

Judicial Enforcement of Socio-Economic Rights in Bangladesh: Lessons from India and South Africa

Tariq Bin Sarwar*

Abstract

Socio-economic rights are fundamental to every human being. These rights are entrenched in the Constitution of Bangladesh, India and South Africa. But the mandate for their judicial enforcement is not visible in all those instruments. In the Constitution of India and Bangladesh, socio-economic rights are placed as unenforceable principles distinct from civil and political rights. On the other hand, these are enumerated as part of enforceable Bill of Rights in the Constitution of South Africa. The current paper visualizes how the Indian and South African practices can facilitate to develop the jurisprudence of judicial enforcement of socio-economic rights in Bangladesh. It is demonstrated that the Supreme Court of India and the Constitutional Court of South Africa have successfully enforced the socio-economic rights. Whereas the Supreme Court of Bangladesh establishes fewer examples vis a vis India and South Africa. The submission of the paper is that the construction of the related constitutional provisions in a wider approach will make the judicial enforcement of the socio-economic rights a common reality in Bangladesh. In doing so, analysis of the Indian and South African cases is made which shows the activism of the judges in enforcing the socio-economic rights by including those within the scope of fundamental rights and by applying the test of reasonableness.

Introduction

The socio-economic rights are entrenched in the Constitution of Bangladesh, India and South Africa like many other modern constitutions. But they are so entrenched with a different constitutional

* Lecturer, Department of Law, Northern University Bangladesh, E-mail: tariqsarwarman@gmail.com

status. Therefore, the present treatise is destined to demonstrate that how the socio-economic rights can be judicially enforced where these rights are expressly mentioned in the Constitution to be not judicially enforceable. In doing so, comparison will be made with other countries' experiences in this regard. The objective is to substantiate the place of such enforcement in Bangladesh and it will reveal that how judicial activism leads to enforcement of socio-economic rights in India and South Africa, which is an end of which judicial review is a means. Besides, judicial approach to the socio-economic rights in Bangladesh will also be discussed.

This treatise seeks to disprove the prevailing notion that socio-economic rights are incapable of judicial enforcement. Hence, it is required to transplant the models of enforcement of socio-economic rights of other jurisdictions into the present system. The paper will demonstrate that the typical objections to the judicial enforcement of socio-economic rights are unfounded.

Socio-Economic Rights: An Overview

Socio-economic rights relate to an individual's social, economic and cultural entitlements (James, 2007: 1). These are the rights which cover the basic needs of human being without which life on earth becomes impossible. A common example of socio-economic rights is right to an adequate standard of living including adequate food, clothing and housing. Dimba (2008) says that "By social and economic rights, I refer to... "the red and green rights", namely, the rights to housing, health care, food, social security, social services, education, and human dignity in conditions of detention, healthy environment, land and security of tenure."

Socio-economic rights have a strong jurisprudential basis. They are part of human rights and often called as second generation human rights. But in every era these were the fundamental necessities of human beings. The socio-economic rights aim at creating an egalitarian society whose citizens are free from the abject physical conditions that had hitherto prevented them from fulfilling their best selves (Balakrishnan, 2009).

Historically, The Second generation rights were introduced in Germany under Bismarck in the late 19th Century (Sachs, 2005: 136). The glorious communist revolution makes clear the way of flourishing the socio-economic rights as part of human rights. After the Second World War, Universal Declaration of Human Rights (1948) and International

Covenant on Economic, Social and Cultural Rights (1948) were adopted. Thus socio-economic rights were recognised in International Law. Other international instruments with strong socio-economic rights dimensions are the Convention on the Elimination of All Forms of Discrimination against Women (1979) and the Convention on the Rights of the Child (1989).

