Ph.D. Thesis

Title

Enforcement of Social and Economic Rights: South Asian Judicial Discourses

Submitted By

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A thesis submitted to the Department of Law, Faculty of Law, University of Dhaka in partial fulfillment of the requirements for the degree of Doctor of Philosophy.

Under the Supervision of

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Declaration

I declare that **"Enforcement of Social and Economic Rights: South Asian Judicial Discourses"** is my work under the supervision of Professor **Dr. Md. Nazrul Islam** and this thesis has not been submitted for any degree or examination in any other University or academic institution.

All sources and materials used are duly acknowledged and are properly referenced.

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Certificate

This is to certify that the thesis entitled **"Enforcement of Social and Economic Rights: South Asian Judicial Discourses"** is researched by Snehadri Chakravarty submitted to the Department of Law, Faculty of Law in partial fulfillment of the requirements for the degree of Doctor of Philosophy under my supervision and guidance.

No part of the thesis has been submitted for any degree or examination in any other University or academic institution. The researcher has fulfilled all the requirements for submission of the thesis as prescribed by the rules and regulations of the University of Dhaka. I, therefore, recommend this thesis for submission and evaluation for the award of the degree of Doctor of Philosophy.

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Abstract

This thesis aimed to bring new dimensions to the contextual interpretation of the Constitution, particularly in the field of judicial enforcement of social and economic rights. So far, the attempt of judiciaries to interpret social and economic rights adjudication has been limited to the discussions of the "right to life" discourse or a retrogressive approach. By offering a broader and liberal perspective, this thesis work has tried to encroach on that barrier.

This study has worked within the jurisprudential contention of the global south and global north in approaching and adjudicating social and economic rights performed by the judiciaries. It has identified some significant features of South Asian judicial discourses by analyzing predominant scholarly thoughts and arguments. The study has analyzed the contexts and conditions of the constitutional journey of South Asian countries especially, India, Pakistan, and Bangladesh which has unleashed the changing phenomena of judicial approaches from positivistic to interpretivist while dealing with social and economic rights.

The thesis has found that the approach of treating principles, whether directive or fundamental, so far has been applied by the judiciaries, and legal scholars of South Asian countries is mainly dominated by positivistic jurisprudence. The principles have been treated through the lenses of rules and so the judiciaries often feel difficulties to find the enforceability of social and economic rights. To address this situation, the study has attempted for contextual interpretation of principles.

The study has experimented with internal and external aids to constitutional interpretation in finding more justification and rationality for enforcing social and economic rights taking into consideration of constitutional framework of Bangladesh. It has examined the preamble as an internal aid and various pre-constitutional documents of the Bangladesh Constitution, like- the 21 Points Programme of 1954 Provincial Election (which was the Election Manifesto of the United Front, and demand was for Complete Provincial Autonomy), 11 Points Demands of All-Party Students' Action Committee in 1969, Historic Speech of 7th March by Bangabandhu Sheikh Mujibur Rahman in 1971, the Proclamation of Independence of 1971, and pre-constitutional documents in the post-Liberation period including the speeches and proceedings in the Constituent Assembly as external aids to interpretation. After examining all of these, the study

has argued that these internal and external aids can be used as effective tools for constitutional interpretation for more efficient enforcement of social and economic rights. It has further claimed that the subsequent economic and social development of Bangladesh over the last 50 years has also to be considered as another external aid to constitutional interpretation for enforcing social and economic rights. Along with it, the thesis has also underscored some concerning factors of using internal-external aids, which prescribes for conscious and purposive use of aids otherwise judicial transgression in the guise of activism may occur. Being alert about judicial transgression, the figuring out a justified, comprehensive, and effective enforcement discourse for social and economic rights is the prime object of this thesis.

Acknowledgment

The survival of a human depends upon the cooperation of his surroundings. The acquisition of knowledge takes place in the same method. Hundreds of thousands of years of knowledge have been developed through the combined efforts of the labor and experiences of countless people. The character of knowledge is therefore social. One of the conditions for following this path is to properly evaluate and acknowledge the past work of others. At the same time, it is morally and ethically necessary to recognize those who are by the side in difficult times with all their guidance, hope, love, courage, and belief. My journey to the completion of this thesis was a combination of ups and downs, proceeded through many difficulties, like all researchers face. Still, some persons have conferred their faith upon me in all my well and woe. Among them, the names of a few will be mentioned here. But there are many others out there who could not be mentioned, although they are equally important to me cherishing my every dream.

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I am grateful to my parents, Shanta Chakravarty and Himardri Chakravarty whose debts incurred in my upbringing will never be reimbursed. Their unconditional love and unwavering faith have made me capable of going through this journey.

Finally, my love, respect, and gratitude to the marginalized, poor, and oppressed people of Bangladesh who have always inspired this thesis work to move forward. Their struggles of getting two meals in a day, having a little shelter, and the least survival are still on. If any of these writings, no matter how trifling, are useful in any aspect of their well-being, the work will find its justification.

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Dedication

Shanta Chakravarty

Himadri Chakravarty

.....My parents

"Whosoever receives me

With unbound clemency"

..... Rabindranath Tagore

Table of Contents

List of Abbreviations

AD	Appellate Division
CA	Constituent Assembly
CAD	Constituent Assembly Debates
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CP	Civil and Political
CRC	Child Rights Convention
DLR	Dhaka Law Report
DPSP	Directive Principles of State Policy
ESC	Economic Social and Cultural
FPSP	Fundamental Principles of State Policy
FR	Fundamental Right
FRs	Fundamental Rights
GDP	Gross Domestic Product
HCD	High Court Division
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
PIL	Public Interest Litigation
PLD	Pakistan Law Digest
PP	Principles of Policy
SAL	Social Action Litigation
SC	Supreme Court
SDGs	Sustainable Development Goals
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
US	United States
USSR	United Socialist Soviet Republic
WHO	World Health Organization

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BNWLA v. Bangladesh (2009) 14 BLC (HCD) at 694.

Brown v Board of Education, (1954) 347 US 483.

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BTRC v. Ekushey Television, (2005) 58 DLR (AD) 82.

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Centre for Environment and Food Security v. Union of India, (2011) 5 SCC 676

CERC v. India (1995) 3 SCC 42: AIR 1995 SC 927.

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Chameli Singh v. State of Uttar Pradesh (1995) Supp. 6 S.C.R. 827.

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Council of Civil Service Unions V. Minister for the Civil Service, (1985) AC 374 at 408.

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Ekushey Television v. Bangladesh, (2002) 56 DLR 91.

ETV v Dr. Chowdhury Mahmood Hasan, (2002) 54 DLR (AD), 132.

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Enforcement of Social and Economic Rights: South Asian Judicial Discourses

Chapter- 1

Introduction

1.1 Dynamism of Human Rights Evolving Worldwide

The justification for enjoying human rights is very simple- one has to be a human. Different types of rights are included in the paradigm of human rights. Theoretically, they are equal, unequivocal, fundamental, and inalienable. They are universal in their character and should be enjoyed by everyone. But in practice, human rights have the complexities of being treated as a single and all-encompassing definition. Therefore, the recognition and realization of human rights stand in quite a dynamic position worldwide. Consequently, the equal treatment of different categories of human rights is being varied both within and between countries.

Despite having a different notion of understanding human rights there exists a formal human rights framework both internationally and nationally. The United Nations (UN) has developed a formal framework by incorporating the "International Bill of Human Rights." It consists of three legal instruments providing some directives applicable to the whole world. Among the legal instruments. the "Universal Declaration of Human Rights" (UDHR) was the one that provided the detailed adjudication of rights and was designed to be universal both in its content and application.[1] Although the provisions of UDHR are not legally binding, a central declaration is considered to treat this international document as having the status of customary law.[2]

[1] The UDHR lists numerous human rights like- political, civil, economic, social, and cultural to which all people are entitled. Though it does not have signatories, it was ratified by a 1948 General Assembly proclamation with no votes against (and 48 votes in favor). However, eight countries did abstain – all the Soviet Bloc states, South Africa, and Saudi Arabia.

[2] The Final Act of the 1968 International Conference on Human Rights ("Proclamation of Teheran") states that the UDHR "constitutes an obligation for the members of the international community" (UN Doc. A/CONF. 32/41 at 3, 1968).

The "International Bill of Human Rights" consists of another two international human rights documents having their specific categorization. The first one is- the "International Covenant on Civil and Political Rights" (ICCPR) and the second is- the "International Covenant on Economic, Social, and Cultural Rights" (ICESCR). These two documents outline the two different categories of rights applicable to the whole world. [3] Consequentially, this differentiation of human rights gave birth to some controversies and brought forth immediate (and in many ways, permanent) effects both in the theoretical and practical implications of human rights. The classification of rights has established the ongoing practice of uneven treatment of rights which is continuing till today. Current debates on the hierarchy of rights, unevenness of treating rights, and different implementation mechanisms are the byproduct of this categorization of rights. The most regressive example is to indicate the prioritization of civil and political (CP) rights over economic, social, and cultural (ESC) rights in the field of enforcement, implementation, and even research. Apart from this, the historical evolution of these two categories of rights also provides the most entrenched view of the "generations" approach to human rights.[4] Where CP rights have been recognized as 'first', ESC rights as 'second' and "right to development, right to ecologically balanced and healthy right to ownership of the common heritage of mankind"[5] as 'third' generation of rights.

From the above perspective, over the last several decades, the discourses of enforcing and implementing ESC rights have been engaged with intense political, ideological, philosophical, and practical controversies.[6] ESC rights were often treated as a less priority in comparison to CP rights

[3] The principal CP rights elaborated in the ICCPR include freedoms from racial and equivalent forms of discrimination, slavery, torture, and arbitrary arrest, detention, and exile; rights to life, liberty, security of the person, fair and public trial, participate in government, and own property; and rights of movement, thought, conscience, and religion, opinion and expression, and peaceful assembly and association. On the other hand, the principal economic and social rights elaborated in the ICESCR include rights to an adequate standard of living, including adequate food, clothing, and housing, and the continuous improvement of living conditions. These include rights to be free from hunger, to the enjoyment of the highest attainable standard of physical and mental health, to education, to work and to just conditions of work, to form and join trade unions, to social security, to take part in cultural life, and to the family (including protections for pregnant women and mothers, and children).

[4] In November 1977, Karel Vasak, UNESCOs legal advisor and distinguished human rights scholar, wrote an article for the UNESCO Courier, introducing the idea of three generations of human rights. The theory gained traction among researchers and practitioners and became part of the standard vocabulary describing the history and contents of the human rights framework. Despite its many flaws, it continues to be referenced. See Karel Vasak. "A 30-year Struggle: The Sustained Efforts to Give Force of Law to The Universal Declaration of Human Rights." *The UNESCO COURIER,* November 1977, p- 29. Available at: https://unesdoc.unesco.org/ark:/48223/pf0000074816.nameddest=48063. (Last accessed: 24.02.20222)

[5] Ibid.

[6] See for instance, Marks, Stephen P. "The past and future of the separation of human rights into categories." *Md. J. Int'l L.* 24 (2009): 209.; Patnaik, J. K. "Human, rights: The concept and perspectives: A third world view." *The*

bereft from the human rights paradigm. Many scholarly academic connotations reveal the ideas that have diminished the normativity and significance of ESC rights.[7] But it is also a truth that there has been substantial progress in defending the significance of ESC rights mingling with CP rights by a comparative study of human rights.[8] Although, there still exists controversy about enforcing and

Indian Journal of Political Science (2004): 499-514.; Howard, Rhoda E., and Jack Donnelly. "Human dignity, human rights, and political regimes." *American Political Science Review* 80, (1986): 801-817.; Kao, Grace Y. *Grounding human rights in a pluralist world.* Georgetown University Press, 2011.; Kohen, Ari. *In defense of human rights: A non-religious grounding in a pluralistic world.* Routledge, 2007.; Posner, Eric A. "Human welfare, not human rights." *Colum. L. Rev.* 108 (2008): 1758.; Ingram, David. "Between political liberalism and postnational cosmopolitanism: Toward an alternative theory of human rights." *Political theory* 31, (2003): 359-391.; MacCallum, Gerald C. "Negative and positive freedom." *The Philosophical Review* 76, (1967): 312-334.; Alexy, Robert. "Discourse theory and human rights." *Ratio Juris* 9, (1996): 209-235.; Alexy, Robert. "Discourse theory and fundamental rights." *In Arguing fundamental rights,* pp. 15-30. Springer, Dordrecht, 2006.

[7] See generally, Narain, J. "Human and fundamental rights: What are they about?" *Liverpool Law Review* 15, no. 2 (1993): 163-187.; Alexy, 'Discourse Theory and Fundamental Rights' (n 6); Vierdag, E. W. "Some remarks about special features of human rights treaties." *Netherlands Yearbook of International Law* 25 (1994): 119; Posner (n 6); Griffin, James. "Welfare rights." *The Journal of Ethics* 4, no. 1 (2000): 27-43.; Ling, Angelina. *Charles R. Beitz, The Idea of Human Rights.* Oxford University Press, 2009.; Vierdag, Egbert W. "The legal nature of the rights granted by the international covenant on economic, social and cultural rights." *Netherlands yearbook of international law* 9 (1978): 69-105.; Bhagwat, Ashutosh. *The myth of Rights: the purposes and limits of constitutional rights.* Oxford University Press, 2010.; Kelley, David. *A life of one's own: Individual rights and the welfare state.* Cato Institute, 1998.; Cranstson, Maurice. *What Are Human Rights?* The Bodley Head Ltd, 1973. Shue, Henry. *Basic rights: Subsistence, affluence, and US foreign policy*. Princeton University press, 2020.; La Torre, Massimo. "Nine critiques to Alexy's theory of fundamental rights." *In Arguing Fundamental Rights,* pp. 53-68. Springer, Dordrecht, 2006., Brest, Paul. "The fundamental rights controversy: The essential contradictions of normative constitutional scholarship." *The Yale Law Journal* 90, (1981): 1063-1109.; MacMillan, C. Michael. "Social versus political rights." *Canadian Journal of Political Science/Revue canadienne de science politique* 19, (1986): 283-304.

[8] There are now numerous publications defending the justiciability of ESC rights. The following are just few examples: Shue (n 7); Alston, Philip, and Gerard Quinn. "The nature and scope of states parties' obligations under the International Covenant on Economic, Social and Cultural Rights." *Hum. Rts. Q.* 9 (1987): 156.; Udombana, Nsongurua J. "Social rights are human rights: Actualizing the rights to work and social security in Africa." *Cornell Int'l LJ* 39 (2006): 181.; Eide, Asbjørn, Catarina Krause, and Allan Rosas, eds. *Economic, social and cultural rights: a textbook*. Brill, 2001.; Sen, Amartya. *Development as freedom*. Ausgabe, 2001.; quires, John., Malcolm Langford and Bret Thiele (eds.). *The Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights.* UNSW Press, 2005. Langford, Malcolm. and Aoife Nolan (eds.). *Litigating Economic, Social and Cultural Rights.* Legal Practioners Dossier, Centre on Housing Rights and Evictions, COHRE, 2006.; Langford, Malcolm. "The justiciability of social rights: From practice to theory." *Social rights jurisprudence: emerging trends in international and comparative law* 3 (2008): 43-45.; Gewirth, Alan R. "The community of rights." *In Applied ethics in a troubled world,* pp. 225-235. Springer, Dordrecht, 1998.; Jayawickrama, Nihal. *The judicial application of human rights law: National, regional and international jurisprudence.* Cambridge university press, 2002.; Coomans, A. P. M. *Justiciability of economic and social rights-experiences from domestic systems.* Intersentia, 2006.; Tinta, Mónica Feria. "Justiciability of Economic, Social, and Cultural Rights in the Inter-American system of protection of human rights: Beyond traditional paradigms and notions." *Hum. Rts. Q.* 29 (2007): 431.; Nnamuchi, Obiajulu. "Kleptocracy and its many faces: The challenges of justiciability of the right to health care in Nigeria." *Journal of African Law* 52, (2008): 1-42.; International Commission of Jurists. *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability.* 2008.; Eiedel, Eibe, Gilles Giacca, and Christophe Golay, eds. *Economic, Social, and Cultural Rights in International Law: contemporary issues and challenges*. OUP Oxford, 2014.; Koch, Ida Elisabeth. "The Justiciability of Indivisible Rights'(2003)." *Nordic Journal of International Law* 72: 3.; Dennis, Michael J., and David P. Stewart. "Justiciability of economic, social, and cultural rights: should there be

implementing ESC rights in a particular given political-economic situation of states. Centering upon this context, the contentions of adjudicating ESC rights are evolving into two central questions- first, whether or not the ESC rights could be treated equally with CP rights, and second, the finding of a more justifiable and rational approach to treating ESC right in practice. The same questions are centered on the constitutional discourses of South Asian Countries. The South Asian Countries mainly incorporate ESC rights in their constitutions giving less enforceability or priority than the CP rights. The legislative bodies have seldom ratified the SEC rights in their respective constitutions. That sometimes extends the role of the judiciary of these countries to deal with SEC rights. So this thesis mainly concentrated on the comparative judicial discourses that have been evolving in South Asian Countries approaching the adjudication of SEC rights. Another aspect is to be noted- though cultural rights are treated equally with economic and social rights, popularly inclined in the category of 'second generation rights', this study has mainly focused on the justification, rationality, and enforcement mechanism of social and economic rights.

1.1.2 Different Judicial Discourses Growing Around

The judiciaries of South Asian countries have articulated, so far, a distinct judicial attitude towards the 'non-binding' social and economic rights and, in this way, given birth to distinct judicial discourses quite different from the 'global north'.[9] This claim is the ultimate sum-up and will be gradually evident with the progression of the discussion. However, the judiciaries of South Asian countries while dealing with social and economic rights have articulated different discourses. 'Interdependence theory of human rights' is one of them. Applying this theory, the judiciaries, as discussed earlier, have adopted the combined approach to establish the significance of social and economic rights taking aid of CP rights.

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an international complaints mechanism to adjudicate the rights to food, water, housing, and health?." *American Journal of International Law* 98, no. 3 (2004): 462-515.; Riedel, Eibe, Gilles Giacca, and Christophe Golay, eds. *Economic, Social, and Cultural Rights in International Law: contemporary issues and challenges.* OUP Oxford, 2014.; Ssenyonjo, Manisuli. *Economic, social and cultural rights in international law.* Bloomsbury Publishing, 2009.; Liebenberg, Sandra. *Socio-economic rights: Adjudication under a transformative constitution*. Juta and Company Ltd, 2010.; Baderin, Mashood A., and Robert McCorquodale, eds. *Economic, social and cultural rights in action.* Oxford: Oxford University Press, 2007.

[9] The North is primarily associated with the Western world, whereas the South is generally associated with emerging countries (formerly known as the "Third World") and the Eastern world. The two categories are frequently described by their varying levels of wealth, economic development, income disparity, democracy, and political and economic freedom. Same thing is measured in relation to judicial response. According to a specific sociological phenomenon pertinent to 'right' discourse in Western world countries, the judiciaries generally perform a 'minimalist' duty in which they rarely engage in the people's socioeconomic problems because the state owes a reciprocal obligation to give promised or implied benefits to its citizens. Judicial skepticism is also usually evident in this global part. The detailed discussion is in the 6th chapter of this work.

The judiciaries have inclined to observe human development by compelling the question of human dignity coupled with physical, psychological, and spiritual needs.[10] This kind of discourse is warranted by the promise of judicial activism. At the same time, this kind of judicial activism is encountered by critics as a transgression of the limits of judicial power. To put it another way, this sort of activism has been criticized for populism and excessivism, commonly be said as a transgression of the Judiciary.[11] So the existing judicial discourses have been encircling in the paradigm- the formalistic approach versus judicial activism.[12]

Advocates of limited judicial power repudiate 'judicial social responsibility, raising hesitations about judicial role in social reform, suspecting the possibility of "the hollow hope"[13]. It is also another common saying that the judges are incapable of dealing with social, and economic issues commonly known as 'polycentric issues'[14], issues like allocating resources that impact the public exchequer, are incapable of judicial resolution.[15] Contrary to these views, Allison explores the 'judicial problems of dealing Polycentricity' as a deficient insight because it underestimates the judicial role. He shows that the concept of 'polycentricism' in fact exists in every legal dispute.[16] In this way, he extends the periphery of judicial activism.

The formal argumentation tends to restrict judges to advance their roles in enforcing social and economic rights, to hold apathy in terms of innovating rights independently of those contained in positive laws[17], administering formal justice, and providing common remedies[18]. South Asian Constitutionalism was, too, greatly influenced by the formalistic judicial approach. Over the years, different judiciaries of South Asian countries felt hesitant to participate creatively, especially in the

[10] See generally Minkler, Lanse, and Shawna Sweeney. "On the indivisibility and interdependence of basic rights in developing countries." *Human Rights Quarterly* (2011): 351-396.
[11] It is populism when doctrinal effervescence exceeds the judiciary's institutional capacity to transform doctrine into reality, and it is excessivism when a court assumes obligations that should typically be carried out by other co-ordinate organs of government. (See generally Hoque, Ridwanul. *Judicial activism in Bangladesh: a golden mean approach*. Cambridge Scholars Publishing, 2011.
[12] See generally Sathe, Satyaranjan Purushottam. *Judicial activism in India.* Oxford University Press, USA, 2002.
[13] Rosenberg, Gerald N. *The hollow hope.* University of Chicago Press, 2008.
[14] Stone, Julius. *Social dimensions of law and justice.* Stanford University Press, 1966. 653-54.
[15] Fuller, Lon L. "The forms and limits of adjudication." *Harv. L. Rev.* 92 (1978): 353-409.
[16] Allison, J. W. F. "Fuller's Analysis of Polycentric Disputes and the Limits of Adjudication'(1994)." *Cambridge Law Journal* 53: 371.
[17] Bell, John. "Policy arguments in statutory interpretation." Dunné (ed), *Legal Reasoning and Statutory Interpretation* Rotterdam Lectures in Jurisprudence 1988 (1986): 77.
[18] S.D. O'connor, "The role of the judiciary in protecting individual rights in the United States", Vol: 8, *National Law School Journal,* 13.

adjudication of social and economic rights. But the attitude has changed with getting ahead of time. The Indian Judiciary has been playing a pioneering role in this part.

India started to implement the extended form of 'right to life' jurisprudence in enforcing social and economic rights in the 1980s and after the 1990s it proceeded highly.[19] Other South Asian countries' higher courts have, so far, positively enforced these rights as well. The majority of these countries have introduced 'non-enforceable' social and economic rights enshrined as 'principles' aimed at uplifting primarily disadvantaged populations. Pakistan, Bangladesh, Nepal, and Sri Lanka have tended to enforce social and economic rights very similar to India. All these countries have extreme poverty, invoking the courts to adopt a more socially and economically viable understanding of justice. For at least twenty years the judiciaries of these countries have been effectively using the tool of Public Interest Litigation (PIL) intending to earn a substantial change in the down condition of marginalized people.[20] Questions may be asked to what extent and effectiveness the narrow situation of downtrodden people has altered over the years. Answers may vary according to different ideological and political divisions. But it may be referred that in almost all the cases and all the judiciaries of South Asian Countries have established the 'principle of indivisibility and interdependence of human rights' by using the 'right to life' discourse. They have to take recourse to CP rights to materialize social and economic rights.[21]

This study after comparatively discussing the different constitutional journey of South Asian Countries has claimed that the approach so far taken by the judiciaries are not enough. There exist some other

[19] Robinson, Nick. "Expanding judiciaries: India and the rise of the good governance court." *Wash. U. Global Stud. L. Rev.* 8 (2009): 1. 60.

[20] In Nepal, public interest litigation was explicitly made part of the 1991 Constitution, and the court often interferes in social issues in a manner similar to that in India. (Constitution of Nepal, art. 88(2). Bangladesh also has developed a public interest litigation jurisprudence, with the judiciary intervening in matters like ordering that iodine be added to salt for consumers' health or that two stroke engines be removed from Dhaka to fight pollution. (Sayed Kamaluddin, BD Judiciary Showing Increasing Assertiveness, *PAKISTAN DAWN,* Apr. 4, 2002. In Pakistan, while taking up several cases of public interest litigation, the Supreme Court and High Courts have expanded their interpretations of the right to life under the Pakistani Constitution and the elements of standing in a manner similar to that seen in India. (A useful discussion and analysis of PIL in Pakistan can be found Menski, W. R., Alam, & M. Raza. *Public interest litigation in Pakistan*. London: Platinum Publishing. 2000. More recently, public interest litigation in Pakistan has helped situate the Court as a proponent of the interests of the public in its larger political battles with the executive and the military. (Judicial Activism Behind Reference to CJP, THE NATION, May 3, 2007. Sri Lanka has generally less developed public interest litigation, but the Court still intervenes in basic governance matters, such as outlawing loudspeakers at night (in which it followed precedent from India). Pradeep Kariyawasam, Noise Pollution: Let's Follow Our Neighbor, *THE ISLAND,* Dec. 12, 2007.

[21] The cases relating to the adjudication of social and economic rights dealt by the India, Pakistan, Bangladesh, Nepal, Sri Lankan judiciaries have been elaborately discussed in the 3rd, 4th, and 5th Chapter of the thesis paper.

justifications and rationalities for treating social and economic rights. Because so far the judiciaries have treated social and economic rights by giving birth to different discourses have not recognized the independent position of the rights. From the very beginning of the constitutional journey, none of the South Asian Countries have recognized social and economic rights other than 'non-enforceable' principles. Although with the progression of time, the judiciaries of these countries have been inclined to enforce these rights indirectly taking aid of CP rights, i.e. right to life. But there may have been some other justifications embedded inside in the very constitutional history that this thesis sincerely attempted to re-discover.

The study claimed that the justification of enforcing and implementing social and economic rights can greatly be engaged by taking cognizance of different important constitutional documents, historical events, and speeches of the founding fathers, which can act as the external aid to interpretation. For finding out the true intention of the framers of the Constitution, it is more than necessary to make an in-depth understanding of constitutional history and discover the rationality for a further progressive interpretation of constitutional texts. This is an ardent necessity where the constitutional provisions regarding social and economic rights stand on some vulnerable footing and remained all most in the same position over the years.

Secondly, the thesis paper has argued about the newer interpretive value of fundamental principles concerning the enforcement of social and economic rights, which, so far, has not been discussed in any academic discussion. The work has claimed that the 'context-specific role' of principles has not been discovered and identified while approaching the discourses of enforcing social and economic rights. The author attempts to substantiate and establish these newer rationalities and justifications. In this way, the author desires to provide some firm footing in adjudicating social and economic rights. This effort will revolve around the whole discussion. That is why it is necessary to take a look at the context of the research work.

Before going to that discussion it needs to ascertain the trajectory of this chapter. The next discussion will be followed by the context of this thesis, as mentioned above. Then research aims and objectives will be discussed followed by the scopes and limitations of the research. The attempt of determining the hypotheses will be the next step and then the succeeding part will be on literature review along with the findings of gaps in works of literature. The subsequent part will enlighten the significance of the research and then the two consequent parts will follow about research questions and research

methodology. Finally, this chapter will end the discussion by making a brief notation of all chapters discussed in this thesis.

1.2 Context of the Study

Constitutionally enshrined socio-economic rights have always given birth to some controversies.[22] In the beginning, the controversy started with its very conception, which by the progression of time is evolving now through the debate of enforcement. The debate started with contents and categorization of rights in the evolving of statehood of the nineteenth and twentieth-century when social and economic rights have been fighting to settle their position with CP rights and their relation with states. Then the debate began- whether this category of rights was to be inserted into the constitution. Some countries by understanding the necessity had made prioritized socio-economic rights in their constitutions as 'enforceable rights'[23] and others treated them at least as 'principles'.[24] After that, the debate, so far, has been sharping over the years regarding the enforcement procedure and mechanism of these rights. Though enforcement may be of many types- budgetary allocation, and parliamentary enforcement through some procedure or review, the debate regarding judicial competency to enforce these rights has been encircling mostly for several periods. The debate is still on and interestingly the diverse opinions regarding this issue are illuminating the judicial correspondence to adjudicate and execute social and economic rights.

To understand this diverse feature, there is a need to know the conceptualization and constitutionalization of social and economic rights practiced worldwide with special attention to South Asian Constitutionalism. That is why, the following discussion of this chapter is bifurcated into two parts- the history of conceptualization of social and economic rights and then their constitutional

[22] Supra No. 6.

[23] The best example of including social and economic rights in the Bill of Rights the Constitution of South Africa. Articles 24, 25, 26, 27, 28, 29, 35 are dealing with the social and economic rights. For more details, see Khoza, Sibonile. *Socio-economic rights in South Africa: A resource book.* Community Law Centre, University of the Western Cape, 2007. The Interim Constitution of Nepal in 2007 and the subsequent Constitution of 2015 adopted certain socio-economic rights as fundamental rights. For more details, see Singh, Sabrina. "Realizing Economic and Social Rights in Nepal: The Impact of a Progressive Constitution and an Experimental Supreme Court." *Harv. Hum. Rts. J.* 33 (2020): 277.

[24] More than three-quarters of the world's constitutions contain at least one formally justiciable economic, social, or cultural right (ESCRs). (See Hirschl, Ran, Evan Rosevear, and Courtney Jung. "Justiciable and aspirational economic and social rights in national constitutions." *In The future of economic and social rights,* pp. 37-65. Cambridge University Press, 2019. The Constitutions of the India, Bangladesh, Pakistan where many of these rights have the status of Directive Principles or fundamental principles or principles of policy intended to "act as a guide to the executive in governing the country but [that] do not have the same status as enforceable rights."

recognition in different countries. This discussion shows the inherent political, philosophical, and ideological controversies revolving around social and economic rights.

1.2.1 Conceptualisation of Social, Economic Rights: A Divergent Worldview

The co-relation between politics and the execution of social and economic rights in the progression of modern civilization has been a recurring history so far. The evolving history of south Asian nations has been a part of that history. The history of the gradual development of human rights has been elaborated and transformed into written form for a long time. Many important and historical documents such as the Magna Carta (1215), the Petition of Rights (1628), and the Bill of Rights (1689) in England are parts of this process. Particularly during the eighteenth century, the early ideas of natural law developed into legal rights. These rights were written into national constitutions, thus echoing a living relationship between the State and the individual. That promise was also found in the French Declaration of the Rights of Man and of the Citizen of 1789. The renaissance of Europe influenced the struggle in North America. The American Bill of Rights of 1791 was the outcome of the movement. During the nineteenth century, a significant change emerged throughout the world, the human rights started to be recognized in many constitutions and so were social and economic rights.[25]

There are some examples where the independent States began to recognize social and economic rights. In 1883, Otto von Bismarck, the chancellor of Germany incorporated social legislation maintaining the benefit for unemployed persons, raising funds for accidents, illness, and many other welfare facilities.[26] The state indeed has to take responsibility to arrange social security and basic amenities of life. Without the state's involvement, these rights could not be attained. This approach has been seen in other European countries. The constitutions of Germany and Mexico have included social rights in their respective constitutions. So did the then-Soviet Union. The Soviet Constitution of 1936 incorporated a list of social and economic rights including the right to food, health, work, housing, education, and other necessities. In fact, the recognition of social and economic rights was greatly advanced by the United Socialist Soviet Republic (USSR), which later on, influenced some other countries to incorporate these rights into their constitutions. In 1937, the Irish Constitution recognized these rights, albeit in a weaker form. They included the rights as directive principles of state policy.

[25] See, Murphy, T., *Reflections on the Socio-Economic Rights Debate.* Ragnarsbók [Festschrift for Ragnar Aðalsteinsson](Reykjavík, Mannréttinda-skrifstofa Íslands and Hið íslenska bókmenntafélag, 2009), pp. 453-484.
[26] https://en.wikipedia.org/wiki/State_Socialism_(Germany)

The purpose was to formulate guidelines for the judiciary to interpret rights, and the government to take steps following those principles. India and some other South Asian countries were greatly influenced by the constitutional design adopted by the Irish Constitution. After the second world war, the situation changed and the incorporation of social and economic rights in the constitutions proceeded quite significantly.[27]

That distinctive change had some reasons. The Great Depression of the 1930s induced a noticeable alteration of the capitalist world system, notably finishing the authoritarian roles of the British Empire.[28] The decade was characterized by the gradual dismantling of trade and commerce in favour of big capitalist countries, and, above all, by mass unemployment.[29] Classic economic liberalism was dead and remained so for half a century. But the crises of the capitalist market induced the capitalist world to occupy the market by any means, even by warmongering which has given birth to the Second World War in 1941.

After Second World War, the earlier notion of considering social and economic rights changed. The practice began by treating social and economic rights in relation to CP rights, though most early written constitutions did not contain specific economic and social rights. During the Cold War, which was the worst result of ideological, economic, and political differences between two superpowers of the world- the Soviet bloc and the United States (US), the set of two different categories of rights emerged. The USSR established by the Proletarian revolution promised to ensure the basic necessities of their people (food, shelter, cloth, medicine, education, right to work, and others) commonly known as 'socio-economic rights' as the FRs. Concurrently, a series of Five-Year Plans were introduced by the Communist Party of the USSR led by Joseph Stalin. The purpose was to achieve rapid industrialization using a centrally planned economy. This sort of initiative shook the world, especially the capitalist countries, and then out of the necessity to channel the people's aspiration and movement of the working class they gave birth to the concept of the 'Welfare State'. Many scholars, committed to the capitalistic ideology, commented that there existed no need for revolutionary changes, rather it was sufficient to reform the regular common laws, adopted the changes in the administrative system, and

[27] Weinrib, Lorraine. 2006. "The Post War Paradigm and American Exceptionalism". *In The Migration of Constitutional Ideas* edited by Sujit Chaudhry, 83-113. New York: Cambridge University Press.

[28] Arrighi, Giovanni. *The Long Twentieth Century: Money, Power, and the Origins of Our Times*. Verso, 1994., 277–85.

[29] Hobsbawm, Eric J. *Nations and Nationalism Since 1780: Programme, Myth, Reality*. Cambridge University Press, 1992, p. 132; see also Hobsbawm, Eric. *The Age of Extremes: The Short Twentieth Century, 1914–1991*. Michael Joseph (UK), 1994.85–109.

maintained the general needs of the people which reflected social and economic rights.[30] In accordance with this view, they endeavored to contain social rights in the 1948 Declaration.[31]

Differences of viewpoint still remained. In 1966 the 'uniform' human rights were divided. Two covenants were adopted- the ICCPR and the ICESCR. But problems were raised in their implementation mechanism. The covenant concerning civil-political rights imposed a duty to the state parties for immediate implementation of rights. But the other covenant consisting of economic, social, and cultural rights expressed less attribution to the right execution. It conveyed a duty to the state parties to take steps in accordance with their 'maximum available resources for the progressive realization of these rights.[32] This discriminated approach was reflected in different constitutions. Many countries did not recognize social and economic rights as FRs in their national legal instruments. So it can be told that the disparity between the legal status of rights has not only been seen in the international treaty but also in the national legal documents. Although the UDHR has equally recognized all categories of rights, they are differently treated in different national and international instruments.

While finding the different treatment of two sets of rights, the study claims that it is the ideological and philosophical differences that provide normative and jurisprudential justification for that division of rights. The different approach to viewing the needs of the people ultimately provides a variety of the status of rights. Even before the inception of UDHR, the difference was leaning regarding whether socio-economic rights have transformative potentialities.[33] This notion has changed with the headway

[30] See Lukina, Anna. The Soviet Legacy and Current Human Rights Debates, 21st January 2018 (https://ohrh.law.ox.ac.uk/the-soviet-legacy-and-current-human-rights-debates/)

[31] 14 The consensus to include social rights in the Universal Declaration of Human Rights (UDHR) was, to a large extent, due to Eleanor Roosevelt's success in persuading the reluctant US State Department. On the inclusion of social rights in the UDHR and the accompanying controversies, see: Richts, Human. "A World Made New: Eleanor Roose-velt and the Universal Declaration of Human Rights, by Mary Ann Glendon (New York: Random House, 2001) and The Universal Declara." (2002): 287-315. Sloan, James. *Johannes Morsink, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING AND INTENT*. University of Pennsylvania Press, 1999. 251-253.

[32] Art 2(1). For an influential document on the implementation of the Covenant, which resulted from a meeting of experts under the auspices of the International Commission of Jurists, see The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN Doc E/CN.4/1987/17 (annex, reprinted in (1987) 9 Human Rights Quarterly 122). See also 'The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' (1998) 20 *Human Rights Quarterly* 691 (a document emanating from a meeting of experts convened on the tenth anniversary of the Limburg Principles); and the General Comment adopted by the United Nations Committee on Economic, Social and Cultural Rights, CESCR General Comment 3 on The Nature of State Parties Obligations, DocE/1991/23 (1990).

[33] Sripati, Vijayashri. "Constitutionalism in India and South Africa: A comparative study from a human rights perspective." *Tul. J. Int'l & Comp. L.* 16 (2007): 60-67. The Constitution of Ireland predates the UDHR by more than a decade. Keane, David. "The Irish Influence on the Indian Constitution: Contrasting the Fortunes of the Directive

of time. The normativity and transformative character of social and economic rights have been established in the latter period of constitutional history in many countries. But before that, the reflection of non-prior treatment was noticed in different constitutions in the early period of constitutionalization of social and economic rights. In fact, the political and ideological preferences were identified in the respective constitutions while incorporating social and economic rights. The next discussion substantiates that proposition.

1.2.2 Constitutionalisation of Social, Economic Rights: A Liberalist Position

The constitutionalizing of social and economic rights has been a growing practice throughout the world. More than eighty countries have engaged themselves through constitutional reform over the past three decades. Before discussing a well-known distinction that has been drawn by political theorists, "negative" ("first generation") rights and "positive" ("second generation") rights have to be discussed here. "Negative" rights are understood as freedom from interference; "positive" rights include the freedom to act in such a way that an individual will be endorsed to do his job positively. Freedom of movement, association, assembly or freedom of speech, conscience and thought or protection of life and liberty are negative rights. Positive rights are essentially social and economic rights. Rights to food, clothing, shelter, medical facilities, health, education, and work are traditionally recognized as positive rights. As regards negative rights, it is supposed to have refrained from the state's interference. On the other hand, for fulfilling positive rights the engagement of the state is needed since their materialization is supposed to be maintained by the state. Thus, a positive right is something to be claimed, while a negative right is a bar about not being interfered with.[34]

The American Declaration of Independence proclaimed individual liberty as one of the basic rights. The preamble of the Constitution of the US declared - the right to life, the right to liberty, property right, and other CP rights as some of the FRs. The laws of the US were highly influenced by the philosophical and political thoughts of John Locke and Thomas Jefferson. So, the US, following the same principles, at their initial stage, did not pay heed to constitutionalize social and economic rights separately in the claim of state intervention. But this sort of American political discourse turned into a great deal just before and after the Second World war. After the Great Economic Depression, John Maynard Keynes (popularly known as Keynesian Theory) in his 1936 book advocated for a managed market economy

Principles of State Policy 60 Years On". In Kirti Narain and Mohini C. Dias (eds.), *60 Years of the Indian Constitution: Retrospect and Prosepects* (New Delhi: Macmillan, 2011), pp. 199-209.

[34] See Charles Fried. *Right and Wrong.* p-110, Harvard University Press, 1978.

through state intervention.[35] And John Rawl's principal work can be picturized as one of the leading expressions of liberal thinking. He advocated for equal distribution of resources coupled with individual freedom executed by the State.[36]

On the other hand, after the proletarian revolution in 1917 the USSR unleashed its socialist position of constitutionalizing social and economic rights. The first Constitution of the USSR was passed and adopted on December 5th, 1936. Based on Socialist-Communist ideology, the leaders of the USSR declared socio-economic equality, ownership of the means of production, and fulfillment of basic amenities for the people.[37] And then one major argument during the Cold War period has been flourishing as to which set of the system (capitalist system led by the US and socialist system led by USSR) has properly addressed the most fundamental "social rights" - adequate health care, the right to a job and decent housing.[38]

During that period, among the various anomalies, a group of British thinkers argued for state intervention while enforcing economic, social, and cultural life. They presented a new thought in this discourse, that is 'social liberalism'. John A. Hobson, Leonard Hobhouse, and Thomas Hill Green were the intellectuals who had propagated that view. They advocated for favorable social and economic circumstances where the liberty of an individual could only be achieved.[39] They believed that only a strong, welfare-oriented, and interventionist state could resolve poverty, illness, ignorance, or unemployment. This sort of social liberal policies gained a wide range of support across the political spectrum because they wanted to reduce the troublesome and dividing tendencies in society, without challenging the existing capitalist system. In this way, the workers could be stayed away from Marxism by proposing a mixed form of nationalist and religious ideologies to overcome class antagonism by non-revolutionary means. Then it seemed to be less evil, rather more left-wing modes of government. This sort of system could be characterized as the combination of big business, government, and labour unions. With this proposed system, the government was able to show a more aggressive role because

[35] Keynes, John Maynard. "The general theory of employment." *The quarterly journal of economics* 51, no. 2 (1937): 209-223.
[36] Rawls, John. *A Theory of Justice*. Belknap Press, 1971.
[37] Qian, Jingyuan. "A Brief Research on 1936 Soviet Constitution under Joseph Stalin." *The Macalester Review* 2, no. 1 (2012): 7.
[38] Ormerod, Richard J. "The history and ideas of critical rationalism: the philosophy of Karl Popper and its implications for OR." *Journal of the Operational Research Society* 60, no. 4 (2009): 441-460.
[39] Adams, Ian. *Political ideology today.* Manchester University Press, 2001.

it had been strengthened by the wartime economy. The impact of this system was wide-ranging among the Western Democratic countries.[40]

One of the Western Democratic Countries, Ireland by resonating the liberal ideologies embedded a minimal set of socio-economic rights, primarily those concerning property, education, and child welfare provision, and several non-binding 'Directive Principles of Social Policy' (DPSP) in their 1937 Irish Constitution. In the making of the 1937 Irish Constitution, drafters though feared class conflict motivated debates on socio-economic rights, discussed property rights, land redistribution, and financial regulation as well as education, labour, and general living standards. They accepted the inclusion of socio-economic provisions not as 'rights' but as 'principles' only.[41] It was so happened because of the socialist revolution in 1917, and its supporters in the Communist Party of Ireland provided a model for the execution of socio-economic rights.[42] This liberal ideology concerning the constitutionalization of social and economic rights is also followed in some South Asian countries. The next discussion is on this proposition.

It is an interesting issue that the Constitution of India has a great coherence with the Irish Constitution, especially in the incorporation of social and economic rights in its Constitution in 1950. It is because the Indian Congress's long-standing affinity with the Irish nationalist[43] movement made the example of Constitutional socialism expressed in the Irish DPSP especially attractive to a wide range of Assembly members.[44] However, the aspirations of an exploitation-free society had been echoed in 1931 by the Karachi Resolution[45] where for the first time, a list of socio-economic principles/rights had been put forward. These included free primary education, protection of industrial workers and agricultural labor as well as abolishing of child labor.

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[40] Richardson, James L. *Contending liberalisms in world politics: ideology and power*. Lynne Rienner Publishers, 2001.137–138.

[41] Article 45 of the Irish Constitution provides: "The principles of social policy set forth in this Article are intended for the general guidance of the Direchtas. The application of those principles in the making of laws shall be the care of the Direchtas exclusive and shall not be cognizable for any court under any of the provisions of the Constitution".

[42] Murray, Thomas. "Socio-economic rights and the making of the 1937 Irish constitution." *Irish Political Studies* 31, no. 4 (2016): 502-524.

[43] The Irish-Congress relationship extended back to the late nineteenth century. The Nehru Report spoke of Ireland as 'the only country where the conditions obtaining before the treaty were the nearest approach to those we have in India.'

[44] Austin, Granville. *The Indian constitution: Cornerstone of a nation.* Oxford University Press, USA, 1999. 76.

[45] Karachi Resolution was a passed by the Indian National Congress at its 1931 Karachi session. The Resolution stated the Congress Party's commitment to 'Purna Swaraj' or 'complete independence'.

The Constitution architects of India have taken a position, resemblance to Irish Constitution, that is they do not contain social and economic rights as 'enforceable' but rather include these rights into the DPSP chapter. Article 37 of the Indian Constitution thus says,

> "The provisions contained in this Part shall not be enforceable by any court, but 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."

The Constitution makers empowered the Supreme Court of India to enforce social and economic rights by using Article 32,[46] though specifically mentioned in Article 37 that directive principles are not justiciable. Some of the Assembly members, however, critically observed the non-enforceability of directive principles and in their view, the Directives should be justiciable if they were to be adequate to their task.[47] On the other hand, some important members of Constituent Assembly B.N. Rau, Ayyar, Ambedkar, K.T. Shah defended Directive Principles enormously. Among them, Rau defended the Directives by saying, 'The principles cannot be denied as they may have an educative value.'[48] K.T. Shah one of the most doctrinaire members in the Constituent Assembly said, 'There must be a specified time limit within which all the Directive Principles must be made justiciable. Otherwise, they would be mere 'pious wishes' and so much window dressing for the social revolution.'[49] The directive principles 'give a certain inflection to political public reason' to guide legislators towards the progressive realization of social and economic rights.[50]

It is a notable dimension of discussion when to identify the differences in approach regarding the adjudication of directive principles in Article 37 of the Indian Constitution and Article 45 of the Irish Constitution. First, it has been stated in Article 45 that any court shall not take principles into its cognizance whereas Article 37 says that although the Court can cognize the principles these shall not be enforceable by the Court. Secondly, Article 45 states that the principles of social policy are for general guidance whereas Article 37 directs the use of principles as fundamental in the governance of

[46] See Art. 32 of Indian Constitution (guaranteeing the right of individual citizens "to move the Supreme Court by appropriate proceedings for the enforcement of [fundamental] rights")
[47] Supra No.44. T.T. Krishnamachari, one of the members of Constitutional Assembly, termed the Directive Principles as a veritable dustbin of sentiment.... sufficiently resilient as to permit any individual of this House (Assembly) to ride his hobby horse into it.
[48] Rao B.N. *India's Constitution in the Making.* Vasanta Press, 1960. 364-365
[49] Shah's minute, dated 20 April 1947. Also see, Rao B.N., "India's Constitution in the Making," 1960, 88.
[50] Michelman, Frank I. "The constitution, social rights, and liberal political justification." *International Journal of Constitutional Law* 1, no. 1 (2003): 13-34.

the State. Thirdly, according to Article 45, the Direchtas is liable to use principles in making laws but Article 37 emphasizes much more in this regard. Applying directive principles in making laws is the fundamental responsibility of the State.[51] The above-mentioned changes brought by the architects of the Indian Constitution were very significant and helped to set a new dimension of liberal ideology enshrined in the Constitution.

The innovation treasured by the Indian Constitution was so phenomenal that the Constitution makers of Pakistan and Bangladesh could not ignore it in the time of the making of their respective Constitutions. The Constitution of Pakistan provides separate parts for FRs and 'Principles of Policy' (PP), following the approach of the 1962 Constitution. Chapter II of Part II (Article 29 to 40) sets out the PP. The Constitution requires each organ of the State to act in accordance with the PP as per provision of Article 29(1).[52] But exempts any action or law to be challenged "on the ground that it is not in accordance" with these Principles.[53] By incorporating this constitutional provision, it shall make a resemblance with one of the parts of Article 37 of the Indian Constitution, where the non-enforceability of DPSP has been referred to. The Constitution of Pakistan has attributed the responsibility to every organ of the State to be followed the principles enshrined in chapter two.

The Constitution of Pakistan includes some social and economic rights[54] but has introduced a unique form of 'principle adjudication' clause by inserting Article 29(3), unlike of India and Bangladesh Constitution, which states-

[51] Choudhury, Ram Kishore, and Tapash Gan Choudhury. *Judicial Reflections of Justice Bhagwati.* Academic Foundation & Publication, 2008.118-119.

[52] The Principles set out in this Chapter shall be known as the Principles of Policy, and it is the responsibility of each organ and authority of the State, and of each person performing functions on behalf of an organ or authority of the State, to act in accordance with those Principles in so far as they relate to the functions of the organ or authority.

[53] Art. 30(2) of the Constitution of Pakistan.

[54] The Principles of Policy contains in Art. 37 that the State shall promote the educational and economic interests of backward classes or areas; remove illiteracy and provide free and compulsory secondary education within a minimum possible period; make technical and professional education generally available and higher education equally accessible to all on the basis of merit; ensure inexpensive and expeditious justice; secure just and humane conditions of work with suitable employment for women and children, with maternity benefits, and enable full participation in all national activities, including public service, through education and training. Article38 enjoins the State to secure the well-being of all by raising their standard of living through equitable distribution of wealth and adjustment of rights between employers, employees, and landlords and tenants and to provide work facilities and an adequate livelihood for all balanced with reasonable rest and leisure; social security through compulsory insurance or other means; basic necessities of life such as food, clothing, housing, education and medical relief for all those permanently or temporarily unable to earn their livelihood through infirmity, sickness or unemployment; and to reduce income disparity. (Byrne, Iain, and Sara Hossain. "South Asia: Economic and Social Rights Case Law

> "In respect of each year, the President in relation to the affairs of the Federation, and the Governor of each Province in relation to the affairs of his Province, shall cause to be prepared and laid before each House of Majlis-e-Shoora (Parliament) or, as the case may be, the Provincial Assembly, a report on the observance and implementation of the Principles of Policy, and provision shall be made in the rules of procedure of the National Assembly and the Senate or, as the case may be, the Provincial Assembly, for discussion on such report."[55]

That means the Constitution of Pakistan has officially introduced an authority for measuring the implementation of the PP. As previously discussed, the principles of policy include the list of social and economic rights, that would also be discussed, measured, and implemented, as the case may be, by the executive and legislative bodies. So unlike India and Bangladesh or other South Asian countries, it is different in the sense that the Constitution of Pakistan has ensured a process of 'observance and implementation of the PP by involving Majlis-e-Shoora (Parliament).[56] Probably the makers of the Constitution have believed while making the Constitution that the proper implementation of social and economic rights can be better executed by the legislative and executive bodies than that of the judiciary. Despite having that constitutional statement, the Judiciary of Pakistan has approached forward to enforce social and economic rights amid strong political controversies. The details have been discussed in the fourth chapter of this thesis.

In Bangladesh, though the fundamental principles were categorically said by the constitution to be judicially unenforceable, interestingly the constitution itself imposes an obligation to interpret the constitution and other laws of the country in light of these principles. Article 8(2) of the Bangladesh Constitution states-

> "The principles set out in this Part shall be fundamental to the governance of Bangladesh, shall be applied by the State in the 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."

This constitutional statement resembles, to some extent, the constitutional provision of India. By featuring these principles to be the basis of all the actions of the state and citizens, the constitution

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of Bangladesh, Nepal, Pakistan and Sri Lanka." *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008): 125-143.

[55] See Art. 29(3) of the Constitution of Pakistan.

[56] "the National Assembly" was replaced by Majlis-e-Shoora (Parliament) in (Eighteenth Amendment.) Act, 2010 (10 of 2010), s. 11.

virtually wants to secure the gradual or progressive realization of these principles in almost every sphere of state life. In the Constitution of Bangladesh, social and economic rights have been placed in the form of fundamental principles. Though there is a huge sameness of articulation of socio-economic rights between India and Bangladesh Constitution, the Constitution makers of Bangladesh have placed their part above and high than that of India. It is so claimed because the Indian Constitution describes these sorts of rights as 'Directive Principle' and on the other hand, the Bangladesh Constitution terms those as 'Fundamental Principles' in the chapter naming Fundamental Principles of State Policy (FPSP). Here the word 'Fundamental' is more substantial and adds more significance that envisions a concrete form of realization.

Another comparative discussion between India and Bangladesh regards the treatment of 'principles'- the Bangladesh Constitution has gone beyond the Indian Constitution by laying down that these principles would not only be fundamental to the governance of Bangladesh and be applied by the State in making laws as provided in the Indian Constitution but would also be a guide to the interpretation of the Constitution and other laws of Bangladesh. By inserting the words "*shall be a guide to the interpretation of the constitution and of other laws, and shall form the basis of the work of state and of its citizens*", the Constitution of Bangladesh creates an enhanced and productive scope of judicial intervention in the implementation or realization process of these principles.[57] Though the fundamental principles were categorically said by the constitution to be judicially unenforceable, interestingly, the constitution itself casts an obligation even upon the judicial organ to interpret the constitution and other laws of the country in light of these directives.[58] On the other hand, the Constitution of Bangladesh provides a framework for economic and social changes to be effected through legislation. It has enumerated in its First Schedule enactment which would be protected from judicial review. Apart from this, Article 47 expressly specifies certain types of legislation involving economic restructuring "which would not be held void on the ground of inconsistency with Fundamental Rights if parliament expressly declared that such legislation was made to give effect to any of the fundamental principles of state policy."[59]

[57] The detailed has been discussed in the 6th chapter.
[58] See generally, Sayeed, Md. Abu, "Judging Social Rights under the Constitution of Bangladesh: A Dialogical Interpretation," 2016, *Jahangirnagar University Journal of Law*, vol. IV. pp- 61-80.
[59] Waheduzzaman, Moha, "Judicial Enforcement of Socio-economic Rights in Bangladesh: Theoretical Aspects from Comparative Perspective", *Dr. M. Rahman (ed.), Human Rights and Environment* 12 (2011): 64.

These are some of the distinctive assertions made by the founding fathers of the Bangladesh Constitution while incorporating the principles in the Constitution. As previously discussed, the principles in the Constitution of Bangladesh have ascertained social and economic rights. That means, social and economic rights should have been distinctively approached than that of the Indian and Pakistan Constitutions. But that did not happen so far in the constitutional journey of Bangladesh. The assertion has not been placed to the extent that it should be. Social and economic rights have been recognized as aspirations[60] and ultimately the FPSP has not found its firm footing.

There might be many reasons for that kind of constitutional dealing. One of the reasons might be that the Chapter holding the principles was not rigorously and extensively debated [61] in the Constituent Assembly Debates (CAD) as to how those principles would be materialized in the later period of the constitutional development. Apart from that, although some attractive terminologies and phraseologies were used in different constitutional provisions, borrowed from the Constitutions of India, Ireland[62] that have not been properly used in the constitutional interpretation, especially in social and economic rights adjudication. Moreover, most of the Constitution makers thought that the adjudication of social-economic rights could only be done by the representatives of the people, the legislative body, as they could alone mobilize planning, enact laws, and sanction financial support for that purpose.[63] But with the advancement of time, it has become proved that the legislative body alone cannot earn a substantive change in the implementation of social and economic rights. Rather, the Judiciary of Bangladesh, being part of South Asian constitutionalism, has become the forerunner when the question of adjudicating social and economic rights comes.

In spite of terming the Judiciary of Bangladesh as a 'forerunner', this thesis argues that the Judiciary has a lot to do. So far the hurdles in enforcing social and economic rights have been overcome by the Bangladesh Judiciary, the attempt was to cohabit social and economic rights with FRs. At this

[60] 'The fundamental principles of state policy sought to spell out the vision of an exploitation-free society that we believed represented the aspirations of the people of Bangladesh. . .. It further provided that a socialist economic society would be established with a view to ensuring the attainment of a just and egalitarian society, free from the exploitation of man by man." The quotation is taken from the book Hossain, Dr. Kamal, 'Bangladesh: Quest for Freedom and Justice' (published by University Press Limited, January 2016, P-145.)

[61] See Constitutional Assembly Debates. Halim, Md. Abdul (ed.) "Bangladesh Ganaporishod Bitorko", CCB Foundation, 2nd Edition, 2019. See speeches of Syed Nazrul Islam at 4th meeting, 19th October 197; Sree Surinjit Sengupta at 8th meeting, 24th October 1972; Dr. Kamal Hossain at 12th meeting, 30th October 1972) Translated by Author.

[62] ibid (Speech of Dr. Kamal Hossain at 12th meeting, 30th October 1972) Translated by Author.

[63] ibid.

particular point, this study tends to enlighten by discovering much more potentialities, justifications, and rationalities for enforcing social and economic rights. For the sake of that purpose, one of the endeavors is to make an in-depth reading of CAD. The speeches of Bangabandhu Sheikh Mujibur Rahman, Tajuddin Ahmad, Syed Nazrul Islam, arguments of Suranjit Sengupta, Ali Azam, Muhammad Mansur Ali, Asaduzzaman Khan, and so on demonstrate the aspiration for exploitation free society, social-economic equality, and pledge to be independent in all its means. Even the indication of periodical implementation of socio-economic rights can also be found in that historical documents.[64] Not only CAD, the objective enshrined in the Proclamation of Independence 1971, in the Speeches of Father of the Nation, especially speech given on the 7th March 1971, in some demands comprised in the historical 11 Point Movement in 1969[65] and 21 Point Movement[66] in 1954 disclose the manifestations of our heroic people which invoke them to fight in their every single historical struggle as well as the thoughts of our founding fathers who have encompassed that aspirations and desires, all of which can be summed up in one single sentence- the actual implementation of social-economic rights to build up a truly exploitation free society.

These all are the very important 'pre-constitutional' documents that intended to shape and make the Constitution of Bangladesh in 1972. They are the implicit part of the Constitution. But regrettably enough, they are hardly used in constitutional interpretation, especially in socio-economic rights adjudication. The trend prevailed by the Indian Judiciary, a wide explanation of the right to life that encompasses all socio-economic rights, has been followed by the Bangladeshi Judiciary so far. In this context, this 'implicit' part of the Constitution may be a huge source of creative and progressive interpretation of enforcing social and economic rights. The research work has proceeded to enlighten this proposition.

1.3 Research Aims and Objectives

This thesis has engaged itself with two aims to fulfill. One is to critically analyse the comparative judicial discourses of South Asia. The other is to find out the more rational method of enforcing social and economic rights generally for South Asian constitutionalism and particularly for Bangladesh. Upon these two aims, the research objectives have been encircled. To fulfill the first aim, the research objective involves identifying the existing predominant discourses in South Asian Judicial activism and

[64] ibid. (Speech of Tajuddin Ahmed, 30th October 1972) p- 421. Translated by author.
[65] Demand no- 1, 6, 7 of 11 Point Movement in 1969
[66] Demand no- 2, 8, 9, 10 of 21 Point Movement in 1954

to evaluate the prospects and problems of these discourses. While identifying, the research work investigates the reasons why and how the 'judicially non-enforceable' social and economic rights have been enforced by the judiciaries of South Asia. Then it makes a comparative discussion among the countries belonging to this region. After that, this study engages in another comparative discussion by finding out the distinct constitutional features and enforcement mechanisms of South Asian Constitutionalism compared to the Global North.

While discussing the second aim, this thesis tries to establish the originality of the research. The second aim tends to find out additional justification and rationality of judicial enforcement mechanism of social and economic rights. For that reason, the research objective decorates itself to explore the newer understanding of principles. Because the constitutions of South Asian countries have recognized social and economic rights either as DPSP or FPSP or PP. That is why, this thesis illuminates some newer ideas regarding principles, which may become quite worthy to interpret and enforce social and economic rights.

Another aspect may enlighten finding the rationality of enforcing social and economic rights, especially from the Bangladesh perspective, that is the ascertainment of internal and external aids of the Constitution. This particular objective is exclusively connected to the constitutional history of Bangladesh. Because the second aim of this thesis is to find out the enforcement rationality of social and economic rights, particularly for Bangladesh. For inclusive constitutional interpretation, this study emphasizes the analyses of the Preamble, pre-constitutional documents like- different charter of demands, the 7th March Speech, CAD, the Proclamation of Independence, and so on. Along with it, the recent economic and social developments are another appropriate external aid for proper and inclusive interpretation of the Constitution. These are the objectives on which the research work has mainly focused.

