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An Analysis of the Judicial Enforcement of Social and Economic Rights

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Abstract

The modern concept of human rights can be traced back to the European Renaissance. However, it was only after the foundation of the United Nations Organization that practical steps toward global recognition and enforcement could become possible. The Universal Declaration of Human Rights (UDHR) is a unique document in the sense that never before in the history of mankind, nations did agree on universal human rights standards. As it was a declaration and non-binding in nature, it was succeeded by two conventions namely, the International Convention on Civil and Political Rights (ICCPR) and the International Convention on Social Economic and Cultural Rights (ICSER), each comprising of a separate set of human rights. On the other hand, their champions argue that civil and political rights are a wasteful luxury for an empty belly.

Key Words: Constitutional Law, Socio-Economic Rights, International Covenant on Social Economic and Cultural Rights, Judicial Enforcement of Socio-economic Rights

Introduction

Human rights according to their mode of enforcement may be classified as positive and negative. The former is a right that 'corresponds to a positive duty and entitles its owner to have something done for him' whereas the latter 'has a negative duty corresponding to it and enjoyment is complete unless interference takes place' (Salmond, 1977). Socio-economic rights are positive rights by nature and their enforcement can only become possible if steps are taken to provide them. Thus the state, in order to guarantee such rights has to perform the 'corresponding positive duty' that lies on its behalf. The examples are right to food, shelter, a clean environment, health etc. It is obvious that the provision of these rights needs resources. It is for this reason that their enforcement has always been a topic of debate among experts. There is a view that the enforcement of these rights is not possible either by incorporating them in the constitution or through court intervention. The proponents of this point of view suggest that positive rights should be guaranteed by a decent society (Sunstein, 1993).

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Another group argues that such rights are basic needs like food, drinking water, cloth, shelter etc. and without their fulfilment; the civil and political rights remain of no value. Despite this debate, many states have recognized them by their entrenchment in the constitution. For example, Chapter II Part II of the Constitution of Pakistan provides for certain rights under the title, principles of policy. These are certain guarantees that the state owes to its citizens and mere a glance over them would reveal that these are positive rights. Other countries e.g. China guarantees them as fundamental rights vide the constitution. The main difference between fundamental rights and principles of policy as enunciated in the Pakistani constitution is their justiciability i.e. their enforcement through the courts of law. In countries where these rights are treated at a higher pedestal than fundamental rights, the courts are bound to enforce them in the very first place. Whereas in countries where they are considered guiding principles of policy, the courts, in order to entertain them, have to look at several other factors. In both cases, however, judicial intervention has proved to be an important as well as an effective tool for their enforcement.

There is yet another argument propounded by some that judicial intervention for the purpose of enforcement of socio-economic rights is a domain that does not belong to them. They consider these rights as a matter related and subject to the policy and not to the law. Since policy matters are normally considered as ousted from the court's jurisdiction, therefore, such interventions attract criticism from certain quarters.

Sources of the Socio-Economic Rights

The concept of socio-economic rights has sprung from certain religious teachings and philosophies. Both these sources have affected the constitutional orders of many states which, in their turn, have incorporated them into their constitutions. The constitution of the Islamic Republic of Pakistan may be considered as an example wherein the teaching of Islam and certain socialist doctrines are reflected via several articles especially the preamble, the article about the elimination of exploitation and in Part II under the head, principles of policy (Articles 2A, 3, 29-39). Social and economic well-being as a matter of right achieved global significance in 1919 when, through the Treaty of Versailles, the International Labor Organization was formed. Its significance can be weighed by the fact that it is the only remnant of the treaty that survived the death of the League of Nations and now is an integral part of the United Nations Organization (the UN). Just before World War II, an unprecedented economic crisis engulfed the globe, the great depression, stressing the nations to realize and provide for social security. The aftermath of WW II demanded the establishment of the United Nations and one of the foremost proposals included certain positive rights necessary for social welfare and prosperity to be recognized in the charter of this organization. Hence, we can see their reflective promotion in Article 55 (a) of the UN Charter. In 1948, the Universal Declaration of Human Rights (UDHR) was adopted wherein these rights were integrated vide articles 22-28. Notwithstanding the significance of the declaration itself, its provisions were of non-binding nature which stressed the nations to go for more comprehensive treaties that have binding effects for all the signatories (Steiner, Alston and Goodman, 2008). The result was the adoption of two separate conventions, the ICCPR and the ICSER. The ICCPR enjoys universal acclaim as it was adopted and ratified by countries all around the globe. Whereas the ICSER, since it contains certain positive rights which could be implemented by expanding resources, was

