

# **Economic, Social and Cultural Rights**

## **under**

### **Human Rights Jurisprudence with Nepalese Perspective**

Tek Tamrakar,  
Human Rights Advocate, LL.M. in Constitutional Law

*The State has to adopt a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals. - Soobeamoney 1998 (1) SA765 (CC), para 8.*

#### **Background**

The practice of analysis and explanation of human rights along with the norms of collective interest in addition to individual interest has begun. The Universal Declaration of Human Rights in its beginning has ensured the place for basic rights and life with dignity. Of course, without equality and human dignity, no right can be completed. Equality and human dignity in fact, should be received as the fundamental rights. Science has proved that no one could be of higher and lower status by birth. Though physical size and appearance is natural, yet different and unequal treatment to any one at any basis at any cost can never be reasonable and justifiable. And, this is definitely not the time for the state to relax by only fulfilling the right of physical life. This is the twenty-first century and the period is of people oriented state mechanism. Now the state, assessing the human values and norms at the utmost, has to protect human rights strongly in order to focus it to provide and protect human respect.

Human rights jurisprudence emphasizes to enable human rights country, time and situation oriented. The fact of human rights is that they are entitled to human as natural esteem. The rights not only protect anyone's individual interest, but also support for the development of society, community and country. At the present changing situation, all groups have been raising their voices for recognition, identity and equality. Whatever demands and subjects they have been fighting for, the common characteristics of their demands are human rights. Whether the voice is raised for equality or for self-recognition and human dignity or political inclusion, if all issues can be incorporated on human rights perspectives, then definitely, the state can settle current transitional political economy comfortably; no one will disagree with it.

#### **Relation between Political rights and ESC rights**

Political and civil rights are the source of freedom while economic, social and cultural rights describe all matters mainly freedom, equality and progress. Civil rights advocate about individual development and, economic, social and cultural rights advocate for holistic interest of marginalised class, ethnicity and those with different cultural identity. Therefore, there requires proper homework for institutional development of such rights. Both of these rights are said as supplementary to one another therefore, achievement of one right can be possible only with existence of another. Following human rights are presented as fundamental rights in totality.

**Civil and Political Rights**

**Economic, Social and Cultural Rights**

Right to vote	Right to meaningful representation on state mechanism
Right to equality	Right against caste discrimination
Right to human dignity	Right to meaningful equality
Right to individual freedom and security	Right to education
Right to privacy	Right to food
Right to information	Right to health
Right of freedom to assembly and form political organisation	Right to land
Right to citizenship	Right to healthy environment and water
Right to profession and association in labour organisation	Right to work and employment
Right to political freedom	Right to culture and language

As mentioned above, civil and political rights are related with individual development and freedom. Individual development is necessary for development. Similarly, social and cultural rights are related with community rights. And, in order to develop a holistic feature of human rights, all these rights should be taken together. Interrelationship and interdependency between civil and political rights and social and cultural rights are remarkable and unavoidable. Its realisation can be shown by answers of the following questions.

- Is right to vote without basic education, in reality exercised or not?
- Do rights to impression and opinion as well as right to candidacy and being elected without education have meaning or not?
- Without eliminating discrimination, are practices of other political rights changed into reality or not?
- What is the meaning of right to justice without access?
- Is there meaning of right to form labour organisation without work or not?
- What is the meaning of right to property without it?
- Is there meaning of right to freedom without fulfilment of basic needs and family?
- Is there access to information for people without economic and social rights and rights to language?
- Finally, does political democracy do institutionalized development of democracy?

Real protection of human rights cannot be done by the culture which provides protection to one right but remains silent on other rights. All rights should be protected at the same time. In totality, protection of economic, social and cultural rights particularly can support in real practice of political rights, elimination of all forms of discrimination, creation of citizen's faith and belief towards the state and maintain them, for conflict transformation, positive peace building and institutional development of democracy.

