

A Review on Judicial Activism in Enforcing Economic, Social and Cultural Rights

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Abstract

In a modern state, judicial activism in matters relating to economic, social and cultural (ESC) rights plays a pivotal role in the substantiation of these rights. The precise approach that ought to be adopted by the judiciary remains debatable and highly contentious, as social and economical injustices are still prevalent in the society. An important debate has therefore emerged on what role judges ought to play in enforcing ESC rights; how they should intervene in the political and policy making process in order to adjudicate on ESC rights issues. This paper attempts to examine the general criticisms of the justiciability of ESC rights, and the desirability of judicial activism in the fulfillment of such rights. Furthermore, the paper points out the limits or constraints of judicial activism, then focuses on the concepts of 'queue-jumping' and 'trade-offs' and their relationship to both socio-economic policymaking and resource allocation. In conclusion, the paper points out two approaches, 'reasonableness' and 'non-discriminatory' approaches for ensuring distributive justice through judicial intervention, thereby defining the extent to which judicial activism is appropriate in this sphere.

1. Introduction

It has historically been argued and traditionally accepted that socioeconomic rights are non-justiciable¹ i.e. not enforceable in courts of law. Over the last decade, many have argued for more attention to civil and political rights than to economic, social and cultural (ESC) rights. Many scholars have contested the ESC rights, as rights belonging to a different category requiring more of a progressive realization over time

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¹ Justiciability 'refers to the ability to judicially determine whether or not a person's right has been violated or whether the state has failed to meet a constitutionally recognized obligation to respect, protect or fulfill a person's right.' See, C Scott and P Macklem, 'Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution' 141 (1992) *University of Pennsylvania Law Review*, at 17

and positive actions by the state. Views on the nature and implementation of ESC rights have long been subject to substantial ideological influence. In general, the communist countries and the Third World have traditionally placed a heavy emphasis on the importance of realizing ESC rights, while the West has given priority to respect for the classical freedoms.² Since 1981, the US has maintained that ESC rights should be seen not as rights, but as goals of economic and social policy.³ Contemporary human rights jurisprudence suggests parity between civil and political rights and ESC rights, and describes the two sets of rights as 'universal, indivisible and interdependent and interrelated.'⁴ Despite this position, there remains deep and often debilitating disagreement over the proper status of ESC rights and the nature of States' obligations towards their fulfillment.⁵ At one end of the spectrum lies the view that while socioeconomic rights may have value as moral statements of a nation's ideals, they should not be viewed as a legal declaration of enforceable rights and, the proper enforcement of socioeconomic rights requires significant government resources that can only be adequately assessed and balanced by the legislation. Judges, according to this argument, lack the political legitimacy and constitutional competence to decide such matters.⁶ At the other end of the spectrum, it is contended that ESC rights are more important than civil and political rights, as no hungry, illiterate or homeless individual cares much for his right to vote or freedom of association.

² For a discussion of the various approaches, see A. Cassese, *International Law in a Divided World*, Oxford:Oxford University Press, (2nd Ed., 2005)

³ Philip Alston and Gerard Quinn, 'The Nature and Scope of the State Parties' Obligation under the International Covenant on Economic, Social and Cultural Rights', *Human Rights Quarterly*, Vol. 9, No.2, May 1987, pp.156-229.

⁴ See UN General Assembly, Vienna Declaration and Programme of Action, 12 July 1993, A/CONF.157/23, para.5.

The paragraph in its entirety reads: 'All human rights are universal, indivisible and interdependent and interrelated.'

The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.'

⁵ Henry J. Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals: Text and Material*, Oxford University Press (3rd ed., 2008), at 263

⁶ Eric, C. Christiansen, 'Adjudicating Non-justiciable Rights: Socio-Economic Rights and the South African Constitutional Court', *Colombia Human Rights Law Review*, Vol. 38, No. 2, 2007.

In recent years, ESC rights are seen as basic human rights and the debate concerning the implementation of these rights has developed rapidly over the last few years. The realization of ESC rights, which was of policy nature, is now considered as a duty to be fulfilled by the state in collaboration with national judicial institutions.

This paper proceeds on the premise that states have an inescapable obligation to protect, respect and promote ESC rights. This obligation is to be fulfilled within the context of scarce resources, and therefore within a framework of progressive realization. An important debate has therefore emerged on what role judges ought to play in enforcing ESC rights. In this paper, I seek to examine the general criticism of the justiciability of ESC rights, and the desirability of judicial activism in the fulfillment of such rights. The paper, in the context of Bangladesh, then, focuses on some other legal systems, such as, South Africa and Colombia to demonstrate that courts are capable of identifying the relevant legal standards to apply in cases concerning alleged violation of socio-economic rights. An analysis of legal systems of countries like India, Sri Lanka indicates that courts have recognized these rights by implication and through a process of interpretation. Moreover, the paper also points out some limits or constraints of judicial activism in respect of ESC rights issues. In conclusion, the paper explains some approaches for ensuring distributive justice through judicial intervention, thereby defining the extent to which judicial activism is appropriate in this sphere.

