Claiming a 'Fundamental Right to Basic Necessities of Life': Problems and Prospects of Adjudication in Bangladesh

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1. Prelude

The debate on whether socio-economic rights can or should be adjudicated upon and enforced by courts is ongoing since the 1960s, when the rights in the Universal Declaration of Human Rights (UDHR) were separated into two covenants. Though the International Covenant on Civil and Political Rights (ICCPR) 1966 and the International Covenant on Economic Social and Cultural Rights (ICESCR) 1966 differ from each other in many respects, the key point which makes the ICESCR drastically weaker than and subservient to the ICCPR[1] is Article 2(1), which stipulates that State parties are required to work towards the progressive realization of socio-economic rights subject to the availability of resources. On the other hand, Article 2 of the ICCPR imposes an immediate and justiciable obligation upon the State. Since civil political rights figured prominently in the west while socio-economic rights were propagated by the socialist block, ideological cleavages between socialism and capitalism shadowed the necessity of integration of socio-economic rights among justiciable fundamental rights and they were thereby avoided practically.[2] After the World War II most of the third world countries emerging free from capitalist colonial legacy adopted this formula of segregating the human rights and hence socio-economic rights remained the poor cousins of their civil and political counterparts. In the sub-continent, Indian (1950) and Pakistani (1973) constitutions adopted this model and later so did the Constitution of Bangladesh in 1972.

1.1. Socialist illusions of the Constitution of Bangladesh

One of the fundamental principles inspiring our forefathers to lay down their lives in the Liberation War of 1971 was the emancipation

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1 Yubaraj Sangroula, *Right To Adequate Standard of Living, Development and Social Respect and Dignity* in SOCIAL RESPONSIVE HUMAN RIGHTS LEGAL EDUCATION (A Compendium of Conference Proceedings and Papers) SALS Forum, 2004, pp.62-73, at p.70

2 Abdullah Al Faruque, *Realization of Economic, Social and Cultural Rights: A Survey of Issues* in HUMAN RIGHTS AND EMPOWERMENT, 85, 85 (Mizanur Rahman ed., 2002).

of working class, peasants and toiling masses from all sorts of oppression and economic deprivations.[3] Accordingly, the Preamble of the original constitution (1972) adopted 'socialism' as one of the guiding philosophies of the new state which was to be a scheme of social security from cradle to grave.[4] The motto was to eliminate inequality in income, status and standard of life by providing adequate shelter, education and medical care to all. Article 10 also approved the assertion by pledging, 'A socialist economic system shall be established with a view to ensuring the attainment of a just and egalitarian society, free from exploitation of man by man.'

However, half-heartedness on the part of the framers regarding the exact capability of the State to take the burden in this regard prompted them to relegate socio-economic 'Rights' to mere 'Principles.' Accordingly, the sunny promises of its Preamble faded in the very first Article (Article 8) of Part II. Here the constitution creates a dichotomy between civil and political rights on the one hand, and economic, social and cultural rights on the other by making the former enforceable by the court and the latter non-enforceable.[5] Economic, social and cultural rights included in Part II under the head 'Fundamental Principles of State Policy, includes the provision of basic necessities of life including food, clothing, shelter, education and medical care, etc.[6] While the 'Fundamental Rights' in Part III are justiciable.[7]

To make the situation worse, after the 1975 killing of the Father of the Nation, Article 10 of the Constitution harboring 'socialism' was substituted with something new: 'Steps shall be taken to ensure participation of women in all spheres of national life' 'Socialism' in the Preamble was amended to mean *economic and social justice*. Thereby a political agenda was relegated to a mere economic program and a

3 Bangladesh Italian Marble Works Ltd v. Bangladesh, 14 BLT (Spl) 1 p .230-231.

4 A.K.M SHAMSUL HUDA, THE CONSTITUTION OF BANGLADESH (VOL. 1) 206 (Rita Court, 1997).

5 BAN. CONST. art 8 (2), Sri Suranjit Sen Gupta, the lone opposition member from *National Awami Party* (pro-Moscow) in the Constitution Drafting Committee of 1972 alleged that the draft did not adequately provide for the establishment of socialism. He suggested that the words 'shall not be judicially enforceable' should be deleted. Ultimately he refused to sign the Constitution on demand that at least the right to receive education upto Class 8 be accepted as Fundamental Right. See: Abul Fazl Huq, *Constitution-Making in Bangladesh*, PACIFIC AFFAIRS, Vol. 46, No. 1 (Spring, 1973), pp. 59-76, University of British Columbia, Stable URL: http://www.jstor.org/stable/2756227 (Accessed: 24/02/2010).

6 *Id.*, Art. 15.

7 *Id.*, Arts. 44 & 102.

socialist economy turned into a bourgeoisie one.[8] A welfare state became a *laissez faire* and the fortune of the millions of dying destitute fell upon the mercy of cruel and rampant God of market.

1.2. In search of reform

Quite happily, the Supreme Court in a recent case[9] has given Bangladesh her socialist complexion back by reviving the original Preamble and Article 10. This is the case where the 'ill-legacy' of military rule was condemned.[10] The invalidation of the 1975-79 military regime resulted in the auto invalidation of the constitutional amendments effected by the regime and hence the original constitution, especially the Preamble and state policy related articles, got much of their original look back. Thereafter the 15th Amendment to the Constitution of Bangladesh that came into effect in July 2011 accommodated most of the observations of the Supreme Court. It also introduced some other vital changes regarding which the Court had no observations at all. However, the legislature did not take a chance at reconsidering the confusions of 1972 regarding the affordability of the fundamental right to basic necessities of life holds. Hence the original equation of principles versus rights remains intact.

Given the situation, I take the chance to argue for placement of 'basic necessities of life', which now resides in Article 15 of Part II of the Constitution (Fundamental Principles), within the ambit of Part III (Fundamental Rights) to re-install and further invigorate the socialist

8 In the original Constitution, it was 'Socialism' unqualified and simple. Later on the qualifying phrases *meaning economic and social justice* were included. The rationale behind the change was obviated due to the emergence of capitalist forces having a strong US leaning to the power. The socialistic inspirations of the revolutionary leadership were in marked distinction with the free-market de-regularized economy professed by the erstwhile Pakistani military elite. The military establishment usurping power in Bangladesh in 1975 was in no way comfortable with a 'basically socialist' Constitution. Hence it was thought better to concoct the original socialism to a mere socialism in ink and paper. An individualist capital economy was given priority over the greater purpose of social and political justice. Consequently, in a bid to attract direct foreign capital most of the nationalized industries were de-nationalized. State-owned banks, financial institutions, trading concerns fall to private hands. The shares until recently held by the government in many enterprises were sold to the private individuals or companies. See - REHMAN SOBHAN, BANGLADESH PROBLEMS OF GOVERNANCE 36 (UPL Dhaka, 1995).