### **ESC rights and existing legal provision**

Conflict arises due to poverty, hunger, disease and discrimination. Poverty is a multidimensional issue. Among various causes of poverty, discrimination, exploitation, and deprivation from rights appear as the main causes. For the last couple of years, Nepal has also experienced extreme pain of conflict. The post conflict period is used to be appeared as a challenge to the state. The issue of conflict transformation happens to be very difficult and time consuming, as well as without analytical study and experience; the state can not achieve anticipated real peace. Real transformation of conflict is also the state's positive acceptance and active adoption of collective welfare and aspiration. Where the issues of collective welfare and class interest appear, of course we have to bring forward the issues of economic and social rights. However, there should not be the situation to take account of economic and social rights only but to forget civil and political rights.

The constitution is not only a political document rather as it also represents interests and aspirations of all citizens; therefore it should cover the feelings of all citizens. Similarly, since protection of and respect to human rights, and fulfil these responsibilities through human rights mechanism are the task of the state, therefore, it should be able to emphasize on such issues constitutionally. The constitution should not forget the physical, social and cultural structure of the country. Seeing the constitutional practice till present in the country, it could be said that the Constitution of Nepal 2072 had attempted to cover economic, social and cultural rights partially as the form of fundamental rights. However, in comprehensively, these rights are kept outside the limitation of judicial practice by keeping them under the state's directing principles. While seeing the process of constitution building and the situation, such happening was natural. In fact, in the constitution building process, neither there was representation from all groups and classes nor did then political environment realise the importance to economic, social and cultural rights.

But, along with the passage of time and situation, there has emerged the realisation that economic, social and cultural democracy should be developed. As a result, Comprehensive Peace Agreement, and the Interim Constitution of Nepal are before us. The Peace Agreement, protecting economic, social and cultural rights, has incorporated the matter that realisation of full democracy should be made to the people. It has remarked that right to education, women and children rights, rights against all forms of exploitation, right to food security, right to medication should be protected.

Similarly, the Interim Constitution has also included a lot of economic, social and cultural rights as the fundamental rights for the first time in the history of the constitutional jurisprudence of Nepal. However, all economic, social and cultural rights could not be protected. In addition, there may need a study on if the mentioned rights are made exercisable in reality or not. However, on the basis of acceptance and development, we can observe it as fruitful and meaningful development. The rights included as fundamental rights in the Interim Constitution are:

- Right to live in neat and clean environment and environment related rights;
- Right to education and culture to everyone ensuring protection of language, culture and script;
- Right to reproductive health, rights against physical and mental violence;
- Right to social justice for underprivileged (backward) groups to participate in state structure on the basis of inclusive proportionate principle;
- Along with own identity and name, rights to nutrition and basic health and social security, rights against physical and mental or any form of exploitation, child rights along with rights to special protection for handicapped, orphans, mentally disables, victims of conflict and children at risk from the state for ensured future;
- Right to each person to adopt and practice any religion with due respect to existing social and cultural tradition, rights to each religious community to operate and protect owns religious places and "Guthies" maintaining free existence as according to law;
- Each person is entitled with rights against exploitation, human sales, practice of slavery and bondage and forced labour without his/her wish; and
- Right to proper labour practice for each labour and employee, right to organise, form trade union and collective bargaining for protection of own interest.

Similarly, various social and economic rights are provided as a form of state directing principles, stating to maintain lawful system in social and economic areas by establishing people's welfare oriented state, to distribute available resources in the country properly by eliminating access of limited persons, and to remove social and economic disparities.

Where, there are the provisions of: policy to expand the relationship among various religions, cultures, castes, communities, origins, languages on the basis of equality and co-existence; maintain pure environment, special provision for employment, education and health to women, provision of social security for protection for single women, orphans, children, handicapped, senior people, disabled people; provision of reservation system for marginalised groups in education, health and employment sectors for certain time period; adopt the policy of positive discrimination for women, *Dalit*, *Janajati*, *Madheshi*, *Muslim*, minorities, landless, squatter, *Kamiaya*, disable, backward group; and employment to freed *Kamaiyas*; and necessary arrangement for labourers and peasants.

Similarly, various treaties and agreements that Nepal ratified and which also act as similar to the national laws, also urge the state to make necessary provisions for the enforcement of collective rights. They are mainly, covenant on political and civil rights, covenant on economic, social and cultural rights, convention against racial discrimination, convention on child rights, convention on elimination of all forms of discrimination against women, and recently ratified ILO convention 169.

