

# A Positive Approach to the Judicial Enforcement of Economic, Social, and Cultural Rights; Whether a Myth or Reality in Bangladesh

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**Abstract:** The Economic, Social and Cultural Rights cover most of the basic needs of human beings and in some cases, they are related to the core existence of human beings. But these are declared to be judicially non-enforceable in the constitutions of many states including ours. Interestingly the courts have been playing a very positive role in direct or indirect enforcement and progressive realization of these rights. As we are signing parties to many international human right treaties, we have a responsibility to comply with the provisions of the treaties that guide the enforcement or at least obliges states to take all appropriate steps, to the maximum of its available resources, to progressively achieve the full realization of the rights recognized in the treaties. The objectives of this paper are to convey a general idea on Economic, Social and Cultural Rights, a brief description of national and international documents containing these rights and mechanisms for the judicial enforcement of these rights especially the role of courts in this sub-continent and that of Bangladesh. As the work is qualitative in nature, to collect data, resorts have been taken to different national and international law journals, law books, different international treaties and so on. Therefore, a number of cases have been referred here showing the court's approach in liberal interpretation of these rights.

**Keywords:** Economic, Social and Cultural Rights, Constitution, Judicial Enforcement, Implement, Realization

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## 1. Introduction

The responsibilities of states are getting wider since the inception of the concept of 'welfare state', which is taking room in the place of 'police state'. To be truly converted into a welfare state, there is no alternative to the implementation of socio-economic and cultural rights the availability of which is a prerequisite for a life with minimum respect and dignity in society. In addition to lying down the enforcement mechanisms of civil and political rights, some socio-economic and cultural rights, in some regions are not only recognized but now considered as compulsorily enforceable for the very reason of nexus between these two categories of rights. In our country also, we are struggling to ensure these rights in our citizens' life since the incorporation of them in our constitution; especially the role of the judiciary in this regard is praiseworthy even though the Constitution does not allow for judicial enforcement of economic, social, and cultural rights.

We have some glaring precedents where the court played a positive role in terms of enforcement of some socio-economic rights. But still, we have a bunch of limitations in the way of realization of these rights.

## 2. Socio-Economic and Cultural Rights Under the National and International Instruments

The International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966 requires States to take steps to the maximum of their available resources to achieve progressively the full realization of economic, social and cultural rights. [1] The Covenant also requires States to guarantee the enjoyment of economic, social and cultural rights without discrimination and to ensure the equal right of men and women to the enjoyment of these rights. The

International Covenant on Economic, Social, and Cultural Rights is, however, the most comprehensive international treaty dealing with this field of human rights law. Bangladesh ratified the covenant in October 1998. [2] States that have ratified the International Covenant on Economic, Social, and Cultural Rights (ICESCR) and its Optional Protocol are required to take deliberate, specific, and targeted actions to fully realize ESC rights. They also have "a minimum core obligation," regardless of their resources, to ensure the satisfaction of minimum subsistence rights such as essential foodstuffs, essential primary health care, basic shelter and housing, and basic education. Other treaties or constitutions word obligations differently and even include specific actions that States must take, such as adopting legislation or promoting these rights in public policies. Article 2.1 requires States parties to begin immediately to take measures towards the full enjoyment of all the rights in the Covenant by everyone. The Covenant embodies the following major economic and social rights;

### **2.1. The Right to Work**

Article 8 contains the rights related to employment. These mandate that the State make certain that private sector employers uphold the legal minimum wage and respect workers' rights.

### **2.2. The Right to Social Security**

Article 9 states that no one may be denied social security payments by the state on the grounds of gender, class, color, or any other status. Every woman working in the public or private sector has to be able to get social security benefits from the government.

### **2.3. The Right to Food**

Article 11 states that the State shall neither damage crops or refuse anybody access to food, nor shall it permit private parties to destroy or contaminate food and its sources, such as arable land and water. Through the transmission of technological knowledge, the State needs to improve food production, distribution, and conservation methods. This article safeguards the rights to water, sanitation, and housing as well.

### **2.4. The Right to Health**

Article 12 mandates that the State supervise and regulate the services provided by private hospitals and ensure that no expectant mother is turned away. The State cannot refuse access to medical services for women who have obstetric fistulas or uterine prolapse. It further states that women must have access to services for sexual and reproductive health from licensed medical professionals, and that responsibility rests with the State.