Socio-Economic Rights in the Modern Constitutions

Almost all the written Constitutions have socio-economic rights entrenched in them. But one right in a Constitution may be absent in another Constitution due to country specificity behind their incorporation. States have made selective choices as to which socio-economic rights to protect using their Constitutional apparatus. Constitutionalisation of these rights is influenced by the cultural and political history of the state (James, 2007: 1). Generally, constitutional status of socio-economic rights is not the same *vis a vis* civil and political rights. The distinction often made between socio-economic and civil and political rights, is arbitrary (Wall, 2004: 1). This has the far reaching impact in a country's social and economic development. Mukelani Dimba (2008) says:

“...the third wave of democracy has not... translated to social and economic development of communities... this is largely because focus has tended to be largely on full constitutional protection of civil and political rights as the cornerstone of the democratic order while neglecting or partially entrenching social and economic rights within the constitutional framework.”

Socio-economic rights are, thus, housed in the modern constitutions like Bangladesh, India and South Africa along with the civil and political rights. But the question remains whether these pronouncements on the socio-economic rights are only lip-service or whether these are judicially enforceable human rights (Winkler, 2008: 2).

Status of Socio-Economic Rights in Bangladesh Constitution

Socio-economic rights are entrenched in the part II namely “Fundamental Principles of State Policy”, henceforward FPSP, of the Bangladesh Constitution which is destined to the socialist society envisioned by the framers in the preamble and sets the economic, social goals which the government is required to strive for (Islam, 2003: 52). It is obvious that the principles, primarily being social and economic rights, oblige the

state, amongst other things, to secure a social order for the promotion of welfare of the people.¹

Article 8(2) of the Bangladesh Constitution provides that FPSP shall be fundamental in the governance of the state, shall be guide to interpretation of the Constitution and other laws, shall be applied by the state in the making of laws, shall be the basis of all actions of the state and its citizens but shall not be judicially enforceable meaning “if the state does not or cannot implement these principles the court cannot compel the state to do so.”² It is a peculiar provision which keeps the socio-economic rights away from the purview of judicial enforcement. But at the same time puts the government under an obligation to remain within the periphery of those rights. The above Article portrays the constitutional status of socio-economic rights in Bangladesh which attaches strong values to them.

Meaning of Judicial Enforcement

Generally, judicial enforcement means power of the court to compel any authority or individual to do an act or omission. Under the Constitution, the state is obligated to do something or to refrain from doing something. If the state refrains from doing something which it is obligated to do, for example, does not take legislative or administrative measures, then the Supreme Court can order the state to do that. Whereas if the state makes law or the government takes action which violates the negative obligation of the state, that will also be declared void by the Supreme Court. This is the wide sense of judicial enforcement and such enforcement is done by using the power of judicial review.

In common perception, judicial enforcement takes place in cases when the matter is justiciable. Justiciability is...the ability of an individual to take a case against a state in breach of its obligations. (Wall, 2004: 1). It also means the ability of courts to apply certain law to a certain situation.³ Such Judicial enforcement can be categorized as declaratory enforcement and mandatory enforcement (Choma, 2009: 45).

Another sorting of judicial enforcement in respect of socio-economic rights may be substantive model of enforcement and minimal level of enforcement. ‘Substantive model of enforcement’ is that which gives

¹ *Dr. Mohiudin Farooque vs. Bangladesh*, 49 DLR (AD) 1, p.18.

² *Kudrat-E-Elahi Panir vs. Bangladesh*, 44 DLR (AD) 319, p. 330.

³ The Centre on Housing Rights and Evictions (COHRE). 2007. *The Legal Enforcement of Economic, Social and Cultural Rights in Sri Lanka*. Netherlands: The Centre on Housing Rights and Evictions (COHRE), p.5.

protection directly and substantively to socio-economic rights. Whereas 'Minimal level of enforcement' takes place in a jurisdiction which minimally protects socio-economic rights; the constitution does not identify explicit substantive socio-economic entitlements, but seeks to protect these rights in the due process sphere. (Aolain & McKeever, 2004). Judicial enforcement can also be either Strong or weak (Shankar & Mehta, 2008: 175). Thus, it is understood that judicial enforcement has several aspects which are to be considered by the court when a relevant matter arises.