Through the judicial activism, though there has been not any remarkable history of decisions in relation to interest/welfare of backward group, class and group having different culture, however, it does not mean that the judiciary has never spoken about social and economic rights. Especially, the judiciary has spoken a little with regard to women and children rights and in some extent to

Dalits' rights. However, it is not irrelevant to say that the situation of observance of the formulated positioned justice and decision has been unsatisfactory. Similarly, Human Rights Commission is institutionalised as a constitutional body. That gives the Commission more energy for protection of human rights.

### **Economic, social and cultural Rights and the new Constitution**

As mentioned above, these rights are provisioned in the Interim Constitution at some extent. However, since there requires the legal mechanism for enforcement of some provisions, it has not in fact been practical and real. Showing legal requirement for enforcement of all matters has someway turned it as cosmetic attempt. At the present context, as the whole state mechanism is targeted towards the constituent assembly election, it cannot be said that the Interim Legislature Parliament will make legal provision in order to implement various constitutional rights. By mentioning the ESC rights as fundamental rights, a stronger presentation is required to bring changes in the constitutional structure, which only engages in political rights, and as well as to institutionalize and legitimate it. Similarly, if the issues of economic, social and cultural rights could be institutionalized by analyzing the matters like social situation, cultural composition, geography, etc., only then democracy could be deep rooted. Therefore, instead of mentioning these rights in the human rights related part, it would be rather necessary to make the constitution the human rights oriented. In this regard, a concrete mechanism should be built for provision and enforcement of human rights.

Therefore, the upcoming constitution, being constructed through people's wider participation and representation, should provisioned necessary mechanisms for enforcement of the following economic, social and cultural rights:

- *Rights against all forms of discrimination:* Any act of discrimination at any basis including caste, ethnicity, gender, religion and region should be prohibited and punished. And, the victim of such discrimination should be provided with sufficient and meaningful compensation, resettled and rehabilitated.
- *Rights to education:* There should be clear provision of: compulsory basic and adult education, right to education in non-discriminatory environment, right to education in own language (mother tongue), right to open educational institution in own investment.
- *Right to food and right against hunger:* These include right to access to adequate food, children's right to nutritional food, right to nutritional food to people including prisoners. This right attached with rights to work speaks of physical existence. The physical existence has great importance because without it any right related with human dignity does not have meaning.
- *Right to employment and work:* Because this right is related to right to life therefore, the state should be able to make required provision for protection of the right. Right to work mainly includes right to access to employment without any form of discrimination, right to appropriate wage, right to work at non discriminatory environment, right to professional training and equal wage for equal work and other rights that are entitled to labourers.

- Rights to health: This right includes right to required medication, right to access to primary treatment, right to safe drinking water, etc.
- Rights to land: This includes right to access to natural resources including land. In an agricultural country like Nepal, as the right against hunger is mainly related right to land/agricultural land therefore, it seems that landless people must have right to own the land. Similarly, with regard to other natural resources like water and forest, there should be right to equitable access without any form of discrimination including caste and class.
- Right to environment: This right includes right to clean environment and right against pollution. Similarly, under this right, the responsibility of creation of clean environment should be mentioned.
- Right to social security: Some countries in the world has provisioned social and economic rights as the form of constitutional rights discarding the traditional perspective of human rights that considered social and economic rights as legal rights rather than constitutional rights. The example can be found in the constitution of the countries like South Africa. If these rights are not accepted as constitutional rights, there will raise question mark on judiciary remedy in case of not implementing of such rights. Then the judiciary may attempt to renounce from the principle of balance of power.
- Right to adequate housing: It should be able to include right to access to adequate housing and right to housing with minimal facilities. The state should guarantee right to settlement, right stay at safe and environmentally clean and desired place. Similarly, the right to housing means not only the house that saves from sun and rain rather it also states about adequate security, privacy and proper respect to human dignity. Because, right to housing not only provides security but also the environment to lead and determine the future life.
- Right to free legal aid: It is necessary that each person lacks with necessary means and resources should be entitled with right to free legal aid. And, the right to free legal aid should be mentioned in a significant way. Mentioning that the right to legal aid should be guaranteed by the law, each legal aid related committee along with various related mechanisms should be inclusive.
- Rights against bonded labour and other exploitation: There should mention formulation of special legislation in order to prohibit the worst crime, such as bonded labour including *Kamaiya*, *Haliya*, *Khali* that remains as a form of slavery, and human sales and child labour at any form and, ensure proper compensation to the victims and punishment to the perpetrators of such crime.
- Right to economic freedom: In particular, it is crucial to make necessary provisions in order to guarantee the rights of free access and practice of profession, employment and private economic activities. Needless to say that backward group has also been being victimised with different kinds of discriminations in economic activities. And, remains of the hierarchism system can be found elsewhere. Therefore, it is inevitable to mention this freedom for the protection of economic rights by eliminating discrimination in economic activities.