### **2.5. The Right to Education**

Articles 13 and 14 establish the rights to education. They

contend that in order to guarantee that education is suited to the needs of native and tribal populations and that private education providers do not discriminate against Dalit females enrolled in schools, the State must take aggressive measures. The State cannot close public schools under the pretense of not having enough money.

## **3. Optional Protocol to the ICESCR**

The Optional Protocol established three procedures for the protection and enforcement of socio-economic and cultural rights. These are the individual and group communication procedure; the inter-state communication procedure; and the inquiry procedure. The communication procedure allows either individuals or groups of individuals who have exhausted all available domestic remedies to submit a complaint of an alleged violation of socio-economic and cultural rights to the ICESCR and to seek redress for that violation. The inter-state communication procedure allows the ICESCR to consider communications by a State Party against another State Party concerning non-fulfillment of ICESCR obligations. The inquiry procedure allows the ICESCR to initiate inquiries into 'grave or systemic violations' by a State party of any of the socio-economic and cultural rights. Thus, it is no exaggeration to say that the Optional Protocol provides effective enforcement mechanisms with respect to the violation of socio-economic and cultural rights. [3] Besides The Universal Declaration of Human Rights (UDHR) embodies some basic socio-economic and cultural rights. The UDHR is a milestone document in the history of human rights. It is widely recognized as having inspired and paved the way for, the adoption of more than seventy human rights treaties, applied today on a permanent basis at global and regional levels. [4] It contains provisions relating to;

- 1) the right to education,
- 2) the right to participate in the cultural life of the community,
- 3) the right to enjoy the arts and to share in scientific advancement and its benefits,
- 4) right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services,
- 5) the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control and
- 6) the right to work, to free choice of employment, to just and favorable conditions and to protection against unemployment.

## **4. Recognition of Rights to Social Security in Bangladesh constitution**

The framers of the constitution of Bangladesh have given the international human right law a profound recognition in

the constitution of Bangladesh. However, a dichotomy has been maintained between civil-political rights and socio-economic rights. Part-III of the constitution embodies the Fundamental Rights while part-II incorporates Economic, Social and Cultural (ESC) rights declaring the former ones enforceable and the latter ones non-enforceable by the courts. [5] So, the inclusion of the rights, especially the economic, social and cultural rights, under Fundamental Principles of State Policy is very important: though it is enshrined in the constitution as fundamental principles, it is also stated that those principles will be the guideline to interpret the fundamental rights which does not undermine the ESC rights in any way. [6] From Articles 8 to 25 of our constitution deal with the fundamental principles of state policy among whom a number of articles are directly related to economic, social and cultural rights that evince the direct and indirect recognition of social security of workers. The followings are the major ones relating to economic, social and cultural rights embodied in our constitution;

#### **4.1. Right to Work**

Every citizen who is able to work has a right to do so, as stated in Article 20 (1) of the Bangladeshi Constitution, and everyone who works must be paid for their labor in accordance with the maxim "from everyone according to his talents to each according to his effort." [7]

#### **4.2. Right to Adequate Food**

Article 15 (a) of the Constitution describes the right to food, saying that "it shall be a fundamental responsibility of the State to attain a steady improvement in the material and cultural standard of living of the people, with a view to securing to its citizens the provision of the basic necessities of life, including food, clothing, shelter, education, and medical care." [7]

#### **4.3. Right to Health**

The constitution of Bangladesh mandates 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 with a view to serving its citizens through the provisioning of basic necessities of life, including food, clothing, shelter, education and medicine." [7]

#### **4.4. Right to Water**

In Bangladesh, the National Water Policy (1998) and the National Sanitation Strategy (2005) recognize water and sanitation as human rights. Bangladesh recognized that water and sanitation are human rights at the regional level when it signed the Delhi Declaration of the third South Asian Conference on Sanitation. Numerous other national policies are also directly related to water and/or sanitation, such as the Policy for Safe Water Supply and Sanitation (1998), the Water Management Plan (2004) and the Policy for Arsenic Mitigation (2004), as well as the Sector Development

Framework (2004), the Pro- Poor Strategy for Water and Sanitation Sector (2005) and the Poverty Reduction Strategy Paper (2009). [8]

#### **4.5. Right to Education**

Free and compulsory education is contemplated in Article 17 of the Bangladeshi Constitution. The State shall take effective steps to:

- 1) establish a uniform, mass-oriented, and universal system of education;
- 2) extend free and compulsory education to all children up to the stage that may be determined by law;
- 3) relate education to societal needs; and
- 4) produce citizens who are properly educated and motivated to meet societal needs.
- 5) eliminate illiteracy within whatever timeframe set forth by law.

