# Empowering ESC rights to ensure human development

Mohammad Golam Sarwar

HE underlying spirit of human rights jurisprudence is gaining momentous success in this modern era. Human rights by its divine virtue of human dignity have taken place with due emphasis in the modern legal system. Over the years there has been a gradual enlargement of the scope of human rights through reinterpretation of the concept of human rights to protect victims from abusers and perpetrators. But the fragmentation of human rights from freedom to fear and want still reflect the sorrow picture of human rights realisation. This minimal realisation reveals particularly in the area of economic, social and cultural entitlements.

Though many human rights proponents argued about the indivisibility and interdependence of human rights but the reality suggests otherwise regarding Economic, social and cultural rights (ESC). The ESC rights are often remaining unrealised in the area of human development.

ESC rights are recognised either explicitly or implicitly at both the international and national instruments dealing with human rights. Explicit recognition is found in a variety of international instruments ranging from hard-law treaties to soft-law documents, such as the International Covenant on Economic, Social and Cultural Rights, the European Social Charter and ASEAN Human Rights Declaration (AHRD). Implicit recognition of ESC rights is also found within the rubric of various civil and political rights contained in international instruments. For example the right to adequate housing has been read into the right to protection against inhumane and degrading treatment and the right to respect for private and family life which is found in European Convention on Human Rights.

At the domestic level ESC rights are also recognised in various ways. Like, in Bangladesh ESC rights are incorporated in the constitution under the head of fundamental directives which are not judicially enforceable.

### Exploring ESC rights through judicial activism

The Judges are playing pro-active role by giving progressive interpretation to realise ESC rights. In India, People's Union for Civil Liberties v Union of India and Others (2004,12 SCC108), the Court through interim order directed the authorities to see that food is provided to the aged, infirm, disabled, destitute men and women who are in danger of starvation, pregnant and lactating women, destitute children. Court also directed to identify



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the families below poverty line.

In Kapila Hingorani v State of Bihar (2003; 6SCC1), the Court approved that human being has the right to food and 'hunger' is a form of violation of human rights and state cannot escape the liability of starvation deaths.

In one of the Bangladeshi case, Dr. Mahiuddin Farooque v Government of Bangladesh 48 DLR, held that right to life includes right to adequate standard of living which includes clothing, shelter and medicine. In another case name Rajdhani Unnayan Kortripokkho (RAJUK) and another v Mohshinul Islam and another, the Appellate Division gave directions for protecting the environment of Dhaka city and providing an environment-friendly interpretation of urban development.

However, the technique of protecting economic and social rights is still a difficult issue remains to be conceptualised, as the legal effect of ESC rights is a matter of debate. The debate concentrates mainly on the recognition of ESC rights i.e. their source and content and their enforcement i.e. justifiability along with monitoring mechanisms for the protection of ESC rights.

### Challenges for enforcement of ESC rights

The proper implementation and enforcement of ESC rights is facing many challenges. Though they are incorporated in the International covenants and declarations, still they have been kept in the inspirational and programmatic category and not making any decisive element of right.

As a result, the enforcement of ESC rights got further deceleration on the ground that they are too vague to have clear legal content, too costly to implement and thus involve number of positive measures to fulfill.

Regarding the cost and positive measures, UN Committee on Economic,

Social and Cultural Rights in its General Comment No. 3, underscored for comprising obligations to take steps towards realising these rights. In this regard, the countries of Asia concentrated mainly on the implicit recognition of ESC rights. However by virtue of the device of judicial activism, the ESC rights receive significant indirect protection through the interpretations and applications of other constitutional rights.

Establishing linkage between ESC Rights and Human development A careful analysis of the ESC rights suggests proper implementation of the basic necessities of a human being that includes, right to food, health and education. On the other hand the human development, by virtue of capability approach, can only be ensured when a particular individual is able to function as well as to avail those basic necessities It is clear that, in order to attain the status of human development one has to avail the economic, social and cultural rights.

Let me refer the human development approach based on the framework of capability approach pioneered by Amartya Sen. He said, the capability approach refers two core normative claims: first, the claim that the freedom to achieve well-being is of primary moral importance; second, that freedom to achieve well-being is to be understood in terms of people's capabilities, that is, their real opportunities to do and be what they have reason to value.

The capability approach purports that freedom to achieve well-being is a matter of what people are able to do and to be, and thus the kind of life they are effectively able to lead. In the development paradigm the capability approach enables a particular individual to assess his well being taking into account the social dynamics.

To realise the human rights, it is significantly essential to address the social, economic and cultural aspects of a particular individual which are inherently attached with that person. In the same way, the functioning's (beings and doings) and capabilities (freedom and opportunities to achieve those beings and doings) of a person purported by human development approach cannot be understood without addressing the social and economic conditions of that person.