1.4 The Scopes and Limitations of the Study

In the previous part, the conceptualization and constitutionalization of social and economic rights have been discussed. The latter part of this thesis has been encircled by the 'enforcement' analyses. That analyses have shown that the enforcement initiatives of the different South Asian countries have given birth to controversies and debates. This study has made a comparative discussion of that evolving discourses. In this way, it has examined very relative, quite connected as well as little bit distinctive features of that arising discourses.

It is known to all that enforcement of social and economic rights can be materialized either judicially or by non-judicial means i.e.- through budgetary allocation by the state or parliamentary procedure and review or some other methods. Different methods have been followed across the world. But this work has only focused on judicial enforcement of social and economic rights in South Asian countries with special reference to reported cases.

As written in the title of the thesis 'South Asia' it needs to be clarified. South Asia is Asia's southernmost region, characterized both geographically and ethno culturally. Bangladesh, Pakistan, India, Sri Lanka, Afghanistan, Maldives, Nepal, and Bhutan all are South Asian countries. Though generally 'South Asia' means and includes all these countries, this research work only analyses the evolving judicial discourses of India, Pakistan, and Bangladesh. These three countries are so discussed as they are historically, socially, and culturally connected for centuries. Citation of cases, references, and above all, using precedents are very common among them and they are *pari materia* with each other. That is why, a comprehensive discussion of these three countries regarding enforcement of social, and economic rights may exhibit a distinctly South Asian trend in the purview of the global justice movement.

Existing methods in South Asian constitutionalism are more or less prone to positivism, denouncing moral, ethical, and social concerns in varying degrees in determining the validity of the law. While the research work is critical to that positivistic approach and deals with some internal-external aids to constitutional interpretation. As regards 'internal-external aids', the work means the Preamble of the Constitution as well as different pre-constitutional texts like documents of different political movements, historical facts, and surrounding circumstances, subsequent social-political-economic developments, foreign decisions, international laws, bills, stare decisis, and so on.

In the time of discussing 'external aids to interpretation, the concept of 'Unwritten Constitution'[67] has been borrowed. The unwritten constitution forms the implicit part of the Constitution, while the written one makes the explicit part. The explicit and implicit parts are the 'two halves supplementary

[67] This concept was introduced by an eminent professor of Law and Political Science of Yale University- Amar, Akhil Reed. *America's Unwritten Constitution: The Precedents and Principles We Live by.* In *Federal Bar Association Midyear Meeting*, vol. 28, 2013. Later on, an important book was written named Matin, M.A. *Unwritten Constitution of Bangladesh*. Mullick Brothers, 2019, taking considerations all the pre-constitutional texts. The Author is greatly indebted to these personalities as one of the central themes of this thesis has been revolved with their thoughts.

to each other.'[68] The written half is the terse text which needs to be looked into through the lenses of the unwritten part for the purpose of its proper understanding and expounding.[69] This conception is so important because to ascertain the rationality and justification of judicial enforcement of social and economic rights it needs to judge the written texts through the lens of unwritten texts, which is the significant argument of this thesis.

In depending upon the internal-external aids to constitutional interpretation, it should not be wise to forget their limitations. For perfect use of internal-external aids, it needs to be concerned with their boundary. It is also necessary for building up a comprehensive outlook. The major challenge arises when internal-external aids are used in some 'clear' and 'expressed' clauses. This is the main limitation of using these aids. To avoid or to break down that inactivity, there needs to foil of the actuality of the 'clear' and 'expressed' clauses. Because what seems to be clear or expressed in one context, may become obscure in another context. That is why, in setting the arguments of putting internal-external aids in constitutional interpretation, it has to be made by the contextual interpretation. That is one of the biggest challenges of this thesis.

Sometimes, internal-external aids lack determinate meaning and have the possibility of potential influx. For that lacking, ideological preferences may stay. Using the discourse of 'right to life' or 'suo motu' attempt by the judiciaries reflects the battle of different organs of the State. Any indeterminate meaning of legal terminology may accelerate this kind of tension. There are some other arguments of judicial transgression that may find some footings of the use of internal-external aids to interpretation. Apart from this, in the debate of whether judicial intervention in every sphere of life should be desirable or where the judiciary has been used as a weapon of political prejudice, or where the judiciary bears the allegation of 'juristocracy', 'judicial sovereignty', this sort of interpretative approach may add fuel to the flames. These are the challenges on where this thesis needs to focus.

Apart from this, this work did not pay heed to the implementation feature of socioeconomic rights across South Asian countries. It has only focused on the judgments given by the courts in enforcing socio-economic rights. Some policies taken by the governments have also come into consideration for

[68] Matin, M.A. *Unwritten Constitution of Bangladesh*. Mullick Brothers, 2019.1.
[69] Ibid. Black's Law Dictionary defines unwritten Constitution as- "The customs and values, some of which are expressed in statutes that provide the organic and fundamental law of the state or the country that does not have a single written document functioning as a constitution or the implied parts of a written constitution, encompassing the rights, freedoms and processes considered to be essential, but not explicitly defined in the document."

relevance. Though in some of the cases Courts have appointed themselves to monitor the progress of the decision, what are the aftereffects of that monitoring activities did not come within the focus of this study.

1.5 Hypothesis

The research work involves two hypotheses. The first is- that the judicial role in enforcing social and economic rights in South Asia is a necessary and effective means of socio-economic rights protection. And the second one is- that the 'unwritten constitution' (the Implicit part of the written constitution) is important for comprehensive and rational enforcement of social and economic rights.

1.6 Literature Review

In the early making stage of the Indian Constitution, though the members of the Constituent Assembly disagreed as to whether the social and economic rights should be justiciable, Granville Austin and others have argued that the members were of high value on socio-economic rights and did not differentiate between part III and IV (part IV consists of socioeconomic rights) of the Constitution in terms of its importance.[70] But in terms of enforceability, by adopting the Irish model of the Constitution the framers of the Drafting Committee separated justiciable FRs with non-enforceable directive principles, where social-economic rights mainly stand. At that stage, the framers wanted less opportunity for judicial activism given to the judiciary. The intention was to hand over the responsibility of executing social-economic rights to the legislatures. The framers of the Constitution had skepticism about Judicial review. It was evident in B.R. Ambedkar's saying, the chief architect of the Indian Constitution - 'the future legislatures would be compelled to adjudicate the 'non-binding' directive principle to fulfill their mandate or would "answer for them before the electorate at election time."[71] B.R. Ambedkar, B.N. Rao[72] and other drafters were not advocates of a strong judiciary.

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[70] Tripathi, Pradyumna Kumar. *Spotlights on constitutional interpretation.* NM Tripathi Pty. Limited, 1972.293. (arguing that in comparison to fundamental rights, "directive principles . . . do not constitute a set of inferior and subsidiary principles"); See also Supra No. 44. p-159.

[71] Supra No. 44. pp- 79-80.

[72] B.N. Rao was one of the foremost Jurists of his time and a key personality of Drafting Committee. He was highly influenced by US legal system of which Supreme Court's stand was- judicial review was not only burdensome to the judiciary, but also undemocratic for allowing a few unelected judges to invalidate laws and orders issued by elected officials. And because of that, Rau convinced the Drafting Committee to remove the words "due process" from Article 21 of the early Constitution. (See Mate, Manoj. "The Origins of Due Process in India: The Role of Borrowing in Personal Liberty and Preventive Detention Cases." *Berkeley J. Int'l L.* 28 (2010): 218–19.)

But why were they so conservative about that rights? One of the scholars and supporters of Indian Judicial activism Nick Robinson said in his article, 'Expanding Judiciaries: India and the rise of the Good Governance Court"[73] - "The Indian Constitution not only solidified the gains won in the country's struggles for independence against Britain but also attempted to spark and shape social and economic revolutions within India, partly out of fear that the failure to do so would lead to political revolution."[74] The justification of his claim is found in Ambedkar's saying- 'when India's Constitution came into effect, we are going to enter into a life of contradictions. In politics, we will have equality and in social and economic life we will have inequality. . . How long shall we continue to deny equality in our social and economic life? If we continue to deny it for long, we will do so only by putting our political democracy in peril.'[75]

However, the Indian Judiciary has played a significant role in the history of Judicial activism worldwide. The Judges like Krishna Iyer, P.N. Bhagwati, and Chinnappa Reddy powerfully promoted social and economic litigation. Before going into their significant roles, let's find the justification of judicial activism in socio-economic rights from the statement of another justice D.P. Madon of the Supreme Court:

> "To deny judicial activism to the courts is to nullify the judicial process and to negate justice... The collective will of society today wants that if the rich sleep in luxury apartments, the poor should at least sleep with a roof over their head; that if rich eat both bread and cake, the poor should at least eat bread; that if rich live in opulence, the poor should at least be able to afford the basic comforts of life. If the law is to operate today so as to secure social justice to all, who else can do it but judges whose constitutional task is to apply and interpret the law? Nature abhors a vacuum. Take away judicial activism and tyranny will step in to fill the vacant space."[76]

Justice D.P. Madon wanted to equate judicial activism with social justice. The inevitable result of disparity evolving from a classified society can only be redeemed by the proper role of the Court, which was the true motivation for instituting judicial activism, according to Madan. To what extent the

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[73] Robinson, Nick. "Expanding judiciaries: India and the rise of the good governance court." *Wash. U. Global Stud. L. Rev.* 8 (2009): 4.
[74] Ibid, p- 4.
[75] Ambedkar, Dr. B.R. *Remarks at the Meeting of the Constient Assembly of India* (Nov. 25, 1949), available at http://parliamentofindia.nic.in/ls/debates/vol11p11.htm.)
[76] . Madon, Justice DP. "Judicial Activism: An Essential Part of the Judicial Function." *XI Indian Bar Review* 246 (1984): 253-54.

purpose of judicial activism has been fulfilled is a question of fact. But without judging that elementary question, it is a must saying to refer *Kesavananda Bharati* case.[77] Rehan Abeyratne,[78] an eminent academician, has termed the *Keshavananda* case as a floodgate opening for the next legal historical journey for three important reasons. 'First, it substituted the framers' idea of parliamentary supremacy with judicial supremacy, marking a shift in power distribution among the government's branches.[79] Second, it prepared the stage for future cases describing the content of the Constitution's "basic structure," in which the Supreme Court compares the importance of FRs to directive principles. For example, Justice Chandrachud observed in *Minerva Mills Ltd. v. Union of India (1980)* that Parts III and IV of the Constitution function "like a twin formula for attaining a social revolution, which is the aim... the visionary authors of the Constitution placed before themselves."[80] This created the groundwork for the Supreme Court to find that socioeconomic rights are covered by Article 21. Finally, during the Emergency Rule phase, *Keshavananda* brought the inspiration for many of the laws and constitutional reformations that were passed.[81]

During the emergency period, the Indian Judiciary attempted to ease the arbitrary executive influence. Describing that effort Pratap Bhanu Mehta, an Indian academician articulated the Court's emergence as 'stronger than ever.[82] Because, in his opinion, judges crafted far-reaching interpretations during that period that would serve as a constitutional foundation for future judicial attempts to limit the powers of the two other institutions. Furthermore, the Supreme Court has established itself as a legitimate institution of governance as well as a venue of last resort for problems of governmental responsibility.

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[77] *Kesavananda Bharati Sripadagalvaru & Ors. v. State of Kerala & Anr.* (1973) (4 SCC 225; AIR SC 1461)

[78] Rehan Abeyratne, Assistant Professor and Executive Director of Centre for Public Interest Law, Jindal Global Law School, National Capital Region of Delhi, India. J.D. (Harvard), A.B. (Brown). Name of the article- eyratne, Rehan. "Socioeconomic rights in the Indian constitution: toward a broader conception of legitimacy." *Brook. J. Int'l L.* 39 (2014): 18–19.

[79] See Mehta, Pratap Bhanu. "The inner conflict of constitutionalism: Judicial review and the basic structure." *India's living constitution: Ideas, practices, controversies* 179 (2002). Khosla, Madhav. *The Indian Constitution.* Oxford University Press, 2012. 155-60. (arguing that Keshavananda's impact has been exaggerated in the academic literature).

[80] *Minerva Mills Ltd. v. Union of India*, (1981) 1 S.C.R. 206, 208–09 (India)

[81] See Austin, Granville. "The expected and the unintended in working a democratic constitution." *India's living constitution: Ideas, practices, controversies* (2002): 324–25.

[82] See Mehta, Pratap Bhanu. "India's unlikely democracy: The rise of judicial sovereignty." *Journal of Democracy 18,* (2007): 73. (Author identifies that time as the Court's thwarting of the government was not absolute: The justices tended to uphold the state's preventive-detention orders.)

The Court's PIL initiatives, which were influenced by Gandhi's populist political style, allowed judges to make policy and demand that executive officials would implement it.[83]

As regards socio-economic rights, the post-emergency period has set some significant events. Some of the Indian Jurists, especially P.N. Bhagwati and others explicitly made connotations in favor of socio-economic rights. For example, Bhagwati said FRs were "practically meaningless . . . unless accompanied by social rights necessary to make them effective and accessible to all."[84]

Not only that, Bhagwati remarked on the justification of judicial activism for adjudicating social justice. He termed this activism as 'another form of constitutionalism' by saying-

> "Let me make clear that the objective for which we are trying to use juristic activism is realization of social justice. Judges in India are not in an uncharted sea in the decision-making process. They have to justify their decision-making within the framework of constitutional values. This is nothing but another form of constitutionalism which is concerned with susbstantivization of social justice. I would call this appropriately "social activism"-activism which is directed towards achievement of social justice."[85]

Bhagwati, J has attempted to clarify the objections of 'judicial transgression'[86] raised against judicial activism in India. The claim of the judiciary's initiative to work beyond the constitutional framework has been responded to in the above statement. Bhagwati has tried to show activism as within "the framework of constitutional values" which according to him, is for the acceleration of social justice. Undoubtedly, this is an interesting and creative interpretation of judicial activism.

Justice Reddy, on the other side, elucidated the justification of the relationship between FRs and directive principles which the Supreme Court used as a response to parliamentary attacks on judicial review in those years.

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[83] Ibid.

[84] Craig, Paul P., and Shirish Laxmikant Deshpande. "Rights, autonomy and process: Public interest litigation in India." *Oxford J. Legal Stud.* 9 (1989): 356.

[85] Bhagwati, Prafullachandra Natwarlal. "Judicial activism and public interest litigation." *Colum. J. Transnat'l L*. 23 (1984): 561.

[86] Judicial transgression is when the judiciary starts interfering with the proper functioning of the legislative or executive organs of the government, i.e., the judiciary crosses its own function and enter the executive and legislative functions.

> "Because Fundamental Rights are justiciable and Directive Principles are not, it was assumed, in the beginning, that Fundamental Rights held a superior position under the Constitution than the Directive Principles, and that the latter were only of secondary importance as compared with the Fundamental Rights. That way of thinking is of the past and has become obsolete. It is now universally recognized that the difference between the Fundamental Rights and Directive Principles lies in this that Fundamental Rights are primarily aimed at assuring political freedoms to the citizens by protecting them against excessive State action while the Directive Principles are aimed at securing social and economic freedom by appropriate State action. The Fundamental Rights are intended to foster the ideal of a political democracy and to prevent the establishment of authoritarian rule but they are of no value unless they can be enforced by resort to Courts. So they are made justiciable... It does not mean that Directive Principles are less important than Fundamental Rights or that they are not binding on the various organs of the State."[87]

That was a very strong and innovative judgment made by Reddy, J. Before that judgment, for the last 30 years in Indian constitutionalism, the priority was given to FRs over directive principles on the ground of judicial enforceability. Social and economic rights were also given the same treatment as they are directive principles. But the judgment showed the interdependency of right discourse and correctly encapsulated an inter-relation between CP and ESC rights.

Observing all these, Lord Bingham, an eminent British Judge, perceived: "Over recent years 'judging' is no longer what it used to be. Judges have now a dominant role in society ... today, the highest Judiciary is also held in highest public esteem."[88] The Indian Supreme Court, which was formerly tasked with the responsibility of adjudicating conflicts between parties, has evolved into an institution charged with promoting the ideas of socioeconomic and political justice as time has passed.[89] In the post-emergency period, the Indian judges even were viewed as the 'messiah' of the Indian people.[90]

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[87] *Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India*, (1981) A.I.R. S.C. 298, 335 (Reddy, J., concurring).

[88] Lord Bingham of Cornhill, Law Day Lecture, (2000) S.C.C. 29,

[89] VR. Krishna Iyer, "Democracy of Judicial Remedies: A Rejoinder to Hidyatullah," (1984) 4 *S.C.C.* 43, 43. (He notes: "If a Judge is to bear true faith and allegiance to the Constitution, he must necessarily imbibe the social justice values of that paramount instrument.")

[90] See Sharma, K. M. "The judicial universe of Mr. Justice Krishna Iyer." *Judges and the judicial power: Essays in honour of justice VR Krishna Iyer.* London and Bombay, Sweet and Maxwell and Tripathi (1985): 316-336. ("The Judge is exalted as Lawgiver and Prophet in the Temple of Justice. He must have the wisdom of Solomon, the moral vision of Isaiah, the analytic power of Socrates, the intellectual creativity of Aristotle, the humanity of Lincoln and Gandhi, and the impartiality of the Almighty.").

As a result, judges cease to be adjudicators and instead become activists, actively contributing to the realization of India's constitutional goal.[91]

Upon standing in this constitutional position some theoretical research has been done. Anashri Pillay in her PhD research showed a way for the judiciary to use 'reasonableness' as one of the tools to adjudicate social and economic rights.[92] Her core argument was that the doctrine of reasonableness could be applied at varying levels of intensity. Contextual suitability of it might give an option of flexibility about the judiciary's "legitimate concerns about the limits of both its constitutional role and its institutional capacity."[93] These concerns often come when the judiciary plays a pivotal role especially in executing social and economic rights.

An important factor has been reflected in another research work where the question of democratic legitimacy has occurred. Judicial intervention in adjudicating DPSP and to which extent these principles can be enforced judicially have brought forth the tension of vulnerability of 'separation of power.' To bridge the gap between the judiciary and other branches of the government, Manwendra Kumar Tiwari in his research work showed the path by saying- " [t]he easier and less confrontationist path to tread on for the courts is to not scrutinize the decisions taken, rather confine its job to simply ensuring effective implementation of the decisions taken. .... In this kind of intervention, the executive or the legislature will not have the moral standing to question the judicial interventions as the implementation of legislative and executive decisions cannot be argued as discretionary. An examination of the important judicial decisions of the Supreme Court clearly establishes that the Court is quite willing to use this kind of adjudicatory model for the realization of constitutional socio-economic rights."[94] That means the legislative framework that recognizes social and economic rights, according to him, becomes the best way to realize them. The Judiciary should not put any adjudicatory role but rather only apply an interpretivist approach. This is a very conservative idea indeed.

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[91] See generally Khanna, H.R. *Law and Men of Law.* (1976) *1 S.C.C.* 17,21 ("Judges, it has been said, are men not disembodied spirits, they respond to human emotions. The great tide and currents which engulf the rest of mankind, in the words of Cardozo, do not turn aside in their course and pass the judges idly by.").

[92] Pillay, Anashri. *Reinventing reasonableness: the adjudication of social and economic rights in South Africa, India and the United Kingdom.* PhD diss., UCL (University College London), 2011.

[93] Ibid.

[94] Tiwari, Manwendra. *Adjudication and Enforcement of Socio-economic Rights under the Indian Constitution: A Critical Study*. Ph.D. thesis in Law submitted in Dr. R M L National Law University, Lucknow, 2017.

The debates, and discourses as to the judicial enforcement of social and economic rights also have some impacts in other South Asian countries. The impact of judicial activism was felt both theoretically and practically in Pakistan and Bangladesh as well. In Pakistan, the judicial attempt in interpreting the Constitution was used to be treated as 'self-contradictory' and 'lack of authority in nature. One of the most famous Pakistani scholars A.K. Brohi critically portrays the role of the judiciary by saying that the judges should consider their limit of using jurisdiction and authority. Otherwise, that may create a difference of opinion while constructing rules. This kind of variance of thoughts may turn judicial decisions into a vulnerable condition. Not only that, the judgments of the judges can be manipulated by extra-judicial factors.[95] What A.K. Brohi predicted has a logical basis. Pakistan Constitution has the nature of a totalitarian constitutional framework. It restricted and controlled political representation. The result is the autocratic bureaucracy that has created such disorder.[96]

In the 1990s Pakistan faced a complex situation in the post-emergency period. The crises of the political institution became acute as well as the judicial purging.[97] The contradiction was not only sharpened between the elite and military junta, the crises also succumbed in the different branches of the new civilian government. An issue like the dissolution of the National Assembly enshrined in Article 58(2) was making the constant tension which complicated matters further and for that reason, deeper fractures in governance mechanisms were created.[98] That condition provided sufficient space for the judiciary to move forward and, at least, to institute some attempts for adjudicating social and economic rights through PIL and suo motu attempts.[99]

In that situation, courts gained some power amid feeble and fragmented political systems. At that time the task was relatively easier for the Judiciary because of the absence of any institution or class that could exert a distinguished hold over the state and political processes. Several important and

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[95] Brohi, A. K. *Fundamental Law of Pakistan: Being an Exposition and a Critical Review of the Juridical, Political, and Ideological Implications of the Constitution of the Islamic Republic of Pakistan in the Light of the Basic Principles of Comparative Constitutional Jurisprudence.* Din Muhammadi Press, 1958.

[96] Braibanti, Ralph. "Public bureaucracy and judiciary in Pakistan." *Bureaucracy and Political Development* (1963): 360-440.

[97] Khan, Maryam. "The Politics of Public Interest Litigation in Pakistan in the 1990s," *Social Science and Policy Bulletin*, Volume 2, No. 4, (Spring 2011) ISSN 2073-6789

[98] Article 58(2)- Notwithstanding anything contained in clause (2) of Article 48, the President may also dissolve the National Assembly in his discretion where, a vote of no-confidence having been passed against the Prime Minister, no other member of the National Assembly command the confidence of the majority of the members of the National Assembly in accordance with the provisions of the Constitution, as ascertained in a session of the National Assembly summoned for the purpose.]

[99] Supra No. 97.

highly contentious issues were ended up by the courts. While resolving several complex political and social issues, the judges were capable to expand the authority of the courts. That was a strategic move by the courts. Ginsburg and Moustafa have analyzed this particular move of the courts. Under the authoritarian regime, the activism of the Judiciary of Pakistan might be explained as arguably the most significant phenomenon of judicial politics in Pakistan.[100] This is the distinctive feature of Pakistan Constitutionalism in comparison to others.

The Judiciary of Pakistan used that space, to some extent, to attribute some roles in enforcing social and economic rights. As previously discussed, social and economic rights have been recognized in Pakistan Constitution as 'Principles of Policy'. Azra Anjum in the PhD dissertation referred to "[t]he Supreme Court of Pakistan has declared and termed them (principles of policy) as a subsidiary and conscience of the Constitution."[101] In one of the important cases, the intention of the framers of the Constitution as regards the value of the PP was clearly manifested-

> "The intention of the framers of the constitution, as it seems to me, is to implement the Principles of social justice and economic justice enshrined in the principles of policy within the framework of fundamental rights. Chapter One and Two of the Constitution which incorporate fundamental rights and Directive Principles of State Policy respectively, occupy a place of pride in the scheme of the constitution, and if I may say so, these are the conscience of the constitution, as they constitute the main thrust of the commitment to socio-economic justice..... the authors of the constitution, by enumerating the fundamental rights and the principles of policy, apparently did so in the belief that the proper and rational synthesis of the provisions of the two parts would lead to the establishment of the two parts would lead to the establishment of an egalitarian society under the rule of law."[102]

This means, that although the framers attach non-enforceability to the execution of PP, they thought to treat them along with FRs. Thus social and economic justice has been articulated within the framework of different FRs. This is a combined approach shown by the Apex Court of Pakistan. The reflection of this approach has later been seen in different cases, especially in education and environment-based cases.

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[100] See generally Ginsburg, Tom, and Tamir Moustafa, eds. *Rule by Law: The Politics of Courts in Authoritarian Regimes.* Cambridge: Cambridge University Press, 2008. doi:10.1017/CBO9780511814822. eds., 2008).
[101] Anjum, Azra. *Economic human rights & their impact on contemporary constitutions.* PhD diss., University of Karachi, 2006.
[102] Miss Benazir Bhutto v The Federation of Pakistan, (1988) PLD SC 416.

Bangladesh, in comparison to the other two countries, achieved independence lately and drafted the Constitution in 1972. Dr. Kamal Hossain, the first law minister and chairman of the drafting committee in the Constituent Assembly, addressed the notion of socio-economic rights- "fundamental principles can be invoked to support measures designed to remove disparities, promote equality of opportunity and give meaning and substance to the pledges of economic and social justice made by the Constitution."[103] The Constitution of Bangladesh has bifurcated the human rights conception into two different parts- part II addresses social, economic, and cultural rights as 'judicially non-enforceable principles, and part III recognizes CP rights as enforceable FRs. Though there exists the contradiction of enforceability and non-enforceability, as per Muhammad Ekramul Haque, Constitution has maintained a 'balanced relationship between these two'.[104]

In compliance with that view, some intellectuals have shown the 'inclusive' role of the judiciary of Bangladesh, which Ridwanul Hoque, comparative constitutional law specialist, has addressed by saying-

> "The concept of the inclusive judiciary has a functional aspect too, which emphasizes the judiciary's role in protecting and including within the governance system, the minorities or those excluded in society. It also means the wider public's access to the justice system... This role of the judiciary helps achieve the objective of social inclusion, by preventing, for example, further marginalization of the disadvantaged and excluded people."[105]

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[103] Hossain, Kamal. "Interaction of Fundamental Principles of state policy and Fundamental Rights." *Public Interest Litigation in South Asia, Rights in Search of Remedies.* Dhaka: University Press Limited (1997).

[104] Dr. Muhammad Ekramul Haque, Professor, Department of Law, University of Dhaka.
His saying, "Obviously the Fundamental Principles of State Policy are not judicially enforceable whereas the fundamental rights are enforceable in the courts as mentioned by articles 8 and 26. It seems to give higher legal status to the fundamental rights in comparison with the Fundamental Principles of State Policy. But on the other hand article 47(1) incorporates an interesting and significant provision regarding the relationship between these two. It provides that no law shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges, any of the fundamental rights, if Parliament in such law (including, in the case of existing law, by amendment) expressly declares that such provision is made to give effect to any of the fundamental principles of state policy set out in part II of this Constitution. This provision seems to give higher legal status to the Fundamental Principles of State Policy in comparison with the fundamental rights. So I think it will not be wise to term any of these two as superior to another, because, it seems that Constitution has maintained a balanced relationship between these two." (Haque, Dr. Muhammad Ekramul. "LEGAL AND CONSTITUTIONAL STATUS OF THE FUNDAMENTAL PRINCIPLES OF STATE POLICY AS EMBODIED IN THE CONSTITUTION OF BANGLADESH", *Dhaka University Law Journal* (The Dhaka University Studies Part-F) Volume 16, Number 1, June 2005: P-52)

[105] Hoque, Ridwanul. "The Inclusivity Role of the Judiciary in Bangladesh." In *Inclusive Governance in South Asia,* pp. 99-122. Palgrave Macmillan, Cham, 2018.

As regards enforceability of socioeconomic rights in Bangladesh Constitution, Hoque has said, "Scholars have generally argued that despite the judicial unenforceability of social rights in Bangladesh, the senior judiciary is both capable and possessed of constitutional tools to deal with resource issues or to realize its role in achieving social justice."[106] He is very optimistic about PIL-based judicial activism in adjudicating socio-economic rights enshrined in FPSP.[107] Though his anxiety about 'Court being used for over judicialization of politics' does not go unnoticed or his elaborated and sharp analyses of vested interest-based political influences over Bangladesh Judiciary are a very important part surrounded in the discussion of 'Judicial activism in Bangladesh'[108], he has a strong belief in 'judicial leadership crucial for effective and sustained judicial rights and constitutional activism'[109] and so that he is a 'strong supporter of the emerging trend of constitutionalism'.[110] He hopes that the Courts will transform its decision from 'mere pronouncements to an aspect of justice which will earn greater impacts on society.'[111]

Having taken the normative definition, some scholars[112] of Bangladesh want to introduce judicial remedies by applying a dialogical approach. In their connotation, "Socioeconomic rights violations may largely occur due to malafide institutional practice or discriminatory state policies. Redressing this situation, therefore, requires a structural change to these faulty institutional and policy set-ups... social rights violations require the active engagement of the judges in their administration and implementation, in addition to the legal issues."[113] Almost all the scholars and academicians of Bangladesh have urged for this kind of 'active' judicial initiative.[114] Not only that, there exist some

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[106] Ibid.

[107] For more details, see Hoque, Ridwanul. "Taking justice seriously: judicial public interest and constitutional activism in Bangladesh." *Contemporary South Asia* 15, no. 4 (2006): 399-422.

[108] For more details, see Hoque, Ridwanul. "The Judicialization of Politics in Bangladesh." *Unstable Constitutionalism—Law and Politics in South Asia* (2015).

[109] For more details, Supra No. 107.

[110] Ibid.

[111] Cooper, Jeremy. "Public interest law revisited." *Commonwealth Law Bulletin* 25, no. 1 (1999): 135-153.

[112] Naznin, SM Atia, and A. L. A. M. Shawkat. "Judicial Remedies for Forced Slum Evictions in Bangladesh: An Analysis of the Structural Injunction." *Asian Journal of Law and Society* 6, no. 1 (2019): 99-129.

[113] ibid.

[114] Md. Nazrul Islam (Asif Nazrul), "The constitution of all the above three countries (India, Pakistan, Bangladesh) has made the social and political rights judicial non-enforceable. However, the Indian courts, following the precedence of other jurisprudences, are making important contributions in the recognition and implementation of economic rights. Unfortunately, our judicial activism still mostly centres on traditional political rights." (Asif Nazrul, "Social and economic rights: Our failures", an article published in 'The Daily Star' on December 10, 2012. available at: https://www.thedailystar.net/news-detail-260545)

Ridwanul Hoque (2018) has said, "Bangladeshi judiciary has often acted in the protection of the marginalized peoples' right to participate in governance. In doing so, the higher courts even had to overcome constitutional

scopes of interpreting international legal documents in addressing social and economic rights. The international instruments which Bangladesh ratifies there occur 'specific treaty obligation.' But unfortunately 'there is no direct law in Bangladesh according to which the courts can enforce those obligations in the domestic jurisdiction.'[115]

The Supreme Court of Bangladesh is liberal in interpreting 'right to life' as meaning 'right to life with dignity', 'meaningful life', or 'life worth living' to include some selected social and economic rights. The interpretation of the 'right to life' guaranteed under Articles 31 and 32 of the Constitution has expanded from 'mere physical existence from conception to death' to 'amenities and facilities which are necessary to enable a man not to sustain life but to enjoy it in a full measure.'[116] In this way, the socio-economic rights enshrined in part II of the Constitution have got some values.

1.6.1 Gaps in Literature

In the above-discussed literature, it has been observed the different perspectives of judicial enforcement of social and economic rights. From the works of literature, it has been seen that the proactive role of the Indian Judiciary establishes a profound stand in the constitutional practice. The creative interpretation of constitutional provisions especially by using 'right to life' discourse and combinedly approaching DPSP with FR is noteworthy. Although there exist some concerning issues regarding the doctrine of separation of issues. The judicial practices of India have a reflective effect on two other South Asia countries- Pakistan and Bangladesh. Though political scenarios, as well as judicial attempts, are different the judiciaries of both these countries tried to implement the social-economic

deficiencies and silences regarding, for example, the enforcement of social rights and the indigenous people's special participatory rights. For the realisation of this pro-active role, however, the judges needed to invoke the fundamental constitutional premises of social justice, democracy, and the rule of law." (Hoque, Ridwanul. "The Inclusivity Role of the Judiciary in Bangladesh." *In Inclusive Governance in South Asia,* pp. 99-122. Palgrave Macmillan, Cham, 2018. Supra No.105.

[115] Haque, Muhammad Ekramul. "The Bangladesh Constitutional Framework and Human Rights." The Bangladesh Constitutional framework and Human Rights, *Dhaka University Law Journal,* The Dhaka University Studies Part-F 22, no. 1 (2011): 72. For more details, see some other articles of the same author- Dr. Muhammad Ekramul Haque, "Economic, Social and Cultural Rights versus Civil and Political Rights: Closing the Gap between the Two and the Present International Human Rights Regime", *Dhaka University Law Journal* (The Dhaka University Studies Part-F) Volume 29, 2018: 41-54; Dr. Muhammad Ekramul Haque, "Multifaceted Dimensions of Human Rights", *Dhaka University Law Journal* (The Dhaka University Studies Part-F) Volume 28, 2017: 21-34

[116] Waheduzzaman, Moha. "Economic, Social and Cultural Rights Under the Constitution: Critical Evaluation of Judicial Jurisprudence in Bangladesh", *Bangladesh Journal of Law* (Vol. 14, Nos- 1 & 2) (June & December 2014): 1-42.

rights within their constitutional framework. In that countries also, some considering factors have been noted in different works of literature.

Saying all these, this thesis tends to find out some gaps in the literature. Because different works of literature have mainly considered the high ground of constitutional text and linguistic construction to substantiate the meaning of either DPSP or PP or FPSP. So, this study has aimed to depart from that approach by re-discovering a better understanding of principles. The contextual interpretation of principles particularly with all the available pre-constitutional documents was not evident in any of the above studies. Almost all have justified the combined approach between rights and principles.

This thesis has attempted to find out the fairer meaning of constitutional languages incorporated in social and economic rights using external-internal aids to interpretation. This is also a newer form of interpretivist approach in adjudicating social and economic rights. Because having over-analytical approaches to analyze constitutional text and strict or literal construction based on subjective views are some of the trends that have been observed in the literature. Applying these, the Courts have wanted to reach so-called constitutional intent. But that attempt never helps to understand the true meaning and actual intention of the founding fathers of the Constitution. To fulfill that purpose, a progressive and in-depth interpretation of the Constitution is necessary. Applying internal-external aids to interpreting the constitution helps to find out that intention and brings to the desired goal.

Bangladesh has a remarkable history of struggle two hundred years of British and twenty-four years of Pakistani occupational rule followed by enormous bloodshed for democratic movement, quite distinct from the history of India and Pakistan. This significant aspect of the birth history of a nation should have been considered as one of the core yardsticks to consider the social, and economic upliftment of its citizen as well as should have been considered as one of the core justifications for enforcing social and economic rights. This kind of discussion is rarely found in the above-discussed literature review, where my thesis has thrown light. To understand the struggles and aspirations of the people, this study has used different pre-constitutional documents. The documents are very essential to substantiate the necessary enforcement mechanism of social and economic rights.

There has been little discussion made so far to formulate a combined and comparative theoretical discussion of three historically, culturally embedded countries- India, Pakistan, and Bangladesh, especially in the field of social and economic rights adjudication, which also has been the intention of this thesis.

1.7 Significance of the Research

The significance of this research work lies in the further justification and rationality of the judicial enforcement of social and economic rights. In the process of establishing that, the work has identified different theoretical obscurities and lacunas and thus put forth a more comprehensive theoretical discourse to enforce social and economic rights. To illustrate a distinct view of judicial activism of South Asian Constitutionalism, the work has critically dealt with, summed up, and categorized various scholarly views, and judicial decisions surrounding the judicial enforcement of socio-economic rights. The work has attempted to grow up a relationship between judicial activism and the prevailing social and economic contexts, which may earn a distinct aspect of significance in the discussion of the contemporary legal field.

This research work intends to re-assure the important role of principles in adjudicating socio-economic rights. So far, legal scholars have treated principles within the category of rules. But rules and principles have different dimensions and effectivities. The work has attempted to measure principles by their weights in different cases based on particular facts and laws. Along with it, the work has made an effort to adjudicate principles on the basis of suitability, necessity, and proportionality. These measurement tools would help to incriminate the enforcement discourse of social and economic rights more strongly.

Taking cognizance of normativity and descriptivism, this thesis has tried to build a newer justification of judicial enforcement of social and economic rights by applying the concept of 'unwritten constitution' along with constitutional texts of the Constitution of Bangladesh. Because Bangladesh has a prolonged history of the freedom movement, which ultimately gives birth to the Constitution in 1972. The core aspiration of that freedom struggle was for an exploitation free society where no disparity among the people would exist, for achieving a just democracy designed to ensure the rights of the most disadvantaged members of the society, for improving the overall condition of the country through pro-people action, and above all, for getting rid of the 'tyranny of the minority'. An attempt was made to reflect all of these in our long dreamt constitution using the term 'Socialism'. And who differs- the proper enforcement of social and economic rights would have accelerated the upliftment of the people at large?

After passing 50 years of liberation, however, it has been observed that the aspirations have turned into frustration as the commitment has not been fulfilled. Economic arrangement and political

motivation have not been synchronized properly. The objectivity of flourishing social and economic conditions has not been accomplished at its full scale. At the same time, the judiciary did not play any exceptional role. It has shown a minimum degree of 'Judicial creativity' demonstrated to indirect enforcement of social, and economic rights.

In this respect, there is much more to be done. So far, the Judiciary of Bangladeshi has followed the footstep of the Indian Judiciary despite having some slender differences. Now the time has come to set some other objectivities and justifications to establish social, and economic rights on their profound footing. This thesis has been an attempt to find a way to make an effective execution of socio-economic rights.

So, in a nutshell, this thesis will contribute the following-

a. This thesis will add new ideas to the contextual interpretation of the Constitution, especially in the judicial enforcement of social and economic rights. So far, judicial interpretation has been limited generally by 'right to life' discourse or by negative enforcement in particular. This study attempts to encroach on that boundary by bringing a more inclusive and liberal interpretation.
b. Considering pre-constitutional documents and subsequent economic-social development as external aids to constitutional interpretation will earn additional justification and rationality for enforcing social and economic rights.
c. As the findings of this study encapsulate the context, facts, and circumstances of every particular case, the Judiciary can use the discourse as a tool for appropriating social and economic rights progressively, on the basis of importance, and phase by phase.

1.8 Research Questions

The objective of this research is to illustrate the portrait of judicial enforcement of social and economic rights. The constitutional guarantees for CP rights have somehow been achieved, but there remain enormous challenges as regards socio-economic rights. In this context, the work has gone through by finding answers to the following questions-

a) How did South Asian Countries formulate a distinct form of judicial discourse in dealing with social, and economic rights?

b) What were the contexts and conditions that promoted the judicial enforceability of social and economic rights in India, Pakistan, and Bangladesh despite having a 'judicial non-enforceability clause in their respective constitutions?
c) What are the roles of principles in formulating the right discourse?
d) What are the potential roles of internal-external aids to make an inclusive constitutional interpretation?
e) How can Bangladesh Judiciary make a more comprehensive justification and rationality in enforcing social and economic rights using internal-external aids to interpretation?

1.9 Research Methodology

Qualitative research methodology has been applied in this thesis. It is qualitative in the sense that it analyses and interprets various concepts, debates, phrases as well as historical events. The analyses include the comparative constitutional history of South Asian countries, important case laws, and different national and international laws.

This research methodology has incorporated an interpretivist approach, quite opposite to the positivist approach, using the collected data to develop a theoretical framework. It is exploratory in nature and tries to build up coherence of internal-external sources of interpretation.

The data collection method of this thesis was the systematic study of relevant kinds of literature, constitutional documents, historical records, and so on. Interviewing eminent jurists, academicians, lawyers, and constitutional experts was another important source of data collection. The interview was collected upon a semi-structured questionnaire. Some of the interviewees have answered the questions in writing, some verbally. Above all, it was a library and internet-based work. Despite having limitations, it was a comparatively more convenient and cost-effective research method.

In this research work, the 'law-in-context method' has been applied to understand the contextual differences and similarities of South Asian countries in enforcing social, and economic rights. This method is also applicable in realizing the present economic, and social development to redefine social, and economic rights, especially from the Bangladesh perspective.

Corresponding case laws especially of India have been frequently referred to as they have set pioneer role in articulating South Asian judicial discourses. The reference was also important to establish a relationship between the judiciaries of India, Pakistan, and Bangladesh. Because they are historically connected for centuries. *Pari materia* relationship prevails with each other.

This thesis has looked for, as per its relevance, judicial activism of some other South Asian countries like- Sri Lanka, and Nepal. Although the Constitution of Nepal has already recognized some of the social and economic rights as fundamental rights. By analyzing all of these, a comprehensive approach has been synthesized purposing which is to enforce social, and economic rights more effectively. This is a very necessary attempt for ventilating a way for South Asian constitutionalism generally and for Bangladesh in particular.

1.10 Chapter Overview

This thesis is a combination of seven chapters guided by research objectives as outlined above. The trajectory of the chapters is as follows- following this introductory chapter, chapter 2 focuses on existing dominant legal theories and outlines a theoretical framework. The attempt was necessary to situate the rationale of arguments of the thesis within a jurisprudential landscape. Chapter 2 examines how far the three dominant legal theories- natural law, positivism, and sociological school accommodate the role of the judiciary. Finally, this chapter demarcates a theoretical framework from other legal theories to properly ascertain the claim of the thesis.

Chapter 3 analyzes the judicial enforcement of social and economic rights from the Indian perspective. The whole discussion can be bifurcated into two parts- first; it describes the historical evolution of judicial attempts towards the enforcement of social and economic rights. The chapter demarcates the initial positivist approach from the growing tendency of the interpretivist approach. Then in the second part, the chapter outlines different scholarly debates and judicial discourses. The discussion in this chapter has progressed in thesis-anti thesis-synthesis style.

In Chapter 4, the judicial enforcement of social and economic rights from Pakistan's perspective has been discussed. It follows the same trajectory of discussion referred to in the third chapter. First, it narrates the constitutional history and judicial treatment of social and economic rights. The influence of Indian judgments on Pakistan's constitutionalism is another aspect of this chapter. Then the predominant discourses, debates, and arguments regarding the judicial attempt to adjudicate social and economic rights have come into consideration.

Chapter 5 explains the Bangladesh perspective of judicial enforcement of social and economic rights. Following the discussion of the constitutional history of its own, the chapter focuses on the historical co-relation and coherence among India, Pakistan, and Bangladesh. Then the chapter critically analyzes

the dominant thoughts, and practices encircling the enforcement discourse of social and economic rights in Bangladesh. The attempt is crucial to move on to the next chapter where the thesis wants to set some theoretical propositions for better enforcement justification, especially from Bangladesh's perspective.

Chapter 6 is a crucial one, where this thesis has put some theoretical propositions. In this chapter, the discussion has been divided into two parts. In the first part, a comparative discussion ranging in global south especially, South Asian constitutionalism has been provided. The second part has argued to outline a more justified, comprehensive, and rational framework to better suit the judicial enforcement of social and economic rights. Initially, in the first part, two comparative discussions have been presented. First of all, the comparison between the global south and global north and within that realm, the birth of South Asian judicial discourses. Secondly, a comparative study as regards 'right to education' between Bangladesh and India-Pakistan. This discussion illuminates the possibility of enforcing at least the right to education in Bangladesh. In the second part of the discussion, the chapter deals with different constitutional provisions of the Bangladesh Constitution to implicate a justified constitutional framework to address social and economic rights. Then it proceeds with a discussion of the contextual interpretation of principles. That discussion shows that the so far discussed constitutional bar of non-enforcing social and economic rights has some contextual perspective. Taking consideration of that perspective, the constitution bar can be exterminated. Judging the legal and factual possibility of principles in every particular case may bring a different perspective to the existing legal discourse especially, in the enforcement discourse of social and economic rights. Then the chapter takes in another exciting issue, that is for adducing more justification to the judicial enforcement of social and economic rights the use of internal and external aids for inclusive constitutional interpretation. Here in this chapter, Preamble of Bangladesh Constitution, the pre-constitutional documents and subsequent social-economic developments have been recognized as internal-external aids to constitutional interpretation. The last portion of this chapter also underscores the concerning factors of using internal-external aids, which provides the whole discussion more comprehensive.

Chapter 7 is the concluding chapter of this thesis. It states the findings of this thesis and makes some recommendations that the concerned authority may consider for initiating proper reform in the judicial discourse of enforcing social and economic rights.

Chapter- 2

Legal Theories and Theoretical Framework

2.1 Introduction

Every thesis has its theoretical basis. To justify the arguments and to scrap the counter-arguments for building up an attribution, it needs to have a profound theoretical framework. As discussed in the previous chapter that this thesis focuses on different South Asian judicial discourses evolving around the judicial enforcement of social and economic rights and tries to add a newer discourse for bringing more justification, rationality, and comprehensiveness to that realm of knowledge, this chapter attempts to articulate a jurisprudential landscape where the main objective of this thesis can be positioned in and articulated.

The project undertaken by this thesis widens the role of the judiciary where it engages itself in the creative interpretation of different provisions of the constitution. Here, the judiciary expands its interpretivist approach to different societal, political, and economic factors to substantiate the logical basis of its argumentation. Contextual interpretation of principles by the judiciary is one of the significant aspects of the discussion of this thesis. Establishing all these arguments on a firm footing, discussing different contemporary and dominant legal theories, and forming a theoretical framework is essential, which this chapter inclines to build up.

It has been observed that Eurocentric legal theorizing has marginalized the application of the judicial role.[1] Judicial enforcement of social and economic rights has not been the concern of their constitutionalism. They have managed it in some other way. That is why, as regards legal theorizing in that particular region, there has been seen the domination of legal centralism.[2] That results in the non-

[1] Hoque, Ridwanul. *Judicial activism in Bangladesh: a golden mean approach.* Cambridge Scholars Publishing, 2011. 18.

[2] Legal centralism means that 'law' is and should be the law of the state, uniform for all persons, exclusive form all other law, and administered by a single set of administrations.' Legal centralism thus marginalizes other lesser

attribution of non-state legal sources. This means social tradition, religious precepts, social-moral interpretation of the law, and the inclusion of historical-social aspects sometimes become disregarded. Centering on such a positivistic assumption of law creates the blockade and brings apathy to creative interpretation of the constitutional text. That can be summarized as terming a particular approach of the Western method of understanding law.[3] This research work needs to build up the opposite of that legal centralism where an interpretivist approach can be applied by the judiciary along with social-moral attribution of law.

The trajectory of this chapter is as follows- it has discussed the extent of accommodation of the judicial role in principal legal theories. Three dominant legal theories are discussed here- natural school of thought, positivist school, and then sociological school of thought in three consecutive parts. Then, the chapter discusses the desired legal theory that mostly fits with the core arguments of this study combined with some other theoretical aspects. Along with it, the chapter also examines the hypotheses outlined in the first chapter with the desired legal framework to ascertain its proper footing.

2.2 Natural Legal Theory: Judicial Creativity Has Not Been Overlooked

Many scholars claim that the central idea of right-wrong, equality-disparity, fairness-unfairness, good-evil, and so on lies in the philosophical and religious tradition which ultimately brings forth the modern idea of human rights.[4] The religious texts incorporated the ethical-moral values that convinced humans to be connected with God. At the early stage, the moral values were the totality of duties dedicated to God, but not the 'rights' we currently conceive. The idea of equal treatment to others manifested in the religious texts replicates the underlying principles of human rights. In fact, religious principles were regarded as a commitment to God. Upon this understanding, natural legal theory has been given birth. Initially, this theory maintained that the values of right-wrong or fairness-unfairness were

normative orderings such as religious norms, family/social customs or organizational rules. (See Griffiths, John. "What is legal pluralism?." *The journal of legal pluralism and unofficial law* 18, no. 24 (1986): 3.)

[3] This unresponsiveness is facilitated not only by western intellectual domination but also by the universality claim of western legal ideas. See more Watson, Alan. *Legal transplants: an approach to comparative law.* University of Georgia Press, 1993. 95.

[4] Kolp, Felicity Ann. *The Right to Life with Dignity: Economic and Social Rights Respect in the World.* PhD diss., UC Berkeley, 2010.

inherent in people given by God. The values cannot be created either by society or by the judge. However, the notion of understanding has changed over time.

The language of natural legal theory began to change in the early modern period. John Locke (1632-1704) claimed in the 'Second Treatise of Civil Government (1690)' that all people have "natural rights to life, liberty and property,"[5] which should be available for all and respected by all. He ascertained the legitimacy of government to the extent it protects individuals. The concept of 'social contract' emerged. Locke justified the concept of the social contract by saying, "when man entered a civil society, the need for a new structure for society was created."[6] John Rawls (1921-2002) further extended the idea by introducing his newer conception of the "maximin" (maximizing the minimum) rule. This conception says about the allocation of minimum social goods for the maximum number of people to earn social equality.[7] Rawls's theory of justice has previewed the formal and legal idea of social and economic rights.[8]

The reformist theories of the seventeenth and eighteenth centuries familiarized the idea of the 'first generation' of human rights, civil and political rights (CP). Though rooted in religion, the adjudication of CP rights prolonged beyond the boundary of the contractual obligation between God and humans where the concept of State intertwined. The margin was defined between people and the government. Individual liberty was prioritized free from state intervention. The ideas of CP liberty gained fuel during the English, American, and French Revolutions, and that process advanced through Enlightenment.[9] Essentially, that movements "took natural rights and made them secular, rational, universal, individual, democratic, and radical."[10] Under this perspective, individuals consented to be governed as well as retained the rights to the State as per the social contract.

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[5] Bouandel, Youcef. *Human Rights and Comparative Politics.* Brookfield, VT: Dartmouth Publishing, 1997.p-14.
[6] Ibid.
[7] Rawls, John. *A Theory of Justice*. Cambridge, MA: Belknap Press, 1973.
[8] Rawls wrote, "Justice is the first virtue of social institutions, as truth is of systems of thought" (Ibid. p- 3). He moves very close to linking CP and ESC rights, writing: "Therefore in a just society, the liberties of equal citizenship are taken as settled; the rights secured by justice are not subject to political bargaining or to the calculus of social interests" (Ibid. p- 4).
[9] In Europe, subjects used the emerging nation-state as a forum for acquiring and securing secular rights in an ecclesiastical dominion. In America, the idea of separation of church and state became a founding principle for the emerging nation, and the Founding Fathers incorporated ideas and language of natural law, inherent freedom, and self-determination into the Declaration of Independence, and later the Constitution and Bill of Rights. Thomas Jefferson, in particular, recognized that natural rights remained limited in exercise and applicability if they were not explicitly inscribed in a country's legal structure.
[10] Henkin, Louis. *Human Rights: University Casebook Series*. New York: Foundation Press, 1999. 8.

The natural legal theory incorporates morality with law. For the creation and application of laws, there needs to establish a relationship between morality and law.[11] Rationality and human reason induced from nature are the necessary principles of Natural legal theory. In the classical normativity of natural law, there has a tendency to observe state-made law and morality on a common footing, morality is seen as the ultimate justification of all laws. On the other hand, some modern thinkers upholding the natural legal theory like John Finnis (1940-present) are of the view that the law should abide by some of the basic moral principles but the whole legal system should not be based on morality only. Because that may turn into total jeopardy to a system.[12]

Now comes the question of the position of the judge's role in natural legal theory. Being highly abstract, Natural legal theory innominate the judge's role in ensuring justice. Although for the concretization of concepts like 'justice' or 'rights' there needs to ascertain some criteria or specific delegation in which a judge can play a significant role. In other words, natural law assumes some principles of rulemaking and criteria for assessing justness which requires judges to encapsulate the reasoning and invigorate justice. This continuing attempt of searching idealistic form of justice keeps them engaged in the process of attributing creative interpretation. According to K.K. Mathew- 'for the quest of justice, judges have often searched for some measure of goodness in law.'[13] Julius Stone shows the justification of applying interpretive tools by the judges referring to German natural lawyer Rudolf Stammler (1856-1938)- 'in applying lenient legal standards to concrete situations as well as in dealing with situations not covered by the existing laws, judges need to apply their understanding of justness. Even where legal rules exist, there is a need for the recognition of judicial grace'.[14] Here, Stammler referred to 'grace' in the sense of judicial discretion.

2.3 Legal Positivism: Centralist Idea of Rules

Applying natural law by way of judicial intervention is not always warranted. In the positivist approach, judges have been particularly disarmed as they are required to function only within the constitutional text or only apply laws as given by the lawmakers. In positive legal theory, the proponents did not conform to the law 'what it ought to be' rather concentrated only on 'what the law is'. In that sense, any unjust law, if given state sanction, is law in the true sense. Bentham, Austin, Kelsen, Hart- all

[11] Fuller, Lon L. "Positivism and fidelity to law--A reply to Professor Hart." *Harv. L. Rev.* 71 (1957): 630-72.
[12] Finnis, John. *Natural law and natural rights.* Oxford University Press, 2011. 361-62.
[13] Mathew, Kuttyil Kurien. *Three Lectures.* Eastern Book Company, 1983. 1-23.
[14] Stone, Julius. *Human law and human justice.* Stanford University Press, 1965.p- 171.

propagated the same view, though differentiated each other in some theoretical aspects and approaches. On this ground, judges face problems because they are bound to follow the rule made by the legislative body, even if it is unjust. So it raises a serious question as to the judicial incapability of rejecting unjust law in the positivistic frame of legal theory.

John Austin (1790-1859), a leading proponent of legal positivism after Jeremy Bentham (1748-1832), endorsed the command theory of law by saying, "Laws proper...are commands; laws which are not commands, are laws improper".[15] In command theory, the legal effect can only be measured by sanction or punishment by the politically superior to the inferior. Here it is presumed that obedience to authority is habitual and cannot be altered. Austin specifically excludes the relation between law and morality and rests all power on the sovereign authority. This kind of exclusionary, arbitrary, and one-sided legal approach was vehemently criticized by some other philosophers belonging to the same school of thought. The conception of 'sovereign authority' set by John Austin may fit with the most powerful, arbitrary rulers like any dictator or military author. But in comparison with their anti-democratic notion, can they really be the legitimate sovereign authority? What would be the position of general people who are being claimed as the ultimate source of power? Austin's theory is unable to give answers to these queries.

Hans Kelsen (1881-1973), another philosopher of legal positivism, articulated a rigid form of theoretical framework applying the 'pure theory of law'. He wanted to sketch law excluded from all other considerations such as politics, history, sociology, ethics, and morality, that is law in its 'pure' form. His articulated legal system is the composition of some set of norms that stay in the order of a pyramid-type hierarchical manner, where each norm derives validity from the previous higher norm, and in this way, every proceeding norm gets validity from a presupposed highest norm- the 'Grundnorm'.[16] Kelsen said, 'only a competent authority can create valid norms and a legal norm or order is valid if it is by and largely effective, that is applied and obeyed.'[17] Kelsen divided law into two categories- effectivity and validity, where validity is dependent on effectivity. Effectiveness is the prime concern of being a norm, validity is its logical consequences. This kind of understanding of the law may earn a threat to the whole legal system. Upon this consideration, any authoritarian ruler can usurp the power and by its

[15] Austin, John. "Province of Jurisprudence Determined", In: R Campbell (ed.), "*Austin on Jurisprudence*", vol-1, London, 1911, p- 80.
[16] Kelsen, Hans. *Pure Theory of Law*. (Translated from 2nd revised and enlarged German edn.) Berkley, University of California Press, 1970. p- 194.
[17] ibid, p-212.

effectiveness may introduce valid law. As the law is seen in this legal theoretical framework only like a command with a gun, may sometimes fitted with a 'might is right' regime.

Another legal philosopher belonging to the same school, HLA Hart (1907-1992) has softened the rigid form of legal positivism. He attempted to connect law with a socio-legal perspective and thus intended to come off from a rigid framework. Denying the absolute rigidity of John Austin, Hart replaced the command theory with the 'rule of recognition'. He emphasized social convention and shifted the validity of laws from sovereign authority to general acceptance of the people and by the state officials.[18] According to Hart, the acceptance by the community as a whole is the true ground of a valid law, which assigns particular people or officials to make law.[19] Although he did not clearly define the nature of that 'acceptance'.[20] Questions can be raised about whether the enforced or compelled acceptance can validate the law. Hart was silent on that particular issue. Moreover, Hart's idea is not globally focused.[21] These are some of the limitations of Hart's theory that need to focus on.

While the discussion of general debates of contemporary legal theories does not give an account of the specific roles of judges in adjudicating laws and their interpretation, let's find out the specific notion of the positivist school of thought as regards the role of judges. It is a general phenomenology that the positivist approach tends to articulate the role of judges as mere followers of the sovereign authority. Thus. the positivist or analytical school of thought did not sufficiently endorse the creative role of the judges. Jeremy Bentham (1748-1832), the founder of legal positivism, was vehemently against the creative participation of the judiciary as he thought that might earn legal uncertainties. During his period, he made a definitive role in earning legal certainties in the common law system which had become "unmanageable and complex".[22] John Austin did not assimilate the same view but rather expected the judges' role. He intended to adjust the role only with the compliance of sovereign authority or only apply the sovereign's command without making any questions. Austin thought the judges' role was inevitable in the modern legal system and therefore he recognized that the sovereign

[18] Hart, H.L.A. "Positivism and Separation of Law and Morals," Vol-71, *Harvard Law Review*, 1958. 593-629.
[19] Dworkin, Ronald. *Law's empire.* Harvard University Press, 1986. p- 34.
[20] ibid, p- 35.
[21] Menski, Werner. *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*. London: Platinum, 2000, p- 122.
[22] K.L. Bhatia, "Kaleidoscopic view of Jurisprudential Dimensions of Judicial Activism with Reference to Swadeshi Jurisprudence," in K.L. Bhatia (ed.), "*Judicial Activism and Social Change*," New Delhi: Deep & Deep, 1990, p-139.

legislative power could also be delegated sometimes to the judiciary.[23] Having derived delegated power judges could not bind the sovereign. No doubt, this kind of theoretical assertion is not maintainable in the modern legal system.

The post-Austinian positivist era has slightly departed from its rigid stand. For example, HLA Hart endowed legal positivism with a view to judges could decide 'hard' cases by exercising their discretionary power. But Hart's discretion is conservative, overly constrained, and interstitial.[24] Because though Hart wanted to have judges' participation in hard cases, that had to be within the ambit of established law.[25] Judicial discretion subject to established principles and some standards is not wrong, but Hart's proposition of using this tool was not within the contemplation of Judicial activism. Rather he thought in using judicial discretion as there might be a chance or always there would be some gaps in the law, so to deal with the open-textured language of law there need to use 'linguistic philosophy.'[26] So it can be told that the existing positivist theories of law enable a narrow space of judicial lawmaking, and tend to trivialize the need for activist judging which ignores the reality of today's need.

2.4 Sociological School of Thought: A Societal Idea of Justice in the Legal Arena

Apart from natural and positivist schools of thought, there is another influential legal school- the sociological school. The sociological school mainly connect law with society and defines law as the manifestation of common people's aspiration. This school tends to articulate the unsuitability of the Eurocentric notion of justice in non-European countries. Because it encourages to use of specificity and contextuality of a particular legal system. In this respect, Carl Von Savigny (1779-1861) termed a particular legal system as 'the spirit of the people.' Savigny also ascribed that the officials should not make laws in contradiction with local values, customs, and particularity. Sir Henry Maine (1822-1888) was also expressive about the local history and circumstances. He opined about law as the gradual evolution of the given society.

[23] Cotterrell, Roger BM. *The politics of jurisprudence: A critical introduction to legal philosophy*. University of Pennsylvania Press, 1992. p-54.
[24] Justice Holmes' famous phraseology in Southern Pacific Co. v Jenson, 244 US 204 (1917), 221.
[25] Hart, Herbert Lionel Adolphus., Joseph Raz, and Leslie Green. *The concept of law*. oxford university press, 2012.p- 272.
[26] Supra no. 23, p-154.