ratified with hesitation and by each country according to its available resources and financial position.

It has been mentioned earlier that the enforceability of socio-economic rights differs from that of civil and political rights which makes it controversial. An important aspect of rights is the existence of an effective enforcement mechanism otherwise the people cannot enjoy any benefit from them. It is for this reason that countries usually incorporate them in their domestic law, including the constitution so that the judiciary can be invoked to implement them in case they are violated. Furthermore, since the enforcement of positive rights is always conditional i.e. if and when adequate resources are available, the intervention of courts is considered by some as interference in policy matters.

In the post 2005 Superior Judiciary used to intervene in matters of public importance. Since Independence Act (1947) judiciary played a commendable role in national politics. Indian constitution article 32 and 226 and the constitution of Pakistan article 184(3) provides an opportunity to interfere in socio-economic matters. Pakistan Steel Mill was established in 1968 to boost the economy of Pakistan with the assistance of the former USSR. The total cost was estimated as Rs. 24.7 billion which will earn a production of one Million tons of steel but due to some insurmountable reasons it fails to achieve its desired target, and there has been a loss of Rs. 100 billion.

The recent privatization of the Mill dates back to 2006 when Watan Party challenged the privatization scam in the Supreme Court of Pakistan. The court formed a larger bench to deal with whether a bid of $362 million is sufficient. Judiciary, after a thorough investigation, declared the same void. Earlier, the government announced privatization in 2005 when General Pervez Musharaf was the president of Pakistan. Superior judiciary took Sue Moto in 2006 under article 184(3) of the constitution. It became the first important case for the judiciary in the process of social litigation (Watan Party V. Federation of Pakistan PLD 2006 SC 697).

An interviewee has expressed his views regarding the privatization process and has argued:

"In 2005, keeping in view the economic liberalization policy, the government privatized public enterprises mainly with the support of Citibank. These enterprises included Pakistan State Oil (PSO), Pakistan Telecommunication Ltd. (PTCL), and Pakistan Steel Mills (PSM)…" (Participant # 16, Interveiw, September, 18, 2021)

To cover the unlimited debt, the government of Pakistan provided a bailout package for the Mill as a sigh of relief worth Rs. 41.20 billion in 2009. The total bailout was reported as Rs. 150 billion in 2005. There have been reports that Steel Mill production in 2004 was worth 30 million and the net profit in this regard was Rs. 6 million. Despite the above figures it suddenly falls short of the target and the government initiated the procedure for privatization. Once president Obama had Stated, for creating better services, and brought innovation, the private sector must be launched to play its role in national development.

Pakistan Steel Mill is a purely government-limited company, which has a 100% share, owns by the government. The company had roots in 1968 worth Rs. 24.7 billion and started production in 1981. It was the biggest source of steel material in the country. It is located near port Qasim and it has 19000-acre land used for multi-purposes. The production capacity was 1.1 million tons but the surplus pool of servants has brought financial constraints to the company. The process of privatization was initiated in 1997, then in 2000 and at last in 2005 by chief executive General Pervez Musharaf's government in the

meeting of the council of common interest. Initially, the government wanted to restructure the Mill. The basic aim was financial and manpower rebuilding and no further investment is to be made regarding the expansion. The court held: "At the time of issuance of the E.O.I, the privatization commission intended to sell 51-74 shares…But despite the decision made by the cabinet committee on privatization to reject the proposal was not accepted and…Thereafter the matter was not again placed before CCOP and the letter of acceptance was issued on the same date" (SC, 2006).