The question still remains that, whether the economic growth of a country can ensure human development through realisation of human rights particularly ESC rights. The practical evidence suggests the negative answer. This is true that economic growth facilitates to create an atmosphere where the indicators of development like, life expectancy, infant mortality and adult literacy secure incentive but economic growth alone, does not guarantee human development.

Over the years, Bangladesh has achieved commendable economic growth despite consistent political turmoil. It also secured success towards achieving the Millennium Development goals. However, this is an evident truth that human development remains a far cry in Bangladesh. The Court in some cases gave decisions regarding the Esc rights to be judicially enforceable, but amidst of persistent human rights violations across the country creates difficulties to realise ESC rights.

In this backdrop, the ESC rights should be integrated into the development process through constitutional and judicial commitment. The development stakeholders should overview the principles of ESC rights while undertaking a development project.

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## Zero tolerance for sexual harassment

NAZMUN ZAMAN CHOWDHURY

ANGLADESH National Woman Lawyers' Association (BNWLA) in association with the USAID and Plan Bangladesh organised an advocacy meeting with the civil society members titled as "Prevention of Sexual Harassment; Experience, Challenge and Way Forward" on 8 September, 2014. Advocate Salma Ali, Executive Director of BNWLA,

focused on the severity of sexual harassment as it constitutes a serious human rights violation, while addressing the session. In the wake of increasing incidents of sexual harassment on campus and at workplaces in Bangladesh, BNWLA, invoked the writ jurisdiction under Article 102 of the Constitution for prevention, protection and redress against sexual harassment at educational institutions and workplaces, she referred.

Accordingly the High Court came up with a declaration which calls to formulate complains committees in



their respective organisations as per Article 9 of the guideline. But it is regretful that after five years of this declaration it is found not be implemented properly, she added.

Advocate Rehana Sultana presented the key note paper where she briefly discussed the salient features of the sexual harassment guideline and also the proposed draft law on sexual harassment. This is very shameful that the proposed law on sexual

harassment is yet to be passed, said A.K. Azad Chowdhury, Chairman (State Minister) University Grants Commission of Bangladesh while addressing the meeting as chief guest.

Among others, Ms. Dilara Choudhury, Professor of Political Science at North South University, Dr. Shah Alam, Member, Law Commission of Bangladesh, and Dr. Khurshida Begum from Jahangirnagar University also spoke at the programme.

Distinguished participants came up with concrete recommendations which include zero tolerance for sexual harassment at educational institutions, conducting a survey in primary and secondary schools under few unions to determine the implementation status of the guideline, uniting BNWLA and other NGOs to come together and pressurise the government to pass the proposed Act. They reiterated that without establishing an effective legislative framework- the elimination of sexual harassment will not be practicable.

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### **Enforcement of international laws**

By observing the last few months devastating condition along with the death toll in Palestine, Syria and other middle east states and the silence or absence of any action against these unjustified attacks on innocent civilians and non-combatants, it has become quite clear that all international rules and laws are being violated and promises to the humanity has been denied to be implemented.

Within states, municipal laws are followed to avoid punishment and to protect the rights of the citizen. When law comes under a global shed, states follow the international law considering it as custom or norm to maintain the relationship between states. States discharges its conduct with other states through international law and also maintain its relation with each

other under the terms and conditions of international law. However, states are not the only subjects of international law but the international organizations as well. Moreover, non state actors have also been considered as the legitimate subject of international law. Among all the international organisations, United Nation is the mastermind to regulate the international relations among its member states and maintain peace and

security. After the disastrous ending of the Second World War the United Nation was established with a view to keep check on the security and maintains peace in world community. According to Article 34 of the charter of UN "the security council may investigate any dispute or any situation lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger international peace and security". The Security Council has been given extensive power and authority in pen and paper to control the dispute between states.

Then what comment shall we pass when we see the current situation between Israel and Palestine. So far 2016 people have been killed in Gaza(Palestine) by Israel armed force among them 542 were children and 250 were women and 95 were elderly men and almost 10000 people are injured and fighting with death(Cihan News Agency, Turkey).

Moreover, Ayelet Shaked, the Honorable member of Israeli Parliament has passed a comment on a social networking page stating, "Behind every terrorist stand dozens of men and women, without whom he could not engage in terrorism. They are all enemy combatants, and their blood shall be on their heads". These types of racial statement legalised the unstopped attacks and ceasefire of Israel on Palestine. The saddest part is still no steps has been taken so far by the United Nation to stop this mass killing.