By the early 20th century many theoretical propositions under the banner of 'sociology of law' came into account promoting the relationship between law and society, giving less attention to individual rights.[27] Max Weber (1864-1920) and Rudolf Von Jhering (1818-1892) are the two important philosophers who lectured on contextualizing law and legal studies with mention to 'social purposes to be accomplished through rational-legal institutions. Another influential philosopher belonging to the same school is Austrian jurist Eugen Ehrlich (1862-1922), who prescribes 'living law'. In his opinion, the law does not reside in statute or the decisions of the judges, but rather in the practices, functions, customs people live by. Ehrlich termed society as the "centre of gravity of legal development".[28] Roscoe Pound (1870–1964) is another legal philosopher who propagated the sociology of law. In his view, the law has the inherent tendency to change and the changing method does not only reside in the mere rules but rather in the other dynamic precepts, doctrines, and principles. In this particular content, Pound advocated for judicial creativity. However, when seen in the context of the time and society in which the theory was formed, it is unlikely that it envisioned judicial activism in the current sense.

2.4.1 Legal Realism: Prescription of Law-making Authority by the Judges

Sociological and historical jurisprudence was given an added dimension by some legal scholars who have given birth to a new school of thought- legal realism. The scholars like Oliver Holmes (1841-1935), Jerome Frank (1889-1957), and Karl Llewellyn (1893-1962) are the propagators of this particular legal view. The view initially originated in America (that is why it is called American legal realism) and afterward spread to Scandinavian countries. Essentially legal realism can be characterized as a criterion of jurisprudence that mainly highlights the law as to how it actually operates, rather than the law that resides in the textbooks.[29] That means this theory gives importance to the context of the law which really matters. The question they raised was who would be the protector or guarantor of that contextual analysis. The theorists claimed the judges would be the real protector and the predictability of courses of law would depend on the judges.[30] Because the law should not stand still and so should

[27] Menski, Werner F. *Comparative law in a global context: the legal systems of Asia and Africa.* Cambridge University Press, 2006. p- 109.
[28] ibid, p- 93.
[29] Clinton, Robert N. "Judges Must Make Law: A Realistic Appraisal of the Judicial Function in a Democratic Society." *Iowa L. Rev.* 67 (1981): 736.
[30] ibid. p- 711.

the judges. Rather laws and values should be inseparable from human behavior and that should be contextualized and decided by the judges.

Positivists' critical view regarding judicial creativity was remarkably counteracted by the realists as they were of the opinion that judges had been given the power of wide-ranging interpretation. Giving scholarly stimulation to legal realism Homes has prescribed judge's participation in making and applying laws. He opined that 'what court decides that is law' or 'law's life has not been logic but experience'.[31] Karl Llewellyn, another renowned theorist of this school, has expressed the same view. Apart from saying about judicial creativity and extensive interpretation, Llewellyn has concentrated on the goal-oriented judicial application of the law.[32] Robert Samuel Summers (1933–2019) has added a new feather in the cap of legal realism- 'pragmatic instrumentalism' by which he tends to give prominence to optimistic judicial lawmaking. In his opinion, the law is the tool for achieving practical social ends and the court is the best institution to implement that objective by minimizing legal formalism.[33] Summers wanted to introduce revitalizing moral arguments in judicial interpretations.[34]

Observing all these, it can be said to some extent that the theory of legal realism or pragmatic instrumentalism can comfortably fit with the growing constitutionalism of South Asia. The tendency here is the rising acceptance of the judiciary in social, economic as well as civil-political issues along with wide-ranging interpretation by the judiciary. And demand has also been raised as to judiciary should pay more focus on the goal-oriented interpretation of rights.

Having said all these we should be concerned enough to find out some of the limitations of these theories to understand the actual materialization of rights, especially in the context of South Asian countries. It is true that judicial assertiveness is necessary but being focused mainly upon that matter the realists or instrumentalists solely pay heed to the judgments and their impacts. They have exceedingly given attention to the external factors of law. Ronald Dworkin has criticized this stand.[35] Moreover, many of them, belonging to this school, ignored the naturalistic notion of justice. In this

[31] See generally Holmes, Oliver Wendell. "The Path of the Law, 10 *Harvard Law Review.*" (1897). 457-78 and "The Common Law," 1881, London: Macmillan.
[32] Llewellyn, Karl N. "A realistic jurisprudence--the next step." *COLUM. L. rev.* 30 (1930): 464.
[33] Summers, Robert Samuel. "Introduction," In Robert Samuel Summers (ed.) *"American Legal Theory,"* Aldershot et al: Dartmouth, 1992, p: xv.
[34] Summers, Robert Samuel. *Instrumentalism and American Legal Theory*. Ithaca and London: Cornell University Press, 1982, 189-190.
[35] Dworkin criticized Holmes for his 'external legal theory' that denies internal factors of law. See Dworkin, Ronald. *Law's Empire*. Oxford University Press, 2000, p: 14.

way, they somehow connected with the positivistic approach of law, only cherished the coercive nature of legal enforceability though propounded by the jurists. However, the realists or instrumentalists did not understand or contextualize the legal condition of some countries where policy matters mainly originated from authoritarian sources. Pressing sole importance upon the judges would not bring any practicality in these states. Hence, it can be said that neither of the theories can adapt to the changing realities of the different societies and so, legal realism or pragmatic instrumentalism did not become a comprehensive theory to be granted.

2.5 Neo-legal Realism: Pro-active Judiciary by Elevating Social Reality

So far we have seen the traditional legal theories have understood the role of the judiciary only to settle down disputes arising before them, to secure justice within the framework of existing laws, and to interpret laws obliging traditional boundaries of legal principles. Being influenced by western legal thoughts, South Asian constitutionalism too, used to see the existence of the judiciary as a neutral, apolitical agent. More often, the judiciary has been recognized as the 'least dangerous state organ'[36] having neither power nor purse. This is purely a positivistic naivety shown as regards the judiciary. But at the same time debates have been ascended as to the effectiveness of the judiciary. Because what will happen if there found a 'legal injustice' or 'insufficiency or inappropriateness of laws' made by the legislative body? Or what will be the remedy if the traditional remedy (other than judicial remedy) becomes incapable to reduce social redress, and unusual social disparity? So, these situations demand to re-articulate the justice system where the role of the judiciary lies. Then to secure 'justice according to law', judicial creativity has to be dispensed with "consciously to develop law relatively freely to meet new social and economic conditions"[37] and 'apply the law as it should be.'[38]

The conception of the 'welfare state' in the 20th century has treated the role of the judiciary from a different perspective. Accordingly, people's demands as to the fulfillment of all necessary amenities of life rest in the duty of the State. After the second world war, this feature is even more evident. The incorporation of ICESCR and ICCPR is an example of permitting the State's intervention in every need of the citizen. Countries across the world inverted the rights in their respective legal documents, which had been so far indefensible. But the very situation gave birth to some other peculiar phenomena- the

[36] Hamilton, Alexander."The Federalist, No. 78: The Judiciary Department" in *"The Federalist Papers: Alexander Hamilton, James Madison, John Jay,"* edited by C. Rossiter, 1999, p-433.
[37] Freeman, Michael DA. *Lloyd's introduction to jurisprudence.* 7th edition, London: Sweet & Maxwell, 2001, 1405.
[38] Stone, Julius. *Social dimensions of law and justice.* Stanford University Press, 1966. p-74.

birth of rigid, overly legalistic bureaucracy extracting derivative power from the legislative organ to dispense with the needs of the citizen. The state-sponsored bureaucracy makes feeble the role of the legislature and replaces the socio-economic duties of the public body.[39] In this particular context of declining public accountability, people are turning their faith and belief to the activism of the judiciary, and their hope and aspirations are tilting toward the 'least dangerous' agent of the State. Judicial activism is becoming inevitable day by day. The reducing feature of public accountability by the legislative body, the urge for making the pro-active role of the judiciary is a growing phenomenon.

As stated earlier, the existing legal theories, in their unalterable form, are not convenient enough to insist on judicial activism to ensure true justice. Their reluctance to find out the latent insurability, the definiteness of action, the measurability, and the predictability of judicial certainty keep judicial activism lagging. Legal formalism has failed to ensure justice. When we recourse to natural justice, we find the natural legal theory without combining socio-political, and cultural particularities cannot secure complete justice. Positivist, sociologist schools of thought also have some limitations in effectively addressing the current need. That is why, we need to combine the natural, positivist, and sociological schools of thought to form a theoretical framework. It is essential to ascertain such a theoretical framework where the pro-activeness of the judiciary can be ensured by upheaving the social reality. Jurisprudentially we can express this kind of theoretical framework as neo-legal realism. The theory of neo-legal realism having essence the combination of positivism, natural law, and sociological thoughts would be a much needed forward-looking approach to administering justice. As this thesis is dealing with a different perspective of judicial enforcement of social and economic rights and as this thesis means enforcement of social and economic rights is like ensuring social justice in a greater sense, the theory of neo-legal framework seems to be most adjusted form to put up with the matter.

The combination between law and social science is the essence of neo-legal realism. This theory incorporates a "bottom-up" legal concept. This concept mainly judges the impact of law at the ground level. It mainly relies on empirical research rather than individual experience. A bottom-up approach grants an open-minded and extensive view of how the law is impacted within the ambit of a big margin of people. This approach is effective to ascertain the actual position of socio-economic rights enjoying the people at large. This is also helpful to understand the realities of power dynamics and hierarchies

[39] Loughlin, Martin. *Sword and scales: an examination of the relationship between law and politics.* Bloomsbury Publishing, 2000. p- 101.

of law[40], and most importantly the hierarchies of rights. Professors Guadalupe Luna and Thomas Mitchell expressed that finding the "bottom" of the social hierarchy in our analyses of law is not always easy; the less powerful people in society are often more invisible and silenced.[41] Hence, to dig out the actual scenario of the unprivileged class and picture their condition in the legal field, neo-legal realism could be an effective tool. By using this theory, we can interconnect various disciplines with the law where societal necessity in form of reality stands in priority. Thus jurisprudential plurality is ensured and the judges become an effective tool to use law creatively for societal reasons.

Ensuring social justice and adjudication of rights (social, economic rights in particular) proceed hand to hand. That is why this study not only depends upon the neo-legal theory but also draws encouragement from Dworkin's right theory. Ronald Dworkin rejects the prominence of rules in administering decision-making by the judges. He opines- that to ensure rights discourse seriously the role of 'principles' should be adjusted prominently. He believes that judges' inability to cross over the line of existing laws keeps them attached to legislature unreasonably.[42] For a better understanding of South Asian constitutionalism in the issue of adjudicating social and economic rights, Dworkin's right theory helps a lot. Along with it, Dworkin's assertion of 'moral reading of constitution' is a worth notable thought to be discussed.

Taking into account Robert Alexy's ideas, this study contends that the explanation of valuing principles has been underestimated so far. It asserts categorically that the principle never dies or goes extinct. Other, more important principles should take precedence when the situation demands. When a contextual interpretation of principles is required, the weight of the principles can only be determined on a case-by-case basis. Using this logic, this thesis asserts that fundamental principles can be acknowledged separately even without taking help from fundamental rights.

It is indeed a fact that judges are not social reformers. That is also not the purpose of this work. But can they remain silent seeing the social disparity, economic imbalance, and crying of the underprivileged? They should not be and the existing societal condition will not keep them quiet and

[40] A symposium named "A Roundtable on New Legal Realism, Microanalysis of Institutions, and the New Governance: Exploring Convergences and Differences," remarks by Handler, one of the participants. 2005, p: 505-6.

[41] See Luna, Guadalupe T. "Legal Realism and the Treaty of Guadalupe Hidalgo: A Fractionalized Legal Template." *Wis. L. Rev.* (2005): 519.; Mitchell, Thomas W. "Destabilizing the normalization of rural black land loss: a critical role for legal empiricism." *Wis. L. REv.* (2005): 557.

[42] See generally, Dworkin, Ronald. *Taking Rights Seriously*. London: Duckworth, 2005.

there lies the justification for judges' initiative to widen the scope of enforcing social, and economic rights. The procedure-based legal system cannot adequately address the necessity of unprivileged people, especially in their social, and economic needs. Because the issues are very complex, standing the justification of adjudicating social-economic rights on the one hand, and the resource-constrained feature on the other. Along with it, engulf with huge exploitation, embedded with corruption, mal-administration everywhere brings huge sufferings to the most disadvantaged section of people. So the way the western jurisprudence views the limited possibility of judicial activism does not create the same connotation in South Asian constitutionalism. Here Judiciary does have a huge role in administering justice. Moreover, the differential treatment of "disadvantaged and underprivileged"[43] is required here to ensure equitable justice rather than so-called equality. Judiciary in this particular field can play a significant role. By harmonizing public necessities with State's capability, judicial intervention to make a formal declaration of rights (social, economic rights in particular) is the utmost necessity. The arguments of Justice Bhagwati will guide us to move further regarding this inevitability.

> "The modern judiciary cannot [...] plead incapacity when social justice issues are addressed to it. This challenge is an important one, not just because judges owe a duty to [...] a just society, but because a modern judiciary can no longer obtain social and political legitimacy without making a substantial contribution to issues of social justice."[44]

Justice Bhagwati, in one sense, equates the role of the judiciary with the issue of social justice. And there is no denying that the judiciary, along with other important institutions of the state, must play a significant role in ensuring justice.

The theoretical framework could be an effective measuring instrument to judge the hypotheses outlined in this thesis paper. The hypotheses are- firstly, "Judicial role in enforcing social and economic rights in South Asia is a necessary and effective means of socio-economic rights protection quite distinct with the global north and secondly, "Unwritten Constitution (Implicit part of written constitution) is important for comprehensive and rational enforcement of social and economic rights." From the above-mentioned discussion, it has been stated that the neo-legal realism theory encompasses or prioritizes the judge's role in settling legal disputes. The same thing will happen in the

[43] The detailed has been discussed by Justice Bhagwati in K.L. Bhatia (ed.), "Kaleidoscopic View of Jurisprudential Dimensions of Judicial Activism with Reference to Swadeshi Jurisprudence," 1990, p- 156.
[44] Bhagwati, Prafullachandra Natwarlal. "Judicial activism and public interest litigation." *Colum. J. Transnat'l L.* 23 (1984):566.

case of adjudicating social and economic rights, where the judges' role has been a significant part. This very judicial participation is a distinctive and determining factor in South Asian constitutionalism. Having said that, there are some more scopes and opportunities to effectively use judicial discretion in materializing social and economic rights. In this particular field, this study will introduce the concept of the unwritten constitution, the implicit part of the written constitution, in which a creative judge can take part. In that discussion, anyone will find the justification of written text in the inbuilt rationality of many 'unwritten texts' and that texts have been flared up in many historical and social events. Here, the judges are very important agents to ascertain the true spirit of justice by analyzing the societal, and historical facts. Taking into consideration these views, the justification of enforcing social and economic rights rests not only in the bare texts of the constitution, rather in the various elements of the society, events of history; which a creative and purposeful judiciary will keep searching and finding out more legal, logical rationality. Neo-legal realism helps in this regard to find out the necessary relation between law and other phenomena of society and history.

2.6 Concluding Remarks

The judges' role in enforcing social and economic rights, which has another meaning of establishing social justice as well, is the pertinent concern of this thesis. For that purpose, this chapter deals with the necessity of forming a theoretical framework where the main argument of this thesis can be placed in. After analyzing all the dominant legal theories, we find neo-legal realism as the desired theory for this research work. In this theoretical framework, it has been the need to combine pluralistic views with national specificities. The concept of interdisciplinarity has been used here which combines legal interpretation with social, political, and economic perspectives. The theory of neo-legal realism urges us to find out that way where the judiciary needs to play a substantial role after analyzing social-legal reality. This is the core intention of this study which is more likely to move forward.

By applying this theoretical framework, the succeeding three chapters (Chapters 3, 4, and 5) have examined the different judicial treatments of enforcing social, and economic rights in South Asian countries, especially India, Pakistan, and Bangladesh. In the 6th chapter, this theoretical framework has been applied to build up a newer interpretive method which has earned more justification and rationality for adjudicating social and economic rights. That means this chapter has played an important role in situating the whole discussion of this thesis.

Chapter- 3

Enforcement of Social and Economic Rights

Indian Perspective

3.1 Introduction

The enforcement discourses of social and economic rights generally have emerged through the conceptualization and constitutionalization of these rights. This thesis has already discussed the debates, and arguments regarding the conceptual and constitutional rationality of social and economic rights in the 'context of the study' of the first chapter. From this chapter onwards enforcement discourses of social and economic rights have been analyzed based on the theoretical framework discussed in the second chapter. However, what needs to be said in this chapter, the analyses of judicial enforcement of social and economic rights are always shared by a significant portion of the Indian Judiciary. It is not only in the South Asian perspective rather in respect of the whole world, the discussion of progressive judicial interpretation as regards the enforceability of social and economic rights would remain incomplete without acknowledging the noteworthy contribution of the Indian Judiciary. As already indicated in the first chapter, for the sake of earning substantiality, this thesis has frequently referred to different case laws of India, engaged in a comparative discussion with other South Asian countries as well as dealt with arguments pros and cons of different legal scholars concerning the Indian Judicial activism. However, this chapter has attempted to make an overview of the judicial position of India regarding the enforcement discourses of social and economic rights.

Before going into the deep of that discussion, it should be kept in mind that the conception of judicial review has given birth to complex relational dynamics with the Executive and Legislative bodies. The period of that debate has been quite long-standing. This discourse has originated from the justification debate of judicial review which was first experienced in the *Marbury vs Madison* case.[1] From then, the

[1] 5 U.S. (1803) (1 Cranch) 137. In this case, John Marshall, the Chief Justice of United States held that Marbury was entitled to the commission and Madison had withheld it from him wrongfully. Marshall compared Article III of the Constitution with section 13 of the Judiciary Act of 1789 by which the writ jurisdiction was created by the Congress. The Court considered the conflict between the two and held that the essence of Judicial duty is to follow the Constitution. The Court found the Judiciary Act repugnant to the Constitution and as such void.

rationalization of judicial review was established and with the headway of time, it has been flourishing across the countries. The enforcement rationality of social and economic rights by the judiciary has also accelerated those relational dynamics. The same thing happened in South Asia. Here, the debates of judicial activism regarding the enforcement of these rights have proceeded mainly in two directions- whether the judiciary can enforce social and economic rights and what would be the limit of that judicial activism.

The South Asian Countries did not recognize the judicial enforcement of social and economic rights in their respective constitutions. They have intended that the legislature and the executive can be the more suitable institutions for the implementation of social and economic rights.[2] Because framing of policy issues rests in their hands. But over time, that approach has been changed. Due to various limitations and failures of the other two branches of the government, the judiciary has been given space to expand its scope of work. Besides, changing of the political plot has also played a significant role in this aspect.

The attitude of the judiciary towards the enforcement of social and economic rights varies from country to country. The general picture, however, is that the judiciary has always sought to play a role in these matters following the legislature and the executive. However, a somewhat exceptional scenario can be seen in the constitutional history of India. Where the judiciary has set its profound foot-steep for the sake of existence, although, there are multifarious opinions regarding this judicial standing. But whatever the case may be, this kind of judicial activism has been hailed as a landmark event in the constitutional history of South Asia. This role has also added a new dimension to the judicial history of the global South.

The following discussion has three main aspects divided into nine parts. The first aspect is mainly the discussion of the background and development of judicial activism in the journey of enforcing social and economic rights. The second one has analyzed the evolving arguments and counter-arguments centered around the enforcement discourse. Finally, the conclusion chapter has outlined some findings after discussing all these. The first part starts with the background and development of judicial activism in the way of enforcing social and economic rights.

For the first time the US Supreme Court applied the doctrine of judicial review and laid down the principle that any law repugnant to the constitution is void.

[2] The Constituent Assembly Debates of the respected countries show the substantiality of this comment.

3.2 British Colonial Legal Heritage Reflected in Indian Constitutionalism

The Indian Constituent Assembly drafted a Constitution between 1946 and 1949. In this way, they were able to form their democratic governance. The transcendent goal of the Constitution was to promote 'social revolution'.[3] The framers anticipated that this social revolution would provide the basic requirements of Indian residents, as well as bring about fundamental changes in Indian society's structure.[4] The theme of social revolution was evident throughout the proceedings and documents of the Assembly. The adoption of a parliamentary form of government, provisions of Fundamental Rights (FRs), Directive Principles of State Policy (DPSP), the scope of judicial review, and so on have been attached to implement that goal. Although the theme of social revolution spread throughout the entire Constitution, Parts III and IV of the Constitution that is FRs and the DPSP respectively demonstrated the core of this commitment.[5] These two parts are perceived as the conscience of the Constitution.[6]

In the early period, being part of the British colonial legal heritage, the Indian Parliament was recognized as the supreme body. Remaining no scope of judicial review of Acts of Parliament, the Indian Judiciary was reluctant to bring down statutes. The Indian Judiciary explained the legislative powers in its widest context. In *Queen v Burah*, the Privy Council rejected the view that 'Indian legislatures were mere delegates of the Imperial Parliament and held that they had plenary legislative power as vast as that of the Imperial Parliament itself, subject only to such restrictions as had been explicitly stated in their Acts of Incorporation.'[7] This liberal interpretation of the legislatures' power was based on British tradition, and the premise that a Constitution is 'a mechanism under which laws

[3] Austin, Granville. *The Indian constitution: Cornerstone of a nation.* Oxford University Press, USA, 1999. The work of drafting the Constitution was done between 1946 and 1949. The drafters drew heavily on the Government of India Act 1935, the last constitutional statute made by the British Parliament for India. Some provisions of the Constitution came into force on November 23, 1949, and the rest on January 26, 1950.

[4] ibid. See generally Mishra, Panchanand. *The Making of the Indian Republic: Some Aspects of India's Constitution in the Making*. Scientific Book Agency, 1966. (Discussing the social, economic and political origins of the Indian Constitution)

[5] ibid. See generally Kuppuswamy A. "Framing of the Constitution and Dr BR. Ambedkar's Role in INDIAN *CONSTTUTION AND POLICY*, 1, 1-13.

[6] Ibid. Prime Minister Jawaharlal Nehru articulated a similar view of the Constituent Assembly's task in stating: "The first task of this Assembly is to free India through a new Constitution, to feed the starving people, and to clothe the naked masses, and to give every Indian the fullest opportunity to develop himself according to his capacity." Tope, Trimbak Krishna. *Constitutional law of India*. Eastern Book Company, 1992. For a fuller discussion of Nehru's importance and role in the drafting of India's Constitution, see "NEHRU AND THE CONSTITUTION" (Rajeev Dhavan & Thomas Paul eds., 1992).

[7] (1878) 5 IA 178, 193–94: (1878) 3 AC 889, 903–904.

are to be made, and not a mere Act which declares what the law is to be'.[8] This sort of positivist understanding of law-making power along with the liberal interpretation of legislative power was evident in the commentary of HM Seervai, a leading commentator on constitutional law-

> "Well established rules of interpretation require that the meaning and intention of the framers of a Constitution—be it a Parliament or a Constituent Assembly—must be ascertained from the language of the Constitution itself; with the motives of those who framed it, the Court has no concern."[9]

Seervai wanted to be strict in the literal meaning of the Constitution, being identical to the authority of the legislative body. He absolutely refused any kind of interpretive role of the Judiciary. This was purely a positivistic approach shown by the leading constitutional expert.

The intentions of majority leaders of the CA and Judges were identical.[10] During the whole Nehru[11] period, the Parliament attempted the initiatives, the Judiciary was its follower.[12] Although some members expressed reservations regarding the role of the judiciary, leaders, and representatives particularly from minority groups were in a doubtful position about the absolute authority of parliamentary supremacy. They believed that would earn the permanent supremacy of the religious majority. Representatives of major religions would ultimately dominate. In their opinion, the judicial participation (power of judicial review) in a parliamentary democratic system might liberate the unitary authority. Dr. BR Ambedkar, a leader of the oppressed caste, an opponent of the Congress Party during the National Movement, was elected as the chairman of the Constitution's drafting committee by the Constituent Assembly (CA) expressed his concerns by saying:

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[8] A-G for NSW v Brewery Employees Union (1908) 18 CLR 469, 611 (Higgins J).
[9] Seervai, HM. *Constitutional Law of India*. 4th edn., NM Tripathi, Bombay, 1991, vol. 1. 172.
[10] Sathe, Satyaranjan Purushottam. *Judicial activism in India.* Oxford University Press, USA, 2011. 6.
[11] Jawaharlal Nehru (14 November 1889 – 27 May 1964) was an Indian independence activist, and subsequently, the first Prime Minister of India and a central figure in Indian politics before and after independence. He emerged as an eminent leader of the Indian independence movement under the tutelage of Mahatma Gandhi and served India as Prime Minister from its establishment as an independent nation in 1947 until his death in 1964.
[12] These members of the Constituent Assembly wanted judicial review to operate in the same manner as it did in England. Nehru said, "Within limits, no judge and no Supreme Court can make itself a third chamber (of the Legislature). No Supreme Court and no judiciary can stand in judgment over the sovereign will of Parliament representing the will of the entire community. If we go wrong here and there, it can point it out but in the ultimate analysis, where the future of the community is concerned, no judiciary can come in the way. And if it comes in the way, ultimately the whole Constitution is a creature of Parliament." (Constituent Assembly Debates, Vol 9, 1195.)

> "In a federal constitution, it is always open to the judiciary to decide whether any particular law passed by the legislature is ultra vires or intra vires in reference to the powers of legislation which are granted by the Constitution to the particular legislature...In other words, the judiciary would be endowed with the authority to question the law not merely on the ground whether it was in excess of the authority of the legislature, but also on the ground whether the law was good law, apart from the question of the powers of the legislature making the law."[13]

It was an interesting as well as fascinating thought of Ambedkar as he could think of this kind of balancing method sitting at that period. He rightly pointed out the danger of an 'omnipotent' legislative body and for that purpose, proposed certain roles of the judiciary to make some check, although, his proposition was not reflected in the early days of Indian Constitutionalism. Rather during the 1950s and early 1960s, the Court seemed to share the Nehruvian vision of socialist India, as evident in its decisions on the rights of industrial labor and regulation and control of the economy.[14] Even during that period, the Court was submissive to some extent. Therefore, the Court held in *Balaji v. Mysore*[15] that backwardness should not be assessed solely by caste, but rather by secular factors, with caste being one of them, and reserved seats in educational institutions should not exceed 50% of total seats. Similar restrictions were imposed on the reservation of jobs in civil services.[16] These are some examples of the Parliament and the Judiciary working together to achieve some positive rights.

3.3 Positivist Approach Turned into Interpretivist Approach

The power of judicial review under a written constitution with a bill of rights did not remain merely positivist. The reason might be that the expressions used in it were often open-textured and continue to acquire new meanings.[17] The Court, at the same time, initiated to acquire the rationality of applying an interpretivist approach. This movement was neither linear nor chronologically consistent.

As discussed previously, the Nehruvian vision of socialist India continued to dominate Indian constitutionalism in the early days. The Judiciary mainly approached making a good partnership with the legislative and executive bodies. As regards the functionality of DPSP, the Court did not attempt

[13] Constituent Assembly Debates, Vol 7, 1000.
[14] Supra No. 3.
[15] (1963) AIR SC 649.
[16] *Chitralekha v. State of Mysore* (1964) AIR SC 1823
[17] For example, see how the equal protection clause of the Fourteenth Amendment of the United States Constitution was interpreted differently in *Plessey v Ferguson* (1896) 163 US 537 and *Brown v Board of Education*, (1954) 347 US 483.

any adventurous step. In this perspective, the *State of Madras vs Srimathi Champakam* case[18] can be referred to. The Court laid down as the DPSP cannot in any way override or abridge the FRs rather they have to conform to and run as a subsidiary of the FRs laid down in Part III. It was the case where there introduced the doctrine of sub-ordination (priority of FRs over DPSP), even, for the first time the importance of adjudicating DPSP was made known. That was a significant development considering that situation. After the *Champakam* case, a new concept of 'harmonious construction' got a shade of light in the legal field.[19] Later on, the notable manifestation of DPSP appeared in the *Golak Nath* case[20], where the Court introduced an 'integrated scheme' between FRs and DPSP. The Court held that-

> "The fundamental rights are given a transcendental position under our Constitution and are kept beyond the reach of Parliament. At the same time Parts III and IV of the Constitution constituted an integrated scheme forming a self-contained code. The scheme is made so elastic that all the Directive Principles of State Policy can reasonably be enforced without taking away or abridging the fundamental rights."

The partnership, however, became incoherent at a later stage, specifically just before the emergency period, when the Indian Judiciary appeared to have triumphed over the executive by redefining the amending power of parliament enshrined in article 368 and the execution of FRs in the light of the Judiciary's self-assuming authority. The adjudication of social and economic rights based on DPSP was also heated from judicial triumph. That was a logical consequence of being subjugated by the legislative and executive bodies of India. It was a different landscape than that of the Nehruvian era.

3.3.1 The Sequence of Judicial Treatment Towards the Enforcement of Social, Economic Rights

Earlier the approach taken by the Indian Judiciary was to follow the 'non-enforceability' of DPSP in a strict sense. The judiciary conferred higher status to the FRs over the DPSP by considering Article 37 along with Article 13 of the Constitution.[21] This attitude was reflected in treating social and economic

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[18] (1951) AIR 226, 1951 SCR 525.

[19] *Mohd. Hanif Quareshi & Others vs The State of Bihar* (1958) AIR 731, 1959 SCR 629). In this case the Court held that- "A harmonious interpretation has to be placed upon the constitution and so interpreted it means that the state should certainly implement the DPSP but it must not do so in such a way that the laws take away or abridge the F.R. for otherwise the protective provisions of Chap III will be a mere rope of sand."

[20] *I. C. Golaknath & Ors vs State Of Punjab & Anrs* (1967) AIR 1643, 1967 SCR (2) 762.

[21] "The DPSP of the state policy, which by Article 37 are expressly made unenforceable by a Court, cannot override the provisions found in part III, which, notwithstanding other provisions, are expressly made enforceable by appropriate Writs, Orders or directions under Article 32. The chapter of FRs is sacrosanct and not liable to be abridged by any Legislative or Executive Act or order, except to the extent provided in the appropriate article in

rights concerning CP rights. The Court mainly focused in its verdict primarily on the interpretation of the clause "shall not be enforceable in any court of law".[22]

With the progression of time, the attitude regarding treating DPSP was changed. Judiciary mainly used the principles in interpreting the FRs. Because DPSP comprises the aspiration of millions of people to establish a socially and economically sound society. Hence, the Judiciary used to interpret DPSP in a more constructive nature to furnish a more meaningful life standard for an individual. However, in this stage, it was recognized that though the DPSP were non-justiciable, the Court would apply the principles as they form a very important justification of other constitutional texts. The Court followed that the DPSP should be used to apply 'reasonable restrictions' in exercising FRs, validation of public purpose, and imposing community interest over individual interest.[23]

The approach towards the treatment of DPSP kept changing. Within the emergency period, the Court started again treating FRs and DPSP in an integrated approach.[24] The Court gave harmonious interpretation to the contradictory legislative texts.[25] The court adopted a purposive role to apply the provisions of the directives while understanding various legislations.[26] When there remains no conflict

part III. The DPSP of State Policy have to conform to and run as subsidiary to the chapter of FRs." *State of Madras v Champakam Dorairajan*, (1951) AIR SC 226; see also *M H Quershi v State of Bihar,* (1959) SCR 629; see also *Kerala Education Bill*, (1957), Re, AIR 1958 SC 956.

[22] *Jagwant Kaur v State of Bombay,* (1951) AIR Bomn 461; see also *Ajaib Singh v State of Punjab,* (1952) AIR Punj. 309; see also *Biswambhar v State of Orissa*, (1957) AIR Ori 247.

[23] *State of Bihar v Kameshwar Singh,* (1952) AIR SC 252; see also *Bjay Cotton Mills v The State of Ajrmer*, (1955) AIR SC 33.

[24] "Keshvanand Bharti has clinched the issue of primacy as between Part III and Part IV of the Constitution. The unanimous ruling there is that the Court must wisely read the collective DPSP mentioned in Part IV into individual FRs of Part III, neither Part being superior to the other! Since the days of Dorairajan, judicial opinion has hesitatingly tilted in favour of Part III but in Keshvanand Bharti, the supplementary theory, treating both Parts as fundamental, gained supremacy." *State of Kerala v N M Thomas*, (1976) AIR SC 490.

[25] "...what was fundamental in the governance of the country could be no less significant than that which was fundamental in the elide of an individual and therefore FRs and DPSP were complementary." *Keshvanand Bharti v State of Kerala*, (1973) 4 SCC 225.

[26] "... what the injunction means is that while courts are not free to direct the making of legislation, Courts are bound to evolve, affirm and adopt principles of interpretation which will further and not hinder the goals set out in the DPSP. This command of the Constitution must be ever present in the minds of judges when interpreting statues which concern themselves directly or indirectly with matters set out in the DPSP." *UP State Electricity Board v Hari Shankar Jain,* (1979) AIR SC 65.

between FRs and DPSP, the Court commenced referring principles.[27] In this way, the Judiciary transformed its approach toward the DPSP.[28]

Later in constitutional history, it is easy to find the integrated approach of FRs and DPSP in available cases. In the post-emergency period that approach was reflected. The Judiciary has been treating social, and economic rights comprised in the DPSP chapter as 'justiciable' FRs. By defining social and economic rights under the framework of FRs, the court ushered in a new era. The Court delivered judgment for the protection of equal pay for equal work enshrined in Article 14, 16(1) of the Indian Constitution in the *Randhir Singh v Union of India*[29] case. In the *M H Hoskot v State of Maharastra*[30] case, the Court justified the right to free legal aid referred to in Article 39A as DPSP with Article 21 as FR. In a renowned case where the right to free and compulsory education up to fourteen years of age has been recognized as a fundamental right making related to the right to life and liberty.[31] In India, judicial activism concerning the right to the environment has been developed by the wide elaboration of Article 21 along with Article 48 A of the constitution.[32] In *Rajeeva Mankotia v. Sec. to President of India*[33] case, the issue of protection and maintenance of national monuments has come where the Court has applied article 49 taking assistance of article 21. Not only that the ambit of right to life discourse has been widened to include the right to doctor's assistance,[34] the right to shelter,[35] the right to a reasonable accommodation to live in,[36] having the necessary infrastructure to live with human

[27] "It is thus well established by the decisions of this Court that the provisions of Parts III and IV are supplementary and complementary to each other and that FRs are but means to achieve the goals indicated in Part IV of the DPSP." *J P Unnikrishnan v State of AP,* (1993) AIR SC 2178.

[28] "...the dialectics of social justice should not be missed if the synthesis of part III and part IV is to influence state action and court pronouncements. Constitutional terms cannot be studied in a socio-economic vacuum, since socio-cultural changes are the process of the newly equity-loaded. The judge is a social scientist in his role as a constitutional invigilator and fails functionally if he forgets this dimension in his complex duties." *State of Karnataka v Ranganatha Reddy*, (1978) AIR SC 215.

[29] (1978) AIR SC 1548.

[30] (1978) 3 SCC 544.

[31] *JP Unnikrishnan v State of Andhra Pradesh*, (1993) 1 SCC 645.

[32] *M C Mehta v Union of India*, (1987) AIR SC 1086; see also *Rural Litigation and Entitlement Kendra v State of Uttar Pradesh,* (1987) Supp SCC 487; see also *Subash Kumar v Union of India*, (1991) 1 SCC 598; see also *ND Jayal v Union of India,* (2004) 9 SCC 362; see also *M C Mehta v Union of India,* (2006) 3 SCC 399.

[33] (1997) AIR SC 2766

[34] *Pt. Parmanand Katara v Union of India,* (1989) AIR SC 2039.

[35] *Gauri Shankar v Union of India,* (1994) 6 SCC 349; see also *Shiv Sagar Tiwari v Union of India*, (1997) 1 SCC 444.

[36] *Shantisar Builders v NK Totame,* (1990) AIR SC 5151.

dignity,[37] arrangement for a dignified life of a prostitute,[38] the right to reputation,[39] and so on. In the remarkable case of *Paschim Banga Khet Majdoor Samity v State of West Bengal,*[40] the SC delivered a very important judgment. Emergency medical care for accident victims was recognized in this case as one of the core components of the right to health and above all, an integral part of the right to life. In the *Farhad K Wadia v. Union of India* case, the right to health was widely used by adding new dimensions. The Court held that the right to health is the right to freedom from noise pollution.[41]

The *Olga Tellis v Bombay Municipal Corporation,*[42] the case is a famous case of the right to livelihood. In that case, the Apex Court of India related the right to livelihood with the right to life. In *Francis Coralie v Union Territory of Delhi*[43] case, the Court interpreted the right to life in its wide range. Here, the Court defined the right to life as the right to live with dignity. In *Bandhua Mukti Morcha v Union of India,*[44] the Court took into consideration the right to life as getting basic amenities of life. In *Sodan Singh v NDMC,* the Apex Court held that giving these decisions applying Article 21 of the Constitution is a strong indicator of transforming affirmative rights into necessities of life.[45]

3.4 Political Turmoil Had an Impact On Judicial Activity

After the Nehruvian period, the decision of the *Kesavananda Bharati* case brought a revolutionary setback to the basic tenants of democracy, especially parliamentary democracy, because the unelected Court exposed an overwhelming triumph over the representative body like Parliament. The

[37] *Chameli Singh v State of Uttar Pradesh,* (1996) 2 SCC 549; see also *J P Ravidas v Nay Yuvak Harjan Uttapam Society Ltd.,* (1996) 9 SCC 300.
[38] *Gaurav Jain v Union of India*, (1997) 8 SCC 114.
[39] *State of Bihar v L KAdvani,* (2003) 8 SCC 361.
[40] (1996) 4 SCC 37.
[41] (2009) 2 SCC 442. The Court has observed that "Interference by the court in respect of noise pollution is premised on the basis that a citizen has certain rights being "necessity of silence", "necessity of sleep", "process during sleep", and "rest", which are biological necessities and essential for health. Silence is considered to golden. It is considered as one of the human rights as noise is injurious to human health which is required to preserved at any cost."
[42] (1986) AIR SC 18o. See also, *Centre for Environment and Food Security v. Union of India*, (2011) 5 SCC 676 - Right to livelihood is higher than a mere legal right. It is an integral part of right to life under Art. 21.
[43] "We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings." (1981) AIR SC 746.
[44] "...these are the minimum requirements which must exist in order to enable a person to live with human dignity, and no State...has the right to take any action which will deprive a person of the enjoyment of these basic essentials." (1984) AIR SC 802.
[45] (1989) 4 SCC 155.

majority view was that the Court would have the last say in respect of the Constitution. But during the emergency period (25th June- 21st March 1977), the Judiciary was not able to keep pace with that role because the Indira Gandhi government took recourse to amend the power of parliament and made a check to counter the judiciary by curtailing the power of the courts. However, the emergency period passed and it was revealed how the court was weak and feeble against a hegemonic executive. The decision of *A.D.M. Jabalpur v. Shiv Kant Shukla*[46] showed the Indian Apex Court's misery by discovering itself against all the FRs during the emergency period. Probably it was one of the darkest hours of the Indian judiciary which struck at the very heart of FRs.

After the emergency, the Judiciary might have realized that the proximity of people in defining and guiding different social causes would save them against another assault by the executive. Therefore, they reshaped themselves through liberal interpretation of Constitutional provisions in respect of the right to equality and the right to personal liberty. Not only that, by starting to interpret the bill of rights as a whole, they started to give extended meaning to the words 'right to life', and 'procedure established by law' contained in article 21 of the Indian Constitution. Moreover, the Indian Judiciary has set a pedagogic example to view social rights as enforceable despite having their constitutional unenforceability. By giving birth to the concept of 'Public Interest Litigation' (PIL) the judiciary has helped its Constitutionalisation as a bulwark against "state repression, governmental lawlessness, administrative deviance and exploitation of disadvantaged groups".[47] That is why, it can be said that the post-emergency period has been guided through a new philosophical guideline, which is- defining the constitution not merely as some bundle of rules but rather as statements of principles of constitutional governance.[48]

3.5 Re-Birth of Article 21: Highest Benchmark Set in Interpretivist Approach

After a period of 'parliamentary domination,' a revival of the judiciary had borne in the *Maneka Gandhi v. Union of India*[49] case. Though the case originated for dealing with the right to personal liberty

[46] (1976) AIR SC 1207.
[47] Bhagwati, Prafullachandra Natwarlal. "Judicial activism and public interest litigation." *Colum. J. Transnat'l L.* 23 (1984): 571.
[48] Sathe, Satyaranjan Purushottam. *Judicial activism in India.* Oxford University Press, USA, 2011. 12.
[49] (1978) AIR SC 597: (1978) 1 SCC 248. In that case, the passport of Mrs Maneka Gandhi had been held and she challenged the validity on the ground that the action violated her personal liberty. No hearing had been given to her as to why her passport should not be impounded. The Supreme Court not only gave wider meaning to the words 'personal liberty' but also brought in the concept of procedural due process under the words 'procedure established by law'. The Court held that the procedure must be reasonable, fair and just and not arbitrary,

nonetheless it expanded the scope of Article 21, that is right to life, exponentially. The court obligated future courts to expand the horizons of Article 21 to cover all the FRs as well as social and economic rights by construing it in a broader sense. In that case, JJ P.N. Bhagwati, Untwalia, and Fazal Ali remarked-

> "The expression "personal liberty" in article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights and given additional protection under article 19."[50]

The word 'life' in article 21 had almost been neglected till then. These Justices have articulated the word 'life' in such a wider meaning. This wider interpretation of life has been referred to in different cases in India. In *Francis Coralie Mullin* case[51], it was held that-

> "The right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings. The magnitude and content of the components of this right would depend upon the extent of the economic development of the country, but it must, in any view of the matter, include the right to the basic necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human self."

The *Francis Coralie Mullin* case defined the term 'life' as comprising everything necessary for bearing life. The Indian Judiciary has become successful to incorporate everything in the definition 'life' because it was the culmination of its previous efforts. The evolving practice of the Indian Judiciary, as applied before the doctrine of 'harmonious construction',[52] brought a proposition subsequently that to determine the scope and ambit of FRs, the DPSP could not be negated or ignored. This approach was reflected in a judgment where the state 'to secure to all workers a living wage, conditions of work

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whimsical or fanciful and it is for the Court to decide in the exercise of its constitutional power or judicial review whether there occurred the deprivation of life or personal liberty in a given case. The rules of natural justice, which is a term used or a fair hearing, are the essential requisites of fair procedure.

[50] (1978) AIR SC 597: (1978) 1 SCC 248.

[51] (1981) AIR 1 SCC [529 B-F].

[52] In *Minerva Mills Ltd. v. Union of India,* (1980) 3 SCC 625 the doctrine of harmonious construction was re-introduced keeping pace with *Champakan* Case.

ensuring a decent standard of living and full enjoyment of leisure and social and cultural opportunities.'[53]

The right to life became a canvas for various other human rights such as the right to privacy,[54] right to development,[55] right to gender justice,[56] right to freshwater or air,[57] right to protection against environmental degradation,[58] and right to food and clothing.[59] It also included the right to shelter,[60] right to health[61] , and right to education[62] which were earlier termed as 'unenforceable' DPSP.

In *Olga Tellis* case,[63] the Apex Court redefined the 'right to life', discourse as having means of livelihood. Because without the means of living, no person can live. It is one of the necessities without which survival becomes too difficult. The Court substantiated the logic with other directive principles of the Constitution, although the principles are not judicially enforceable. The Court directed the government to incorporate policy ensuring adequate means of livelihood for all citizens of the country. The court thus stated:

> "If there is an obligation upon the State to secure to 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."

In the *Paschim Banga Khet Mazdoor Samity*[64] case, the Court articulated the right to life discourse as an obligation imposed upon the State to arrange some facilities for the people at large. The Court unequivocally stressed the preservation of the life of the citizen. It opined that the government hospitals and the employees are duty-bound to serve the general people when they suffer illness. Failure to do such is the amount to the violation of the right to life guaranteed in Article 21 of the

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[53] *Chandra Bhavan Boarding and Lodging v. State of Mysore,* (1970) AIR SC 2042 at 2050. The Court held- "We see no conflict on the whole between the provisions contained in Part three and Part four. They are complementary and supplementary to each other."
[54] *Kharak Singh v. U.P.* (1963) AIR SC 1295.
[55] *Municipal Council, Ratlam v. Vardhichand* (1980) AIR SC 1622: (1980) 4 SCC 162
[56] See Sathe, Satyaranjan Puruhottam. *Towards gender justice. Research Centre for Women's Studies*. SNDT Women's University, 1993.
[57] *M.C. Mehta v. India* (1988) AIR SC 1037
[58] *M/s A.R.C. Cement Ltd. v. U.P.* (1993) Supp. (1) SCC 57.
[59] *M/s Shantistr Builders v. Narayan K. Totame* (1990) 1 SCC 520.
[60] *Olga Tellis v. Bombay Municipal Corporation* (1985) 3 SCC 545: AIR 1986 SC 180.
[61] *CERC v. India* (1995) 3 SCC 42: AIR 1995 SC 927.
[62] *Mohini Jain v. Karnatak,* (1992) AIR SC 1858.
[63] (1985) 3 SCC 545.
[64] *Paschim Banga Khet Mazdoor Samity & Others v State of West Bengal & Another,* (1996) AIR SC 2426.

Constitution.[65] As a result, the Court determined that the denial of timely medical assistance amounted to a violation of Article 21's right to life, and awarded compensation to the petitioner. In addition, the Court established a set of directions after reviewing the various arguments to ensure that sufficient medical facilities are available to cope with public emergencies.[66]

In 2001, in the *People's Union for Civil Liberties (PUCL) v. Union of India and Others* case[67] (popularly known as a right to food case) the Supreme Court (SC) of India, argued that because their incompetence evidenced in the collapse of the public distribution system and insufficiency of drought relief works, the Central and State Governments had infringed the right to food arising out of the right to life guaranteed in Article 21 of the Constitution.[68] The petition was filed at a time when many sections of the country were experiencing drought and people were dying of starvation, even though the Food Corporation of India had abundant grain reserves. In one of its interim orders, the Court observed:

> "… what is of utmost importance is to see that food is provided to the aged, infirm, disabled, destitute women, destitute men who are in danger of starvation, pregnant and lactating women, and destitute children, especially in cases where they or members of their family do not have sufficient funds to provide food for them. In case of famine, there may be shortage of food, but here the situation is that amongst plenty there is scarcity. Plenty of food is available, but distribution of the same amongst the very poor and the destitute is scarce and non-existing leading to mal-nutrition, starvation and other related problems. The anxiety of the Court is to see that poor and the destitute and the weaker sections of the society do not suffer from hunger and starvation. The prevention of the same is one of the prime responsibilities of the Government-whether Central or the State. Mere schemes without any implementation are of no use. What is important is that the food must reach the hungry.
>
> Article 21 of the Constitution of India protects for every citizen a right to live with human dignity. Would the very existence of life of those families, which are below the poverty line not come under danger for want of appropriate schemes and implementation thereof, to provide requisite aid to such families? Reference can also be made to Article 47 which inter alia provides

[65] Ibid. Para. 9.
[66] Ibid. Para. 15.
[67] Writ Petition (Civil) No. 196 of 2001
[68] Tool for Action, Supreme Court Orders on the Right to Food, Right to Food Campaign, p. 6

> that the State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties."[69]

In this case, the Indian Judiciary came out strongly and set an example of what an institution can do for the people of a country. The impact of this case was huge. Different states of the country had to change their food policy and had to recourse to some steps to fight against hunger. The Court observed that the right to food was one of the basic needs of the people and the government was under an obligation to run the food-related program in such a way that the marginalized people did not fall into food crises.

In *Laxmi Mandal v. Deen Dayal Harinagar Hospital & Others*[70] case, the petitioner felt aggrieved by the systematic failure of the government health institutions in providing a minimum standard of treatment. Although public health schemes were adopted at that time to reduce the mortality rate.[71] The Court again elaborated the term 'right to life' and held-

> "One is the right to health, which would include the right to access government (public) health facilities and receive a minimum standard of treatment and care. In particular, this would include the enforcement of the reproductive rights of the mother, and the right to nutrition and medical care of a newly born child and continuously thereafter the age of about six years. The other facet is the right to food, which is integral to the right to life and right to health."[72]

Here, inspired by the right to food case, the Court included the right to health within the ambit of the right to life. This was a huge development in respect of the interpretivist approach applied by the Court. Another significant issue, in this case, was to issue several directions to the State to address the gaps in public health schemes.

In a politically remarkable case *Kedar Nath Yadav v State of West Bengal*[73], the West Bengal government formulated a policy where Tata Motors company was supposed to build an industry of small cars. The West Bengal government published a notification, specified the plots, and started proceeding with the acquisition. The declaration of the government was the acquisition of land for a public purpose that

[69] Order dated 2nd May 2003. (*People's Union for Civil Liberties (PUCL) v. Union of India and Others* case)
[70] Judgment of Delhi High Court dated 4th June 2010, W.P.(C) Nos. 8853 of 2008
[71] Ibid. Para. 1.
[72] Ibid. Para. 19.
[73] Civil Appeal No. 8438 of 2016

would generate the development of West Bengal.[74] But the proceeding of the acquisition was challenged. The Court dismissed the suit and directed for acquisition. The rationale of the judgment was that the acquisition of land was for public purposes.[75] Thereafter the judgment of the High Court was challenged before the SC. Whether the land acquisition was for a public purpose, the SC observed that-

> "In this day and age of fast paced development, it is completely understandable for the State government to want to acquire lands to set up industrial units. What, however, cannot be lost sight of is the fact that when the brunt of this 'development' is borne by the weakest sections of the society, more so, poor agricultural workers who have no means of raising a voice against the action of the mighty State government, as is the case in the instant fact situation, it is the onerous duty of the State government to ensure that mandatory procedure laid down under the L.A. Act and the Rules framed thereunder are followed scrupulously, otherwise the acquisition proceedings will be rendered ab-initio in law. Compliance with the provisions of the L.A. Act cannot be treated as an empty formality by the State government, as that would be akin to handing over the eminent domain power of the State to the executive, which cannot be permitted in a democratic country, which is governed by the rule of law."[76]

This case is important concerning the reflection of the 'public spirited' judiciary. The Judiciary, in this case, showed the meaning of democracy, rule of law which cannot be jeopardized for the cost of 'development.' Hence, the Court held that the acquisition of land was not for 'public purpose'.

In *Devika Biswas v. Union of India* and other cases, PIL was filed to ensure that sterilization procedures are carried out in line with recognized legal standards and medical requirements and that women and men who experience injury as a result of the failure to follow the norms and procedures should have compensated appropriately. The Court observed that the non-maintaining of the sterilization procedures endangered the life of the citizen. Two components of the right to life had been jeopardized- one was the right to health and the other the reproductive rights.[77]

In fact, the newer interpretation of 'right to life' or Article 21 marked the beginning of a new era in the Constitutional history of India. Which leading Indian legal scholars like Upendra Baxi and S. P. Sathe

[74] Ibid. Para. 8.
[75] Ibid. Para. 11.
[76] Ibid. Para. 63.
[77] (2016) 10 SCC 726, Para. 81.

opined as 'an attempt to marshal a new historical basis of legitimization of judicial power in response to the post-emergency euphoria at the return of liberal democracy.'[78] Its effects were far-reaching. Giving legal enforceability to judicial 'non-enforceable' principles in this way was groundbreaking. This kind of judicial activism in India has affected the Constitutional discourse of the rest of South Asia. The judiciaries like Pakistan and Bangladesh have also used this issue to set a new precedent in the judicial process of their respective field.

It has been seen, so far, the judicial activism of India in different cases, especially in social and economic rights adjudication. Probably, it has become clear that the early approach of judicial activism has subsequently turned into an 'activist' Indian Judiciary. In this way, the Judiciary has to move forward combating various zigzag ways. But reviewing the journey of the Indian Judiciary it is not possible to measure the activism in one single approach. There are many incidents where the activism itself has initiated some controversies of 'transgressing the border.' The tagging of 'juristocracy', 'lust for popularity', and 'judicial over activism' are some of many that the Indian Judiciary has to bear. Now the following discussion, this work has attempted to make light upon these issues. This new aspect of the chapter is interesting in succumbing to the debates, and controversies as well as ascertaining the correct notion of understanding arising out of the enforcement discourse of social and economic rights.

3.6 From 'Adjudicator' To 'Activist' Role of The Judiciary: The Dilemma Lies Within

This work wants to throw light on the debates and analyzes, the discourses that are prevalent in terms of the judicial enforcement of social and economic rights. First of all, as regards the justification of judicial activism in the field of social and economic rights Nick Robinson says, "...the Indian Court has expanded its mandate as a result of the shortcomings (real, perceived, or feared) of India's representative institutions. The Indian SC's institutional structure has also aided its rise and helps explain why the Court has gained more influence than most other judiciaries."[79] What Robinson wants to say is - that India is going through a new experience of a 'global phenomenon of the rise of rule, good governance via courts'. He proceeds by telling that - like many constitutions, the Indian

[78] See Baxi, Upendra. *The Indian Supreme Court and Politics.* Eastern Book Company, 1980. 122–23. (asserting that the Indian Supreme Court 's judicial activism in the post Emergency period was an attempt to —bury its emergency past and —to increase its political power vis-a-vis other organs of government.) See Sathe, Satya P. "Judicial Activism: The Indian Experience." *Wash. UJL & Pol'y* 6 (2001): 29.

[79] Robinson, Nick. "Expanding judiciaries: India and the rise of the good governance court." *Wash. U. Global Stud. L. Rev.* 8 (2009): 1.

Constitution has created 'an ongoing, controlled revolution by laying an architecture in which massive social and economic transformation could take place within the limits of liberal democracy and the Court has reshaped itself to promote.'[80]

The causes of judicial activism in India can be summed up in the write-up of Upendra Baxi. He, in an essay, tried to explain the sources of the Indian Court's Constitutional power of intervention by indicating- that 'people's miseries arising from repression, governmental lawlessness and administrative deviance'[81] are the actual sources of having that intervening power. He ascribed emphatically the miseries of the commoners by saying- "women in protective custody, children in juvenile institutions, bonded and migrant laborers, unorganized laborers, untouchables and scheduled tribes, landless agricultural laborers who fall prey to faulty mechanization, women who are bought and sold, slum-dwellers and pavement dwellers- these and many more groups now flock to the SC seeking justice."[82]

Baxi, in another essay, with a more clear vision has depicted the justification of the Judiciary's immense power of intervention by characterizing judicial activism as "a struggle for the recovery of the Indian Constitution"[83] and then indicates the failures of other branches which paves the way of the judiciary. "I do not mean . . . to suggest that the Supreme Court is the sole agency to safeguard and advance human rights in a democratic society like India . . . it is nonetheless a crucial agency, sometimes perhaps—in the light of a corrupt and an errant executive, an irresponsible Parliament—a virtually indispensable one for the protection of human rights in India."[84]

Addressing these discussions gives a justification for wide extensive judicial activism. But the paper also finds some criticism of such activism. Because in a democratic system, utilizing certain deficiencies of other branches of government, the court gets opportunities to intervene more directly. Though it

[80] Ibid. p-5.
[81] Baxi, Upendra. "Taking suffering seriously: Social action litigation in the Supreme Court of India." *Third World Legal Stud.* (1985): 108.
[82] Ibid. p-108.
[83] Baxi, Upendra. "Judicial Discourse: Dialectics of the Face and the Mask." *Journal of the Indian Law Institute* 35, no. 1/2 (1993): 12.
[84] Ibid.

may point out the failure of the executive, even, sometimes that goes beyond the adjudicatory and interpretative roles within the classic separation of power framework.[85]

As this thesis mainly focuses on the enforcement discourses of social and economic rights, the following discussion delimits itself within that boundary. Frank I. Michelman, an American legal scholar, is critical of the judicial enforcement of social and economic rights. According to him, it restricts the democratic decision-making process. Because the political branch of the government, sometimes, has to comply with a single judgment. The policies which have been democratically formulated have to adjust the decision of the court. For that reason, sometimes individual benefit or collective benefit has to be treated differently.[86] Rehan Abeyratne proclaims the same kind of thoughts. He raises two structural concerns. He opines that the judicial enforcement of social and economic rights gives birth to a concern for the separation of power. The contradictions between the judicial branch and the democratic branches become sharper. Because the court is allowed to invalidate the decision of the elected body as to the allocation of resources. And then he feels concerned about the judicial capacity of enforcing social and economic rights. He thinks judges are not the best state actors to measure different government policies and select between priorities.[87] Michelman clarifies why the judges are incompetent to select the priority because they do, generally, have the scarcity of research capacity and democratic accountability to legislatures and the executive. Michelman's concerns about the extensive judicial enforcement may render democracy meaningless.[88]

As to which extent the Indian Judiciary has acted, that pushes us into a much bigger controversy. In the *Deepak Rana v State of Uttarakhand*,[89] case, we will find the Indian Judiciary's activity intrudes into the ambit of the executive. Here in this case the petitioner filed a PIL against the State of Uttarakhand, alleging that government schools in the state lacked basic infrastructural and educational facilities. The High Court of Uttarakhand took judicial notice of the dilapidated condition of schools across the

[85] Rudolph, Lloyd, and Susanne Hoeber Rudolph. "Redoing the constitutional design: From an interventionist to a regulatory state." *The success of India's democracy* (2001): 131–132.
[86] Michelman, Frank I. "The Constitution, Social Rights, and Liberal Political Justification," in Barbosa, Ana Paula. *"Exploring Social Rights: Between Theory and Practice."* (2008): 1110-1112.
[87] Rehan Abeyratne, Assistant Professor and Executive Director of Centre for Public Interest Law, Jindal Global Law School, National Capital Region of Delhi, India. J.D. (Harvard), A.B. (Brown). Name of the article- Abeyratne, Rehan. "Socioeconomic rights in the Indian constitution: toward a broader conception of legitimacy." *Brook. J. Int'l L.* 39 (2014): 18–19.
[88] Supra No: 86 at 32–33.
[89] WP (PIL) No 201/2014 (order dated 19 November 2016).

state and directed the state government to provide basic supplies, facilities, and infrastructure in public schools across the state, including school uniforms, mid-day meals, water purifiers, heaters, and ceiling fans, blackboards, computers, libraries, and toilets, among other things.[90] In a subsequent order, the Court noted that the state government had failed to implement its earlier orders and once again reproached the state government for being responsible for "falling standards of education" and for "miserably failing to provide bare minimum facilities" in public schools.[91] In light of this failure, the Court prevented the state government from purchasing mobile phones, cars, air conditioners, and other "luxury" items for its members until it successfully provided necessary amenities in all public schools across the state.[92]

Another example of the higher judiciary assuming a quasi-executive role is the Allahabad High Court's judgment in *Shiv Kumar Pathak v State of Uttar Pradesh.*[93] case. In this case, the Court after showing the deplorable situation of schools categorized the schools into three. Court saw that the first category schools were run by the elite class including high-ranking bureaucrats, ministers, and members of parliament. The second category comprised schools that were primarily run by private bodies or individuals that the Court called "semi-elite schools". The final category comprised primary schools operated and administered by the Uttar Pradesh Board of Basic Education which are 90 percent of the concerned population and were deemed to be "common-man's schools". The Court took the extraordinary step to direct the Uttar Pradesh Chief Secretary to take appropriate action in consultation with other concerned state officials to ensure that all government servants, elected representatives, members of the judiciary, and those who received any salary or benefit from the state exchequer or public fund send their children to primary schools administered by the Uttar Pradesh State Education Board.[94] The Court further stated that this move would "boost [the] social equation" between students attending schools within the three categories and allow them to interact with each other regularly.[95]

In the above-mentioned cases, the judiciary's strong position in favor of socio-economic rights is praiseworthy. But sometimes the overall functioning of the judiciary can be jeopardized if there is an

[90] Ibid. (order dated 19 November 2016).) [22].
[91] 27 WP (PIL) No 201/2014 (order dated 22 June 2017), [6] and [10].
[92] Ibid, (order dated 22 June 2017), [6] and [10].) [10].
[93] (2016) 2 All LJ 374
[94] Ibid.
[95] Ibid.

over-emphasis on issues other than the main ones to which the judiciary should not pay attention. Here 'prevention of buying 'luxury' items until providing necessary amenities in all public schools across the state' or 'to order children of all government servants, elected representatives, members of the judiciary, and those who received any salary or benefit from the state exchequer or public fund to go to govt. primary schools' are not the ideal job for what the Judiciary needs to do. Sometimes this kind of exaggerative activity shrinks the wider space of playing roles.

