

Judicial Enforceability of Economic, Social and Cultural Rights in Bangladesh: A Critical Evaluation

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Abstract

The implementation of economic, social and cultural rights (ESC rights) continues to pose uncertainties in the modern world. Given that many states constitutionally treat such rights as aspirational and not justiciable, it is difficult to enforce them judicially at the domestic level. Bangladesh has embodied these rights in Part II of its Constitution as a social welfare goal of the State. This article takes Bangladesh as a case study and examines the international legal framework for the implementation of ESC rights at the domestic level. Making a comparison with other jurisdictions, such as India and South Africa, the article examines the approach of the judiciary of Bangladesh (the Supreme Court) in giving effect to these rights. Lastly, the article argues that the court should devise appropriate and effective enforcement mechanisms for these rights.

Keywords

Bangladesh – judicial enforceability – economic social and cultural (ESC) rights – implementation of rights

1 Introduction

The economic, social and cultural rights (ESC rights), deemed to be positive rights, impose positive obligations on the state.¹ Though the concept of ‘civil and political rights’ is more commonly discussed and acknowledged, this is not to be understood as the development of a hierarchy over ESC rights.² The most universal human rights document, namely the Universal Declaration of Human Rights³ (UDHR) provides ‘a common standard of achievement’ of all nations⁴ and seeks to universalise the recognition and realisation of ESC rights along with civil and political rights.⁵ The two sets of rights were formally recognised within international law in 1966 through the adoption of two separate conventions—the International Covenant on Civil and Political Rights (ICCPR)⁶ and the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁷ Both these treaties are legally binding instruments that impose clear obligations on State parties to protect ESC rights and civil and political rights at the domestic level. In 1993, the Vienna Declaration affirmed that both categories of rights are ‘indivisible, interdependent and interrelated’.⁸ Quite unfortunately, however, many developing countries simply ratified the ICESCR without taking into consideration the treaty obligations, especially with respect to its domestic implementation. Notably, a number of challenges exist

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- 1 Traditionally, a common view was that civil and political rights impose negative obligations and economic, social and cultural (ESC) rights impose positive obligations. However, it was later clarified that all human rights entail both positive and negative duties. See eg Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (1987), UN Doc E/CN.4/1987/17, Annex; International Commission of Jurists (ICJ), *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 26 January 1997, <<https://www.refworld.org/docid/48abd5730.html>> accessed 11 December 2021.
 - 2 See the definition of indivisibility of human rights adopted by the United Nations Population Fund which states ‘all human rights have equal status and cannot be positioned in a hierarchical order’. Human Rights Principles’ (*Unfpa.org*, 2021) <<https://www.unfpa.org/resources/human-rights-principles>> accessed 7 December 2021.
 - 3 Universal Declaration of Human Rights, UNGA Res 217A (III) (10 December 1948) (UDHR).
 - 4 *ibid* Preamble.
 - 5 On the ESC rights in the UDHR, see especially, Gudmundur Alfredsson and Asbjorn Eide (eds), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (Martinus Nijhoff Publishers 1999).
 - 6 International Covenant on Civil and Political Rights, (adopted opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) 999 UNTS 171 (ICCPR).
 - 7 International Covenant on Economic, Social and Cultural Rights, (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).
 - 8 Vienna Declaration and Programme of Action, GA Res 48/121, 12 Jul 1993, UN GAOR, 48th sess 22nd plen mtg, UN Doc A/CONF.157/22, (20 Dec 1993) [5].

in implementing ESC rights in these countries. These include lack of financial and other resources, inequitable treatment of ESC rights at the domestic level (holding the view that ESC rights cannot be defined in terms of law), and the non-existence of state practice regarding the application of international treaties in domestic law and absence of good governance. Against this backdrop, there have been efforts to enforce the ESC rights by the judiciary. The intervention by the court to adjudicate violations of ESC rights has often been objected to on the ground that it violates the principle of separation of powers. The argument put forward is that implementation of ESC rights is largely a matter of legislative and policy concern and thus the court oversteps its boundaries in making any order that seeks to enforce such rights.⁹

This article examines the international legal framework regarding the implementation and realisation of ESC rights at the domestic level and describes its challenges and possibilities. The article takes Bangladesh as a case study to investigate the justiciability of ESC rights at the domestic level. In doing so, it considers the constitutional and legislative recognition of ESC rights, briefly discusses how such rights are realised in Bangladesh, and thereafter examines the judicial enforcement of ESC rights. To better understand the shortcomings of the Bangladesh Supreme Court's approach to enforcing ESC rights, the article discusses the judicial protection of ESC rights in India and South Africa. Lastly, the article evaluates the justiciability of ESC rights in Bangladesh and argues that the Supreme Court should devise an appropriate and effective remedy in ESC rights adjudication.