2. States' Obligations towards ESC Rights

A clear understanding of the State Parties' obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR) and General Comments of the Committee on Economic, Social and Cultural Rights (CESCR) serve to destroy some misperceptions which in past served to undermine the necessity of these rights. Two provisions from article 2(1) of the Covenant, "progressive realization" and the "maximum of available resources" are often seen as being too vague provisions towards the fulfillment of ESC rights⁷. The

⁷ The International Covenant on Economic, Social and Cultural Rights, GA Res. 2200A (XXI), 21 UN GAOR Supp. (No.16) at 49, UN Doc A/6316 (1966) Article 2 reads: 'Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to *achieving progressively* (emphasis

term progressive realization indicates the fact that full realization of all ESC rights will generally not be able to be achieved within a short period of time.⁸ But, in the General Comment no. 3, the Committee on Economic, Social and Cultural Rights (hereinafter mentioned as CESCR) had qualified the interpretation of that phrase by indicating that states have first to show that they have started 'to take steps' and they move as 'expeditiously and effectively as possible' towards the goal of full realization of ESC rights.⁹ Steps should include 'all appropriate means, including particularly the adoption of legislative measures.'¹⁰ However, it was contended that the adoption of legislative measures is by no means exhaustive. Other measures considered appropriate in this regard include administrative, financial, educational and social measures. Thus, while full realization may be achieved progressively, steps must be taken immediately and such steps should be deliberate, concrete and targeted towards meeting the obligations recognized in the Covenant.¹¹

The phrase 'maximum of available resources' as used in article 2(1) of the Covenant has sometimes been interpreted erroneously to imply that states with very limited resources have no obligation under the Covenant. All countries, however, have at least some 'available resources', even if severely limited in comparison with other countries and are obliged to respect ESC rights regardless of their level of economic development.¹² However, the governments can decide in which rights realization it will put the available resources first. In 1986, some experts in international law adopted the Limburg Principle¹³ which specify that, "the obligation of progressive achievement exists

added) the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.'

⁸ Michael Windfuhr, 'Budgeting ESC Rights- A Useful Concept for Poverty Oriented Development Co-operation: a Pre-study for the Church Development Studies', p.8, viewed at <www.Equalinrights.org/Rights/windfuhr_background_study.doc>

⁹ UN Committee on Economic, Social and Economic Rights (CESCR), *General Comment No. 3 (1990)*, UN Doc E/1991/23, Annex III, Para. 2.

¹⁰ Above note 7, Art. 2 (1)

¹¹ Above note 9, Para 9

¹² Virginia A. Leary, 'The Right to Health in International Human Rights Law', 1 *Health and Human Rights*, 1994, pp. 24-56.

¹³ Limburg Principle on the Implementation of the International Covenant on Economic, Social and Cultural Rights as adopted at a meeting convened by the International Commission of Jurists, Faculty of Law, University of Limburg and the Urban Morgan Institute of Human Rights, University of Cincinnati in 1986. The Limburg Principle have been reproduced in *Human Rights Quarterly*, Vol. 9, No. 2 pp. 122-135 and as UN DOC. E/CN 4/1987/17.

independently of the increase in resource; it requires effective use of resources available".¹⁴ The Principle also asserts that "resources available" refers to "both the resources within a State and those available from the international community through international co-operation and assistance."¹⁵ Thus the State parties are obliged to ensure respect for minimum subsistence rights for all. Also, in 1990, the Committee viewed that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Similarly, the Committee underscores that even in times of severe resource constraints the vulnerable members of society can and indeed must be protected by the adoption of relatively low cost targeted programs.¹⁶

It is evident from Article 2 of the Covenant that State parties are obliged to give effects to the ESC rights by all appropriate means. In this respect, the CESCR, in *General Comment no. 9* stated that the Covenant norms must be recognized in appropriate ways within the domestic legal order, appropriate means of redress of remedies must be available to any aggrieved person or groups and appropriate means of government accountability must be put in place.¹⁷ As to the domestic application of the Covenant, the Committee recommended States to follow two principles. The first is that, states should modify the domestic legal order as necessary in order to give effect to their treaty obligation. The second principle is that states should ensure everyone the right to an effective remedy by competent national tribunals for violation of their rights.¹⁸

This General Comment thus indicates the types of measures that ought to be adopted by States to bring about the progressive realization of these rights. However, the question remains as to whether such measures should include judicial remedies for the enforcement of ESC rights, particularly where it is alleged that the state has failed to fulfill its obligations through non-judicial means.

¹⁴ See *ibid*, Article 23.

¹⁵ See *ibid*, Article 26.

¹⁶ See *Supra* Note 9, Para.10

¹⁷ General Comment No. 9 on Domestic Application of the Covenant was adopted at the 19th session of CESCR in 1998. See UN DOC.E/1998/24.

¹⁸ See *ibid*, Para 8

3. The Justiciability of ESC Rights

Justiciability refers to the 'ability to judicially determine whether or not a person's right has been violated or whether the state has failed to meet a constitutionally recognized obligation to respect, protect or fulfill a person's right'.¹⁹ This brings us to the question whether ESC rights should be vindicated within the framework of progressive realization or be enforceable in the courts.

The International Covenant on Civil and Political Rights (ICCPR)²⁰ in Article 2(3) (b) specifically requires States to develop the possibilities of judicial remedies for violation of relevant rights, whereas no such provision is found in the ICESCR. Nevertheless, in recent years a steadily increasing number of countries have chosen to include socioeconomic rights in their constitutions with varying levels of enforcement. South Africa is exceptional for its comprehensive list of enumerated enforceable social rights which include right to adequate housing, health care, food, water, social security and basic education.²¹ Colombia entrenched socio-economic rights in its 1991 Constitution and, since then, the Constitutional Court has begun to develop these rights in an imaginative way. In countries where there is no explicit constitutional provisions of socioeconomic rights such as India, Sri Lanka and Bangladesh, courts have recognized these rights by implication and through a process of interpretation. The trend has now been to pronounce that the debate is over, and that social and economic rights have been proven to be justiciable.

A. Criticisms of the Justiciability of ESC Rights

The question of what rights or components of rights should be subject to adjudication and remedy by courts or other bodies raises critical questions about how governments are to be made accountable to human rights norms. The role of the courts must be understood with changing understanding of fundamental rights and response to new challenges

¹⁹ C Scott and P Macklem, 'Constitutional Ropes of Sand or Justiciable Guarantees: Social Rights in a New South African Constitution' 141 *University of Pennsylvania Law Review*, 1992, pp. 1-51, at 17

²⁰ See International Covenant on Civil and Political Rights, General Assembly res. 2200A (XXI), 21 UN GAOR Supp (No. 16) at 52, UN Doc. A/6316 (1966), Article 2.