9 Khandker Delwar Hossain v. Bangladesh Italian Marble Works Ltd (Civil Leave to Appeal Petition No 1044/2009) commonly known as *the 5th Amendment Case* (Dec. 12, 2010) http://supremecourt.gov.bd/judgement C.P.%20Nos.%201044%20&% 201045 %20of%202009%20(5th%20Amendment).pdf (Accessed : May 12, 2010).

10 Dr. Shah Alam, *Constitutional Issues are political as well as legal: Implementing the SC 5th Amendment Judgment*, THE DAILY STAR, LAW & OUR RIGHTS, August 28, 2010.

promises of the Preamble. Answering the questions regarding the Court's suspected inability to judge a fundamental right to 'basic necessity' is the focus of this exercise.

After briefly addressing the widely professed 'problems' relating to the justiciability of Socio-economic Rights (Para 2), the paper proceeds to unveil the 'smuggling' that Bangladeshi courts are doing now-a-days under the umbrella of Fundamental Rights (Para 3). Then, the inadequacies of the indirect and minimum enforcement regime developed through judicial activism are explained as part of a preliminary justification of a 'fundamental right' claim (Para 4). Thereafter, for a comfortable linguistic formulation of the proposed 'fundamental' right to basic necessities of life, I have taken the South African Bill of Rights as a model (Para 5). Then, to ease the hesitation regarding the resultant judicial activism, I've tried to chalk out the patterns of probable orders and judgments that the judiciary may render in a future claim to basic necessities as of right. At the same time I've tried to show that the judiciary of Bangladesh is already in the habit of making such orders and judgments in course of its engagement with Public Interest Litigations (PILs) and obviously they have done it with a considerable amount of success (Para 6). Lastly, the question as to whether Bangladesh is ready enough, economically and politically, to adapt herself with the proposed drastic change in 'rights' regime is dealt with, briefly though (Para 7). The ultimate attempt is to establish that we don't need to be worried of the court's 'institutional capacity' to adjudicate such fundamental rights claims.

2. Justiciability 'concerns' and the Replies

The key 'problems' rooted in the traditional perceptions of progressive and resource dependent ESC rights, their violations and resultant remedies may be summed up in two major points: *Firstly,* that their realization is progressive and therefore more difficult to assess, e.g. a right to education as compared to a right to vote; and being subject to the available resources, and therefore more difficult for States to guarantee to every citizen unconditionally, the theory of separation of power is inherently against their justiciability. *Secondly,* the courts do not have the institutional capacity to appreciate and attend to all the polycentric interests involved therein.[11]

11 Christopher Mbazira, LITIGATING SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA: A CHOICE BETWEEN CORRECTIVE AND DISTRIBUTIVE JUSTICE 17 (Pretoria University Law Press, 2009).

In fact, already settled responses to these readily preached 'problems' are so well known that a short assemblance of points should suffice. Lack of resource as an excuse fails in its totality when we see a violation of socio- economic rights as a problem of governance, not of resource.[12] A rights claim may not be 'reasonably' discharged simply on the basis of a bald assertion of resource constraints. Resource consideration is not totally ignored by the court judging a violation. What the court does is question the 'reasonableness' of resources already allocated to see that decisions and their implementation remain fair, rational,[13] balanced, flexible, coherent, proportional,[14] progressive and purposeful.[15] It also takes care that the program pays appropriate attention to the crises, short, medium and long-term needs.[16] Under the doctrine of separation of powers, it is the job of courts, not legislatures, to consider allegations of rights violations. The ever present potential for an on-going tussle between the courts and the government should be seen as part of the process of constitutional dialogue rather than a threat to the constitutional order.[17] The institutional capability of the court to adjudge socio-economic rights litigations becomes undoubted in the sense that such litigations focus on structural or systemic violations requiring the weighing of competing interests in the scale of reasonableness and proportionality.[18] Institutionally, no other organ of the State is better equipped than the Judiciary to adjudicate the proportionality concern objectively.

3. Smuggling Socio-economic Rights through the backdoor

While in spite of having similar constitutional disposition, the Indian judiciary appeared as a vanguard of social justice,[19] the Supreme Court of Bangladesh remained adamant not to change its stance over the non-justiciability of socio-economic rights finding place within the Principles of State Policy until recently.

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12 Md. Zakir Hossain, *Good Governance: Road to Implementation of Human Rights* in HUMAN RIGHTS AND GOOD GOVERNANCE, 107-118, 115 (Mizanur Rahman ed., 2004).

13 Soobramoney v. Minister of Health, KwaZulu-Natal, 1998 1 SA 765 (CC).

14 Khosa and Others v Minister of Social Development, 2004 6 BCLR 596 (CC).

15 TAC v Ministers of Health, 2002 (10) BCLR 1033 (CC).

16 Grootboom v Ostenberg Municipality and Others, 2000 3 BCLR 277 (CC).

17 Sandra Liebenberg, South Africa's Evolving Jurisprudence On Socio-Economic Rights (Jan. 2, 2011) http://www.communitylawcentre.org.za/clc-projects/socio-economic-rights/research/socio-economic-rights-jurisprudence.

18 MBAZIRA, *supra* note 11, at 43.

19 Anirud Prasad, *Human Rights and Socio-Economic justice: A Study with Special reference to India*, 12 Civil & Military L.J., 84, 85 (1976).

In *Re Wills Little Flower School*[20] the High Court Division negated a requisition of land in favor of an English Medium Private School on the ground of its being not in 'Public Purpose.' Relying on Article 17 of the Constitution which mandates the State to work for the 'mass-oriented uniform system' of education, the Court held that use of governmental power for private English medium school having little interest in the culture and heritage of Bangladesh would never be an action aimed at 'mass oriented' 'universal' education. Unfortunately the Appellate Division turned down the effort by holding that Fundamental Principles of State Policy (where Art. 17 belongs) were not to be judicially enforced and thereby refused to use them even as aid to interpretation.[21]

Again, *Kudrat-E-Elahi Panir and Others* v. *Bangladesh*[22] concerned a challenge to Ordinance No. XXXVII of 1991 (that subsequently became Act No. II of 1992) which abolished the elected *Upazila Parishads* (the third tier of the local government) and vested in the government all rights, powers, authorities and privileges of the dissolved *Upazilla Parishads*. The appellants, some chairmen of dissolved *Upazilla Parishads,* unsuccessfully challenged the law in the High Court Division and then appeared before the Appellate Division by obtaining leave to appeal. One of the grounds was that the Ordinance being inconsistent with Articles 9 (as it was before the 15th Amendment) and 11 ran against the spirit of the Constitution and became void by operation of Article 7(2). It was clear that the Ordinance was clearly against the gist of Articles 9 and 11.[23] But the problem was that the Articles 9 and 11 were in the Part II containing the Fundamental Principles. In the main judgment Shahabuddin Ahmed CJ held that Articles 9 and 11 being located in Part II of the constitution were not judicially enforceable. If the State does not or cannot implement these principles the Court cannot compel the State to do so.[24]

