural electrification, promotion of cottage industries, separation of judiciary from the executive, eradication of poverty and unemployment, population control– all these are yet to be done. It, however, would be wrong to say that nothing has yet been achieved. To some extent rural electrification, communication development, women education etc. have been done. State has also passed law fixing a ceiling for the land to be possessed by an

individual; it has made primary education free and compulsory; laws have been made as regards prohibition of intoxicating drinks and drugs. Much effective work, however, had not been done. It cannot be denied, however, that the problems like eradication poverty, achieving full employment, equitable distribution of national wealth, raising living standard are colossal, indeed, and no government whatever be its complexion can achieve miracles. Several decades may take to achieve the goals set forth in the fundamental principles.

Decisions on Fundamental Principles of State Policy

Indian Jurisdiction

In Indian jurisdiction there has been a quite good number of decisions on the relationship between Fundamental Rights and Fundamental Principles of State policy. A close observation of some of these decisions will give an idea that the Indian Supreme Court has taken the following two approaches regarding the Directive Principles.

1. **Strict Legalistic Approach:**

At the initial stage the Indian Supreme Court took the view that Directive Principles do not have much legal value. In the case of conflict between the two Fundamental Rights will prevail. This is evident from *Sankari Prasad's* case (1952) SCR 89, *Madras v. Champakan* (1951) SCR 525 and *In re Kerala Education Bill 1957* (1959) SCR 995.

2. **Harmonious Construction Appraoch:**

Since the *Golak Nath* Case in 1967 the Indian Supreme Court has taken this approach. In *Golaknath Case* (1967) SCR 762 it was held that Fundamental Rights and Directive Principles form an "integrated scheme" and they should be given effect to as far as possible. Any collision between the two should be avoided.

In *Fundamental Rights* case it was held "the framers of our Constitution had conferred Fundamental Rights on the people by enacting Part III. Those rights were not an end in themselves but were the means to an end, the end being specified in Part IV."

In *Minerva Mills* case Chandrachud C.J. held that FRs are means to achieving the objectives set out in the DPs. " The goals set out in Part IV have to be achieved without the abrogation of the means provided for by Part III. It is in this sense that Parts III and IV together constitute the core of our Constitution and combine to form its conscience. Anything that destroys the balance between the two parts will *ipso facto* destroy an essential element of the basic structure of our Constitution."

Before the enactment of the 25th Amendment of the Constitution of India in 1971 the provision was that Fundamental Rights prevailed over Directive Principles and that a law enacted to implement a Directive Principles could not be valid if it conflicted with a Fundamental Rights. Article 31C was inserted by the Constitution (25th Amendment) Act 1971 and it protected laws giving effect to the Directive Principles laid down in Article 39(b) and (c) from unconstitutionality on the ground of contravention of Articles 14 and 19 and 31. Article 31C as it stood before the 42nd Amendment in 1976 was as follows:

"Notwithstanding anything contained in Article 13 no law giving effect to the policy of the state towards securing the principles specified in clause (b) or clause (c) of Article 39 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 Articles 14, 19 or 31;

and no law containing a declaration that it is for giving effect to such policy shall be called into question in any court on the ground that it does not give effect to such policy."

The objective behind Article 31C was to establish socialistic society. Article 31C had two parts. The first part protected a law giving effect to the policy of the state towards securing the principles specified in Article 39(b) and (c) from challenge on the ground of infringement of the rights under Articles 14, 19 and 31. The second part of Article 31C sought to oust the jurisdiction of the courts to find out whether the law in question gave effect to the principles of Article 39(b) and (c). Thus Article 31C paved way for enacting review proof legislation if such legislation was enacted to promote the policy laid down in Article 39(b) and (c) and the courts will not be able to scrutinise whether the law is enacted in fact to promote that policy.

The validity of the 25th Amendment introducing Article 31C was questioned in *Keshavananda Bharti* V. *State of Kerala* (Fundamental Rights case) AIR 1973 SC 1461. The SC held valid the first part of Article 31C which provided that a law giving effect to the principles laid down in clauses (b) and (c) of Article 39 would not be questioned on the ground that it is inconsistent with or took away the rights conferred by Articles 14, 19 and 31. However, the second part of Article 31C which provided that "No law containing a declaration that it is for the giving effect to such policy shall be called into question in any court of law on the ground that it does not give effect to such policy" was declared invalid.

Positive Aspect of Keshavananda:

(1) By upholding the first part of Article 31C the legislators in India have been conceded greater power to implement the socialist and socio-economic programmes.

(2) Invalidation of second part of Article 31C avoids the possibility of the state legislatures immunising all sorts of laws from judicial scrutiny.

(3) To prevent each and every legislature to enact review proof legislation in the name of Article 39(b) and (c) could have led to socio-economic chaos in the country.

(4) There should be a nexus between Articles 39(b) and (c) and the object of acquisition: where the inputs of valuation prescribed by the statutes are wholly irrelevant or unconnected with the social good, Article 31C may not be saved by the statute.