There have been two arguments; one is that eighteen thousand employees have been working in the Mill. Privatization shall deprive these families of all kinds of facilities. The ratio of unemployment shall increase. The other argument is that in the case of privatization, a large sum of Rs. 30 billion can be saved and should be utilized in another sector, which shall more productive. Since 2005 Supreme Court had adopted the policy of judicial activism which focused on the protection of the core values of society. In Watan Party V. The Federation of Pakistan (PLD 2006 SC 697, p. 737) has analyzed the privatization of KESC. The bench of nine judges of the superior court headed by chief justice Iftekhar Mohammad Chaudhry argued that: "It is a well settled that normally in the exercise of the power of judicial review, this Court will not scrutinize the policy decision or to substitute its own opinion in such a matter as held in M/s Elahi Cotton Mills case" (PLD 2006 SC 697, p. 737).

In the same manner, such a case was found in India in AIR 2002 SC 350, in the light of the above the case of privatization has been dealt with, it asserted that: the "Process of disinvestments is a policy decision involving complex economic factors…that the Courts would decline to interfere. In matters relating to economic issues, the Government has while taking a decision, the right to "trial and error" as long as both trial and error are bona fide and within limits of authority" (Balco employees union V. Union of India AIR 2002 SC 350).

Supreme Court of Pakistan adopted the case of India in the following words as opined "This view is in line with this Court's view as given in Elahi Cotton. Similar view was taken by the Indian Supreme Court in Delhi Science Forum V. Union of India "(AIR 1996 SC 1356). There have been two strategies to be adopted in the privatization of various sectors, one is to favour the government policy to speed up the process of economic development and the second is to look into the guidelines of the constitution of 1973; article 184(3) enabled the court to interfere in the privatization scheme for the protection of core values (Art. 184(3) of 1973).

Supreme Court favours such privatization which ensures transparency, and merit, which must be within the circles of the constitution; in case the issue is malafide, the courts refrained in such cases. In the case of PLD 2006 SC 697, the courts have declared that the privatization commission ordinance (2000) is still intact. It supported the government to continue with the policy-making, till the government made any changes in it. The court declared that we will support those actions which have their roots in the constitution of the State, in Elahi Cotton Mills vs. Federation of Pakistan (PLD 1997 SC 582, p. 675), it declared:

"The Courts while interpreting laws relating to economic activities view the same with greater latitude than the laws relating to civil rights such as freedom of speech, religion etc., keeping in view the complexity of economic problems which do not admit of solution through any doctrinaire or strait jacket formula as pointed out by Holmes, Justice in one of

his judgments" (Elahi Cotton Mills vs. Federation of Pakistan, PLD 1997 SC 582, p. 675).

It argued that privatization must aim at the well-being of the people. Transparency, merit, and fairness must be supported by the government. Under the Company act 1984, the government can transfer shares from one entity to another. Government must formulate dynamic policies on the basis of wisdom for the maximum benefit of the people. In India, Public Interest Litigation has been in action since 1980, in AIR 2002 SC350: 381 declared that: "Public interest litigation was not meant to be a weapon to challenge the financial or economic decisions which are taken by the Government in the exercise of their administrative power…The decision to disinvest and the implementation thereof is purely an administrative decision relating to the economic policy of the State and challenge to the same at the instance of the busy body cannot fall within the parameters of Public Interest Litigation" (Janata Dal V. H.S. Choudhury AIR 2002 SC 350, p. 381).

In another case, AIR 1970 SC 564: 601, has argued in the following words "It is again not for this Court to consider the relative merits of the different political theories or economic policies... This Court has the power to strike down a law on the ground of want of authority, but the Court will not sit in appeal over the policy of the Parliament in enacting of Law" (Rustom Cavasjee Cooper V. Union of India, AIR 1970 SC 564, p, 601).