2 Protection of Economic, Social and Cultural Rights under the International Legal Framework

The UDHR is the first global international human rights instrument to incorporate both ESC rights and civil and political rights. After over a decade, the ICESCR was adopted in 1966 and came into force in 1976. This agreement imposes a treaty obligation upon the State parties to ensure the effective protection of

9 A strong argument against judicial enforcement of ESC rights is that, since judges are not elected by citizens, it is impermissible for them to have a say on the advancement of ESC rights. It is alleged that judicial decisions with respect to ESC rights sometimes overrule national goals and priorities determined by people's representatives, such as government authorities, member of parliament, and so on. See eg Y Ghai and J Cottrell, 'The role of the courts in the protection of economic, social and cultural rights' in Y Ghai and J Cottrell (eds), *Economic, Social and Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social and Cultural Rights* (Interrights 2004).

fundamental ESC rights of all persons within their jurisdictions.¹⁰ However, it is not clear whether this obligation extends beyond the borders of State parties.¹¹ Article 2 of the ICESCR provides that every State party has the obligation to take necessary steps, including legislative measures, for the progressive realisation of ESC rights. Presently, the other international human rights instruments such as the Convention on the Rights of the Child 1989,¹² the Convention on the Elimination of All Forms of Racial Discrimination 1965,¹³ and the Convention on the Elimination of All Forms of Discrimination against Women 1979¹⁴ have incorporated relevant provisions of the ICESCR along with civil and political rights. In 1968, the Tehran Proclamation on Human Rights declared '[t]he achievement of lasting progress in the implementation of human rights is dependent upon sound and effective national and international policies of economic and social development'.¹⁵

The above-mentioned human rights instruments reflect the growing inclination of universality and indivisibility of these rights in the modern world. Thus, it is arguable that ESC rights may not be regarded as the second category of rights and are no less important than civil and political rights.¹⁶ State parties should implement these rights from the core level, and legislative and administrative steps must be adopted for the full realisation of the rights.¹⁷ In this regard, the willingness of the State parties is a significant factor for ensuring ESC rights to their citizens.

2.1 *Responsibility and Obligations of State Parties Under ICESCR*

ESC rights have great value in the protection and promotion of human rights in the modern world. As noted above, the ICESCR is the primary legal instrument that obliges ratifying states to respect, protect and fulfil ESC rights within

10 On domestic applicability of ICESCR, see especially Matthew CR Craven, *The International Covenant of Economic, Social and Cultural Rights: A perspective on its Development* (Clarendon Press 1998).

11 For details, see Fons Coomans, 'The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights' (2011) 11 *Human Rights Law Review* 1.

12 Convention on the Rights of the Child opened for signature 20 November 1577 UNTS 3 (entered into force 2 September 1990).

13 Convention on the Elimination of All Forms of Racial Discrimination, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

14 Convention on the Elimination of All Forms of Discrimination against Women, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

15 Proclamation of Teheran, UN Doc A/CONF 32/41 (1 May 1968) art 13.

16 Abdullah Al Faruque, *International Human Rights Law: Protection Mechanisms and Contemporary Issues* (New Warsi Book Corporation, 1st ed, 2012) 36.

17 ICESCR (n 7) art 2 (1).

their territories. Article 2(1) of the ICESCR refers to such obligations and provides that the State party to the Covenant ‘undertakes to take steps, [...] to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the Covenant by all appropriate means’. It is important to mention here that the expression ‘all appropriate means’ is not only limited to administrative, educational, financial and social measures, but it also includes the technical and vocational guidance, training programme, policies, and techniques for the realisation of ESC rights.¹⁸ The ICESCR provides for four types of State obligations: firstly, an obligation to respect, which connotes refraining from interfering with the enjoyment of rights; secondly, an obligation to protect, that means it forces the State parties to take steps through legislation or other ways to prevent or prohibit the violation of the recognised rights or freedoms; thirdly, an obligation to promote, which requires raising public awareness for the realisation of ESC rights which can be achieved progressively; fourthly, an obligation to fulfil—that requires far-reaching measures on behalf of the government to create congenial conditions towards the full realisation of the recognised rights and freedoms.¹⁹ This obligation is a ‘programmatic’ obligation under the framework of ESC rights.²⁰ However, all of these obligations cannot be examined separately as they are reciprocally connected. For instance, the right to housing is related to the obligation to respect, i.e. no one should interfere with the enjoyment of these rights, and the obligation to protect, which requires legal remedies for the violation of these rights. Comparably, a right to food necessitates both obligations to ensure it and for a state to take necessary steps to provide food for all. In this context, the obligation to promote requires the state to initiate land reforms to improve food production and distribution of food.²¹