²¹ Each of these rights is enumerated in the 1996 South Africa Constitution. For the full text of these rights provision see Part II.B.3.b.

and problems in relation to good governance and human rights.²² If the judiciary is not allowed to interfere with government's choices of social and economic policy and resource allocation, it is likely to mean that there will be nowhere for the aggrieved to go for a hearing in relation to violations of these rights and that no institution will hold governments accountable for violating them. Denying access to any effective remedy when these rights are violated, however attacks the central place accorded to rights holders as the subjects of rights. This is why a process for hearing and adjudicating claims is generally seen as central to ensuring meaningful accountability to human rights norms.²³ Questions about the role of courts in relation to socioeconomic rights need to be framed within a broader commitment to the core human rights values.

While the arguments criticizing the characteristics of socio-economic rights have withered, a more persistent debate about social rights adjudication has come forward. The most recurrent of such arguments are: i) the propensity for ESC rights adjudication to undermine the democratic process, ii) the lack of institutional capacity to deal with socio-economic rights violations, and iii) budgetary limitations.

(i) *The Legitimacy Concern*

It is argued that it is not the role of courts to deal with social and economic problems and that to do so would be an inappropriate use of judicial powers. By giving courts the power to enforce these rights, the separation of power within the state is threatened and it can result in judicial dictatorship.²⁴ In most countries, judges are appointed to the bench; as unelected officers purportedly outside the democratic process, judges should not adjudicate on issues pertaining to the allocation of

²²A. Nolan, B. Porter, M. Langford, 'The Justiciability of Social and Economic Rights: An Updated Appraisal', *Centre for Human Rights and Global Justice Working Paper*, Nov 15, 2007.

²³ Michael J. Dennis & David P. Stewart, 'Justiciability of Economic, Social and Cultural Rights: Should There be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, Health?', 98 *American Journal of International Law*, 2004, 462, at 467.

²⁴ E Wiles, 'Aspirational Principles or Enforceable Rights? The Future for Socio- economic Rights in National Law' 22 *American University International Law Review*, 2006-7, pp. 35-42

scarce resources, which is the 'democratic majority's moral right'.²⁵ Therefore '[j]udges are not responsible to the electorate in the sense that the elected governments are ... they should not perform a function where the allocation of state resources to targeted groups is decided'.²⁶ If this were to occur, the judiciary would be usurping the role of the legislator and with all the power concentrated within one branch of the government 'democracy would be under serious threat'.²⁷

This above criticism can be rejected by arguing that courts are not being asked to make law or policy but review it against a set of criteria, in this case human rights.²⁸ The judiciary remains a powerful 'counter-majoritarian' mechanism through which checks and balances could be imposed on the legislature and executive. Thus, even if one is to concede that the judiciary ought to play only a limited role in the vindication of ESC rights, there seems to be little reason to deny the constitutionalization of ESC rights altogether.²⁹ As Fabre argues, the government may be put under weaker constitutional constraints compelling the fulfillment of minimum obligations, while the judiciary may ensure that the government does indeed fulfill such obligations.³⁰

(ii) *The Competency Concern*

It is argued that that judges are not competent enough to decide on matters of economic development, because 'they do not have adequate training and the information gathering tools that are required to decide whether funds have been spent the way they should have and whether a particular individual got the resources the constitution entitles him to have'.³¹ Critics argue that many of ESC cases require extensive review of social programs created from vague laws, and such complex cases

²⁵ Cecile Fabre, 'Constitutionalising Social Rights', 6 *Journal of Political Philosophy*, 1998, 263, at 280

²⁶ G Erasmus, 'Socio-Economic Rights and their Implementation: The Impact of Domestic and International Instruments' 32, *International Journal of Legal Information*, 2004, pp. 243-252.

²⁷ N Jheelan, 'The Enforceability of Socio-Economic Rights' (2007) *European Human Rights Law Review*, Issue 2, pp. 146-157

²⁸ I E Koch, 'The Justiciability of Indivisible Rights' (2003), 72 *Nordic Journal of International Law*, pp. 3-39

²⁹ Fabre, *above note 25*, at 283

³⁰ *Ibid*

³¹ Fabre, *above note 25*, at 281

are beyond the competency of the courts.³² Moreover, judges are given a short time to resolve the issue, have little discretion to research beyond the facts presented to them, and may have little experiences in the area in which the dispute arose. Similarly, Neier contends that since courts do not possess the requisite expertise to adjudicate questions of resource allocation, it is highly inappropriate for them to intervene in ESC rights issues.³³

The arguments that adjudication of socio-economic rights is too complex for members of the judiciary are exaggerated. In fact, judges 'are trained directly to be able to analyze and evaluate many different types of legal cases involving an extensive amount of complex evidence.'³⁴ Thus, despite the relative vagueness of the principles and the complex social situations in which disputes over socio-economic rights arise, a properly trained judiciary should possess the requisite capability to review and adjudicate the matter. This is particularly evident in South Africa where the Constitutional Court insisted on the interdependence between social, economic, political and civil rights in different occasions.³⁵

(ii) *Budgetary Constraint*

It is often argued that even if a violation of a socio-economic right was to be heard before the courts, any decision would still be unenforceable because of severe budget restraints. This argument is not a powerful motivator to prevent the enforcement of socio-economic rights. Some socio-economic rights can be upheld by the courts without any severe budgetary impact. As noted in Audrey Chapman's article, there are numerous ways that a socio-economic right can be violated and remedied without forcing a state to establish a new social program.³⁶

³² Dennis M. Davis, 'The Case Against the Inclusion of Socio-Economic Demands in a Bill of rights Except as Directive Principles', 8 *South African Journal of Human Rights*, 1992, at 475

³³ Aryeh Neier, 'Social and Economic Rights: A Critique', 13/2 *Human Rights Brief* (2006), at 2.