Judicial Approach to Socio-Economic Rights in Bangladesh

Before going to focus on the Indian and South African Practices, light should be thrown on the judicial approach towards the enforcement of socio-economic rights in Bangladesh so far. At present, role of the Supreme Court of Bangladesh in enforcing socio-economic rights up to now will be examined which is indispensable for identifying the gaps to be filled up with the lessons from India and South Africa.

The first case to be studied is *Kudrat-E-Elahi Panir vs. Bangladesh (1992)*⁴ The High Court Division, henceforward HCD, judge held that though fundamental principles are not enforceable in court but a law which is directly contrary to any of them or which negates such a principle may be declared void in spite of the provision in article 8(2). Thus, it appears that the fundamental principles can be enforced in the sense of declaring a law void on the ground of 'direct inconsistency'. But Mustafa Kamal J observed in the Appellate Division, henceforward AD, it is the law of the Constitution itself that the FPSP are not laws but principles. Therefore to equate principles with laws is to go against the law of the Constitution itself. So other laws cannot be made void on the ground of inconsistency with these principles.⁵ Thus, literal interpretation was taken up while considering the enforcement of FPSP and rights based approach seems to be absent.⁶ Nonetheless, a remarkable point arises on behalf of the appellants, which is to bring FPSP within the

⁴ 44 DLR (AD) 319.

⁵ Above note 4, at para 84-85, p. 346.

⁶ For similar approaches see also *Winifred Rubie vs. Bangladesh* 33 DLR (HCD) 182. *Sheikh Abdus Sabur vs. Returning Officer & others* 41 DLR (AD) 30. *Mosharrif Hossain vs. Bangladesh* 56 DLR (AD) 113. *Aftabuddin vs. Bangladesh* 48 DLR (HCD) 1. It has been seen that though the HCD sometimes stood for the enforcement of the socio-economic rights but the AD remained reluctant in this matter.

scope of Article 7(2) of the Constitution and thus enforce them without violating Article 8(2) of the Constitution.

A successful enforcement is seen in the case of *Professor Nurul Islam vs. Bangladesh* (2000).⁷ The court held that the right to life under Articles 31 and 32 of the Constitution not only means protection of life and limbs necessary for full enjoyment of life but also includes protection of health enshrined in Article 18(1). Right to life being a fundamental right can be enforced by the court to remove any unjustified threat to the health and thus, Article 18(1) is enforced which lays down the obligation of the state to raise the level of nutrition and the improvement of public health by preventing use of contaminated food, drink, etc.⁸ The court issued necessary directions as such prohibiting advertisement of tobacco related products.

Another case in which the Supreme Court stood for socio-economic rights is *Dr. Mohiuddin Farooque vs Bangladesh*⁹ (2003). This is a Public Interest Litigation, henceforward PIL. The court held that it is the constitutional obligation of the government to ensure that the rights of the people under Articles 18 and 32 of the Constitution are implemented in its real spirit to protect the interest of the people. If there is any breach or laches in this respect, such constitutional obligations can be enforced against the government under Article 102 of the Constitution.¹⁰ Article 32 guarantees right to life. This expression 'Life' does not mean merely an elementary life or sub-human life but connotes right to a decent and healthy way of life in a hygienic condition. It also means a qualitative life free from environmental hazards.¹¹ The court, therefore, gave necessary directions to the government to adopt adequate and sufficient measures to control pollution within one year and to ensure that no new industrial units and factories are set up in Bangladesh without first arranging adequate and sufficient measures to control pollution. This is a good example of judicial enforcement of socio-economic rights in Bangladesh.

Recently liberal interpretation can be seen in the case of *Rabiya Bhuiyan, MP vs. LGRD* (2007).¹² This was also a PIL. The court observed that the claim of the appellant is based on Articles 15(a), 18(1), 31 and 32 of the Constitution and as the tube wells are already identified

⁷ 52 DLR (HCD) 413.

⁸ *Id.*, at para 18.

⁹ 55 DLR (HCD) 69.

¹⁰ *Id.*, at para 52, pp. 78-79.