Interestingly, the Article 8(2) has five parts – The principles: a) shall be fundamental to the governance of Bangladesh; b) shall be

20 Wnifred Rubie v. Bangladesh, 1 BLD 30.

21 Bangladesh v. Mrs. Winifred Rubie and Others, 2 BLD (AD) 34.

22 Kudrat-E-Elahi Panir and Others v. Bangladesh, 44 DLR (AD) 319.

23 Article 9 and 11 emphasized on maintaining democratically elected local government institutions.

24 Kudrat-E-Elahi Panir and Others v. Bangladesh, 44 DLR (AD) 319, para 22; Two other important cases where the non-justiciability was mechanically preached are – Dr.Ahmed Hussein v. Bangladesh, 44 DLR (AD) 109 and Farida Akter v. Bangladesh, 57 DLR (2005) 201.

applied by the State in making of laws; c) shall be a guide to the interpretation of the Constitution and other laws of Bangladesh; d) shall form the basis of the work of the State and its citizens; and e) shall not be judicially enforceable. It seems that while strictly asserting that principles are not judicially enforceable, judiciary is ready to enforce the fifth criteria only and not the other four criteria set out in article 8(2). It may be asked whether article 8(2) binds the judiciary only and leaves the executive and legislature out of its ambit. Once Justice Badrul Haider Chowdhury of the Appellate Division of the Supreme Court got almost near to the point but the vital question of justiciability remained unanswered and the Court ended in a mere general observation:

> *Though the directive principles are not enforceable by any court, the principles therein laid down are nevertheless fundamental in the Governance of the country and it shall be the duty of the state to apply these principles in making laws. .... This alone shows that the executive cannot flout the directive principles. The endeavour of the Government must be to realise these aims and not to whittle them down.*[25]

However, there are some instances of judicial enthusiasm and of late the trend has gained momentum. This part of the write-up explores the possibilities 'to smuggle (if not possible to claim) the socio-economic rights through the backdoor and down the chimney or through the window' within the constitutional framework of Bangladesh.[26] While courts are using some of the lee-ways, others remain yet to be explored. The first strategy is in asserting socio-economic rights under the umbrella of prominent Fundamental Rights like right to life and liberty, freedom of association, expression and opinion, right to information, equality and non-discrimination, etc.[27] Second, is to emphasize the domestic application of ICESCR to enforce socio-economic rights.

3.1. Resorting Fundamental Rights to claim Socio-economic Rights

The 'right to life' has been widely utilized by courts to ensure medical services, food, shelter, a healthy work environment and

25 Anwar Hossain v Bangladesh, 1989 BLD(Spl) 1, para 53.

26 Albie Sachs, *Social and Economic Rights: Can They Be Made Justiciable?* in HUMAN RIGHTS AND EMPOWERMENT, 77, 79 (Mizanur Rahman ed., 2002).

27 GHULAM RABBANI, CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH: EASY READER (BANGLA), 49 (Samunnoy, 2008).

housing etc. of the people.[28] Stumbled by the plea of non-justiciability of Directive Principles, the Indian Supreme Court has shown its dire determination to enforce the socio-economic rights of the people by following this line. Article 21 of the Indian Constitution ensuring right to life has been interpreted to cover right to necessary conditions of life,[29] right to livelihood,[30] right to get adequate relief in starvation crisis,[31] right to receive timely medical aid,[32] right to live in healthy environment,[33] right to education[34] and even the access to better road communication facilities.[35]

In Bangladesh as well, the right to life has been resorted to in addressing a wide range of welfare concerns such as slum dweller's legitimate expectation to not be evicted without alternative settlement,[36] protection and preservation of environment and ecological balance,[37] prohibition of advertisement of cigarettes,[38] ban on imposing VAT in case of health treatment at hospitals, clinics and doctors' chamber,[39] development of children, maternity benefits, creation and sustenance of conditions congenial to good health[40] etc.

Right to equality and non-discrimination has been another area of great strategic value. The activist judges around the world rely greatly on the principle of non-discrimination to strike at the roots of socio-economic inequality. The Supreme Court of Bangladesh has done the same whenever the opportunity came.[41]

28 Kamal Hossain, *Interaction of Fundamental Principles of State Policy and Fundamental Rights* in PUBLIC INTEREST LITIGATION IN SOUTH ASIA: RIGHTS IN SEARCH OF REMEDIES, 50 (Sara Hossain and Ors ed., 1994).

29 Francis Coralie v. Union of Delhi, AIR 1981 SC 746.

30 Olga Tellis v. Bombay Municipal Corporation, AIR 1981 SC 180.

31 Orissa Starvation Death Proceedings, National Human Rights Commission of India (HRC), Case No. 37/3/97-LD, (17 January 2003) and People's Union for Civil Liberties v. Union of India & Ors (Rajstan Starvation Death Case, 2003) (Jan. 11, 2011) http://www.communitylawcentre.org.za/ser/casereviews.php.

32. Paschim Bang Khet Mazdoor Samiti v. State of WB, (1996) 4 SCC 37; Consumer Education and Research Centre v. Union of India, (1995) 3 SCC 42; Parmanand Katara v. Union of India (1989) 4 SCC 286.

33 Ratlam Municipality v. Vardichand, AIR 1980 SC 1622

34 Mohini Jain v. State of Karnataka, (1992) 3 SCC 666; Unni Krishnan J.P v State of Andra Pradesh, AIR 1933 SC 2187.

35 State of Himachal Pradesh v. Umed Ram Sharma, (1986) 2 SCC 68.

36 Ain O Shalish Kendra and Others v. Govt. of Bangladesh, 4 MLR (HC) 358.

37 Dr. Mohiuddin v. Bangladesh and Ors., 49 DLR 1997 (AD) 1 (FAP 20 Case), Dr. Mohiuddin (BELA) v. Bangladesh, 55 DLR (HCD) 69 (Environment Pollution Case).

38 Professor Nurul Islam v Govt. of Bangladesh & Others, 52 DLR 413.

39 Chairman, NBR v. Advocate Julhas Uddin, 15 MLR (AD) 457.

40 Dr. Mohiuddin Farooque v. Bangladesh, 48 DLR (1996) 438 (Radio Active Milk powder case)

41 Retired Government Employees Welfare Association v. Bangladesh, 46 DLR 426.

4. The Inadequacies of the Piecemeal Protection

While the judiciary has developed a piecemeal protection for socio-economic rights using fundamental rights, it is in no way sufficient in protecting socio-economic rights. Rather it will be beneficial to explicitly recognise socio-economic rights as capable of judicial enforcement. The problems prevailing in the minimal protection trend are manifold.

