

# ENFORCING SOCIO-ECONOMIC RIGHTS JUDICIALLY: EXPERIMENTS IN BANGLADESH INDIA AND SOUTH AFRICA

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## 1. Introduction:

Why do the courts exist? A classical and 'minimalist'<sup>3</sup> account for existence and operation of courts in any society is, of course, adjudication of disputes through proper application of laws. This minimalist account, however, falls long way short of a proper and inclusive functional definition of judiciary, which should necessarily accommodate the 'special' role of superior courts which the constitution, the supreme law of the land, assigns to such courts. Moreover, an operative theory of constitutionalism assumes and presupposes an active judicial role to ensure fairness, checks and balances in the state machinery at the minimum, and securing respect and compliance with the letters and innate spirit of the constitution at the maximum.

Judiciary shares with the executive and legislature the same broader mandate and 'state responsibility' of implementing fundamental aims and principles<sup>4</sup> of the state. However, the role of judiciary, in this implementation process shall obviously be distinct from that of the other two organs of the state, mainly because of the factual impossibility of 'judicial presence' in on-the-ground implementation process due to primacy of its essential function i.e. adjudication of disputes. Moreover, in the realm of theory at least, the doctrine of separation of powers would also support this notion of common but differentiated responsibility of the three organs of the state in respect of the realization of the socio-economic rights; a proper mapping of the permissible, indeed desired, judicial role in implementation of socio-economic rights is the central focus of this paper. In this connection, this paper also reflects on the way courts in India, South Africa and Bangladesh have so far experimented with the notion of judicially enforcing socio-economic rights within the contours of the respective national Constitutions and particularly, the way the courts did this innovation by way of profitable use of their interpretive freedom.

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<sup>3</sup> Sunstein, Cass R., Beyond Judicial Minimalism (September 25, 2008). Harvard Public Law Working Paper No. 08-40; Available at SSRN: <http://ssrn.com/abstract=1274200>

<sup>4</sup> Art.8, The Constitution of Bangladesh

## **Socio-economic rights and their enforceability under The Constitution**

### **1.1 Bangladesh**

Socio-economic rights form part of the 'Fundamental Principles of State policy' under Part II of the Constitution of Bangladesh. The provisions contained in Part II, particularly Articles 9, 10, 11, and 13-20 contain a bundle of socio-economic rights. Provisions for basic necessities under Article 15, State obligation to improve public health under Article 18, and right to education under Article 17 are of vital importance among such rights. The Constitution has expressly made these rights non-justiciable as Article 8(2) clearly bars judicial enforceability of any principles under Part II. This poses a vital question: whether these are rights at all; and if so, why were they styled as 'principles'? The simple answer, if primarily deduced from the text of the Constitution, is that they are 'principles' -- and that is the locution makers of the Constitution perhaps carefully chose to use in respect of them -- not 'rights'.<sup>5</sup>

### **1.2 India**

Socio-economic rights have been incorporated under Part IV of the Indian Constitution as "Directive Principles of State Policy" which are non-justiciable in view of express bar to judicial enforcement contained in Article 37 of the Constitution. Articles 38-51 of the Indian Constitution provide for various socio-economic rights. The status of socio-economic rights in the Constitutions of Bangladesh and India is, therefore, nearly the same; they score comparably when it comes to measuring their strength in terms of enforceability.

### **1.3 South Africa**

Unlike the Constitutions of Bangladesh and India, South African Constitution<sup>6</sup> provides for justiciable socio-economic rights. In *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996*<sup>7</sup> the Constitutional Court of South Africa decided in favor of judicial enforceability of socio-economic rights in the Constitution. Chapter II provides for a catalogue of rights under Articles 7-39. Right to housing under Article 26 and right to healthcare, food, water and social security as contained in Article 27, are some of the important socio-economic rights under the Constitution. While right to housing is qualified by resources constraint, right to emergency healthcare appears to be unqualified.

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<sup>5</sup> For a discussion on their 'rights' status, see below.

<sup>6</sup> The Constitution of the Republic of South Africa, 1996, was approved by the Constitutional Court (CC) on 4 December 1996 and took effect on 4 February 1997.

<sup>7</sup> 1996 (4) SA 744 (CC).

## **Socio-economic Rights in Bangladesh: judicial enforcement-debate**

### **2.1 Argument for enforceability**

Under the Constitution of Bangladesh, the socio-economic rights being part of 'fundamental principles of state policy' (FPSP); the question of judicial enforcement of socio-economic rights is entangled with the more problematic question of judicial enforceability of state policies, which, Article 8 expressly declares to be not judicially enforceable. This being so, various multi-dimensional policy considerations, policy choices, tradeoffs, and more importantly, the economics of enforcement always revolves round the agendum for enforcement of state policies, and the socio-economic rights as part of the policies. There are still arguments to counter, rather bypass, the express enforcement-bar contained in Article 8, and these arguments demand an 'alternative' and restrictive' reading of the enforcement-bar. But a striking feature, if not a limitation, of this string of arguments is that they relate to, and indeed squarely support, the case for negative enforcement only, while the question of affirmative enforcement and judiciary's role in such enforcement is quite problematic and hedged with many contentious principles.

(i) Article 7(2) of the Constitution of Bangladesh emphatically proclaims that the Constitution is the supreme law of the Republic, and if any law is inconsistent with this Constitution, that other law shall, to the extent of inconsistency, be void. The term "this Constitution" is the compendious name given to all the provisions contained in the Constitution, including the provisions for socio-economic rights (as fundamental principles of state policy) contained in Part II of the Constitution. It therefore, logically follows that any act of the State and any law violative of these principles should be void. More so because, it is argued, Article 8 does not contain a non-obstante clause, which consideration led **Naimuddin, J. in Ahsanullah V Bangladesh**<sup>8</sup> to hold that Art 8(2) could not be interpreted as completely superseding Article 7(2).

(ii) A commentator on Indian Constitution **Dr. Jain Kagzi**,<sup>9</sup> argues that the declaration that the directive principles under the Indian Constitution (corresponding to 'Fundamental Principles of State Policies' in Part II of the Bangladeshi Constitution) are not enforceable by any court does not provide

<sup>8</sup> Ahsanullah V Bangladesh 44 DLR (1991) 179.

<sup>9</sup> Kagzi, Jain MC, The Constitution of India, 4th Ed. Vol. 2, p. 983, Naimuddin, J. 'fully agreeing' with the view of this author, quoted it in Ahsanullah V Bangladesh 44 DLR (1991) 191.

raison d'etre for their disregard. Axiomatically, a direct violation of the principles might make a law unconstitutional. A mere non-implementation of these principles, in his view, violates no individual constitutional rights, and therefore affords no basis for litigation and legal remedy. "A court can", Dr. Kagzi argues, "in a fit case, unambiguously declare a law bad as manifestly opposed to the fundamental principles of governance of the country and therefore, unconstitutional.... The legislation can, in a fit case, be impugned on the ground of legislative contravention of the Article 37 directive.<sup>10</sup> If applied, law may be rendered unenforceable even if not void ab initio."<sup>11</sup>

(iii) If Article 8(2) is to be read as an exception to the broad scope of Article 7(2) of Constitution, the rule of construction prescribes that an exception should be interpreted not so broadly as to take away the whole ground of existence of the general principle.<sup>12</sup> Again, in case of conflict between two provisions, the provisions (the general rule and the exception) should be interpreted harmoniously so as to make none of the provisions nugatory. Article 8(2) simply enjoins that that the provisions of Part II shall not be judicially enforceable; it does not provide *raison d'etre* for their contravention. Article 8(2), properly construed, should mean that the State policies cannot be enforced by the judiciary by issuing mandamus on the other two organs of the government; but does it also follow from this principle that a citizen shall have no constitutional rights to seek enforcement of the State policies when the legislative and the executive organs of the State fails to act for implementation of these policies?<sup>13</sup> And what if they act in clear violation of these policies?