Now, this thesis discusses an important point, that is the Indian Judiciary's law-making initiatives in dealing with social and economic rights. As a legislative character, the Court attempts lawmaking in broadly two ways- giving guidelines on specific issues and or integrating concepts and principles from International law. It will be seen this trend in the following cases- the Court's initiative to fill the vacuum of the legislative body by prioritizing constitutional importance.[96] The Court emphatically proclaimed that as long as the legislature did not make law in this regard, the guidelines set by the Court would be followed. In another case, *MC Mehta v State of Tamil Nadu,* the Court offered some additional duties for statutory bodies to ensure compliance with the Child Labour (Prohibition and Regulation) Act of 1986.[97] The Court also laid down some principles to better adjudicate with the said Act. In *MC Mehta v Union of India*[98] the Court held:

> "[A]n enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous nature of the activity which it has undertaken."[99]

[96] See *Vishaka,* (1997) A.I.R. S.C. 3011.
[97] (1996) 6 S.C.C. 756.
[98] (1987) 1 S.C.R. 819, 843.
[99] MC Mehta, (1987) 1 S.C.R. 819; see Vellore Citizens Welfare Forum, (1996) A.I.R. S.C. 2715 (holding the "polluter pays" principle, the principle of "sustainable development," and the "precautionary principle" as part of Indian environmental jurisprudence, incorporating international environmental principles into the corpus of domestic law premised on the argument that the same had become part of customary international law and that there was nothing under domestic law that was contrary to it); see also Indian Council for Enviro-Legal Action, (1996) 3 S.C.C. 212.

In the 'Right to Food'[100] case, the Court's direction of executing social and economic policy restricted the democratic policymaking like- within limited resources how to make a priority of various aspects of socio-economic development.

The Judiciary's quasi-legislative or quasi-executive response toward dealing with social and economic rights certainly gives birth to new discourses. Because globally 'separation of power' is a very important topic to decide the particular role of the judiciary, executive, and legislature concerning their own responsibilities. With this notion, we see some differences in approaching social and economic rights in India. Upendra Baxi, however, argues the notions of the judiciary's role from the Indian context. Those who criticize the role of the Indian Judiciary because of their over-activism, Baxi tries to let them indicate the issue contextually. He says the role of judiciaries that they have played in developed countries has given birth to the concept of separation of powers. The situation so occurs because sometimes an activist judge does have no option but to consider herself perfectly justified in making laws when the legislature doesn't feel anything to do her job... any initiatives of that period from the part of the judiciary are both necessary and desirable. From the Indian perspective, this role of the judiciary does not appear much resenting from the angle of the legislative body as the judiciary has taken some of the burdens of the legislature.[101] Although Baxi's contextual understanding of judicial activism is not supported by many scholars. Jeremy Waldron, a legal and political philosopher, claims this kind of 'judicial review' is 'democratically illegitimate'. Because it marginalizes ordinary citizens and disregards principles of representation and political equality in the discourse of rights.[102] This thesis argues in favor of contextual interpretation. Because the specificity of any particular context should be considered for taking a proper decision. Baxi has already discussed the necessity of judicial intervention in different amenities of a citizen's life. Only considering that analysis, the discussion of Baxi can be effectively understood.

[100] See *People's Union for Civil Liberties v. Union of India & Others,* Writ Petition (Civil) No. 196 (2001) (India) and subsequent interim orders, http://www.righttofoodindia.org/case/case.html; see also Legal Action: Supreme Court Orders, RIGHT TO FOOD CAMPAIGN (Aug. 19, 2016), http://www.righttofoodindia.org/orders/interimorders.html
[101] Baxi, Upendra. "On the Shame of Not being an Activist-Thoughts on Judicial Activitism." (1987). 259, 265.
[102] Waldron, Jeremy. "The core of the case against judicial review." *Yale lj* 115 (2005): 1346. Also see, Bellamy, Richard. "Political constitutionalism: a republican defence of the constitutionality of democracy." (2007). Smillie, John. "Who Wants Juristocracy." *Otago L. Rev.* 11 (2005): 183. On the issue that entrenchment of any rights are incompatible with democratic ideals, See, Waldron, Jeremy. *Law and Disagreement*. Oxford: Oxford University Press, 1999. and 'The Core of the Case Against Judicial Review' (2006)." *Yale LJ* 115: 1346., 221-22.

The answer to Jeremy Waldron's criticism is found in Justice Bhagwati's discussion. In his argument, we see that the Judiciary sought such judicial activism not to undermine the representative democracy but to represent the marginalized people to implement their rights. He said-

> "[I]et me make it clear that when judges are granting relief they are not acting as a parallel government. They are merely enforcing the constitutional and legal rights of the underprivileged and obligating the Government to carry out its obligations under the law. The poor cannot be allowed to be cheated out of their rights simply because those who should act do not act, act partially, or fail to monitor what they are doing."[103]

The differences of opinion are clear here. There is always a difference in the classical definition of 'separation of power' with its contextual understanding. But it should not be forgotten that in many cases when the representative bodies are failing to reflect the minimum aspirations of the people, the judiciary cannot be confined to a mere academic definition. And, though, it is arguable but still, a reality that in transitional societies, the judiciary often enjoys more 'grassroots' popularity than the other branches of government.[104]

In the *Delhi Jal Board case*[105] when High Court ordered the relevant govt. authorities to provide sufficient protective equipment to workers, medical service, and compensation to the families of the victims the argument was whether the direction of the High Court possessed legislative power.[106] The Court in reply commented 'when courts attempt to fill the ensuing gap, they are often confronted with 'the bogey of judicial activism or judicial overreach'.[107] The court concluded that, in handing down the impugned order, the High Court had simply exercised its 'obligation to do justice to the disadvantaged and poor sections of the society.'[108]

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[103] Bhagwati, Prafullachandra Natwarlal. "Judicial activism and public interest litigation." *Colum. J. Transnat'l L.* 23 (1984): 576.
[104] Kurland, Philip B. "The Rise and Fall of the" Doctrine" of Separation of Powers." *Michigan law review* 85, no. 3 (1986): 592, 610; In India, judicial activism by the Supreme Court has enjoyed tremendous public support. See Cassels, Jamie. "Judicial activism and public interest litigation in India: Attempting the impossible?" *The American Journal of Comparative Law* 37, no. 3 (1989): 514-15; Shah, Sheetal B. "Illuminating the possible in the developing world: Guaranteeing the human right to health in India." *Vand. J. Transnat'l L.* 32 (1999): 435, 485.
[105] *Delhi Jal Board v. National Campaign for Dignity and Rights of Sewerage and Allied workers and others,* CIVIL APPEAL NO.5322 of 2011 (Arising out of Special Leave Petition (Civil) No. 12345 of 2009) at para 15.
[106] Ibid. para 10.
[107] Ibid. para 15.
[108] Ibid. para 20.

Debates over judicial overreach are not going to be exhausted. However, the example of South Africa is noteworthy in this regard. Through the use of the 'reasonableness' doctrine, they have shown that coordination is a viable way to implement socio-economic rights. In the *Grootboom*[109] case, they have introduced a fine balance between judiciary and executive. There the Judiciary has enabled social and economic rights adjudication and at the same time, put the policy-making agenda into the prerogative of the executive. In India, the 'right to food case' is an example of maintaining that balance. This may be a sustainable way of balancing the power-sharing of the different governmental institutions.

3.7 Debates On the Effectiveness of Judicial Activism

The extent of the effectiveness of judicial activism in the enforcement of social and economic rights is a debatable matter. Because the judicial power and its exercise in India, though invoked all the time, in reality, do not offer an accurate empirical description of how the courts work. There is a saying, that the judiciary does not have 'either purse or power' which is why it is very difficult for the judiciary to continue its activities facing many adversities. If the judiciary has to look at its progress even after making a decision, it will certainly create a very complicated situation. Nonetheless, when we see the judiciary going beyond its limits, we cannot deny the various analyzes raised about it.[110]

What legitimizes judicial activism? The conceivable answer is how much it contributes to the preservation of democratic institutions and values. An assertive judiciary may be both a shield and a sword for democracy if judges use their power to restore integrity to the democratic process, make human rights (including social and economic rights) more relevant, and advance the public interest. This is the most compelling argument.

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[109] *Government of the Republic of South Africa. & Ors v Grootboom & Ors* (2000) (11) BCLR 1169. (CC)

[110] In December 2006, Justice Markandey Katju issued a strong cautionary warning about the Court's expanding role in governance in the Aravali Golf Course case, noting: "If the judiciary does not exercise restraint and overstretches its limits, there is bound to be a reaction from politicians and others. The politicians will then step in and curtail the powers, or even the independence of the judiciary. If there is a law, judges can certainly enforce it, but judges cannot create a law and seek to enforce it. Judges must know their limits and must not try to run the government. They must have modesty and humility, and not behave like emperors. There is a broad separation of powers under the Constitution and no organ of the State- the legislature, the executive, and the judiciary-should encroach into each other's domain. We are compelled to make these observations because we are repeatedly coming across cases where judges are unjustifiably trying to perform executive or legislative functions. (*Divisional Manager, Aravali Golf Club v. Chander Hass,* (2007) 12 S.C.R. 1084, 1091, 1098.) Same assertion we will find in S.P. Sathe's remarks that 'Indian Judiciary has 'transcended the limits of the judicial function and has undertaken functions which really belong to either the legislature or the executive'. Sathe, Satya P. "Judicial Activism: The Indian Experience." *Wash. UJL & Pol'y* 6 (2001): 29.

On the other hand, as per Pratap Bhanu Mehta, judicial activism can mean- scrutiny of legislation to determine constitutionality, the creation of law, and the exercise of policy prerogatives normally reserved for the executive.[111] Differences of opinion can be noticed in the above-mentioned views. However, this kind of controversy is inevitable because whenever any department of the government shows visible activity, it also gives rise to some arguments. Our next discussion will follow this discourse.

The SC of India has set some exemplary and landmark decisions over the years in many social and economic rights cases like the right to education, livelihood, shelter, medical facilities, and so on. The judicial innovation in PIL cases has been exemplary. The most amazing work the courts have done so far is to relax the legal requirements of 'locus standi.' Previously, only the directly aggrieved person would appear in the litigation process but the judicial innovation has made the wide ambit of 'aggrieved' person which allows anyone to approach seeking judicial remedy for an alleged injustice.[112]

PIL has deeply influenced the constitutional law of India. Now, not only the social-economic issues, it is hard to find any dominant political or environmental issue without having touched by PIL. PIL has been concentrating on child labor and child adoption,[113] health care facilities,[114] environment-related issues,[115] privacy matters,[116] transparency in public life,[117] police functioning,[118] jail reforms,[119]

[111] Mehta, Pratap Bhanu. "India's unlikely democracy: The rise of judicial sovereignty." *Journal of Democracy* 18, no. 2 (2007): 70-83.
[112] Ibid.
[113] See *M.C. Mehta v. State of Tamil Nadu*, (1997) A.I.R. S.C. 699; *Bandhua Mukti Morcha v. Union of India*, (1997) A.I.R. S.C. 2218; *Gaurav Jain v. Union of India*, (1997) A.I.R., S.C. 3021; *Vishal Jeet v. Union of India*, (1990) 2 S.C.R. 861; *Gaurav Jain v. Union of India*, (1990) 25 S.C.R. 173.
[114] See *State of Punjab v. Mohinder Singh Chawla,* (1997) A.I.R. S.C. 1225; *Paschim Banga Khet Mazdoor Samity v. State of W Bengal*, (1996) 4 S.C.C. 37; *Parmanand Katara v. Union of India,* (1989) 3 S.C.R. 997, 1005-06.
[115] See *B.L. Wadehra v. Union of India*, (1996) 2 S.C.C. 594; *Indian Council for Enviro Legal Action v. Union of India,* (1996) A.I.R. S.C. 1446; *Vellore Citizens Welfare Forum v. Union of India*, (1996) A.I.R. S.C. 2715; *M.C. Mehta v. Union of India,* (1987) 1 S.C.R. 819, 826.
[116] See *People s Union for Civil Liberties*, (1997) A.I.R. (1997) S.C. 568; *R. Rajagopal v. State of Tamil Nadu*, (1993) A.I.R. S.C. 264; *Govind v. State of Madhya Pradesh*, (1975) 3 S.C.R. 946.
[117]See *Vineet Narain v. Union of India*, (1998) A.I.R. S.C. 889.
[118] See *D.K. Basu v. State of W Bengal*, (1997) A.I.R. S.C. 610; *People's Union for Civil Liberties v. Union of India*, 1997 A.I.R. S.C. 568; *Sheela Barse v. State of Maharashtra,* (1983) 2 S.C.R. 337, 341; *Prem Shankar Shukla v. Delhi Admin.,* (1980) 3 S.C.R. 855, 862.
[119] See *Charles Sobraj v. Superintendent, Cent. Jail,* (1987) A.I.R. S.C. 1514; *Javed Ahmed Abdul Hamid Pawala v. State of Maharashtra,* (1985) 2 S.C.R. 8, 17-18; *Sher Singh v. State of Punjab,* (1983) 2 S.C.R. 582, 587; *Prabha Dutt v. Union of India,* (1982) 1 S.C.R. 1184, 1186.

educational issues,[120] gender justice,[121] prostitution,[122] economic rights,[123] and so on. So now from religious liberty to clear air; from waste management to education rights- it will be hard to find any popular issue, the Indian Judiciary does not set any mark. It has continuously attempted to portray itself as the 'Supreme Court of Indians' rather than the 'Supreme Court of India'.[124] In doing so, on one hand, few scholars have gone to the extent of labeling it as the 'most trusted public institution' in the country.[125]

Upendra Baxi named Social Action Litigation (SAL) instead of PIL.[126] He has expressed the necessity of SAL by remarking "SAL has exposed how systematically citizens are degenerated into mere subjects, entirely dependent at the mercy of the new Rajas, and subject to their whims and fancies."[127]

However, this sort of role of Judicial activism has been questioned and criticized. The first criticism concerns the inconsistency of progressive interpretation made by the judiciary. For example, in 2002, the workers' attempt to stop disinvestment in a public sector for continuous loss was repelled by the court on the ground that the government had the authority to set any economic policy.[128] In *T.M.A. Foundation v. Karnataka*, the Court gave such a judgment about the right to education nearly opposite to the previous judgments that have been given so far by the Indian judiciary. The Court decided that the unaided educational institutions would not face any bar to set school fees as long as they became "excessive" or "discriminatory." Although, the Court did not specify the definition of the 'justifiable' fee.[129] Observing these cases, it seems that the Court, generally, has taken different notions as regards

[120] See *Unni Krishnan v. State of Andhra Pradesh,* (1993) 1 S.C.R. 594, 622-23.
[121] See *MadhuKishwar v. State of Bihar*, (1996) A.I.R. S.C. 1864; *Vishakha v. State of Rajasthan*, (1997) A.I.R. S.C. 3011.
[122] See GauavJain, (1997) A.I.R. S.C. at 3021.
[123] See *Olga Tellis v. Bombay Mun. Corp.,* (1985) 2 S.C.R. Supp. 51, 62.
[124] See, generally, Baxi, Upendra. "The avatars of Indian judicial activism: Explorations in the geographies of [In] Justice." S. Verma and Kusum (eds) *The Indian Supreme Court: Fifty Years Later* (2000): 156-209.
[125] Mendelsohn, Oliver. "The Supreme Court as the most trusted public institution in India." *South Asia: Journal of South Asian Studies* 23, no. s1 (2000): 103.
[126] SAL has been clearly influenced by PIL. SAL tends to more aggressive. Because PIL has been dominated by institutional petitioners, namely public interest law firms, SAL has been guided by and large by the initiatives of committed judges, lawyers, citizens and social activists. While PIL primarily purports to increase people's participation in decision-making and policymaking, SAL, in strict sense, is concerned with governmental lawlessness and the exploitation of deprived groups.
[127] Baxi, Upendra. *Courage, craft, and contention: the Indian Supreme Court in the eighties.* NM Tripathi, 1985.
[128] *Balco Employees Union (Registered) v. India*, (2002) 2 SCC 333, cited by Sathe, *Judicial Activism in India*, lviii–lx. Sathe defends the judicial verdict. However, he raises the possibility of intervention on grounds that unemployment in a society marked by deep material poverty and bereft of social security might demand judicial intervention.
[129] (2002) 146 8 SCC 481. Sathe, *Judicial Activism in India*, (Supra No. 10.)

the enforcement of social and economic rights, especially after getting recourse to economic liberalization. It is also true that the Judiciary cannot give assurance for the enforcement of social and economic rights, since it may only pronounce the decisions, which ultimately brings the responsibility for the other branches of the government and many government-non government institutions to implement. That is why, in the long run, the judiciary has to face what scholars call Hamilton's dilemma: "The judiciary…may truly be said to have neither FORCE nor WILL, but merely judgment; and it must ultimately depend on the aid of the executive arm even for the efficacy of its judgments."[130]

The second criticism is about the growing number of cases reflecting the interests of the big business house rather than being responsive to adjudicate social and economic rights for the poor and marginalized people. Recently an empirical assessment of SC cases, Varun Gauri has shown the trend of the judges about their less responsive attitude to the claims made by or on behalf of the poor and marginalized people. Whilst it is possible that the claim raised before the court is reasonably weak, the attribution is less justified. But at the same time there observes an increase of successful judgments applicable to the advanced class of society. This may indicate that the approach of the court is less active to the need of the people living in dire conditions.[131]

The next criticism is about the 'conditional social rights approach'.[132] This approach has mainly focused on the execution of social rights rather than the justification of measures undertaken by the State. Madhav Khosla is the propagator of this view. He deals with the distinctive feature of the implementation of social rights which, according to him, has not been noticed by the constitutional lawyers either in India or any other place.

The celebrated *Olga Tellis* case,[133] which has dealt with the right to shelter of slum and pavement dwellers. It has been observed in the case that the homeless persons reside on land belonging to public property. Questions were raised by the petitioners about whether eviction of landless people could be done without arranging alternative accommodation by the State. The petitioners argued that

[130] McCubbins, Mathew D., and Daniel B. Rodriguez. "The judiciary and the role of law." In The *Oxford handbook of political economy.* Oxford University Press, 2008.273–86.
[131] Gauri, Varun. "Public interest litigation in India: overreaching or underachieving?." *World Bank Policy Research Working Paper* 5109 (2009). and also see Iyer, V.R. Krishna. "Judicial Activism: A Democratic Demand," 31 *Indian Bar Review* 1. 2004. (They may appropriate the rhetoric of the poor and position themselves as "The People's Court,"10 but they unwittingly serve the interests of the powerful.)
[132] Khosla, Madhav. "Making social rights conditional: Lessons from India." *International journal of constitutional law* 8, no. 4 (2010): 739-765.
[133] *Olga Tellis v. Bombay Municipal Corporation,* (1985) 3 S.C.C. 545.

Article 21 dealing with the right to life would become meaningless without the protection of life.[134] Although the Court upheld the right to life discourse, at the same time held that no person "has the right to make use of a public property for private use. . . [and] it is erroneous to contend that the pavement dwellers have the right to encroach upon pavements by constructing dwellings thereon."[135] The reminded an old question again, the principle of adjudicating social-economic rights, to respect, to protect, and to fulfill the rights. Has the *Olga Tellis* case respected or protected the social rights claimed by the petitioners? The answer might be negative. It would have been claimed as protecting, and respecting social rights if the Court had granted the minimum facility of shelter to those who were residents on the pavements. But the Court was unable to do that. It only relied upon the State's ability to arrange accommodation facilities for the marginalized people.

A similar incident happened in the Ahmedabad Municipal Corporation[136] case. As mentioned above in the *Olga Tellis* case where the Court debarred the use of the public property for private benefit. The Court held that those who had lived for a long period could be eligible for granted benefit from the government scheme. But they had to apply for the scheme otherwise would not be allowed. And those who were encroachers either during filing the suit or by purchasing from original squatters would not be eligible for the scheme and would not get any remedy.[137] Once again the Court applied the conditional social rights approach. The Court emphasized the importance of social rights but did nothing significant for the enforcement of this right. The conditional social rights approach takes to observe beyond the rhetoric of enforcement discourse performed by the judiciary. Sometimes, it discovers the emptiness of thousands of seemingly powerful words.

The approach is further applied in two important cases relating to the right to education. One is *Mohini Jain*[138] and the other is *Unni Krishnan*[139] case. In the *Mohini Jain* case 'capitation fee' was charged by private medical colleges in the Karnataka State. There it was observed that the students 'who do not have merit' had to provide higher tuition fees. The Court engaged to distinguish who was meritorious or who was not. In this case, the Court held that "educational institutions must function to the best advantage of their citizens."[140] Although the Court did not place any emphasis on the establishment

[134] Ibid.
[135] Ibid. at 579.
[136] *Ahmedabad Municipal Corporation v. Nawab Khan,* (1997) 11 S.C.C. 121.
[137] Ibid. at 143.
[138] *Mohini Jain v. State of Karnataka,* (1992) 3 S.C.C. 666.
[139] *Unni Krishnan v. State of A. P.,* (1993) 1 S.C.C. 645.
[140] *Mohini Jain,* supra No. 138, at 680

of schools. In another case, *Unni Krishnan*, the Court directed that no child would be charged for fees under the age of fourteen. Although the Court did not say anything about the State's mandatory responsibility to provide education for all children up to fourteen years of age. The responsibility of saying such by the judiciary cannot be ignored when it is observed the huge number of drop-out children every year and the lack of necessary educational institutions for an aggregate number of children. Nonetheless, the judgment of these cases is important in terms of the State's liability to provide primary education within its limits and that limit will be ascertained by the State itself.[141]

Finally, an important criticism is from Charles R. Epp, a prominent academician. He has remarked, "The Indian Supreme Court clearly tried to spark a rights revolution—but little happened."[142] Epp's criticism is mainly for the lack of support structure for materializing rights addressed by the judiciary. He has indicated the absence of consistent right-advocacy organizations, activist lawyers, necessary government funding and so on which constantly undermined the potential of rights revolution.[143]

From the above discussion, it came to be known many limitations to judicial activism. Though the observations discussed above cannot be ignored or while acknowledging these limitations, it does not prove that the significant role of the judiciary in the implementation of social and economic rights in Indian constitutionalism is negligible. Rather, the role that the Indian judiciary has played so far, become a pioneer in the constitutional practice of South Asia, especially in dealing with social and economic rights. In that case, the above limitations discussed can be said to be less in comparison with the vast work of the judiciary.

The judiciary is one of the institutions of the state. The judiciary does not have the power to make decisions separate from the policies adopted by the state. That is why, it can be seen that when the state adopts the policy of commercialization-privatization, leaving the services sector to the private, the judiciary also has to make decisions in line with that policy. Where the role of the judiciary in formulating state policy is negligible and when the judiciary has to work amidst various obstacles, it is almost impossible for the judiciary to examine whether the verdict has been implemented even after the verdict has been announced. Although this very situation is also changing gradually. The judiciary

[141] Supra No. 139 at 737.
[142] Epp, Charles R. *The rights revolution: Lawyers, activists, and supreme courts in comparative perspective.* University of Chicago Press, 1998. 71.
[143] Ibid. pp: 17–18.

has also begun to play a role in the extent to which its decisions are being implemented. This thesis has focused on this matter in the discussion below.

Of course, the Judiciary has the limitations to adopt the good governance strategy it desires. The Court's actions are limited by the government's willingness to carry out its instructions. Its capacity to appeal to India's constitutional vision or civilizational ideals also influences its activities. There may be a growing perception that the SC has overreached and is impeding governance, or, on the other hand, that it is not acting positively enough to protect the interests of the downtrodden people. However, it is not a representative body capable of making concrete decisions. Although, under specific circumstances, the SC can assume many of the functions of its representative bodies. The ongoing finger-pointing could stem from a lack of knowledge about the Court's current role, or unwillingness to welcome the Court's activities. Whatever may be the cause, the Court's initiatives and innovations in enforcing social and economic rights have achieved a high level of consistency.

Let's give some examples. Sometimes the SC of India adjudicates social and economic rights which require the other institutions of the government to implement. The SC uses to declare some guidelines and instructions and orders the government official to take appropriate steps in accordance with that instructions. However, the Apex Court cannot always necessarily create the 'monitoring' mechanism to verify whether the orders are properly implemented. The *Olga Tellis*[144] case is a notable example of this approach. Although Madhav Khosla has found the 'conditional right approach' in this case, it should not be overlooked that the SC of India ordered 'the pavement and slum inhabitants must be given substitute accommodation and that the Slum Upgradation Programme, which intends on providing essential facilities to the inhabitants of slums, should be implemented forthwith.'[145]

It's worth noting that in this case, the SC could have simply decided that pavement and slum dwellers have the right to livelihood as well as the right to live in peace and dignity. The SC would have also done its job by generally saying that the state cannot take steps that infringe on the right to livelihood. Instead, the SC declared the right to livelihood to be an important right and then issued broad mandatory directives to protect the right.

[144] *Olga Tellis and ors Vs. Bombay Municipal Corporation and ors,* (1985) SCC (3) 545.
[145] Ibid, para. 57.

In another example, where the SC of India has taken a 'continuous mandamus approach' by supervising the implementation of its directions. By adopting this approach, the Apex Court not only declares the directives only rather monitors periodically, assesses the progress, and takes action in compliance with the necessities. Earlier in the *Bandhua Mukti Morcha v Union of India*[146] case, after a detailed examination of the severe miseries of the bonded laborers, issued broad remedial orders, including mandating the state government to establish sub-divisional Vigilance Committees to monitor bonded labor, develop a plan for bonded laborer rehabilitation, and ensure that workers got their minimum wage.[147] The SC appointed a government official as a "Commissioner" to ensure the implementation of decisions and tasked him with rehabilitating bonded laborers, guaranteeing the payment of minimum wages, confirming the overall implementation of the decision, as well as reporting to the Court on the pace of progress.[148] This approach was also found in the *PUCL* case,[149] commonly known as the 'right to food' case. The Court had issued 44 interim orders in this case and appointed two Commissioners to oversee and report to the Court on the respondents' execution of different social programs and initiatives.

3.8 The Extent of Using The 'Right to Life' Connotation

From the early discussion, it is evident that the Indian SC has made a prominent role in formulating and enforcing socio-economic rights. The framers of the Constitution have set forth CP rights in the III part and non-justiciable social, and economic rights as DPSP in the IV part of the Constitution. But the SC has altered this constitutional structure by the wide-ranging explanation of Article 21, increasing invocation of DPSP, and thoughtful use of preamble. For example, in *Chameli Singh v. State of Uttar Pradesh*,[150] the Court found that the "right to live guaranteed in any civilized society implies the right to food, water, decent environment education, medical care, and shelter. These are basic human rights known to any civilized society."[151] That's why Upendra Baxi has said, "Indian judges have been very

[146] (1997) 10 SCC 549.
[147] Ibid, para. 39.
[148] Ibid.
[149] Writ Petition (Civil) 196 of 2001
[150] (1995) Supp. 6 S.C.R. 827.
[151] Ibid, at 834. In *Consumer Educ. & Research Ctr. v. Union of India,* the Court noted, "Law is the ultimate aim of every civilized society as a key system in a given era, to meet the needs and demands of its time." (1995) A.I.R. S.C. 922, 938. It went on to explain that in India these demands mean that: Social security, just and humane conditions of work and leisure to workman are part of his meaningful right to life and to achieve self-expression of his personality and to enjoy the life with dignity, the State should provide facilities and opportunities to them to reach at least minimum standard of health, economic security and civilized living while sharing according to the capacity, social and cultural heritage.

active and creative in addressing what they see as the socioeconomic needs of the Indian people."[152] But it has created some problems and anomalies as well.

The Indian Judiciary has interpreted Article 21 consisting of the right to life discourse to such extent as to include life with human dignity and includes a series of social and economic rights.[153] However, the structural demarcation between part III and part IV was clearly stated in the Indian Constitution. Most importantly, Article 37 of the Constitution states that DPSP "shall not be enforceable by any court" even though these principles are "fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws."[154] It is apparent that the text of Article 37 is explicit and there exists little scope to make any deviation. It is a common saying in the theory of constitutional law that the plain meaning of language seldom permits for judicial interpretation.[155] Therefore, the Indian Judiciary has to obey a huge burden of justifying the creative interpretation of Article 37.

The extensive interpretation of Article 21 was first introduced by *Maneka Gandhi*[156] and got its wide assertions in the *Francis Coralie* case, where Court defined 'right to life'-

> "includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings."[157]

Rehan Abeyratne says, in this respect, that in both these cases the Court widely explained 'right to life' without "a reference to any precedent, CAD or other sources of law."[158] Even both the cases failed "to

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[152] Baxi, Upendra. "Taking suffering seriously: Social action litigation in the Supreme Court of India." *Third World Legal Stud.* (1985): 107.
[153] *Mullin v. Adm'r, Union Territory of Delhi*, (1981) 2 S.C.R. 516 (India).
[154] India Constitution, Article 37
[155] See, e.g., Balkin, Jack M. *Fidelity to text and principle.* Advance 1 (2007): 47. ("The Constitution's text contains determinate rules (the president must be thirty-five, there are two houses of Congress), standards (no 'unreasonable searches and seizures,' a right to a 'speedy' trial), and principles ('freedom of speech,' 'equal protection') . . . Adopters use fixed rules because they want to limit discretion.")
[156] *Maneka Gandhi v. Union of India,* (1978) 2 S.C.R. 621, 627.
[157] *Mullin v. Adm'r, Union Territory of Delhi,* (1981) 2 S.C.R. 516, 518 (India)
[158] Supra no-87, P-64.

mention Article 37, much less explain how the Court got past the plain meaning of Article 37 when it reinterpreted Article 21."[159]

In the *Bandhua Mukti Morcha* case, Bhagwati J attempted to justify the use of Article 21. Initially, he admitted the DPSP was not judicially enforceable and therefore, the judiciary could not able to bind the other branches of the government to make laws or fulfill social and economic rights. Then Bhagwati picturized a hypothetical scenario as if the State would have made legislation for enforcement of social and economic rights. Then the state actors must have to observe such law and any non-observance of such law amounts to a violation of the right to life stated in Article 21.[160]

Justice Bhagwati's explanation later drew criticism. Justice Bhagwati was adamant about the use of Article 21 for the implementation of social and economic rights, albeit, no proper explanation could be found in this discussion. The interpretation of the hypothetical use of Article 21 also casts a shadow over the extent to which judicial activism can be practiced. In this aspect, Pratap Bhanu Mehta, in his article, remarked - "The Court has helped itself to so much power . . . without explaining from whence its own authority is supposed to come."[161] Clark D. Cunningham noted, "in several cases, the Court has granted relief to petitioners and issued specific directions to the government before deciding whether it has jurisdiction."[162]

In the *Keshavananda*[163] case, The SC of India recognized DPSP and FRs as the important parts of the "basic structure" of the Constitution.[164] In another case, the judge referred to former Prime Minister Nehru for characterizing DPSP and FRs by identifying FRs are "static," DPSP "represents a dynamic move towards a certain objective."[165] But explaining all these, the Court did not clearly indicate why DPSP was equivalent to FRs. As Pratap Bhanu has said, "Other than a hortatory appeal to the need for

[159] Ibid.
[160] Supra No. 146.
[161] Mehta, Pratap Bhanu. "India's unlikely democracy: The rise of judicial sovereignty." *Journal of Democracy* 18, no. 2 (2007): 74.
[162] Cunningham, Clark D. "Public interest litigation in Indian Supreme Court: a study in the light of American experience." *Journal of the Indian Law Institute* 29, no. 4 (1987): 494, 498–99.
[163] *Kesavananda Bharati Sripadagalvaru and Ors. v. State of Kerala and Anr.* (1973) 4 SCC 225: AIR 1973 SC 1461
[164] *Minerva Mills Ltd. v. Union of India,* (1981) 1 S.C.R. 206, 208 (India); *Waman Rao v. Union of India,* (1981) 2 S.C.R. 1 (India).
[165] *Waman Rao,* (1981) 2 S.C.R. at 24 (quoting from Prime Minister Nehru's speech in a Parliamentary Debate).

a social revolution, the court did not advance reasons for why the DPSP is an expression of the equal standing of free and independent citizens in the same way that fundamental rights are."[166]

Another criticism of a broad interpretation of the term 'right to life' is that it is too ambiguous to define. Any number of positive entitlements could be deemed necessary for human survival. But if 'right to life' is added to everything, then the importance of the rights given separately in the constitution loses its value. Again, by explaining 'right to life' to some socio-economic rights, and some rights have not been associated with it - that too is not proper in the case of equal evaluation. And when uncertainty remains citizens may no longer accept the Constitution as a valid source of political power.

Further, there are complaints that sometimes 'right to life' jurisprudence has been used for vested interest groups. Then Prime Minister Manmohan Singh has cautioned that PIL can be used as "a tool for obstruction, delay and sometimes even harassment."[167] In 1996, there happened a discussion in the Parliament where it was claimed that PIL was often misused. In 2005, the Court itself identified, "The judiciary has to be extremely careful to see whether, behind the beautiful veil of public interest an ugly private malice, vested interest or publicity-seeking is not lurking."[168]

In addition to the above criticisms, there is no denying fact that criticism of judicial activism arises mainly when it comes to the rights of the second generation. If the judiciary plays a role in first-generation rights, it is considered normal. But if it tends to decide on the implementation of socio-economic rights, there occurs hundreds of criticisms. So if a person is illegally arrested, the judiciary could issue habeas corpus to make him free. If a person's property is taken illegally, the court may order that the act be prohibited. However, it is unclear whether a court could require everyone to have access to clean water or fresh air, or whether a court could order everyone to have access to shelter. When the Indian judiciary attempted to do so, some contradictions arose.

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[166] Mehta, Pratap Bhanu. "The inner conflict of constitutionalism: Judicial review and the basic structure." *India's living constitution: Ideas, practices, controversies (2002)*.198.

[167] Manmohan Singh, Prime Minister of India, Speech at the Conference of Chief Ministers & Chief Justices of High Courts: Has the Pendulum Swung to the Other Extreme? (Mar. 11, 2006), available at http://www.outlookindia.com/full.asp?fodname=20060311&fname=manmohan&sid=1& pn=1

[168] Supreme Court cautions against use of PIL, indlaw.com, Dec. 22, 2004, available at http://indlaw.com/ 769197157EDB544BB0639CB6077F572A.

It should not be forgotten the political situation where the doctrine of 'right to life' has been applied. The judiciary had to work in that situation. According to Sathe, the attempt of the judiciary was inevitable, especially after the articulation of the 'Basic Structure' doctrine in the *Keshavananda*[169] case. Sathe proceeded by saying once it started, "the Court could not stop."[170] Though Sathe hypothetically observed some co-related issues, that have certain justification. Sathe has tried to find out the core reason for the judicial activism of India. He has conceded that the emergency experience might have inspired for being activist judges. The judiciary might have understood that for getting space amid the political turmoil and to keep neutrality of its own, there need to have support from the people.[171] Early judicial activism, according to Baxi, was a moment of "catharsis." Therefore an attempt to repair the court's image provided the judiciary a "new historical base of legitimacy."[172] Taking into consideration all these factors it is not difficult to find out the wide extensive use of the 'right to life' connotation and its justification.

Nevertheless, the criticism of the activities of the Indian judiciary makes one think deeply. How effective the decision that the judiciary makes will actually be beyond the power of the judiciary. There is no other way but to play the role of other institutions of the state. But the judiciary can certainly play a role in building discourse. Other organizations can work on that discourse. The Indian judiciary has built discourse. That discourse is a combination of the widespread use of the 'Right to Life', FRs, and the DPSP. But the limitations of this discourse are also discussed above. In this context, the acceptance of this thesis has been created. This is because it has been observed that the Indian judiciary while playing a major role in socio-economic rights, has not been able to create much precision in the uniqueness of these rights. That is the purpose of this thesis. This is discussed in detail in the sixth chapter.

[169] Supra No. 163.
[170] Supra No. 10, pp: 13, 99.
[171] Ibid. pp: 6, 12
[172] Ibid. p-107. The Baxi quote is from the essay, Baxi, Upendra. "Taking suffering seriously: Social action litigation in the Supreme Court of India." *Third World Legal Stud.* (1985): 107. 289–94. Although Sathe asserts that "we have no evidence" for such a claim, he nonetheless states that India's apex judiciary had "to overcome the negative image it had acquired because of its decision in the…FRs case." See Sathe, Satyaranjan Purushottam. Judicial activism in India. Oxford University Press, USA, 2002. 107, 100.

3.9 Concluding Remarks

The Indian SC's substantial involvement in social and economic rights over the last four decades has set universal teachings for socioeconomic rights implementation. Despite the fact that socio-economic rights are not listed as 'enforceable' FRs in the Indian Constitution, the Indian SC has made a significant contribution to enforcing social, and economic rights. The wide number of judicial decisions consisting of creativity and pragmatism have shown the unparalleled judicial necessity to protect the rights of marginalized people and established the 'non-enforceable' socio-economic rights into strong constitutional protections. It is a notable achievement set by the Indian Judiciary in South Asian Constitutional history.

The interpretivist approach is inevitable in exercising the reasons for human affairs.[173] Because the substantive values of human rights have to be assembled from the constitutional texts, without following an interpretivist approach these cannot be discovered. The Indian judiciary has done an excellent job in this regard by interpreting constitutional texts moving away from the positivist approach. Not only that, the judicial enforcement of social and economic rights has addressed the shortcomings of India's mainstream political system, which fails to adequately represent the downtrodden people.

There are the special spectra where the South Asian Judicial approach has set a difference from the 'global north'. The Indian judiciary, which is part of the South Asian Judicial Activism, has largely given birth to a discourse in which the judiciary plays a role in implementing socio-economic rights by representing marginalized peoples - while Global North considers it to be overly dependent on the judicial review.[174] This subject matter has been discussed in the sixth chapter of this thesis.

In a nutshell, the overview of the judicial activism of the Indian Judiciary is - the liberal and creative interpretation of FRs and DPSP, bringing the innovative idea in procedural aspects, i.e.- PIL, SAL to widen the opportunity in access to the courts, introducing a newer form of the substantive idea of justice- 'right to life' connotation, transforming of judicial role into quasi-legislative or quasi-executive. Such an innovation in the overall functioning of the Indian judiciary has been able to make a splash in

[173] See Sunstein, Cass. *The Partial Constitution*. Cambridge University Press, 1995, pp: 103-104.
[174] Michelman, Frank I. "Socioeconomic rights in constitutional law: explaining America away." *International journal of constitutional law* 6, no. 3-4 (2008): 686. Michelman while explaining the possible reasons for non-exclusion of social and economic rights in the America's Constitution argues that perhaps it would make the realisation of socio-economic rights overly dependent upon judicial review.

South Asian judicial activism. Through this, the leading position of the Indian judiciary has also become obvious. In the next discussion, it has been evident how much judicial initiatives of India have influenced other countries of South Asia like Pakistan and Bangladesh. The succeeding two chapters have dealt with that discussion.

Chapter- 4

Enforcement of Social and Economic Rights:

Pakistan Perspective

4.1 Introduction

Enforcement of social and economic rights is largely based on a particular socio-economic context and the constitutional and statutory arrangement of each country. Within South Asian countries, too, the same can be observed. Although many judiciaries have been increasingly familiar with the judgments of the Indian Supreme Court, they try to adjudicate social and economic rights in their own fashion. In this chapter, the work intends to examine the influence of the Indian decisions on Pakistan Judiciary in social and economic rights issues as well as the particularities of Pakistan constitutionalism. As the constitutionalization of social and economic rights of Pakistan has been discussed in the first chapter, here, the main focus will be on the enforcement discourses of the social and economic rights as performed by the Pakistan Judiciary.

The constitution of Pakistan is an outcome of the struggle of post-colonial states in the second half of the twentieth century.[1] The fundamental commitment of the Constitution was to establish the democratic system and to maintain the 'norms of equality and nondiscrimination.'[2] In the Constitution of Pakistan, the protection of social and economic rights has been recognized as 'Principles of Policy' (PP) Although considered as 'judicially non-justiciable'[3] the judiciary of Pakistan has been increasingly invoked to give the meaning to these principles in their relation with the fundamental rights- in particular the 'right to life.' But the way the Judiciary has so far progressed was by no means straightforward.

Since its birth in 1947, the Pakistan State has gone through various complications. Military rule has come in stages. The bloody departure of one ruler has led to the rise of another. Needless to say, this

[1] Byrne, Iain, and Sara Hossain. "South Asia: Economic and Social Rights Case Law of Bangladesh, Nepal, Pakistan and Sri Lanka." *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008): 125.
[2] Ibid.
[3] Art. 30(2) of the Constitution of Pakistan.

political backlash impacted the different organs of the state. Military laws have abrogated the existing constitution on several occasions. The suspended constitution, later on, has been restored, and sometimes the Martial Law has been challenged by the Superior Courts. All these activities have brought forth significant effects on the constitutional development of Pakistan.[4]

Democratic norms, principles, and procedures are one of the main conditions for the overall development of a country. In other words, if civil-political rights are fully implemented, socio-economic rights will also gradually become a reality. But repeated military rules in Pakistan have squeezed the civil-political rights, socio-economic rights have also become affected.[5] A mere guarantee of human rights in the constitution cannot ensure its implementation. The policymakers including the judiciary have to play role in the adjudication of the rights. The verdicts in favor of enforcing civil-political or socioeconomic rights and their continuous protection by the judiciary are one of the main safeguards. Unfortunately, the judiciary of Pakistan has barely been used in consonance with that objectives rather used mostly as a tool for implementing political agenda.[6]

Hence, it can be said that undemocratic regimes retarded the development of judicial activism in Pakistan.[7] By legitimizing various extra-constitutional regimes for a good number of the period instead of cognizing constitutionalism by the Judiciary the situation had worsened much more.[8] However, after the withdrawal of the third martial law in 1985 the Pakistan Judiciary started to proclaim its authority against the 'all-powerful' executive.

These differences in constitutional history have also created differences in scenarios facilitating judicial activism in India and Pakistan. In the third chapter, we have seen that the judiciary of India has carried out various 'judicial experiments' to adjudicate socio-economic rights. Through this, India has been

[4] See generally Tomar, Sangeeta. "Human Rights in Pakistan." *India Quarterly* 57, no. 2 (2001): 121-132.
[5] Mian, Ajmal. *A judge speaks out.* Oxford University Press, USA, 2004. Ajmal, in his book, says that judicial judgments on the issue of the doctrine of state necessity acts like a 'musical chair game' which is dangerous for the socio economic development of the country. He has of an opinion by keeping a specific emphasis on the Zafer Ali Shah case that the uncertain and instable position and views of the judges of the Supreme Court of Pakistan, over the ultra vires acts of the military is not good for political stability of country.
[6] Patel, Dorab. *Testament of a Liberal.* Oxford University Press, 2000.
[7] Hoque, Ridwanul. *Judicial activism in Bangladesh: a golden mean approach.* Cambridge Scholars Publishing, 2011.88-89.
[8] See *State v. Dosso* (1958) PLD SC 533, and *Begum Nusrat Bhutto v. Chief of Army Staff* (1977) PLD SC 657. Recently, the decision in *Zafar Ali v. General Pervez Musharraf* (2000) PLD SC 869, it seems to glorify the military regime by accepting the military coup and giving the military ruler an authority to amend the Constitution. Exceptionally, in *Asma Jilani v. Punjab* (1972) PLD SC 139, the Court declared a military regime unconstitutional but only after the dictator left power.

able to elevate itself to a unique height in terms of judicial activism. But the judiciary of Pakistan did not get that many opportunities to play such a role. However, the state of emergency in both countries and the sheer power exercised by the legislature and the executive have induced the judiciaries to take different paths.

The following discussion has three main aspects divided into seven parts. The first aspect is mainly the discussion of the background and development of judicial activism in Pakistan in the journey of enforcing social and economic rights. It includes a comparative discussion with the Indian judicial activism. The second aspect has analyzed the particularity of Pakistan's constitutionalism which differs from other South Asian countries in adjudicating social and economic rights. Finally, this thesis has analyzed the evolving arguments centered around the enforcement discourse.

4.2 Colonial Legacy and Its Effects On Pakistan Constitutionalism

The two nation-states- India and Pakistan, were born in defiance of the British colonial rule and exploitation. As we have seen in the case of the rise of Bangladesh, the two states were not born out of a bloody conflict. However, the beginning of the two states by breaking the shackles of British rule was the result of 200 years of endless, incessant struggle. After the end of the Second World War, the imperialist British government was bound to grant independence to its colonial counterpart. The British government enacted the Independence Act, of 1947 to surrender its sovereign power to Pakistan and India on the 14th and 15th of August respectively.

Colonial courts like India, and Pakistan upheld the spirit of English common law where Parliament was supposed to hold the supreme power over other organs of the state. So in the earlier days, the parliaments of India and Pakistan sustained the unilateral powers to control and alter the verdicts of the judiciaries. Parikh and Damell (2007) state that the situation was the same as in the pre crown era of 1773 under the control of the East India Company or in the Federal Supreme Court of 1935 under the control of the crown, in that period there existed only the supreme authority of the executive, no room for the judiciary.[9]

Though earlier, courts were formed to serve the interests of the executive but post-independence judiciary tried to establish its worth and position to become a bargaining agent. That certainly begot

[9] Parikh, Sunita, and Alfred Darnell. "Interbranch bargaining and judicial review in India." *In Presentation at the Law and Political Economy Colloquium at North-western University Law School],* October, vol. 29. 2007.

the contradiction among the different branches of the government. It was inevitable because the judiciary wanted to protect the authority and legitimacy of its acts.

The concept of 'judicial review' was originated in England, the main argument was to examine the acts of parliament concerning the laws made by the parliament. This concept was up brought in a colonial country like Pakistan. Although there existed a difference- English Courts did not invalidate the acts of Parliament whereas the practice was widespread in the British colonies.[10] The Constitution of Pakistan in 1973 incorporated the writ jurisdiction quite resembled with British Constitution, where the Pakistani judges are allowed for greater interpretive freedom. The Pakistani Constitution deliberately recourse to 'certiorari', 'mandamus', 'quo warranto', and 'habeas corpus' in dealing with the powers of the courts.[11] With the exercise of these powers, the activist judges have enhanced their judicial capacity through linguistic creativity. With the progression of time, they have not only dealt with the question of 'public importance' as well as given directions, and orders to enforce civil-political and socio-economic rights.[12]

4.3 The Influence of the Indian Judiciary

After a long-term British tyranny, Pakistan Constitutionalism has witnessed the rule of a military junta leading towards an undemocratic system of governance. It had been continued till the late nineties. Between 1988 to 1999, the SC of Pakistan has become a 'self-preserving' and 'autonomous' (although the transformation was highly politicized) power agent amid the ruling of a military-backed executive and highly fragile parliament. These happened as the Apex Court has been involved in the political questions by arguing article 58(2)[13] as well as the verdict given in the Judges' case of 1996.[14] However,

[10] Sathe, Satya P. "Judicial Activism: The Indian Experience." *Wash. UJL & Pol'y* 6 (2001): 29, 33.
[11] Article 199 of the Constitution of Pakistan.
[12] Article 184(3) of the Constitution of Pakistan reads: 'Without prejudice to the provisions of Article 199, the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter I of Part II is involved have the power to make an order of the nature mentioned in the said Article.' For a detailed discussion of how the Supreme Court under Iftikhar Muhammad Chaudhry expanded the frontiers of its suo motu jurisdiction, see the ICJ report 'Authority without Accountability: the search for justice in Pakistan'.
[13] Siddique, Osama. "The jurisprudence of dissolutions: Presidential power to dissolve assemblies under the Pakistani constitution and its discontents." *Ariz. J. Int'l & Comp. L.* 23 (2005): 615.
[14] The Court held that the upon the issue of appointing the judges of Supreme Court and High Courts, the opinion of Chief Justice would be given primacy over the President's opinion when any problem raised.

the self-imposing power of the judiciary was in the heist of high political drama and was dependent upon many contingencies of power-shifting dilemmas.

In the post-1990s era, the avenue of judicial involvement has been widened and acquired much sustainability. This judicial movement was known as PIL (Public Interest Litigation) and became an important tool for the judges to exercise juristic implication on FRs as well as different policy matters comprising social and economic rights. In a nutshell, the PIL movement in Pakistan can be characterized by the direct involvement of the Constitutional Courts in different constitutional, legal, political, environmental, social, or economic issues, widening rules of legal standing and procedure, creative and extended interpretation of rights.

These sorts of judicial creativities were influenced by the judicial activism of India. In the mid-1970s, India was encountered judicial populism while acting for the economic and social justice of the marginalized people. The procedural and substantive innovation of the Indian SC centered around the discourses of the right in favor of direct judicial intervention for the "little Indians in large numbers."[15] The innovations included the extended interpretation of 'right to life' discourse, relaxation of the procedural method, the establishment of 'epistolary jurisdiction' to take cognizance of letters, and newspaper reports to address right violations. The judicial adventurism also includes the re-interpretation of directive principles to enforce categorically 'non-enforceable' social and economic rights. The kinds of judicial populism targeted "freedom from indigence, ignorance, and discrimination as well as the right to a healthy environment, to social security and protection from massive financial, commercial and corporate oppression"[16] Upendra Baxi, an Indian scholar, explained the context of the judicial activism of India. He specifically referred to the post-emergency period. In his words, the judicial activism is a comeback as the "post-Emergency euphoria at the return of liberal democracy"[17] Sathe, another legal scholar, referred to the emergency period of Indira Gandhi in 1975-76 as "to increase its political power vis-à-vis other organs of government"[18]

Due to some similarities in the political situation, we see its reflection in the constitutional journey of Pakistan. That's why all the procedural and substantive innovations seen in the PIL and SAL

[15] *S.P. Gupta v. Union of India*, (1982) A.I.R. S.C. 149.
[16] Bhagwati, Prafullachandra Natwarlal. "Social action litigation: The Indian experience." *The Judiciary in Plural Societies* 20 (1987).
[17] Baxi, Upendra. "Taking suffering seriously: Social action litigation in the Supreme Court of India." *Third World Legal Stud.* (1985): 107.
[18] Sathe, Satya P. "Judicial Activism: The Indian Experience." *Wash. UJL & Pol'y* 6 (2001): 29, 6.

movements have a resemblance to the PIL movement in Pakistan. The creative interpretation of articles 184(3) and 199(1) of the Pakistan Constitution has widened the scope of dealing with 'a question of public importance' where the wide interpretation of 'right to life' enshrined in article 9 has been articulated which has a resonance with the interpretation of article 21 of the Indian Constitution. Examples of some of the resemblances are- the incorporation of the phrase "little Indians in large numbers" in the Indian judgment of *S. P. Gupta* case[19] has been borrowed in *Darshan Masih* case[20] like "little Pakistanis in large numbers". The issue of bonded labor, leading to the formation of Bonded Labour Abolition Act 1992 in Pakistan, was greatly influenced by the judgment of the seminal case of India *Bandhua Mukti Morcha.*[21] Along with all these, the 'suo motu' doctrine was articulated and widely used by the Pakistan Judiciary has tended them to become closer to Indian Jurisprudence.[22]

4.4 Gradual Changing of Judicial Approach

As we have already noticed that the approach of the Pakistan Judiciary has gradually been changed. The same thing has happened as regards the issue of enforcing social and economic rights. Alike the Indian Constitution, the Constitution of Pakistan has also adopted the 'non-enforceable' social and economic rights as the PP inserted in chapter two of the Constitution from Articles 29 to 40. However, the chapter on FRs and PP ensures a vast array of rights including social, economic, civil, and political rights. It has been held by the Pakistani Courts that principles and FRs both are associated with each and they have direct relation. That is why combinedly they are enforceable like human rights.[23] And in another case where the Sindh High Court observed, "these principles can always be called in aid for the purpose of interpretation of any legal provision or instrument".[24]

From the 1990s to now, for over two decades, the Pakistan Judiciary has shown its commitment to equality, defined the social and economic rights as enshrined in the Preamble, in the Chapter of FRs, in the PP, or the Objective Resolution.[25] Not only that, the Court has considered many matters by

[19] (1982) A.I.R. S.C. 149.
[20] (1990) PLD S. C. 513
[21] *Bandhua Mukti Morcha V Union of India*, (1982) AIR, SC 802.
[22] Menski, W. R., Alam, & M. Raza. *PIL in Pakistan*. London: Platinum Publishing, 2000.
[23] . *Bandhua Mukti Morcha V Union of India*, (1982) AIR, SC 802; See also *Benazir Bhutto v Federation of Pakistan*, (1988) PLD, SC, 416.
[24] Shahabad Mattoon Case (1993) PLD, Kara 83)
[25] Justice Sabihuddin Ahmed, 'Equality among Unequals: the power of Pakistani courts to enforce fundamental rights' in Kazim Hassan, Nausheen Ahmad, Sanaa Ahmed, Salahuddin Ahmed (eds), Law in a World of Change: selected essays in the memory of Justice Sabihuddin Ahmed (Pakistan Law House 2012) 14, 22. The idea found expression in *Benazir Bhutto v. Federation of Pakistan* (1988) PLD SC 416, wherein the principles of social and

elaborating 'public importance' and given the wide extended meaning of 'right to life'. That shows the judicial creativity intended to find out the deeper meaning of right discourses. The work has discussed some of the cases of this nature in the latter part of this discussion.

In *Shehla Zia v. WAPDA,*[26] the construction of an electricity grid was challenged by some residents residing near there. They challenged the construction of the Water and Power Development Authority because it was being constructed on the designated 'green belt' property which would earn environmental catastrophe. The Court considered the matter under Article 184(3) of the Constitution of Pakistan by identifying the matter as of 'public importance.' It was a very notable case where the Court held that a healthy environment was a part of the fundamental right to life. It is connected with the right to dignity. Both the rights have been described in Articles 9 and 14 of the Pakistan Constitution respectively. The Court has given an extensive interpretation of the right to life discourse including all the amenities of life needed for human existence.

The Court stated-

> "Article 9 of the Constitution provides that no person shall be deprived of life or liberty save in accordance with law. The word 'life' is significant as it covers all facts of human existence. The word life has not been defined in the Constitution, but it does not mean that it can be restricted only to the vegetative or animal life or mere animal existence from conception to death. Life includes all such amenities and facilities, which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally. For the purposes of the present controversy it is suffice to say that a person is entitled to protection of law from being exposed to hazards of

economic justice were referred to as the 'conscience of the Constitution' by then Chief Justice Haleem speaking on behalf of the full court. Justice Ahmed himself was to fully develop these ideas as a judge at the high court as well as the Supreme Court. Among his significant judgments are two regarding the master-slave doctrine, wherein he read down the law to provide remedies for employees of public corporations unfairly dismissed by employers. See *Shahid Mehmood v. KESC* (1997) CLC 1936 and *Muhammad Dawood and others v. Federation of Pakistan* (2007) PLC (CS) 1046. The constitutionalisation of rights and the protection of judicial review as an outcome to the prioritization of human rights post-World War II - to echo the commitment to protect the rights of the vulnerable from the potential tyranny of the majority, Ahmed argues that the construct of legal or formal equality - as opposed to substantive equality - is 'altogether alien to our constitutional ethos' and that the intent of the constitution is to bridge social and economic inequalities.

[26] (1994) PLD SC 693. In this case, the Court accepted the petitioner's argument that it should adopt the precautionary principle set out in the 1992 Rio Declaration on the Environment and Development, the first international instrument that linked environment protection with human rights.

> electromagnetic fields or any other hazards which may be due to installation and construction of any grid station, any factory, power station or such like installations."[27]

The judgment of the Court resembles the decision of an Indian case. In *Francis Coralie Mullin vs The Administrator, Union*[28] case the Indian Court defined the term 'life' as comprising everything necessary for bearing life. The Indian Judiciary has become successful to incorporate everything in the definition of 'life' because it was the culmination of its previous efforts. The Pakistan Court in the same case further held-

> "Under our Constitution, Article 14 provides that the dignity of man, and subject to the law – the privacy of home shall be inviolable. The fundamental right to preserve and protect the dignity of man under Article 14 is unparalleled and could be found only in few Constitutions of the world. The Constitution guarantees dignity of man and also right to life under Article 9 and if both are read together, question will arise whether a person can be said to have dignity of man if his right to life is below bare necessity like without proper food, clothing, shelter, education, health care, clean atmosphere and unpolluted environment."[29]

In *Fazal Jan v. Roshua Din*,[30] the SC of Pakistan ruled that the fundamental constitutional right to equality compelled the state to establish particular provisions for the protection of women and children, and that all state organs had a positive obligation to take active measures to protect their interests.[31] The SC has also taken positive steps to combat gender discrimination, such as establishing a quota system for women's medical school admission.[32]

In *Mrs. Anjum Irfan v. Lahore Development Authority* case[33] the Apex Court has introduced some guidelines to resist environmental pollution to the municipal authority. In another case, the High Court issued some directives to government and non-government organizations to prevent city pollution by compensating vehicles responsible for pollution.[34] In *re Human Rights Case*[35] (Environment Pollution in

[27] Para. 12
[28] (1981) AIR 1 SCC [529 B-F].
[29] Para. 14
[30] (1990) PLD SC 661.
[31] Miscarriage of justice where woman did not have adequate representation in inheritance case.
[32] *Shirin Munir v. Government of Punjab* (1990) PLD SC 295.
[33] (2002) PLD Lah 555
[34] In re: *Pollution of Environment Caused by Smoke Emitting Vehicles* (1996) SC MR 543.
[35] (1994) PLD Supreme Court 102.

Balochistan), the Court by notifying a newspaper report prohibited the 'dumping of industrial and nuclear waste in a coastal area though the land had been allocated for that purpose.