The reason behind this could be the passing of a motion by the United Nations' General Assembly changing Palestine's "entity" status to "non-member observer state" on 29th November 2012. Since 11th may of 1949, Israel is the member state of United Nations. Then isn't it the duty of this members state to maintain the agenda of the United Nation which starts with the vow of maintaining peace and international security worldwide?

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# **REVIEWING THE VIEWS**

IMPEACHMENT OF JUDGES

## How far the initiative is constitutional?

ARIFUL ISLAM SIDDIQUEE

HE initiative taken by the government to restore the impeachment power of the judges to the parliament scrapping the existing provision of supreme judicial council draws public attention and stirs a debate among the people of legal arena. Whether vesting the impeachment power to parliament creates any impediment to judicial independence? Judicial independence without proper judicial

the question can be raised, does our legislature enjoy the supremacy over other two organs of the state? Article 7 of our constitution indicates the supremacy of the constitution in Bangladesh. The three organs of the state i.e. parliamentary, judiciary and executive runs their functions within the periphery of the constitution. So, the parliament is not sovereign. Article 7 further says, if any law made by parliament is inconsistent with this constitution, it shall be declared void. The responsibility of this declara-



accountability mechanism may generate judicial anarchy. In principle, we believe that the legislature as a body of elected representatives with a high degree of independence from the other branches of the government perform their constitutional duties without allowing

their activities to be distorted by partisan considerations. But in reality, we are now not in a position of sound democracy. For this reason, vesting the impeachment

power to parliament may be a risky one. The high-ups of the ruling government try to justify it by saying that parliament is sovereign and must have the power to impeach the Supreme Court judges. Now

tion must be exercised by the Supreme Court since the Supreme Court is the guardian of the Constitution. Parliament stands equal footing with other two organs of the state. So, why judiciary is accountable to legislature?

The government intends to restore the article 96 of the original constitution to return the impeachment power to lawmakers. Article 96(2) provides "A judge shall not be removed from his office except by an order of the president passes pursuant to a resolution of parliament supported by a majority of not less than two-thirds of the total number of members of parliament, on the ground of

proved misbehaviour or incapacity."

Further, Article 96(3) stipulates that parliament may by law regulate the procedure in relation to resolution, investigation and proof of the misbehaviour or incapacity of a judge. The misery is that no government had taken any step to make such law since our independence. Absence of such law creates opportunity of misusing this power arbitrarily. Sri Lanka has set a distortion example in front of our eye. The Chief Justice of Sri Lanka, Dr Shirani Bandaranayke, was impeached by the vote of government members of that nation's parliament on 10th January 2013, after a report from a Select Committee of seven government ministers declared her guilty of misconduct. It was condemned by all section of judicious people. Besides, Article 70 of our constitution frustrates the democratic

practice of members of parliament. Let's have a check with provisions of sound democracy. Article II, section 4 of US constitution provides that all civil Officers including judges of the United States, shall be removed from Office on the ground of Treason, Bribery or other high Crimes and Misdemeanours. In 1980 the US Congress passed the Judicial Councils Reform and Judicial Conduct and Disability Act. This empowers federal judicial councils, which consist of certain judges, to investigate complaints that any federal judge or magistrate "has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts". The councils may not remove a judge, but may send to a coordinating body called the Judicial Conference, which may forward to the House of Representatives, any informa-

tion indicating that a judge has engaged

The Indian constitution contains the

in conduct which might constitute

ground for impeachment.

power as our original constitution. But India under Article 124 (4) of the constitution formulated The Judges (Inquiry) Act, 1968 prescribing the procedure for the investigation and proof of 'misbehaviour' and 'incapacity' of judges. Under the procedure laid down in the Act, the responsibility of inquiry of 'misbehaviour' or 'incapacity' of the judges is given to a committee of three members, one each from the Chief Justice or other Judges of the Supreme Court, Chief Justices of the High Courts and distinguished jurist. The Committee will frame definite charges against the Judge on the basis of investigation and submit its report before the respective House or the Houses stating its findings for consideration. So, the impeachment process is semi judicial. It creates check and balance between the two organs.

same type of provision of impeachment

Finally "Latimer House Principles" agreed by Law Ministers of the Commonwealth and by the Commonwealth Heads of Government provides "Judges should be subject to suspension or removal only for reasons of incapacity or misbehavior."This requires clear proof of misconduct that renders them unfit, at least in the eyes of reasonable people, to occupy the justice seat. So, the procedure of inquiry must be settled earlier. If the government restores Article 96 of

the Constitution in the running sessions of parliament, it will not only be able to impeach judges of the Supreme Court, but it will also wield the power to dismiss persons of several constitutional and semi-constitutional institutions. So, policy makers should go forward more carefully.

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