There have been many cases in India, in which the issues of public importance have been dealt with successfully. Superior courts in Pakistan have adopted these cases as a litmus test. Supreme Court in Coal–Fired Lakhra Power Plant, declared the lease of two decades illegal. This is the case merit, which argued that transparency must be the hallmark of decisions. Asian Development in its reports, has analyzed the scenario and stated that privatization is the best solution for an ill economy.

Despite all these events Pakistan Steel Mill union challenged the privatization in the Sindh High Court but the case was dismissed. It argued that article 154 concludes that the council of common interest is the legal body for privatization which has already favoured so. The decision was challenged by the superior judiciary saying that CCI is not a privatization agency and a high court cannot decide the academic questions. In the same manner, the Wattan party has also challenged the privatization under article 184 (3) of the constitution of 1973. The whole record put the following questions:

The first question was Whether TOR formed for the privatization was according to the rules established by the privatization commission. As mentioned earlier M/S Citi group was the fiscal consultant for evaluating the assets but ironically appraisal of wealth was not made clear, (Section 24, ordinance, 2000) and independent evaluators were not managed for neutral analysis, in the financial year 2004-005 the Mill repay the debt worth Rs. 11.35 billion, in these circumstances the logic of privatization was invalid.

The second question was raised, whether the bid was according to International standards. The privatization commission should have fixed high rates for the bid but it was not materialized; the record found from the supreme court of Pakistan made it clear that the financial advisor has not valued the land and assets properly which is contrary to section 2 of the ordinance.

The third question was, whether the bidders satisfied the rules formulated by the privatization commission of Pakistan. Abdul Hafeez Pirzada argued that bidders had not fulfilled the pre-qualification terms which has been established under rule 4(2) of the privatization commission.

The fourth question was raised, whether the cabinet standing committee approved the bid of Rs. 16.18 per share according to the law of the land. Everywhere privatization is undertaken to repay the debt of the country and for that purpose high amount of rates are fixed but here everything was missing on the part of the government neither the value of land, nor other assets were truly evaluated to benefit the country. The court had to report "There is no need to privatize the PSMC at the lesser price instead of selling it at a fair market price for achieving the objects set out for privatization" (SC, 2006).

Constitution of 1973 article 184(3), part vii, deals with judiciary powers, to interfere in matters of public importance. Here are two domains (1) if the matter is of public importance and (2) if it involves the gross violation of fundamental rights as guaranteed by the constitution of the land. There are two schools of thought (1) favour this role of the judiciary for social litigation on the plea that justice is delivered to the poor people in the society and (2) argued that it leads to the Judicialization of politics as done in the prime minister Gillani disqualification in 2012 and premier Nawaz Sharif disqualification in 2017, such kind of activism hampers democratic development in the developing countries.

The ICSER, despite its binding nature, lacks a proper enforcement mechanism and leaves the matter to the domestic courts of a signatory state. It obliges a signatory country to take steps for implementation of these rights while exhausting its best available resources. It also demands such countries report to the Committee for Economic Social and Cultural Rights (CESCR). The ICESCR expects a minimum possible level from its signatory countries through which it shall ensure implementation by taking all necessary steps and using all possible means. While reporting to the CESCR, each state has to justify why the steps taken by it for the implementation of these rights should be considered appropriate (Article 16 of the ICSER). The committee then gives its observations over the report and communicates them to the reporting country. One significant means of the implementation of socio-economic rights is their incorporation into domestic laws of a state thereby ensuring the availability of judicial remedy to its citizens (General comment 3 by the CSER). It was also held that among other steps which might be deemed appropriate, and besides proper legislation upon the subject matter, an effective enforcement mechanism established through domestic courts to provide remedies in cases where these rights are violated is also a significantly important step towards their enforcement.