This means that a law enacted to implement Article 39(b) and (c) would not be challengeable under Articles 14 and 19, but the courts have the power to go into the question whether the law in question does really achieve these objectives or not. Thus when a law is challenged, the courts would have the power to consider whether it could reasonable be described as a law giving effect to the policy of the state towards securing the said aims.

In 1976 by the Constitution (42nd Amendment) Act 1976 the scope of Article 31C was further extended. The first part of Article 31C now says that *no law giving effect to any of the Directive Principles shall be deemed to be void on the ground of inconsistency with Articles 14 and 19*. Thus primacy was given to Directive Principles over Fundamental Rights and the protection was extended to legislation for implementing of all or any of the Directive Principles enumerated in Part IV. The validity of this change in Article 31C came up in the *Minerva Mills* case AIR 1980 SC 1789. The Supreme Court struck down section 4 of the Constitution (42nd Amendment) Act 1976 amending Article 31C giving primacy to Directive Principles over Fundamental Rights. Chandrachud C.J. broke the doctrine that Directive Principles and Fundamental Rights supplement and complement each other; in

case of conflict Fundamental Rights must prevail. So the amended Article 31C which gave priority to laws implementing Directive Principles in Article 39(b) and (c) was held void because it "tore away the heart of basic fundamental freedoms." Under the pretext of furthering the objectives found in the Directive Principles, the Fundamental Rights enshrined in Part II of the Constitution cannot stand abrogated and thereby relegated as becoming unenforceable and that would certainly amount to subverting the Constitution by destroying its basic features.

In *Unni Krishnan* Vs. *State of A. P.* (AIR 1993SC 2178) the Supreme Court held that Fundamental Rights and Directive Principles are supplementary and complementary to each other and Fundamental Rights must be construed in the light of the Directive Principles. The Court also held that Fundamental Rights are but a means to achieve the goal indicated in the Directive Principles.

Bangladesh Supreme Court

The Directive Principles as they appear in the Constitution of Bangladesh have almost the same status compared to Indian Constitution. Article 8(2) specifically provides that these principles shall not be judicially enforceable. Again, Article 47(1) provides that parliament can make review proof legislation in certain specified matters stipulated in Article 47(1) with a view to implementing any of the Fundamental Principles in the Constitution. Unlike the Indian scheme this has been done in the very original Constitution of Bangladesh. Thus with reference to implementation of any of the Fundamental Principles parliament can make law or amend any existing law regarding six specified matters stipulated in Article 47(1) and if such law comes into conflict with any of the fundamental Rights, such law will not be void. In other words, parliament may make fundamental Rights subordinate to the Fundamental Principles in certain cases. This has been done with a view to adopting welfare measures in the country. There has so far been a very few cases dealing with the

Fundamental Principles or the relationship between Fundamental Principles and Fundamental Rights.

In *Kudrat-e-Elahi* V. *Bangladesh* 44 DLR (AD) 319 (1992) the appellant sought enforcement through Fundamental Principles pressing in aid of the provision of Articles 7(2). The AD held that these principles are not law and there is no question of application of Article 7. Article 9 and fundamental Principles are not judicially enforceable. They are in the nature of programme for social development. Petitioners challenged the Constitutional validity of the Bangladesh Local Government (Upzilla Parishad and Upzilla Administration Re-organisation) (Repeal) Ordinance 1991 on the ground that this Ordinance is inconsistent with Articles 9, 11, 59 and 60 and as such it is void in terms of Article 7(2) of the Constitution.

In view of the *Masdar Hossain*[1] case decided in 1999 by the Appellate Division which is also called separation of judiciary case, it is sometimes contended that in this case the Appellate Division has implemented one of the fundamental principles of our state policy and this fundamental principle appears in Article 22 which states that "The state shall ensure the separation of judiciary from the executive organs of the state." The question is- did the Appellate Division give directions to the government on the basis of the proposition that the fundamental principles in the constitution are enforceable? Obviously the Appellate Division did not give any decision on that point. However, it is to be borne in mind that the Appellate Division in that case did no where mentioned in the judgment that it gave effect to Article 22 of the Constitution although in effect it give effect to that Article. Secondly, the ratio of the decision clearly speaks of something else than the doctrine of fundamental principles of state policy. In *Masder Hossain* case the

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[1] *Secretary, Ministry of Finance v Md. Masdar Hossain and Others*, 52 DLR(AD) 82.

Appellate Division did not overrule the decision in *Kudrat-e-Elahi* V. *Bangladesh* 44 DLR (AD) 319 (1992). His Lordship Mr. Justice Latifur Rahman stated:

"Article 22 of the Constitution contemplates separation of judiciary from the other organs of the state and it is for the legislature to decide on the issue. Further, if we say that no constitutional amendment is necessary then the existence of Article 22 will be nugatory which cannot be the intentions of the framers of the constitution." (See paragraph 88).

From the part of the judgment by His Lordship Mr. Justice Mustafa Kamal it is clear that the ratio of the judgment is based on observation of implication and significance of some terms and provisions specifically mentioned in the constitution, e.g. the President's rule making power under Articles 115 and 133 of the Constitution and whole scheme of the judiciary within the spirit of the constitution of Bangladesh.