³⁴ E Wiles 'Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights in National Law' 22 *American University International Law Review*, 2006-7, pp. 35- 42.

³⁵ Eric, C. Christiansen, 'Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court', 38 *Columbia Human Right Law Review*, 2007, at 321.

³⁶ A Chapman, 'A "Violations Approach" for Monitoring the International Covenant on Economic Social and Cultural Rights' 18 *Human Rights Quarterly*, 1996 at 23

The role of the courts should not be brushed aside simply because there are budgetary considerations. Every single case has budgetary considerations. In *Schachter v. Canada*³⁷, the Supreme Court of Canada concluded that '[a]ny remedy granted by a court will have some budgetary repercussions, whether be a saving of money or an expedition of money.' In civil and political rights adjudication, courts often impose remedies that can have very broad repercussions, including budgetary repercussions. The Supreme Court of Canada in its *Askov*³⁸ decision deals with the right to fair trial; which is a civil and political right. In that decision, the Court ruled that the state must hold criminal trials in a more timely fashion. However, the court never ruled how the government must meet this requirement, ultimate power over budgetary consideration and implementation was left to the executive. This effect did not impede the decision making or make the remedy unenforceable. A similar approach could be adopted with ESC rights also.

In view of this ongoing debate, it seems obvious that the traditional objections to the justiciability of ESC rights, though still relevant and somewhat compelling, have begun to wane under the pressure of recent progressive jurisprudence on the matter. As will be demonstrated in the next section, courts around the world including the Supreme Court of Bangladesh have begun to adjudicate ESC rights cases while still being aware of budgetary considerations and still adhering to the separation of powers principles.

4. ESC Rights in the Context of Bangladesh

The precise position in Bangladesh on the justiciability of ESC rights is not quietly ascertainable from the provisions of the Constitution. Most ESC rights find some articulation in the Fundamental Principles of State Policy contained in Part II of the Constitution.³⁹ For example, Article 19 refers to the State's obligation to ensure equitable distribution of wealth among citizens and equality of opportunity to all citizens.⁴⁰ Similarly, Article 15 requires the State to secure the basic necessities of life including food, clothing, shelter, education and medical care.⁴¹ Hence, the State's responsibility to vindicate ESC rights is rather

³⁷ [1992] 2 SCR 679, [63]

³⁸ R. v. Askov [1990] 2 SCR 1199

³⁹ The Constitution of the People's Republic of Bangladesh, Part II

⁴⁰ The Constitution of the People's Republic of Bangladesh, Article 19

⁴¹ The Constitution of the People's Republic of Bangladesh, Article 15

unambiguously acknowledged by these provisions. However, the question of justiciability is addressed in Article 8(2) of the Constitution. The Article explicitly states that the principles set out in Part II of the Constitution are not judicially enforceable.⁴²

Thus, no case purely alleging a violation of any fundamental principle can be judicially enforced by the courts. While fundamental principles of state policy have been referred to, and relied on in cases such as *Kudrat-E-Elahi Panir and Others v Bangladesh*,⁴³ these principles have not been officially accepted as justiciable. In the above mentioned case, Ordinance No. XXXVII of 1991 which abolished the elected *Upzilla Parishads* was challenged by some chairmen of dissolved *Upzilla Parishads* on the ground that the Ordinance was inconsistent with Articles 9 and 11 (containing fundamental principles) of the Constitution,⁴⁴ and, therefore, the Ordinance becomes void by the operation of Article 7(2).⁴⁵

In the judgment, Shahabuddin Ahmed CJ held that Articles 9 and 11 being fundamental principles of state policy are not judicially enforceable. If the State cannot implement these principles the Court cannot compel the state to do so and other principles also stand on the equal footing.⁴⁶ The Court also mentioned that FPSPs are not laws but principles, and Article 7(2) cannot be interpreted to say that if any other law is inconsistent with the fundamental principles then that law to the extent of the inconsistency shall be void.⁴⁷

Despite the 'non-justiciable status' granted to fundamental principles in *Kudrat-E-Elahi*, the Supreme Court of Bangladesh, over the years has entertained contentious matters of ESC rights by interpreting and

⁴² Article 8(2) reads as follows: The principles set out in this Part shall be fundamental to the governance of Bangladesh, shall be applied by the state in making of laws, shall be a guide to the interpretation of the constitution and of the other laws of Bangladesh, and shall form the basis of the work of the state and of its citizens, but shall not be judicially enforceable.

⁴³ *Kudrat-E-Elahi Panir and Others v Bangladesh* 44 DLR (AD)(1992) 319

⁴⁴ Article 9 obliges the State to encourage local government institutions composed of representatives of the area concerned with special representation given to peasants, workers and women. Article 11 states that State shall ensure effective participation of people through their 'elected representatives' in administration at all level.

⁴⁵ Article 7(2) deals with the supremacy of the Constitution and provides that 'if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void.'