Role of Judiciary in the Enforcement of Socio-Economic Rights

Rights incorporated in the legal system of a state could either be provided by the constitution or statutory law. The constitution, being fundamental law of the land, guarantees certain rights, they are termed fundamental rights. Whereas rights incorporated in laws other than the constitution are called statutory rights. Thus, the major source of rights within a state is the constitution. The case of positive rights, recognized for the economic and social well-being of the citizens, is not an exception although they aren't recognized by many constitutions. In such cases, they are based upon other rights which are recognized and may be civil and political rights by nature. Article 9 of the constitution of Pakistan is a suited example which guarantees the right to life and liberty to every person. The courts have exhaustively interpreted the right to live where it is held that 'life does not mean mere biological existence but… also include the right to livelihood' (PLD 1994 SC 693).

In Indian jurisdiction, one of the most quoted cases is *Olga Tellis v Bombay Municipal Corporation* in which the right to life was given wider meaning through interpretation by the Supreme Court and considered the right to livelihood as part and parcel of the right to life (AIR 1986 Supreme Court 18). In fact, the same case provided the basis for the judgments by Pakistani courts as referred supra.

The brief facts of the case are that people living in slums of the Bombay were ordered by the municipal corporation to vacate their houses for their occupation and construction was illegal. The people challenged such action taken by the corporation for depriving them of their shelter may threaten their life which is recognized by the constitution as a fundamental right. The main legal question involved in *Olga Tellis's* case was whether the deprivation of a person of his livelihood amounts to the violation of the fundamental right to life or not. The court held that such deprivation would indeed amount to the violation of the right to life. The court interpreted the right to life thereby assigning a meaning beyond its ordinary understanding. It ordered the corporation to arrange alternative accommodation for the slum residents before evacuating the area (AIR 1986 Supreme Court 49).

In another case where the applicant was wounded and upon reaching the hospital, he was refused medical treatment. The court recognized the right to health care through the interpretation of article 21 of the constitution. It was held that denial of medical treatment by the hospital to a person who was really in need of it was indeed a violation of the fundamental right provided under article 21 (AIR 1996 SC 2426). This amounts to the conclusion that even if certain rights fall under the principles of policy, the courts have strived to assign them meaning vide interpretation and connect them to fundamental rights guaranteed in the constitution.

The courts have interpreted fundamental rights in an exhaustive manner so that other positive rights which do not fall directly under the subject may be enforced to a minimum extent. Another example may be quoted from the Karachi Oil Spill Case in which an oil-carrying shipwrecked near the coastal line. The oil spill in seawater endangered the fish life and various other species of *flora and fana* within the sea. The Supreme Court took notice of the incident vide constitutional petition No. 45 of 2003 and issued appropriate directions to the concerned authorities. In another case where it was reported in newspapers that some business tycoons are trying to buy some land near the coastal area of Baluchistan and convert it into a dumping ground for nuclear waste. The Supreme Court issued notices to all the concerned stakeholders and authorities and after hearing the case issued restrictive orders to the authorities (PLD 1994 SC 102). In both these cases article 9 was interpreted and the court declared that the actions were tantamount to threatening the right to life.

It is interesting to note that in South Africa, socio-economic rights are treated at par with fundamental rights. It has been mentioned earlier that the enforcement of such rights is related to the financial status of a country and depends upon the availability of resources. However, their incorporation in the constitution as fundamental guarantees has given a lead to South Africa. Some experts say that in the long run, South Africa could prove to be a role model for the rest of the world in case of their enforcement. The South African courts have built impressive jurisprudence regarding these rights and have decided on some important cases while implementing the constitutional guarantees.