¹¹ *Id.*, at para 53, p. 79.

¹² 59 DLR (AD) 176.

as contaminated with arsenic contents the respondents are under legal duty to completely seal up the contaminated tube wells to save the lives of millions. Md Tafazzul Islam J observed that “...non-compliance with the statutory duties of the respondents to ensure access to safe and potable water constitutes a violation of the right to life as guaranteed by Articles 31 and 32 of the Constitution read together with Articles 15 and 18 of the Constitution.”¹³ In making such observation some cases of Indian jurisdiction were cited. Thus, comparative elements were used in enforcing right to safe water. The role of the court was supervisory in this case.

The abovementioned cases clearly exhibit the attitude of the Supreme Court of Bangladesh towards the enforcement of socio-economic rights. Apart from few cases, the Supreme Court has adopted literal interpretation keeping the socio-economic rights unenforceable according to Article 8(2).

Status of Socio-Economic Rights in the Indian Constitution and Judicial Enforcement of Those Views

The present phase will examine the constitutional status of socio-economic rights in India and the approach of the Indian Judiciary towards their enforcement. Under the Indian Constitution, the enforceable rights are contained in Part III which are civil and political rights. Whereas Part IV of the Constitution contains social, economic and cultural rights called “Directive Principles of State Policy”, henceforward DPSP. The latter is stated to be unenforceable by the courts but they provide guiding principles for the working of the Constitution and include rights such as the right to work, the right to education and equal pay for equal work and so on.

This segment is of particular importance for hoarding well-run machineries apposite for functioning in Bangladesh. The approach of the Indian Supreme Court towards socio-economic rights gets reflected as Usher (2008: 164) says:

“The Indian Supreme Court’s creative transformation of India’s non justiciable Directive Principles of Social Policy into actionable rights - through reading these Directive Principles with the enforceable right to life in Article 21 is well documented. In doing so the Court did not shy from elaborating ambitiously on the content of such actionable rights.”

¹³ *Id.*, at para 24, p. 184.

In many cases the Indian Supreme Court fused socio-economic rights with civil and political rights (Goldstone, 2008: viii) and observed that a lack of financial resources does not excuse a failure to provide adequate services.

The cases which come before the Supreme Court were regarding some specific socio-economic rights like right to livelihood, right to adequate housing, right healthy environment etc. One of the first and most important socio-economic rights cases to go up to the Supreme Court in India was *Olga Tellis v. Bombay Municipal Corporation*,¹⁴ which was filed as PIL on behalf of the pavement dwellers of Bombay city. Among others, the issue came before the court was that whether pavement and slum dwellers' forcible eviction and removal of their hutments under The Bombay Municipal Corporation Act deprives them of their means of livelihood and whether right to life includes right to livelihood.

The Indian Supreme Court elaborated on the right to adequate housing, shelter and livelihood being part of the all-encompassing right to life under Article 21 of the Indian Constitution. The court, for the first time, held that the right to livelihood and shelter is an important component of the right to life.¹⁵ Chandrachud J observed that "...the eviction of the pavement or the slum-dwellers not only means his removal from the house but the destruction of the house itself and the destruction of a dwelling house is the end of all that one holds dear in life."¹⁶

Another case relating to the enforcement of socio-economic rights is *Shantistar Builders v. Narayan Khimatal Tomtame*.¹⁷ The Supreme Court of India takes up a similar interpretation of expanding the scope of the right to life and stated that:

"The right to life...would take within its sweep the right to food, the right to clothing, the right to decent environment and a reasonable accommodation to live in. For the animal, it is the bare protection of the body; for a human being it has to be a suitable accommodation, which would allow him to grow in every aspect-physical, mental and intellectual."¹⁸

¹⁴ (1985) 3 SCC 545.

¹⁵ *Id.*, pp. 571- 573.