(IV) Article 7(2) proclaims that the constitution is the supreme law of the country and provides that any other law which is inconsistent with the Constitution shall be void to the extent of inconsistency. It requires to be seen whether the fundamental principles of State policies, and socio-economic rights as part of them, and both taken together, while definitely forming part of the text of the Constitution, enjoy the same supremacy as the Constitution, taken as a whole, enjoys. Again it is sensible to ask if the Constitution is the supreme 'law', whether the provision for socio-economic rights, by virtue of being part of it, possesses the force of 'law' at least. This Article finds implausible the reason behind the fundamental principles of state policies, and in particular the socio-economic rights, being accorded a different treatment than that accorded to

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<sup>10</sup> Corresponding to Art.8, The of Bangladesh Constitution

<sup>11</sup> *Ahsanullah V Bangladesh* 44 DLR (1991) 191

<sup>12</sup> Maxwell on the Interpretation of Statutes.

<sup>13</sup> *Naimuddin, J. in Ahsanullah V Bangladesh* 44 DLR (1991) 191

the rest of the Constitution. In this connection, it needs to be plainly appreciated that Article 7 confers supremacy upon 'This constitution', which collective expression clearly means whatever is contained in the Constitution, which obviously includes the socio-economic rights. It, therefore, logically follows that the question of validity of any law violating the State policies and any socio-economic rights, and the consequences thereof, needs to be determined with reference to the provision contained in Article 8(2) that requires the state to apply these principles while making laws.

## **2.2 Arguments against enforceability**

The traditional arguments against judicial enforcement of socio-economic rights can be understood in two distinct contexts; one is legalistic (jurisdictional bar argument), and the other is realistic (prudential bar argument).

### **2.2.1 Jurisdictional bar argument**

This formal legalistic argument against judicial enforcement derives force from the express bar to such enforcement a particular Constitution may provide for. Article 8(2) of Bangladeshi Constitution, for example, bars judicial enforceability of socio-economic principles (arguably rights) contained in Part II of the Constitution. Similarly, Article 37 of Indian Constitution expressly bars judicial enforcement of the Directive Principles of State policy. On such basis, it is categorically claimed that the socio-economic rights as placed under the Constitution are not 'law' (although contained in the Constitution, the Supreme law of the State) but mere 'principles'<sup>14</sup> which are not judicially enforceable. Often, it is also argued that the principle of separation of powers would also imply a bar to judicial involvement in socio-economic rights' implementation, not to say enforcement, which may potentially have significant budgetary implications<sup>15</sup> given that budget is something that usually falls within the domain of the legislature.

### **2.2.2 Prudential bar argument**

This line of argument against judicial enforcement is shaped by the empirical obstacles to realization of socio-economic rights. It is argued that realization of such rights is not a matter fit for judicial enforcement since it requires adequate resources on the availability of which judiciary has no control. Moreover,

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<sup>14</sup> For a forceful pronouncement of such argument, see *Kudrat-E-Elahi V Bangladesh* 44 DLR (AD) 319

<sup>15</sup> In *Re Certification of the Constitution* 1996 (4) SA 744 (CC) (S. Afr.) the Constitutional Court of South Africa held that the separation of powers concern does not bar judicial enforceability of socio-economic rights.

enforcement of socio-economic rights is a matter of policy which the judiciary is not well-equipped to decide since all relevant data and information may not be available to it. It is forcefully contended that making of economic policy and allocation of available resources are matters falling outside the judicial domain, mainly because of their poly-centric nature and the concern over judges' competence and expertise in dealing with economic issues.

### **2.3 The Kernel of enforcement-debate: misplaced focus on characterization**

The above discussion shows that the characterization of the socio-economic rights is the crux of the enforcement debate. In Bangladeshi context, the debate is essentially one on the nature of the provisions contained in Part II of the Constitution of Bangladesh. The pro-enforcement arguments intend to view the provisions as part of the supreme 'law', and as such enforceable,<sup>16</sup> and make vigorous efforts to establish their 'law' status with reference to the proposition that enforceability (or non-enforceability) is not the sole test of such status. On the other hand, counter-enforcement arguments characterize such provisions as 'not law, but principles' and as such not judicially enforceable.

### **2.3 Legitimacy of judicial enforcement of socio-economic rights**

In view of express bar in Article 8(2) of the Constitution of Bangladesh, any argument for judicial enforcement of socio-economic rights must be premised on some sound, logical and legitimate grounds. Moreover, if Article 8(2) bar against judicial enforcement is to be read as merely restricting positive enforcement, while implicitly allowing negative enforcement, such alternative reading of this constitutional provision has to be justified with reference to cogent constitutional necessities and reasons. Moreover, enforcement advocacy must be backed by public opinion as to propriety of judicial enforcement and/or judicial oversight on the process of implementation of the socio-economic rights. The soundness and strength of any pro-judicial enforcement argument must not only be tested with reference to its ability to make out a persuasive case for such enforcement, but more importantly, with reference to its efficiency in terms of addressing the supposed empirical and prudential bars to such enforcement. Upon these normative standards, we would now proceed to examine whether there exists a constitutionally viable legitimate basis and cogent reason for judicial enforcement of socio-economic rights.

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<sup>16</sup> In view of express bar to judicial enforcement under Art 8(2), this line of arguments may, if at all, be understood as marginally supporting the notion of negative enforcement only. Any such argument on the basis of characterization of socio-economic provisions in Part II of the Constitution as 'law' has to be understood in the narrow context of negative enforcement only.

Rights, be it under the general law or the constitution, absent effective enforcement mechanism and remedies for their violation, are not rights in any meaningful sense; they are merely window-dressing. Some scholars have attempted to theoretically justify the 'rights' status of 'non-justiciable' socio-economic rights by drawing a somewhat subtle dividing line between 'promotion/implementation aspect' and 'violation aspect'<sup>17</sup> of rights which difference is popularly propounded as difference between the 'respect' obligation and 'protect and fulfill' obligation of state with regard to socio-economic rights. Such a distinction has gained, if at all, narrow support from the international human rights bodies and activists. There seems to be a broader consensus on the issue that economic, social and cultural rights impose three different types of obligations on States: the obligations to respect, protect and fulfill. Failure to perform any one of these three obligations constitutes a violation of such rights.<sup>18</sup>

Rights, **Prof. Scheinin**<sup>19</sup> observed, should be seen as 'bundles of binary relationships' in which one of the two parties is the subject of one element of the rights (rights-holder or the person entitled) in question, and the other party is, correspondingly, the duty-holder. A right consists of 'a number of such binary relationships', one of which can be called the 'core element', that is, the bare legal relation between the rights-holder (the person entitled) and the duty-holder (the person bound); whereas the others are seen as 'protective elements' that protect, enforce and implement the 'core element'. For a conceptual understanding of rights, it is, therefore, essential to appreciate the protective elements of rights, involving third parties, like administrative, judicial enforcement mechanisms, which are as important as the 'core element'. Hence 'genuine rights' or 'rights proper' should be construed as a bundle of the 'core element' and the 'protective elements'.

The subject of rights (rights-holder) is not a true subject only because of having been promised a position of advantage in relation to the duty-holder, but because of the existence of protective elements that constitute binary relationships between the subject and various third parties, including courts, which protects and enforces that legal relationship. Needless to say, rights, for which no enforcement mechanism has been provided for, are not 'rights proper'; they are either 'promised rights',<sup>20</sup> or 'inchoate rights', if at all they may be called rights.

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<sup>17</sup> Report of the Oslo Symposium on 'Human Rights and Human Development', 2-3 October 1998.

<sup>18</sup> The meaning of violations of economic, social and cultural rights' in Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22-26, 1997.

<sup>19</sup> Professor Martin Scheinin in Report of the Oslo Symposium on 'Human Rights and Human Development', held on 2-3 October 1998

<sup>20</sup> Oslo Symposium on 'Human Rights and Human Development', 2-3 October 1998

The theoretical understanding of rights as aggregates of binary relationships forming the core and protective elements of the rights in question is based on the writings of W.N. Hohfeld and Carl Wellman. According to Wellman, rights are, besides these aggregates, also logical wholes. Such recognition and perception of rights as a 'logical whole' clearly implies that if we recognize something as rights, despite the fact that a domestic enactment or the constitution speaks only of the core element, we must be willing to devise the 'protective elements' necessary for the enforcement of the core element'.<sup>21</sup>

Now, the starting point in any inquiry into the position of socio-economic rights under the Constitution of Bangladesh shall be to ask whether Part II of the Constitution may logically and properly be interpreted as creating and providing for, at least, any such 'core element'<sup>22</sup> of the socio-economic rights. The following discussion would show that the determination of this all-important question is not simple and straight forward.