A person suffering from chronic renal failure was denied treatment at a local hospital for the reason that no sufficient dialysis facilities were available. Such a treatment would

help him prolong his life and was not the ultimate cure to his illness. Instead, those patients were preferred who, in the opinion of doctors, could fully recover. He challenged such action on the touchstone of articles 27 (3) and article 11 of the Constitution. It was held that the right to health care was already covered by article 27 (3) and therefore, the right to life provided under article 11 was not required to be invoked. However, it was also held that since the case was not of an emergent nature, it found the decision of the hospital to delay his treatment reasonable by recognizing the shortage of available resources at the health department (1997 (12) BCLR 1696). The judgment while recognizing the socio-economic rights and relying upon them on one side, shows the judicial restraint shown on the other whereby the court restrained to interfere in matters which did not fall under its domain (ibid).

In another case government-funded housing scheme, people were encouraged to apply and pay to the extent of a stipulated share, it was revealed that many people have been neglected and couldn't get a chance to get a house. These people were residing in slums from where they had to be evicted. The matter was brought before the Supreme Court. Article 26 of the constitution of South Africa provides for adequate housing. While interpreting the constitutional provisions and the law, the Supreme Court also sought guidance and assistance from the ICSER and the comments of the Committee on it. The court urged for taking adequate measures warranted by the available resources so that the right could be realized 'progressively'. While opining on the comments of the committee, the court did not accept the standard of minimum core obligations as pronounced by the committee by saying that they differ for each country according to its social and economic background. Thus, the court did not interfere in the matters of policy by holding that those were not justifiable. Furthermore, the court related the test of reasonability of measures taken with the availability of resources although it declared that constitutional rights should not be denied to the citizens (2001 (4) SA 46 CC). The court, in other words, has restrained from assuming the role of the state itself but rather as an impartial arbitrator (Byrne, 2005).

The above are only some examples of how the courts entertain the applications about enforcement of rights which are necessary for the welfare of citizens but which do not fall under the fundamental guarantees provided under the constitutional scheme. Broadly speaking, there are two approaches adopted by the judiciary for the enforcement of these rights, each depends upon the constitutional mechanism provided for their implementation. Thus in states like India and Pakistan, where most of such rights are mentioned as the principles of policy and are not guaranteed like fundamental rights, rather are made subject to the financial position of the government functionaries who are responsible to provide them, the courts give effect to them through interpreting fundamental rights so that to ensure the minimum obligation over the state for their enforcement. Whereas in a country like South Africa, the constitution treats socio-economic rights as fundamental rights, the courts, while realizing the importance of their enforcement, have adopted the policy of restraint to interfere in the executive domain. In some cases, the Supreme Court has overruled the judgments of the high courts which were held as an intervention in the domain of the executive (Jheelan, 2007).

Conclusion

Socio-economic rights differ from civil and political rights in two aspects. Firstly their

implementation requires a corresponding positive duty on part of the government and secondly, such enforcement is subjected to the availability of resources. The test is whether the government has taken reasonable steps in order to ensure their availability. Many countries have incorporated them in their constitutions and other laws with the realization that when and if the government feels resourceful to provide them, such rights would be available to each and every citizen. This opens a way for the courts to analyze and, in some cases, adjudicate upon these rights which would otherwise be ousted from their jurisdiction. In such countries, the judiciary has intervened for their enforcement in cases where sufficient resources were available and/or the cases were to be resolved on an emergency basis. In fact, when adequate resources are available to the government, it is the constitutional obligation of the courts to intervene and ensure the implementation of socio-economic rights. As warranted by the enforcement mechanism provided by the domestic legal system of a country, the judiciary has adopted different approaches to the enforcement of these rights. In many countries where the courts can not intervene directly in policy matters, they have adopted the course of exhaustive interpretation of substantive fundamental rights through which other positive rights are also made justifiable to a significant extent. Most of the positive rights are guarantees ensured to the citizens by a state for their social welfare and economic well-being. This is a responsibility bestowed upon the state as well as society to remain vigilant and cooperative in dispensing social and economic justice. In a scenario where ICSER does not provide a proper enforcement mechanism, therefore, the role of domestic courts in its enforcement becomes significantly important. It is also important to mention here that the role of the domestic judiciary has been recognized as an effective measure by the Committee on Socio-Economic and Cultural Rights.

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