⁴⁶ *Kudrat-E-Elahi Panir and Others v Bangladesh* 44 DLR (AD)(1992) 319, Para 22

⁴⁷ *Ibid*, Para 84 and 85

expanding the scope of Fundamental Rights in the Constitution. For example, in *Ain O Shalish Kendra & others v Government of Bangladesh*,⁴⁸ an order of the Government to evict slum dwellers of Dhaka city without prior notice and alternative rehabilitation scheme was challenged on ground of being in violation of their fundamental right to life which includes right to acquire livelihood. The Supreme Court of Bangladesh referring to the *Olga Tellis*⁴⁹ decision of the Indian Supreme Court held that the State must direct its policy towards ensuring the provision of basic necessities of life including shelter, a directive principle enshrined in Article 15 of the Constitution. While such directive principles are not judicially enforceable, the Court held that the right to life included the right not to be deprived of a livelihood and shelter. The Court ordered the government to develop pilot projects or guidelines for the resettlement of slum dwellers and that any such plan to evict slum dwellers should include the phased evictions in accordance with a person's ability to find alternative accommodation.⁵⁰

In the *Vehicular Pollution* case⁵¹ a writ petition was filed by the petitioner against different government authorities seeking appropriate direction from the Court for controlling environmental pollution created by motor vehicles and to take measures to prevent further aggravation and danger to life and public health. The main thrust of submission was that although the right to a safe and healthy environment has not been directly specified in the Constitution as a fundamental right such a right is inherent and integrated in the "right to life" as enshrined in Article 32 of the Constitution. Hence, the right to a sound environment was also a fundamental right under Article 32 being supported by Article 31 that ensures that no action detrimental to life, body, property could be taken.⁵²

⁴⁸ *Ain O Shalish Kendra & Others v Government of Bangladesh*, Writ No. 3034 of 1999; 4 MLR (HC) 358

⁴⁹ See *Olga Tellis vs. Bombay Municipal Corporation* [1986] AIR SC 180. In 1981, the Bombay Municipal Council moved to evict all pavement and slum dwellers from Bombay City. The petitioners claimed that this was a violation of the pavement dwellers' right to livelihood and employment. It was held that the authority's action amounted to deprivation of the citizens' right to livelihood.

⁵⁰ *Supra Note 48*, Para 17

⁵¹ *Dr. Mohiuddin Farooque v. Bangladesh* 55 DLR (HCD)(2003) 613

⁵² Article 31 guarantees the protection of law. It states that no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law. Article 32 states that no person shall be deprived of life or personal liberty save in accordance with law.

The matter was pending for a long time and after a lapse of 7 years, on the 27th March of 2002 the High Court recognizing the pollution free environment as a part of right to life directed the government to phase out all two stroke vehicles from city street by December 2002 and to convert all petrol and diesel-fuelled government vehicles into Compressed Natural Gas (CNG) powered within six months.

In another case, *Dr Mohiuddin Farooque v Bangladesh & Others*⁵³ a consignment of powdered milk containing radiation level above the acceptable limit was not sent back by the relevant government officers. Since it is a threat to the life of potential consumers of such good, including the petitioner, he sought directing that measures be taken to prevent such food items entering the market according to Article 18(1) of the Constitution.⁵⁴ The Supreme Court held that the 'right to life' under Articles 31 and 32 of the Constitution is not limited to the protection of life and limb but also includes, amongst other things, the protection of the health and normal longevity of an ordinary human being. Even though the directive principle of raising the level of nutrition and improving public health (Art 18 of the Constitution) cannot be enforced, the State can be compelled by the Court to remove any threat to public health unless such a threat is justified by law.⁵⁵ Hence the Court ordered the Government to take measures for return of the consignment.

In a writ petition *Rabia Bhuiyan MP. V. Ministry of Local Government and Rural Development*,⁵⁶ the petitioner alleged that the arsenic contamination in the tube wells across the country constituted a violation of the fundamental right to life under Article 32 of the Constitution and, government has failed to take remedial measures despite the legal obligation to do so under Article 18.⁵⁷ At the first instance, the High Court Division dismissed the petition ruling that the petitioner had failed to point out any law or rule to allow for sealing of the tube wells.

However, on appeal, the Supreme Court mentioned that the responsibilities of the government to supply safe and clean drinking water were set out in a number of domestic laws such as the

⁵³*Dr Mohiuddin Farooque v Bangladesh & Others* 48 DLR (HCD) (1996) 438

⁵⁴ *Ibid*, Para 4

⁵⁵ *Ibid*, Para 20

⁵⁶ 59 DLR (AD) (2007)

⁵⁷ Article 18 of the Constitution obliges the State to raise the level of nutrition and the improvement of public health.

Environment Conservation Act 1995,⁵⁸ the *Environment Conservation Rules*, the *Paurashava Ordinance 1977* and the *Local government (Union Parishad) Ordinance 1983*. The Court also relied on Article 12 of the ICESCR⁵⁹, in conjunction with General Comment No. 14 of the CESCR⁶⁰ laid down the obligations of State Parties under the right to health, which included access to safe drinking water. Referring to all these provisions the Court held that non-compliance with statutory duties to ensure access to safe drinking water constituted a violation of the right to life as guaranteed by Articles 31(right to protection of law) and 32(protection of right to life and personal liberty) of the Constitution. Thus, the Court recognized the legal obligation of the government authorities and ordered for sealing of the arsenic contaminated tube wells and to test the water quality of those wells.

The above experience suggests that in countries like Bangladesh with obvious socio-economic constraints, the movement for enjoyment of rights is taking a new dimension as the potential of judiciary is being increasingly emphasized by legal and social activists. Our Supreme Court being inspired by the decisions of other judicial systems are dealing with cases seeking relief against administrative anarchy and ignorance. The next section focuses on some of the approaches and remedies followed by courts of different countries to ESC rights violation.

4. The Approach of the Judiciary towards Socio-economic Litigation

In a surprising number of cases from a variety of legal systems, courts have proved that they are capable of identifying the relevant legal standards to apply in cases concerning alleged violations of socioeconomic rights. Some courts have applied provisions directly or as interpretative status, other courts are willing to interpret domestic law in conformity with international law in cases where individuals have sought to rely on it. For example, Colombia entrenched socio-economic rights in

⁵⁸Section 4(2)(h) of the Environment Conservation Act provides that the Department of Environment was 'to take measures and to give necessary directions to any person to conduct drinking water surveillance programs and submit report and advise, or in appropriate cases, direct, every person to follow the standard of drinking water.'

