

ECONOMIC, SOCIAL AND CULTURAL RIGHTS UNDER THE CONSTITUTION: CRITICAL EVALUATION OF JUDICIAL JURISPRUDENCE IN BANGLADESH

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ABSTRACT

Incorporation of Economic, Social and Cultural (ESC) rights in the constitution evidences a state's concern for creating conditions which will allow every individual to develop his maximum potentials. The principal object of having social and economic provisions in a constitution is simply to put the state under an obligation to utilize its available resources maximally in order to redress social and economic imbalances and inequalities and thereby creating equal opportunities for all. Under the constitutional dispensation of Bangladesh, however, the problem has not been the incorporation of ESC rights but the manner in which these rights are incorporated and the guarantee of protection afforded to them by the Constitution. They have been embodied in Part II of the Constitution not in literal 'rights' term but as 'social welfare goals' of the state and more crucially they have been explicitly declared by Article 8(2) of the Constitution to be judicially non-enforceable. However, the Supreme Court of Bangladesh even in the face of such an express constitutional bar is enforcing rights that are clearly or at the least predominantly socio-economic in nature as part of the enforcement of judicially enforceable 'fundamental rights.' From some immediate past years the Supreme Court has shown extreme activism or been considerably instrumental in enforcing socio-economic rights of various form and nature by extending the scope and ambit of the fundamental rights of 'right to protection of law' and 'right to life and personal liberty' guaranteed under Articles 31 and 32 respectively of the Constitution. In this backdrop, the principal objectives of this article are two-fold. First, to examine the propriety of enlarging the content of some fundamental rights so as to include within it a wide variety of socio-economic rights and thereby enforcing them indirectly. Second, to assess critically the utility and effectiveness of Supreme Court's particular indirect approach for true and sure ensuring of the ESC provisions embodied in the Constitution as policy aspirations or goals of the state.

I. INTRODUCTION

Bangladesh had to undergo a long and historic struggle for national liberation and could finally establish itself as an independent, sovereign People's Republic in 1971. A Constitution for the newly born state was adopted on 4th November 1972¹ and came into force from 16th December of the same year.² But what

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¹ See, last para. of the Preamble of the Constitution of Bangladesh.

² See, Article 153 of the Constitution of Bangladesh.

inspired the heroic people of Bangladesh to dedicate themselves to, and the brave martyrs to sacrifice their lives in, the national liberation struggle? As it is stated in the preamble of the Constitution, they were the high ideals of nationalism, socialism, democracy and secularism.³ These four, therefore, were declared by the framers to be the fundamental principles of the Constitution of Bangladesh.⁴ Written constitutions today invariably contain a preamble which is seen as the key to open the mind of the makers of the constitution because it sets out in general the aims and objectives of a constitution. The fundamental aim of the Constitution of Bangladesh is to “realise through the democratic process a 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.”⁵ Thus, one of the fundamental aims of the Constitution of Bangladesh is to establish a society where socio-economic and political equality and justice will be secured for all citizens. Part II and Part III of the Constitution taken together has constituted a solid foundation for the lofty ideals enshrined in the preamble. To be more specific, to give meaning and content to the high ideals or values of ‘fundamental human rights and freedom’, ‘equality and justice’ and ‘a socialist society free from exploitation’ envisioned in the preamble, framers inserted in Part II of the Constitution the Fundamental Principles of State Policy (FPSP) and in Part III the Fundamental Rights (FRs).

Incorporation in the constitution of all sets of human rights especially Civil and Political (CP) rights in the one hand and Economic, Social and Cultural (ESC) rights on the other hand evidences a state’s concern for not only protecting its individuals from state absolutism but also creating conditions which will allow every individual to develop his maximum potentials. Traditionally, CP rights are seen to be individualistic and libertarian in character and their protection allow individuals to be free from arbitrary state interference. On the other hand, ESC rights are supposed to be collectivistic in

³ 2nd para. of the Preamble. See, also Article 8(1) of the Constitution.

⁴ Original Constitution of 1972 contained these four fundamental principles. Subsequently, by Martial Law Proclamation the Constitution was amended to the effect that the principle of ‘secularism’ was replaced by the expression ‘absolute trust and faith in the Almighty Allah’ and the principle of ‘socialism’ was given a new explanation to the effect that socialism would mean economic and social justice. Fifth Amendment of the Constitution (6th April, 1979) inserted in 4th Schedule to the Constitution a new paragraph 18 so as to ratify, confirm and impart validity to all amendments, additions, modifications etc. made in the Constitution during the 1st martial law period between 15th August, 1975 to 9th April, 1979 by any Proclamation of the Martial Law Authority. Constitution (Fifteenth Amendment) Act, 2011 (Act XIV of 2011) has revived the original provisions. See, Sec. 3 of the Act.

⁵ 3rd para. of the Preamble of the Bangladesh Constitution.

dimension and their protection guarantee the individuals a conducive and favourable condition for the promotion of their multidimensional development of human personality. Thus, the object of having social and economic provisions in a constitution is quite evident and clear. The main object is simply to put the state under an obligation to utilize its available resources maximally in order to redress social and economic imbalances and inequalities and thereby creating equal opportunities for all. These rights are indispensable for an individual's dignity and the free development of his personality.

Under the constitutional dispensation of Bangladesh, however, the problem has not been the incorporation of ESC rights but the manner in which these rights are incorporated and the guarantee of protection afforded to them by the Constitution. CP rights embodied in Part III of the Constitution as 'Fundamental Rights' are judicially enforceable and the state is also put under a constitutional imperative not to enact laws inconsistent with any provision of these rights.⁶ On the contrary, ESC rights or rather the social welfare policy goals of the state are not stated in literal 'rights' term but are designed as 'fundamental principles of state policy' and more crucially they are explicitly declared by Article 8(2) of the Constitution to be judicially non-enforceable. However, the Supreme Court of Bangladesh even in the face of such an express constitutional bar is enforcing rights that are clearly or at the least predominantly socio-economic in nature as part of the enforcement of judicially enforceable 'fundamental rights'. In this article such an exercise of the Court has been termed as the 'Indirect Judicial Enforcement of ESC Rights.' From some immediate past years the Supreme Court has shown extreme activism or been considerably instrumental in enforcing socio-economic rights of various form and nature by extending the scope and ambit of the fundamental rights of 'right to protection of law' and 'right to life and personal liberty' guaranteed under Articles 31 and 32 respectively of the Constitution.

In the backdrop of these events, the principal objectives of this article are two-fold. *First*, to examine the propriety of enlarging the content of some fundamental rights so as to include within it a wide variety of socio-economic rights and thereby enforcing them indirectly. *Second*, to assess critically the utility and effectiveness of Supreme Court's particular indirect approach for true and sure ensuring of the ESC provisions embodied in the Constitution as policy aspirations or goals of the state. They will be discussed and examined in the due course of time or in their proper contexts. To begin with, however, the author considers it necessary to see in general the overall status and question of judicial enforcement of FPSP as ESC rights have been embodied as such in Bangladesh Constitution.

⁶ See, Article 26 of the Bangladesh Constitution.