In *Manzoor Bhatti v. Executive Officer*, Cantonment Board Multan, and another case, the Court objectified the 'recreational facilities' as one of the FRs and ordered the local authority to preserve the children's park.[36] In another case, the Court detained a multi-national authority from building a factory as that would affect the environment and educational institutions.[37]

As regards health issues, the Pakistan SC upheld the right to clean water as an integral part of public health and held that- the right to life encompassed the right of every person to have clean, unpolluted, and drinkable water.[38] Other health rights cases addressed by the Judiciary include the mislabeling of food;[39] halting the sale of infected betel nuts;[40] ordering the relocation of a hazardous leather hide market;[41] and, providing bar on cigarette advertisements telecast on radio and TV on the ground of encouraging smoking, especially among the young.[42] In another case *Shaukat Ali v. Govt. of Pakistan*, where the Apex Court opined that the laws of Pakistan and Islam guaranteed the right to livelihood.[43]

As regards education, the Judiciary of Pakistan has provided a number of important judgments. Those judgments were so influential that at one stage the legislative body of Pakistan had to amend the Constitution and recognize education as a fundamental right. That was an elevation from PP to FRs. The detailed discussion is in the sixth chapter. However, in the cases relating to the right to education, the Pakistan Judiciary has applied the provisions of FRs in determining the issue. In one case, the Court struck down a government policy that allowed a migration process from one medical college to another. The argument Court put forth was that the migration process violated the right to education by making some colleges overcrowded.[44] In another case, the Court upheld the rule of reservation

[36] (2002) PLD Lahore 412.
[37] (2005) CLC 424.
[38] *General Secretary West Pakistan Salt Miners Labour Union, Khewra, Jhelum v. the Director Industries and Mineral Development,* (1994) Punjab Lahore SC MR 2061.
[39] *Karachi Metropolitan Corporation v. Qarshi Industries Ltd* (2002) Sup Ct 439 – includes the requirements for proving the violation.
[40] *Adeel-ur-Rahman & Others v. The Federation of Pakistan and Others* (2005) PTD 172 (State is under a duty to protect a person's right to life from those elements which may harm him including impure food items).
[41] *Anjuman Tajran Charam v. The Commissioner Faislabad Division, Faislabad* (1997) CLC 1281 (in order to enforce fundamental rights courts can require public functionaries to do something which they are not normally required to do under any other specific law).
[42] *Pakistan Chest Foundation & Others v. The Govt. of Pakistan (*1997) CLC 1379.
[43] (1997) PLD Supreme Court 342.
[44] *Aneel Kumar v. University of Karachi* (1997) PLD SC 377.

seats in educational institutions. The Court so decided because of the reason that the reservation seat would be helpful for the persons who came from backward areas.[45] In another case, the Court despite the hardship for the students allowed alike deal with a school in comparison to other evicted tenants.[46] In the *Shah Alam Khan* case, the Court adjudicated the right to education for a student who was allowed to continue his studies.[47]

In this and other cases including those falling under the traditional civil liberties category, the Court gave an extended meaning to the constitutional right to life and human dignity.[48] Also in some notable cases by applying suo motu interventions, the Judiciary actively responded in the public interest to protect the life, liberty, honor, and property of the citizen. This type of careful activism resulted in significant prison reforms, reduction of stove-burn deaths of women, extraordinary protection for victims of rape, and stopping the inhumane practice of publicly executing death convicts.[49]

Development of this sort of jurisprudential basis was not an easy task to do, the Pakistani Jurists creatively applied the 'Islamic notions' of social justice and equality in arriving at better justice. Not only that, they claimed that the earlier belief of non-compliance of Islamic Guidelines with secular rights turned futile as the harmonization of Islamic ideals with secular constitutional provisions had 'enlarged' the scope of human rights.[50]

The constitutional journey of the Pakistan Judiciary has created some differences from the Indian Judiciary albeit having a profound effect of Indian judgments. But the judges of Pakistan have attempted to find their way of interpreting the judicially non-enforceable social and economic rights. That is why they have to take shelter from the Islamic notion of social justice to adjudicate the PP. Here lies the particularity of the Pakistan Judiciary. The specificity did not end here. The constitutional

[45] *Abdul Baqi v. Muhammad Akram* (2003) PLD SC 163; *Mstt Attiya Bibi v. Federation of Pakistan* (2001) SCMR 1161 and *Shireen Raza v. Federation of Pakistan* (2002) SC MR 1218.
[46] *Province of Punjab v. Muhammad Tufail* (1985) PLD SC 360.
[47] *Shah Alam Khan v. Vice-Chancellor, Agriculture University* (1993) PLD Supreme Court 297.
[48] See *Salt Miners' Labour Union v. Industries and Mineral Development* (1994) SCMR 2061, 2017 (right to life embraces a right to have 'unpolluted water'); *Sajida Bibi v. In-Charge, Chouki No. 2, Police Station Sadar, Sahiwal* (1997) PLD Lah 666. (bashing police excess that set apart a woman from her husband, the court held that 'life' included a happy marital life.)
[49] Respectively, Re Juvenile Jail, Landhi, Karachi 1990 PCr LJ 1231; *State v. Senior Superintendent of Police, Lahore* (1991) PLD Lah 224; *Re Human Rights Case (1993) SCMR 200;* Re *Suo Motu Constitutional Petition (*1994) SCMR 1028.
[50] Lau, Martin. *Islam and Judicial Activism: Public interest litigation and environmental protection in Pakistan.* (1996): p- 295.

arrangement of Pakistan has tended to view the settlement of social and economic rights more on the executive body than that of the judiciary. The formation of Majlis-e-Shoora has been established for that purpose.

4.5 Idea of Forming Majlis-e-Shoora: Incorporated A New Dimension

The judicial attempt of Pakistan has been seen, so far, to enforce the 'non-enforceable' principles concerning the social and economic rights. All the constitutions of South Asian countries have the same tendencies to incorporate social and economic rights giving non-enforceable assertion. In this particular perspective, judiciaries of these countries have played a role by ascertaining much more rationality and relevance to adjudicate social and economic rights. By doing so, the judiciary has also unleashed and strengthened its role in various policy-making matters. Pakistan's judiciary is no exception in this regard. But on a certain point, Pakistan has done an exceptional job, which other countries in South Asia have not. That is, although they have called the Principle of Policy 'Judicially non-enforceable, they have not been silent on its implementation, rather placed the responsibility of its overall execution on the Parliament. Apparently, they have shown the seriousness of implementing the principles but on the other hand, the role of the Judiciary has become shrunk to some extent.

In 2010, the legislative body of Pakistan has imposed a constitutional provision for the implementation of principles. It has so incorporated that the responsible authority may be bound by additional accountability. Article 29 (3) of the Pakistan Constitution has been re-decorated. The Constitution has emphasized that the President and Governor of the Federation and Province respectively submit reports about the observation and implementation of PP every year. The President's report has to be submitted before the House of Majlis-e-Shoora (Parliament) whereas the Governor to the Provincial Assembly.[51] But how far the purpose of imposing this new constitutional provision is fulfilled is a matter of concern. Because without incorporating this additional imposition, the provision was operative since 1973. But only 12 annual reports have been held by the concerning authority before the

[51] The Term "Each House of Majlis-i-Shoora i.e. Parliament" replaced the words the National Assembly in Article 29, Clause 3 by Section 11 of the Constitution (Eighteenth Amendment) Act, 2010. Article 29(3) of the Pakistan Constitution- "In respect of each year, the President in relation to the affairs of the Federation, and the Governor of each Province in relation to the affairs of his Province, shall cause to be prepared and laid before 2[each House of Majlis-e-Shoora (Parliament)] or, as the case may be, the Provincial Assembly, a report on the observance and implementation of the PP, and provision shall be made in the rules of procedure of the National Assembly [and the Senate] or, as the case may be, the Provincial Assembly, for discussion on such report."

Parliament so far.[52] This is a concerning issue indeed. The non-seriousness or non-compliance with the constitution provision also indicates one dejecting feature of Pakistan. That is, none of the government, whether military-backed or elected, has paid proper concentration over the fulfillment of the principles, in other words, the implementation of social and economic rights did not become a matter of importance. But it is such an important constitutional approach rarely found in any other South Asian country. Regular discussion and debates on the implementation and actual features of PP, could have earned an encouragement for better policy-making.[53] . In that way, social and economic rights could have been situated on a firm footing.

Now, the rest of the discussion would follow the different controversies, debates, and impacts centering around the judicial activism of Pakistan, especially for the enforcement of social and economic rights. The most significant aspect of this discussion is the birth of the Chaudhry court led by the then Chief Justice of Pakistan Iftikhar Muhammad Chaudhry. The Court of that time was named by his identity.

4.6 Birth of Chaudhry Court: Judicial Controversy at its Top

There were many reasons for enabling a 'failure' constitutionalism in Pakistan. None of the governments could settle down the irreconcilable relationship between state and religion. Along with the nexus between civil and military bureaucracy and the colonial factor of elitism has created disparity as well as political polarization and a lack of legitimacy of the Constitution.[54] Within this context, the Judiciary of Pakistan has to play with it. Since there has always been tension over power-sharing among the vested groups and there remains political instability most of the time, the Judiciary has to be engaged mostly with the civil and political questions. That is why it is found a comparatively lesser judicial activism in respect of social and economic rights.

In Pakistan, the judiciary climbed into the upper hand in the last decade. At that time the application of PIL and suo motu attempt was used as two important weapons by the Judiciary. The Judiciary intervened in almost every matter- from social, and economic to civil, political rights, and other constitutional issues. As regards PIL, initially, the object declared by the Court was to widen the scope

[52] Sattar, Adnan Abdul, Rafia Rauf & Sana Masood. *Social & Economic Rights: From Rhetoric to Reality*. A Brief for Parliamentarians and Opinion-makers, December 2010.
[53] Ibid.
[54] . Maluka, Zulfikar Khalid, and Zulfiqar Khalid. *The Myth of Constitutionalism in Pakistan.* Oxford University Press, USA, 1995.

of the litigation process, especially for the poor and down-trodden people. Along with them, those who were generally unable to pursue their claims to the State for various reasons would get priority by way of PIL.[55] The intention was visible in many PIL-related cases which were intended for "alleviating the sufferings of the masses."[56] In fact, the attempt was to liberalize the litigation process to bring marginalized sections of people to make act with it.[57] Other than that the Judiciary of Pakistan has worked immensely on civil and political rights.

As previously discussed, for a considerable number of times Pakistan has been struggling for restoring democratic institutions. In Pakistan, the military is a very powerful institution, a deciding factor for the political parties. Several military coups were held there and even the elected Prime Minister had to go to jail. In that context, Iftikhar Muhammad Chaudhry became the Chief Justice of Pakistan. During his tenure from 2005-to 2013, the SC of Pakistan has intervened in many political questions by suo motu attempt or by otherwise.[58] The effect of such an attempt was immense. At that time the Judiciary climbed to its peak in respect of setting an influential position in the political context of Pakistan. Most of the cases were very much sensitized by the media. There was also a discussion that the judicial attempt was for the lust of popularity.[59]

Between 2005 and 2013, the Chaudhry Court heard a total of 113 similar cases.[60] These instances involved charges of police and revenue bureaucracy harassment;[61] police reluctance to register and investigate rape, murder, and other criminal offenses;[62] torture in police custody and extrajudicial

[55] *Darshan Masih,* (1990) 42 PLD (SC) at 514–16; *Benazir Bhutto*, (1988) 40 PLD (SC) at 446–47.
[56] Shah, Nasim Hasan. "PIL as a means of social justice." *PLD Journal* (1993): 31-34.
[57] Munir, Muhammad Amir. "PIL in Supreme Court of Pakistan." *Available at SSRN 1984583* (2007). 12–13.
[58] See Qureshi, Taiyyaba Ahmed. "State of Emergency: General Pervez Musharraf's Executive Assault on Judicial Independence in Pakistan." *NCJ Int'l L. & Com. Reg.* 35 (2009): 518–28. (discussing several political cases heard by the Supreme Court of Pakistan); see also Khan, Maryam S. "Genesis and evolution of PIL in the supreme court of Pakistan: toward a dynamic theory of judicialization." *Temp. Int'l & Comp. LJ* 28 (2014): 285. (the discussion was about Chaudhry's reinstatement to the Supreme Court of Pakistan in 2009 and the resulting increase in the court's consideration of questions of a political nature.)
[59] Munir, Kishwar, and Prof Dr Iram Khalid. "Judicial Activism in Pakistan: A Case Study of Supreme Court Judgments 2008-13." *South Asian Studies* 33, no. 2 (2020). 321 – 334.
[60] See Qazi, Asher A. "Suo Motu: Choosing Not to Legislate." *Politics and Jurisprudence of the Chaudhry Court*, por Moeen H. Cheema e Ijaz S. Gilani. Islamabad: Oxford University Press (2015).
[61] *Human Rights Case No. 5466-P of 2010*, Supreme Court of Pakistan.
[62] *Suo Motu Case No. 66 of 2009*, Supreme Court of Pakistan; *Human Rights Case Nos. 44 of 2008 & 14 of 2009,* Supreme Court of Pakistan, *Human Rights Case No. 4095 of 2006*, Supreme Court of Pakistan, *Human Rights Case No. 4860 of 2006,* Supreme Court of Pakistan, *Human Rights Case No. 5443 of 2006,* Supreme Court of Pakistan, *Suo Motu Case No. 12 of 2005* and *Constitution Petition No. 22 of 2005,* Supreme Court of Pakistan.

killings;[63] and the treatment of inmates in jails.[64] Discriminatory customary practices, honor crimes against women, and domestic abuse were also mentioned in several of these human rights cases.[65] Other instances involved pension discrimination, land eviction, and other issues[66] or compensation for death or personal injury caused by the negligence of government departments and agencies.[67]

The SC has exercised unprecedented powers by taking individual claims and human rights breaches immediately within its original jurisdiction. Even more remarkable was the Human Rights Cell's performance, which brought in over 200,000 applications between 2009 and 2013.[68] More than 180,000 such petitions were disposed of by the Human Rights Cell on its initiative through administrative orders and directions. Even though the apex court or the Human Rights Cell has taken up a large number of abuse of power cases, it is unclear whether they have succeeded in building a resistant culture against the abuse of power by the civil administrator, particularly the police and revenue bureaucracies, and its nexus with local politicians and those with power within rural social hierarchies. Rather some claimed the initiatives of the Judiciary as the 'judicialization of politics.' Nonetheless, it can be said that the Court's efforts to regulate the administrative apparatuses revealed the illegalities, including the unusual power of the elected governments. In addition, the Court's human rights jurisdiction exposed the absence of any other redress mechanism, whether as administrative tribunals or as an effective ombudsman system where people would find their juristic shelter.

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[63] See, e.g., *Human Rights Case No. I 109-P/2009,* Supreme Court of Pakistan.
[64] See, e.g., *Suo Motu Case No. I of 2006,* Supreme Court of Pakistan.
[65] 90 See, e.g., *Human Rights Case No. 5466-P of 2010,* Supreme Court of Pakistan, *Human Rights Case No. 57 of 2009,* Supreme Court of Pakistan, *Human Rights Case No. 4181-N of 2009,* Supreme Court of Pakistan, *Human Rights Case No. 12912-P of 2009,* Supreme Court of Pakistan, *Suo Motu Case No.1 of 2009,* Supreme Court of Pakistan; *Criminal M.A. No. 396 of 2005,* Supreme Court of Pakistan, *Constitution Petition No. 16 of 2004,* Supreme Court of Pakistan.
[66] See, e.g., *Human Rights Case No. 29 of 2009,* Supreme Court of Pakistan, http://www.supremecourt.gov.pk/HR.Cases/4rth%20final/29of2009.pdf; Human Rights Case No. 11108-P of 2009, Supreme Court of Pakistan, http://www.supremecourt.gov.pk/HR-Cases/Sth%20 final/1 I 108-Pof20 09.pdf.
[67] See, e.g., *Human Rights Case No. 2041-P of 2009,* Supreme Court of Pakistan, http://www.supremecourt.gov.pk/HRCases/1Oth%20final/2041-Pof2009.pdf; Human Rights Case No. 2435 of 2006, Supreme Court of Pakistan, http://www.supremecourt.gov.pk/HR.Cases/2nd%20finall 2435of2006.pdf; Human Rights Case No. 4805 of 2006, Supreme Court of Pakistan, http://www.supremecourt.gov.pk/HRCases/2nd%20final/4805of2006.pdf; Human Rights Case No. 8207 of 2006, Supreme Court of Pakistan, http://www.supremecourt.gov.pk/iIRCases/ 2nd%20finall 8207of2006.pdf.
[68] Siddiqi, Faisal. "PIL: Predictable Continuity and Radical Departures." *The politics and jurisprudence of the Chaudhry Court* 2013 (2005). 77, 84.

4.7Judicialization of Politics: Legality of Overt Activism?

The worldwide trend of judicialization of politics has been an apparent depiction in Pakistani Constitutionalism. Judicial participation in the overall political scenario through interpretation has trickled down in Pakistan over the years. It has been a common saying that immature democracy and vested political interests push the judiciary into a shabby condition. Judiciary as the least dangerous organ tends to collaborate with executives and legislatures for restoration of power. The same thing happened in Pakistan for a long time. The Judiciary of Pakistan has been used as a platform for rendering legitimacy for all kinds of overt activism by other branches of the government.

Naturally, there are two opinions regarding the judicial attempt in Pakistan. Those who support PIL or suo motu, indicate the shabby political situation, fragile democratic institutions which are too incapable to provide social-economic demands of the people. They opined that the traditional legal system of Pakistan is quite unable to lessen the disparity between the have and have nots. In that perspective, the Judiciary of Pakistan can make some role to improve the condition. PIL or suo motu in respect of socio-economic rights adjudication can accelerate people's aspirations. Because all other institutions of government have suffered from the public trust.[69]

On the other hand, there is a view opposing the above stated. The opposition mainly comes from the viewpoint of the 'separation of power' doctrine. Generally, some issues should not be interfered with by the judiciary. But in Pakistan, especially from the tenure of Iftikhar Muhammad Chaudhry the judiciary of Pakistan has entertained some political questions which had not been practiced earlier. That attempt has been criticized as an over activism on the part of the Pakistan Judiciary. The allegation of disturbing the balance of power has been raised. Therefore, it should be the ideal practice for the judiciary to be self-restraint and not interfere with the governmental policies which are supposed to be handled by other organs of government.[70]

Ran Hirschl, one of the leading theorists of recent times, shows concerns about the effectiveness of judicial participation in the right discourse. The way the Judiciary of Pakistan has moved forward, Hirschl does have a critical eye on that issue. His analyses introduce a class-based approach which has

[69] Munir, Kishwar, and Prof Dr Iram Khalid. "Judicial Activism in Pakistan: A Case Study of Supreme Court Judgments 2008-13." *South Asian Studies* 33, no. 2 (2020). 321 – 334.
[70] Ibid.

important aspects to be concerned with.[71] The way Pakistan Judiciary has applied PIL or suo motu in different matters including adjudication of social and economic rights, according to Hirschl, that have the 'alignment of interests among the different branches of the government. Sometimes the powerful agent of the State uses even the Judiciary to fulfill its purpose. And sometimes the Judiciary may itself become the powerful agent to meet its unaccomplished desire. Thus, Hirschl's saying not only reflects the danger of unelected courts making domination over political bodies but the scope of the judiciary to be shifted as an autocratic body. Hirschl termed it as 'juristocracy.'

The understanding of Hirschl's theoretical proposition may help understand the judicialization process of Pakistan. It is an undeniable fact that the Judiciary of Pakistan has played a significant role in social and economic issues like the right to life and the environment. Nonetheless, the Pakistan judiciary has created differences from that of the Indian judiciary mainly in the field of politicization of judiciary as well as judicialization of politics. As the politicization of judiciary is the not the matter of discussion in this thesis, the focus is mainly on the judicialization of politics. It has been observed in the feature of judicial activism in Pakistan that it has been used as an instrument for asserting the power of the elites, either by the military or by the elected government. That is why judicialization of politics has occurred repeatedly in Pakistan. And the activism shown by the Judiciary in social and economic perspectives can be identified as an 'alignment of interest' among the influential agents of power. That is why, in every period of transition of political power, it has been seen the Court invigorates some attempts in different issues with the conservative judicial approach which influences the policy-making body not to proceed too long.[72]

Due to the lack of public engagement in government acts, judges always have to collaborate with executives and governments in power to avoid socio-political anarchy. Immature democracy and vested political interests force every political dispute into the realm of the higher courts. Pakistan is not the exception in this regard. But in doing so, political issues have gained much more prominence than discussions on socio-economic rights. Yet the Pakistani judiciary has played a role in the implementation of some socio-economic rights through PIL and Suo Motu initiatives. In this particular

[71] See generally Hirschl, Ran. *Towards juristocracy: the origins and consequences of the new constitutionalism.* Harvard University Press, 2009.
[72] Cheema, Moeen H. "Two steps forward one step back: The non-linear expansion of judicial power in Pakistan." *International journal of constitutional law* 16, no. 2 (2018): 503-526.

field, the roles of the judiciary as regards the right to education and some of the environmental issues are worth mentioning.

4.8 Concluding Remarks

Pakistan is the hereditary of an inescapable bureaucratic tradition from its colonial administrators.[73] The Judiciary of Pakistan has to take a role within that grimy culture of omnipotent rule. It is not at all an easy job to do. Along with it, the massive backlog of cases, severe corruption in different sectors, bureaucratic influence over the judiciary and so on all are the prevalent concern for the well-functioning of the Judiciary.[74] This gray situation significantly prevents the enforcement of basic human rights including social and economic rights, although guaranteed by the Constitution. Different provisions of the Pakistan Constitution clearly protect marginalized people from inequality and social injustice.[75] The Judiciary of Pakistan albeit having the stigma of using the tool of vested interest groups is trying to do something for the group of aggrieved people by acknowledging the aspirations of the Constitution. After restoring comparatively political stability in the 1980s, the Judiciary has attempted to input some procedural creativity to address the needs of the marginalized people. The widened ambit of locus standi, massive use of PIL, and suo motu adjudication are the initiatives that the Judiciary has attempted so far.

The journey was significantly influenced by the judicial activism of India. Judicial participation in people's cause and for that purpose using of phrases-references have been borrowed from Indian case laws. As discussed above, the *Darshan Masih* case or the influence of an Indian judgment in *Bandhua Mukti Morcha* in the making of Bonded Labour Abolition Act 1992 in Pakistan or using of 'right to life' discourse in adjudicating rights or elevating right to education from PP to FR are some of the examples of judicial activism of Pakistan influenced by Indian Judiciary. That was absolutely necessary for making some spaces for the judiciary of Pakistan amid the all-powerful executive. Despite all the initiatives of the Judiciary, the policymakers always intend here to rest most of the power to the legislative and executive bodies, unlike in India. That is why the establishment of Majlis-e-Shoora can be seen where the execution of PP mainly depends upon the executive body. Forming this institution certainly shrinks the wide-spreading function of the Judiciary. But the Judiciary of Pakistan always tries to unfold the

[73] See Tomar, Sangeeta. "Human Rights in Pakistan." *India Quarterly* 57, no. 2 (2001): 121.
[74] Abbas, Muhammad Sher. "The Dynamics of PIL (PIL) in the Perspective of Adversarial Legal System of Pakistan." *Available at SSRN 3760303* (2021). 3.
[75] Art. 2-A of the Constitution of the Islamic Republic of Pakistan,1973.

cycle and makes a separate place to function. That attempt brings forth the birth of the Chaudhry Court although that court has mainly focused on CP rights.

As one of the South Asian countries, the constitutional position of Pakistan is always significant to observe the overall constitutional development of South Asia. In Pakistan, the two-state organs other than the Judiciary have already created "a vacuum of distrust among the vulnerable sections on account of their failure to evolve socio-economic justice through effective enforcement of FRs and PP as enunciated by the Constitution."[76] So, it is the turn of the SC of Pakistan, being the only alternative, to exercise its role in executing these rights and restore the lost faith of the marginalized people to the extent permitted by the Constitution.

[76] Abbas, Muhammad Sher. "The Dynamics of PIL (PIL) in the Perspective of Adversarial Legal System of Pakistan." *Available at SSRN 3760303* (2021). p- 32.

Chapter- 5

Enforcement of Social and Economic Rights

Bangladesh Perspective

5.1 Introduction

The independence of Bangladesh was achieved in the great liberation war of 1971. The greatest achievement of the Bengali nation was to attain freedom at the cost of three million martyrs and the untold miseries of two lakh mothers and sisters in the bloody struggle of nine months. This great sacrifice is a shining, unique example in the history of the worldwide freedom struggle. The people of this country took part in the liberation war with the dream of emancipation from all kinds of exploitation, deprivation, humiliation, and occupational rule. In an independent country, this aspiration for liberation has repeatedly served as an inexhaustible source of inspiration. The dream of establishing a non-exploitative, non-communal, democratic Bangladesh worked behind the lives of countless people. The 1972 constitution also reflected this expectation in a certain way.

The Constitution of Bangladesh ingrains the purpose of establishing 'social justice' as its State's goal. It has clearly defined the constitutional supremacy that prevailed over all laws. It has articulated a series of rights ranging from civil-political to social, economic, and cultural spectrum, although the latter portion of rights was not given judicial enforceability and recognized as 'Fundamental principles of State Policy' (FPSP).[1] Despite withdrawing the judicial enforceability, the state-policy principles provide normativity of every state law and the way of their interpretation. Thus along with Fundamental Rights (FRs), the principles establish 'a reservoir of legal resources' using which the Court and other institutions of governance can bring social change.[2] This constitutional framework gets a resemblance mostly with that of India and with Pakistan to some extent. Different features of the constitutional design of India and Pakistan have already been discussed in the fourth and fifth chapters respectively.

[1] Article 8 of the Bangladesh Constitution.

[2] Hossain, Kamal. "Interaction of Fundamental Principles of state policy and Fundamental Rights." *Public Interest Litigation in South Asia, Rights in Search of Remedies.* Dhaka: University Press Limited (1997). 43.

Chapter II of the Bangladesh Constitution does not comprise only the social and economic rights rather includes some policy issues as well- for example, the Promotion of Local Government institutions[3], Participation of women in national life[4], separation of the judiciary from the executive[5], Promotion of international peace, security and solidarity[6] , etc. These policy issues cannot possibly be dealt with solely by the judiciary. The legislative and executive bodies have to be much more concerned. Apart from these policy issues, some provisions refer to various social and economic rights, where the judiciary can make some role without bothering the legislative or executive body. But the judgments of some Bangladeshi cases, where the 'non-enforceability' clause of Article 8 has been discussed, attempted to approach a wholesale basis not only towards social and economic rights but also to other policy issues. Their arguments for non-execution of social and economic rights had been delimited only by economic constraints, lack of technical knowledge, etc.[7] which hardly suit many policy issues. Suppose, to ensure international peace, security and solidarity worldwide, financial allocation or technical knowledge will be the least priority other than upholding a decent foreign policy. But the Court has addressed the fundamental principles and policy issues on the same footing, which sometimes creates a problem. The same thing can be addressed as per adjudication of social and economic rights. Because the logic of lack of resources for non-execution of these rights sometimes appears as a mere excuse, when it is seen that a violation of social and economic rights is not the problem of resources, but of governance.[8]

The following discussion has three main aspects divided into seven different parts. The first aspect is mainly the discussion of the background and development of judicial activism in Bangladesh in the journey of enforcing social and economic rights. The second one has analyzed the comparative feature of judicial attribution towards enforcement of social and economic rights with other two South Asian countries- India and Pakistan. Then this thesis captures the evolving arguments and counter-arguments centered around the enforcement discourse. And making that discussion, the author has put his view in that matters. It has proceeded like thesis-anti thesis and synthesis method. Initially, the

[3] Article 9 of the Bangladesh Constitution.
[4] Article 10 of the Bangladesh Constitution.
[5] Article 22 of the Bangladesh Constitution.
[6] Article 25 of the Bangladesh Constitution.
[7] In *Kutrat-E-Elahi Panir and others v. Bangladesh*, (1992) 44 DLR AD case, as per Shahabuddin, CJ.
[8] Hossain, Md. Zakir. "Good Governance: Road to Implementation of Human Rights," In: *HUMAN RIGHTS AND GOOD GOVERNANCE,* 2004. 115.

discussion starts with the background and development of judicial activism in the way of enforcing social and economic rights.

5.2 A brief discussion of the journey by the judiciary

The judiciary of Bangladesh in the post-independence era had found a very limited scale of time to work in a democratic environment towards building its constitutional jurisprudence. Initially, the Apex Court was not even allowed judicial review which was adopted with the commencement of the Constitution.[9] But with time the Judiciary started to cast off the legal rigidity, although gradually, by upholding the true spirit of the Constitution. In the early stage of the Constitutional journey, a judicial attempt to overcome procedural challenges and technicalities was seen.[10] And later on, the broad interpretation of the right discourse, where the decisions of India and Pakistan have a profound influence, has played a significant role in the trajectory of our judicial journey.

Following the fall of the dictatorial administration in 1990, a new constitutional environment arose, resulting in a rebirth of popular trust in both constitutionalism and the judiciary.[11] After 1990 and afterward, the Judiciary became active enough to summon its critical overview of various public-related issues. The judicial activism was instigated sometimes through 'Public Interest Litigation' (PIL) or sometimes by Courts' self-initiative (suo motu). The conscious struggle of the people has acted as an important catalyst behind the activism of the judiciary. The judiciary not only gave its opinion on various issues of politics, but it also had to deal with various social and economic issues at that time, particularly for those who remained marginalized and discriminated against. Thus, we find a wave of constitutional judicial activism in Bangladesh during the post-autocratic era, indicating a profound paradigm shift driven by creative judicial interpretations and inspired by judges' self-awareness about their prior failures during martial rule regimes.[12]

However, unlike their Indian Judiciary, Bangladeshi judges have not been extensively focused on treating FPSP in recognizing social, economic rights, and other purposes. Instead, they have followed a long-awaiting jurisprudential path for two decades, being hesitant to look beyond their own world.

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[9] See, Article 4 of the High Court of Bangladesh Order, 1972.
[10] *Kutubuddin v. Nurjahan* (1973) 25 DLR (HCD) 21.
[11] Rahman, M. H. "The role of the judiciary in the developing societies: Maintaining a balance." *Law and* (1988). 1–10.
[12] See, for example, the decision in *Bangladesh Italian Marble Works Ltd v Bangladesh* (2006) BLT (Special) HCD 1, in which the Court virtually admitted to its abdication of responsibility during the martial law regimes.

That was so happened not for the reason that they were unconscious of what the Indian Judiciary has already significantly delivered or other constitutional development occurred around the globe. Rather the Judiciary of Bangladesh has 'delayed implanting it until the pressure from established legal quarters became overwhelmingly strong.'[13] Moreover, Bangladesh Judiciary has kept up the colonial and semi-colonial legal thinking[14], which indeed plays role in keeping boundaries within legal formalism and constitutional textualism, become important facilitators for Judiciary's hesitant response towards treating state principles. Such attitudes of the Judiciary have also been observed in dealing with social and economic rights.

5.2.1 Changing of Approaches by the Judiciary in Treating Social, Economic Rights

Before 1990, the Judiciary has got the opportunity to play a vital role in adjudicating social and economic rights. But in the case of *Winifred Rubie v. Bangladesh,*[15] there has been shown a lack of judicial insights in properly recognizing the status and function of FPSP. In that case, the HCD intended to relate Art. 14, 17, 19 with the question of the right to education. The Court found that the *'Little Flower School'* has not been made for 'public interest' because the school's tuition fee was so high that only an affluent section of the community could afford to study there and hence 'it does not conform to national education policy of the Government according to FPSP laid down in Part II of the Constitution of Bangladesh.'[16] The Court further held-

> "With the introduction of a Constitution as the fundamental law of the land incorporating fundamental principles of State policy, the term public purpose and public interest must be interpreted in the background of such State policy, since there is a direct nexus between the fundamental principles of state policy and public purpose and public interest as such."[17]

But unfortunately in this very case, the Appellate Division (AD) could not uphold the position that High Court Division (HCD) has penetrated. The Apex Court narrowed down the acceptability of judicial

[13] Menski, Werner F. "Public interest litigation: A strategy for the future. The Fourth Cornelius Memorial Lecture." (2000): 125.
[14] See, article 149 of Bangladesh Constitution, where 'all existing laws shall continue' indicates the belonging of legal heritage prevailed from British Period to Pakistan Period.
[15] (1980) 9 CLC, HCD.
[16] Ibid, para-3.
[17] Ibid, para-4.

interpretation of FPSP. This undermined the possibility of further enhancing social and economic rights through a broader interpretation of the FPSP. The Apex Court held that-

> "The HCD considered that the School is a private school and it was run for the benefit of a few and therefore, the machinery of the State should not have been utilized for the benefit of the School by way of requisition. It is unfortunate that the learned Judges of the High Court Division considered such adverse and extraneous matters for coming to the conclusion whether the requisition was justified or not. The learned Judges took pains to consider the State policy of education and considered whether the mandate of Article 17 of the Constitution was kept in view while requisitioning the premises for the School."[18]

Here, in this case, the stand of the AD was to avoid the question of how the court would view the FPSP. No definite answer has been found in this case as to why Article 17 does not apply to this particular question. However, the AD's reaction to the observation of the HCD was critically observed by Mr. Mahmudul Islam, the former Attorney General of Bangladesh. He stated thus-

> "…in order to find the meaning of 'public purpose' in relation to education, the High Court Division was not only entitled, but was also under constitutional obligation, to consider whether the requisition of property for a school of the type involved could be said to serve a public purpose when Article 17 mandates the State to adopt effective measures for the purpose of establishing a uniform, mass-oriented and universal system of education."[19]

Thus it is clear that the AD could not properly evaluate the constitutional status of FPSP and with that undermined approach could not correctly address the social and economic question, which could have been a golden opportunity for the Judiciary of Bangladesh to take the interpretive value of the principles to the next level.

However, after a decade of *Winifred Rubie*'s case, the Apex Court again failed to grab the opportunity that came to it in the *Kudrat-E-Elahi* case.[20] Though in this case a policy issue of local government (Articles 9, 11, 59, and 60) was mainly discussed, the question of 'judicial enforceability of FPSP' was also pointed in. As we all know, while the FPSP chapter mainly comprises social, economic, and cultural

[18] *Bangladesh v. Winifred Rubie*, (1981), BLD, 30, as per Badrul Haider Chowdhury, J
[19] Islam, Mahmudul. *Constitutional law of Bangladesh.* Bangladesh Institute of Law and International Affairs, 1995.57.
[20] *Kutrat-E-Elahi Panir and others v. Bangladesh,* (1992) 44 DLR AD.

rights along with other policy matters, the discussion was mainly encircled within the ambit of the judicial capacity of enforcing social and economic rights.

Following the anti-autocratic movement throughout the 90s and the restoration of the democratic environment, the Judiciary has got the chance to make the result of it. The role of the judiciary in the implementation of social and economic rights could be a reflection of the mass people's aspirations. At that time, the opportunity was created to come out of the occupational rule and move out from the 'Judiciary of Bangladesh' to the role of 'Judiciary for the people of Bangladesh'. But unfortunately, the Judiciary of Bangladesh has not been able to show enough capacity to play that role. With the background of the *Kudrat-E-Elahi* case in mind, the court had the opportunity to resurrect the directive principles' status to create 'judicial entitlement' in policy activism. However, in 'the golden age of our judiciary,' that opportunity was squandered. Although, in a dissenting opinion, Justice Naimuddin Ahmed has given revealing observations which could have been the aggregate position of the AD. But they stood still in their previous stand. They got strict with the orthodox view of the 'non-enforceability doctrine'. In this way, the Judiciary once again became unsuccessful to take the chance of elevating the status of FPSP into its enforcement mechanism and so could the social and economic rights to achieve their real destination.

When the *Kudrat-E-Elahi* case came into force in HCD, Justice Naimuddin Ahmed creatively reformulate the enforceability of FPSP. He imagined three probable situations where the FPSP could be dealt with- where the Government might not implement FPSP, where any legislative act might not acclaim to the FPSP, and where any act or omission directly contravenes or violates the provisions of FPSP. In the above-mentioned first two situations, Naimuddin Ahmed, J did not find any possibility of judicial interference. But in the third situation, according to him, the Court should intervene. In his words-

> "In the first contingency, the court has no jurisdiction to direct the legislature to enact laws or the executive to act for implementing the Fundamental Principles and in the second contingency also the court cannot intervene and say that the legislative act or the executive action is invalid not being in conformity with the fundamental principles and also cannot issue directions to make them in conformity with these principles."[21]

[21] Ibid. para-64.

But as regards the third situation, where any legislative or executive action clearly contradicts or violates the directive principles, according to His Lordship, the court should have the authority to overturn such actions. In his words-

> "…it does not mean that since the Court cannot compel the enforcement, the executive or legislature are at liberty to flout or act in contravention of provisions laid down in Part-II of the Constitution….and [thus] at the same time it means that the court has the power to intervene when the Government flouts and whittles down the provisions of this part."[22]

Justice Naimuddin referred to Justice Badrul Haider Chowdhury's opinion in consonance with his argument. Justice Badrul Haider Chowdhury made this connotation in another renowned case, the *8th Amendment Case*-

> "Though the directive principles are not enforceable by any Court, the Principles 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. It is a protected Article in our Constitution and the legislature cannot amend this Article without referendum. This alone, shows that the directive principles cannot be flouted by the executive. The endeavour of the Government must be to realize these aims and not to whittle them down."[23]

The AD, however, objectified the analyses of Justice Naimuddin Ahmed as "mere hypotheses" and did not accept them. Chief Justice Shahabuddin Ahmed made the constitutional position of FPSP. He opined as such-

> "The Repeal ordinance has been challenged mainly on the ground of its being inconsistent with Articles 9,11 and 59 of the Constitution. Article 7(2) of the Constitution says that any law inconsistent with the Constitution shall be void. Learned Counsels for the appellants are seeking a declaration of nullity of the Repeal Ordinance on this ground. A law is inconsistent with another law if they cannot stand together at the same time while operating on the same field. Article 9 requires the state to encourage the local Government institutions but the Ordinance has abolished a local Government, namely the Upazilla Parishad. Similarly, Article 11, they have pointed out, provides that the Republic shall be a democracy in which, among other things, "effective participation by the people in administration" at all levels shall be ensured;

[22] Ibid. para-67.
[23] Ibid. para-66.

but the Ordinance has done away with such participation in the administration at the Upazilla level. These two Articles as already quoted are Fundamental Principles of State Policy, but are not judicially enforceable. That is to say, if the State does not or cannot implement these principles the Court cannot compel the State to do so. The other such Fundamental Principles also stand on the same footing. Article 14 says that it shall be a fundamental responsibility of the State to emancipate the toiling masses—the peasants and workers— and backward sections of the people from all forms of exploitation. Article 15(a) says that it shall be a fundamental responsibility of the State to make provision for basic necessities of life including food, clothing, shelter, education and medical care for the people. Article 17 says that the State shall adopt effective measures for the purpose of establishing a uniform mass-oriented and universal system of education extending free and compulsory education to all children, for removing illiteracy and so on. All these Principles of State Policy are, as Article 8(2) says, fundamental to the governance of the country, shall be applied by the State in making of laws, shall be guide to the interpretation of the Constitution and of other laws and shall form the basis of the work of the state and of its citizen, but shall not be judicially enforceable."[24]

To clarify the reasons for judicial non-enforceability of the FPSP he justified-

> "The reason for not making these principles judicially enforceable is obvious. They are in the nature of people's programme for socio-economic development of the country in peaceful manner not overnight, but gradually. Implementation of these programmes requires resources, technical know-how, and many other things, including mass-education. Whether all these prerequisites for a peaceful socio-economic revolution exist is for the state to decide."[25]

In the same judgment, Justice Mustafa Kamal agreed with Justice Shahabuddin Ahmed and elaborated his arguments by relying on two vital points:

1) He denied the fact that FPSP did have any characteristics like a 'double-edged sword', which of course, belonged to FRs. The FRs chapter does have art 26 (Laws inconsistent with FRs to be void), which is absent in the case of FPSP. This omission is deliberate and calculated. So any attempt to equate FPSP with FRs would be nugatory.[26]
2) Secondly, Art 8(2) of the Constitution sets FPSP to be recognized as 'principles' that shall be applied while making other State laws. That means, here the provision makes clear the

[24] Ibid. pp. 330-331.
[25] Ibid.
[26] Ibid. para-85.

> differences between law and principle. Apart from this, Justice Mustafa Kamal referred to the definition of law described in art 152(1) where the Constitution did not incorporate the principles within the purview of the law. In this way, he said, "[t]o equates 'principles' with 'laws' is to go against the law of the Constitution itself…. Not being laws. These principles shall not be judicially enforceable."[27]

Observing all these, we can see that the Apex Court possesses an orthodox legal view. The judiciary could not get off from the view of 'judicial non-enforceability of principle'. Although Justice Mustafa Kamal compared the FPSP as a 'beacon of light', we do not see the judiciary, at least in this case, going beyond the boundaries mentioned by its own. Rather they would feel relieved handing over the exclusive liability of enforcing FPSP to the legislature. And if any failure occurs, then public opinion or political party will play a role there.

Hopefully, this attitude of the Apex Court has not protracted for a long time. The ice continued to melt for a variety of reasons. With the winds of trans-judicial influence blowing, the judiciary has begun to establish a broader perspective, particularly in realizing social and economic rights. The consequences of this 'judicial reconsideration' have been reflected in some later instances involving provisions of fundamental principles.

The *Dr. Mohiuddin Farooque vs. Bangladesh*[28] case is one of the renowned examples where the Judiciary was able to step into bright feet. In this case, the issue of 'locus standi' meaning legal entitlement to stand for a case, the Court managed to re-articulate a newer and wider meaning using 'right based policy activism'. In this way, the non-enforceable principles have attained a newer height. In this case, the Court adjoined the principle 'absolute trust and faith in Almighty Allah' with His creation and therefore widened the concept of 'aggrieved person' in a very illuminating way. The Court held as follows-

> "The preamble and article 8 also proclaim principles of absolute trust and faith in Almighty Allah as a fundamental principles of state policy. Absolute trust and faith in the Almighty Allah necessarily mean the duty to protect his creation, and environment. The Appellant is aggrieved,

[27] Ibid. para-84.
[28] (1996) 1 BLC (AD) Page- 189 to 219.

> because Allah's creations and environment are in the mortal danger of extinction and degradation."[29]

Justice Latifur Rahman, in that case, pointed out the interpretative value of FPSP to cope with the changing nature of the Constitution. He observed-

> "The principles, primarily being social and economic rights, oblige the state, amongst other things, to secure a social order for the promotion of welfare of the people… A constitution of a country is a document of social evolution and it is dynamic in nature. It should encompass in itself the growing demands, needs of people, and charge of time. A constitution cannot be morbid at all. The language used by the framers of the constitution must be given a meaningful interpretation with the evaluation and growth of our society. An obligation is cast on the constitution in a manner in which social, economic and political justice can be advanced for the state and its citizens."[30]

Thus the Court added an interpretive value of FPSP to the right discourse and made a justification of being a person 'aggrieved.' More importantly, the Court has wanted firmly to make FPSP implemented. In this way, the court paved the way for the broader interpretation of the principles and also extended the role of the court in the proper adjudication of social and economic rights. This is quite a departure from the orthodox view of the 'non-enforceability' doctrine made before.

In another case, *Ain o Salish Kendro (ASK) v Bangladesh case*[31] the court stood in favor of the 'right to livelihood'. In this case, a group of vulnerable people was forcefully evicted and then the matter came into consideration. The Court, taking the aid of the 'right to life' proposition, gave a decision in favor of the downtrodden people not to be evicted suddenly. Rather the Court proposed to the Government to execute the eviction process phase by phase after allocating the alternative shelter to that evictees. In another case,[32] the Court articulated the plight of the country's poor and oppressed by saying-

> "…the slum dwellers, poorest of the poor they may be, without any future or dreams for tomorrow, whose every day ends with a saga of struggle with a bleak hope for survival tomorrow, but they are also citizens of this country, theoretically at least, with equal rights. Their fundamental right may not be fully honored because of the limitations of the State but ...

[29] Ibid. para 25.
[30] Ibid. para 72.
[31] (1999) 19 BLD (HCD) 488
[32] *BLAST and Others v Government of Bangladesh (*2008) 60 DLR 749 (HCD).

> they have got a right to be treated fairly and with dignity, otherwise all the commitments made in the sacred Constitution of the People's Republic, shall prove to be a mere mockery."[33]

Similarly, in the case of *BSEHR v. Bangladesh,*[34] The court ruled that the government's arbitrary and unexpected removal of hundreds of sex workers was illegal since it effectively deprives them of their livelihood and consequently their right to life. Furthermore, the court, in this case, has asked the government to develop its promised rehabilitation programs in accordance with human dignity and to include educational, moral, and socioeconomic amenities that would result in the elimination of prostitution-facilitative factors.[35] In another case,[36] the Court held that proper service of 7-day notice is 'mandatory and compulsory'.

In the case of *Advocate Zulhash Uddin,*[37] the Court held that the excessive imposition of tax over health and medicine services is unconstitutional as it violates the 'right to health' enshrined in the FPSP chapter as well as opposing the right to life provision inserted in the Art 32 of the Constitution.

In another case[38], though the Court did not consider the issues of whether 'education should be considered as "fundamental rights" or whether the non-compliance of policy by the educational institutions is 'any violation of any constitutional position', the Court simply maintain the usual position and assert that the government policy has to be followed by the educational institution. Therefore the institutions would not be allowed to take any decisions against the interest of the students.[39] In another education-related case[40] where the Court stood against the imposition of VAT on English Medium schools. The Court, by relying upon Art. 15 and 17 of the Constitution, found that imposing VAT was totally contrary to the Constitution and it has created 'a gross discrimination'.

> "Now let us examine how far the action of the Respondents in imposition VAT on a certain class of educational institution is justified. So far as it relates to "education", we never find anywhere in the Constitution that the students studying in English Medium Schools have ever been differentiated from the students studying in Bengali medium schools. Therefore, on the face of

[33] Ibid. para-19.
[34] (2001) 53 DRL (HCD)
[35] See, Hoque, Ridwanul. *Judicial activism in Bangladesh: a golden mean approach.* Cambridge Scholars Publishing, 2011. 148.
[36] *Aleya Begum and others vs. Bangladesh and others*, (2001) 53 DLR (HCD) 63.
[37] *Chairman, National Board of Revenue (NBR) Vs. Advocate Zulhas Uddin Ahmed and others,* (2010), 39 CLC (AD)
[38] *Campaign for Popular Education (CAMPE) & another vs Bangladesh* (Writ Petition no. 312 of 2012)
[39] Ibid. as per Naima Haider, J.
[40] *Md. Faizul Islam and another vs. Bangladesh and others* (Writ Petition No. 10127 of 2015, HCD)

> the Constitutional mandate, a gross discrimination has been created by imposing VAT upon certain schools, herein English Medium schools, which is totally contrary to the provision as enunciated in Article 15 and Article 17 of the Constitution."[41]

In the above-mentioned cases, we can observe some trends the Judiciary of Bangladesh has been following. One of the trends is to prevent, though, to a very limited extent, the government's arbitrary action. Secondly, the Judiciary has tried to make 'negative' judicial enforcement even if it cannot impose a positive obligation to the government. But in the following case, the Court has attempted to initiate an affirmative action.

In the case of *BLAST and Others v. Bangladesh,*[42] the court has provided some directives to the government to commence affirmative action in favor of the disabled, handicapped, or blind by reserving quotas for them in the public service. It appears that our court's approach reflects a growing judicial consciousness and a greater willingness under the pretext of the constitutional framework of the right to life or broader constitutional principles such as non-discrimination.

In another case,[43] we can observe the positive attitude of the Judiciary to enforce the principles despite having a 'non-justiciability' clause. In that judgment, the Court hailed the struggle of the liberation war to a great extent and therefore, directed the government, as per Art. 24 of the Constitution, to form committees to 'preserve historical places, mass graves, and building of monuments concerning the Liberation War of Bangladesh.'[44]

If we look into some more judgments, we will find that the judiciary has worked on a somewhat wider range of right discourse. In this case[45], the HCD not only talked about the right to education but also shed light on how it could be implemented. For example, in Bangladesh, though the government has made primary education compulsory, every year many children are not enrolled, or even if they are enrolled, they cannot survive in schools due to financial insufficiency. In this judgment, we will see that the judiciary has dealt with this question and instructed the government on what to do. Deciding such a comprehensive way is a unique phenomenon in the context of Bangladesh. The Court viewed this-

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[41] Ibid. para-38.
[42] WP Nos. 343/1997
[43] *Major-General KM Safiullah v Bangladesh* (2010) 18 BLT (Special Issue- 01)
[44] Ibid.
[45] *Ain-o-Salish Kendra and another vs. Bangladesh, represented by the Secretary, Ministry of Labour and Manpower and others, (*2011) 63 DLR (HCD) 95.

> "In the light of our observations in the body of this judgment, we are of the view that the Ministry of Education must take the initiative to ensure that compulsory education provided by statute enacted under the mandate of Article 17 of the Constitution for all the children of Bangladesh becomes a realistic concept and not just lip-service. To that end steps must be taken to ensure that children can attend school without jeopardising the family's food security. In other words, there must be financial provision for the family such that the child's attendance at school should not result in the reduction of the family's income earning capacity. To put it more plainly, the head of the family must be given the equivalent amount of benefit (cash or kind), which the child would have earned if he was not compelled to attend school. Moreover, to ensure continuity of attendance, provisions must be made for necessary uniform and stationary for the child's use as well as any other costs that she or he may incur in the course of attending a school. In addition, a hot and nutritious meal provided for the child would be an added attraction for him or her as well as for the family and would ensure attendance throughout the day. Of course, such financial and other benefits would have to be closely monitored to ensure that attendance in the school is not a mere paper transaction, giving benefit only to the unscrupulous teachers and other officials."[46]

So from the above discussion, it can be told that the Judiciary of Bangladesh has been passing through a transitional period from complete passivity to enhancing activity. These are some of the cases where this progression and a graph of improvement can be identified. Although in the strict sense, the Bangladeshi Judiciary did not want to move forward beyond their boundaries, albeit, they have made some contributions to enforcing social-economic issues.

In one very important case of recent time, *Aynunnahar Siddiqua and Others v. Bangladesh*[47] case the Court showed creativity and earned interpretive value of 'right to life' discourse. In that case, rule 3(4) (Kha) of Dhaka Metropolitan Police Ordinance, 1976 was challenged.[48] The petitioners took the help of Article 8(2) of the Constitution which "provides guidelines for making of laws and all the law-making powers exercised by the State shall be in accordance with the mandate of the Constitution. The

[46] Ibid. para- 32(2).

[47] *Aynunnahar Siddiqua and Others v Government of Bangladesh represented by the secretary, ministry of law, justice and parliamentary affairs, Bangladesh secretariat, Ramna, Dhaka and others,* Writ Petition No. 3424 of 2016.

[48] Ibid. Rule 3(4)(kha) of the Rules of 2006 reads as "ঢাকা মেট্রোপলিটন এলাকায় জনসাধারণের শান্তি বিঘ্নকারী যে কোন উদ্যোগ প্রতিহতকরণসহ শান্তিপূর্ণ অবস্থা বজায় রাখার স্বার্থে দ্রুত যে কোন পদক্ষেপ গ্রহণ". The petitioners have challenged, in particular, the words "যে কোন" in Rule 3(4)(kha) of the Rules of 2006. They being the city-dwellers of Dhaka were handed over a form each captioned "ভাড়াটিয়া নিবন্ধন ফরম" and asked to return the same to the police after filling in the same.

Constitution does not contemplate vesting of any absolute or unrestricted power in any public functionary."[49] The Court held that

> "[i]t is implicit that a person must be free from fear and threat to life inasmuch as life under fear and threat of death will be no life at all. Right to life should include the right to live with human dignity. Against this backdrop, there is a great responsibility onto the shoulder of the DMP Authority to see that the city-dwellers live with dignity and they must be free from fear and threat to life."[50]

The Court recognized the 'right to privacy' within the ambit of the 'right to life' taking cognizance of one of the fundamental principles. In this way, the Court used the interpretive aspect of FPSP. In another recent case *M. Asafuddowlah v Bangladesh*[51] where the petitioner challenged the salary and other benefits received by the Govt. OSD officers without rendering any service. The Court came to a decision that an officer "on OSD beyond the stipulated period of 150 days was declared ultra vires the Constitution and, therefore, without lawful authority." The Court interpreted Article 20(2) along with other Articles by saying that- "This is manifestly in contravention of Article 20 (2) of the Constitution, which prohibits enjoyment of unearned income. In other words, the Government itself is violating the provisions of Article 20 (2) of the Constitution by allowing the officials to enjoy 'unearned income'. Obviously, this could not have been the intendment of the Legislature."[52] In the above-stated two recent cases, it has been observed the much inclination toward FPSP by the Judiciary. This is certainly a progressive sign on the part of the Judiciary to use fundamental principles as a guide to the interpretation of the Constitution and other laws of Bangladesh.

Having said that, the approach shown in almost all the cases is 'negative enforcement' of these rights. In most cases, the Apex Court has directed the government or different governmental bodies to implement the non-compiled directions. On a very limited scale, the Judiciary has made a proactive role by administering positive enforcement. The orthodox interpretation of 'non-enforceable' social, and economic rights, always abstains to go over the line. Though our Judiciary is vastly influenced mainly by Indian constitutionalism, has made a parsimonious approach in comparison with them.

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[49] Ibid.
[50] Ibid. para-33.
[51] *M. Asafuddowlah v Government of Bangladesh, represented by the Secretary, Ministry of Public Administration, Bangladesh Secretariat, Dhaka.* [2021] 15 SCOB HCD 1. Barrister Aneek R Haque was one of the lawyers of this case. He mentioned this case while giving interview.
[52] Ibid. para- 30.

However, there exists a golden opportunity in our Constitution and in the foundations of the Constitution to implement social and economic rights. The tasks done by the Judiciary so far are praiseworthy, but still many miles to go. Many times structured thinking can hinder attempts to cross boundaries. That is why there is always a need to explore new thinking and reasoning. So that the new needs of the national life can be met. The efforts of this work remain the same. But before that, it needs to know how the judiciary of Bangladesh has been influenced by the judicial wisdom of two important South Asian countries- India and Pakistan.

5.3 Carrying the Legacy of Judicial Activism in India and Pakistan

In the case of PIL, the judicial effect or influence of India and Pakistan is quite evident in Bangladesh's Judiciary. The concept of life recognized in Art. 31 and 32 of the Bangladesh Constitution is reasonably similar to provision 21 of the Indian Constitution and Art. 9 of the Pakistan Constitution. So we have seen the connotation of 'right to life' used in some of the social, and economic rights adjudications are comparable in the above said three countries. Another significant characteristic, which has been propounded by the Indian Judiciary, to enforce social and economic rights indirectly by the judiciary, has been commonly promulgated by both Pakistan and Bangladesh Judiciary. Although, later period of their constitutional journey, India has got into direct judicial enforcement and Pakistan has practiced the enforcement of social and economic rights mostly by legislative means.

The *Dr. Mohiuddin Farooque v Bangladesh*[53] case is the most referred PIL in Bangladesh. Here, an environmental organization (BELA) filed PIL against the State challenging a flood control project. The AD reinterpreted the clause 'aggrieved person' of Art. 102 by explaining that 'any person having sufficient interest' can litigate for people's rights.[54] The learned Chief Justice A T M Afzal further observed:

[53] Writ Petition (WP) No 998/1994. It will not be an exaggerated saying that the wide extended meaning of 'locus standi' has been practiced by the Bangladesh Judiciary in the early period even before the Indian Judiciary. In *Kazi Mukhlesur Rahman V. Bangladesh* (1974) 26 DLR (SC) 44 case where a widened interpretation of locus standi has been delivered by the Court in a particular constitutional content. Abu Sadat Mohommad Sayem, the learned Chief Justice observed in this case that "It appears to us that the question of locus standi does not involve the Court's jurisdiction to hear a person but of the competency of the person to claim a hearing, so that the question is one of discretion which the Court exercises upon due consideration of the facts and circumstance of each case." Although that very acclaimed position of the Judiciary has not lasted long, remained dormant for next 23 years.

[54] Ibid. Ref 23, p 33, per Chief Justice Afzal.

> "[a]ny person other than an officious intervener or a wayfarer without any interest or concern beyond what belongs to any of the 120 million people of the country or a person with an oblique motive, having sufficient interest in the matter in dispute is qualified to be a person aggrieved and can maintain an action for judicial redress of public injury arising from breach of public duty or for violation of some provision of the Constitution or the law and seek enforcement of such public duty and observance of such constructional or legal provision."[55]

Justice Kamal substantiated the logical basis of this reasoning-

> "[w]hen a public injury or public wrong or an infraction of a fundamental right affecting an indeterminate number of people is involved...any member of the public, being a citizen...or an indigenous association...has the right to invoke the [Court's] jurisdiction."[56]

Analyzing this case, it appears a significant shift from the earlier position of "a person aggrieved" to the position of a person having "sufficient interest." The scope and extent of aggrieved person have so widened with the passage of time that a person, not even a citizen of Bangladesh, can file a writ petition when "the functionaries of the Republic do not act in accordance with the law."[57] In fact, the former Chief Justice K.M. Hasan has summed up the current position of the Apex Court in the case of *ETV v Dr. Chowdhury Mahmood Hasan,*[58] by saying- "The narrow confines within which the rule of standing was imprisoned for long years have been broken and new dimension is being given to the doctrine of locus standi." Very recently, in the *M. Asafuddowlah* case, the Court even held that "The petitioner is … a regular tax-payer of this country. As such, he has a legitimate expectation to be apprised of the manner in which the tax-payers money is being spent by the Government."[59] and as such the tax-payers of the country have the 'sufficient interest' to file a writ petition.

All these observations mirrored the famous Indian case S.P. Gupta vs. India[60] where Justice Bhagwati has delivered the same notion of collective justice. The Court held that 'any member of the public acting bona fide can move the Court'. This decision was observed later in a subsequent case- *People's Union for Democratic Rights vs. Union of India.*[61] Along that path, the journey was made to a larger range

[55] Ibid.
[56] Ibid. Ref 23, p 51, per Mustafa Kamal J.
[57] *Northpole (BD) Ltd. vs. Bangladesh Export Processing Zones Authority,* (2005) 57 DLR 631.
[58] (2002) 54 DLR (AD) 132.
[59] Supra No. 51. para- 22.
[60] (1982) AIR SC 149.
[61] (1982) AIR SC 1473

of PIL. The Indian Judiciary ushered in a new horizon, the continuation of which later formed the concept of SAL[62]. For Bangladesh, the *Mohiuddin Farooque* case was the beginning point from where the previous judicial approach started to reverse into creative constitutional interpretation and adjudication. Although the trend commenced much later than that of the Indian Judiciary.

Fortunately, standing on that foundation, the Judiciary of Bangladesh has widened the scope much more of an 'aggrieved person'. The wide explanation has been noticed mainly on procedural issues. In *Mohammad Tayeeb & another vs. Bangladesh & others case,*[63] the question raised whether an aggrieved person could get any remedy because of his inability to file a formal application as directed in the Art. 102. The Court took the shelter of Art. 21, one of the FPSPs by stating that-

"(1) It is the duty of every citizen to observe the Constitution and the laws, to maintain discipline, to perform public duties, and to protect public property.

(2) Every person in the service of the Republic has a duty to strive at all times to serve the people."

The Court held that the "Constitution not only imposes an obligation upon the citizens but also protects them from the excesses as well as laches of the authorities. As such, the persons who are unable to file a formal application, cannot be without remedy in vindication of their rights guaranteed under the Constitution and the laws of the land."[64] However, the SC of India and Pakistan have treated the letters, post-cards, telegrams as applications in their respective cases.

The widened scope of PIL expanded the edge of other rights. The social and economic rights got light in the reflection of civil and political rights. The traditional approach of the Judiciary has gradually changed. In course of time, the Judiciary of Bangladesh started to put the role on some of the basic necessities of people. Right to education, food, medical, environment, etc. are some of the issues

[62] Social Action Litigation (SAL). SAL has been clearly influenced by PIL. SAL tends to more aggressive. Because PIL has been dominated by institutional petitioners, namely public interest law firms, SAL has been guided by and large by the initiatives of committed judges, lawyers, citizens and social activists. While PIL primarily purports to increase people's participation in decision-making and policymaking, SAL, in strict sense, is concerned with governmental lawlessness and the exploitation of deprived groups. Detailed discussion can be found in the third chapter.

[63] Civil Appeal No. 593-594 of 2001, 4 LNJ AD (2015) 48

[64] Ibid.

where the Judiciary started playing a role.[65] In all of the cases the Judiciary has applied the justiciable 'right to life' clause enshrined in Art. 31 and 32 of the Constitution and related the basic amenities of life - food, shelter, medical, education, environment with it. For example, in *Bangladesh Legal Aid and Services Trust and Others vs. Government of the People's Republic of Bangladesh and Others* case, the Judiciary held that "The right to life which is guaranteed under the Constitution includes the right to livelihood and, since they will be deprived of their livelihood if they are evicted from their slum and pavement dwellings, their eviction is tantamount to deprivation of their life and is, hence, unconstitutional".[66] The same thing happened in India in the early days when the Indian Judiciary applied the 'right to life' clause enshrined in Art. 21 of their Constitution and linked all the social and economic rights with this clause.