Similarly, the state system may have realised that human rights cannot be protected and promoted only by provisioning them. The important thing is the realisation of the responsibilities at all

segments of society as well as in the government mechanisms both in mentality and behaviour. However, in the society like ours where level of social education is lower, the duty and accountability of the state mechanism should be clearly described. The duties and accountabilities to be provisioned constitutionally are respectively:

- Everyone should strongly stand against baseless ill practices that have been deeply enrooted in the society and which are inhuman by human rights perspective and unscientific by scientific perspective;
- It shall be the responsibility of the state to make necessary provision for protection of above mentioned rights;
- It shall be the responsibility of the state to inform people through workshop, seminar, training and publication about the rights, and the remedies of practices provisioned in the constitution;
- There should be necessary legal, administrative, financial and judicial provisions for effective enforcement of mentioned rights

### **Required mechanisms for remedy and prevalence**

Although the role of the state is primary for meaningful enforcement of above mentioned rights, roles of other agencies are also important. And, there needs to bring changes in the attitudes that citizens' rights will be protected by providing the human rights matters in the constitution by the state. In addition, there requires establishment of active mechanisms as accordingly. Similarly, in case of violation of the rights, mainly remedies for compensation, rehabilitation, mediation alike are required to follow. Beyond, since economic, social and cultural rights are new practices in our context; therefore, mainly the following mechanisms should be established and instituted.

#### **1. National Human Rights Commission**

Establishment of independent and competent Human Rights Commission and its institutional development should be done indeed primarily. In order to create respect to these rights, the Commission should play a crucial role to promote these rights and build a human rights culture. Similarly, the Commission should monitor, investigate and study on enforcement and practice of economic, social and cultural rights and also to learn about if unnamed community has been able to exercise them in practice or not. In this regard, there require all possible representation from all backward groups in the Commission as well as the executive structure also needs to be of pluralistic nature. As a result, each community can feel the real promotion and protection of human rights.

Similarly, it also seems necessary to maintain provision to collect the report from government and non government organisations regarding if the mentioned rights are

observed or not. Along with traditional and defensive monitoring system, active and progressive study and monitoring mechanisms also can be advanced strongly.

## **2. National Dalit and Women Commission**

For the welfare of women and backward people as per new constitution, a Commission having well-built structure, mandate and jurisdiction, which can also suggest and assist Human Rights Commission, should be established. Hence the role of Commission will be vital in order to conduct necessary study and research on policies, rules and programmes, laws, other necessary special provisions that the state requires to follow for the welfare of women and Dalits. Similarly, the Commission also needs to pay attention to take necessary initiatives for the implementation of provisions related to social and economic rights of the international laws.

## **3. Judiciary and Nepal Bar Association**

The roles of pluralistic judiciary and organisations of law professionals are also very important with regard to protection of ESC rights. It has become necessary for the judiciary to make arrangement to bring informal justice mechanism into practice as well as avail legal aid effectively in order to enhance access to justice for all. Similarly, it seems necessary to construct a system for the people oriented justice system by making necessary changes in a very long and much technical judicial procedure. For this regard, there should be paid attention whether the accusatorial system is in accordance with the social perspectives or not, and how poor people's access to justice system can be created. Similarly, developing public interest litigation into social interest, there should be arrangement to develop the court system as a protector and conductor of social justice, and economic, social and cultural rights of people. Formation of judicial police as well as special separate unit inside judiciary in order to monitor the implementation of court's orders would also be worthwhile. The court should apply a strategy to consider these rights while interpreting the constitution and the laws. And, a structure to pay special concern in the incidents of violation of these rights should be constructed.