#### **4.6. Right to Shelter**

A fundamental principle of state policy is to provide for the needs of life, such as food, clothes, shelter, education, and medical care, according to Article 15(a) of the Constitution. The right to life is likewise protected by Articles 31 and 32. [7]

## **5. Court's Role in Implementation of Socio-Economic and Cultural Rights**

As stated earlier, both civil and political rights and Economic, Social and Cultural (ESC) rights are enshrined in the Bangladesh Constitution. Civil and Political rights are directly justiciable since they are recognized as fundamental rights in the constitution while ESC rights are defined as fundamental principles of State policy, but are not automatically justiciable. According to Article 8(2) of the constitution the rights described in part II of the Constitution, Fundamental Principles of State Policy, is not directly justiciable but the same article stated 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. [7] Nevertheless, interestingly the Judiciary of different countries including Bangladesh is taking resort to different techniques to enforce these principles under the guise of fundamental rights which are judicially enforceable. 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. [9] Therefore, it is understood that constitutional provisions as well as different decisions, both in Indian and Bangladesh Supreme Court, make a balanced relation between fundamental principles and fundamental rights, and it will not be a wise decision to call any category of rights inferior in comparison with other categories of rights. [10]

## 6. PIL as a Tool to Implement Socio-Economic Rights

Since the inception of the concept of Public Interest Litigation popularly known as PIL, it has been playing a prominent role in the implementation of socio-economic and cultural rights in our country. It involves the collective rights of entire public where no individual is specially affected. [11] Public Interest Litigation is usually entertained by a court for the purpose of redressing public duty, protecting social rights and vindicating public interest. [12] Our Supreme Court in a famous case called *Ain o Salish Kendra (ASK) v Government and Bangladesh & others* held that

*“.....the Constitution provides that the State must ensure fundamental rights including life, respect for dignity and equal protection of the law and, further, that the State must direct its policy towards to ensuring the provision of the basic necessities of life including shelter. This latter constitutional directive was not judicially enforceable but the right to life includes the right not to be deprived of a livelihood. The government should develop a master guidelines, or pilot projects for resettlement. The plan should allow evictions to occur in phases and according to a person's ability to find alternative accommodation and reasonable notice is to be given before eviction and finally the government should clear up slums beside the railway lines and roads, but resettle these slum dwellers.” [13]*

Public Interest Litigation is working as an important instrument of social change. It develops a new jurisprudence of accountability of the state for constitutional and legal violations adversely affecting the interest of the weaker elements of community. [14] and to assure them social and economic justice. [15] There are hundreds of decisions where the courts in this sub-continent and in Bangladesh upheld the enforcement of socio-economic and cultural rights in response to Public Interest Litigation.

## 7. Extended Interpretation by the Court

In a number of cases, the court took positive stand in enforcing ESC rights through liberal interpretation of the constitution and in some cases, the court would go further and direct the government to take necessary steps or to formulate appropriate laws and policies to ensure better protection of ESC rights. [3] Followings are the some instances where the court took liberal stand;

### 7.1. Right to Life Is Not Merely Animal Existence

The Supreme Court of India held that *“By the term ‘life’ as here used, something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by amputation of an armored leg or the pulling out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world in.” [16]*

### 7.2. Right to Life Includes the Right to a Healthy Life

The Supreme Court in *Sunil Batra v. Delhi Administration* held that the ‘right to life’ included the right to lead a healthy life to enjoy all faculties of the human body in their prime conditions. It would even include the right to protect a person’s tradition, culture, heritage and all that gives meaning to a man’s life. In addition, it consists of the right to live and sleep in peace and the right to repose and health. [17]

### 7.3. Right to Life Means the Right to Live with Human Dignity

In the renowned case of *Maneka Gandhi vs Union of India* [18], the Supreme Court gave a new dimension to the concept of right to life. The Court held that the right to live is not merely a physical right but includes within its ambit the right to live with human dignity. Elaborating the same view, the Court in another case observed:

*“The right to live includes the right to live with human dignity and all that goes along with it, viz., 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 mingling with fellow human beings and must include the right to basic necessities the basic necessities of life and also the right to carry on functions and activities as constitute the bare minimum expression of human self.” [19]*