Language used in the Articles under Part II does not provide any clear-cut guidance for determination of the issue. The wording of the Articles at best indicates imposition of certain obligations (be it 'perfect or 'imperfect') on the State and nothing more. It leaves unanswered the question whether these State obligations have corresponding rights (enforceable or not) vested in the citizens. This question obviously boils down to determination of status of the citizens in relation to socio-economic rights contained in part II, the essential point for determination being whether the citizens are mere 'beneficiary' or 'rights-holders' with regard to these socio-economic rights. A reference to the provision for fundamental rights, contained in the part III of the Constitution, may be instructive in determination of this crucial issue.

It may not be doubted that fundamental rights create enforceable rights for the citizens and imposes corresponding negative obligations upon the State not to violate them. But do the provisions for fundamental rights also impose upon the State any positive obligation to ensure, fulfill, enhance and maximize the fundamental freedoms of the citizens? The answer lies in part II of the Constitution of Bangladesh, which provides for a catalogue of state obligations, fulfillment of which is a precondition for enabling the citizens to enjoy greater freedom in a democratic and welfare state set up. However, does it mean that Part II provisions contain obligations corresponding to the fundamental rights

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<sup>21</sup> Professor Martin Scheinin in Report of the Oslo Symposium on 'Human Rights and Human Development', 2-3 October 1998

<sup>22</sup> 'Core element' here means and refers to the bare (legal) relation between the person entitled to an advantage (right-holder) and the person obliged to provide such advantage (duty-holder) irrespective and independent of the notion of enforceability of the relation judicially or otherwise, as explained by Professor Martin Scheinin.



rights contained in Part III and vice versa? The answer, in most cases, is in the affirmative.

This may provide some basis for the proposition that the socio-economic provisions contained in Part II of The Constitution of Bangladesh are in the nature of 'rights',<sup>23</sup> though not immediately realizable or enforceable by the court at the instance of an individual claim. If this proposition is correct, the citizens are definitely the rights-holders, while the State is the duty bearer<sup>24</sup> with regard to the socio-economic rights contained in Part II of the Constitution; and as such, the Constitution, read as a whole, may properly be interpreted as creating and providing for the 'core element' of socio-economic rights. Having provided for the 'core element', the Constitution obliges the State to devise appropriate 'protective elements necessary for the enforcement of the core element'.<sup>25</sup>

There can be no two opinions as to soundness and propriety of the view that the Constitution of Bangladesh has placed the State under such an obligation,<sup>26</sup> irrespective and independent of any controversy that centres round the problematic question of judicial enforcement. True it is that it would be perhaps neither legally justified<sup>27</sup> nor practically viable for the court to issue a writ to the Government requiring it to give food, shelter, housing, medical and social security services to all citizens of the State. But it may be proper to issue an appropriate writ to an erring Government which keeps its eyes shut to the sufferings of the common masses requiring/directing<sup>28</sup> it 'to take steps' by all appropriate means to alleviate those conditions which constitute a clear denial of human dignity.

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<sup>23</sup> This paper forcefully argues that judicial enforcement of such provisions does not necessarily depend upon their determination as 'rights' or 'laws'. Their enforcement claim is based on their, to develop a purposeful terminology, 'rights relevance' or 'rights linkage'.

<sup>24</sup> In *Wahab V Secretary, Ministry of Land*, 1 MLR 338 it was held that although not judicially enforceable, the fundamental principles of State cast an obligation upon the Government to act on them. Arguably, this obligation exists irrespective of the question of its judicial enforcement.

<sup>25</sup> Art 8 requires that the provisions contained in Part II shall be fundamental in the governance of Bangladesh and shall form the basis of work of the State. It necessarily implies that these are the Constitution-set priorities in State activities.

<sup>26</sup> In *Wahab V Secretary, Ministry of Land*, 1 MLR 338 it was held that although not judicially enforceable, the fundamental principles of State cast an obligation upon the Government to act on them. Arguably, this obligation exists irrespective of the question of its judicial enforcement.

<sup>27</sup> In the realm of civil procedure, there is a rule which prohibits specific performance of an obligation being decreed when the court is incapable of enforcing the performance.

<sup>28</sup> An analogy of such strategic judicial role may be found in the case of *Altemesh Rein V Union of India* (1988) 4SCC 54 where the Indian Supreme Court took the view that while it is not open to the court to issue a writ in the nature of mandamus to the Government to bring a statute into force it is open to the court to issue a writ in the nature of mandamus to the Government to apply its mind and consider whether the time for bringing the statute into force has arrived. It is because every discretionary power vested in the Executive should be exercised in a just, reasonable and fair way and that is the essence of rule of law

This line of understanding as to the necessity of a proper judicial role commands considerable support from the accountability concern of the contemporary thinkers in the fields of human rights and development. There exists a 'growing consensus on the centrality of accountability' in the implementation and outcome of any development process since rights and obligations demand accountability and 'unless supported by a system of accountability, they can become no more than window-dressing'.<sup>29</sup> Moreover, accountability lies in the core of the principles of constitutionalism and good governance. Judicial supervision may be an effective, though not exclusive, accountability measure in implementation process of socio-economic rights.

There has already been a considerable volume of influential literature which advocates for a perception of development and rights as freedoms<sup>30</sup> and there seems to be an important shift of focus, at least in the realm of theory, from the notion of human rights to human welfare and human development.<sup>31</sup> This new perception of rights would definitely urge upon the extension of traditional fundamental rights-bias of the court. It would necessarily require the courts to employ public spirited judicial activism with a view to ensuring not merely formal enforcement of fundamental rights, but also strategic judicial measures against the socio-economic conditions which denies or curtails people's enjoyment of fundamental rights.

### **Legitimacy concern over judicial enforcement of socio-economic rights under the Constitution of Bangladesh**

Many points may be placed as arguments to establish a high degree of desirability of at least some sort of judicial presence in the implementation process of socio-economic rights. However, there still exists legitimacy concern with this contemplated protective judicial role in view of the express bar to judicial enforcement under the Constitution of Bangladesh.

We have discussed above the proper judicial role as one of the 'protective elements' of socio-economic rights. Rights, viewed from the 'violation aspect', require judicial protection and judicial redress of their violation. That is also the traditional perception of judicial role with regard to protection of rights.

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<sup>29</sup> Human Rights and Poverty Reduction: A Conceptual Framework, OHCHR, United Nations, New York and Geneva, 2004

<sup>30</sup> Sen, Amartya. *Development as Freedom*, Oxford University Press, 1999

<sup>31</sup> Posner, Eric, A. *Human Welfare, Not Human Rights*, Chicago Public Law and Legal Theory Working Paper No. 207

There is no controversy on the proposition that such a role of the judiciary with regard to fundamental rights is proper, legitimate and justified; whereas, a similar (though not equal) role with regard to 'non-justiciable' socio-economic rights is perceived as problematic. This paper argues that a protective judicial role with regard to 'non-justiciable' socio-economic rights and some sort of judicial enforcement of the same may be sufficiently justified on the basis of functional correlation between the fundamental rights in Part III and the provisions of socio-economic rights contained in Part II of the Constitution of Bangladesh.

In most of the cases, a violation of any provision contained in Part II may lead to a non-fulfillment or violation of fundamental rights contained in Part III. While non-fulfillment of socio-economic rights denies the enjoyment of other rights greater realization of the former leads to greater enjoyment of the latter. Whether and to what extent non-fulfillment/violation of socio-economic rights in Part II would entail a violation of fundamental rights in Part III depend upon the degree of relevance between the provisions concerned? For example, provision relating to State responsibility under Art. 15 for fulfilling the basic necessities have a high degree of constitutive relevance to right to life under Articles 31 and 32 of the Constitution. Likewise, rights to education (Article 17) have a close instrumental relevance to freedom of expression under Article 39. Similarly, right to safe environment has a close relationship with the fundamental right to life.

However, the question whether, and to what extent, the court should enforce the socio-economic rights at a particular time does not, though in principle ought to, materially depend upon the degree of relevance between the fundamental right(s) which it seeks to enforce and the relevant socio-economic rights in question. In fact, enforcement decision of the court is shaped by the availability of resources (resources-constraint factor) and socio-economic realities (broadly speaking, inadequate arrangement factor), which substantially outweighs the relevance factor in the process of decision-making.