¹⁶ *Id.*, p.582. See also *Chameli Singh v. State of UP*, (1996) 2 SCC 549; *Ram Prasad v. Chairman, Bombay Port Trust*, AIR 89, SC 1306. *Mohini Jain v. State of Karnataka* (1992) 3 SCC 666, pp. 679-680. See also *Unni Krishnan, JP and others v. State of AP and Others*(1993) AIR S.C. 2178

¹⁷ (1990) 1 SCC 520.

¹⁸ *Id.*, p. 527.

The Supreme Court gave directions to effectively implement the scheme for constructing dwelling houses for the people of weaker sections.

Another relevant case is *People's Union for Civil Liberties v. Union of India & Ors.*¹⁹ It was held that right to food is included in the right to life which is a fundamental right and capable of judicial enforcement. The court gave certain orders accordingly like famine code is to be implemented within three months. Thus, the court did not enforce right to food directly but did so by including it in the right to life through liberal interpretation.

In the case of *Paschim Banga Khet Mazdoor Samity v. State of West Bengal*,²⁰ concerning the indifferent and callous attitude on the part of the medical authorities at the various State run hospitals in Calcutta in providing treatment for the serious injuries, the court held that Article 21 imposes an obligation on the state to safeguard the right to life of every person. The Government hospitals and the medical officers employed therein are duty bound to extend medical assistance for preserving human life. Failure on the part of a government hospital to provide timely medical treatment to a person in need of such treatment results in violation of his right to life guaranteed under Article 21. The petitioner was awarded compensation as such and other necessary mandatory directions were provided to rule out recurrence of such incidents in future and to ensure immediate medical attention and treatment to persons in real need. This is a clear enforcement of right to medical treatment.

The abovementioned cases clearly exhibit that the Judges have devised mechanisms to bring the socio-economic rights within the field of adjudication by the court. In assessing the role of the Supreme court in this regard Sachs (2005: 137) observed: "...the Indian Supreme Court went on to interpret these rights in a creative way, so using them to give texture and substance to the fundamental civil and political rights directly enforceable in the courts."

Hence, this chapter can be concluded with the assertion that notwithstanding the express unenforceability of the socio-economic rights in the Indian Constitution, "in response to popular demands, activist Indian judges carved out enforceable social and economic rights from the right to life that was judicially enforceable" (Goldstone, 2008:

¹⁹ (1997) 1 SCC 301.

²⁰ (1996) 4 SCC 37.

viii). Thus, the Supreme Court of India leads it towards the enforcement of socio-economic rights successfully.

Status of Socio-Economic Rights in South African Constitution and Judicial Enforcement of Those Views

The South-African post-apartheid Constitution decided to accord socio-economic rights full constitutional recognition with justiciability instead of merely making a list of them. Justice Yacoob observed²¹ that the issue of whether socio-economic rights are justiciable at all in South Africa has been put beyond question by the text of the Constitution. It houses all the civil and political rights and socio-economic rights under the single heading of the 'Bills of Rights', henceforward BOR. Therefore, the South African Constitution of 1996 is regarded as being one of the most progressive in the world, in particular due to its far reaching commitment to socio-economic rights.²² The inclusion of socio-economic rights as justiciable rights in a national Constitution is a relatively recent development, and the degree to which this was done in the South African Constitution is certainly unique.

There are constitutional provisions that allow the South African courts to play the role of arbiter in socio-economic cases (Jaichand, 2006) and their protection is constitutionally ensured.²³ There are different constitutional obligations on the state regarding socio-economic rights like obligation to respect, obligation to protect and obligation to fulfill those rights.²⁴ Hence, therefore, in the South African jurisdiction, the question is therefore not whether socio-economic rights are justiciable under the Constitution, but how to enforce them in a given case.²⁵

After observing the constitutional status of the socio-economic rights now we need to consider the judicial enforcement of those rights in South Africa. It is observed that the court has developed a mixed form of review that permits selective deployment of strong-form review and direct remedies where the government has failed to adequately respond to an

²¹ *Government of the Republic of South Africa and others v Grootboom and Others*, 2000(11) BCLR 1169 (CC), at para 20.