First, it is ironic, that though the courts have developed this protection using the concept of human 'dignity', they intervene only in cases of *extreme* and *exceptional* degradation. In overlooking the other less severe cases of destitution, they contravene the value they are trying to uphold. Moreover, a practical question that arises from this is - how are authorities to determine when an individual's situation meets the requisite level of severity, requiring them to redistribute resources to eliminate the disadvantage?[42]

Secondly, courts face fundamental difficulties in protecting civil rights where they are inextricably bound up in socio-economic issues that are held to be non-justiciable. Therefore, courts are reluctant to intervene in the resolution of resource allocation disputes even where civil and political rights are in issue, and the result is that both sets of rights go unprotected.

Thirdly, for the present level of justiciability, recognition of socio-economic rights in the Constitution in any format is not necessary at all. For example, the US Bill of Rights or the Canadian Charter of Rights and Freedoms do not contain express guarantees of socio-economic rights. Even in such countries, protection for such rights is indirectly derived from the protection given to civil and political rights such as the right to life or the right to equal protection of the law. Hence without clear recognition of socio-economic rights as 'rights', the present scheme of our constitution makes no difference at all.

Fourthly, the use by courts of Directive Principles and other forms of open-ended constitutional rhetoric is often only possible in societies where there is general acceptance of the legitimacy of judicial activism. Judicial activism being a fluid and fluctuating concept, it makes the enforceability of socio-economic rights an uncertain issue.

42 Asha P James, *The Forgotten Rights - the Case for the Legal Enforcement of Socio-Economic Rights in the UK National Law*, 7; Available Online: http://www.ucl.ac.uk/opticon1826/archive/issue2/VfPLAW_SE_rights.pdf, (Accessed : November 20, 2011).

It is significant that the Irish courts have not followed the approach of courts in the sub-continent in relation to the very same set of Directive Principles shared by both the Irish and Indian Constitutions. The Irish Supreme Court has taken the view that the limited role of the courts in a system based upon a firm adherence to separation of powers prevents them making use of the non-legally binding Principles.[43]

Fifthly, the present scheme narratives of social justice, redistribution, economic efficiency, development and growth compete, clash and combine with the principles of *laissez-faire* economic libertarianism and individual self-realization. Hence socio-economic rights remain largely on the sidelines of the political, social and economic debates. As Alicia Yamin has commented, "perhaps the greatest obstacle to advancing ESC rights—on both the external and internal level—is that there is a lack of consciousness about ESC rights as rights, and a concomitant lack of indignation at their systematic violation."[44]

Therefore more direct judicial enforcement is needed instead of hitching socio-economic entitlements on the backs of political and civil rights. Such an action would transform the 'target duties' into 'specific duties'. A programmatic model of socio-economic rights enforcement, which is elaborated by reference to the South African Constitution, may be incorporated in the Constitution. These 'target duties' coupled with aspects of the 'programmatic' model would require that socio-economic entitlements be considered in the process of policy making, local authority decisions and legislation. It would require public authorities to target available resources on groups of greatest socio-economic need.[45] Additionally the 'severity test', aided by the reasonableness approach, developed in relation to the right to life would be applied to these explicit socio-economic rights. Extreme rights-denial would convert the 'target duty' into a 'specific duty' that is enforceable by the individual affected by the breach of the right/duty.[46]

43 Colm O'Cinneide, *Bringing Socio-economic Rights Back into the Mainstream of Human Rights: The Case-law of the European Committee on Social Rights as an Example of Rigorous and Effective Rights Adjudication*, 8; Available at SSRN: http://ssrn.com/abstract=1543127 (Accessed : November 20, 2011).

44 A. E. Yamin, *The Future in the Mirror: Incorporating Strategies for the Defense and Promotion of Economic, Social, and Cultural Rights into the Mainstream Human Rights Agenda*, 27(3) HUMAN RIGHTS QUARTERLY, 2005, pp. 1200-1244, at 1242.

45 Asha P James, *supra note* 41, at 8.

46 Alicia Ely Yamin, & Oscar Parra Vera, *The Role of Courts in Defining Health Policy: The Case of the Colombian Constitutional Court*, HARVARD WORKING PAPER SERIES, Available Online: http://www.law.harvard.edu/programs/hrp/documents/Yamin_Parra working paper.pdf (Accessed : October 15, 2011).

5. Promoting 'Principles' to 'Rights': The South African Model

In spite of their indirect enforcement by the Supreme Court, there is a dire need to elevate the status of basic necessities of life from mere aspirational goals to concrete fundamental rights. To this end, assistance may be drawn from the South African Constitution which is groundbreaking in entrenching protection of socio-economic rights under the umbrella of judicial review.[47] The language applied therein crystallizes the normative content of the otherwise 'vague' socio-economic rights.

The Constitution of Bangladesh nowhere acknowledges any 'right' to any social security benefits. She is full of promises having fine literary value. In terms of placing legal burden or enforceable duties upon the State, Articles 15-19 of the Constitution remain completely nugatory. The whole socio-economic rights talk, on the excuse of resource constraint, dwells on a charity-based approach. The language applied in Article 15 of the Constitution, for example, delineates the content of the basic necessities of life as charitable largess. It is accepted to be a 'fundamental responsibility' of the State 'to attain', through planned economic growth, a constant increase of productive forces and a steady improvement in the material and cultural standard of living of the people, with a view to securing to its citizens the provision of the basic necessities of life, including food, clothing, shelter, education and medical care, etc.' Article 16 – 19 also are full of vague terms hardly specifying any concrete right holder or duty bearer.

Conversely, while not brushing aside the same resource constraints, the South African Constitution has adopted a 'Rights Based Approach' to socio-economic rights. The Bill of Rights enshrined in Chapter 2 of the South African Constitution (Act 108 of 1996) protects three categories of socio-economic rights: rights with internal limitations, rights without internal limitations and negative rights.

The *first category* of rights includes the right of all persons to have access to adequate housing,[48] health care services, including reproductive health care, sufficient food and water and social security, including appropriate social assistance if they are unable to support themselves and their dependents.[49] All these rights are all subject to

47 Mark Tushnet, *Enforcing Socio-Economic Rights Lessons from South Africa*, 6:3 ESR REVIEW. 3-4 (2005).
48 S.A. CONST. § 26.
49 *Id.* § 27.

an internal limitation by which the state is required to take reasonable legislative and other measures, within its available resources, to achieve their progressive realization.[50]

The *second category* of rights includes children's rights to basic nutrition, shelter, basic health care services and social services.[51] It also includes the right of all persons to basic education including adult education[52] and the rights of detained persons to adequate accommodation, nutrition, reading materials and medical treatment.[53] Their realization is immediate and not subject to reasonable legislative and other measures within the state's available resources.