It may be emphatically argued that a proper judicial role in relation to the fundamental rights as perceived by the Constitution involves a solemn duty to recognize, uphold and (progressively) enforce this empirical relevance between fundamental rights and socio-economic rights contained in Part II of Bangladeshi Constitution. In the realm of theory, this judicial duty essentially arises as a corollary to the duty to interpret the Constitution and fundamental rights on the basis of the provisions contained in Part II of the Constitution. Arguably, the duty to interpret implies duty to interpret progressively, and supposedly, it requires the judiciary to read and interpret the fundamental rights in their full logical purport and empirical scope and relevance. Sufficient empirical justification and logical persuasion for such a judicial role may be

found in the prophetic words of Justice Albie Sachs- "Is the Constitution about welfare or it is concerned with freedom? It relates to both. We do not want bread without freedom, nor do we want freedom without bread: we want bread and we want freedom."<sup>32</sup>

There may be an alternative account for a promotional and developmental judicial role in relation to fundamental rights. This paper argues that fundamental rights as contained in Part III of the Constitution of Bangladesh are 'minimum core protection' of human freedoms, whereas fundamental rights together with the socio-economic rights contained in Part II of the Constitution constitute a total 'human dignity' package. Here, it is important to appreciate that it is for the judiciary to determine and assess whether, and to what extent, a particular assertion (of a benefit) or claim falls within the scope of any of the broad rights provided in the Constitution.<sup>33</sup> New rights may be read into, and inferred from, the existing fundamental rights<sup>34</sup> contained in the Constitution in the sense that the Judiciary may fairly recognize a claim or inchoate rights as (constituting) an element of any fundamental rights on the ground of high degree of relevance between the claim in question and the concerned fundamental rights. For example, the Indian Supreme Court has recognized that rights to receive education is included in, and flows from, the right to life.<sup>35</sup> The function of judiciary in context of constitutional rights adjudication is, therefore, more in the nature of an assessment than a determination. The judiciary as a constant negotiator between competing claims, has to assess claimed, inchoate rights against socio-economic realities.<sup>36</sup> The experience of the South African Constitutional Court with *Soobramoney*<sup>37</sup> may provide for some valuable insights into the way judiciary assesses and balances a claim underlying an

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<sup>32</sup> Sachs, Albie, 'Social and Economic Rights: Can They Be Made Justiciable?', Justice Sachs of South African Constitutional Court delivered this lecture at Southern Methodist University School of Law, Dallas, Texas, on April 10, 2000. Reproduced in 'Human Rights and Empowerment',

<sup>33</sup> See also the view taken by the Indian Supreme Court in *Unni Krishnan V State of A.P.* AIR 1993 (SC) 2178 that recognition of a right as a fundamental right does not necessarily depend on whether the right in question is expressly stated as a fundamental right under Part III. New rights can be read into and inferred from rights stated in Part III.

<sup>34</sup> Indian Supreme Court in *Unni Krishnan V State of A.P.* AIR 1993 (SC) 2178 took the view that recognition of a right as a fundamental right does not necessarily depend on whether the right in question is expressly stated as a fundamental right under Part III. New rights can be read into and inferred from rights stated in Part III.

<sup>35</sup> *Ibid*, while education is a non-judicially enforceable directive principle under the Indian Constitution, right to life is a fundamental right under Part III of the Constitution.

<sup>36</sup> Professor Martin Shaplo argues in 'Democracy, The Courts and The Making of Public Policy' that Constitutional rights decisions by judges are always balancing of interests decisions, just as legislatures are supposed to deal with interests, balance them and prioritize them.

<sup>37</sup> *Soobramoney v Minister of Health (Kwazulu-Natal)* (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997)

Mizanur Rahman (ed), ELCOP, 2001 inchoate right<sup>38</sup> against currently available resources and existing socio-economic realities in general, and available resources in particular. The object of such careful assessment and balancing is to determine the 'minimum core' content(s) and standard of rights under the Constitution. This 'minimum core' is not a constant; the court would progressively recognize more contents and higher standard(s) as 'minimum core' of any rights. Arguably, the courts have a solemn duty, and indeed some degree of liberty, to read and recognize new contents and implant new/advanced standards in such rights, and thus enhance the level and widen the scope of those rights.

Therefore, a claim which may not be recognized by the judiciary as a right today may be so regarded tomorrow. In *Soobramoney* the Court, having recognized that right to emergency treatment was unqualified and immediately realizable right under the Constitution of South Africa, held that the right to "emergency medical treatment" could not extend to life-prolonging treatment for terminally ill patients. It seems that the court could have fairly regarded the claim as an 'element' of right to emergency medical treatment but for resources-constraint and inadequate socio-economic arrangements necessary for affording such rights. Chances are that such a claim may be recognized by the judiciary as part of the emergency healthcare rights in the future when the socio-economic arrangements in the society would so warrant. For example, in Bangladesh, basic rights to food as a content or element of right to life is still one of the inchoate rights in the sense that upon practical considerations, the judiciary may not be able, willing or prepared to immediately accord 'rights' status to the basic need for food.<sup>39</sup> But for the time being, judiciary is under a continuing duty to assess, recognize, and assert its relevance to fundamental right to life. A proper appreciation of this relevance inevitably implies and invariably necessitates some sort of judicial supervision of the State activities directed towards progressive realization of food security for the people. Simple is the logic, the court is obliged to enforce right to life so it has a legitimate concern for implementation of all such linked and relevant socio-economic principles/(inchoate) rights,<sup>40</sup>

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<sup>38</sup> Here the term 'inchoate right' has been used to refer to the indeterminate nature and status of the underlying claim, which the judiciary may sooner or later determine and recognize as 'rights' proper. Before obtaining such judicial recognition of 'rights status' all claims to socio-economic benefits may be classed and categorized as 'inchoate rights'.

<sup>39</sup> At a certain point in the future, an intensified vulnerable group feeding (VGF) program of the Government may justify a judicial assertion of right to food as one of the core contents and constitutive elements of right to life under Art 32 of The Constitution of Bangladesh.

<sup>40</sup> Use of 'Rights' terminology in referring to any provisions contained in Part II of The Constitution of Bangladesh is a bit problematic and at the very least confusing in terms of their status in comparison with the fundamental rights under Part III. Properly speaking, these are not economic or social privileges either; arguably, the expression 'inchoate rights' seems to more appropriately reflect their status in rights jurisprudence.

as forming the basic constituent elements of a dignified human life. The judiciary, of course, has a solemn duty to interpret the fundamental rights in the context of their full logical purport and relevance with the socio-economic principles. And in so doing, the judiciary is free to recognize and add new elements and contents into such rights and thus expand their scope and extent. This is, in fact, the true purpose of constitutional mandate for interpreting the fundamental rights in light of the State policies.

### **Adjudication of socio-economic rights in Bangladesh, India and South Africa: a critical review**

The following discussion offers a brief outline of socio-economic rights adjudication by the higher judiciary in Bangladesh and India. We keep aside South African experience here as it has been earlier, and try to reflect on the Indian and Bangladeshi experience to understand the way higher judiciary has responded to the constitutional bar to judicial enforcement of socio-economic rights. It is to be reiterated that the challenge of enforcement of socio-economic rights under the Constitution of Bangladesh and India is closely associated with the challenge of enforcement of fundamental and directive State policies, whereas in South Africa, it is essentially a question of enforcement of constitutional rights.

#### **4.1 Position in Bangladesh**

Due to the placing of socio-economic rights under Part II titled "Fundamental Principles of State Policies", we need to examine even the non socio-economic rights cases which may have a bearing on the broader question of enforcement of Part II 'State policies'. The issue of judicial enforcement of State policies under Part II (which also contains socio-economic rights provisions) came before the Supreme Court of Bangladesh, incidentally though, in *Sheikh Abdus Sabur V Returning Officer*<sup>41</sup>, a non-socio-economic rights case, which involved a challenge of validity of a provision in a local Government law<sup>42</sup> on the ground of alleged violation of equality clause under Art 27 of The Constitution of Bangladesh. The Appellant placed only an incidental reliance on Art 9 which obliges the State to encourage local government. As Shahabuddin, J. observed obiter-

"These principles, though they must be applied by the State in making laws, are not justiciable in court."

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<sup>41</sup> 44 DLR (AD) 30.

<sup>42</sup> Section 7(2) (g) of Local Government (Union Parishads) Ordinance 1983 provided for disqualification of loan-defaulters in election.