⁵⁹ International Covenant on Economic, Social and Cultural Rights, GA Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316

⁶⁰UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Standard of Health*, 11 August 2000, E/C. 12/2000/4

its 1991 Constitution and, since then, the Constitutional Court has begun to develop these rights in an imaginative way. In *Mora v. Bogota District Education Secretary & Others* case⁶¹, a 5-year old child of low income family was placed in a school located in an area far from their residence on the basis of a quota system. The Court found that the quota system did not take into account the mothers lack of income, required time and transportation cost and, hence ordered the government to reallocate the child in a school close to her home, holding that if 'right to education' is affected by quota restrictions, the guarantee of this right is not effective. This judgment of the Colombian Court also reflected that right to education may be immediately enforceable given the right set of circumstances.

In *Grootboom* case,⁶² which dealt with the right to adequate housing, the Constitutional court of South Africa concluded that any determination of socioeconomic rights must be made having regard to the needs of the most vulnerable group entitled to protection of the right in question. Here the court examined whether the measures taken by the state to realize the right on housing are reasonable or not, thereby giving the legislature considerable flexibility to adopt any program. Applying the reasonableness test, the constitutional court found that governments housing program was inconsistent with the constitutional provision of right to housing. The court did not specify the relief, but gave order to the effect that states housing program should involve reasonable measure to provide relief for the group of housing beneficiaries.⁶³

In the *Treatment Action Campaign (TAC)* case⁶⁴, the Constitutional Court of South Africa concluded that the government had breached the express constitutional guarantee of access to health care services, in particular the State's positive obligations in respect of that right by failing

⁶¹ *Mora v. Bogota District Education Secretary & Others*, Decision T-170/03, Feb 28, 2003: in *Leading Cases on Economic, Social and cultural Rights: Summaries*, Working Paper no. 7, ESC Rights Litigation Program, Centre for Housing Rights and Eviction (COHRE), 2009.

⁶² *The Government of the Republic of South Africa and Others v Grootboom and Others* (2001) (1) SA 46

⁶³ M. Brennan, 'To Adjudicate and Enforce Social Economic Rights: South Africa Proves that Domestic Courts are a Viable Option' 9 *Queensland University of Technology Law and Justice Journal*, 2009.

⁶⁴ *Minister of Health and others v TAC and others* (2002) (5) SA 703,721. In this case, the petitioner contended that South African government was violating the Constitution by failing to provide a public sector program to prevent mother –to-child transmission (PMTCT) of HIV.

to develop and implement a comprehensive PMCTC program. The government was directed by the Court to take certain steps to ensure access to PMCTC services without delay.⁶⁵ But, unlike in *Grootboom*, in this decision, the court granted quite a stringent remedy against the state in a manner that still considers the limited resources of the government. This shows that in the future courts may need to order more effective remedies to ensure compliance with socio-economic rights. In the groundbreaking decision in *Mazibuko*⁶⁶ the Constitutional Court of South Africa ruled that the installation of prepayment water meters is unconstitutional, unlawful and discriminatory, and ordered the local council to increase the daily quota of free water to 50 liters. In arriving at this decision, the Court used the minimum core concept as a means by which to determine reasonableness in the context of maximum available resources and progressive realization.

The Indian Supreme Court, in *Olga Tellis v. Bombay Municipal Corporation* case⁶⁷, analyzed the issue of enforcing ESC rights under the Indian Constitution. The Court held:

Article 41, which is a Directive Principle of State Policy, provides, inter alia, that the state shall within the limit of its economic capacity and development, make effective provision for securing the right to work in cases of unemployment and of undeserved want. If there is an obligation upon the state to secure to the citizens an adequate means of livelihood and the right to work, it would be sheer pedantry to exclude the right to livelihood from the content of the right to life. The State may not, by affirmative action, be compellable to provide adequate means of livelihood or work to the citizens. But, any person, who is deprived of his right to livelihood except according to

⁶⁵ *Ibid*, see par. 135 of the judgment.

⁶⁶ *Mazibuko v. City of Johannesburg*, Case no. 06/13865, High Court of South Africa (Witwatersrand Local Division): in *Leading Cases on Economic, Social and Cultural Rights: Summaries, Working Paper no. 7*, ESC Rights Litigation Program, Centre for Housing Rights and Eviction (COHRE), 2009. In this case, the installation of pre-payment water meters in a poor neighborhood in Soweto was challenged by arguing that it violates the right to water enshrined in Article 27 of the Constitution of South Africa.

⁶⁷ See *Olga Tellis vs. Bombay Municipal Corporation* [1986] AIR SC 180. In 1981, the Bombay Municipal Council moved to evict all pavement and slum dwellers from Bombay City. The petitioners claimed that this was a violation of the pavement dwellers' right to livelihood and employment. It was held that the authority's action amounted to deprivation of the citizens' right to livelihood.

just and fair procedure established by law, can challenge the deprivation as offending the right to life conferred by Article 21.⁶⁸

In *Paschim Bangla Khet Mazdoor Samiti v. State of West Bengal*⁶⁹ case the Indian Supreme Court found that a seriously wounded person seeking emergency medical treatment in state hospital was denied and forced to seek treatment at his own cost. The Court held that he was entitled to the right of receiving emergency medical treatment which was part of his 'right to life' under Article 21 of the Indian Constitution and ordered the state to compensate him.

The above experiences suggest that there is a strong jurisprudential basis for judges to play a reasonable role in the fulfillment of a State's obligations in respect of ESC rights. Despite that, there also exist some compelling considerations that should limit the exercise of this role. The next section focuses on the limits of judicial activism and examines some of the considerations that warrant judicial restraint.

5. The Constraints of Judicial Activism

The jurisdiction of national courts as shown above proves that although many socio-economic rights are progressive in nature, the courts can play a pivotal role in determining that violation of some of these rights are of such a nature that can be implemented immediately. However, certain parameters should be followed to guide the extent of the courts role. The author will explain hereinafter some of these considerations that warrant judicial restraint in respect of ESC rights issue.