In order to make necessary arrangement regarding human rights related issues, it would be worthwhile to set up "Human Rights Court". Though it is appropriate to keep the court fully independent, it shall not consider that it is out of access and control of people. Therefore, the justice system should be responsible to the people and it is appropriate to think about access and participation of media to the court.

Law professional is not only a social advocate but also an integral part of the court. And, without strong and sensitive law professional the justice system cannot also be updated. The role of law professional has been vital in protection of these rights. Particularly, the law professional can support to provide legal aid by creating pluralism in professional organisation, informing about people's rights and providing effective input in the activities of governmental and non governmental mechanism

## **4. Office of the Attorney General**

The Office of the Attorney General will have greater role in taking initiatives for proceeding the recommendations made by Human Rights Commission and other Commission as well as the cases proceeded by other administrative bodies. You may have information that the Interim Constitution has provided Human Rights Commission

the mandate to file the case against human rights violators and therefore, the Commission may recommend to this Office.

## **5. Non Government Organisations and the Civil Society**

The roles of the civil society and non governmental organisations have been very important in the context of present political economy. Mainly, with reference to economic, social and cultural rights, the NGOs can play the vital roles in protection of these rights by raising human rights awareness, conducting various studies, investigations and monitoring, preparing shadow report to provide required support to human rights based agencies, and monitoring economic, social and cultural rights.

### **Finally (Conclusion),**

Human dignity is an unprecedented recognition of human rights document. It is only goal of Human rights national and international mechanism. However, human dignity does not have any meaning without victory over poverty and inequality as well as without existence and identity. Basic human needs such as food, water, health, housing and self-culture, are the inherent values of the right to live with dignity. Hence, the role of the government is crucial in protection and promotion of all kinds of rights. Similarly, the court also has to interpret economic, social and cultural rights in their own context.

With reference to Nepal, for conflict transformation and positive peace and prosperity, economic, social and cultural rights should be provisioned as fundamental rights in the new constitution and a strong framework should be designed for its enforcement and implementation. Otherwise, it will be injustice to the spirit of people's movement. Economic, social and cultural rights are not the new rights. National and international organizations have been working and advocating on these rights for decades. The act of avoiding these rights stating as these rights are only for unnamed community does not have any meaning. Similarly, it is not logical to have a narrow mind that such rights may cause for limiting the civil and political rights as well as individual rights. None of the human rights are limited to any individual or community. They are universal, natural and interrelated. Guaranteeing of such rights definitely supports to improve the welfare of backward community. In addition, it also supports to eliminate the observed structural weaknesses in the state system. And, elimination of such weaknesses means opening of the way to positive peace and development.

The practice has shown that social and economic rights have been kept under state's directing principles stating for the sake of limited means and resources. Such practices have never developed the culture of responsibility for protection of basic rights in any state mechanism. Therefore, only the basis of state's limited means and resources, if anyone attempts to undermine such rights which are related to person's physical and human dignity, that will be the historic mistake and not pardonable.

On the other hand, the constitutional practice till present has followed the majority rules concept, which has provided the majority group the dominating role in the enforcement mechanism of the state. As a result, they manipulate the laws including the constitution as to fulfil their own interest. Issue of social justice has been absolutely forgotten. And, neither the participation of the backward group was accepted nor their issues got represented. Perhaps, it may be the reason that the observation committee on covenant on economic, social and cultural rights, remarking the report presented by Nepal, has stressed on meaningful participation and representation of all backward groups in the Constituent Assembly. Therefore, in order to guarantee effective

implementation of the upcoming constitution, the proportional and meaningful representation of all communities in all mechanisms and bodies of the state is compulsory. Similarly, the jurisprudence has verified that the proportional representation and participation in the constitution making process also supports for its implementation.