In *Saiful Islam Dildar V Bangladesh*<sup>43</sup>, another non-socio-economic rights case, the Government's decision to extradite Anup Chatia<sup>44</sup> to India was challenged as being violative of Article 25 of the Constitution of Bangladesh. The Court, however, held that it would not violate Article 25, a fundamental principle of State policy under Part II of the Constitution of Bangladesh. Again, in *M. Saleemullah V Bangladesh*<sup>45</sup> Government's decision to send troops to Haiti as part of UN sponsored multinational force was challenged as being derogatory to Article 25 of the Constitution. The Court held that it was not violative rather in consonance with the spirit of the Fundamental Principles of State Policies.

*Mosharraf Hossain V Bangladesh*<sup>46</sup> marks the tendency of the judiciary to refer incidentally to the State policies. Appellate Division interpreted the provision of local Government (Article 9) only to conclude that "Article 9 of the Constitution is in the chapter with the heading Fundamental principles of State policy and the matters in Article 9 of the Constitution are policy matters of the Republic...for the attainment whereof endeavour shall have to be made by the State. Suffices it to say that the Court is to go by the law as it is..."

The above observation, though an obiter, shows a high-handed approach of the judiciary with regard to enforcement of State policies. It reflects complete abstention from, if not abdication of, the judicial duty, with regard to State obligation, to progressively realize the fundamental principles of State policy.

In *Bangladesh V Winifred Rubi & others*<sup>47</sup> a question arose as to whether land requisition for a private school was for 'public purpose' and there also arose an incidental question as to whether a private school which charges a very high tuition fees could be regarded as acting in furtherance of State policy relating to education as contained in Article 17. The Appellate Division of the Bangladesh Supreme Court held that such an incidental enquiry was 'unwarranted by law in the Constitution on the ground that "the Constitutional mandate provides in the Chapter on Directive principles of State policy that these are not enforceable in the court of law"'.

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<sup>43</sup> 50 DLR 318.

<sup>44</sup> General Secretary, United Liberation Front of Assam (ULFA), an organization striving for freedom in the state of Assam, India.

<sup>45</sup> 47 DLR 218

<sup>46</sup> 56 DLR (AD) 113 involved a challenge of provisions for removal of Chairman of a local Government body.

<sup>47</sup> 34 DLR (AD) 164

In *Dr. Mohiuddin Farooque V Bangladesh*<sup>48</sup> (popularly known as the FAP-20 case), which involved a legal challenge of Flood Action Plan adopted by the Government on the ground of potential environmental hazards the Appellate Division granted locus standi to BELA, an environmental organization. In *Anwar Hossain V Bangladesh* popularly known as 8th amendment case, Justice Badrul Haider Chowdhury stated that though directive principles are not enforceable by any court, the principles therein laid down were nevertheless fundamental in the governance of the country and it would be the duty of the State to apply these principles in making laws. The fact that Article 8 of the Bangladeshi Constitution is a protected Article and the legislature cannot amend this Article without referendum also implies that the executive cannot flout the fundamental principles of State policies. Therefore, government's endeavours must be to realize these aims and not to whittle them down.

#### 4.1.1 Ahsaullah and Kudrat-E-Elahi Case: a missed opportunity?

The question as to judicial enforcement of State policy posed in full-frontal mode before the High Court Division of Bangladesh Supreme Court in *Ahsanullah V Bangladesh*<sup>49</sup> another non socio-economic rights case, where abolition of a local Government statute was challenged as being violative of Article 9 of the Constitution which obliged the State to encourage local government institutions. In a sense, this case involved a claim of what may properly be termed as 'negative enforcement' of the State policies. The underlying claim in this case was essentially to protect and defend the existing threshold of the State policy implementation and prevent its deterioration, though it did not involve the cause of positive implementation and enforcement of the State policies. However, the Court found that Upazila Parishad was not a 'local Government institution' within the meaning of Article 9. Upon such finding, observation as to normative strength and inviolability of the State policies became mere obiter. While Abdul Jalil, J. was quite straight forward in concluding that the principles are 'not mandatory provision' but directory in nature Naimuddin, J. was affected by characterization-bias in indulging in the law-policy debate. His ultimate conclusion that the State cannot violate the State policies and laws violative of such policies shall be void was solely based on his characterization of the State policies as part of the supreme 'law' of the State. What was most significant in this decision was that Naimuddin, J. justified his pro-negative enforcement view with reference to number of highly persuasive arguments.

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<sup>48</sup> 49 DLR (AD) 3

<sup>49</sup> 41 DLR 191



An appeal from this decision came before the Appellate Division in the form of *Kudrat-E Elahi V Bangladesh*<sup>50</sup> and this time the Appellate Division also misplaced its attention on characterization of the State principles as either 'law' or 'policy'. Mustafa Kamal, J. pointed out that these were 'principles' as distinguished from 'laws', and as such there arose no question of enforcement under Article 7 of the Constitution. Shahabuddin Ahmed, CJ. also held these principles non-enforceable, stating-

"They are in the nature of People's program for socio-economic development of the country in peaceful manner, not overnight, but gradually. Implementation of these programs requires resources, technical know-how and many other things including mass education. Whether all these pre-requisites for a peaceful socio-economic revolution exist is for the State to decide".<sup>51</sup>

Characterization of State policies as 'people's programme' by the leaned Judge is yet another instance of misplaced judicial attention on characterization of socio-economic rights contained in the State policies. His Lordship was silent on the legal consequences that follow if the State does not decide to take steps towards implementation of the State policies and the socio-economic rights contained therein?<sup>52</sup> With profound respect, this view may be an appreciation of ground realities in the process of implementation of socio-economic rights, but it does not reflect what should be the proper perception<sup>53</sup> of such rights under the broader Constitutional scheme. One important implication of this decision was that it cut ground from under the feet of Naimuddin, J.'s powerful arguments in favour of at least negative enforcement of rights.

#### **4.1.2 Road towards affirmative enforcement**

A positive judicial trend towards affirmative enforcement of State obligation with regard to public health, as contained in Article 18 of the Constitution, began with *Professor Nurul Islam V Bangladesh*.<sup>54</sup> In this case the petitioner being the Chairman of ADHUNIK, an anti-smoking organization, sought a ban on

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<sup>50</sup> 44 DLR (AD) 319

<sup>51</sup> Ibid, p. 331

<sup>52</sup> The Court faced such a situation in case of Secretary, Ministry of Finance V Md. Masdar Hossain & others [20 BLD (AD) 2000] where Latifur Rahman, J. observed that Article 22 of the Constitution provides that the State shall ensure the separation of judiciary from the executive organ. Though more than 29 years have elapsed since making of the Constitution... no effective steps have been taken.

<sup>53</sup> This Article proposes a 'rights-linked' or 'rights-relevant' perception as the proper perception of such provisions and forcefully argues that socio-economic provisions/policies contained in Part II of the Constitution should be perceived in the context of their relevance to and linkage with judicially enforceable fundamental rights.

<sup>54</sup> 52 DLR 413

all kinds of advertisement of tobacco products on the ground of baneful effect on public health. The Court read State obligation to improve public health with its relevance to the right to life under Article 32 in holding that the State is under an obligation to ban all types of advertisements of tobacco products and directed the Government to prohibit all such advertisements in any form. This case may be viewed as an instance of 'rights-linked' perception of a State obligation under a fundamental principle of State policy as has been proposed in this paper. State obligation to improve public health under Article 18, standing alone, was not judicially enforceable in its own right. The Court in fact essentially enforced rights to life under Article 32; and in addition, it enforced State obligation under judicially non-enforceable State policy (Article 18) so far and to the extent such enforcement is relevant to, and indispensable from, enforcement of fundamental rights to life. This case may form the basis for judicial recognition and enforcement of many other relevance and linkage between other fundamental rights and socio-economic principles contained in Part II of the Constitution.

In *Dr. Mohiuddin Farooque V Bangladesh*<sup>55</sup> the petitioner moved the Court for appropriate relief relating to the matter of control of pollution from industries and factories which were identified as polluters. In another case<sup>56</sup> filed by the same Petitioner, the petitioner sought a court order requiring/directing to take all measures for preventing sound pollution and environment pollution by the vehicles, including the conversion of diesel and petrol driven vehicles to CNG-driven vehicles. In both the cases the Court issued various directions to the different departments of the Government.