### 7.4. Right to Life Extends the Healthy Environment and Basic Needs

Upholding the importance of the right to a decent environment and a reasonable accommodation in *Shantistar Builders v Narayan Khimalal Totame* [20] the Court took a step forward and held:

*“The Right to life would take within its sweep the right to food, the right to clothing, the right to decent environment and reasonable accommodation to live in. The difference between the need for an animal and a human being for shelter has to be kept in view.”*

In the famous case of *Dr. Mohiuddin Farooque and Another vs. Bangladesh*, [21] (p. 84) B. B. Roy Chowdhury J. declared that right to life encompasses within its ambit the protection and preservation of environment and ecological balance. [5]

### 7.5. Right to Get Pollution Free Water and Air Include Right to Life

Public Interest Litigation is maintainable for ensuring enjoyment of pollution-free water and air, which is included in right to life. The Court observed:

*“Right to live is a fundamental right under Art 21 of the Constitution and it includes the right of enjoyment of pollution free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has right to have recourse to*

*Art.32 of the Constitution for removing the pollution of water or air which may be detrimental to the quality of life.” [22]*

The case of *Rabiya Bhuiyan, MP v Ministry of Local Government and Rural Development and otrs*, [23] (p. 176) is worth mentioning where Appellate Division of the Supreme Court of Bangladesh observes that failure to ensure safe drinking water violates the right to life read with articles 15 and 18 of the Constitution of Bangladesh. [10]

### 7.6. Right to Life Includes Right to Education

The Indian Supreme Court held that right to education is implicit in the right to life and personal liberty. [24] The right to basic education is implied by the fundamental right to life when read in conjunction with the directive principle on basic education. Besides, the ICESCR enumerates a combination of both negative and positive obligations of States parties to provide education to their citizens. [25]

## 8. Realization and Judicial Enforcement of ESC Rights in Bangladesh

As stated earlier, there is no provision in our constitution directly envisaging the judicial enforcement of ESC rights. However, a number of international treaties where Bangladesh is a signing party emphasizes the progressive realization of these rights. Even though the Constitution of Bangladesh recognized ESC rights as judicially non-enforceable Fundamental Principles of State Policy, the Supreme Court of Bangladesh has played a commendable role in protecting ESC rights through the harmonious interpretation of fundamental rights and Fundamental Principles of State Policy in several cases on socio-economic rights violations. [3] The main limitations in realization of Economic, Social and Cultural rights are financial restraints of state and uncertainty of these rights. Therefore, these rights are not matter of immediate achievement and they are goals to which the state has to reach and keeping in line with the socio-economic progress, the state will implement them step-by-step. [26] 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. 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. [9] In regards to securing this enjoyment of these rights, the Court stressed the importance of the economic, social, and cultural rights embodied in Part IV of the Constitution. [27] The Court stated that:

*“...the moral rights embodied in Part IV of the Constitution are equally an essential feature of it, the only difference being that the moral rights embodied in Part IV are not specifically enforceable as against the State by a*

*citizen in a Court of law in case the State fails to implement its duty but, nevertheless, they are fundamental in the governance of the country and all the organs of the State, including the judiciary, are bound to enforce those directives.” [28]*

Sadly, though, it has frequently happened that the government of Bangladesh has used a variety of justifications—such as a lack of sufficient institutional and financial resources—to refuse to comply with the court's orders. This strategy substantially jeopardizes Bangladesh's ability to effectively implement ESC rights. Prioritizing action is needed from the Bangladeshi government to guarantee the fair and efficient utilization of the resources at hand. [3]

## 9. Conclusion

The inherent value of socio-economic and cultural rights lies in that the implementation of these rights is pre-requisite for true economic development of a country for it will ensure proper and equal distribution of wealth. With the development of the concept of human rights, the states now tend to progressive implementation of socio-economic and cultural rights to the maximum of its available resources. Bangladesh is not an exception to it and the courts' role in this regard is praiseworthy. Since the incorporation of these rights in our constitution, we have been struggling to implement to the maximum of our available resources. But that seems not to be enough. Being a member state of many international human right treaties, Bangladesh should adopt the proper measures to offer legislative, administrative, and judicial assistance for the fulfilment of the economic, social, and cultural rights in order to fulfill its responsibility to defend such rights. Drawing on the interdependence of all rights and urging the judiciary to interpret constitutions and laws in accordance with international human rights law are crucial parts of advocating more expansive interpretations of these rights.

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