The Indian Judiciary has applied the indirect enforcement of social and economic rights as these rights are incorporated as the 'Directive Principles of State Policy' (DPSP) like the Bangladesh Constitution, where 'these principles shall not be judicially enforceable' has been categorically said. In the *Olga Tellis* case,[67] the Indian Judiciary has indirectly enforced the right to shelter in relation to the right to life and the right to livelihood. Though this decision is extremely criticized by some scholars as the judicial approach did not bring any tangible outcome and recognized only the procedural rights of the evicted pavement dwellers.[68] We can see the same approach expressed in the slum dwellers case of Bangladesh. From the early period of social and economic rights adjudication, the Judiciary of Bangladesh has been the follower of indirect enforcement.

In some of the remarkable cases of socioeconomic rights, we observe the influence of Indian Judgement. For example, in *BNWLA v. Bangladesh* case,[69] it has been seen the reflection of Indian judgment on the same issue. Here, in this case, a PIL was instituted for the frequent sexual harassment committed against women in Bangladesh. The Court found that though in the Constitution there are provisions for gender quality or equal protection of law irrespective of gender and sex, there exists no all-encompassing law regarding the matter. Then the Court introduced a detailed guideline to be

[65] See e.g. *Dr Mohiuddin Farooque v. Bangladesh* (2003) 55 DLR 69 (HCD); *BLAST v. Bangladesh* (2005) 25 BLD 83 (HCD); *Human Rights and Peace for Bangladesh v. Bangladesh* (2009) 30 BLD 125 (HCD); *Ain o Salish Kendra and Another v. Bangladesh* (2011) 63 DLR 95 (HCD).
[66] (2008) 60 DLR 749 (HCD), p. 751.
[67] *Olga Tellis and Others v. Bombay Municipal Corporation* (1985) 3 SCC 545.
[68] Langford, Malcolm. "Domestic adjudication and economic, social and cultural rights: A socio-legal review." *Sur. Revista Internacional de Direitos Humanos* 6 (2009): 106.
[69] (2009) 14 BLC (HCD) at 694.

followed in educational institutions or other institutions to protect women from sexual harassment until 'effective legislation' is made.[70] In this case, a Division Bench of the HCD considering Articles 10, 19, 26, 28, 29, 31, 32, 102, and 111 of the Constitution of Bangladesh; Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region [1995], National Women Development Policy (2008) of the Government of Bangladesh, Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and a number of cases of English, Indian, and our jurisdiction, particularly, *Vishaka Vs. State of Rajasthan* case.[71]

The Judiciary of Bangladesh has upheld the '*principle of legitimate expectation*'[72] in an important case *Soya-Protein Project Ltd. V. Secretary, Ministry of Disaster Management*[73] to substantiate and accelerate the right to education of the school-going children. This principle was previously applied by the Indian Judiciary[74] where the Bangladesh Judiciary may have found inspiration.

Along with Indian judgments, the decisions of the Pakistan Judiciary have also made influenced Bangladesh's growing constitutionalism. For example, the Pakistan Court has given extended meaning to the word 'Life' enshrined in Art. 9, in the case of *Ms. Shehla Zia vs WAPDA*[75] case which has been referred in *Professor Nurul Islam and others vs. Government of the People's Republic of Bangladesh & others.*[76] The HCD of Bangladesh has given the same connotation of 'Life' in that particular judgment.

5.4 Some concerning issues regarding Judiciary-led social transformation

In this phase of discussion, the debates, and discussions on the enforcement of social and economic rights, especially of Bangladesh Constitutionalism have been analyzed. The attempt is to review the prevalent thoughts critically to reach a conclusion where it can be easier to find a way that may become more rationally fit with the enforcement mechanism. However, it has been observed that the

[70] Ibid.
[71] (1997) AIR SC 3011.
[72] When a public entity rescinds from a representation made to a person, the theory of legitimate expectation was first developed in English law as a ground of judicial review in administrative law to preserve a procedural or substantive interest. It is founded on natural justice and fairness ideals, and it aims to prevent authorities from abusing their power. A legitimate expectation develops when an authority makes a legally binding representation that an individual will get or will continue to receive some type of substantial benefit.
[73] (2002) 22 BLD 378. This principle was also referred in *Chairman, Bangladesh Textile Mills Corporation V. Nasir Ahemd Chowdhury* case. (2002)122 BLD(AD) 99. The said principle was reiterated in the *Government of Bangladesh V. Md. Jahangir Alam* case. [C.A. Nos. 45 to 47 of 2010).]
[74] (1989) AIR SC 49 (Paras 17 to 20)
[75] (1994) PLD (SC) 693.
[76] Writ Petition No. 1825 of 1999 with Writ Petition No 4521 of 1999.

Judiciary of Bangladesh in its early stage did not adopt an unambiguous role, although, the early Constitution had enacted several provisions aiming to institute an egalitarian society where 'socialism' and 'democracy' were the 'high ideals' of a newly-born State.[77] The Constitution also established a substantive concept of legal equality, food-shelter-clothe-health-education-work for all with a provision for affirmative state actions.

The notion of judicial enforcement of social and economic rights has been changed from the 1990s to afterward. This has already been discussed in detail. Along with that, it can be observed that the Judiciary has even endorsed their judicial reasoning and execution in some 'torts' related cases using the 'right to life' proposition. Citing some recent case works- The HCD entertained a case relating to the accidental death of a little boy Jihad. The death was committed due to falling into an abandoned deep tubewell owned by a govt department. The victim's family was awarded 2 million Bangladeshi takas as compensation.[78] In the *Rustom Ali V. State*[79] case, one Sano Mia died falling into an open manhole. The family of Sano Mia was awarded 5 million Bangladeshi takas. Interestingly, the monetary damages were not claimed by the petitioner but the Court proceeded with the matter suo motu. In another case, the HCD using its own discretion through suo motu awarded compensation of 0.9 million Bangladeshi takas to an affected person- a woman because a gauze was found inside her abdomen while she had undergone a cesarean section surgery.[80]

This sort of constitutional development through judicial encroachment is, now a day, very much prevalent. And so is the debate as to the boundary of 'constitutional limit' of the judiciary as an unelected body is also a matter of discussion. Compared to the world view, it is now a common discussion 'the Courts are looking more aggressive', or 'socioeconomic rights are more extensively adjudicated by the Court' or 'judiciary is behaving like a new birth of accountability institutions[81], and so on. In Bangladesh, the differences of opinions about the involvement of the judiciary are mostly, in respect of degree, not kind. Almost all the scholars of Bangladesh talk in favor of progressive judicial

[77] Article 10 of the original Constitution (1972) longed for '[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.'
[78] *Children Charity Bangladesh Foundation v. Bangladesh,* WP No. 12388 of 2014 (18 February 2016; full judgment on 9 October 2017).
[79] (2017) 5 CLR (AD) 154 (31 March 2017).
[80] The HCD gave an interim order on 13 December 2017.
[81] Landau, David, and David Bilchitz. "The evolution of the separation of powers in the global south and global north." *In The Evolution of the Separation of Powers.* Edward Elgar Publishing, 2018. 18–22. Bonilla Maldonado, Daniel. "Introduction: toward a constitutionalism of the global south." *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia*, Cambridge, CUP (2013). 1, 5–19.

activism especially in the enforcement of social and economic rights. But judicial activism in weak democratic countries also raises questions and controversies because 'these countries are relatively economically disadvantaged, socially unstable, and politically unaccountable.'[82] These are some of the pertinent issues that need to be addressed in dealing with the question of judicial participation in social transformation, especially in the Bangladesh context.

In countries of growing democracy like Bangladesh, the Court indeed speaks with authority and that's why people at times expect them as their 'savior'. People expect the judiciary to solve their distressed condition. But in reality, the problem remains unsolved because almost all of the matters related to govt. policy where there is little left for the judiciary to do. The Court professes itself as an apolitical identity. This is an important source of prestige for the SC.[83] That is why, it remains to be seen, how far, our Judiciary can rise to the occasion in implementing the FPSP in consonance with the spirit of the Constitution to safeguard and promote sociopolitical jurisprudence in Bangladesh in days to come.

Some advocates of judicial activism expect 'judicial leadership'[84] for effective social reform in Bangladesh. But implementation of judicial leadership may turn rhetorical if it does not consider the philosophy of Charles R. Epp, a distinguished academician. Epp's criticism is mainly for the lack of support structure for materializing rights addressed by the judiciary. He has indicated that the absence of consistent right-advocacy organizations, activist lawyers, necessary government funding, and so on would constantly undermine the potential of rights revolution. Ensuring these are much more important than only propagating rights consciousness or judicial leadership.[85] But these important factors are quite unheard of in the discussion of the supporters of judicial activism. Judges can enunciate rules, but to make them effective there requires a reservoir of public acceptance to make

[82] For different opinions on the Global South constitutionalism, see Michaela Hailbronner, Overcoming Obstacles to North-South Dialogue, 49 *Verfassung und Recht in Übersee* 253 (2016); Hailbronner, Michaela. "Transformative constitutionalism: Not only in the global south." *The American Journal of Comparative Law* 65, no. 3 (2017): 527-565. (arguing that features of transformative constitutionalism are not peculiar to the Global South).

[83] Shapiro, Martin M. *Law and politics in the Supreme Court: New approaches to political jurisprudence.* [New York]: Free Press of Glencoe, 1964. 31.

[84] For more details, see Hoque, Ridwanul. "Taking justice seriously: judicial public interest and constitutional activism in Bangladesh." *Contemporary South Asia* 15, no. 4 (2006): 399-422.

[85] Epp, Charles R. *The rights revolution: Lawyers, activists, and supreme courts in comparative perspective.* University of Chicago Press, 1998. 18–19.

them stick. Ran Hirschl proclaims the same view. He also emphasizes the existence of a support structure for the effective implementation of rights.[86]

Moreover, the 'impact analysis' of judicial activism as regards social and economic rights adjudication and other issues is a rare subject of discussion. In Bangladesh, anyone will get very few empirical studies to understand the actual scenario of the after-effect of judicial pronouncement or to analyze the extent of actual implementation of social and economic rights. In India, some prominent researchers have shown some case studies of actual beneficiaries, where PIL issues have become the privilege of middle-class people whereas a significant number of lower and down-trodden people are increasingly excluded from legal protection.[87]

Another important factor is sometimes felt absent in the discussion of judicial enforceability of socio-economic rights discourse. That is the political normativity of adjusting social and economic rights adjudication. It is no doubt that the courts are the part and parcel of the political process. Elected political parties, appointed bureaucracy, selected private organizations and other state apparatus all are the important co-agent of effective judicial activism. Judicial discretion should be judged in the context of the entire spectrum of governmental activities. It may be an exaggeration to term the judiciary as the effective machinery to alleviate the miseries of down-trodden, poorest people in society. Because courts lack implementation mechanisms. Not only that, the courts need to be dependent upon the policy-making of other branches of the government. Therefore, the courts are structurally constrained to bring social change without taking the assistance of other political institutions of government. In immature democratic countries, the decisions of courts can easily be thwarted by strong political opposition or beauracratic complexities. So, the expectation for achieving anything effective by the judiciary there needs to have a conducive political arrangement.

5.5 Judiciary-led dialogical method: Rhetorical or Real?

In recent period 'dialogue' has become a global metaphor within the constitutional theory.[88] It mostly requires interaction between the judiciary and other branches of the government in adjudicating

[86] Hirschl, Ran. "On the blurred methodological matrix of comparative constitutional law." *The migration of constitutional ideas* 39 (2006).
[87] Gauri, Varun. "Public interest litigation in India: overreaching or underachieving?." *World Bank Policy Research Working Paper* 5109 (2009).
[88] The dialogic structure of constitutionalism has been opted worldwide. New Zealand and the United Kingdom have taken for a weaker form of dialogic judicial review where courts can declare laws to be incompatible with rights and

constitutional rights. Dialogic theories emphasize that the judiciary does not, both in the empirical or normative matter, have absolute control on constitutional interpretation rather has dialectical, interconnected sharing with other constitutional agents.[89]

Taking into consideration this definition, some scholars[90] of Bangladesh want to introduce a dialogical method for judicial remedies. They want to keep active judicial participation in policy dialogue. Because most of the issues are politically determined by branches other than the Judiciary. So they suggest 'structural change' in policy set-ups[91] How can the active engagement of judges be possible there?

Judges seek to reorganize current bureaucratic deficiency to the degree that it threatens constitutional and public values by ordering the structural injunction. In summary, it mandates that the violator repair the claimed breach under the supervision of the court. The Court will be able to identify and address the root of the problem through communication with the government in this manner. Ridwanul Hoque, a constitutional law scholar in Bangladesh, holds the same opinion.[92] He hopes to elicit Indian experiences to promote a dialogical approach.

The political environments of most South Asian countries invoke and apply dialogic judicial review. Because judiciaries do not have much option other than making dialogue with other branches of the government. Primarily, there are two reasons for this situation: one, the continuity of the authoritarian regime, and second, considerable political control over the judiciary. Bangladesh is not an exception to this condition. For example, in *Ain o Salish Kendra v. Bangladesh* case,[93] it is found that the government's eviction attempt is allowed by the HCD. The Court only gives the order to the government for providing alternative accommodation as a remedy. The court did not stand strongly but left the remedy in the consideration of the government to decide by making effective policy. As a

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invite legislative reconsideration, but they cannot strike laws down. On the other hand, South Africa has taken a stronger form of dialogic judicial review that allows laws to be struck down and does not allow the legislature, except in emergency situations, to derogate from rights as interpreted by the courts.

[89] Bateup, Christine. "The Dialogic Promise-Assessing the Normative Potential of Theories of Constitutional Dialogue." *Brook. L. Rev.* 71 (2005): 1109.

[90] Naznin, SM Atia, and A. L. A. M. Shawkat. "Judicial Remedies for Forced Slum Evictions in Bangladesh: An Analysis of the Structural Injunction." *Asian Journal of Law and Society* 6, no. 1 (2019): 99-129.

[91] Ibid. p-14.

[92] Ridwanul Hoque opines that "However, the future of PIL-based judicial activism seems to depend much on the judiciary's capacity to increase its focus on justice and generate a dialogic atmosphere to enhance decisional legitimacy, ensure executive compliance and solicit legislative cooperation." Haque, Ridwanul. "Taking justice seriously: judicial public interest and constitutional activism in Bangladesh." *Contemporary South Asia* 15, no. 4 (2006): p- 412.

[93] *Ain o Salish Kendra (ASK) and Others v. Government of Bangladesh and Others* (1999) 19 BLD 488 (HCD).

result, academicians, academics, and judges are increasingly expecting the efficacy of dialogical judicial approaches.

The judiciary as a 'monitoring authority' is, however, doing some good jobs in recent times. Apart from some civil-political rights cases, the Court has wanted to direct the other branches of the government to foster socioeconomic rights by inviting them to co-act. In *Human Rights and Peace for Bangladesh v. Bangladesh* case,[94] the establishment of the food court and appointment of public food analysts were directed by the HCD in accordance with the Pure Food Ordinance 1959. The Court directed the government to implement the order within one year from the judgment. Along with it, acknowledging the court by the timely report was also mentioned in the judgment. In another case *Campaign for Popular Education (CAMPE) and Another v. Bangladesh*[95] where excessive charges of private educational institutions in the name of donation or admission fees were challenged. The Court issued a rule nisi along with an interim order for taking immediate steps by the concerned Ministry. In this case, too, the Court gave an order for submitting a progress report within three months from the judgment. Thus the Court intends to engage itself with other branches of the government in the litigation process, though the effectiveness of such remediation is still in doubt. Even then it can be told that the Bangladeshi Court has initiated a process to adjudicate various rights issues in the way of dialogue among the concerned actors.

The advocates of the dialogical approach always feel concerned about the political domination of legislative and executive bodies,[96] and so they emphasize the judges' role of 'intellectual and functional perceptions of and justice' and keep established the 'judicial authority'. On the other hand, some argue that 'the Court should not hesitate to adopt a bargaining or consensual model if the facts and circumstances of the case merit it.'[97] But to what extent do these aspirations come in the lime of effectivity- that is one of the most important questions to be answered.

This discussion does not argue that there can exist no dialogue between courts and legislatures along with other branches. Rather, it should be. But in doing so there exist some structural limitations upon which consideration needs to be focused on. In that discussion sometimes the core question comes

[94] (2009) 30 BLD 125 (HCD).
[95] *Campaign for Popular Education (CAMPE) and Another v. Bangladesh* (2012) Writ Petition No. 312.
[96] Supra No. 90. P- 21.
[97] Chowdhury, M., and Jashim Ali. "Claiming a Fundamental Right to Basic Necessities of Life: Problems and Prospects of Adjudication in Bangladesh." *Indian J. Const. L.* 5 (2011): 184.

to the light- what would be the normative character of the dialogical approach and whether it is ultimately a real task or rhetorical.

It may be a wrong expectation that in a nascent democratic system the political branches will go even when they disagree with the court's decision. As well as, it is very difficult to find out to what extent the other political branches comply with the decision of the court. In Bangladesh, the record of compliance with the court's decision by the legislature and executive is not systematically managed. That's why it is quite impossible to detect whether the decisions have been implemented eventually after the pronouncement of the court. Along with this, the lack of freedom of the press and suppression of civil society make the actual scenario of adjudication quite undetectable. So, although the judiciary of Bangladesh intends to comply with dialogical methods with other branches of the government it is difficult to ascertain to what extent it is still effective.

Admittedly, perfect compliance with judicial decisions is something illusory. Suppose, the Constitution of Bangladesh denotes that "*It shall 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...*"[98] Here if we observe the words 'planned economic growth', or 'material and cultural standard of living is subject-oriented and context-specific issues. And when these issues come to the court, they need to substantiate that standard using their own discretion. A defined category set by the judiciary often does not conform with other political branches. So it becomes indeterminate to ascertain. Though we suppose that the judiciary becomes capable of setting the specific definition of some socioeconomic rights, the legislature and other branches of government do have the ample opportunity to ascertain that definitions and way of execution in another way. Because all the matters that rest in the hand of the executive and legislature are political. They tend to deal with the issues politically and seek political gain.

If we want to justify the dialogical technique from an ideal standpoint, we might say that no dialogue as deliberation could work or sustain itself unless certain conditions were met. First and foremost, each person must see the other as a partner on an equal footing. There should be no hierarchy. Second, dialogue should be persuasive, with no compulsion allowed. Third, this regulative ideal must guide the conversation process: any solution must be the product of free and rational agreement (or

[98] Article 15 of Bangladesh Constitution.

disagreement) among people who are regarded as equal partners.[99] There is 'legislative responsibility' as well as 'judicial responsibility' for an efficient dialogical approach. Legislative accountability indicates that the legislature will be held accountable for its own political judgments, just as the courts will be held accountable for their judicial decisions. Judges and legislatures are not the 'last' institutes to say the last word in an idealistic sort of institutional dialogical model. No amount of legislative power can override the judges' final responsibility to determine cases in accordance with their own constitutional standards. However, no type of judicial accountability can trump the ultimate responsibility of legislatures to assess what legislation is constitutionally legitimate in light of their own constitutional principles, according to a related notion of legislative responsibility.[100] This would be a form of institutional dialogue.[101] Now, if we judge the current feature of the judiciary-legislature relationship, the potentiality and practical position of the judiciary in bargaining with the legislature and executive organ, then what we will find? So far the Judiciary has not been treated as an 'equal partner' with other branches of the government. Judiciary did not even function in a non-coercive condition. Very often political influence has affected its agency. Here lies the ineffectiveness of the dialogical method.

The Constitutional history of Bangladesh has experienced a state of emergency (1974), one party presidential form of government, and other occupational rules that mounted with assaults on much constitutional founding as well as on the independence of the judiciary. The state of emergency (2007-08) was also imposed even after the restoration of the so-called democratic era in 1990. In the above-mentioned politico-legal history, the Judiciary of Bangladesh has almost shirked its judicial responsibility of upholding people's aspirations or justice during extra-constitutional and martial law regimes. With a few notable exceptions, the SC was extremely deferential to the Executive and resorted to subjective interpretations of the Constitution. What are the reasons for the Judiciary's apathy? Maybe that unconcerned attitude is due to extreme political domination or judicial unwillingness to change the scenario to effectively implement justice and take into a new role. All of these reasons have contributed to the recent understanding of the judiciary-led dialogical method.

[99] Tremblay, Luc B. "The legitimacy of judicial review: The limits of dialogue between courts and legislatures." *International Journal of Constitutional Law* 3, no. 4 (2005): 617-648.
[100] Bickel, Alexander M. *The least dangerous branch.* Yale University Press, 1986.
[101] This form of dialogue would constitute a version of what some have called "coordinate dialogue."

The post-1990 judiciary has set some examples of dialogical methods on civil and political rights, which later on, got influenced the issue of enforcing social and economic rights. In a renowned case *BLAST & Others v. Bangladesh*,[102] the Judiciary introduced a very impactful judgment issuing directions and guidelines against brutal police custody. The Court intended to set some directions regarding arresting power of police under section 54 of the Criminal Procedure Code 1898. Interestingly, the newfound judicial assertiveness invoked the Court to enter into a dialogical method by proactive interaction with other branches of the government, particularly on topics with broad political implications.[103] Even the Judiciary engaged itself in the core political issue like- the President's first-ever Constitutional reference on the issue of 'legality of long-drawn boycotting of Parliament by the opposition members'. In this way, the Judiciary critically analyzed the doctrine of political question.

In *Kudrat-E-Elahi Panir v. Bangladesh*[104] opportunity came for the Bangladesh Judiciary to make creative interpretations of FPSP. Though apparently, it was seen that the AD refused to undertake the authority of Fundamental principles, it stated that the government had an obligation to make all existing local government laws Constitution-compliant, and it mandated that elections to existing local bodies be held within six months, keeping in mind the principle of special representation for women enshrined in Article 9 of the Constitution. This type of indirect enforcement of non-justiciable FPSP shows creative judicial interpretation and therefore, the Judiciary was able to launch "a creative dialogue with the Executive and the Legislature."[105]

Another aspect of the dialogical method propounded by Sujit Choudhry who identifies the 'dialogical' use of comparative public law[106], has been randomly acknowledged in our judicial practice. The latest case of *BNWLA v. Bangladesh*[107] is greatly matched with the Indian *Vishaka* case[108] where the Court issued detailed guidelines as regards sexual harassment of women binding upon the employers and

[102] (2003) 23 BLD (HCD) at 115.
[103] *Najmul Huda, MP v. Secretary, Cabinet Division* (1997) 2 BLC (HCD) at 414. See also *Khondaker Modarresh Elahi v. Bangladesh* (2001) 21 BLD (HCD) at 352, 375, the Court thought that the 'political issue' of hartal (strikes) 'should in all fairness be decided by the politicians'.
[104] (1992) 44 DLR (AD) at 319.
[105] Hoque, Ridwanul. "Constitutionalism and the Judiciary in Bangladesh." *Comparative Constitutionalism in South Asia* (2013): 322.
[106] Choudhry, Sujit. "How to Do Comparative Constitutional Law in India: Naz Foundation, Same Sex Rights, and Dialogical Interpretation." *COMPARATIVE CONSTITUTIONALISM IN SOUTH ASIA*, S. Khilnani, V. Raghavan, A. Thiruvengadam, eds., Oxford University Press: New Delhi (2010). Choudhry, Sujit. "Globalization in search of justification: toward a theory of comparative constitutional interpretation." *Ind. Lj* 74 (1998): 819–92.
[107] (2009) 14 BLC (HCD) at 694.
[108] *Vishaka v. State of Rajasthan,* (1997) AIR SC 3011.

educational institutions until 'effective legislation' is made. The rationale of the judgment was significantly influenced by the Indian decision which is a classic example of using comparative public law. This sort of example is ample in number already discussed in the previous part of this chapter.

From the above discussion, it is found that the dialogical method has been incorporated and used in Bangladesh Constitutionalism for some days. This is also being used in the adjudication of social and economic rights. But the approach taken is not well discussed. Although, presently it has become a global constitutional phenomenon, so brings significance to Bangladesh Constitutionalism. Apparently, the Judiciary of Bangladesh has been diligent to use this method. But it should not be forgotten that in order to implement this dialogical method, various obstacles like- political suppression, occupational rule over the judiciary, lack of judicial endurance, and so on have to be overcome. Commitment towards independence of the Judiciary should be the preference. Otherwise, its benefits will not be available in the true sense. There is no substitute for converting the rhetorical dialogical method into reality.

Finally, the theory of the dialogic judicial method rejects the premise that either judges or legislators are infallible. Simultaneously, dialogic judicial review does not appoint judges to the role of 'Platonic guardians.' The continued rejection of judicial and legislative supremacy is crucial to the continuation of the dialogic judicial method. Dialogue theorists should make it clear that their theories are not intended to instruct judges on how to handle difficult cases, but rather to show how society can work together to find the best solutions to legal disputes.[109]

5.6 Using 'right to life' Discourse: Principle-Based Constitutionalism Being Overlooked

In Bangladesh, the right to life has been taken into account in addressing a wide range of welfare concerns such as slum dweller's case of the right to shelter,[110] ban on imposing VAT on health facilities,[111] child development, maternity benefits, good health,[112] environmental right,[113] a ban on advertisement of cigarettes[114] , etc.

[109] Roach, Kent. "Dialogic judicial review and its critics." *Supreme Court Law Review (2nd)* 23 (2004): 49-104.
[110] *Ain O Shalish Kendra and Others v. Govt. of Bangladesh,* (1999) 19 BLD 488.
[111] *Chairman, NBR v. Advocate Julhas Uddin*, (2010) 15 MLR (AD) 457.
[112] Dr. MohiuddinFarooque v. Bangladesh, (1996) 48 DLR 438. (Radio Active Milk powder case)
[113] Dr. Mohiuddin v. Bangladesh and Ors., (1997) 49 DLR (AD) 1 (FAP 20 Case), Dr. Mohiuddin (BELA) v. Bangladesh, (2003) 55 DLR (HCD) 69 (Environment Pollution Case).
[114] *Professor Nurul Islam v Govt. of Bangladesh & Others,* (2000) 52 DLR 413.

Why the SC of Bangladesh has extended the meaning of 'right to life'? In *Dr. Mohiuddin Farooque vs. Bangladesh and Others*[115] ABM Khairul Haque, J said-

> "The expression 'life' enshrined in Article 32 includes everything which is necessary to make it meaningful and a 'life' worth living, such as among others, maintenance of health is of utmost importance and preservation of environment and hygienic condition are of paramount importance for such maintenance of health, lack of which may put the 'life' of the citizen at naught. Naturally, if the lives to the inhabitants living around the concerned factories are in jeopardy, the application of Article 32 becomes inevitable because not only a right to life but a meaningful life is an inalienable fundamental right of citizens of this country."[116]

Taking experiences from India, the Bangladeshi Judiciary has interpreted the 'judicial enforcement of FPSP' as part of the judicially enforceable FRs. The interpreters of the Constitution have given little concentration to the dynamic interpretation of FPSP and so to interpret the adjudication of the social and economic rights. Although the framers of the Constitution have ascribed regarding FPSP that, "The principles set out in this Part shall be fundamental to the governance of Bangladesh, shall be applied by the State in the 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 unfortunately, all have engaged themselves in the proposition of '(these principles) shall not be judicially enforceable.' In most of the decisions, the concentration mainly evolves in the connotation of 'judicial non-enforceability' of the principles. This kind of judicial attitude, to some extent, may arise contradictions with modern principle-based constitutionalism.

In the Constitutional discussion of Bangladesh, it might be an expected understanding that the legislators deduced the principles and the interpreters inferred the principles as a 'logical oneness' with FRs in order to bridge the gap between principles and rights. But that seldom happened; rather by exposing simply the bare reasonableness of ideas entrenched in the Constitution, the so-called pragmatic objectives have been accelerated without inventing anything new. This manner of weighing principles was quite traditional and usual practiced over the years. Such a conception, however, cannot be an expected and accepted way of judging rights in the long run.

[115] (2003) 55 DLR (HCD) 69.
[116] Ibid. para-23.

Because, in today's constitutional state, principles that were once the ultimate expression of the legal system's logical unity are now being called upon to perform a constitutive task, namely the articulation of a common normative matrix that allows for the dialogical unity of the law of complex societies supported by the constitutional state's institutional architecture. Because the principles are self-contained and have their own validity.[117]

The principles that fulfill a constitutive function are explicit principles with no hidden aim of 'gap-filling.' However, legal academics and scholars in Bangladesh tend to only measure principles having no binding effect with rules that have binding effects, which is known as a 'legal positivist' approach. These types of measurement methods should be abandoned totally. Because, in today's world, principles are considered as if they are always at work, even when rules exist. Apart from having intrinsic value and independent validity, principles are used 'as semantic vehicles of the legal system, shaping the meaning of rules employing what is called 'conforming interpretation.'[118]

But the way the Bangladeshi Judiciary has adopted the 'right to life' proposition in adjudicating social and economic rights does not conform to the intrinsic value and independent validity of principles enshrined in the Constitution. Probably, they have failed to understand the dynamic value of principles and so taken shed of FRs, though some powerful words have been inserted in the time of the making of the Constitution- 'fundamental to the governance of Bangladesh', 'tool in the making of laws', 'guide to the interpretation of the Constitution, 'form the basis of the work of the State'. Not only that, there are so many inspirational and influential words and aspirations inscribed in the preamble or in the declaration of the Constitution that have conformity with social and economic rights adjudication, remain untenable.

The judicial trend not only subordinates the fundamental spirit of the Constitution but also creeps certain content-based directives by approaching them merely as 'legal positivists' or having just the rule-based rationale, that is, 'the principles are not judicially enforceable.' As a result of this trend, the judiciary will need to rely on FRs to implement the principles. Although, the principles have their own constitutive ability. Taking it into consideration, the social and economic rights as enshrined like principle in the Constitution have, too, their own validity to be enforced.

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[117] Zagrebelsky, Gustavo. "Ronald Dworkin's principle based constitutionalism: An Italian point of view," Oxford University Press and New York University School of Law 2003. I.CON, Volume 1, Number 4, 2003, pp. 621-650

[118] Ibid. p- 637.

Now, the question may arise when two principles or fractions of principles or rules and principles contradict each other, what will be the solution. The legal scholars have answered this question by prescribing the 'negative enforcement' of principles.[119] The discussion has some differences with this view.

This sort of difficulty cannot be overcome through the usual criteria used to resolve antinomies between rules or principles by imposing 'preferability'. It is a very common trend of legal positivists to prefer rules over principles because they assume less enforceability over principles. This approach cannot work, however, for purposes of validating the principles of the constitutional state. Principles should all co-exist, as they all guarantee protection and are all hallowed in the Constitution. This model of coexistence denotes a combined solution.

The constitutional principle of equality requires equal treatment of equals and unequal treatment of unequal. But what ought to be considered, is precisely context-specific. That is why, articles 10, 14, 15, 17, 19, 20, and others which are known as fundamental principles should not be interpreted only in the ambit of 'these principles are not judicially enforceable'. Fixation to only one specific answer will not cope with the changing situation. For example, the importance of life as a value, performing an abortion by a physician may be a criminal offense. But 'protection of life' as a principle denotes discussion regarding the rational consequences of abortion, that is- whether it is logical to somebody who voluntarily wants to terminate the pregnancy. And that very consideration has to be judged by the difference of situations, by choice or by necessity. In the same way, when the Constitution declares to ensure 'free and compulsory education to all children to such stage as may be determined by law'[120] the 'stage determined by law' should be meant contextually. If it is fixed to the connotation that 'positive enforcement of FPSP is barred by law' only then the ever-growing trend of a dynamic instrument like the Constitution will remain futile. Rather in the opposite, understanding the objective situations, selecting proper constitutional theories, interpreting statutes and precedents, and

[119] . Waheduzzaman, Moha. "Economic Social and Cultural Rights under the Constitution: Critical evaluation of Judicial Jurisprudence in Bangladesh," *Bangladesh Journal of Law* (vol. 14 no(s) 1 & 2), June & December 2014, Published by Bangladesh Institute of Law and International Affairs (BILIA). The author has said, "... only positive enforcement of FPSP is barred by Article 8(2) because negative enforcement, in the absence of any raison d'etre, cannot come under the bar of Article 8(2) of the Constitution. So fundamental principles set out in Part II shall not be judicially enforceable means only that judiciary cannot compel the state for their progression but can always pin down retrogression whether by arbitrary and unreasonable law or by detrimental executive action."

[120] Article 17 of the Bangladesh Constitution.

ensuring the standard of political morality and imperatives of legal continuity will decide every particular case on their particular basis.

What will be the role of judges in deciding the cases, especially principle-oriented socio-economic cases? Ronald Dworkin has represented a general preview relating to this matter. There is rigorous adherence to the law as it stands in rule-based jurisprudence. The discretionary power of judges comes into play when there is a gap in the law or when the strict legal connotation is insufficient to deal with a particular issue. Principle-based jurisprudence, on the other hand, necessitates productive labor on the part of the judge, who must grapple with a mountain of normative information in order to reconcile it with the situations at hand. However, because this activity is reconstructive rather than creative, Dworkin's judge is not entitled to operate as an 'activist' in creating new laws in dealing with new instances. The judge's job is to 'find' or 'disclose' the rights and obligations of litigants, not to 'create' new rights and obligations.[121] This discussion clearly expresses that the judges do have huge responsibilities to execute social, and economic rights. The principles, where the social, and economic rights rest, are the latent source of discovery. The judges only need to discover and reveal the intrinsic values, rationality, and justifications of principles to execute socioeconomic rights.

The adjudication of social and economic rights, like- the rights to food, shelter, cloth, education, health, and work requires public policy to promote and secure the downtrodden people. More specifically, this kind of promotion or fostering social good or ensuring social reform is mostly of political decision. But then again, the judiciary should play a significant role in furthering those initiatives. For that purpose, only taking shelter of 'right to life' discourse to actualize social and economic rights will not be enough. Rather the Judiciary should think and tend to cross the border and come over the line. This kind of approach may open up a new horizon of interpretation. It may create a newer understanding of the intrinsic value and independent validity of principles. But for being that the judges do not need to fasten with the false image of a 'herculean judge'. Along with being committed to the newer understanding of principles, judges only need to focus on the Constitutional history, take internal-external aids to interpretation, and uphold the inherent spirit of the Constitution. These are the interpretive tools that can bring further justification and rationality to enforcing social and economic rights.

[121] Ronald, Dworkin. Ronald. *Freedom's law: the moral reading of the American constitution.* Oxford University Press UK, 1996.

5.7 Concluding Remarks

In the post-independence era, Bangladesh's court had a very short amount of time to operate in a democratic environment to develop its constitutional jurisprudence. However, over time, the judiciary began to unlock legal rigidity. A judicial endeavor to overcome procedural difficulties and technicalities was observed in the early stages of the Constitutional process which in the later period, with the broad interpretation of the right discourse, has moved forward and achieved some significant milestones. Thus, a wave of judicial activism can be found in Bangladesh during the post-autocratic era, indicating a major paradigm shift fuelled by creative judicial interpretations and inspired by judges' self-awareness and commitment to the right discourse.

Although in comparison with India, it is still very meagre and within that ambit, the extent of the judicial initiative is mainly observed as regards civil and political issues, with very few in the field of social and economic rights. Being cautious to get over the line for at least 25 years, the Judiciary of Bangladesh gradually expanded its tail feathers after the FAP case. That was not because they were unaware of what the Indian judiciary had already accomplished or other constitutional developments that had erupted around the world. Rather, Bangladesh's judiciary held over until there was overwhelming pressure from established legal circles. Along with it, the constitutional practice of Bangladesh was extremely influenced by British Colonial and Pakistani semi-colonial legal thought. The formalistic approach along with paying heed only to the bare text of the Constitution has kept constitutional development lay behind. Such judicial attitudes have also been noticed while dealing with social and economic rights.

As regards enforcement of social and economic rights, the Judiciary of Bangladesh mainly follows the 'right to life' discourse and 'negative enforcement' doctrine. Rarely they have positively enforced social and economic rights. Having said that the Court introduced 'continuous mandamus', dialogical method, and some other structural modifications by which their involvement in social and economic rights adjudication becomes more focused. Still, many more miles to go. Newer understanding of principles, discovering more rationality and justifications of enforcing social-economic rights by digging deep into the constitutional history, and above all, upholding the inherent spirit of the Constitution are some of the issues which the Judiciary needs to focus on.

In this chapter different discourses, and arguments relating to judicial enforcement of social and economic rights have been discussed along with their critique. In the last part of this chapter, there

has been discussed the Intrinsic value and independent validity of principles which, according to the author, may widen the interpretive approach. Along with it, the reference of internal-external aids to interpretation has been shared viewing them as interpretive tools. These are the issues that have been extensively discussed in the next chapter. The purpose of the discussion is to justify these interpretive tools better suited for the enforcement of social and economic rights. For a better understanding of using these tools, the constitutional framework and constitutional history of Bangladesh have been taken into consideration.

Chapter- 6

A Search for a New Discourse

6.1 Introduction

The very structure and content of the preamble, Fundamental Rights or Principles whether directive or fundamental, are designed to be made to replicate the people's aspirations, dreams, and desires. The Constitutions of South Asian countries, especially India, Pakistan, and Bangladesh, are no exception in this regard. Anyone will find here a very wide angle of rights either in the form of rules or principles. The structure and content of the provisions having those rules or principles suggest an illuminating attribution- 'Justice is not subordinate to law.' They promote a common observance that freedom, human dignity, and equality will be ensured for all.

In an exploitation-free society fundamental human rights, rule of law, equality, justice, and freedom stand in harmonization. But, at the same time, anyone will notice that in the interpretation of the different constitutional provisions, there exists a tendency to deal with the economic rights differently from the political rights. As if, political freedom will be established all alone and so it should be prioritized over economic freedom. But lexicographically, that is a wrong connotation and did not become materialized anywhere in the world. Rather both categories of rights, whether civil-political or social-economic, are equally connected and are a prerequisite for achieving individual freedom in a true sense. So, it will not be an over saying that although social and economic rights are viewed differently in the constitutions of the countries mentioned above, their judicial recognition is not beyond the realm of constitutional legitimacy. And the judiciaries of India, Pakistan, and Bangladesh have performed their role in upholding constitutional legitimacy while recognizing social and economic rights. The features of the judicial attempt of India, Pakistan, and Bangladesh have been elaborately discussed in the previous three chapters- 3rd, 4th, and 5th respectively.

Constitutional legitimacy confers and becomes prioritized over legislative supremacy in different articulations in the South Asian countries. For example, in India, it was expressly deliberated in the *Minerva Mills* case[1] where the Court held that - "government, legislature, executive and judiciary are all

[1] *Minerva Mills Ltd. and Others. v. Union of India and Others, (*198)0 AIR SC 1789.

bound by the Constitution, and nobody, is above or beyond the Constitution." Article 7 of the Constitution of Bangladesh clearly stipulated the supremacy of the Constitution over all kinds of authority.[2] Although the Constitution of Pakistan does not have such expressive stipulation, even in Article 141 there is a bar to making any kind of law abrogating constitutional supremacy.[3]

Along with it, these constitutions are of a common view, of course in a different notion, towards approaching the judiciary as the 'guardian', 'protector' of the Constitution. The scope of judicial review over the activities of the executive and legislature has been permitted through different case laws steamed from various provisions of the Constitution. In India, there are many case laws where the doctrine of judicial review was profoundly established.[4] The Pakistan Constitution could not be able to formulate such an approach. Although, within a limited scale, the Judiciary enjoys the power of review.[5]

In this particular perspective, the Constitution of Bangladesh has provided ample scopes and opportunities for the Judiciary to function properly to secure the ends of justice. The Judiciary of Bangladesh has been given the privilege to act as the guardian of the Constitution and accordingly to review the administrative and legislative acts and, if thinks fit, may bring down the unconstitutional efforts of the authorities. This is an exceptional phenomenon and rarely found. First of all, if Article 102(1) is to be considered- the Court can validly exercise its remedial authority by way of directions or of orders to any person or authority in any subject matter if it considers that 'may be appropriate for the enforcement of any the fundamental rights'. Secondly, in Article 102(2) the term "efficacious remedy" is used.[6] The measurement of the efficacious remedy totally rests upon the Judiciary. Thirdly,

[2] Art. 7(1) of the Constitution of Bangladesh- "All powers in the Republic belong to the people, and their exercise on behalf of the people shall be effected only under, and by the authority of, this Constitution." Article 7(2) of the Constitution provides- "This Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic, and if any other law is inconsistent with this Constitution and other law shall, to the extent of the inconsistency, be void."

[3] Art. 141 of the Constitution of Pakistan- "Subject to the Constitution, Majlis-e-Shoora (Parliament) may make laws (including laws having extra-territorial operation) for the whole or any part of Pakistan, and a Provincial Assembly may make laws for the Province or any part thereof."

[4] The Supreme Court of India in different case laws established the doctrine of judicial review. Some of the examples are- *Golaknath v. State Of Punjab,* (1967) AIR 1643; 1967 SCR (2) 762; *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225; AIR 1973 SC 1461; *Minerva Mills Ltd. and Others. v. Union of India and Others,* (1980) AIR SC 1789; *Supreme Court AOR Association Vs. Union of India*, (2015) WRIT PETITION (CIVIL) NO. 13.

[5] Art. 188 of the Pakistan Constitution where it declares- "The Supreme Court shall have power, subject to the provisions of any Act of Majlis-e-Shoora (Parliament) and of any rules made by the Supreme Court, to review any judgement pronounced or any order made by it."

[6] Efficacious remedy implies a form of relief that can be obtained at a different forum from the current forum. It is generally necessary to exhaust other efficacious remedy before filing writ petition. Art. 102(2) of the Bangladesh

the term mentioned in that section "equally" is a noteworthy point because by applying this, the Judiciary can move to provide an equal remedy in comparison to damage suffered by a legal personality in a particular case. This is absolutely a fascinating remedial authority provided by the Constitution to the Judiciary. Fourthly, considering Article 104 of the Constitution, it has been stated that the Apex Court can 'issue directions, orders, decrees or writs as may be necessary for doing complete justice in any case or matter pending before it.' Here the term 'complete justice in any case or matter' has given plenty of opportunities to exercise juristic prudence and preference to secure justice.[7]

Analyzing these provisions, especially the clauses mentioned above enshrined in the Constitution of Bangladesh, it can be said that the Judiciary of Bangladesh can avail many more options to ensure the ends of justice in a variety of cases pending before it. The subject matter also includes the enforcement of social and economic rights. Although the Constitution itself expressly bars the judicial enforceability of this category of rights by inserting Article 8(2).[8] This is, too, a common feature in the Constitutions of India and Pakistan. Article 37 of the Indian Constitution and Article 30(2) of the Pakistan Constitution restrict the enforceability of the principles where the social and economic rights rest in.[9] Despite saying all these, the Indian Judiciary has made a profound footstep in materializing social and economic rights by stepping down the constitutional bar. The wide explanation of 'right to life' discourse, the huge upsurge of Public Interest Litigation (PIL) and later on Social Action Litigation (SAL), judgments incorporated as state policy and binding law and so other initiatives have transformed Indian Judiciary into the activist judiciary and to become a 'lighthouse' in the judiciary led constitutional expansion. A detailed discussion has been done in the third chapter. The Pakistan

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Constitution implies the inherent power of the High Cout Division to issue prerogative writs or order to invoke its extraordinary jurisdiction. Thus, a person can avail writ petition only in a case where he does not have any other alternative remedy or there there exists good grounds to invoke the extra ordinary writ jurisdiction for the High Court Division to secure the ends of justice.

[7] Not only the opportunities of dealing the case pending before the Court rather the Constitutional provision ensures the binding effect of that decisions delivered by the Court. See Art. 111 of the Constitution of Bangladesh where it states- "The law declared by the Appellate Division shall be binding on the High Court Division and the law declared by either division of the Supreme Court shall be binding on all courts subordinate to it."

[8] The partial portion of Art. 8 provides a check against judicial enforceability of social economic rights, the rights which have been referred in the Constitution in the form of principles. The Article states- 'The principles set out in this Part…. shall not be judicially enforceable.'

[9] The partial portion of Art. 37 of the Indian Constitution is as follows- 'The provisions contained in this Part shall not be enforceable by any court…' and Art. 30(2) of Pakistan Constitution states- 'The validity of an action or of a law shall not be called in question on the ground that it is not in accordance with the Principles of Policy, and no action shall lie against the State, any organ or authority of the State or any person on such ground.'

Judiciary did not follow the same path. Though after 2007, the Judiciary has entertained some PILs on different social and economic issues. Various judgments (regarding the right to education) have invoked constitutional amendment by turning the right to education from the mere principle of policy to FR. But, still, the main trend of Pakistan's constitutional practice is to approach social and economic rights through the legislative and administrative process. The establishment of Majlis-e-Shoora (Parliament) especially to materialize social and economic rights is a distinct phenomenon in the South Asian rights discourse. A detailed discussion can be found in the fourth chapter of this thesis. The constitutional practices in Bangladesh did not follow, in toto, either the practices of India or Pakistan. Although, the trend is more towards the practices of India and admittedly, there is a lot to take from both countries.

While there is much to be gained from the two countries in their constitutional practices, there is no denying the fact that the birth of the Constitution of Bangladesh is very much distinctive and that the history of constitution-making speaks about the sound realization of social and economic rights. This thesis seeks to understand the significance of this statement. If the constitution can be read in the profundity of its history, if the deep significance of the Articles and their inter-relation can be understood with their objective of insertion, if the relevance of the Articles can be determined in accordance with the context, then the issues of implementation of socio-economic rights can be understood more accurately. The pre-constitutional documents which work as an external aid to interpretation, are a hidden treasure for understanding the enforcement justification and rationality of social and economic rights. After fifty years of Independence, understanding this kind of justification has a huge potential for finding the social-economic rights from a different perspective.

As previously mentioned social and economic rights have been recognized as 'principles' in all the above-mentioned three countries. All of them have treated the principles through the lens of rules. They did not pay much importance to the reviving character of principles and so become indifferent to the contextual interpretation of principles. This study has relied upon the importance of contextual interpretation of principles (having any other name-fundamental or directive) and showed newer arguments for enforcing social and economic rights.

So, the progression of the discussion in this chapter has been bifurcated into two main parts- firstly, it has attributed the newer understanding of principles by pointing out the existing lacunas of treating principles along with analyses of different constitutional provisions for judicial enforceability of social

and economic rights and secondly, the attempt of finding out different pre-constitutional documents, subsequent economic-social development as external aid and analyses of the preamble as internal aid for bringing more justification and rationality in the interpretation of enforcement discourse of social and economic rights. But before that discussion, another important aspect of discussion has been placed here regarding the identification of 'South Asian Judicial Discourse' as a part of Global South Constitutionalism opposite to Global North. The judicial activism of South Asian judiciaries has been portrayed in this chapter by a discussion titled 'synergistic relationship among rules, principles, and policies.' All the discussions have been decorated in six different parts of the chapter. One thing to be noted, although judicial enforcement of social and economic rights of three different South Asian countries has been discussed in three different chapters of this thesis, the sole intention of this chapter is to revitalize the enforcement discourse by taking into consideration of Bangladesh's perspective. All the pre-constitutional documents used here are related to the constitutional history of Bangladesh. At the same time, different statistics of subsequent social and economic development shown here are of Bangladesh. Though the discussion of 'further interpretation of principles' is suited for any country having a constitutional resemblance to Bangladesh, the examples of constitutional provisions used for that discussion have been cited from Bangladesh Constitution. The discussion about 'using preamble as an internal aid to interpretation' is also about the preamble of Bangladesh.

South Asian judicial discourses are quite distinctive from the Global north. In the previous chapters, we have seen different approaches of the judiciaries of three South Asian countries while dealing with social and economic rights. Their approaches create differences because of their distinctive political, social, and economic background from those of countries belonging to the Global North. The differences also lie in the structure and content of the Constitutions of the South Asian countries. The next discussion has focused on this issue.

6.2 South Asian Judicial Discourse: Added New dimension in the Global South Constitutionalism

A Constitution is not the combination of some mere rules, it also contains some set of ideals that invigorate the normative core of constitutional order.[10] These ideals are naturally universal in their character derived from the international treaties, covenants, and agreements. Sometimes they also

[10] Rawls, John. *Political liberalism.* Routledge, 2020. 227 speaks of "constitutional essentials" that involve both "fundamental principles that specify the general structure of government and the political process" and "equal basic rights and liberties of citizenship that legislative majorities are to respect."

represent the context of local history and particularity of social incidents. Thus it can be told that the normativity of a Constitution is the result of the dialectical relationship between general norms and particular history. While discussing the South Asian Judicial discourses within the realm of global South constitutionalism, it is essential to take into account these dual aspects of normativity.

The repository of ideals is generally contained in the preamble or the form of principles or the bill of rights in some countries. Irrespective of south and north, almost all the countries across the world follow this general tradition. In that sense, the incorporation of ideals has a general character. But which country upholds which ideals is the matter of measuring their priority. Generally, Western Europe and North America made very little saying about the protection of ESC rights, rather emphasizing CP rights. To understand the reasons for such standing of the global north, it is necessary to focus on the history and context of their freedom struggle. Mostly the constitutions of these countries were the result of the struggle against political repression and strive for liberation. For that reason, they have emphasized much more individual liberty and freedom from the occupation of authority and the State.[11]

The French declaration adopted in 1789 was one of the core documents of modern civilization where the aspiration of emancipation was expressed. In that Declaration Article 2 reckons- "the aim of all political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression."[12] It is known to all that this great revolution was upheaved out of feudal society prevailing than a broken-down economic condition, even then the Declaration did not mention the right to food or housing or any rights relating to economic issues. Although property right was there as 'inviolable' and 'sacred'.[13]

The U.S. Constitution was the by-product of the struggle against British tyranny where 'people were forced to escape the repression of their religious liberty in Europe.'[14] That is why the Constitution of the USA focused on freedom of expression and religion. In this Constitution also there are property rights for the citizen which is indirectly connected with economic rights but even then there is no such

[11] Maldonado, Daniel Bonilla, ed. *Constitutionalism of the Global South: the activist tribunals of India, South Africa, and Colombia*. Cambridge University Press, 2013. 45.
[12] French Declaration on the Rights of Man and of the Citizen, article 2, available at http://www.hrcr.org/docs/frenchdec.html
[13] Ibid, Art. 17.
[14] Supra No. 11, p-46.

provision in the Constitution that directly protects the social and economic rights of an individual.[15] The same thing happened in the Canadian Charter of Rights and Freedoms. This Charter of Rights and Freedoms although recognizing many CP rights did not insert anything for the protection of social and economic rights for individuals.[16]

In contrast, many constitutions belonging to the Global South have introduced transformative aspects in their respective constitutions. Specifically, their attempt is not only to stand in the constitutional 'status quo' position but to 'commit the state to overcome racial, ethnic, gender-based and economic inequalities in society.'[17] The countries linking to the global south are tending to give importance to including social and economic rights either by direct incorporation as FRs or at least by judicial interpretation coupled with FRs. But this kind of tendency is less in the countries within the ambit of the global north. The reasons may be that their residents are likely to enjoy at least some level of basic rights like food, cloth, shelter, health, or education. Social safety nets are strong there while that type of protection is generally applicable for the privileged, economically viable but not for the most marginalized people of the global south. [18] In this context, as a part of the global south, the judiciaries of South Asia play a role in dealing with the enforcement of social and economic rights. There is some evidence encompassing here that the political process has utterly failed to address the crises of the poor. Lack of will by the policy-makers and systematic abuse of the process do not upheaval the aspirations of the mass people. Then the Judiciaries need to come forward to make some roles. Among the South Asian countries, judiciaries of India, Pakistan, and Bangladesh are trying to put some effort to make a setback. And of course, constitutional history supports their stand.

The Indian Constitution emerged from the struggle against British tyrannical rule. India was within the claw of extreme poverty caused for the British exploitation for about two hundred years. After the Independence, an attempt was taken for making a Constitution. In the CAD, it was an agreed view to incorporate the aspiration of economic and social freedom. As the prominent lawyer, Setalvad wrote- "there was near unanimity on enacting provisions designed to bring about an egalitarian society with

[15] Michelman, Frank I. "Socioeconomic rights in constitutional law: explaining America away." *International journal of constitutional law* 6, no. 3-4 (2008): 663-686.
[16] Supra No. 11.
[17] Bilchitz, David, ed. *The Evolution of the Separation of Powers: Between the Global North and the Global South*. Edward Elgar Publishing, 2018. 9.
[18] See, Couso, Javier A. *The changing role of law and courts in Latin America: From an obstacle to social change to a tool of social equity*. na, 2006. 61, 73.

social justice."[19] For that reason the preamble declares the aspiration- *"WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a [SOVEREIGNSOCIALIST SECULAR DEMOCRATIC REPUBLIC] and to secure to all its citizens: JUSTICE, social, economic and political."*[20] Having said that the policymakers did not introduce 'enforceability' to social and economic rights at the initial stage of forming the Constitution. Probably that was too early to incorporate because of its shabby economic condition at that period where these rights were difficult to materialize immediately.[21] Consequently, the Constitution makers divided the whole category of rights and inserted the CP rights into part III as 'enforceable' FRs and social and economic rights into part IV as 'judicial non-enforceable directive principles. The directive principles, although, bear a 'non-enforceability' clause, they are "fundamental in the governance of the country and it shall be the duty of the state to apply these principles in the making of laws."[22] Part IV of the Indian Constitution includes the Right to work, education, health, living wages of the workers, raising the level of nutrition and standard of living, and so on.[23] Thus the principles set in this part comprehensively approach economic and social justice for the people at large. That was a clear reflection of the aspiration of the Indian nation fighting for centuries against the oppressive forces.

Historically connected with India, the other two countries Pakistan and Bangladesh have gone through the same way of struggle. What Indian people have aimed at in their liberation movement same was done by the Pakistani people. The desire for social justice, economic freedom, and political and civil rights was reflected, to an extent, in the Preamble, PP, FRs in the Constitution of Pakistan. Alike India, here also the social and economic rights found their place in the Constitution as 'principles' and were treated with the same notion that they would be judicially non-enforceable by article 30(2). However, the Judiciary of Pakistan dealt with social and economic rights through creative interpretation of provisions and by PIL. In the early 1990s, PIL was initiated with an intention to alleviate the miseries of the down-trodden people through recognition of social rights.[24] From then onwards, a huge number

[19] Setalvad, Atul M. "The Supreme Court on Human Rights and Social Justice: Changing Perspectives", in BN Kirpal (ed.), "*Supreme but Not Infallible: Essays in Honour of the Supreme Court of India*", Oxford University Press, 2000. 233.
[20] See Preamble to the Constitution of India.
[21] See Setalvad, supra note 19, p- 233. The Chief of the Drafting Committee, Dr. B. R. Ambedkar said, "a state just awakened from freedom might be crushed under the burden unless it was free to decide the order, the time, the place and the mode of fulfilling the Directive Principles."
[22] Article 37 of the Indian Constitution
[23] Part IV of the Indian Constitution.
[24] Shah, Nasim Hasan. "Public interest litigation as a means of social justice." *PLD Journal* (1993): 31-34.

of PILs are filed on a variety of issues including educational rights, discrimination, a healthy environment, protection from oppression, and so on.[25] In this way, the constitutionalism of Pakistan attempts to ensure inclusivity and 'liberalizes the adversarial system on behalf of the marginalized people.'[26]

Bangladesh as a country is very much connected historically, socially, and culturally with India and Pakistan. Together these three countries were called as subcontinent before 1947. That is why the constitutional history of Bangladesh cannot be separated from that of the other two countries. Although the struggle of Bangladesh was not only against the British tyrannical rule but also against the Pakistani occupational rule. So, anyone can find here the 'continuation' of history along with India and Pakistan as well as the 'break' with them and step into a newer historical upstairs. The Language Movement in 1952, the education movement in 1962, the six points demands in 1966, the mass upsurge in 1969, and later the Proclamation of Independence in 1971 all are the clear manifestation of the aspiration for self-determination of the Bengali nation against the Pakistani Rulers. Throughout this historical journey, the longing for rights to food, cloth, shelter, health, and education was equally cited with equality, equal protection of the law, anti-discrimination, state repression, freedom of speech, and through.[27] That was reflected in the Preamble of the Bangladesh Constitution "*it shall be a fundamental aim of the State to realize through the democratic process to socialist society, free from exploitation- a society in which the rule of law, fundamental human rights and freedom, equality, and justice, political, economic and social, will be secured for all citizens.*" Although, like India and Pakistan, the Constitution makers of Bangladesh bifurcated the rights and placed social and economic rights in part III as 'judicially non-enforceable' FPSP and CP rights in part IV as 'enforceable' FRs. Despite the restrictions, the judiciary has been able to address some of the socio-economic rights by negative enforcement of Art. 8(2) of the Constitution, making corroborative relation of some social and economic rights with 'right to life' discourse enshrined in Articles 31 and 32 of the Constitution.

From this standpoint, it can be said that despite having an enforceability bar, the judiciaries of South Asia tried to enforce social and economic rights by reacting to their own histories and particularities to a certain extent. Although there is a discussion that the entrenchment of social and economic rights

[25] Ibid.
[26] Hussain, Faqir. "Access to Justice," *PLD Journal* 10, 1994.
[27] One of the interviwees Mohammad A. Sayeed expressed this view- "While CAD has greater legal legitimacy to be used as interpretative aid, political documents may have moral or sociological legitimacy."

is nothing but some promises or expectations deliver very few to the marginalized people and as such their inclusion in the constitutions as like principles is a "bitter mockery to the poor."[28] Some other also doubts whether the judiciary is the proper authority to deal with the enforcement mechanism, rather the rights should be executed through the political process.[29] But it is the whole truth and nothing but the truth that the judiciaries of this particular boundary have not allowed social and economic rights into simple 'paper rights'. Their contribution to this particular field is undeniable. Taking the perspective of Bangladesh, fifty years have passed since its liberation, but a lack of political will to earn fruitfulness in respect of social and economic rights is creating an abundance of poverty. Recent research by the *Bangladesh Bureau of Statistics* (BBS) shows that income inequality is increasing in the country. The average monthly income of the poorest 20 lakh families is Tk. 746 rupees whereas the average monthly income of the richest 20 lakh families is Tk. 79 thousand.[30] This economic disparity extends to all the other sectors. In many ways, the issues are discussed, but the political role in resolving them is not notable. The judiciary is playing some role in this regard. This indicates that the weakness of the political power sometimes makes scope for the judiciary to act.

In an article, Upendra Baxi preferred a comment that "our notions of what judges may, and ought, to perform are thus liable to be held within the dominant North juristic traditions. South judicial activism breaks that theoretical mold."[31] This is the very difference that provides the global south a distinct position. And within that realm, the South Asian judicial discourse amplified some new phenomena. Right to life discourse, suo motu adjudication, relaxing procedural and standing barrier of an aggrieved person, incorporation of PIL and SAL, providing structural injunction in the form of continuous mandamus giving relief through a series of orders for a period of time[32]- are some of the contributions which also provide the South Asian Judicial discourses into a unique stand.

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[28] O'neill, Onora. *Towards justice and virtue: A constructive account of practical reasoning*. Cambridge University Press, 1996. 133.
[29] Sunstein, Cass R. "Social and Economic Rights-Lessons from South Africa." *Const. F.* 11 (1999): 123.
[30] Report of Daily Prothom Alo. Available at: https://www.prothomalo.com/business/analysis/%E0%A6%B8%E0%A6%AC%E0%A6%9A%E0%A7%87%E0%A7%9F%E0%A7%87-%E0%A6%97%E0%A6%B0%E0%A6%BF%E0%A6%AC%E0%A7%87%E0%A6%B0-%E0%A6%9A%E0%A7%87%E0%A7%9F%E0%A7%87-%E0%A6%B8%E0%A6%AC%E0%A6%9A%E0%A7%87%E0%A7%9F%E0%A7%87-%E0%A6%A7%E0%A6%A8%E0%A7%80%E0%A6%B0-%E0%A6%86%E0%A7%9F-%E0%A7%A7%E0%A7%A7%E0%A7%AF-%E0%A6%97%E0%A7%81%E0%A6%A3. (Last accessed- 2nd February 2022)
[31] Baxi, Upendra. "The avatars of Indian judicial activism: Explorations in the geographies of [In] Justice." *S. Verma and Kusum (eds) The Indian Supreme Court: Fifty Years Later* (2000): 156, 168.
[32] *Campaign for Popular Education (CAMPE) and Another v. Bangladesh*, (2012) Writ Petition No. 312.