In *Rabia Bhuiyan V Bangladesh*<sup>57</sup> the Appellate Division of the Supreme Court of Bangladesh held that failure to ensure access to arsenic-free and safe drinking water constituted a violation of rights to life as guaranteed by Articles 31 and 32, 'read together with' Articles 15 and 18 of the Constitution, which provides for State obligation to ensure basic necessities and improve public health. This case is an excellent example of 'rights-linked' perception and enforcement of socio-economic principle under Articles 15 and 18 on the basis of their constitutive and instrumental relevance with judicially enforceable fundamental rights to life under Article 32 of the Constitution. Tafazzul Islam, J. was quite vocal on the point of this relevance, as His Lordship observed- "Hygienic environment is an integral facet of right to healthy life and it would be impossible to live with human dignity without a humane and healthy environmental protection."<sup>58</sup>

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<sup>55</sup> 55 DLR 69

<sup>56</sup> 55 DLR 613

<sup>57</sup> 59 DLR 176

<sup>58</sup> Ibid. p. 184

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<sup>55</sup> 55 DLR 69

<sup>56</sup> 55 DLR 613

<sup>57</sup> 59 DLR 176

<sup>58</sup> Ibid. p. 184

## **4.2 Position in India**

In *Mumbai Karmagar Sabha V Abdullabhai*<sup>59</sup> the Indian Supreme Court recognized the interpretative value of the socio-economic Directive principles and observed that where two judicial choices are available, the construction in conformity with the social philosophy of Part IV (the socio-economic directive principles) of the Constitution would have preference.

Later in *Bandhua Mukti Morcha V Union of India*<sup>60</sup> Bhagwati, J. took the view that 'right to live with human dignity', as enshrined in Article 21, 'derives its life breath' from Directive principles and includes 'minimum requirements, which must exist in order to enable a person to live with human dignity'.

Indian Supreme Court properly perceived a promotional judicial role with regard to fundamental rights and socio-economic principles of Directive State policies in *Unni Krishnan V State of A.P.*<sup>61</sup> where it took the view that the fundamental rights were to be interpreted having regard to the Directive socio-economic principles. The fundamental right to life, so interpreted, included, as the Court found, rights to receive education, which is 'implicit in and flows from the right to life' guaranteed under Art 21 of the Constitution. This is very close to what this Article describes as a 'rights-linked' or 'rights-relevant' perception and enforcement of the principles of socio-economic welfare under the Constitution. More importantly, the Court has fully appreciated its promotional role with regard to fundamental rights, which role is directed towards maximizing basic freedoms and achieving highest welfare in the society through judicial expansion of scope and extent of the existing rights. Unni Krishnan is a forceful assertion of judicial duty to progressively expand and promote basic freedoms (guaranteed in the form of fundamental rights) through recognizing new elements and contents of an existing right. New rights may, in fact, be read into and inferred from the fundamental rights contained in the Constitution.

*Paschim Banga Khet Mazdoor Samity V State of W.B.*<sup>62</sup> posed a difficult question before the Indian Supreme Court as to implementation of rights to health and emergency medical services in view of resources constraints and limited capacity of State owned hospitals. One Hakim Seikh, a member of the Samity fell off the train and received fatal injuries. He ran to and from one hospital to another but was denied admission because of what the hospital authorities stated 'no vacant bed available.' The Court found that denial of admission of emergent patients was partly due to mismanagement and

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<sup>59</sup> AIR 1976 (SC) 1455

<sup>60</sup> AIR 1984 (SC) 802

<sup>61</sup> AIR 1993 (SC) 2178

<sup>62</sup> 1996 SCC (4) 37, 1996 SCALE (4)282

maladministration of existing facilities in the hospitals and asked the Government to chalk out a time bound plan to ensure proper medical services to the people.

### 4.3 Position in South Africa

The experience of the South African Constitutional Court with *Soobramoney*<sup>63</sup> may provide for some valuable insights in to the way judiciary assesses and balances a claim underlying an inchoate right<sup>64</sup> against currently available resources and existing socio-economic realities.

Mr. Soobramoney was an unemployed terminally-ill diabetic patient in the final stages of chronic renal failure and heart diseases. Due to limited hospital resources<sup>65</sup>, he was denied dialysis treatment that could have prolonged his life as a state medical policy made dialysis available to patients whose acute renal failure could be remedied through such treatment or to patients eligible for a kidney transplant. Mr. Soobramoney's was physically ineligible for a kidney transplant because of other health issues. In these circumstances, he sought a court order requiring the hospital authority to provide renal dialysis to extend his life which he could not pay for himself. He claimed right to emergency medical treatment under Section 27(3) and right to life under and Section 11 of the Constitution.

The Court having recognized that right to emergency treatment was unqualified and immediately realizable right under the Constitution held that the right to "emergency medical treatment" could not extend to life-prolonging treatment for terminally ill patients. Soobramoney died two days after the decision and people became angry with the court.

Justice Ablie Sachs, speaking non-judicially,<sup>66</sup> forwards a quite apologetic account of policy considerations and 'opportunity cost analysis' which lied beneath the decision of the court. He observed:

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<sup>63</sup> *Soobramoney v Minister of Health (Kwazulu-Natal)* (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997)

<sup>64</sup> Here the term 'inchoate right' has been used to refer to the indeterminate nature and status of the underlying claim, which the judiciary may sooner or later determine and recognize as 'rights' proper. Before obtaining such judicial recognition of 'rights status' all claims to socio-economic benefits may be classed and categorized as 'inchoate rights'.

<sup>65</sup> The facts show that the hospital had the resources to give medical assistance to only 30% of patients who approaches for such assistance.

<sup>66</sup> In a lecture on 'The Rule of Law and Delivering Justice in Africa' Justice Professor Modibo Ocran of the Supreme Court of Ghana stated that the Soobramoney's claim was rejected apparently due to the opportunity cost of acceding to such a claim. The lecture was delivered at Loyola University Chicago International Law Review Symposium, Feb. 15, 2007. Available on [www.luc.edu/law/activities/publications/ilrdocs/vol5.../ocran\\_rights .pdf](http://www.luc.edu/law/activities/publications/ilrdocs/vol5.../ocran_rights.pdf).

"This was a most painful case. The Court's decision could help prolong his life... We decided that he could not claim emergency medical treatment on an open-ended basis which would give him an unqualified right to indefinite medical assistance... If all chronic illnesses were to be treated as emergency medical cases entitled to treatment on demand at State expense, then there would be no funds left over for mother and child care, nothing for health education or immunization, and desperately little for amelioration of AIDS-related illness, TB or cancer."<sup>67</sup>

**In Government of Republic of South Africa v Irene Grootboom and Others**<sup>68</sup> the petitioner along with 510 children and 390 adults were forcibly and inhumanely evicted from their squatter settlement on private land and became homeless. High Court directed the authorities to provide them shelter until they could themselves manage shelter. Against this order, the Government authorities moved the Constitutional Court. The Court first identified the state's negative obligation under Section 26 of South African Constitution "to desist from preventing or impairing the right of access to adequate housing." As regards the positive State obligation, having fully acknowledged the obligation for progressive realization in the context of limitations of available resources, the Court devised a 'reasonableness test' to determine 'constitutional Compliance' of State initiatives and measures directed towards realization of rights to housing. Applying the reasonableness test, the Court ultimately held that the current system unreasonably neglected to consider and address those in most dire need. The current program fell short of 'constitutional compliance' because it failed to "devise and implement within its available resources a comprehensive and coordinated programme progressively to realise the rights of access to adequate housing." The Court issued a declaratory order requiring the state to remedy this failing and assigned the Human Rights Commission, an independent national body, to monitor and report on the status of the changes.

Referencing a new housing plan proposed during the appeals process, the Court directed that it, or a similar plan of the government's choosing, should be implemented "to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations."

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<sup>67</sup> Sachs, Albie, 'Social and Economic Rights: Can They Be Made Justiciable?', Justice Sachs of South African Constitutional Court delivered this lecture at Southern Methodist University School of Law, Dallas, Texas, on April 10, 2000. Reproduced in 'Human Rights and Empowerment', Mizanur Rahman (ed), ELCOP, 2001.

<sup>68</sup> 2001 (1) SA 46 (CC).