²² See Inga Winkler. 2008. "Judicial Enforcement of the Human Right to Water-Case Law from South Africa, Argentina and India", Issue. 1, *Law, Social Justice & Global Development Journal (LGD)*, p. 4.

²³ Section 38 of the Constitution of South Africa empowers the Court to grant appropriate relief for the infringement of any right entrenched in the Bill of Rights.

²⁴ See Section 7(2) of the Constitution of South Africa.

²⁵ Above note 45.

initial application of a weak remedy or where the government has demonstrated bad faith (Ray, 2007). There is a Constitutional Court²⁶ in South Africa which deals with only constitutional matters and there are many precedents which substantiate the judicial enforcement of socio-economic rights. Thus, South Africa has taken a leading role in the national judicial enforcement of socio-economic rights (Winkler, 2008: 4).

In the case of *Government of the Republic of South Africa and Others v. Grootboom and Others*²⁷ concerning shelter problem of many people, we find that the doctrine of reasonableness provided by the Constitution was interpreted by the Constitutional Court widely. It was observed that the principle of reasonableness ought to be applied while determining the measures adopted by the government relating to socio-economic rights.²⁸ Yacoob J observed that “I stress, however, that...these are rights, and the Constitution obliges the state to give effect to them. This is an obligation that courts can, and in appropriate circumstances, must enforce.”²⁹

The analysis of the Grootboom judgment reveals that the bench did not confine itself to the traditional notion of ‘judicial pedanticism’. It comes out of that barrier to give a new line to the meaning of judicial duty. Besides, considerable weight was attached to the value of international law in interpreting Section 26 of the Constitution. The concept of minimum core obligation was developed to describe the minimum expected of a state in order to comply with its obligation under the ICESCR. It is the floor beneath which the conduct of the state must not drop if there is to be compliance with the obligation. Each right has a “minimum essential level” that must be satisfied by the states parties.³⁰ The order of the court requires the state to act to meet the obligation imposed upon it by section 26(2) of the Constitution. This includes the obligation to devise, fund, implement and supervise measures to provide relief to those in desperate need.³¹ Thus, the court enforced the right by a declaratory order.³²

²⁶ The Constitutional Court was established in 1994 after the country’s first democratic election and was confirmed as the highest court in the land in respect of all constitutional matters in the Final Constitution.

²⁷ Above note 50.

²⁸ Above note 52, at para 41.

²⁹ *Id.*, at para 94.

³⁰ *Id.*, at para 31.

³¹ *Id.*, at para 96.

³² See also *Residents of Bon Vista Mansions vs. Southern Metropolitan Local Council*, 2002 6 BCLR 625 (W). In this case Budlender A. J. held that the

After less than a year of the Grootboom case judgment, the national government immediately established a cabinet committee and provides 300 million South African rand to it for emergency relief to be given to the flood-stricken homeless families which in the opinion of Justice Richard Goldstone would not have been taken prior to the decision in Grootboom (Goldstone, 2008: x). The important legacy of Grootboom is that “it demonstrated that the court was willing to direct the government to enforce a socio-economic right even in the face of budgetary constraints” (Devenish, 1999: 368).

Another landmark judgment in enforcing socio-economic rights is *Minister of Health and others vs. Treatment Action Campaign and others*.³³ The issue of the case was the right of everyone to have access to public health care services and the right of children to be afforded special protection.³⁴ Those rights are enumerated in Sections 27 and 28 of the South African Constitution. Another issue which arose was whether the government is constitutionally obliged to plan and implement an effective, comprehensive and progressive program for the prevention of mother-to-child transmission of HIV throughout the country.³⁵

In its judgment the High Court made an order which states that the respondents are obliged to make Nevirapine available to pregnant women with HIV who give birth in the public health sector and to their babies in public health facilities and the present program does not extend to that. The Constitutional Court observed that³⁶ the state is obliged to take reasonable measures progressively to eliminate or reduce the large areas of severe deprivation that afflict the society. As the BOR indicates, their function in respect of socio-economic rights is directed towards ensuring that legislative and other measures taken by the state are reasonable. The court found that the state had not met its constitutional obligations, and ordered that it should remove the restrictions preventing Nevirapine from being made available at public hospitals and clinics. The state was also ordered to take reasonable measures to extend testing and counselling throughout the public health sector to facilitate the use of Nevirapine.

disconnection of an existing water supply amounted to a prima facie transgression of the state’s duty to respect the right of existing access to water.