Since the enforcement of social and economic rights is one of the most discussed points in global constitutionalism, it also becomes crucial to the discussion of global south constitutionalism and accordingly is now a central character in South Asian judicial discourses. The enforcement of social and economic rights may earn tension within the power balance of the government, may be addressed as a 'threat' to the traditional conception of the separation of power doctrine, nonetheless, the Court will have to play its role in furthering the way of enforcing these rights. The Court must evaluate the defects of social safety nets and assess different policies of the government. Along with it, they have to push the government to enforce new programs, make favorable laws, and correct bureaucratic dysfunctions. The Court also needs to be creative enough to fill the gaps created by the executives and legislative bodies. So the traditional notion of the role of the Courts as being a supervisory body does no longer exist, rather the socio-political design of some countries belonging to the global south permits the Courts to become the vanguard of people's contemplation and desire.

6.3 Synergistic Relationship between Rule, Principle, and Policy: The Growing Tendency

The term used in the title 'synergistic' replicates such a model of relationship where two different entities combinedly produce a greater effect than the sum of their separate effect. Rules or Principles separately cannot create such significance as they can do in a combined way. If it is assumed that CP rights are rules and ESC rights are principles and then approach them combinedly, the justification of the above-mentioned term will certainly be understood. Although traditional constitutional interpretation tends to differentiate rules from principles, the growing tendency is to treat these entities in a combined position. This understanding will bring us to a newer height of constitutional jurisprudence, which will be addressed in the latter part of this discussion.

In the previous discussion, it is seen the partition of rights designed in the Constitutions of India, Pakistan, and Bangladesh. This very structure of the Constitution gives birth to a controversy of understanding regarding rights and principles. Although different documents of international human rights (UDHR, ICCPR, ICESCR) confers the combined idea of rights requiring that the State should equally treat both civil-political and social-economic-cultural rights. The impact of segregation of rights brings forth the segregated approach of the Judiciary. This kind of approach was visible in India, Pakistan, and Bangladesh in the early days of the constitutional journey. Just take an example of Bangladesh in their famous *Kutrat-E-Elahi Panir and others v. Bangladesh* case[33] where Shahabuddin, J

[33] (1992) 44 DLR AD

clarified the reasons for judicial non-enforceability of principles by stating that the implementation of principles depends upon the socio-economic development of the country, enough resources, technical know-how, and many other things. In the same case, Mustafa Kamal, J elaborated the connotation theoretically by conferring the view that in the Constitution of Bangladesh the principles do not have a clause like Article 26 which is attached to the FRs. According to him, 'this omission is deliberate and calculated.' Secondly, Article 8(2) guarantees the use of principles while making laws. That means the provision distinguishes law and principles and thirdly, Justice Mustafa Kamal referred to Article 152(1) where the term 'principle' is absent in the definition of law.[34] and then said, "[t]o equate 'principles' with 'laws' is to go against the law of the Constitution itself…. Not being laws. These principles shall not be judicially enforceable."[35] This view reflects the understanding of the Bangladesh Judiciary regarding principles.

Although that approach has been changed over time in India, Pakistan, and Bangladesh. That has already been extensively discussed in the third, fourth, and fifth chapters. In short, it can be told that the changing notion of the judiciaries has been evolved by taking up the struggles of "the poor, the weak, and the destitute" and "seeking protection of the Court against exploitation, injustice, and tyranny."[36] The Indian Judiciary attempted to review the object and aim of the Constitution and used it to interpret the FRs taking cognizance of directive principles and preamble. *Kesavananda Bharati* case[37] was the perfect example where the Indian Judiciary resorted to the principle of basic structure. The same happened in Bangladesh in *Anwar Hossain Chowdhury vs. Bangladesh*, famously known as the *Eighth Amendment* Case.[38] In the above-mentioned two cases, a combined approach (synergistic relationship) was seen. The principle instituted here was basic structure doctrine which confers a method of combined interpretation relying on the structural relationship among preamble, FRs, and directive (fundamental) principles of state policy (DPSP or FPSP). The SC of India in many cases used this principle taking cognizance of the texts of the Constitution.[39] This approach (synergistic

[34] In Art. 152(1) the definition of law is given as such- "any Act, ordinance, order rule, regulation, bye-law, notification or other legal instrument, and any custom or usage, having the force of law in Bangladesh."
[35] Supra No. 33. para-84.
[36] Mehta, Piarey Lal, and Neena Verma. *Human Rights under the Indian Constitution: The Philosophy and Judicial Gerrymandering*. Deep & Deep Pub, 1999.
[37] (1973) 4 SCC 225; AIR 1973 SC 1461
[38] (1989) B.L.D. (SPL) 1, (1989) 41 D.L.R. (AD) 165.
[39] In *Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India*, (1981) A.I.R. S.C. 298, 335 Justice Reddy remarked that "Article 37 of the Constitution emphatically states that Directive Principles 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. It follows that it becomes the duty of the Court to apply the Directive Principles in interpreting the

relationship) in the latter part of the Constitutional history has become a growing tendency in South Asian Constitutionalism.

6.3.1 Principle Becomes Policy

One of the synergistic relationships can be sorted out when the Judiciary so masterly uses principles that makes legislative or executive body to transform the decisions into state policies. It is one of the examples of a combined approach. This is useful to foster social justice by incorporating a new category of rights. Arguably, principles and policies lack legal enforceability but in a combined manner they create much more weight. In South Asian Constitutionalism, this trend is visible. The Indian Judiciary has progressed in this field and set examples. There we will find the judgment of the Court immensely influenced the national budget policy and with that consequence, the government of India has enacted a new law.

One example we can refer to in this regard is the '*Right to Food*' litigation[40] where in response to the failure of the Indian Government to address the hunger and starvation of food, the Court enforced the '*right to food*' taking cognizance of one of the directive principles and with the aid of Article 21 of the Constitution. The case by setting an example of '*continuous mandamus*' expanded its application to all state governments regarding the issues of food, hunger management as well as unemployment. Article 47, one of the directive principles, creates a non-enforceable duty to the State by stating- "The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties…" This explicit albeit judicially non-enforceable principle was regarded by the Judiciary as locating into the right to life discourse under

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Constitution and the laws. The Directive Principles should serve the Courts as a code of interpretation. FRs should thus be interpreted in the light of the Directive Principles and the latter should, whenever and wherever possible, be read into the former. Every law attacked on the ground of infringement of a Fundamental Right should, among other considerations, be examined to find out if the law does not advance one or other of the Directive Principles or if it is not in discharge of some of the undoubted obligations of the State, constitutional or otherwise, towards its citizens or sections of its citizens, flowing out of the preamble, the Directive Principles and other provisions of the Constitution."

[40] See People's Union for Civil Liberties (PUCL) v. Union of India, (2001) Writ Petition (Civil) No. 196 and subsequent interim orders at http://www.righttofood india.org/case/case.html. 99. See Interim Order of May 2, 2003, PUCL v. Union of India, Writ Petition (Civil) No. 196 (2001) (India), http://www.righttofoodindia.org/orders/may203.html (ordering distribution of ration cards to vulnerable individuals and families).
http://www.righttofoodindia.org/orders/nov28 .html (ordering introduction of cooked midday meals at all government primary schools); Supreme Court Order of Oct. 1, 2008, PUCL v. Union of India, http://www.righttofoodindia.org/orders/interimorders .html#boxl9 (directing the judge-led Wadhwa Commission to extend its review of food aid programs nationally);

Article 21 and thus, thereafter, made a robust impact. The SC of India affirmatively incorporated the right to food by interpreting the right to life with human dignity.

The case has had a huge impact in the Indian context. After the decision in the PUCL case, the government of India was bound to increase its budget and allocate millions of dollars to ensure adequate food and nutrition. For example, by the interim order dated 07.10.2004, the budget was increased for the children aged 0-6 to provide them 1-2 rupees throughout India.[41] Another interim order dated 28.11.2001 directed the government "to implement the Mid-Day Meal Scheme by providing every child in every Government and Government-assisted Primary Schools with a prepared mid-day meal with a minimum content of 300 calories and 8-12 grams of protein each day of school for a minimum of 200 days" and further directed that "those Governments providing dry rations instead of cooked meals must within three months start providing cooked meals in all Government and Government aided Primary Schools."[42] Thus, the PUCL case has influenced government policy. Not only that, the PUCL litigation has expanded a new way of making new legislation. This case has so immensely pushed the main political discourse that on 04.06.2009 the President of India announced the enactment of a law named the *National Food Security Act (NFSA)* to provide adequate food to all and assure food security.[43]

While not as influential as India in policymaking, the Bangladeshi judiciary has done something worth mentioning. In 2009, the *Bangladesh National Women Lawyers' Association (BNWLA) v Bangladesh* case[44] can be referred to in this regard. In that case, the 'issue of sexual harassment at workplace and educational institutions' was identified. The Court taking shelter of combined approach decided by articulating fundamental Article 10 (participation of women in all spheres of national life),[45] and Article 17 to 'ensure free and compulsory education to all children, thereafter Article 28 of FRs chapter which confers 'prohibition of discrimination on the grounds of sex', Article 29 to provide equality of opportunity for all citizens, Article 31 to 'ensure the protection of law' and Article 32 to give bar

[41] Ibid.
[42] Ibid.
[43] On 12.09.2013 NFSA was converted into legal entitlement. Now it is named as 'The National Food Security Act 2013' (also 'Right to Food Act') which aims to provide subsidized food grains to the people of India. It includes the Midday Meal Scheme, Integrated Child Development Services scheme and the Public Distribution System. Further, the NFSA 2013 recognizes maternity entitlements. The Midday Meal Scheme and the Integrated Child Development Services Scheme are universal in nature whereas the PDS will reach about two-thirds of the population (75% in rural areas and 50% in urban areas).
[44] (2009) 14 BLC (HCD) at 694.
[45] This article was substituted by "Socialism and freedom from exploitation" by 15th Amendment in 2011.

anything 'deprived of life or personal liberty save in accordance with law'. The Court also referred to various provisions of international human rights documents like- the UDHR, ICESCR, ICCPR, and of course the CEDAW and as such articulated the most comprehensive decision regarding women's rights.

In this judgment, the Court has set 11 points guidelines that have to be followed by the government and other institutions 'until a law has been passed.' Thereafter, the same petitioner filed another writ petition having the same name *Bangladesh National Women Lawyers' Association (BNWLA) v Bangladesh*[46], the Court addressed the sexual harassment committed outside workplaces and educational institutions. The Court in full compliance with the decision previously made in 2009, issued a supplementary set of guidelines. Some newer and elaborated concepts were introduced there. The rampantly used term 'eve-teasing' instead of sexual harassment was barred by the Court and the term 'stalking' was widely defined including unwanted contact through cyberspace, through media, and anything that forces a female to apprehend her safety reasonably. The Court directed all institutions to form the 'Sexual Harassment Complaint Committee' where the women will register their complaints and the committee will investigate the incidents and take appropriate disciplinary action against the wrongdoer if found guilty.

Under Article 111 of the Constitution, the judgments of the SC shall have binding effect. According to this Article, the directions made in the *BNWLA* case have to be complied with by the institutions working in Bangladesh. In response to the directions some of the institutions have already formed anti-sexual harassment policies in their respective organizations or institutions, i.e. BLAST[47], Government Azizul Haque College, Bogura,[48] icddr,b.[49] Finally, in 2018, a draft law titled "*Sexual Harassment at Workplace Act 2018*" was jointly submitted by BNWLA and eight others following the heinous murder of Nusrat Jahan Rafi[50] at Feni.

[46] (2011) BLD (HCD) 31
[47] Approved at the meeting of the Board of Trustees: 29 December 2015 (Amended)
[48] https://www.risingbd.com/bangladesh/news/433005 (Last accessed: 22.01.2022)
[49] https://www.icddrb.org/dmdocuments/icddrb_sex_harass_fs.pdf (Last accessed: 22.01.2022)
[50] Nusrat Jahan Rafi was a 19–year-old Bangladeshi student who was murdered after reporting her sexual assault to authorities. many argued that the crime was happened for the lack of a Sexual Harassment Complaint Committee in the Sonargaon Madrasa (owing to absence of legislation mandating it) that impeded Nusrat's ability to seek recourse against the accused principal which in turn prolonged her ordeal.

Unfortunately, there is no specific legislation impeaching "sexual harassment" in Bangladesh. Although it cannot be said that in our laws the issue of sexual harassment has not been addressed. Section 509 of the Penal Code 1860 and section 10 of the *Nari-O-Shishu Nirjatan Daman Ain 2000* (as amended in 2003) have dealt with this matter. But the sections are not adequately sound enough to properly point out the discourse, above all, colonial legacy is very evident in that provisions where the judgment of female "modesty" is still a point to adjudicate. Taking cognizance of this perspective, the decision of the *BNWLA* case is time worthy and the inclusion of the court's guidelines as the policy of different institutions is also a praiseworthy act. Now the sooner these guidelines can be turned into law, the better everyone will reap the benefits.

6.3.2 Principle Becomes Rule

One of the finest examples of elevating rule from principle in South Asian Constitutionalism rests in the Constitutions of India and Pakistan. In dealing with the education right, both the Constitutions have uplifted the principles into rights. In India, the right to education was recognized as one of the directive principles whereas in Pakistan it was accepted as a principle of policy. Owning to judicial activism the Indian Constitution elevated the principle into FR by the 86th Constitutional Amendment in 2002 and on the other hand, Pakistan made it by the 18th Amendment in 2010. The judiciaries of both these countries have played an outstanding role in converting the principle to right.

In India, earlier in the *Mohini Jain v. State of Karnataka* case,[51] the Court held the decision by elaborating the concept of the right to life as "the right to live with human dignity and all that goes along with it, namely the bare necessaries of life such as adequate nutrition, clothing, and shelter, and facilities for reading, writing and expressing oneself." Then the Court went on going that the right to life could not be fulfilled "unless it is accompanied by the right to education." Though the Court did not give legal recognition to the principle of 'right to education' as FR but directed generally that the Government had the obligation to provide educational facilities and on the other hand, all citizens did have the right to education. It was a remarkable decision by the Indian SC by anticipating the right to education into the right to life.

[51] (1992) AIR 1858; (1992) SCC (3) 666; (1992) SCR (3) 658

Later on, in the *Unni Krishnan* case,[52] the Court held the decision elevating 'right to education a directive principle into the status of FRs in spite of having judicial non-enforceability bar expressed in Article 37 of the Constitution. Alike the previous case of *Mohini Jain* the Court analyzed the right to education taking cognizance of Article 21 (right to life) and by assimilating the context of directive principles with Article 45 the Court held that the State was bound to provide, "within a period of ten years from the commencement of the Constitution, for free and compulsory education for all children under the age of 14." The Court expressed its disagreement with one of the findings stimulated in the *Mohini Jain* case where the Court expressed 'the right to education at all levels is guaranteed by the Constitution.' in the *Unni Krishnan* case, the Court made an observation that for treating a right it is not essential to place that matter in part III of the Constitution. Anything in part III can be treated as FRs and thus the Court opined that "the provisions of Part III and Part IV are supplementary and complementary to each other". The Court rejected the view that part III is superior to moral claims and aspirations than that of part IV.

In a subsequent case of *M.C. Mehta v State of Tamil Nadu & Others*[53] where the Court expressed the view that Article 45 had already acquired the status of a fundamental right and elevated from directive principles when it was so declared in the *Unni Krishnan* case. In this case, the Apex Court reiterated the right to education. Here the Court extended a new horizon of the right to education by giving the direction of abolishing child labor and expressed that the object of Article 45 could only be possible by solving the problem of child labor.

Owning to the judicial activism of the SC of India finally the legislative body attempted to approach the 86th Constitutional Amendment Bill in the Parliament. After passing the Bill, the right to education became part of the Constitution in 2002. In the Constitution, Article 21A was inserted which provided "The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine."[54] The Apex Court did not stop there, rather incorporated an Article by the same amendment in Article 51A (K) which states- "who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years." That means not only for the State to provide free and compulsory

[52] *Unni Krishnan, J.P. & Ors. v. State of Andhra Pradesh & Ors.* (1993) AIR 217, 1993 SCR (1) 594, 1993 SCC (1) 645, JT 1993 (1) 474, 1993 SCALE (1)290
[53] (1996) 6 SCC 756; AIR 1997 SC 699
[54] Art. 21A of the Constitution of India

education but also over to the guardians, parents to send their children (between 6 to 14 years of age) to school. Therefore, a very comprehensive initiative of ensuring free and compulsory primary education was taken by India.

The judicial review regarding Article 21A did not remain standstill. Because only making law is not sufficient to make sure education for all children. Adequate educational institutions, free meals, free books, and transportation- all are prerequisites for providing education. In this context, the Apex Court intervened and set another agenda for parliament to materialize the right to education. In the *Ashoka Kumar Thakur v Union of India* case[55], the 93rd Amendment of the Constitution and Central Educational Institutions (Reservation in Admission) Act, 2006 were challenged on the ground of violating basic structure doctrine and Article 15 of the Constitution. The Court held that the reservation was lawful and finally, it disposed of the petitions with some directions to the government. The Court directed the Government to make a comprehensive plan and to fix a deadline by which every child requiring the age would get free and compulsory education.

Like Indian Courts, Pakistan also played a significant role in the issue of the right to education and the elevated PP into FRs. In *Ahmad Abdullah v Government of Punjab*[56], case the Court held that "dignified existence may not be possible without a certain level of education and the State has to play a role in ensuring by a positive action that the citizens enjoy this right." This view was sustained in the later cases and although the right to education was not recognized as a fundamental right the Court used to interpret it with the aid of right to life discourse.[57] In *Imdad Hussain v Province of Sindh* case,[58] the Court interpreted the right to life discourse in a much broader sense and observed, "right to education was a fundamental right covered by Arts.9, 14, 18 and 20 read with 37(c) of the Constitution and, therefore, any unreasonable restraint, hindrance or condition on its exercise would be ultra-vires the Constitution, irrespective of whether the same was imposed by an administrative or executive act, by some statutory rule or even by the statute itself." In this way, the Judiciary of Pakistan gradually attributed its place towards ensuring the right to education and finally convening the judicial effects the Parliament by 18th Amendment amended the Constitution in 2010 and inserted a new Article 25A

[55] Writ Petition (Civil) No. 265 Of 2006 Interlocutory Application No. 13 Of 2006 (With Wp (Civil) No. 269 Of 2006, 598 Of 2006, 35 Of 2007 & 29 Of 2007) | 29-03-2007
[56] (2003) PLD 752
[57] *Syeda Zhazia Irshad Bukhari v Government of Punjab*, (2005) PLD 428.
[58] (2007) PLD 116

by stating, "The State shall provide free and compulsory education to all children of the age of five to sixteen years in such manner as may be determined by law."

6.3.3 Lessons Left by Judiciaries While Dealing with Right to Education

From the above discussion, it can be said that some judiciaries of South Asia have established a rich jurisprudence in the history of social and economic rights adjudication through judicial activism. The Justice of the SC of Nepal therefore stated, "[South Asian] judges have long ago shed their traditional role of norm interpretation and embraced a norm-making function."[59] Both India and Pakistan's Judiciary have moved away from the principles and approached FRs. Thereby they have set examples which other states of South Asia can follow. For example, the Constitution of Nepal, adopted in 2015, has incorporated some of the social and economic rights like the right to food,[60] housing,[61] health,[62] education,[63] employment and proper work practices,[64] healthy environment[65] in the FRs chapter. It is now a tendency growing worldwide. Some of the countries of the African Continent, Latin America are following the trend.[66] There is no doubt that South Asian judicial discourse, especially the Indian judiciary, has played a big role in this change.

As one of the countries in South Asia, Bangladesh also has to take from this. Although still, any profound move on the part of the Bangladesh Judiciary has not been found while dealing right to education. In the *Campaign for Popular Education (CAMPE) & another vs Bangladesh case*,[67] the Court did not consider the issues of whether education should be considered as "fundamental rights" or

[59] Bhattarai, Ananda M. "Access of the Poor to Justice: The Trials and Tribulations of ESC Rights Adjudication in South Asia." *Special Edition NJA LJ* (2012): 1.
[60] Art. 36(1) of the Constitution of Nepal.
[61] Art. 37(1).
[62] Art. 35(1).
[63] Art. 31(1).
[64] Arts. 33(1), Art.34(1).
[65] Art.30(1).
[66] Judicial activism of South Africa has put noteable contribution in this regard. In *Sobramoney v Minister of Health* case (1998 (1) SA 765 (CC) although, the Court interpreted the provision of emergency medical treatment very narrowly, it identified the disparities of wealth. Then in *Government of the Republic of South Africa v Grootboom* case (2000, (1) SA 46 (CC) the the Apex Court ordered the government for 'reasonable' and comprehensive housing program. In this case, the Court applied the doctrine of reasonableness by prioritizing the needs of the disadvantaged people. Then another landmark case *Minister of Health v Treatment Action Campaign* (2002 (5) SA 721 (CC) where the Apex Court overulled the argument regarding whether the Court could interfere with a governmental policy and established the right to health by emphatically reinforcing the doctrine of reasonableness referred in Grootboom case.
[67] *Campaign for Popular Education (CAMPE) & another vs Bangladesh* (2012) Writ Petition no. 312.

whether the non-compliance of policy by the educational institutions is 'any violation of any constitutional position', the Court simply put that 'the policies adopted by the government have a binding effect on educational institutions and must be followed' and therefore 'educational institutions are not allowed to take steps prejudicial to the interests of the students generally.'[68] In another case[69] where the Court stood against the imposition of VAT on English Medium schools. The Court, by relying upon Art. 15 and 17 of the Constitution, found that imposing VAT was contrary to the Constitution and it has created 'a gross discrimination'.[70] But the court did not mention any way of eliminating inequality in education or the commercialization-privatization of education. Mainly the approach taken by the Judiciary is to negatively enforce the right to education albeit in very limited cases. The Judiciary of Bangladesh has been passing through a period of complete passivity to register some activity. Although some signs of progression can be identified[71], in the strict sense of the term, the Judiciary of Bangladesh is still incapable to move forward beyond its anticipated boundaries.

To break those restrictions, the judicial activism of India and, to some extent, of Pakistan can in many ways help us. First of all, the traditional critique against enforcement of social and economic rights is that they are like 'positive rights' and to execute them, there need to pursue positive obligation by the state with sufficient budgetary allotment and as there involve policy implications the Court does not have that much of expertise to deal with it.[72] Indian Judiciary has proved that these statements are completely erroneous and wrong while dealing with Right to Education, and Right to Food cases. The Judiciary of Pakistan has done the same job. Based on these cases, the constitution was later amended and a new law was enacted. The administrations of all the states of India were forced to change their respective policies regarding poverty, starvation, and the arrangement of mid-day meals in the schools. The legislative body of Pakistan also amended its Constitution.

Secondly, the critics argued that the adjudication of social and economic rights has an anti-democratic or counter-majoritarian difficulty.[73] Their proper execution rests in the domain of executive and administrative bodies. That is why it should not be the subject matter of the Court. To answer this, it

[68] Ibid. as per Naima Haider, J.
[69] *Md. Faizul Islam and another vs. Bangladesh and others* (2015) Writ Petition No. 10127.
[70] Ibid, para-38.
[71] *Ain-o-Salish Kendra and another vs. Bangladesh, represented by the Secretary, Ministry of Labour and Manpower and others,* (2011) 63 DLR (HCD) 95
[72] Cross, Frank B. "The error of positive rights." *Ucla L. Rev.* 48 (2000): 857, 862.
[73] Tushnet, Mark. "Preface to WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW," xi (2008). 29.

is enough to mention that it took 52 years for the legislative body of India to recognize education as a fundamental right. Where about one decade before the judiciary of India recognized education as a fundamental right from the realm of directive principle. The judiciary has done the right thing and properly upheld the spirit of the Constitution. Because the Constitution of India pledged that primary education should be free and compulsory for all children within ten years of the enactment of the Constitution.[74] And this kind of proactive engagement by the Judiciary can only be possible when, as per Upendra Baxi, 'people's miseries arising from repression, governmental lawlessness and administrative deviance' are felt by the Judiciary.[75]

It was the judicial activism that elevated a Principle to a fundamental right. The Indian Judiciary has boldly ascertained this role thoroughly while the Judiciary of Pakistan emphasized and re-emphasized it repeatedly. Although Pakistan's Court was not brave enough to firmly establish the right to education to FR like Indian Court, nevertheless, this attempt has a profound impact on South Asian Constitutionalism. The biggest lesson is that if the judiciary continues to play its role in upholding the true sense of the Constitution, with the spirit and aspirations of the people, it can bring a positive outcome in the end. And by this way, the constitution becomes relieved from 'constitutional emptiness.'

The judiciary of Bangladesh has played some role in ascertaining the true impact of social and economic rights albeit on a very limited scale. Whether that role could have been strengthened more is a debatable issue. The next discussion has made an input upon that matter. The purpose of the subsequent discussion is to find out the newer justification and rationality of enforcing the social and economic rights of Bangladesh.

6.4 Existing Judicial Approaches of Bangladesh and Searching for a New Approach

In the fifth chapter, some of the judicial approaches of Bangladesh have already been discussed. In continuation with that discussion, an attempt will be made to re-analyze the approaches and tend to find a newer approach which the Judiciary of Bangladesh can follow. It was a common view of the Bangladesh Judiciary that the fundamental principles were intended to be treated as non-enforceable,

[74] Art. 45 of the Indian Constitution states- "The State shall endeavor to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years."

[75] Baxi, Upendra. "Taking suffering seriously: Social action litigation in the Supreme Court of India." *Third World Legal Stud.* (1985): 108.

which only impose a positive obligation upon the state. This judicial stand was critically analyzed by Justice Naimuddin in the *Kudrat-E-Elahi* case.[76] He imagined three probable situations where the fundamental principles can be taken into consideration. He specifically mentioned the 'negative' enforcement of principles where any act or omission directly contravenes or violates the provisions of the FPSP chapter. In that situation, according to him, the Court should intervene. He suggested that the non-enforceability bar of Article 8(2) could only apply to the positive enforcement and not to the negative enforcement of fundamental principles. The AD, however, referred to the analyses of Justice Naimuddin Ahmed as "mere hypotheses" and did not accept them. What could have been the aggregate position of the AD, it remained strict to the orthodox view of judicial non-enforceability of principles.

However, the position of the Judiciary has changed over the years. 'Right to life' discourse has been resorted to with an intention to address some of the social and economic rights enshrined as fundamental principles in the Constitution. The *slum dwellers* case[77] where eviction without alternative settlement was reiterated. Protection of environment and preservation of ecology in the *FAP 20* Case or *Environment Pollution* Case[78], ban on advertisement of cigarettes[79], restrictions upon imposition of VAT in health treatment-clinic-hospital,[80] and others where the Court showed some signs of judicial activism by properly addressing the fundamental principles. In the *Two-Stroke Motor Vehicle* case,[81] the question of a 'healthy environment' was raised praying for some direction against the motor vehicles emitting smoke, producing harsh-loud noise. The Court gave some directions for the intermediate period considering the scale of pollution. It ordered the government to enact laws controlling hydraulic horns, conversion of all government vehicles into CNG within six months, planning for withdrawing two-stroke wheelers, and so on. Interestingly enough, the Court kept the writ petition pending for further monitoring[82] and directed the respondents to submit reports of

[76] *Kutrat-E-Elahi Panir and others v. Bangladesh,* (1992) 44 DLR AD.
[77] *Ain O Shalish Kendra and Others v. Govt. of Bangladesh,* (1999) 19 BLD 488.
[78] *Dr. Mohiuddin v. Bangladesh and Ors.*, (1997) 49 DLR (AD) 1 (FAP 20 Case), *Dr. Mohiuddin (BELA) v. Bangladesh,* (2003) 55 DLR (HCD) 69 (Environment Pollution Case).
[79] *Professor Nurul Islam v Govt. of Bangladesh & Others*, (2000) 52 DLR 413.
[80] *Chairman, NBR v. Advocate Julhas Uddin*, (2010) 15 MLR (AD) 457.
[81] *Dr. Mohiuddin Farooquee v. Bangladesh*, (2003) 55 DLR 613.
[82] Ibid. para 14.

implementing judgments once every six months.[83] This is certainly an advanced attempt in comparison to the judgment viewed in the *Kudrat-E-Elahi* case.

Under the present constitutional scheme, however, it is not the practice of directly filing a suit in the Court. Because the legislative protection of social and economic rights is not mentioned in the Constitution. Then what has instigated the petitioners to move forward to the Court? Generally, three important tools have been used by the petitioners in different social and economic rights-related cases. First of all, the use of the right to life clause to recognize social and economic rights. Almost all the cases this clause has been interlinked and shown as an 'integral part' of the 'non-enforceable' social and economic rights. In this way, indirect enforcement of social and economic rights has been considered in our Constitutional journey. Secondly, the wide interpretation of "person aggrieved"[84] by the HCD includes not only the victim himself but also any person or group who has a direct interest with the particular interest or has genuine cause to come before the HCD.[85] In Article 102(2) the Constitution permits the HCD to provide a remedy if it is satisfied itself, where the 'person aggrieved' does not have "no other equally efficacious remedy is provided by law."[86] The ambit of the clause 'equally efficacious remedy' is huge and the Court is utilizing as to its limit. Thirdly, the increasing use and widening scope of PIL in the Constitutional practice of Bangladesh. Many issues relating to social and economic rights have been set forth before the HCD in the form of PIL and the trend is ever developing.[87]

Having said that the Judiciary of Bangladesh has developed piecemeal protection using FRs for enforcing social and economic rights. It is not an effective tool, in every sense, to adjudicate this category of rights. It is clear that the Court faces fundamental difficulties in treating social and economic rights as they are held to be 'judicially non-enforceable' rights. This constitutional bar approaches the Court not to frequently intervene in the issues of social and economic rights. But

[83] Ibid. para 15.
[84] Art. 102(1) of the Bangladesh Constitution.
[85] The judgment in *Dr. Mohiuddin Farooque Vs. Bangladesh*, (1997) 49 DLR (AD) 1 widening definition of "aggrieved person", that is locus standi for maintaining writ petition is really a landmark one because enforcing any right- social, economic, civil and political- is greatly dependent on the issue of locus standi of the petitioner. The Court held that- "Interpreting the words "any person aggrieved" meaning only and exclusively individuals and excluding the consideration of people as a collective and consolidated personality will be a stand taken against the Constitution."
[86] Art. 102(2) of the Bangladesh Constitution.
[87] See e.g. *Dr Mohiuddin Farooque v. Bangladesh* (2003); *BLAST v. Bangladesh* (2005); *Human Rights and Peace for Bangladesh v. Bangladesh* (2009); *Ain o Salish Kendra and Another v. Bangladesh* (2011).

proper analyses of different constitutional provisions may widen the scope of the Judiciary to make it much more involved in this issue. The next part of this chapter will comply with that attempt.

6.4.1 Constitutional Provisions Widens Interpretative Approach

It has already been discussed the usual practice of the Bangladesh Judiciary. The general tendency of it is to remain strict to the orthodox view of 'judicial non-enforceability of principles as enshrined in Article 8(2) of the Constitution.[88] Although some changes have been visible over the years in this respect, they are mainly within the ambit of 'negative enforcement.' The problem remains in this issue not to be properly compatible with Article 7 (2) of the Constitution. This Article emphatically proclaims the 'Supremacy of the Constitution' and states- "This Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic, and if any other law is inconsistent with this Constitution and other law shall, to the extent of the inconsistency, be void."[89] That means the Constitution reckons the people's will and everything consisting of the Constitution will be treated as 'Supreme law of the Republic'. Here the Constitution does not deliberately differentiate any distinction between or among anything including the two categories of rights- civil-political or social-economic-cultural. Taking into consideration this view, it will be convenient to judge Article 8(2) of the Constitution from a different angle. Article 7(2) requires to be seen that the FPSP and within it the socio-economic rights both taken together while interpreting the text of the Constitution, enjoy the same supremacy as the Constitution.[90]

Article 8 does not address a 'non-obstante clause', by referring to which Naimuddin, J held that 'Article 8(2) could not be interpreted as completely superseding Article 7(2).'[91] For the sake of argument, if it is assumed that Article 8(2) is an exception to Article 7(2), then according to general principles of interpretation of statutes, it can be told that the exception should not be interpreted so broadly to underestimate the basic law. Here, after analyzing some of the cases, one can find a broader

[88] As per Professor Dr. Ridwanul Haque, one of the interviwees, the constitutional design of Bangladesh handicapped the enforcement rationality by inserting judicial non-enforceability of principles in Art. 8(2). He claimed, while giving the interview, that the Judiciary of Bangladesh has only two options- one, either to relinquish the attempt of giving any enforcement discourse to the social and economic rights or to push the boundary of constitutional bar of enforceability to such extent as providing some meaningful contribution to the principles to adjudicate social and economic rights.

[89] Art. 7(2) of the Bangladesh Constitution.

[90] Shohag Md. Reajul Hasan., and A.B.M. Asrafuzzaman, "ENFORCING SOCIO-ECONOMIC RIGHTS JUDICIALLY: EXPERIMENTS IN BANGLADESH INDIA AND SOUTH AFRICA," ISSN 2218-2578, *The Northern University Journal of Law*, Volume III, 2012.

[91] *Ahsanullah vs. Bangaldesh,* (1991) 44 DLR, 179.

interpretation of Article 8(2) than that of Article 7(2).[92] The interpretation should be made harmoniously, if any conflict arises between two conflicting provisions, according to the general rule of interpretation of statutes.

As per Mustafa Kamal, J- 'the Fundamental Rights chapter does have Article 26 (Laws inconsistent with FRs to be void), which is absent in the case of FPSP. This omission is deliberate and calculated. So any attempt to equate FPSP with FRs would be nugatory.'[93] What Mustafa Kamal, J has addressed- is the difference between FPSP and FRs in the presence and absence of Article 26. This study finds that connotation problematic because the constitutional framers did not set this kind of Article before all the chapters enshrined in the Constitution. Suppose, anything like Article 26 has not been put before Preamble, Part I, IV, V, VI, VII, and other parts of the Constitution. Does that mean the Constitution permits or accepts any law inconsistent with these parts? The answer is NO and the justification of the answer lies in Article 7(2) of the Constitution. There is no denying the fact that the FRs Chapter has been strengthened by adding Article 26, but in the absence of that kind of Article, other chapters should not be recognized as not the supreme law of the land.

Now, take a look at another provision of the Constitution, which is Article 102. So far, the HCD has entertained social and economic rights in the form of FPSP under the authority of special original jurisdiction. And almost all the petitioners have brought the case within the ambit of 'right to life' as FRs enshrined in Articles 31 and 32.[94] The very intention of the petitioners is clear, to widen the scope of the writ petition. The HCD also so far has given judgment, tags 'right to life' discourse with the social and economic rights. One of the reasons may be that the Court feels comfortable conferring the legal ground of such kinds of cases as a part of "enforcement of any the FR conferred by Part III of this Constitution."[95] Indeed, the Court has tremendously contributed to widening the ambit of 'person aggrieved', which has been discussed before. But it can be argued that some of the options are lying in the Constitution where the Court can independently address the issues relating to social and economic rights. If we attempt to deeply understand the view of Article 102(2) of the Constitution, we will observe the statement- "*The HCD may if satisfied that no other equally efficacious remedy is*

[92] See generally *Kutrat-E-Elahi Panir and others v. Bangladesh,* (1992) 44 DLR AD
[93] Supra No. 33. para-84.
[94] Professor Dr. Ridwanul Haque in his interview expressed the view that the 'right to life' is nothing but an instrument of interpretation for the judiciaries of South Asian countries. Since the constitutions of these countries did not specifically define the 'right to life' the judiciaries have got ample opportunities to make a wide extended definition and inclined almost every social and economic right within that term.
[95] Art. 102(1) of the Constitution of Ban.gladesh.

provided by law…."[96] Then five kinds of writs have been stated. Now, if we dissect the statement, we will find (1) satisfaction of the court, (2) secure equal and efficacious remedy, and (3) presence of particular law in that matter. The first two points have a huge sphere of interpretation if the Court takes into consideration particular facts and circumstances. The third one is very interesting to deal with. If there exists any particular law for a particular fact, the Court may evaluate whether the aggrieved person is being properly protected or remedied by that law. If there exists no such law, then the Court upon its satisfaction, by analyzing the facts and circumstances, may protect the aggrieved person and secure an equal and efficacious remedy. Here comes the question of adjudication of social and economic rights. The HCD, to its satisfaction, can positively deal with social and economic rights.[97] The Constitution permits the HCD to address these rights and not even succumb to any FRs like the 'right to life' discourse. In the *BLAST and Others v. Government of Bangladesh* case,[98] the Court has dealt with the right to shelter for the slum dwellers justifying the 'equally efficacious remedy', although taking shed of 'right to life' discourse.

In this way, if the matter comes before the AD of the SC Article 104 will also be utilized. In this Article, the Constitution gives authority to the AD to exercise power in the form of 'directions, orders, decrees or writs as may be necessary for doing complete justice, in any case, pending before it.' The scope of the clause 'necessary for doing complete justice in any case' is enormous. The AD has been given a 'blank check' to do anything it feels necessary for doing complete justice. Therefore, adjudication of social and economic rights gets another ample opportunity to be executed.

6.4.2 False Dichotomy of Human Rights

In Bangladesh, the Court adopted a 'violation approach' as regards FPSP where social, and economic rights reside. That means the Court can interfere if it satisfies itself that there occurs any violation or infringement of social and economic rights due to a retrogressive act. But the Court will not impose any positive entitlement on the State to materialize the rights. This is certainly a traditional perception of the judicial role. Because the Court used to impose a false dichotomy between negative and positive rights which tends to prioritize CP rights over ESC rights.[99] One of the answers to this false dichotomy

[96] Art. 102(2) of the Constitution of Bangladesh.
[97] While giving interview, this interpretive approach was also expressed by Barrister Fida M. Kamal, former Attorney General for Bangladesh and Senior Advocate of the Supreme Court of Bangladesh.
[98] (2008) 60 DLR 751 (HCD)
[99] Donnelly, Jack. *Universal human rights in theory and practice*. Cornell University Press, 2013. 30-33.

is to assert that 'all rights are positive'[100] because all types of human rights ultimately depend upon the financial capacity of the States. Suppose protection of property needs a well-equipped police force, and a capable judiciary. Likewise, to secure the right to freedom of thought, conscience, and speech you need to secure the right to education, culture, and heritage. One cannot ignore the fact that if the State intends to run a free and fair election, it certainly needs a huge amount of money to use technology, build infrastructure, and ensure security. So, ultimately the protection of CP rights the State has to pay a huge amount of money as well as equally needs to protect social and economic rights.

Another response to this false dichotomy is to figure out the full description of the positive and negative dimensions of human rights.[101] It is not always true that all human rights are always positive in their nature. They have their negative characteristics too. Suppose, the State shall not do anything that causes deprivation of life or personal liberty of an individual except in accordance with the law. Likewise, the State shall not discriminate against any citizen in consideration of sex, religion, caste, and creed. The same will be applicable in the matter of social and economic rights. Discrimination in education is also preventable for the State. So it can be said without any hesitation that the 'violation approach' should be equally applicable to CP rights as well as social and economic rights.

Taking into consideration this view it should be the standard of constitutional interpretation for Bangladesh Judiciary that violation of any provision (especially provisions containing social and economic rights) contained in Part II leads to violation of the provisions of Part III. Because non-fulfillment of social and economic rights certainly affects the enjoyment of FRs. Here, the quotation of Mustafa Kamal, J is notable- "It is constitutionally impermissible to leave out of consideration Part II of our Constitution when an interpretation of Article 102 needs a guidance."[102]

Considering the very text where the Constitution has been rendered as "the solemn expression of the will of the people"[103], the Judiciary of Bangladesh as the 'guardian of the Constitution does not ignore its role to uphold and progressively interpret the relevance between FRs and social and economic rights. And most importantly, that duty does not end with tagging social and economic rights with the 'right to life' discourse only, but also with recognizing and establishing the separate and identical

[100] Holmes, Stephen, and Cass R. Sunstein. "The Cost of Rights: Why Liberty Depends on Taxes." (1999).
[101] Landman, Todd. "Measuring human rights: Principle, practice, and policy." *Hum. Rts. Q.* 26 (2004): 922–923.
[102] *Dr. Mohiuddin Farooque Vs. Bangladesh*, (1997) 49 DLR (AD) 1.
[103] Art. 7(2) of the Constitution of Bangaldesh.

position of socio-economic rights. Only then human rights will be relieved from this kind of false division of rights. In this context, we can refer to Justice Sachs, who well and truly said against this false dichotomy- "Is the Constitution about welfare or it is concerned with freedom? It is related to both. We do not want bread without freedom, nor do we want freedom without bread; we want bread and we want freedom."[104]

6.4.3 Lack of Proper Understanding of Fundamental Principles

Fundamental principles have two key features, first, they are obligatory, and second, they are contrajudicative.[105] The principles bear constitutional obligations consisting of particular social values and contrajudicative in the sense that they are designed as such not to be judicially enforceable.[106] That means the Courts are not constitutionally permitted to define the obligations. Contrajudicative feature of the principles also has two aspects- the content of relevant obligation is non-justiciable and second, and the obligations require implementation by non-judicial means.[107] It means that for the implementation of obligation, there needs to have relevant legislation. Put it simply, for the implementation of principles there need to insert legislation. This is clearly a positivistic understanding of the law. This kind of understanding of the law is gradually declining. In the era of the hybrid legal system,[108] it is quite difficult to keep in touch with the view principles stated above. Because the transformation of principles is obvious.

This transformation is, to some extent, underway in India and Pakistan. We have already discussed how the judiciaries of India and Pakistan have meticulously worked on the right to education, enshrined as a principle in the respective constitutions, and finally, the legislative body of these two countries elevated the principle (right to education) into FR in the year of 2002 and 2010 respectively. In this way, the 'non-enforceable principle' became 'enforceable' FR.

One of the prominent observations about the transformation of principles into rights is the constitutional 'deferral mechanism'. That means the tools are used such that the State is thought to

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[104] Sachs, Albie. "Social and economic rights: can they be made justiciable." *SMUL Rev.* 53 (2000): 1381.
[105] Weis, Lael K. "Constitutional Directive Principles." *Oxford Journal of Legal Studies* 37, no. 4 (2017): 4.
[106] Ibid. p-5.
[107] Ibid.
[108] India maintains a hybrid legal system with a mixture of civil, common law and customary, Islamic ethics, or religious law within the legal framework inherited from the colonial era and various legislation first introduced by the British are still in effect in modified forms today. Since the drafting of the Indian Constitution, Indian laws also adhere to the United Nations guidelines on human rights law and the environmental law.

have an obligation but immediate enforcement seems to be unsuitable.[109] In this approach, the principles are initially a bundle of aspirations and desires, but over time they become constitutional legal norms when circumstances emerge for their direct enforcement. This is one of the most attractive versions of the legal enforceability of principles. The Indian Judiciary has followed this approach when they dealt with the right to education or right to food cases.

Considering this approach, here is an attempt to analyze the enforceability version of the FPSP of the Bangladesh Constitution. First of all, in comparison to the chapters of the India and Pakistan Constitutions, it can undoubtedly claim that the jurisdiction of Article 8(2) of the Bangladesh Constitution is much wider than that of Article 37 of the Indian Constitution and Article 29(1) of Pakistan Constitution. Now, after dissecting Article 8(2) five components can be found within it- the principles (1) shall be fundamental to the governance of Bangladesh, (2) shall be applied by the State in the making of laws, (3) shall be a guide to the interpretation of the Constitution and of the other laws of Bangladesh, (4) shall form the basis of the work of the State and its citizens, (5) shall not be judicially enforceable. Here, all the five components are equal in their value and cannot be interpreted by making isolation from one another. As well as, nobody can claim here to prioritize component No. 5 is above all components. But unfortunately, the judicial practice over the years has been resonating with the view- that the clause 'principles shall not be judicially enforceable' has occupied the dominant space in the cases related to social and economic rights. For this particular clause, the Judiciary of Bangladesh has frequently fallen into discomfort to adjudicate social and economic rights. But one way to get out of this is to give equal importance to all the other components of Article 8(2) and then review them accordingly, to which the Judiciary of Bangladesh seldom pays to heed.

If it is considered the clause 'shall be a guide to the interpretation of the Constitution and the other laws of Bangladesh', there will be seen ample opportunity for the Judiciary to act on it. The tool 'guide to interpretation' provided by the fundamental principles of the judiciary is nothing but the power of judicial review. This power can be exercised upon any law including the supreme law of Bangladesh. This clause also permits the Judiciary to assess, evaluate, and analyze any provisions of the Constitution as well as any other laws of Bangladesh. In the interpretation, the Court can certainly take into consideration the contexts, facts, and circumstances of any law, the developing trend of global

[109] Tarunabh Khaitan defends a version of this view as an account of at least some of the directive principles in the Indian Constitution: Khaitan, Tarunabh. "Directive principles and the expressive accommodation of ideological dissenters." *International journal of constitutional law* 16, no. 2 (2018): 389-420.

constitutionalism, set forth a nationalistic approach to international law, and many more necessary for proper interpretation. Does this clause only confer the opportunity to the Court to interpret? Does not exist anything in our Constitution to give any legal status to that interpretation? Here we can refer to Article 111 of the Constitution where the 'binding effect of SC judgments' has been proclaimed. That means what the Judiciary will interpret may create legal bindingness. In this way, the constitution itself casts an obligation upon the judicial organ to interpret the constitution and other laws of the country in light of directives, which have legal enforceability. Applying this particular clause, the Judiciary of Bangladesh can play a significant role in adjudicating fundamental principles, and of course, the process of executing social and economic rights.

It was previously told that one of the clauses of Article 8(2) could be used as a tool of judicial review. Because when the very text of the Constitution permits the Judiciary to use principles as a 'guide to interpretation' that confers the power of assessment, evaluation, and weigh the acts of the administrative body working for materializing the values stated in the principles. These are even more relevant now when Bangladesh is celebrating the 50th anniversary of its Constitution. To make the attempt more specific, we may use *Lord Diplock's* formal statement on judicial review.[110] He has introduced three criteria for the judiciary to assess administrative action. They are- illegality, irrationality, and procedural impropriety of administrative action. By illegality he means the decision-maker must understand correctly the law, otherwise, the judicial power of the state is exercisable. By irrationality, *Lord Diplock* refers to '*Wednesbury unreasonableness'*[111] and says the judicial review will be applied to a decision 'which is so outrageous in its defiance of logic' or the decision of the administrative body is so violative to the accepted moral standards that 'no sensible person who had applied his mind to the question to be decided could have arrived at it.'[112] Finally, by procedural impropriety, he indicates the 'failure to basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision.'[113] Procedural impropriety also involves the failure of the administrative tribunal to observe procedural rules, even if such failure does not involve any violation or infringement of natural justice.

[110] Lord Diplock's remarkable statement on Judicial Review was made in the case of *Council of Civil Service Unions V. Minister for the Civil Service,* (1985) AC 374 at 408.
[111] *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* (1948) 1 KB 223.
[112] Supra No. 110.
[113] Ibid.

Taking cognizance of this view, the Judiciary can assess the state's action by way of judicial review using Article 8(2). The yardstick of illegality, irrationality, and procedural impropriety can be applied to State's initiatives toward achieving social and economic rights. Because the very Article requires the State to make law or to form the basis of all works by using the fundamental principles which, however, can be reviewed by the Judiciary. One example can make it clear. Suppose, in the Constitution of Bangladesh Article 17 states for free and compulsory education where aspiration has been conveyed to establish "a uniform, mass-oriented and universal system of education and extending free and compulsory education to all children to such stage as may be determined by law."[114] 50 years have elapsed since the adoption of the Constitution but the State could not able to establish free and compulsory education for all children. A National Education Policy was adopted in 2010 where it was stated- "Steps will be undertaken in the light of this Education Policy and taking into account all laws regulations and policies, directives related to education to formulate a newly coordinated Education law and to ensure its proper implementation."[115] In 2013, the Government of Bangladesh formulated a draft education law. Although it was expected to arrange a wide discussion regarding the problems and solutions of education from different strata of the society, that did not happen. Finally, in 2014 after a few discussions, a draft of Education Law 2014 was prepared but since then there has not been seen any further progress in that education law. Bangladesh is one of the signatories of some International covenants, conventions like-ICESCR, CRC, CEDAW, and UDHR where the right to education is declared and that international legal documents assign Bangladesh to oblige the international obligations. In the CRC (Child Rights Convention, 1989) education has been recognized as a fundamental right. Though Bangladesh is a signatory to that Convention, still becomes unable to domesticate the convention by making laws declaring education as a fundamental right. In the above-stated facts, this writer intends to argue that the Judiciary of Bangladesh has the opportunity to intervene in the acts of the executive and legislative bodies. What the Constitution has permitted the Court to use the principles as a 'guide to interpretation' to all laws including Constitution provides the occasion to examine every attempt of the administrative body or decision-makers in light of illegality, irrationality, and procedural impropriety. Not only the assessment, the Court even stands for ensuring the rights and directs the concerned authority accordingly. Because the Constitution itself requires the

[114] Article 17 of the Constitution of Bangladesh.
[115] Clause 1 of National Education Policy 2010

Court to construe a provision of law in conformity with the fundamental principles even if the language of the law is clear and unambiguous.[116]

6.4.4 Further Understanding of Principles

In this part of the discussion, the renowned book by Robert Alexy named *A Theory of Constitutional Rights*[117] has been referred to find out a newer understanding of principles that may be effective and relevant to this discussion. According to Alexy, all legal norms are either rules or principles. Finding out and properly deciding the distinctions between rules and principles are the "key to the resolution of central problems of constitutional rights doctrine."[118] Principles are norms that are to be realized to their utmost level in both ways- in law and in fact. Principles are optimization requirements. On the other hand, rules are norms having a fixed position both in law and fact. Rules are always either fulfilled or not.[119] Now, if we contrast the constitutional framework of the Bangladesh Constitution (India, Pakistan too) with this theoretical discussion we will find the relevance and will be able to sort out the different characteristics of rules and principles as established FRs and fundamental principles in the Constitution respectively.

During the drafting of the constitutions both in India and Bangladesh, most of the participants of the CA thought to include social and economic rights as principles only to designate them as goals without justiciable rights.[120] In India, the distinction between judicially enforceable rights and non-enforceable principles was drawn by the Sapru Report which aided constituent assembly debates (CAD).[121] In both India, Pakistan, and Bangladesh the principles are treated as 'optimization of goals'. No country

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[116] Islam, Mahmudul. *Interpretation of Statutes and Documents*. Mullick Brothers, Bangladesh, 2017 (Reprint), p-45.

[117] Robert Alexy (born 9 September 1945 in Oldenburg, Germany) is a jurist and a legal philosopher. He is a professor at the University of Kiel, Germany. Alexy's theory of argumentation (Alexy, 1983) puts him very close to legal interpretivism. His book A Theory of Constitutional Rights has been published by Oxford University Press, New York, Translated by Julian Rivers in 2002 and the book was reprinted in 2010.

[118] Alexy, Robert. *A theory of constitutional rights*. Oxford University Press, USA, 2010. 44.

[119] Ibid. pp: 47-48.

[120] Austin, Granville. *The Indian constitution: Cornerstone of a nation.* Oxford University Press, USA, 1999. pp: 27, 28. For Bangladesh, see হালিম, মো. আব্দুল (সম্পাদিত). *বাংলাদেশ গণপরিষদ বিতর্ক*। সিসিবি ফাউন্ডেশন, ২০১৯ Constitutional Assembly Debate (Md. Abdul Halim, (ed.) "Bangladesh Ganaporishod Bitorko", CCB Foundation, 2nd Edition, 2019. See speeches of Syed Nazrul Islam at 4th meeting, 19th October 197; Sree Surinjit Sengupta at 8th meeting, 24th October 1972; Dr. Kamal Hossain at 12th meeting, 30th October 1972), Speech of Dr. Kamal Hossain at 12th meeting, 30th October 1972)

[121] Granville, Austin. *The Indian Constitution: Cornerstone of Nation.* (1966). 27.

mentioned above set any specific goal[122] to immediate materialize principles, rather the approach is to fulfill the aspirations, said in the form of principles, gradually, with the passage of time. But as regards rules (FRs), there is a fixed assumption of fulfillment. In the Constitution, the provisions are specifically mentioned for the remedial method, if any violation occurs. In the Constitution of Bangladesh, Article 102(1) has been inserted by giving authority to the HCD 'to enforce any FR' and if the infringement of FR occurs, the Court can order an 'equally efficacious remedy' to the aggrieved person.

The next point is about the conflict between rules and principles. If there occurs any conflict between rules, according to Alexy, "one rule must be declared invalid and thereby excised from the legal system."[123] That means the rule is either valid or not. This theoretical assumption also does have relevance to the Constitutional framework of Bangladesh. Just observe Article 26 of the Constitution, where the Article emphatically states- "1. All existing law inconsistent with the provisions of this Part shall, to the extent of such inconsistency, become void on the commencement of this Constitution. 2. The State shall not make any law inconsistent with any provisions of this Part, and any law so made shall, to the extent of such inconsistency, be void."[124] Here, the constitutional provision clearly upholds the supremacy of rules, and any other laws, either existing or will be made in the future, being inconsistent will be rendered void. Along with it, as the founding fathers of the Constitution of Bangladesh mainly viewed the provisions of the Constitution as rules, they incorporated the same category of Article which declares- "any other law is inconsistent with this Constitution and other law shall, to the extent of the inconsistency, be void."[125] Thus, the supremacy of the Constitution was established.

But in case of conflict of principles, what will happen? It is a very interesting dimension of this discussion where the prevalent approach of treating principles may be reviewed. Robert Alexy claims the approach to resolving the conflict of principles has to be different than that of rules. This study does have full compliance with that assertion. As Alexy remarks-

> "Competing principles are to be resolved in quite a different way. If two principles compete, for example, if one principle prohibits something and another permits it, then one of the

[122] Only exception of Art. 45 of the Indian Constitution where a target was set to provide free and compulsory education within ten years of incorporation of Constitution.
[123] Supra No. 118, p-49.
[124] Art. 26(1) and (2) of the Constitution of Bangladesh.
[125] Art. 7(2) of the Constitution of Bangladesh.

> principles must be outweighed. This means neither that the outweighed principle is invalid nor that it has to have an exception built into it. On the contrary, the outweighed principle may itself outweigh the other principle in certain circumstances. In other circumstances the question of precedence may have to be reversed. This is what is meant when it is said that principles have different weights in different cases and that the more important principles on the facts of the case takes precedence."[126]

Now, if we contrast and compare the whole statements of Article 8(2) of the Constitution, will not there be a different understanding of principles? For the convenience of discussion, review the Article again. In Article 8(2), there are five components- the principles (1) shall be fundamental to the governance of Bangladesh, (2) shall be applied by the State in the making of laws, (3) shall be a guide to the interpretation of the Constitution and of the other laws of Bangladesh, (4) shall form the basis of the work of the State and its citizens, (5) shall not be judicially enforceable. Although for the sake of arguments, it will be assumed that all the five components are of equal value but mostly the assertion has been given upon component No. 5. Here, after analyzing the Article, it is easy to find out an apparent conflict within the contents of the principle (Article 8(2)). In the previous discussion, we have seen that in adjudicating social and economic rights, the discussion frequently halted in the clause 'the principles shall not be judicially enforceable. But none of the discussions has attempted to ascertain a contextual meaning of principles, what Alexy intends for. Here lies a horizon of scope for the wide interpretation of principles if the judiciary intents to consider that.

Considering the conflict of principles, Alexy intends to measure the weight of principle(s) in every particular case. Principle never dies or becomes extinct. Rather only be outplaced by other weightier principles. The measurement of the weight of the principles can only be ascertained on case to case basis. Here comes the context, facts, and circumstances. Now consider the time, context, and circumstances of Bangladesh when the Constitution has been adopted. Most of the participants of the Constituent Assembly (CA) did not opine to insert social and economic rights as principles into enforceable rights because of the shabby economic condition of the country. Although that has been discussed in more detail in the latter part of this discussion, it is sufficient to say that, most of the participants of CA believed that the principles would have to be materialized with the progress of the

[126] Supra No. 118, p- 50.

economy and other conditions of the country. But it is a matter of great regret that what was relevant at the early stage of the constitution, became a stand for eternity.

If the principle does not die, it must revive with the different phases of the constitutional journey. So the different parts of Article 8(2) - fundamental to the governance of Bangladesh, being applied by the State in the making of laws, a guide to the interpretation, or be the basis of the work shall have absolute relevance to the call of time. At the same time, when there is a conflict between them, judicial non-enforceability of principles may take priority in a concrete case. Truly, measuring the weights in a particular case the applicability of principles will be decided.

It has to be remembered that principles are 'optimization requirements' both legally and factually. That is achieved by measuring the principles based on suitability, necessity, and proportionality in the narrow sense.[127] The first two are related to factual possibility and the rest is linked with legal possibility. Suitability means interference of one principle helps to realize another principle. Like, dealing with Article 15 must have a profound effect to realize the Articles 14, 17, 18, 18A, 19, 20, and so on. Not only that, Articles 15, and 17 of FPSP will certainly play a significant role in attaining Articles 32, 39, and others of the FRs chapter. However, it is an empirical subject matter. Then, a necessity will also be ascertained factually. The necessity of executing any principle depends upon the facts of the case. Finally, the principle of proportionality in a narrow sense claims the measurement of weights of the competing principles in a particular case. Here, to ascertain the correct one normative reasoning is required. By balancing the two competing principles, one determines the limits of what is legally possible.[128] By using the doctrine of proportionality the Court can determine whether it elevates a principle (right to education) into rules (incorporate in the FRs chapter) or binds itself within the boundary of 'non-enforceability of principles.' Explaining the principles in this way, from such an advanced point of view, reveals some new directions for its interpretation and implementation.

Using this type of interpretive approach regarding fundamental principles is much more relevant to the constitutional reality of today's Bangladesh. Because along with some other chapters of the Constitution the FPSP chapter has been strongly declared as 'not amendable' by inserting Article 7B.[129]

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[127] Supra No. 118. p-66.

[128] Möller Kai. "Balancing and the structure of constitutional rights." *International Journal of Constitutional Law* 5, no. 3 (2007): p- 456.

[129] Art. 7B of the Constitution states- "Notwithstanding anything contained in article 142 of the Constitution, the

Thus, judicial non-enforceability of principles and its non-amenability as stated in Article 7B coupled with a literal interpretation of Article 8(2) may create an absolute bar to enforce social and economic rights forever. That is why contextual interpretation by the judiciary is very effective and needful to correctly adjudicate the enforcement possibility of social and economic rights. Ascertaining factual and legal possibilities for using principles in varying cases is an effective method that can be used by the Judiciary. Along with it, for contextual interpretation, the judiciary needs to reinvigorate, re-assess the background of the law, inter-relation of provisions, and continuously develop features of the state including social, economic, and political. Because a statute is not passed in a vacuum, but rather in a circumstantial framework. That is why, Lord Denning has said, "To arrive at its true meaning, you should know the circumstances concerning which the works were used: and what was the object appearing from those circumstances, which Parliament had in view."[130] From this perspective to understand the actual utilization of fundamental principles and to recognize the judicial enforcement of social and economic rights it is essential to re-discover the circumstantial framework of the Constitution of Bangladesh. For that purpose, an in-depth study of the preamble, pre-constitutional documents along with other social and economic developments have to be taken into consideration. These internal and external aids are very essential for the contextual interpretation of the constitution.