In *Minister of Health v Treatment Action Campaign (No. 2) (TAC)*<sup>69</sup> the Government prohibited the use and administration of Nevirapine, a vaccine for preventing mother-to-child HIV transmission outside a pilot project. Court directed the Government to allow wide-spread use of the drug in holding that the government was "constitutionally obliged . . . to plan and implement an effective, comprehensive and progressive programme for the prevention of mother-to-child transmission of HIV throughout the country." *Jaftha V Schoeman*<sup>70</sup> was an instance of enforcement of negative aspect of housing right. It involved a forced sale of petitioner's house in realization of debt owed to another private person. The Court held that due to lack of judicial oversight of forced sale it violated the Constitutional right to housing. In *Khosa V Minister of Social Development*<sup>71</sup> the Court held unconstitutional a Government policy which limited social security provisions for citizens only; and directed to extend such provisions to permanent residents as well.

## **Modes of enforcement of socio economic rights**

### **5.1 Negative enforcement: the floor**

Negative enforcement implies a judicial role against violation of socio-economic rights which necessarily arise from the 'violation aspect' of such rights. The division between negative and positive enforcement presupposes that the rights have both negative and positive aspects. Strong arguments in favour of negative enforcement was forwarded in *Kudrat-E-Elahi* case, but rejected by the Apex Court in Bangladesh. In the South African context, *Jaftha V Schoeman*<sup>73</sup> as discussed above was an example of negative enforcement.

### **5.2 Affirmative enforcement: the ceiling**

Affirmative enforcement, simply speaking, means a positive judicial enforcement of State obligation to progressively realize the socio-economic rights by requiring it to take all reasonable measures to the maximum of its available resources. In Bangladeshi context, cases like *Rabia Bhuiyan V Bangladesh*<sup>74</sup> and *Dr. Mohiuddin Farooque V Bangladesh*<sup>75</sup>; and in South African context, *Minister of Health v Treatment Action Campaign (No. 2) (TAC)*<sup>76</sup>

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<sup>69</sup> 2002 (5) SA 721 (CC) (S. Afr.).

<sup>70</sup> 2005 (2) SA 140 (CC) (S. Afr.).

<sup>71</sup> 2004 (6) SA 505 (CC) (S. Afr.).

<sup>72</sup> See the opinion of the Constitutional Court of South Africa in Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC)

<sup>73</sup> 2005 (2) SA 140 (CC) (S. Afr.).

<sup>74</sup> 59 DLR 176

<sup>75</sup> 55 DLR 69

<sup>76</sup> 2002 (5) SA 721 (CC) (S. Afr.)

lend considerable support to the notion of affirmative enforcement of socio-economic rights. Affirmative enforcement of socio-economic rights involves the enforcement the State 'obligation of conduct' and 'obligation of result' in respect of realization and implementation of such rights. In the policy level, such enforcement necessarily involves a judicial contribution to policy making to ensure that the policy is properly directed towards, and compliant with, State 'obligation of result' in the long run. Grootboom<sup>77</sup> is an illuminating example of such judicial contribution to policy making. And In operational level, judiciary has to ensure that the State is acting in compliance with its 'obligation of conduct' in implementing socio-economic rights.

### **5.3 Backdoor enforcement: rights-linked and rights-relevant enforcement**

Backdoor enforcement may be defined as enforcement of socio-economic rights so far and to the extent such rights are relevant and linked to judicially enforceable fundamental rights. This type of enforcement is conceptually akin to what this paper proposes as 'rights-linked' or 'rights-relevant' perception and enforcement of socio-economic principles under Part II of the Constitution of Bangladesh. Instances of such enforcement may be found in *Unni Krishnan*<sup>78</sup>, and in Bangladeshi context, *Rabia Bhuiyan V Bangladesh*<sup>79</sup> may be viewed as an example of such enforcement.

### **5.4 Passive enforcement**

This type of enforcement (if at all an enforcement) involves merely a passive judicial recognition of socio-economic rights' realization as a directive principle of State policy, or at best a passive judicial assertion of State obligation to realize such policy objectives, which reflects a high-handed approach and passivity of judiciary with regard to implementation of socio-economic rights. *Kudrat-E Elahi*<sup>80</sup> may be viewed as an instance of mere passive assertion of State responsibility with regard to socio-economic principles where the Court unfortunately found no judicial role with regard to the implementation of such principles.

### **5.5 Strategic and progressive enforcement**

This paper argues that a judicial role with regard to implementation and enforcement of socio-economic rights should be both 'strategic' and 'progressive'. Such role, arguably, includes judicial participation and contribution to making of governmental policies for realization of socio-economic rights.<sup>81</sup> It may require

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<sup>77</sup> 2001 (1) SA 46 (CC)

<sup>78</sup> AIR 1993 (SC) 2178

<sup>79</sup> 59 DLR 176

<sup>80</sup> 44 DLR (AD) 319

<sup>81</sup> For contribution of South African Constitutional Court in Housing policy, see Groot boom case [2001 (1) SA 46 (CC)]



the judiciary to oversee the process of implementation through proper mechanism.<sup>82</sup> More importantly, the judiciary is supposed to enhance and promote the basic freedoms and welfare by employing strategic and situational judicial techniques.

### **Problems and challenges of judicial enforcement**

We have discussed above the jurisdictional and prudential bar to justiciability and judicial enforcement of socio-economic rights. This discussion aims at forwarding sound legal arguments and devising efficient judicial techniques to counter the problems and challenges of judicial enforcement of fundamental rights.

#### **6.1 Justiciability problem: jurisdictional bar**

The judiciary has to end its characterization-bias in the sense that it must shift from its position that the question of judicial enforcement of socio-economic principles depends on characterization of such principles as either 'law' or 'policy', and appreciate that their enforcement claim flows from, and is essentially based on, their constitutive and instrumental relevance and linkage to the fundamental rights. This paper argues that such 'rights-linked' and 'rights-relevant' perception and interpretation of socio-economic principles under Part II of the Constitution of Bangladesh is free from the justiciability problem. Jurisdictional bar to judicial enforcement as contained in Article 8(2) does not impede such enforcement since judiciary in essence would enforce fundamental rights; and as a part of such enforcement, such socio-economic principles as are highly relevant to, and indispensable precondition of, enjoyment of the fundamental rights. Arguably, 'rights-linked' or 'rights-relevant' perception and enforcement of socio-economic principles, as this paper proposes, involve no more than enforcement of fundamental rights; but certainly, no less than enforcement of socio-economic rights in their full logical purport, context and relevance.

#### **6.2 Remedy problem**

In socio-economic rights adjudications, devising a proper relief has been a vital challenge. Judicial role in devising appropriate relief involves not merely granting an immediate relief to the parties before it, but strategic crafting of a wide-ranging relieves, which are more forward-looking and pragmatic. Essential features of such relief, as the Indian and South African experience shows, include programmatic guidelines and time-bound outline for implementation by the State authorities concerned, and a mechanism for overseeing the process of implementation. South African cases like Treatment Action Campaign (No. 2) (TAC)<sup>83</sup> and Grootboom<sup>84</sup> suggest that judiciary has adequate prudential capacity

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<sup>82</sup> For example, the National Human Rights Commission in Grootboom case [2001 (1) SA 46 (CC)]

<sup>83</sup> 2002 (5) SA 721 (CC) (S. Afr.).

<sup>84</sup> 2001 (1) SA 46 (CC).

and competence to devise wide-ranging relieves. In the Indian context, *Paschim Banga Khet Mazdoor Samity V State of W.B.*<sup>85</sup> is also instructive on framing of appropriate relief, which indicates that the court may take into account, and rely upon, the opinion of an expert committee in devising appropriate relief. Again, in Bangladesh context, *Rabia Bhuiyan V Bangladesh*<sup>86</sup> and *Professor Nurul Islam V Bangladesh*<sup>87</sup> are also instances of devising wide-ranging relief.

### **6.3 Enforcement problem-**

In principle, all branches of government are supposed to extend assistance to judiciary in implementation and execution of judicial decisions. Hence, except for a case of non-cooperation from the other two organs of the government, judicial enforcement in the form of supervision of implementation process should not be difficult. Still the judiciary may devise measures for either direct or indirect judicial overseeing. In *Grootboom*<sup>88</sup> the Constitutional Court of South Africa assigned to the National Human Rights Commission the task of overseeing and reporting with regard to framing and implementation of housing policy; whereas, the same Court refused to oversee the anti-AIDS Government programme in Treatment Action Campaign (No. 2) (TAC).<sup>89</sup> Such difference in Court's approach suggests that judicial decision as to choice and employment of appropriate overseeing mechanism is situational and to be made on case to case basis.