The *third category*, the negative rights, prescribes a number of prohibitions which include prohibition of refusal of emergency medical treatment to anyone,[54] eviction from or demolition of home without an order of court and permissive legislation.[55]

The South African mode of linguistic formulation dispels the much feared vagueness, separation of power and institutional suitability concerns. The rights in the second and third category are not any less concrete than any of the civil and political rights enshrined in the fundamental rights part of our constitution. Had we adopted the formula, only the first category of rights may pose some, if any, 'problems'. However, the next part of my article endeavours to demonstrate why there is still little cause for worry.[56]

6. Developing Remedies for Violation of 'Fundamental' Socio-Economic Rights

To deal pragmatically with the perceived problems of polycentric decision making, the courts usually give some creative remedies such as damages, declaratory orders (prohibitive or mandatory) and structural interdicts.[57] The appropriateness of such remedies, alone

50 *Id.* § 26(2) & 27(2).
51 *Id.* § 28(1)(c).
52 *Id.* § 29(1).
53 *Id.* § 35(2)(e).
54 *Id.* § 27(3).
55 *Id.* § 26(3).
56 Tara Usher, *Adjudication of Socio Economic Rights: One Size Does Not Fit All*, UCL HUMAN RIGHTS REVIEW, vol. 1, no. 1, 2008 pp. 154-171, p. 166, Online at http://www.uclshrp.com/review, (Accessed : October 25, 2011).
57 Marius Pieterse, *Coming to terms with Judicial Enforcement of Socio-Economic Rights*, 20 SOUTH AFRICAN JOURNAL OF HUMAN RIGHTS, 383 -417, 385 (2004).

and in combination, depends on a range of contextual factors discussed below:

6.1. Damages

In socio-economic rights cases, damages present themselves as an attractive remedy. Though the damages awarded to an individual may deprive the state of resources that could have been used to provide services for the general good of society as a whole, damages serve the ends of distributive justice as well.[58] In most cases it appears to be the most appropriate remedy due to poverty, disability or the disadvantaged socio-economic position of the victim.[59] The High Court Division of the Supreme Court of Bangladesh has already developed a practice of giving palliative remedy of damages in its Special Original Writ Jurisdiction to try fundamental rights cases. The court's extra-ordinary and inherent jurisdiction to pass *any order as it deems fit and proper*[60] has duly empowered it to award costs of the case as well as monetary compensation considering the facts and circumstances in each case.[61] The assertion of the Court's power to do complete justice by giving appropriate, just and equitable relief has been so emphatic that there have even been cases in which entities not parties to the original suit have been required to personally disburse damages to the victim.[62] Hence, the grant of damages will not amount to the invention of a remedy for socio-economic rights cases.

6.2. Declaratory Relief

Declaratory relief presents itself as appropriate when the government is committed to the rule of law and thus respectfully complies with the court order. Here the court simply declares that the

58 In Modderklip Boerdery (Pty) Ltd and Others v President of RSA and Another, 2005 8 BCLR 786 (CC) eviction of illegal occupants of a private property posed a complicated scenario. The occupant's right not to be evicted without alternative settlement and the plaintiff's right to hold and acquire property were in direct conflict. The Court adjudged the conflicting claims by awarding damages in favor of the plaintiff. The distributive effect of the judgment lies in the fact that both the plaintiff's right to property and the occupant's right against eviction without resettlement were upheld at the same time. The State on the other hand benefited from not having to provide alternative accommodation instantaneously. MBAZIRA, *supra* note 11, at 160.

59 MC Mehta and another v. Union of India and Others AIR, 1987 SC 1086 .

60 BAN. CONST. Art. 104.

61 Bilkis Akter Hossain v. Bangladesh and Others, 17 BLD (1997) 395 at p. 407.

62 Shah Azhar Uddin Ahmed v. Government of Bangladesh, 33 DLR 171; Here the Court *suo moto* proceeded to require a delinquent Minister who was not party to the original suit and against whom no remedy was claimed pay damages out of his personal account.

state has defaulted in discharging its constitutional obligation. Its strength lies in its deferential nature which gives the state the latitude to choose the most appropriate way of undoing a constitutional violation.

In *Ain O Shalish Kendra & ors* v. *Government of Bangladesh*,[63] the petitioner argued that wholesale eviction of slum dwellers without prior notice and alternative rehabilitation was violative of their fundamental right to life which included the right to a livelihood.[64] The court, even with due acknowledgment of the the poverty alleviation schemes claimed to be undertaken by the government, declared eviction in any circumstance without alternative settlement illegal.[65] The immediate result of the order was that the eviction process was stopped.

However, on the face of executive recalcitrance, mere declaration of state delinquency may be ineffective and the courts may need to explore the appropriateness of other remedies. For instance, the *Upazila Parishad* case[66] concerned a challenge to an Ordinance which abolished the elected *Upazila Parishads* (the third tier of the local government) and vested all rights, powers, authorities and privileges of the dissolved *Upazilla Parishads* in the government. The Court declared any sort of local governance by non-elected actors to be inconsistent with the constitution. The court opined that the government 'should' replace the non-elected persons by election 'as soon as possible – in any case within a period not exceeding six months from date.'[67] Unfortunately this was not paid heed to by the State and was ultimately forgotten. The case evidences the colossal failure of a mere directory declaration in absence of a mandatory order. This leads us to explore other remedies like interdicts.

6.3. Mandatory Interdict

Where there is evidence of likely non-compliance, it would be appropriate for the court to render a mandatory interdict. The nature of a mandatory interdict may be examined in light of *Campaign for Fiscal Equity* case[68] where the plaintiffs challenged New York State's

63 4 MLR (HC) 358.
64 *Id.*, para 4.
65 *Id.*, para 17.
66 Kudrat-E-Elahi Panir and Others v. Bangladesh, 44 DLR (AD) 319.
67 *Id.*, para 41
68 Campaign for Fiscal Equity v. State of New York, 36 719 N.Y.S.2d 475.

funding of New York City's public schools. In January 2001, Justice Leland DeGrasse of the State Supreme Court of New York in his decision, found that the defendants' method of funding education in New York violated the Education Article of the New York Constitution because it fell below the *constitutional floor* set by that article. He did not prescribe a detailed remedy at that point; instead, he ordered the State Legislature and Governor to devise and implement necessary reform of the State's public school financing system. The State failed to devise and implement necessary reform and, on 14 February 2005, Leland DeGrasse J proposed his own solution after receiving a report from a panel of special referees. He ordered that an additional US$ 5.6 billion in annual operating expenses be provided within four years to ensure that the city's public school children will be given the opportunity to obtain the sound basic education. DeGrasse J's decision was subsequently upheld by the Court of Appeal.[69]

Such examples of judicial assertiveness in issuing directives to the legislature and the executive are not unknown in Bangladesh. In Fire Accidents in Garment Industries case,[70] the petitioner prayed for appropriate directions to address the frequent fire incidents in various garments factories claiming lives of hundreds of garments workers. The Court found negligence on the part of the authorities concerned including the owners of garments factories and ordered the formation of a National Committee comprising various Ministries and representatives of garments factory owners and workers. Quite interestingly BGMEA, the organization of the owners of garments factories, was ordered to fund the office and the necessary staff, including a full-time secretary of the committee.