6.5 Advancing Towards More Justification: Internal and External Aid for Inclusive Constitutional Interpretation

It is known that a provision of a statute has to be construed upon the consideration of that particular statute as a whole. Other provisions also help to understand the context of the provision. Hence, interpretation should not be construed in isolation. The same applies to the interpretation of the constitution. For a proper understanding of any Article, it needs to recourse to other provisions and above all, to determine the true intent of the Constitution. In this need, internal and external aids have become more important. Internal-external aids are also important when ambiguity occurs or any portion of the Article becomes more important or stands as a priority. In the previous discussion, it has been seen that although Article 8(2) has five different parts but has carried more weight than the other parts. Mostly the Judiciary has confined itself to adjudicating social and economic rights within the purview of judicial non-enforceability of principle. At the same time, this paper argues that if another

preamble, all articles of Part I, all articles of Part II, subject to the provisions of Part IXA all articles of Part III, and the provisions of articles relating to the basic structures of the Constitution including article 150 of Part XI shall not be amendable by way of insertion, modification, substitution, repeal or by any other means."

[130] In *Escoigne Properties Ltd. v. Inland Revenue Commissioner*, (1958) AC 549, 565-566.

part of Article 8(2) 'principles as a guide to interpretation' is considered with Articles 102(2), 111, and 104 of the Constitution, then there will arise a huge prospect of interpretation regarding social, economic rights for the Judiciary. And it has also been seen that the principle is never died down by another principal, rather the priority changes according to the perspectives. So all principles should be treated equally. Analyzing the whole discussion from this perspective, there remains a chance of arising ambiguity and obscurity as to in which situation which principle will take priority. There is no straightforward answer for resolving this ambiguity. The Judiciary has to find out the prioritization of principle by analyzing the context. One of the most relevant examples of this perspective is the role of the Judiciary in dealing with the 'separation of judiciary' issue in the *Masdar Hossain* case[131] by applying one of the fundamental principles- Article 22 of the Constitution. If we literally construed the part of Article 8(2)- 'the principles shall not be judicially enforceable' then there would not have remained any scope for the Apex Court to make role 'in Separation of Judiciary from the Executive.'[132]

So, contextual interpretation is always necessary for ascertaining the true intent of the Constitution. And for that purpose, it needs two types of aid- internal and external for interpreting the provisions of the Constitution. In the later part of this discussion, internal aid will be construed as the analyses of the preamble, and external aid will be referred to as pre-constitutional documents which have been working as the basis of our constitutional founding along with the reference of some subsequent social, economic developments. This discussion is important to give a new lease of interpretation for reassessing the present stand of the Judiciary in treating the enforcement of social and economic rights.

6.5.1 Preamble as an Internal Aid to Realise Social and Economic Rights

In the discussion of the preamble, it is admissible that the preamble is a part of the statute and can be used as an aid to interpretation of the statute.[133] The aid of preamble can be taken where ambiguity or

[131] *Secretary, Ministry of Finance v. Masdar Hossain* (1999) 52 DLR (AD) 82.
[132] See Article 22 of the Constitution of Bangladesh. This view has been shared by Justice M.A. Matin, the former Appellate Division Judge of the Supreme Court of Bangladesh while giving the interview. He remarked- "Right to life includes many rights. But it is not correct to say that beyond this there is no scope to implement the principle of state policy. In fact, in the case of Majdar Hossen the Appellate Division gave 12 directions to implement Article 22 of the Constitution. The Supreme Court did not depend on the extended meaning of the right to life."
[133] *Seta Devi v. Bihar*, (1995) Supp (1) SCC 670; *Pasharuddin v. Jolekha Khatun*, (1953) 5 DLR 527; See also *Bangladesh v. Misfor Ali*, (1982) 11 CLC (AD) 34.

controversy arises.[134] When the preamble contains the main object of the Act, it may be treated as a legitimate aid in interpreting that particular Act.[135] Now, look at the preamble of our Constitution, where a fascinating, precise, and condensed articulation and declaration of our birth, aspirations-desires-struggles of the Nation, duty, and liability of the state as well as for the citizen will be found. The preamble has truly been able to determine the struggling past of the common people of Bangladesh and the future goals of the state. So for the discussion regarding the judicial enforcement of social and economic rights, a thorough analysis of the Preamble is necessary.

The realization of social and economic rights is declared not only in the second chapter of the Constitution of Bangladesh but also in the Preamble too. The preamble declares as one of the fundamental aims of the State is to ensure fundamental human rights.[136] It does not differentiate the so-called two categories of rights. So the implementation of social and economic rights is one of the fundamental aims of the State, as pronounced by the Preamble. The declarations of the Preamble do not stand there only, in the latter part, it categorically refers to some social and economic rights like-social freedom, economic freedom; social equality, economic equality; social justice, economic justice-'which will be secured for all citizens.'[137] What else is left to say about socio-economic rights? All the dimensions of social and economic rights have been expressed in an abstract sense. Now it is the task of the concerned bodies to concretize the rights in concreate situation. It is quite clearly stated in the Preamble that the State has been assigned to enforce all these social and economic rights. It, considering the power of judicial review given by the Constitution, is one of the tasks of the judiciary to evaluate the proclaimed aims of the State.

The birth of Bangladesh through a historic war and unprecedented bloodshed has differentiated the constitutional footings and importance of the Preamble from that of others. The assertion resonates with the comment of Mustafa Kamal, J. He said-

> "…the preamble of our Constitution stands on a different footing from that of other Constitution by the very fact of the essence of its birth which is different from others. It is our

[134] *Ekushey Television v. Bangladesh,* (2002) 56 DLR 91; *Syed Akhlaque Hossain v. Habib Ismail*, 21 DLR (WP) 275; *Maharao Shaheb v. India*, (1981) AIR SC 234.
[135] *BTRC v. Ekushey Television, (2005)* 58 DLR (AD) 82.
[136] See 3rd para of the Preamble of the Constitution of Bangladesh.
[137] For more detail see Professor Ekram Law Lectures available at: https://www.youtube.com/watch?v=0B0Ik5WTKcI&list=PL4r0OqgwRFKE9sy7adDjUSLvrADaV58oI Last accessed: 1st February 2022.

> Constitution a real and positive declaration of pledges, adopted, enacted and given to themselves by the people not by way of presentation from skilled draftsmen, but as reflecting the echoes of their historic war of independence."[138]

Shahabuddin, J too remarked the same in *Anwar Hossain Chowdhury V. Bangladesh* case.[139]

> "But preamble of a Constitution is something different from that of an ordinary statute. A Constitution is not merely the outline of the governmental structure; it is the embodiment of hopes and aspirations of the people cherished all the years and include the nation's high and lofty principles and people's life philosophy."

The statements referred above are the profound testimony of the constitutional status of the Preamble made by the Apex Court. So there should not keep any doubt as to the enforceability of the Preamble. But still, the question may arise whether the Preamble is the operative part of the Constitution. This question has been cleared by the Judiciary of Bangladesh in *Anwar Hossain Chowdhury V. Bangladesh* case, popularly known as the *8th Amendment* Case.[140] In this case, Justice Rahman commented,

> "The preamble is not only a part of the Constitution; it now stands as an entrenched provision that cannot be amended by the Parliament alone. It has not been spun out of gossamer matters nor it is a little star twinkling in the sky above. If any provision can be called the pole star of the Constitution, then it is the preamble."[141]

In this case, rule of law, as one of the components of the Preamble, has been declared as one of the basic structures of the Constitution and thus the Preamble has been recognized as the operative part of the Constitution. But one thing to be remembered, in the above-mentioned comment of Justice Rahman, was according to then Article 142. That was made before the 15th amendment of the Constitution. But after that amendment, the words 'cannot be amended by Parliament alone' have been omitted, nonetheless, after the 15th amendment, a new Article 7B has been incorporated where the preamble is declared to be unamendable by any way of 'insertion, modification, substitution,

[138] *Dr. Mohiuddin Farooque V. Bangaldesh* (1997) 49 DLR (AD) 1.
[139] (1989) B.L.D. (SPL) 1, 41 D.L.R. (AD) 165.
[140] Ibid.
[141] Ibid.

repeal or by any other means.'[142] In this way, the status of the Preamble as an operative part of the Constitution has been reinstated.

The basic objective of this discussion is to re-surface the discourse of enforcing social and economic rights by judicial means. But, as discussed earlier, there is a tendency of the Judiciary of Bangladesh not to be active enough to realize social and economic rights. The logic is mainly confined within a space of non-enforceability of principles. Some judges have advanced a bit and approached by negatively enforcing this category of rights taking aid of 'right to life' discourse. In this context, this discussion argues that socio-economic rights should be treated much more firmly and the logic of so doing resides in the very texts of the Constitution. Preamble as an internal aid to interpretation may bring much more justification and rationality towards enforcing social and economic rights. It should also be referred by the Judiciary along with Part II of the Constitution to realize this category of rights.

6.5.2 Pre Constitutional Documents as External Aid: Can Open a New Horizon of Interpretation

Certain documents outside the text of the act or statute can be used as an external aid for interpretation to find out the true intention of the legislature or to remove ambiguity in language.[143] However, it is a general rule of interpretation that where the language is clear, the use of external aid is not necessary. But this understanding of using external aid overlooks the necessity of bringing forth all possible meanings of the language, therefore lacks in finding out the determination of legislative purpose and fails to give full effect to the most satisfactory statutory objectives.[144] Hence, it is erroneous to assume the external aids as worthless in embracing new light upon language which appears to be plain and clear.[145] Rather it is significant fact that broader contextual background should be taken into consideration 'even when the text is apparently susceptible of only one meaning.'[146] One thing to be accepted, the use of extrinsic aids for interpretation should be within the discretion of the court because usually, they are the proper authority to analyze and adjudicate the case. Otherwise, erroneous application of statutes may arise. An error may be for two reasons- either for non-discover of all possible contextual implications of language or assertion of the meaning of language as written

[142] See Art. 7B of the Constitution of Bangladesh.
[143] *Ashok Kumar v. India*, (1991) AIR SC 1792; *PK Unni v. Nirmala Industries*, (1990) AIR SC 933.
[144] Davies, D. J. "The Interpretation of Statutes in the Light of their Policy by the English Courts." *Colum. L. Rev.* 35 (1935): 519.
[145] Examples of this position, that a plain statute is conclusively so, are: *Wilbur v. United States ex rel. Vindicator Consolidated Gold Mining Co.*, (1931) 284 U. S. 231.
[146] Supra No. 144. pp: 519, 527.

in the text. To survive these two dangers, extrinsic aids for interpretation are necessary. From the above discussion, this discussion just wants to argue that for those who say the language of Article 8(2) of the Constitution is clear and unambiguous, there is no opportunity for the judiciary to do anything else because of the non-enforceability of fundamental principles, they should think anew. Because what appears to be plain, placed in a broader periphery, may become quite ambiguous. New possibilities of meaning may derive with the progression of time. To be specific, an interpretation derived from the internal and external history of a statute becomes more dependable than what is interpreted only from the statute itself.

There are essentially two models of constitutional interpretation. The first one is legal positivism, other is structuralism. Legal positivism means all legal norms are basic rules adopted by specific institutions and nothing else.[147] This model is correctly termed as the 'black letter law' tradition which tends to interpret the law as certain, specific, and predictable. Here, the law is separated from morality, interpreted by self-determined principles and concepts.[148] On the other hand, structuralism is another model which interprets the constitution liberally. It wants to determine the provisions in totality and the spirit prevailing underneath the Constitution. The structuralist model seeks to resurface the implicit nuances of the Constitution.[149] It justifies the wide interpretive role of judges. According to Justice Cardozo, a written constitution 'states or ought to state not rules for the passing hour, but principles for an expanding future.[150] Using of external aids for interpretation is thus permitted in the structuralist model.

There are at least three approaches to using external aids in constitutional or statutory interpretation.[151] The first is a restrictive approach where texts of statutes, statutes in pari materia, decisions while interpreting statutes, or any factual external aids are avoided even if language is ambiguous. The second approach is a little bit different, where extrinsic aids for contextual interpretation are admitted but mainly adhere to the plain meaning of the texts of statutes. Here, extrinsic aids are only used to clear doubts and ambiguities in the statutory texts. And finally, the last approach is the permission of using external aids not only to clear doubts and ambiguities but also to

[147] Dworkin, Ronald. *Taking rights seriously*. A&C Black, 2013. vii.
[148] Dhavan, R. "M Galanter Law and Society in Modern India," Oxford University Press, New York, 1997, xvii.
[149] Sathe, S. P. "India: From Positivism to Structuralism." In *Interpreting constitutions: a comparative study*, pp. 215-265. Oxford University Press, 2006. 226.
[150] Cardozo, Benjamin N., and Andrew L. Kaufman. *The nature of the judicial process*. Quid Pro Books, 2010. 83.
[151] De Sloovere, Frederick J. "Extrinsic Aids in the Interpretation of Statutes." *U. Pa. L. Rev.* 88 (1939): 530.

make a constant attempt to verify the plain and explicit meaning to find out more justification and rationality, provided such an attempt is clearly worthy and understood.

Now consider the perspective of constitutional interpretation of Bangladesh, the second approach has got to find the resemblance. But not in toto. Because here recognition of the judicial decision of constitutions pari materia is allowed for clearing doubts or any inconsistency, but not the using of extrinsic aids generally. The legal positivistic approach is mainly applied here, adhering to the 'black letter law' tradition. This work attempts to shift that approach of the Judiciary to move into a new horizon of constitutional interpretation. Although venturing into the non-specified realm of factual backgrounds of the Constitution, as found in its constitutional history, is always a risky journey, as long as the journey is aimless and non-purposive.

However, let's come to another point. What are the external aids that we are considering here for interpreting the Constitution? The National War for Liberation of Bangladesh in 1971 is the culmination of historical events starting from the Language Movement (1948-1952), the formation of the United Front, and its sweeping victory in the 1954 Provincial Election. In that election the 21 Points Programme (which was the Election Manifesto of the United Front, and Complete Provincial Autonomy, and Non-Aligned Foreign Policy were the two most important pledges of the 21 Points Programme), 11 Points Demands of All-Party Students' Action Committee, Historic Speech of 7th March by Bangabandhu Sheikh Mujibur Rahman, the Proclamation of Independence, and so on. Other pre-constitutional documents in the post-Liberation period including the speeches and proceedings in the CA are also vital documents to understand and interpret the Constitution. Among the mentioned pre-constitutional documents, the historic speech of 7th March by Bangabandhu Sheikh Mujibur Rahman and the Proclamation of Independence have been incorporated in the 5^{th} and 7^{th} schedule respectively of the Constitution by the 15th amendment in 2011. These external aids are necessary for the better realization of social and economic rights. Because the Judiciary of Bangladesh lacks the enforcement rationality of fundamental principles especially related to social and economic rights, may find relevance while finding out the true legacy from these pre-constitutional documents and accordingly may adjudicate the rights with a firm attitude. And it is not the denying fact that the constitution of each country should be interpreted by her own historical background, sacrifice, and struggles of her own.

Bangladesh is celebrating the 50th anniversary of its constitution. Coming to the 50th anniversary, on the one hand, we need to evaluate the past work as well as have to outline the future. Coming in this period it cannot be said about the fundamental principles are "like people's program for socio-economic development of the country in a peaceful manner not overnight, but gradually. Implementation of these programs requires resources, technical know-how, and many other things, including mass education. Whether all these prerequisites for a peaceful socio-economic revolution exist is for the state to decide."[152] The judiciary of Bangladesh should not stand still and bestow the whole responsibility of enforcing social and economic rights to the State. Rather there is no denying-that the judiciary does have a lot to do. For that purpose, the external aids to interpretation of the constitution may be a useful tool and keep the Judiciary in a long leap.

Philosopher HLA Hart showed that all substantive terms contained a *'penumbra of uncertainty*.' Though Hart was one of the proponents of the positivist school of thought, even his comment does have relevance to the structuralist model of interpretation. Because statutory meaning is said to be vogue. The details of understanding are left to the interpretation of judges. Referring to some examples might earn clarity in this regard. In the Constitution of Bangladesh anyone will find these abstract phraseologies- 'material and cultural standard of living of the people'[153], 'reasonable wage,'[154] 'reasonable rest, recreation and leisure',[155] 'progressively remove the disparity in the standards of living between the urban and the areas of the rule,'[156] 'free and compulsory education to all children to such stage as may be determined by law,'[157] 'removing illiteracy within such time as may be determined by law,'[158] and so on. These vogue and unspecified terms have been left to the discretion of judges to ascertain. According to Bennion, these words are used purposively by the draftsmen because 'a proper proportion' may be assumed as ambiguous.[159] Here lies the role of judges to figure out the remedy to that extent necessary. That role becomes more justified when they can relate the demands to constitutional legacy.

[152] Shahbuddin, J in *Kudrat-E-Elahi* case.
[153] Art. 15 of the Constitution of Bangladesh.
[154] Art. 15(2) of the Constitution of Bangladesh.
[155] Ibid.
[156] Art. 16 of the Constitution of Bangladesh.
[157] Art. 17 of the Constitution of Bangladesh.
[158] Ibid.
[159] Bennion, Francis. "Hansard-help or hindrance-a draftsman's view of pepper v. Hart." *Statute L. Rev.* 14 (1993): 149.

Keeping an eye on the pre-constitutional documents, the true intention of our founding fathers while making this Constitution will be found. The aspirations of executing social and economic rights have been clearly manifested in every pre-constitutional document. In the 21-point demands of the United Front Movement in 1954, where the struggle for self-determination was initiated, demands no. 9, 10, 11 were for realizing social and economic rights along with other rights.[160] In 1962 a protest against curtailment of higher education, the introduction of 3-year degree pass courses, and an increase in students' fees was sparked and ultimately a bloody struggle against the then Pakistani rulers cost the lives of Mostafa, Wazillah, Babul, and many others for the right to education. In 1969, just before the liberation movement, the charter of 11 points was declared. In that charter also, demands No. 1, 6, 7 were for social and economic rights and declared with other CP rights.[161]

The historic speech of Bangabandhu Sheikh Mujibur Rahman on 7th March 1971, considered as one of the greatest motivations for the liberation war, also reaffirmed the emancipation of Bangladeshi people through the realization of social and economic rights along with fulfilling other demands. The starting of the great speech was with an assertion, "Today the people of Bengal desire emancipation, the people of Bengal wish to live, the people of Bengal demand that their rights be acknowledged." Then, he articulated the reason for that uprising- "We expected that the Parliament would meet, there we would frame our Constitution, that we would develop this land, that the people of this country would achieve their economic, political and cultural freedom." Finally, he reclaimed the reason for struggle with great endeavor and passion by saying- "The struggle this time is a struggle for emancipation. The struggle this time is a struggle for independence."[162] Then struggle for emancipation, struggle for independence started. People from all corners, all statures joined the fight with an aspiration of breaking the chain of exploitation, persecution of the people of Bangladesh, a desire to alleviate 'the agonizing cries of men and women', and contemplation of achieving the 'economic, political and cultural freedom.' Then the greatest achievement of the Bengali nation,

[160] Demand No. 9 stated- 'Introduce free and compulsory primary education in all parts of the country and provide fair salaries and allowances to teachers.' Demand No. 10 declared- 'Radical Reform of Education System, teaching in Mother Tongue, Abolishing Discrimination between Public and Private Schools and Transforming All Schools into Government Aided Institutions', Demand No. 11 declared- 'Repeal of reactive laws like Dhaka and Rajshahi University Act and make higher education easily available.'

[161] Demand No. 1 was- 'Make immediate solution of education problem i.e. repeal of all laws of Hamidur Rahman Education Commission and all University Acts and reduction of all monthly fees of students.' Demand No. 6 was- 'Reduce the taxes and rents from farmers and setting a minimum price of Rs. 40 for jute.' Demand No. 7 declared- 'Provide fair wages, medical treatment, education and housing to the workers and empower the labor movement.'

[162] See 5th schedule of the Constitution of Bangladesh.

freedom was achieved with the cost of three million martyrs and the untold miseries of two lakh mothers and sisters in the bloody struggle of nine months.

During the 9-month war, the elected representatives[163] met at Meherpur on 17 April 1971 and signed the Proclamation of Independence of a newly born country, Bangladesh. It was recognized as a provisional Constitution. This Constitution can be referred to as the First Constitution of Bangladesh. There also, the vigor for ensuring 'equality, human dignity, and social justice' was proclaimed.

The elected representatives, after the formal declaration of Independence on 16th December 1971, formed a CA intending to make a new constitution of Bangladesh. The working of the CA started in January 1972 and ended by adopting the Constitution on 4th November 1972 which became effective on 16th December 1972. During the period, the participants of that CA debated on different matters enshrined in the Constitution. Importantly, a significant part of that debate was encircled by the judicial enforcement discourse of social and economic rights.[164] Finally, it was declared that the social and economic rights would not be judicially enforceable, but with the progression of time, that would be realized.

Bangabandhu Sheikh Mujibur Rahman in his speech on the draft constitution said, 'I have to make arrangements for their (the downtrodden people) rehabilitation. Sad people have to smile. The people of Bengal should at least live by eating.'[165] In which economic system the State would be run, Bangabandhu referred in the same speech, 'We believe in socialism. Where there will be a society without exploitation. The exploiting class will never be able to exploit the people of the country again. ...That is why the economy will be socialist.'[166] Dr. Kamal Hossain, Chairman of the Constitution Drafting Committee in the CA of Bangladesh clearly articulated the duty of the State by saying- 'The state has been entrusted with the responsibility of emancipating the peasants and workers and the

[163] Prior to the 1971 Bangladesh Liberation War, the first general election of Pakistan was held where then Awami League party won 167 seats out of 169 seats in the National Assembly. They became the representatives of lately formed Constituent Assembly in 1972. Despite achieving the right to form Government the then military junta of West Pakistan did not allow which in consequence gave birth to the inflation of liberation war.

[164] This view was supported by Justice MA Matin, one of the interviews. He commented- "Social political rights are the foundation of all rights. The debates in the Constituent Assembly reflected the nation's concern for their protection and implementation. The constitution in its preamble and part II sufficiently embodied the gist of the debates."

[165] Speech of Bangabandhu Sheikh Mujibur Rahman at Constituent Assembly on 12.10.1972. (See Constitutional Assembly Debate (Halim, Md. Abdul. (ed.). *Bangladesh Ganaporishod Bitorko*. CCB Foundation, 2nd Edition, 2019.) Translated by Author.

[166] Ibid.

backward sections of the people from all forms of exploitation. The state has also been entrusted with the responsibility of providing necessities of life to all its citizens. The state will ensure that all citizens have equal opportunities and that equal levels of economic development are achieved throughout the state.'[167] Ali Azam, one of the participants of the CAD, emphasized the content of the Constitution, 'I mean, if needed in the interest of the country, a cloth and a robe will be given to every man; That should be done. When that situation is about to arise, there can be no reason to object. Because that is a sure thing being done through law.'[168] Sree Suranjit Sengupta, one of the participants of that debate, consistently opposed the decision to incorporate social and economic rights in Part II of the Constitution because of their judicial non-enforceability clause. In one of his speeches, he even referred to Abul Monsur who gave a speech on 17th January 1956 in Pakistan CA.

> "Now, Sir, what is this provision for a directive principle which is found nowhere in the world except in India and Ireland? These are the two solitary examples where the constitution provides for directive principles. It is preposterous to think that the constitution will give some directives which will not be enforceable in law and which will not be justifiable and will not be effective. If that is so, why should these things be in the constitution at all? It is not a plaything of children. It is a sacred document that shall be preserved in the breasts of the citizens of the State as a sacrosanct provision on which they would rely for protection of their rights-individual, social, collective, and political. But they provide at the very beginning that these or such provisions shall not be enforceable in any court of law. If that is so, why do you provide it all? Leave it to the People."[169]

In response to that, Dr. Kamal Hossain, Tajuddin Ahmad, Syed Nazrul Islam, and others have placed counter-argument. Here, the speech of Tajuddin Ahmad is noteworthy. He said, 'It would be great if we could legislate today that doing these things (implementing the fundamental principles by law) would meet the needs of human life in the future. But that is not possible.'[170] He further contemplated- 'What is in the second part can be called a general political program. It cannot be implemented in one year or five years. ... As far as the sovereign CA is concerned today, the system of making and enacting basic laws is very reasonable. Therefore, soon, immediately after the adoption of this Constitution, the Parliament which will be elected by the people will see it. ... one day this progress will happen.'[171] He

[167] Speech of Dr Kamal Hossain at Constituent Assembly on 12.10.1972. Translated by Author.
[168] Speech of Ali Azam at Constituent Assembly on 19.10.1972. Translated by Author.
[169] Reference of the speech of Abul Monsur by Sree Suranjit Sengupta on 24.10.1972. Translated by Author.
[170] Speech of Tajuddin Ahmad on 12th meeting of Constituent Assembly held on 30.10.1972. Translated by Author.
[171] Ibid.

did not end his speech by saying only that. He also rightly mentioned the role of the judiciary. '..... If the court observes any gap while interpreting any provision of this constitution, it will fill that gap with an explanation. The direction given by the court in giving that explanation will be effective and the court will have that power.'[172]

Tajuddin Ahmad could envisage the future. He foresaw the potential liability of the judiciary. There is no doubt that the Constitution has been entrusted to permit the legislative body to enact laws necessary for the implementation of socio-economic rights, but the judiciary, using its power of judicial review, can intervene in this subject matter. And, according to Tajuddin Ahmad, that intervention is not only the attempt of explanation, rather may be an explanation with the direction that the Constitution allows the other bodies and institutions of the State to make that direction effective.

A significant number of members of the CA have expressed their views on executing socialism, meaning establishing an exploitation-free society. Bangabandhu Sheikh Mujibur Rahman never denied that demand. Rather he aligned with that ideology. In one of the speeches of CAD, he emphatically remarked- 'We have a clear ideology. Bangladesh has become independent on the basis of this clear ideology. And this country will run based on that ideal. ..... I believe in socialism, where there will be a society without exploitation. The exploiting class will never be able to exploit the people of the country again. And without socialism, 75 million people would not be able to live within 54,000 square miles. That is why the economy will be socialist.'[173]

From the above discussion made in the CA, it is easy to connect the aspirations regarding social and economic rights of our founding fathers. The intention of our founding fathers was clear, that is to execute the social and economic rights, but standing in that perspective they were somehow forced to place the rights in Part II and to recognize them as judicially non-enforceable principles. But they were of the view of the progressive realization of social and economic rights. This was echoed in Tajuddin Ahmad's discussion.

The question may arise whether this kind of discussion is relevant for proper interpretation. Strictly speaking, adherence to legal positivism does not permit this kind of external aid. But to finding out the founders' intention, should be treated as an integral part of the constitutional interpretation. In

[172] Ibid.
[173] Speech of Bangabandhu Sheikh Mujibur Rahman on 12th October 1972. Translated by Author.

Bangladesh, it goes without saying that there is a very minimal incident of mentioning this kind of aid to constitutional interpretation. But for the impact of the comparative constitutional law, the stand of the Bangladesh Judiciary needs to be reconsidered. Nonetheless, some cases can be referred to where using the constitutional history of Bangladesh became relevant and the Judiciary used the aid to reach its conclusion. In the renowned *Dr. Mohiuddin Farooque* case,[174] Justice Mustafa Kamal recognized the bloody history of the Constitution of Bangladesh and invoked the philosophy of treating the constitutional provision. He remarked as "…the Preamble of our Constitution stands on a different footing from that of other Constitutions by the very fact of the essence of its birth which is different from others. It is in our Constitution a real and positive declaration of pledges, adopted, enacted, and given to themselves by the people not by way of a presentation from skillful draftsmen, but as reflecting the ethos of their historic war of independence."[175] In the same case Latifur Rahman, J articulated the birth of the country- "Bangladesh proclaimed Independence on the 26th day of March 1971 and through a historic war for national independence established independent, sovereign Bangladesh."[176] and then reminded the aspect of the role of the judiciary in Bangladesh by saying- "The Constitution of Bangladesh recognizes the welfare of the people in unambiguous terms. If we take a traditional restive rule and remain contented with it then the same will be disastrous for the welfare of a poor, uneducated society like ours in the context of social and economic inequality. Time has come when this court must act according to the needs of doing social justice to the large segment of the population."[177] Another two cases can be referred to where both the AD and the HCD have invoked external aids in deciding cases involving substantial questions of law as to the interpretation of the Constitution. In the *5th Amendment* case[178] and *Abdul Hye v Bangladesh* case[179] it can be observed that the Court has relied upon the constitutional history of Bangladesh to make the judgment. But none of the cases are related to social and economic rights. Although the Judiciary of Bangladesh has shown a restrained approach towards using external aid to interpret but for ensuring the social and economic rights of the people and enforcing those rights, the judiciary needs to explain the Constitution according to its reasoning spirit of it, without being confined to the words or letter.[180] The reasoning

[174] Dr. Mohiuddin Farooque Vs. Bangladesh, (1997) 49 DLR (AD) 1
[175] Ibid. para-42.
[176] Ibid. para- 71.
[177] Ibid. para- 75.
[178] *Khondker Delwar Hossain Vs. Italian Marble Works*, (popularly known as fifth amendment case) (2020) 62 DLR (AD) 298. See paragraphs 35, 36.
[179] Abdul Hye Vs. Bangladesh, (2018) 70 DLR 313. See paragraphs 9, 10.
[180] Probir Neogi, Senior Advocate, Bangladesh Supreme Court expressed this view while giving interview.

spirit lies not only in the written provisions of the Constitution but also in the pre-constitutional documents used as an external aid to interpretation.

In India, the CAD has been referred to as an aid to interpretation when the text of the Constitution is not explicit.[181] Indian Judiciary has further widened the ambit of using external aid by giving an observation in *District Mining Officer and others v. Tata Iron & Steel Co. and another* case.

> "It is also a cardinal principle of construction that external aids are brought in by widening the concept of context as including not only other enacting provisions of the same statute, but its preamble, the existing state of law, other statutes in pari materia and the mischief which the statute was intended to remedy."[182]

In *Indira Sawhney v. Union of India*[183], while interpreting the concept of 'social backwardness' the Court referred to Dr. Ambedkar's speech in the CA. The Court further held that it is permissible to refer to parliamentary debate to sort out the context, background, and objective of the statutes. But that reference could not be treated as having binding force over the Court. In this way, the Court recognized Parliamentary History as an aid to interpretation. In another case, the SC of India declared- "External aids are not ruled out. This is now a well-settled principle of modern statutory construction."[184]

It is obvious that the decisions of the Indian SC are not binding upon us. Nonetheless, the Court can refer because the constitutions are pari materia, help can be deduced from other constitutions. When there exist similarities in the origin of the Constitution, the conditions of the countries seem to be very comparable, it may be permissible to cite decisions from a foreign country, like India while using external aids to interpretation.

Pre-constitutional documents are very important because they form the constitutional founding. A Constitution can be judged by these documents. Considering the pre-constitutional documents, the Constitution of Bangladesh will be regarded as 'revolutionary' and 'autochthonous.' It does have a continuation with its past, as well as, has made a clear break from its past. The founding fathers of the

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[181] See *Golaknath v Punjab* (1967) AIR SC 1643; *Kesavanand Bharathi v Kerala* (1973) AIR SC 1461; TMA. *Pai Foundation v Karnataka* (2002) 8 SCC 481.
[182] (2001) 7 SCC 358
[183] (1993) AIR SC 477, 1992 Supp 2 SCR 454.
[184] *Prabhakar Rao and others v. State of A.P .and others,* (1986), AIR SC 120.

Constitution have established constitutional supremacy, not parliamentary supremacy. The Constitution has recognized all the important international human rights documents, though impliedly. Having all these, the judiciary sometimes suffers from being responsive enough. For the last 50 years, lacking this response has been visible in the judicial enforcement of socio-economic rights. This stagnation can be obliterated if properly recourse to internal and external aids. The distinctive feature of Bangladesh's birth history which has been reflected in its historical struggles creates a separate identity from other South Asian countries is many occasions. That is somewhat mirrored in the pre-constitutional documents. That is why they need to be studied thoroughly. Then only, one could realize what were the true intentions of the founding fathers when they made this Constitution. Then only one can realize that equality, social justice, and freedom cannot be achieved without the implementation of socio-economic rights. Being a 'guardian of the Constitution' should the judiciary be silent? Does not it raise questions about why most of the social and economic rights have not been executed by the State even after 50 years? Will the Judiciary only take shelter from the 'non-enforceability principle' while dealing with social and economic rights? To properly address all of these questions, the Judiciary of Bangladesh needs to approach pre-constitutional documents profoundly to be used as external aids to interpretation.

6.5.3 Subsequent Social, Economic development as External Aids to Interpretation

The interpretation of the Constitution must keep pace with the changing features of a country. The social and economic conditions of a country are constantly changing. So the interpretation should comply with that changing ethos. Although initially, a State becomes unable to provide social and economic rights for its shabby conditions, with the progress of time and subsequent social-economic development may keep the earlier position change. The Judiciary can take this later social-economic development into consideration for enforcing social, and economic rights. With the relevance to this connotation the case *SP Gupta v. Union of India* can be referred to where the Court observed-

> "The interpretation of every statutory provision must keep pace with changing concepts and values and it must, to the extent to which its language permits or rather does not prohibit, suffer adjustments through judicial interpretation to accord with the requirement of the fast-changing society which is undergoing rapid social and economic transformation … It is elementary that law does not operate in a vacuum. It is, therefore, intended to serve a social purpose and it cannot be interpreted without taking into account the social, economic, and political setting in which it is intended to operate. It is here that the Judge is called upon to

> perform a creative function. He has to inject flesh and blood in the dry skeleton provided by the legislature and by a process of dynamic interpretation, invest it with a meaning which will harmonize the law with the prevailing concepts and values, and make it an effective instrument for the delivery of justice."[185]

What the judiciary interprets is the assessment of the governmental action or inaction coupled with some directions. But judges' interpretive power as regards social-economic development can be questioned, as always, by the traditional notion- 'Judiciary is not allowed to intervene in any policy-related issues.' In this regard, Audrey R. Chapman with her fascinating article[186] paved the way forward. She has set some criteria upon which the investment of government can be measured and analyzed. Taking this view, it is possible to assess the State's action or inaction toward materializing social and economic rights. Chapman referred to three criteria- sufficiency, efficiency, and equity of government investment[187] which the Court can assess albeit not being part of the policymaking. This thesis uses these tools considering the Bangladesh context.

It has already been a consensus (as per the suggestion of UNESCO) that 6 percent of the Gross Domestic Product (GDP) would be a sufficient budget for the education sector or according to WHO, 5 percent of the GDP is sufficient for the health sector. If after analyzing the budget allocation and development of the economy, there observe the government has spent less than the accepted (5% or 6% of the GDP) budget, then the Court can ask questions coupled with directions. Spending less than that of maximum available resources can also be assessed by the Court. Secondly, as regards efficiency the Court can assess the government's initiatives in respect of adjudicating social and economic rights that she promised to her people. Because the problem of implementing socio-economic rights is not only the constraint of resources but also the lack of management. The classic example of the 1974 famine can be referred to where the availability of food was greater than that of 1971 or 1976.[188] Yet Bangladesh suffered famine because of mismanagement of food distribution. In India, when people

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[185] (1982) AIR SC 149, 1981 Supp (1) | SCC 87, 1982 2 SCR 365

[186] Chapman, Audrey R. "A violations approach for monitoring the International Covenant on Economic, Social and Cultural Rights." *Hum. Rts. Q.* 18 (1996): 23-66.

[187] By sufficiency she meant assessment by comparing actual expenditure with a benchmark figure, such as the proportion of GDP, or of total government spending. By efficiency -where a sum has been clearly budgeted and not used, a very strong argument can be made to compel a government to fulfil its obligations. The third criterion, equity means spending has not to be inequitable as between genders, classes, regions, or ethnic groupings.

[188] Chowdhury, M., and Jashim Ali. "Claiming a Fundamental Right to Basic Necessities of Life: Problems and Prospects of Adjudication in Bangladesh." *Indian J. Const. L.* 5 (2011): 184.

died from starvation even though adequate food was being stored, the Judiciary came to the fore and gave birth to the renowned PUCL case. Third, is the assessment of equity. The Court can play the role to assess any discrepancy among the category of rights. State's indiscriminate behavior toward social and economic rights can be a subject matter of assessment by the judiciary. All these three criteria can be reviewed by the Court in the feature of the social and economic development of a country.

Bangladesh is rising and the economy is much bigger now since 1971. It is now a widely accepted fact that this country is an emerging economy in South Asia. Remittances of about $14 billion and export of garment products of about $ 25 billion along with a GDP growth rate of over 6.0 percent have made the country a booming economy in recent times.[189] In 1972 the dependency rate on foreign aid for development projects was 88 percent which has reduced to 2 percent in 2010.[190] The per capita income has raised into$ 2,227 in the 2020-21 fiscal year which was $700 in 2010. As regards per capita income, Bangladesh is one of the top countries in South Asia, which is moving her into the middle-income economy. The development of the economy is elevating this country to be assumed as 'the next eleven (N-11) emerging economies of the 21st century after Brazil, Russia, India, and China."[191]

Bangladesh is one of the members of the UN that has pledged to fulfill the 'Sustainable Development Goals (SDGs) for building a better and sustainable future for people around the world. The goals need to be fulfilled within the year 2030. SDGs requires that every State party shall make pro-people, accountable, and inclusive institutions to achieve the goals.[192] Without establishing that kind of institution, it will be impossible to "enforce, protect, and promote human rights and human development."[193] The SDGs are designed to "leave no one behind."[194] Taking all these into consideration, the State needs to make a robust approach toward the establishment of an inclusive institution for people's needs. In this perspective, the Judiciary has the potential of becoming such.

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[189] Bangladesh Bank, "Monthly Economic Trends: March 2013", Vol. XXXVIII, No. 3, 2013.
[190] BBS, "Statistical Yearbook of Bangladesh 2010", Dhaka, Bangladesh Bureau of Statistics. Statistics Division, Ministry of Planning, Government of the People's Republic of Bangladesh.
[191] http://www.dailysun.com/index.php?view=details&archiev=yes&arch_date=26-03-2012&type=daily-sunnews&pub_no=96&menu_id=43&news_type_id=1&news_id=18931
[192] Goal No.16 of Sustainable Development Goals.
[193] Asrafuzzaman, A. B. M. "Strengthening the National Human Rights Commission of Bangladesh through a Legislative Amendment to Fulfill its Commitments Under Sustainable Development Goals (SDGs)." *Dhaka University Law Journal* 31, no. 1 (2020): 167.
[194] https://www.bd.undp.org/content/bangladesh/en/home/sustainable-development-goals.html?utm_source=EN&utm_medium=GSR&utm_content=US_UNDP_PaidSearch_Brand_English&utm_campaign=CENTRAL&c_src=CENTRAL&c_src2=GSR&gclid=Cj0KCQjw8_qRBhCXARIsAE2AtRadWqe07Dn_elANslZaLduJGJgkZiQgYrHodpQX76re5pRw1HnWS4waAuusEALw_wcB Last access: 27.03.2022

For promoting human rights and human development, especially for the people of Bangladesh, the project of strengthening the judiciary is nothing but of paramount importance.

This information is not new, not unknown to anyone. But the question is whether the enforcement discourse of socio-economic rights is being assessed in its form. The answer is no. The subsequent development of social and economic conditions is not being considered while interpreting the rights. At this point, the arguments made in 1972 about the non-implementation of socio-economic rights will be no longer applicable. Because the position of the economy is no longer in that place. Extensive improvements have been made. It needs to think about the implementation of socio-economic rights from that perspective. And the Judiciary also needs to interpret and enforce the rights taking cognizance of this advanced condition of social-economic development.

6.5.4 Some Concerning Factors

Using internal-external aids have some problems too. Sometimes they lack determinate meaning and have the possibility of potential influx. Lack of proper contextual interpretation may resort to ideological preference, resulting in to vitiate of the true intent of the Constitution. The problem of non-specification sometimes might be used as a shield for the non-implementation of rights. Very few judges intend to use internal-external aids to constitutional interpretation. Because that attempt bears some risks of over activism. Such efforts come only from a deep sense of history, a developed ideology, a commitment to politics and society, and strong moral to uphold the Constitution at all times. All the virtues are rarely seen in the present context.

Apart from this, the logic of judicial activism always brings forth another anti-logic of the transgression of judicial authority. There is always a chance of crossing the boundary of the separation of power doctrine. And judicial intervention in all spheres of life is neither desirable nor viable. It is not the denying fact that judicial activism may assign political privilege to the elites. That is why using internal-external aids to interpretation is a very risky job unless the purpose of using that tools is not clear and specific.

Another concerning factor of using internal-external factors is to undermine the role of political parties. It is a common trend for the advocates of judicial activism that they use to represent the judiciary as a messiah of all deeds. Discussing enforcing social and economic rights sometimes

demoralizes the other branches of the government. But that should not be like that. Because it is not the whole truth of enforcing this category of rights.

The role of the judiciary in safeguarding the rights of the citizens can be observed from another angle. Rosa Luxemburg, the German revolutionary socialist, Marxist philosopher once commented- "Without general elections, without unrestricted freedom of press and assembly, without a free struggle of opinion, life dies out in every public institution, becomes a mere semblance of life, in which **ONLY** the bureaucracy remains as the active element."[195] [emphasis added] In such a situation in a country, it becomes difficult for the judiciary to play a sincere role. In some cases, the judiciary also became obedient to the bureaucracy. The role of the judiciary in the use of external or internal aid then demands more in-depth observation.[196]

6.6 Concluding Remarks

This study argues against the segregated approach to human rights. The apparent conflict between the two categories of rights is nothing but a wrong conception of rights. Both categories of rights, whether civil-political or social-economic, are equally connected and are the prerequisite for achieving individual freedom in a true sense. But for some historical reasons the Constitutions of India, Pakistan, and Bangladesh have differently recognized the two categories of rights and generally accepted social and economic rights as judicially non-enforceable. With the progression of time, the approach has been changed and all three have attempted to realize social and economic rights either by a wide explanation of 'right to life' discourse or by initiating PIL (PIL) or Social Action Litigation (SAL).

This thesis also argues that since the enforcement of social and economic rights is one of the most discussed points in global constitutionalism, also becomes crucial to the constitutionalism of the global south, and accordingly South Asian judicial discourses have played a significant role in this regard. Though it is a repeated saying that the enforcement of social and economic rights may earn tension within the power balance of the government, may be addressed as a 'threat' to the traditional conception of separation of power doctrine, nonetheless, context and circumstances allow the courts in this reason to play role in furthering the way of enforcing rights. It has been the duty of the Court

[195] Luxemburg, Rosa. "The Problem of Dictatorship." *Essential Works of Socialism* (1976): 254-57.https://www.marxists.org/archive/luxemburg/1918/russian-revolution/ch06.htm Last access: 27.03.2022

[196] These concerns have been expressed by two of the interviewees- Probir Neogi, Senior Advocate, Bangladesh Supreme Court and Dr. Naim Ahmed, academician and Advocate of Bangladesh Supreme Court.

to correct the defects of social safety nets and assess the policy of the government. So the notion of the role of the Courts commonly ascribed by the global north does no longer exist here, rather the socio-political design of some countries belonging to the global south permits the Courts to become the vanguard of people's contemplation and desire.

In this work, the role judiciary in adjudicating social and economic rights has been extensively discussed keeping an emphasis on the right to education which the judiciaries of India and Pakistan have acted upon. The consistent role of the Judiciary has elevated the right to education from principle to one of the FRs. This attempt has had a profound impact on South Asian Constitutionalism. From this the biggest lesson for Bangladesh Judiciary is to play a continuous effort to uphold the spirit of the Constitution, ultimately bringing positive outcomes. Because non-fulfillment of social and economic rights certainly affects the enjoyment of FRs. If we consider the very text where the Constitution has been rendered as "the solemn expression of the will of the people" the Judiciary of Bangladesh as the 'guardian' of the Constitution does not ignore its role to uphold and progressively interpret the Constitution.

Taking cognizance of Robert Alexy's thought this thesis argues that so far the explanation of valuing principles was erroneous. It emphatically argues that the principle never dies or becomes extinct. Rather only be outplaced by other weightier principles. The measurement of the weight of the principles can only be ascertained on case to case basis where contextual interpretation of principles is needed. Upon relying on this argument, this study claims that the fundament principles can be separately recognized without taking the shade of FRs, which has been the practice so far. This argument has been further elaborated while measuring principles applying the tools of suitability, necessity, and proportionality in a narrow sense

At the same time, this paper argues that if the part of Article 8(2) 'principles as a guide to interpretation' is considered with Articles 102(2), 111, and 104 of the Constitution, then there will arise a huge prospect of interpretation for the Judiciary which certainly unearth the constitutional bar 'the principles shall not be judicially enforceable.' Taking this analysis into consideration the judiciary cannot stand its previous position regarding the enforcement of social and economic rights.

While it is profoundly claimed that the historical background of the Constitution of Bangladesh is characteristically different and the history of its constitution-making speaks of the necessity of the realization of social and economic rights more accurately and effectively. The pre-constitutional

documents work as an external aid to interpretation, which is a hidden treasure for understanding the enforcement mechanism of social and economic rights. After fifty years of Independence, this kind of external aid has a huge possibility to find social-economic rights in a different notion. The subsequent development feature in social and economic fields also should be considered as an external aid to interpretation. Reviewing all these it can emphatically be claimed that the Judiciary can find much more justification and rationality to adjudicate social and economic rights.

Chapter- 7

Conclusion

7.1 Overview of the Thesis and Major Findings

This thesis work has attempted to add new dimensions to the contextual interpretation of the Constitution, especially in the judicial enforcement of social and economic rights. So far, judicial interpretation as regards enforcement of social and economic rights has been limited generally to the discussion of 'right to life' discourse or by a retrogressive approach. This thesis work has tried to encroach on that boundary by bringing a more inclusive and liberal interpretation.

As discussed in the first chapter it has been seen that the enforcement discourse of social and economic rights is a matter of contention. It has been practiced differently throughout the world. The constitutional practices of the Global South differ from the practices of the Global North. As discussed in the sixth chapter, Global North has less prioritized the judicial enforcement of social and economic rights than CP rights, in other words, social and economic rights are more the subject matter of legislative body and state-owned social safety net. This is not the general condition of the Global South. Here, judiciaries have played a much more significant role in adjudicating social and economic rights. The long-standing constitutional practices and social-historical-economical differences have influenced the treatment of socioeconomic rights differently in two major parts of the world. Within that realm of differences, the South Asian judicial discourses have worked. It has explored some added considerations for the implementation of social and economic rights. Following the discussions in the third, fourth, and fifth chapters, it can be observed that the 'right to life' discourse, suo motu adjudication, relaxing procedural and standing barrier of an 'aggrieved' person, incorporation of PIL and SAL, providing structural injunction like continuous mandamus or dialogical method, and so on are some of the contributions which South Asian judicial discourses have endorsed. Although these are not theoretical contributions but even added some important dimensions to the whole spectrum of judicial activism. By analyzing all these, this study has worked for discovering some more attribution capable to be applied in the enforcement discourse.

This study has comparatively discussed the contexts and conditions of the constitutional journey of South Asian countries especially, India, Pakistan, and Bangladesh in the third, fourth and fifth chapters of this thesis respectively. The discussion has promoted the judicial enforceability of social and economic rights despite having non-enforceability provisions in their respective constitutions. The work finds that the changing of judicial approaches from positivistic to interpretivist in the above three countries is for the oppression and failure of political bodies and other branches of the government. With it, we observe a common synergistic relationship between rule, principle, and policy as a growing tendency in the above-mentioned three countries.

It has been observed that the constitutional framework of South Asian countries has the similarity in incorporating principles (whether directive or fundamental) in their constitutions. Generally, the principles comprise the social and economic rights and that principles are not judicially enforceable. This study finds that the approach so far applied by the judiciaries, and legal scholars of South Asian countries in treating principles is mainly dominated by positivistic jurisprudence. The principles have been treated through the lenses of rules or in other sense, there is an attempt to equate principles with rules and so the judiciaries often feel difficulties in finding enforceability of the social and economic rights. To address this situation, this study has tried to contextualize the constitutional theory of Robert Alexy.[1] Alexy's theoretical position has been elaborately discussed in the sixth chapter titled *"Further Understanding of Principles."* Using the theoretical framework, the study finds a further and elaborated understanding of principles that may reasonably be applied to the constitutional framework of South Asian countries. In this thesis, the constitutional framework of Bangladesh has been considered as the principal case study where the theoretical proposition of Alexy has been applied. It has been argued that from Bangladesh's perspective, this new generation of ideas is much more relevant and promising because of the existence of highly significant constituent

[1] Robert Alexy is a German jurist and a legal philosopher. His book *A Theory of Constitutional Rights* has been published by Oxford University Press, New York, Translated by Julian Rivers in 2002 and the book was reprinted in 2010. According to Alexy, all legal norms are either rules or principles. Finding out and properly deciding the distinctions between rules and principles are the "key to the resolution of central problems of constitutional rights doctrine." Principles are norms that are to be realized to their utmost level in both ways- in law and in fact. Principles are optimization requirements. On the other hand, rules are norms having a fixed position both in law and fact. Rules are always either fulfilled or not. If there occurs any conflict between rules, they must be declared invalid and thereby excised from the legal system. For more details, see chapter 6 of this thesis.

instruments such as CAD, elaboration of the functions of the FPSP discussed in the Article 8(2), and the addition of Article 7B to its Constitution.[2]

The major motivation of this thesis has been to explore further justification for judicial enforcement of social and economic rights. For the sake of that purpose, the study has examined the preamble of the Bangladesh Constitution as well as its constitutional history in the sixth chapter. Although the thesis work researched the comparative constitutional features of India, Pakistan, and Bangladesh, the examination is mainly focused on the constitutional framework of Bangladesh. As mentioned above the study examined the preamble as an internal aid to the interpretation and various pre-constitutional documents of the Bangladesh Constitution, such as the 21 Points Programme of 1954 Provincial Election (which was the Election Manifesto of the United Front, and demand was for Complete Provincial Autonomy), 11 Points Demands of All-Party Students' Action Committee of 1969, Historic Speech of 7th March by Bangabandhu Sheikh Mujibur Rahman in 1971, the Proclamation of Independence in 1971, along with pre-constitutional documents in the post-Liberation period including the speeches and proceedings in the Constituent Assembly as external aids. After examining all of these, the study has argued that these internal and external aids can be used as effective tools for constitutional interpretation for more efficient enforcement of social and economic rights. It has also been claimed that the subsequent economic and social development of Bangladesh over the last 50 years has also to be considered as another external aid to interpretation. Considering these aids, it is possible to argue and apply additional justification and rationality for judicial implementation of social and economic rights. Along with it, the thesis work has also underscored some concerning factors of using internal-external aids, which demands conscious use of it otherwise judicial transgression in the form of activism may occur.

The study has adduced more stress on the proper interpretation of some of the constitutional provisions of Bangladesh. It finds the narrow interpretation of the phraseology 'the principles shall not be judicially enforceable' enshrined in Article 8(2) of the Constitution. Following the discussion in a sub-chapter titled "*Constitutional Provisions Widens Interpretative Approach*" of the sixth chapter,

[2] Art. 7B of the Constitution states- "Notwithstanding anything contained in article 142 of the Constitution, the preamble, all articles of Part I, all articles of Part II, subject to the provisions of Part IXA all articles of Part III, and the provisions of articles relating to the basic structures of the Constitution including article 150 of Part XI shall not be amendable by way of insertion, modification, substitution, repeal or by any other means." Article 7B may create an absolute bar to enforce social and economic rights forever. That is why contextual interpretation by the judiciary is very effective and needful to correctly adjudicate the enforcement possibility of social and economic rights. Detailed discussion will be found in fifth and sixth chapter.

this work, on one hand, has attempted to approach Article 8(2) combinedly with Article 7 of the Constitution and, on the other hand, made a contextual interpretation of the other phrases of Article 8(2) like- these principles (1) shall be fundamental to the governance of Bangladesh, (2) shall be applied by the State in the making of laws, (3) shall be a guide to the interpretation of the Constitution and of the other laws of Bangladesh, (4) shall form the basis of the work of the State and its citizens. By applying these tools, the ambit of Article 8(2) has become wider and the 'so called' constitution bar to non-enforceability of principles has turned out to be debatable.

One part of Article 8(2)- 'the principles shall be a guide to interpretation' and Article 102(2) have been re-interpreted in the thesis work and thus identified as the authority given for more liberal judicial review. Here, in the sixth chapter having a title *"Lack of Proper Understanding of Fundamental Principles,"* the study claims that by applying interpretive tools (illegality, irrationality, and procedural impropriety as tools set for judicial review), the judiciary can question the constitutional responsibilities of other branches of the government, especially in the field of implementation of social and economic rights. Along with it, by using some measuring tools like- sufficiency, efficiency, and equity of government investment, the judiciary can scrutinize the use of the government budget even if it not being part of the policy-making body. These are some of the tools which the study finds very effective for the judiciary to make a bold approach toward dealing with social and economic rights.

This thesis work finds some of the terminologies in part II of the Bangladesh Constitution as vague and unspecified which understandably are left to the interpretation of the judiciary. The abstract phraseologies are- 'material and cultural standard of living of the people'[3], 'reasonable wage,'[4] 'reasonable rest, recreation and leisure',[5] 'progressively remove the disparity in the standards of living between the urban and the areas of the rule,'[6] 'free and compulsory education to all children to such stage as may be determined by law,'[7] 'removing illiteracy within such time as may be determined by law,'[8] and so on. These unspecified terms may have been left to the discretion of the judges to ascertain. The study claims that without proper recourse to the constitutional history of Bangladesh the judiciary will not be able to construe the proper meaning of these terms. The internal and external

[3] Art. 15 of the Constitution of Bangladesh.
[4] Art. 15(2) of the Constitution of Bangladesh.
[5] Ibid.
[6] Art. 16 of the Constitution of Bangladesh.
[7] Art. 17 of the Constitution of Bangladesh.
[8] Ibid.

aids to interpretation would greatly assist in dealing with the issues concerning the enforceability of fundamental principles.

7.2 Recommendations

Finding a justified, comprehensive, and effective enforcement discourse for social and economic rights is the prime object of this thesis work. For that reason, the research work engages itself to explore the newer understanding of principles, re-interpretation of constitutional provisions, and ascertainment of internal and external aids to the constitutional interpretation. Following this attempt, the thesis recommends the following-

Firstly, there should be a philosophical change of approach of the legal communities- the judges, lawyers, academicians as well as the general people at large. It should be based on the belief that the enforcement of social and economic rights has similarities with that of civil and political rights. Both categories of rights have the same positive and negative enforcement phenomena. Constitutional legality and institutional capacity are the basis of enforcement for both categories of rights. It may be a lame excuse if anybody confers that the social and economic rights have a lack constitutional legality or for the execution of these rights the judiciary has limited institutional capacity. The thesis work has already dealt with these issues and clarified that the judiciary has ample scope for the enforcement of social and economic rights. So, the discriminated approach to treating rights should be abandoned. To solve this problem, proper legal training addressing these issues for the legal community can be viewed as a useful initiative.

Secondly, as the findings of the thesis work encapsulate the context, facts, and circumstances of every particular case, the judiciary can use the discourse as a tool for appropriating social and economic rights progressively. If it is to be said in detail- the judiciary should respond to the necessity of the situation. The first and foremost duty of the judiciary is to find out the already existing legal favor for the most marginalized people of the country. For example, the workers have the right to enjoy 5% of the net profit of a company under the Bangladesh Labour Act 2006.[9] Children are bound to take care of their parents under the Parents' Maintenance Act 2013. Here, in these kinds of issues, the judiciary can apply its authority using Article 8(2) or 102(2), if feels necessary. In absence of any such legal rules, the judiciary can even perform its role using discretionary power rooted in the above-mentioned

[9] Section 234(b) of the Bangladesh Labour Act 2006.

Articles of the Constitution. Using different interpretive tools and taking guidance of internal-external aids to interpretation the judiciary can apply its authority in enforcing social and economic rights.

Thirdly, by arranging time-to-time dialogue with different branches of the government, non-government organizations, and persons the judiciary can effectively influence and pursue the implementation of social and economic rights.

Fourthly, upon the considerations made by the judiciary in different cases related to social and economic rights, the legislative body can think of amending the constitutions and incorporating some of the social and economic rights in the chapter of fundamental rights.

7.3 A Way Out for Further Research

This thesis does not claim to be the most extensive and comprehensive work. It may have some shortcomings. Nonetheless, this study has tried to develop different ideas and theories on constitutional rights. It has experimented to view principles within enforceability discourse. In the constitutional framework of South Asian countries, it is a different approach addressed by the author. Along with it, a comparative analysis of three South Asian countries has been made, from which anyone would find the resemblances, correlations as well as discrepancies among the three. Above all, the work has captured pre-constitutional documents to be viewed as relevant and effective interpretive tools to enforce social and economic rights by the judiciary, albeit having some limitations.

The attempt has been to develop a newer judicial discourse in favor of enforcing social and economic rights. Taking into consideration this attempt, there may evolve many theoretical avenues. If this theoretical assumption is considered effective, this may also apply to the third generation of environmental rights. If the interpretative approach applied in this thesis work proves operative, then it will certainly approve the statement made by Latifur Rahman, J- "The Constitution is a living document and therefore its interpretation should be liberal to meet the needs of the time and demands of the people."[10] In this way, this study may widen the scope of further research in the rights discourse.

[10] See *Dr. Mohiuddin v. Bangladesh and Ors.,* (1997) 49 DLR (AD) 1. (FAP 20 Case)

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- International Covenant on Civil and Political Rights 1966.
- International Covenant on Economic, Social and Cultural Rights 1966.
- National Food Security Act 2013 (India)
- Parents' Maintenance Act 2013 (Bangladesh)
- Proclamation of Independence 1971 (Bangladesh)
- Pure Food Ordinance 1959. (Bangladesh)
- Universal Declaration of Human Rights 1948.

Appendix A

Questionnaire for interview

1. Thanks for sharing your valuable time to give this interview.

   We all know, for the last 30 years, we have seen as a growing trend of South Asian Constitutionalism, the continued participation of the Judiciary in the enforcement of social and economic rights. Please comment on this issue from your long-term experience as an academician or lawyer of the Apex court of the country?

2. 'Right to life' is a prominent discourse upon which the Judiciaries of India, Pakistan, and Bangladesh have acted upon over the years in dealing with social and economic rights. According to you, what are the causes of hinging upon this position by the Judiciaries?

3. Do you think that the enforcement of social and economic rights can be considered beyond the realm of 'right to life' discourse?

4. Upon analyzing the constitutional history of Bangladesh, what is your opinion regarding the use of the pre-constitutional documents (constitutional history, Constituent Assembly Debates (CAD), 11 points demands of 1969, 21 points demands of 1954, Historic Speech of 7th March, Speeches of the founding fathers of the Constitution, the Proclamation of Independence, etc.) in interpreting and enforcing social, economic rights by the Judiciary?

5. By analyzing the pre-constitutional documents, is there any scope for the Judiciary where social and economic rights can be equally treated with civil and political rights?

6. In Constituent Assembly Debates, most of the members were on the opinion to prioritize civil-political rights than that of socio-economic rights. Do you think, the time has come to make that approach change?

7. In which way, the Judiciary of Bangladesh can come forward to act on the changing approach towards enforcing social and economic rights?

8. Do you think, using external aids (the pre-constitutional documents) by the Judiciary to interpret socio-economic rights adjudication does have some limitations? What are those? How to overcome them?

   Thank you very much.