### **6.4 Resources problem**

True it is that judiciary does not hold the strings of the public purse, but does it necessarily imply that its decisions must not have any budgetary implications? The answer should be obviously in the negative, particularly when such implications is the desirable means and an essential precondition for due compliance with State's human rights obligation under its basic charter. In re Certification of the Constitution opinion<sup>90</sup> the Constitutional Court of South Africa addressed this issue and held that while adjudications of civil and political rights (which are fundamental rights under many Constitutions) also involved budgetary implications, such implications of socio-economic rights decisions could not be a bar to their justiciability.

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<sup>85</sup> 1996 SCC (4) 37; 1996 SCALE (4)282.

<sup>86</sup> 59 DLR 176.

<sup>87</sup> 52 DLR 413.

<sup>88</sup> 2001 (1) SA 46 (CC).

<sup>89</sup> 2002 (5) SA 721 (CC) (S. Afr.).

<sup>90</sup> 1996 (4) SA 744 (CC) (S. Afr.).

In the Indian context, *Paschim Banga Khet Mazdoor Samity V State of W.B.*<sup>91</sup> suggests that it is not resources-constraint that is solely responsible for non realization of socio-economic rights, at times mismanagement and maladministration may also hinder people's access to available socio-economic benefits. Moreover, the obligation to make 'equitable and effective use' and 'prioritize'<sup>92</sup> the realization of rights in using the available resources exists independent of resources-constraint. Again, 'minimum entitlement approach'<sup>93</sup> suggests that the State has a 'minimum core obligation'<sup>94</sup> to ensure an essential level of realization of the most basic rights through equitable distribution of its available resources.

## **Defining a proper, appropriate and situational judicial role**

### **7.1 Judicial enforcement or judicial implementation**

Judiciary has to appreciate that "enforcement" of socio-economic rights connotes a strategic promotion of such rights by the judiciary. There is no magic in the term 'judicial enforcement'; in the context of socio-economic rights, it essentially implies a process of promotion of such rights, in which process, judiciary has to play a vigilant and catalytic role. Most arguments against judicial enforcement centre round the supposed coercive nature of judicial enforcement, which is, a baseless assumption. In socio-economic rights adjudication, there is an empirical need for shift of judicial approach from enforcement-mindedness to strategic implementation engineering. This paper argues that rights-linked enforcement of socio-economic rights would result in progressive realization of socio-economic rights. Such argument demands that the judiciary should recognize and give full effect to the empirical relevance between the fundamental rights and socio-economic principles.

### **7.2 Defining a proper judicial role: judiciary's 'dual role' as an 'actor' and an 'enforcement mechanism'**

This paper argues that the judiciary has a dual role with regard to the implementation, protection and enforcement of socio-economic rights: first, as an actor in the process of implementation of socio-economic rights and secondly, as an enforcement mechanism of such rights. We have discussed above the proper judicial role as a 'protective element' of socio-economic rights. Such

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<sup>91</sup> 1996 SCC (4) 37; 1996 SCALE (4)282.

<sup>92</sup> Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights.

<sup>93</sup> See Report of the Oslo Symposium on 'Human Development and Human Rights' held on 2-3 October, 1998.

<sup>94</sup> CESCR General Comment no. 3 (1990) on 'The nature of States parties obligations'.

judicial role demands that the judiciary should go beyond the traditional perception of mere 'violation aspect' of rights and embrace the 'protective and promotional aspects' of the socio-economic rights.

Now, there arises a critical policy issue: if such judicial role, popularly termed as 'judicial enforcement of rights' is barred by the Constitution itself for any reason whatsoever, does the judiciary still have --or, is it, legally speaking, capable of having-- a 'protective role'? This paper argues that a focus on the 'promotion aspect' of rights would still involve a supervisory judicial role. We would revert to this issue later with a detailed account of proper judicial role in three respects: firstly, as a contributor to the process of making appropriate governmental policy<sup>95</sup>; secondly, as an overseer of government activities in the process of implementation of those policies; and thirdly, redressing violation of such policies. The third role with regard to violation of rights, however, may be a bit technical. Since the judiciary itself cannot redress the violation it may direct and require the government to set up effective non-judicial or quasi-judicial mechanism<sup>96</sup> as a 'protective element' of socio-economic rights. Arguably, judiciary can legitimately assess the effectiveness of such a mechanism. However, when violation/non-implementation of socio-economic rights constitutes a violation of any fundamental rights, judiciary can legitimately enforce such rights.

To reiterate, rights-linked enforcement of socio-economic principles requires the judiciary to interpret the fundamental rights in the context of their full logical purport and relevance with the socio-economic principles. And in so doing, the judiciary is free to recognize new elements of, and add more contents to, such rights and thus expand their scope and extent. This is, in fact, the true purpose behind the Constitutional provision requiring interpretation of the Constitution, including the fundamental right contained therein, in light of the State policies. The judiciary, therefore, should consistently recognize, uphold and assert the relevance between the fundamental rights and socio-economic principles in the Constitution. In assessing such relevance, judiciary must determine a 'minimum core' level of basic necessities and require the State to ensure it as an integral part of fundamental rights to life.

While enforcing fundamental rights, if the judiciary finds that currently available resources do not permit full realization of any of its linked socio-economic For a

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<sup>95</sup> For a illuminating discussion on the judicial role in making of public policy see 'Democracy, The Courts and The Making of Public Policy', Report of a workshop on 'Courts and the making of public policy', Rhodes House, Oxford, 25-27 June 2006. Available on [www.fljs.org](http://www.fljs.org) (last accessed on 19 March 2011)

<sup>96</sup> National Human Rights Commission may be an instance of such mechanism.

principles, it may devise time-bound broad guidelines for progressive implementation of such principles. On the other hand, if available resources permit full realization of such linked rights, there is no reason why the judiciary should not declare and enforce such linked rights as an element of the broad substantive fundamental rights sought to be enforced. Thus inchoate socio-economic rights would be progressively transformed into 'rights proper' or 'genuine rights'.

### **7.3 Borrowing from India and South Africa: challenge of contextualizing foreign experiences**

Judiciary in Bangladesh must necessarily take into account the South African experience particularly in devising appropriate and effective remedy in socio-economic rights adjudications. Of course, such foreign decisions are not authoritative, but greatly persuasive. Hence it is always open to the members of the Bar to use these foreign decisions as 'informational citations'. Likewise, Indian decisions are also relevant, but all these foreign cases need to be understood in the context of the socio-economic condition of the society in which they arose. It therefore is expected that our judiciary should venture to develop its own "Bangladeshi model" of judicial enforcement of socio-economic rights.

### **8. Conclusion**

This paper advocates for a 'promotional' or 'developmental' judicial role in implementing socio-economic rights, which required the judiciary to recognize, implement and enforce the existing human rights and at the same time, progressively expand the scope and contents and the level of enjoyment of the existing rights. The central thesis of this paper is that the 'rights-linked' or 'rights-relevant' perception of socio-economic rights is the basis of any legitimate judicial role with regard to promotion, protection, implementation and enforcement of socio-economic rights in Bangladesh.

There is probably no escape from the simple conclusion that the socio-economic rights under the constitutions are, in their very nature, incapable of enforcement overnight. Full realization of such rights involves both time and resources factor, but such empirical considerations no way weaken their emphatic enforcement-claim. The judiciary, therefore, should constantly emphasize on, uphold and enforce the 'minimum core obligation' of the State to ensure 'basic necessities' of the people. Fundamentally important is the judicial recognition and enforcement of State's 'obligation of conduct' which is an obligation unqualified by the resources-constraint.

Enforcement of this State obligation demands that the judiciary should be zealous to see that the state has been always working towards, and striving for, realization of the socio-economic rights. This is a positive obligation; its corresponding negative is the obligation not to stop acting, or fail to act, for the realization of these rights, which is indeed a gradual process. This paper concludes that the judiciary as a State machinery shares an obligation to promote welfare of the people and achievement of their fundamental aims. With regard to socio-economic rights, this obligation may be discharged by playing a strategic and situational role in the process of development and realization of such rights. Key conclusion of this paper is that so far the judicial role in enforcement of socio-economic rights is concerned, there is a profound empirical need for shifting judicial focus from 'enforcement-mindedness' to 'implementation engineering'.