International human rights experts and the Committee on Economic, Social and Cultural Rights (CESCR) have interpreted the state obligations to include obligations of conduct and obligations of result. In this regard, the International Law Commission has taken the view that Article 2(1) of the ICESCR imposes an ‘obligation of result’ rather than an ‘obligation of conduct’ upon states parties.²² An obligation of conduct requires the state to undertake

18 *ibid* art 6.2.

19 Faruque (n 16) 38.

20 GJH Van Hoof, ‘The Legal Nature of Economic, Social and Cultural Rights: Rebuttal of Some Traditional Views’ in P Alston and K Tomaševski, (eds), *The Right to Food* (Martinus Nijhoff Publishers, 1984) 106.

21 Faruque, (n 16) 39.

22 International Law Commission, ‘Report of the International Law Commission on the Work of its Twenty Ninth Session’ (9 May – 29 July 1977), Report A/32/10 *Yearbook of the International Law Commission* [8].

a specific course of conduct necessary for the enjoyment of a particular right. However, an obligation of result denotes that the state should take the necessary steps and suitable measures to achieve a particular result to satisfy the minimum standard of the treaty.²³ The above-stated obligation is clear from a theoretical perspective. However, in a practical sense, Article 2 of the ICESCR does not articulate the two types of obligations.

2.2 *Optional Protocol to the ICESCR*

The Optional Protocol to the ICESCR (Optional Protocol) was unanimously adopted by the United Nations (UN) on 10 December 2008,²⁴ which later came into force in May 2013. Civil society played a vital role in the adoption of the Optional Protocol, which is considered by the International Commission of Jurists as a 'significant step forward toward the objective of achieving access to justice for victims of ESCR violations'.²⁵ The UN High Commissioner for Human Rights observed that the Optional Protocol closed 'a historic gap in human rights protection under the international system'.²⁶ Though both the ICCPR and its Optional Protocol were adopted on the same day,²⁷ it took 15 years to adopt a protocol for the ICESCR.²⁸

The Optional Protocol established three procedures for the protection and enforcement of ESC 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 ESC rights to the CESCR and to seek redress for that violation (the individual complaints mechanism).²⁹ Any such

23 *ibid* 40.

24 Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, UN Doc A/RES/63/117 UN Doc/HRC/8/2 (2008). It entered into force on 5 May 2013.

25 ICJ, 'International Commission of Jurists' (Annual Report, 2013) 36 <https://www.icj.org/wp-content/uploads/2014/05/icj_rapport_annuel_2013.pdf> accessed 19 December 2021.

26 Navanethem Pillay, *Statement by the High Commissioner for Human Rights*, UN Doc A/63/PV66 (10 December 2008) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14958&LangID=E>> accessed 19 December 2021.

27 Presently, there are two Optional Protocols to the ICCPR. The first established the right of an individual to lodge a complaint against their state before the UN Human Rights Committee. The second was adopted in 1989, dealing with the abolishing of the death penalty, and entered into force in July 1991.

28 Regarding the preparatory work on the ICESCR Optional Protocol, see, M Scheinin, 'The Proposed Optional Protocol to the Covenant on Economic, Social and Cultural Rights: A Blueprint for UN Human Rights Treaty Body Reform – Without Amending the Existing Treaties' (2006) 6 Human Rights Law Review 131.

29 ICESCR (n 7) art 2.

complaint can only be brought by or on behalf of victims who satisfy certain admissibility criteria³⁰ and are under the jurisdiction of a State party to the Optional Protocol. The inter-state communication procedure allows the CESCR to consider communications by a State Party against another State Party concerning non-fulfillment of ICESCR obligations.³¹ The inquiry procedure allows the CESCR to initiate inquiries into 'grave or systemic violations' by a State party of any of the ESC rights.³² Thus, it is no exaggeration to say that the Optional Protocol provides effective enforcement mechanisms with respect to the violation of ESC rights.