³³ 2002 (10) BCLR 1033 (CC). See also *Khosa and others vs. The Minister of Social Development and others* 2002 (8) BCLR 771 (CC). *Mazibuko and others v City of Johannesburg and Others* (2008) 4 All SA 471 (W).

³⁴ *Id.*, at para 4.

³⁵ *Id.*, at para 5.

³⁶ *Id.*, at para 36.

Thus, direct enforcement of right to medical treatment is made by the courts.

From the abovementioned cases judicial enforcement of socio-economic rights in South Africa has become obvious. If government's adopted measures are unreasonable, the courts require that they be reviewed so as to meet the constitutional standard of reasonableness.³⁷ Likewise, the obligation of progressive realization does not give the state any relaxation to adopt measures and not also unlimited time. It necessitates that the state has to strive constantly to progressively realize those rights and keep analyzing their policies until such realization.

Objections to Judicial Enforcement of Socio-Economic Rights

After considering the practices of the judiciary of Bangladesh, India and South Africa regarding the enforcement of socio-economic rights, it is worth mentioning the objections which are usually raised against such enforcement.

Traditionally, it is said that civil and political rights imposes negative obligations upon the state to refrain from interfering with the exercise of the rights of the citizens.³⁸ Whereas socio-economic rights impose positive obligations of which fulfillment is subject to certain requirements. But the Constitutional Court of South Africa observed that the state bears a duty to refrain from interfering with social and economic rights just as it does with civil and political rights.³⁹ Against the argument it is said that "civil and political rights can require states to act...economic, social and cultural rights may just as well require states to refrain from activity" (Ewing, 1999: 7). For example: In the case of *Olga Tellis v Bombay Municipal Corporation*⁴⁰, the right to housing was defined in terms of freedom from state interference. Thus, the courts are capable of implementing economic, social and cultural rights in a negative manner (Wall, 2004: 6).

Judicial enforcement of socio-economic rights is contrary to the doctrine of separation of powers and because of this doctrine the judiciary lacks capacity to enforce socio-economic rights which are the concern of the executive. It is a supposedly strong objection. It was observed by the South African Court that all arms of government should

³⁷ Above note 67, at para 67.

³⁸ *Id.*, at para 47.

³⁹ *Id.*

⁴⁰ Above note 34.

be sensitive to and respect the doctrine of separation of powers. But this does not mean that courts cannot or should not make orders that have an impact on policy.⁴¹ If state policy is inconsistent with the Constitution, the courts are obliged to say so and in so far as that constitutes an intrusion into the domain of the executive, it is an intrusion that is mandated by the Constitution itself (Usher, 2008: 166).

Inadequacy of resources is, too often, presented as an objection to judicial enforcement of socio-economic rights which is well answered. The government of India, for example, could not command resources that would guarantee five hundred million “a standard of living adequate for the health and well being of a citizen and his family”, however ironically just twelve years later the courts of India implemented such a right in the *Olga Tellis v Bombay Municipal Corporation* decision⁴² (Cranston, 1973: 67). Thus, the objections to the judicial enforcement of socio-economic rights are mainly political and unfounded thereby.

Lessons from India and South Africa in Enforcing Socio-Economic Rights in Bangladesh

Having gone by the major parts of the paper now it is crucial to put focus on the elements which can be gathered from comparative study and analysis. This remains the principal objective of the arduous task of this research. Any discussion of judicial enforcement of socio-economic rights must address some broad questions amongst which the most important in the real world is how well do comparative adjudicative models secure such rights (Usher, 2008: 154). At this phase, lessons from Indian and South African successes in judicial enforcement of socio-economic rights will be highlighted which can be applied in Bangladesh jurisdiction.