It is not only private organizations or individuals against whom the court issues mandatory directions. The State itself may be subject to such mandatory directions. In the *Two Stroke Motor Vehicle* case[71] the petitioner sought to reduce environmental hazards from the smoke of motor vehicles and audible signaling giving unduly harsh, shrill, loud and alarming noise endangering the people's right to live in a

69 Campaign for Fiscal Equity v. State of New York 100 N.Y. 2d 893.

70 Salma Sobhan, Executive Director, Ain o Salish Kendra (ASK) v. Government of Bangladesh and others, W/P No. 6070/1997; Judgment delivered on 31 May, 2001 (Unreported). A short description of the judgment is available in Tanim Hossain Shawon, *Role of the Judiciary in Ensuring Rule of Law and Justice* in HUMAN RIGHTS IN BANGLADESH 2001, 45 (ASK, 2002).

71 Dr. Mohiuddin Farooquee v. Bangladesh, 55 DLR (2003) 613.

healthy environment. Considering the scale of environmental pollution, the Court found *ad interim* directions necessary. Accordingly it ordered the government to - enforce the laws relating to control of hydraulic horns, conduct tests of vehicles and convert all government vehicles into CNG operated ones within six months and establish more CNG stations, phase out exiting two stroke wheelers and replace them by alternative transport within December 2002. Quite interestingly the writ petition was kept pending for the purpose of monitoring[72] and the respondents were asked to submit report of actions and results once every six months.[73] This seems clearly to be something more than the judicial role as understood in its traditional sense.

6.4. Prohibitory Interdict

Prohibitory interdict is most appropriate as a remedy for infringements of negative obligations shown in the third category of the South African Model. It is utilized to prohibit either the government, or any other person, from actively depriving the applicants and similarly situated people of their existing socio-economic rights. It is also very effective in preventing future infringements where the plaintiff shows a likelihood of violating protected rights. In this sense it becomes a preventive interdict. The High Court Division of Bangladesh has already taken the stance that the declaration that the directives are 'not enforceable by any court' only means that the state cannot be legally mandated to carry them out. However, this lack of legal enforceability does not imply that the directive can be thrown to the winds, by the enactment of laws in open opposition to them. The former cannot be objected to, but the latter cannot be permitted.[74] So the tendency to issue at least a writ of *prohibition* in non-justiciable socio-economic rights claims is an already known remedy.[75] Supplying justiciability to the right to basic necessities of life will simply bolster the tendency.

6.5. Structural Interdicts

Remedies such as declaratory orders, prohibitory or mandatory interdicts and damages are inappropriate to remedy 'systemic failures or the inadequate compliance with constitutional obligations' arising

72 *Id.*, para 14.
73 *Id.*, para 15.
74 Ahsan Ullah and Others v. Bangladesh, 44 DLR 179 para 68s.
75 BLAST v. Bangladesh, 13 BLC (2008) 384 para 14.

especially out of institutional or organizational behavior.[76] Adequate response to systematic failures of institutional actors requires something more than deterrence or compensation. To this end structural interdicts warrant special attention. Here the court disregards the traditional *functus officio* doctrine which stipulates that the end of the litigation signals the end of the dialogue between the Court and the parties. Instead, retention of jurisdiction over the case propels the government to act more cautiously because of the knowledge that any wayward conduct would easily be brought to the attention of the Court and might also spark the electorate frenzy. The Court arrives at more specific and detailed directions on the basis of the evidence brought to it by parties and by the attitude of the government.[77]

Monitoring compliance with its order by keeping a suit pending is not uncommon in Bangladesh. Bangladeshi courts have done it with great success by a device known as continuing *mandamus*.[78] Some examples will clarify the wrangle the Court had to fight to enforce its continuing *mandamus*. In the *Separation of Judiciary* case[79] around 441 judicial officers of Bangladesh sought separation of Subordinate Judiciary from the Executive as per Article 22 of the Constitution which happens within Part II Principles. They prayed for a *mandamus* on the government to frame necessary Rules facilitating the separation. The High Court Division upheld the contention and ordered framing of rules. The government preferred an appeal. The Appellate Division meticulously examined various provisions of the Constitution and issued a number of directions to achieve the desired separation,[80] including, *inter alia,* the framing of Rules, creation of a separate Judicial Service Commission and a separate Judicial Pay Commission and the maintenance of financial independence of the Supreme Court from the executive.[81] It was in May 1997 that the High Court Division issued the directives to be implemented within eight weeks. The decision was upheld by the Appellate Division in November 2000 and reconfirmed upon review in June 2001.[82] The government's reluctance

76 Grootboom v Ostenberg Municipality and Others, 2000 3 BCLR 277.

77 Sibiya and Others v DPP, Johannesburg High Court and Others [2006] ZACC 22.

78 Maj. Gen (Rtd) K M Shafiullah v. Bangladesh, W.P 4313/2009 (HCD) 340; (Dec. 25, 2010) http://supremecourt.gov.bd/judgement/WRIT%20PETITION%20NO.%204313%20OF%202009.pdf.

79 Masder Hossain v. Secretary, Ministry of Finance, 18 BLD 558.

80 Secretary, Ministry of Finance v. Masdar Hossain, 52 DLR(AD) 82.

81 *Id.*, para 49.

82 M Rafiqul Islam, *Apex Court Ruling on Separation of Judiciary: A Case of Enforcer Becoming Violator*, THE DAILY STAR, LAW & OUR RIGHTS, October 7, 2006.

to separate the judiciary was evidently noticed from the very beginning Three successive governments sought and were granted as many as 22 time extensions over a period of 8 years. Finally another Caretaker Government coming to office made necessary arrangements and the lower judiciary was separated from the clutches of the executive on 1st November, 2007.

This is a classic example of relentless court involvement resulting in fruition of the court's ordered directives. It is evidence of the fact that where the government fails to act in a timely manner in the face of a structural interdict, the Court is prepared to continue to engage the government until full compliance is obtained. If a structural interdict can buy independence for the judiciary, it can also ensure socio-economic rights for the people.

6.6. Various Models of Structural Interdicts

Courts have adopted different models of structural interdict in different cases. The most commonly used models of structural interdicts, as suggested by Susan P Sturm, include the *bargaining or consensual remedial formulation model*, the *legislative or administrative hearing model*, the *expert remedial formulation model* and the *report-back-to-court model*.[83]

6.6.1. Bargaining or Consensual Remedial Formulation Model

The bargaining model involves making remedial decisions through negotiation by the parties involved in the case. The biggest advantage of this model is that it produces a remedy that is acceptable to all the parties, thereby easing its implementation. An independent third party may be appointed to help the parties reach consensual agreement on the remedy. If the parties fail to agree, or if the agreement reached fails to conform to the requirements of the substantive law in issue, the judge may intervene and fashion the remedy.