A. Judicial restraint in matters of resource allocation (Queue Jumping)

A number of critical scholars have argued that while enforcing ESC rights, particularly in matters of resource allocation, courts could unfairly allow some members of society to queue- jump. David Kennedy describes the concept of 'queue jumping' as the phenomenon of permitting a particular segment of society to access scarce resources through means that are outside the democratic process.⁷⁰ Tara Melish

⁶⁸ *Ibid*, see Para 33

⁶⁹ *Paschim Bangla Khet Mazdoor Samiti v. State of West Bengal*, AIR 1996 SC 2426

⁷⁰ See David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism*, Princeton University Press, Princeton, New Jersey 2004, at 17.

describes queue jumping as the strategic use of right-based litigation to jump to the head of a line in accessing scarce entitlements.⁷¹ For example, if a number of communities are in need of any basic item like water, and any particular community brings the issue to the court, court's involvement may cause queue jumping, i.e. the litigating community could jump to the head of the line as a result of court's decision.

So, to avoid queue jumping, judiciary ought to be careful in crafting of remedial orders and should avoid giving expressions to economic entitlements, irrespective of social and financial context. As Melish contend:

Avoiding the problem requires framing remedies in ways that do not privilege litigants over similarly-situated non-litigants in terms of who may access goods and services provided by the state.⁷²

The response of courts to the issue of queue-jumping may be observed in a number of jurisdictions. The South African Constitutional Court in *Soobramoney v. Minister of Health, KwaZulu-Natal*⁷³ held that the reality of limited resources will at times require the State to adopt a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society. This shows that despite the clear justiciability of ESC rights, the Court has preferred to adopt a more cautious approach in order to avoid unnecessary queue jumping. Thus, in the context of ESC rights issues, judges ought not to interfere with the political process where *reasonable* efforts are being taken to ensure the equitable distribution of scarce resources.

B. Judicial restraint in matters of different competing interest (Trade Offs)

While different segments of society are competing for the allocation of resources towards different interests, the question of trade-offs appears.

⁷¹ Tara J. Melish, 'Rethinking the 'Less is More' Thesis: Supranational Litigation of Economic, Social and Cultural Rights in the Americas', 39 *New York University Journal of International Law & Politics*, 2007, 171, at 182.

⁷² *Ibid*, at 184

⁷³ [1998] (1) SA 765 (CC) (SA), *Soobramony* involved an individual with late stage kidney failure who was in urgent need of dialysis, but who had been rejected from hospital because he did not satisfy the strict criteria being used to ration scarce time available on the hospitals limited number of machines. The Court held the hospitals guidelines were reasonable and non-discriminatory.

Any socio-economic activity requiring some budgetary allocation contemplates trade-offs. Judicial decisions pertaining to ESC rights often involves highly complex macroeconomic trade-offs, for example more money for road developments inevitably means less for health, education or for food etc. Judiciary must be very cautious to the proper determination of these trade-offs.

The Constitutional Court of South Africa was confronted with a issue relating to trade-offs in the *TAC* case⁷⁴, where the Court held that the government had breached the express constitutional guarantee of access to health care services, in particular the State's positive obligations in respect of that right by failing to develop and implement a comprehensive PMTCT program. Thus the government was directed to take certain steps to ensure access to comprehensive PMTCT services 'without delay'.⁷⁵ However, the Court neither explained the steps the government ought to take, nor supervised powers over the steps ultimately taken. Instead, the Court noted that judges 'are not institutionally equipped to make... wide-ranging factual and political enquiries'.⁷⁶ This approach perfectly illustrates that in more complex trade-offs involving resource allocation, courts ought not to interfere with. The Court in the *TAC* case restrained itself from proceeding beyond the determination of a rights violation by the State.

In a similar approach, the Supreme Court of Sri Lanka in the *Southern Expressway* case⁷⁷ considered the trade-offs between large scale economic development through the construction of an expressway and the immediate adverse impact of the project on the petitioners' property rights. The Court conceded that when confronted with the trade-off between large scales economic development and proprietary rights of individuals, judicial discretion should be exercised in favour of the State.⁷⁸ Accordingly, it was held that the Southern Expressway Project ought to continue as planned and that the proper and most equitable

⁷⁴ See *supra* note 63. Here, the petitioners contended that the Government of South Africa violated the Constitution by failing to provide a program to prevent mother-to-child transmission (PMTCT) of HIV.

⁷⁵ *Ibid*, at Para 135

⁷⁶ *Ibid*, at Para 137

⁷⁷ *Mundy and Others v. Central Environmental Authority and Others*, SC Appeal 60/2003. In this case the appellants claimed that the Southern Expressway Project adversely affected their lands and they had been denied to be heard in relation to the determination of the alignment.

⁷⁸ *Ibid*, page 15 of the judgment.

remedial intervention in such cases was to order compensation. This approach acknowledges both the complexity of certain trade-offs and the need for judicial caution when interfering with their determination.

In the light of the above cases, it becomes apparent that judges should remain largely deferential in adjudicating ESC rights where policy makers are expected to determine complex trade-offs. Such trade-offs usually pertain to detailed questions of resources allocation. In matters concerning more fundamental trade-offs, judges should adopt a vigilant approach, as the minimum core obligations of State may be involved in the determination of such trade-offs, and political process is better suited to determining questions of resource allocation. Nonetheless, if the political process results in the making of discriminatory or unreasonable trade-offs, judges should intervene in that process in order to vindicate the ESC rights concerned.

6. Alternative Approaches to ESC Rights Adjudication

Mainly two approaches have emerged in the global context for enhancing distributive justice within a reasonable framework of judicial intervention. One of such approaches recommends that judges apply a 'reasonableness' test in relation to the economic policies of the State. The other approach entails an analysis of ESC rights in the context of a general principle of non-discrimination.