Firstly, it can be observed that Indian courts’ approach was heavily supervisory. The court used to supervise ministry and authority had to report to the court from time to time, following which the court would issue new directions. Again the court itself monitored implementation, leaving open the window for petitioners to come back to court if the directives were not implemented. (Shankar *et al*, 2008: 174).

Likewise, application of a more progressive method of interpretation (Choma, 2009: 42) of the constitutional provisions is necessary for judicial enforcement of the socio-economic rights. It is seen extensively

⁴¹ *Id.*, at para 98.

⁴² Above note 84.

in the Indian cases of including the socio-economic rights within the wide scope of right to life. In some cases, the Supreme Court of Bangladesh has followed this style effectively. Such style seems to be the most efficacious lesson which can be earned from this entire piece of work. It is also the most realistic and workable means, being unquestionable, in enforcing socio-economic rights.

The South African reasonableness model is a flexible approach and if it is taken to the scope of the rights entitlement, courts should then consider it their duty to ensure that their orders are carried through using all appropriate remedies at their disposal (Usher, 2008: 169). The court should not only direct what the state should do or ought to have done in respect of implementing the socio-economic rights rather it should determine what measures the state has adopted and whether in adopting such measures the state has acted reasonably to achieve the progressive realization of those rights.⁴³ This seems to be a more progressive approach of the court to be invoked.

South African Constitutional Court considered the international obligations in enforcing socio-economic rights very seriously. The court reiterates that the state has the obligation to respect, protect and fulfill the rights enshrined in the international treaties as a state party to most international human rights treaties, including the ICESCR.

Litigation has a significant role in securing socio-economic rights⁴⁴ by which many issues relating to the government policies become revealed and can be brought under judicial scrutiny which otherwise would not have been possible. Litigation may be resorted to by challenging a particular legislation being inconsistent with the Constitution⁴⁵ or by challenging a government action. The jurisprudence of PIL is an excellent development in this field of litigation. This has developed to a remarkable extent in the Indian jurisdiction and played consistent role in making way to the judicial enforcement of socio-economic rights. In an extensive body of litigations in India and South Africa the apex court has used the power of judicial review to uphold the all inclusive FRs and thus, enforced socio-economic rights.

Therefore, stock of lessons from India and South Africa regarding judicial enforcement of socio-economic rights appears to be efficacious which can be applied in Bangladesh.

⁴³ Above note 83, at para 51.

⁴⁴ *Id.*, at para 8.

⁴⁵ *Id.*, at para 73.

Conclusion

Keeping socio-economic rights unenforceable by the court in the Constitution of Bangladesh, the framers of it, in fact, denied the potential utility of those rights. In a country like Bangladesh where democracy has not been deeply rooted yet, without the capacity of being judicially enforced, those remained hardly as rights rather some black letters. Nonetheless, in the present paper it is demonstrated that those socio-economic rights are capable of judicial enforcement.

The paper can be concluded with the assertion that the government cannot take the socio-economic rights lightly rather they have to take it very seriously and have to demonstrate that they are doing everything necessary within available resources to implement those rights. Such actions of the government must pass the test of reasonableness. Socio-economic rights may not be realized overnight but hardcore efforts must be made to realize them progressively. It cannot be that the government be relaxed and do nothing and when the matter comes before the court, they say socio-economic rights are not judicially enforceable. It has to be kept in mind that such provision can only be invoked when preceding provisions are complied with and it might be the intention of the framers of the Constitution behind the arrangement of Article 8(2) in such a way. The word 'shall' is used throughout the whole Article 8(2). So, if the last part be mandatory in nature, then the other parts must also be mandatory which the state cannot evade and if does so, the Supreme Court shall come into play for defending the constitution from infringement. It is also true that human dignity, social justice, freedom and equality are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in the Constitution. So, therefore, it is necessary to take up searching judicial review by which socio-economic rights can be converted into enforceable fundamental right using right to life.

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