In Bangladesh, the Code of Civil Procedure (Amendment) Act 2003[84] and a large number of other statutes[85] incorporate the

83 Susan P Sturm, *A Normative Theory of Public Law Remedies*, (1991) 79 GEORGE TOWN LAW JOURNAL, 1368-1375; Available Online http://www.changecenter.org/research-publications/sturm-publications/A%20Normative %20Theory% 20of%20Public%20 Law%20Remedies.pdf/at_download/file (Accessed : October 18, 2011).

84 §§ 89A, 89B & 89C, THE CODE OF CIVIL PROCEDURE, 1908

85 The Bank Companies Act 1991, The Acquisition and Requisition of Immovable Property Ordinance 1982, The Family Courts Ordinance 1985, The Muslim Family Laws Ordinance 1961, The Industrial Relations Ordinance 1969 and The Cooperative Societies Rules

bargaining or consensual remedial formulation model in civil, family, industrial, financial and labour matters. This type of mediation, negotiation and conciliation may be undertaken at any stage – trial or appellate – of a suit. Regarding the Supreme Court's opportunity to use such devices, it is boldly asserted that the Special Original Writ Jurisdiction being an extra-ordinary one, the High Court Division has got extra ordinary and inherent jurisdiction to pass any order as it deems fit and proper. Again, considering the widest possible latitude of discretion allowed to the High Court Division in regulating its own procedure, there is no reason why the Court would hesitate to adopt a bargaining or consensual model if if the facts and circumstances of the case merit it.

6.6.2. Legislative or Administrative Hearing Model

The legislative or administrative hearing model resembles a legislative committee process providing for public hearings and direct informal participation by interested parties. This model allows persons not originally party to the litigation to participate in the formulation of the remedy. The informal nature of the process also makes accessibility much easier especially for the weak and vulnerable. In Bangladesh as well, the courts frequently permit voluntary organizations to place their findings and reports before it and take into account their suggestions and recommendations while formulating its decision. The Court sometimes welcomes the opinions of the experts and asks for their suggestions.[86] In the *Post Divorce Maintenance* case,[87] for instance, given the Islamic importance of the question involved, almost 18 individuals and NGOs were allowed as interveners. Individuals included some renowned lawyers, two Professors from the University of Dhaka and even an ordinary housewife, while the *Khatib* (Chief *Imam*) of the National Mosque and Editor of a renowned Islamic monthly were invited as *amicus curie*. The court specially relied on the opinion of the *Khatib* of the National Mosque in formulating its decision.

2004 etc are a few of the many statutes empowering the court to render a bargaining or consensual model of structural interdict.

86 Naim Ahmed, PUBLIC INTEREST LITIGATION IN BANGLADESH CONSTITUTIONAL ISSUES AND REMEDIES, 151 (BLAST, 1999)

87 Hefzur Rahman v. Shasun Nahar Begum and Another, 51 DLR (AD)(1999) 172.

6.6.3. Expert Remedial Formulation Model

The expert remedial formulation model involves the appointment of either an individual expert or a panel of experts with a mandate to develop a remedial plan. The court-appointed experts in structural litigation differ from those we usually see in fundamental rights cases.

In Bangladesh the Code of Civil Procedure 1908 allows commissions to be formed for the purpose of examining witnesses, making local investigations, examining accounts and making partitions. However, this list is not exhaustive and does not limit the inherent power of the High Court Division to appoint commissioners in a writ petition for the ends of justice. The petitioner in a constitutional rights case may not be able to produce enough evidence in support of his case. When impartial assessment of facts is needed swiftly, the official machinery of the state becomes unreliable, inefficient and probably biased. Again, reporting in most cases has to be done against the state machinery and given that the court possesses no investigative machinery of its own, must take resort to a commission of experts lest the disadvantaged sections of the community have their petitions rejected and fundamental rights continue to be violated.[88]

6.6.4. Report-back-to-court Model

This is the most commonly-used model implemented by requiring the defendant to report back to the court with a plan on how he intends to remedy the violation. Usually a fixed date is set for the filing of the plan and the other party is given an opportunity to comment. It is only when the court is satisfied with the plan that it will concretize and incorporate it as part of its decree. In fact, the court reserves the right to reject the plan if it is found to be inadequate.

The *S v. Zuba*[89] case arose from the absence of juvenile reform schools in the Eastern Cape. The Court ordered the Department of Education to file a report disclosing its short, medium and long term plans for the incarceration of juvenile offenders. It was also ordered that a task team, to work on the establishment of a reform school, be identified and its reports be submitted on a regular basis to the inspecting judge as regards progress until the school is established.

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88 SK Agarwala, PUBLIC INTEREST LITIGATION IN INDIA: A CRITIQUE, 26 (Tripathi & Indian Law Institute, 1985).

89 (2004) 4 BCLR 410 (E).

The Bangladeshi brand of Report-back-to-court Model is a little more intrusive than the one discussed above. The instances we have in Bangladesh shows that here the Court itself has defined the plan of action, requiring the government to report back on the progress of implementation. Though the Bangladeshi judgments exhibit a slight variance in the use of the report-back-to-court model, these are nonetheless persuasive in the sense that seeking reports on the government's efforts towards fashioning appropriate remedies is less intrusive than seeking reports on the degree of compliance with court formulated remedies. In *Faustina Perera* v. *State*[90] a *suo moto* rule was issued on the basis of a letter written by *Dr. Faustina Perera*. There attention of the Chief Justice was drawn to the fact that 29 foreigners were languishing in different jails of Bangladesh for about five years even after serving out their sentence. The regional representative of International Organization for Migration was invited to share his experience. The realistic problem regarding the release of the prisoners is that if they are immediately released they will be unable to produce the necessary documents. Most importantly there are no shelter centres in Bangladesh to give necessary protection to them. The Court ordered the Government to increase its engagement with International Organizations working with migrants and to establish a separate cell in the Ministry of Foreign Affairs to deal with foreign prisoners.[91] The Jail Authority was ordered to facilitate their release and make necessary arrangement for their safety and shelter at best within 2 months. The Superintended of Central Jail was to report the Court within 3 months about the release of the 29 prisoners. The IG Prison was to report within 7 days with full particulars of the remaining 822 foreign prisoners across the country and of the steps taken regarding their release.[92]

In the *Environment Pollution Case*[93] Dr. Farooque sought a writ of *mandamus* upon 1176 industries to enforce their duties under the Environment Pollution Control Ordinance 1977 and the Bangladesh Environment Conservation Act 1995. Quoting Krishna Iyer J. with approval the Court asserted that it would not 'sit idly by and allow the government to become a statutory mockery'.[94] The Director General Directorate of Environment was ordered to classify 'red'

90 53 DLR 414.
91 *Id.*, para 10.
92 *Id.*, para 11.
93 Dr. Mohiuddin Farooque (BELA) v. Bangladesh, 55 DLR (HCD) 69.
94 *Id.*, para 56.

industries and adopt sufficient control mechanisms within one year and report compliance within six weeks thereafter. Some factories and industries were ordered to take measures within 2 years and report to the court soon thereafter.[95] The petitioner was ensured the liberty to bring further violations of law to the Court and to approach the Court for directions wherever necessary.[96]

Very recently in the *Pure Food Case*[97] the High Court Division directed the government to set up a food court in every district and to appoint sufficient food analysts and food inspectors in all districts within one year in order to prevent food adulteration. It observed that necessary rules and regulations should be framed in order to ensure safety, purity and proper nutrition values of foods. The court also directed the government to inform the court by July 1, 2010, about its progress in complying with the directions.