A) The Reasonableness Approach

By adopting a standard of reasonableness, courts can create a standard of review⁷⁹, which will allow courts to side step defining the scope of ESC rights and concentrate on whether measures taken by governments are reasonable or not. This doctrine of reasonableness has been apparent in several decisions of South African Constitutional Court. In the *Grootboom*⁸⁰ case, the Court recognized that the doctrine of reasonableness is the basic pivot upon which the inquiry in a socioeconomic rights case ought to proceed. It was opined that judges should determine simply 'whether the measures taken by the state to realize the right... are reasonable in the circumstances'.⁸¹ The Court also held that the fulfillment of the minimum core of any given socioeconomic

⁷⁹ M. Brennan, 'To Adjudicate and Enforce Social Economic Rights: South Africa Proves that Domestic Courts are a Viable Option', *QUTLJJ*, Vol. 9, No.1.

⁸⁰ See *Government of the Republic of South Africa and Others v. Grootboom and Others*, [2001] (1) SA 46 (CC) (S. Afr.)

⁸¹ *Ibid*, see Para 33

right is potentially relevant 'in determining whether measures adopted by the State are reasonable.'⁸²

Fortunately, in a similar case *ASK and others v. Government of Bangladesh*,⁸³ the Supreme Court of Bangladesh recognized the eviction of slum dwellers by the government without any prior notice and rehabilitation scheme as unreasonable and violative of their fundamental right to life, which includes right to acquire livelihood.⁸⁴ The Court also suggested the government to take phase by phase master plan for eviction so that the evicted people may find alternative accommodation.

As there appears to be some scope for the application of the reasonableness standard in Bangladesh, it is submitted that this standard may guide the extent of judicial activism in enforcing ESC rights. It may be inappropriate for judges to dictate the manner in which democratically elected representatives should determine policies, but there seems to be a legitimate basis for judges to comment on the reasonableness of those policies. Where any policy is deemed 'unreasonable', the court may direct the policymakers to formulate a more reasonable policy. This seems to be the preferred method in South Africa and is recommended for replication by the courts in Bangladesh.

B) *The Non-Discrimination Approach*

James Cavallaro and Emily Schaffer contend that the relative advantage of using the non-discrimination principle is that the Court 'may rely on a fundamentally civil right to expand protection of economic, social, and cultural rights.'⁸⁵ In order to make effective use of this principle, the judiciary ought to focus on contentious ESC rights cases that permit an 'expanding constructions of the idea of discrimination.'⁸⁶ In *Abdulaziz, Cabales and Balkandali v. The United Kingdom*,⁸⁷ the petitioners argued

⁸² *Ibid*

⁸³ *Supra* note 48

⁸⁴ *Supra* note 48, Para 4

⁸⁵ James Cavallaro & Emily J. Schaffer, 'Less is More: Rethinking Supranational Litigation of Economic and Social Rights in the Americas', 56 *Hastings Law Journal* (2005), p. 271.

⁸⁶ *Ibid*

⁸⁷ (1985)7 EHRR 471; The petitioners in this case were non-native, permanent residents of the United Kingdom and sought to question distinctions in British immigration law that effectively denied the right of entry to their male spouses in circumstances in which female spouses would have been granted residence. Each of the petitioners lawfully resided in the United Kingdom and had sought permission for her husband to join her in residence. In each case, immigration authorities denied such permission.

that the refusal to grant residence to their male spouses where similarly situated female spouses would have been granted residence violated, *inter alia*, Article 14 of the European Convention of Human Rights.⁸⁸ The European Court of Human Rights upheld the petitioners' claim despite the government's contention that there was a rational basis for the said discrimination i.e. evidence that male immigrants were more likely to seek work than female immigrants. Cavallaro and Schaffer cite this case as a clear example of when the court may rely on the principle of non-discrimination to intervene in matters of socioeconomic policy.⁸⁹

It is submitted that the Bangladeshi courts should adopt a similar approach to adjudicating ESC rights issue. By structuring the scope of judicial intervention around the principle of non-discrimination, the Court may be able to avoid contending with resource-related policy decisions. Judicial activism to combat discrimination on individuals in matters of ESC rights is therefore wholly justified.

7. Conclusion

The author, in this paper has attempted to evaluate the role of the judiciary in vindicating ESC rights. Today there remains no doubt that ESC rights are justiciable, nevertheless it is the courts which possess extensive scope to place greater reliance upon the socioeconomic rights by an appropriate exercise of judicial review power. But the precise extent to which judges should be activist in promoting these rights is contingent on certain other crucial factors. This approach to judicial activism should be contrasted with the more extensive activism that is required of the judges in the realm of civil and political rights. The position by a particular state and of its courts on the issue of justiciability of ESC rights has direct and precise implications for access to justice and equality rights for disadvantaged groups, as the promotion of these rights would eventually lead to greater distributive justice.

While dealing with the enforcement of ESC rights, however, courts should be vigilant to consider the questions of queue jumping and trade-offs, as complex questions of resource allocation are better answered

⁸⁸ Article 14 of The Convention for the Protection of Human Rights and Fundamental Freedoms states: 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

⁸⁹ See Cavallaro & Schaffer, *supra* note 86, at 257

through the political process. Despite these constraints, judicial intervention can be done in socio-economic matters under the principles of non-discrimination and reasonableness. It is therefore submitted that judges ought to intervene where the policies adopted, or the trade-offs made, are either discriminatory or unreasonable. The potential for the courts in Bangladesh to be vigilant in matters of ESC rights is certainly evident from the jurisprudential analysis undertaken above. Our judiciary is expected to be more enthusiastic in giving effects to ESC rights by interpreting the fundamental principles within the ambit of fundamental rights. Thus the interests of socioeconomic development and distributive justice can be best served by the judiciary.