7. Is Bangladesh Ready to Take the Burden?

As to the question whether Bangladesh is ready yet for the dramatic regime change I propose in here in this paper, the my foremost response is already an argument that is oft repeated. This is to view the poor implementation of socio-economic rights as a problem of 'governance' and not of 'resources'. This proposition may be exemplified by the simple question: is the unavailability of food the defining reason for famine? The classic example of 1974 famine acts as an eye opener. The availability of food produce was much greater in 1974 than in any preceding year between 1971 and1976. Yet Bangladesh suffered a famine. All four of the famine districts were among the top five in terms of food availability per head. This evidences the proposition that the availability of food is not the problem so much as access to food to the marginalized.[98] Considering these rights as contingent on economic development results in the suppression of economic and social rights in the wait for its realization. The pain in the present is guaranteed; the gain in the future is speculative and illusory. Few worlds freely opt for such a bargain.[99]

95 *Id.*, para 59.

96 *Id.*, para 61.

97 Human Rights and Peace for Bangladesh v. Bangladesh, (W/P No 324/20090), 30 BLD (HCD) 125.

98 R. Kunnemann, *The Right To Food: The Twelve Misconceptions* in HUMAN RIGHTS SUMMER SCHOOL MANUAL (Mizanur Rahman, ed.) 2001) 129-144, 131.

99 David Beetham, *Democracy and Human Rights: Civil, Political, Economic, Social and Cultural* in HUMAN RIGHTS AND EMPOWERMENT (Mizanur Mizanur ed., 2002) 19-39, 30.

Secondly, it may emphatically be asked whether the doubt in the minds of the founding father regarding the economic strength of the newly independent Bangladesh remains valid even today. Is Bangladesh not ready to take at least a 'minimum' 'reasonable' burden of socio-economic rights? In fact, the economy of Bangladesh has come a long way since 1971. The most basic achievement relates to economic growth, which is a necessary pre-condition for achieving progressive realisation of rights as expeditiously as possible. Bangladesh's rate of growth is not spectacularly high, especially in comparison with the rates achieved by the high-performing countries of East and South-East Asia. From an average of 1.7 per cent in the 1980s, the growth of per capita income jumped to 3.0 per cent in the 1990s and jumped again to 4.4 per cent in the 2000s. Since 2005, per capita income has been growing at more than 5 per cent per annum, representing a three-fold increase compared to the 1980s. The end result of all this is that the current generation of Bangladeshis is almost exactly twice as rich as was the preceding one.[100]

Thirdly, the basic problems in the welfare management of Bangladesh lie not in the availability of welfare benefits, rather it is predominantly in the accessibility of those benefits for the poor. Take the Right to Food, for example. For much of the period in the first two decades after independence, overall food grain availability just about kept pace with population growth, so that per capita availability has remained virtually stagnant.[101] However, a large share of budgeted resources appears not to reach the intended beneficiaries, indicating serious accountability problems. As per the World Bank estimation of 2003, as much as 35 per cent of the food grains allocated to the VGF (*Vulnerable Group Feeding*), 41 per cent of the VGD (*Vulnerable Group Development*), and an overwhelming 75 per cent of allocations to the FFE (*Food-for-Education*) did not reach any household—eligible or otherwise. Diversion of resources at such a massive scale detracts from the success the government can otherwise claim in fulfilling its duty "to provide" by pursuing a pro-poor public food distribution system.[102]

Fourthly, in Bangladesh specially, what we need to emphasise on is spending capability of the government which is the basic

100 SR Osmani, *Realizing the Right to Development in Bangladesh: Progress and Challenges*, THE BANGLADESH DEVELOPMENT STUDIES Vol. XXXIII, March-June 2010, Nos. 1 & 2, 25- 90, 35 -37.

101 SR Osmani *supra note* 99, 45- 46.

102 *Id.*, 52

challenge. The National Budget for the financial year 2009-10 allocated a total of Tk.7,561.41 crore for social sector development, which is about 19 per cent higher than the allocation for the financial year 2008-09 (Tk. 6,346.96 crore). However, ADP utilisation statistics for this sector over the first five months of the financial year 2009-10 (July November 2009) paints a rather gloomy picture (29% total expenditure as percentage of ADP allocation) when compared to the financial year 2008-09 when 87 per cent of the budgeted allocation was spent.[103] The poor implementation scenario is evident in the health sector as well. Although the National Budget for the financial year 2009-10 allocated Tk.70 crore for the purpose, only about 26% has so far been utilised till November 2009.[104]

Lastly, while judging the 'fundamental right to basic necessities of life', the Court will concern itself, as already shown, more with questioning the reasonableness of the already allocated resources rather than requiring excess resources to be allocated. What the Court ought to try to uphold, in particular, in the process of progressive realization include the following propositions. First, the State must begin immediately to take steps to fulfill the rights as expeditiously as possible by developing and implementing a time-bound plan of action. The plan must spell out, *inter alia*, when and how the State hopes to arrive at the full realization of rights. Second, the plan must include a series of intermediate— preferably annual—targets. These intermediate targets will serve as benchmark, against which the success or failure of the State will be judged.[105]

8. Concluding Remarks

On reading this article, a legitimate question may arise regarding the appropriateness of the Bangladeshi decisions cited herein, given that all of the decisions are not related to claims of socio-economic rights. One may thus question the assumption that these judgments shall be 'appropriate' precedent for the enforcement of the potention'fundamental right to basic necessities of life'? My response to this is simple. The central attempt of this paper is to dispel the

103 Independent Review of Bangladesh's Development (IRBD), *State of the Bangladesh Economy in FY2009-10: From Stability to Accelerated Growth*, CENTRE FOR POLICY DIALOGUE (CPD), Dhaka, 11 January 2010; *69* Available:www.cpd.org.bd/downloads/IRBD_FY10_1stInterim.pdf, (Accessed : October 22, 2011).

104 *Id.*, 70-71.

105 SR Osmani, *supra note 99*, 35.

dogmatic perception of socio-economic rights by demonstrating that the court is 'institutionally capable' of dealing with resource issues in the attempt to realize the fundamental right to basic necessities and that the principle of 'separation of powers' does not pose a hindrance to the court in doing so. If the courts can deal with resources and engage in tussles with the executive in civil-political rights cases, then there is little to prevent them from exploring the path to enforcing the claim to basic necessities. Therefore, it is my submission that socio-economic rights that comprise the basic necessities of life ought to be recognized as constitutionally protected fundamental rights in Bangladesh.