3 Judicial Enforcement of Economic, Social and Cultural Rights: Challenges and Possibilities

ESC rights play a significant role in improving people's lives and standard of living.³³ Realising people's basic ESC rights contribute to peace and security; therefore, each state has an interest in promoting and protecting these rights.³⁴ However, it is unfortunate that many states are reluctant to treat ESC rights as full legal rights on the same level as civil and political rights. This is because they regard ESC rights as non-legally binding principles and objectives. Therefore, the ability to enforce ESC rights through courts is of paramount importance.³⁵

The judicial enforcement of ESC rights, though debatable, has been an important topic of discussion for quite some time.³⁶ Many countries tend to include ESC rights in their constitutions in aspirational terms as a duty to

30 *ibid* art 3(2).

31 *ibid* art 10.

32 *ibid* art 11.

33 It is a debatable issue whether the judicial enforcement of social and economic rights (SER) benefit the poor and marginalised sections of the community. For an analytical discussion on the impact of judicial enforcement of SER on the living conditions of poor citizens, see Daniel M Brinks and William Forbath, 'Commentary: Social and Economic Rights in Latin America: Constitutional Courts and the Prospects for Pro-poor Interventions' (2011) 89 *Texas Law Review* 1943.

34 David Weissbrodt, *The Development of International Human Rights Law* (Routledge 2017) xxii.

35 Joy Gordon, 'The Concept of Human Rights: The History and Meaning of Its Politicization' (1998) 23 *Brooklyn Journal of International Law* 689.

36 Eg Kristin Henrard argued that 'the recognition of the justiciability of economic, social and cultural rights is growing and becoming stronger by the day'. See K Henrard, 'Introduction: The Justiciability of ESC Rights and the Interdependence of All Fundamental Rights' (2009) 2 *Erasmus Law Review* 373, 377.

protect such rights rather than to guarantee them.³⁷ For example, the Indian Constitution describes many ESC rights, such as the rights to work, education and health as ‘Directive Principles of State Policy’ and ‘fundamental in the governance of the country’, but it also states that these principles ‘shall not be enforceable in any court’.³⁸ Likewise, the Bangladesh Constitution embodies ESC rights as ‘Fundamental Principles of State Policy’ but provides that these principles are not judicially enforceable.³⁹ The relegation of the ESC rights to such status within the Constitution is no doubt one of the main reasons why governments tend to neglect ESC rights. Unfortunately, because of this nominal acceptance of ESC rights by the supreme law, many countries weaken their commitment to promote and protect such rights at the domestic level. In many cases, this attitude leads to a lack of response to the violation of ESC rights.⁴⁰

Against this backdrop, there have been inspiring instances of judicial intervention regarding ESC rights violation in several jurisdictions.⁴¹ This has been mainly through class action litigation. Notable, in this regard, are India and Bangladesh. Despite this development, the adjudication of ESC rights by domestic courts has often been challenged because their realisation involves policymaking and public expenditure, decisions which are the responsibility of the executive and legislature. Relying on the political question doctrine,⁴² it is sometimes argued that the courts do not possess the power to determine or jurisdiction to enforce ESC rights, matters that require analysis of government

37 See Andrew Byrnes and Catherine Renshaw, ‘Within the State’ in Daniel Moeckli et al (eds), *International Human Rights Law* (OUP 2014) 466.

38 The Constitution of India, adopted 26 November 1949, art 37 (Part IV) <https://legislative.gov.in/sites/default/files/COI_1.pdf> accessed 19 December 2021.

39 The Constitution of the People’s Republic of Bangladesh, adopted 4 November 1972, art 8(2) <<http://bdlaws.minlaw.gov.bd/act-367.html>> accessed 19 December 2021.

40 Judicial enforcement of ESC rights is one way of realising socio-economic rights at the domestic level. Many states pursue various development goals directed at improving the economic and social situations of their citizens. For example, Singapore’s economic development strategy, Malaysia’s export-oriented policy, South Korea and Taiwan’s strong industrial policies all have become a true enabler of economic and social progress. In recent years, Bangladesh has made considerable progress in economic growth and social development that has contributed to a rise in the standard of living of its citizens.

41 According to Mark Tushnet, judicial intervention involves two types of approaches. The substantive approach focuses on ensuring a minimum core of economic and social rights. The procedural approach involves active participation of the court in progressively realising the ESC guarantees. See Mark Tushnet, ‘Social and Economic Rights: Historical Origins and Contemporary Issues’ (2014) e-Publication (online).

42 A constitutional doctrine developed by the US Supreme Court and adopted in a number of legal systems that requires the judiciary to remain silent on issues that pose a distinct political question.

policies. The CESCR discussed the political question doctrine in relation to ESC rights and observed:

It is sometimes suggested that matters involving the allocation of resources should be left to the political authorities rather than the courts. While the respective competences of the various branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters which have important resource implications. The adoption of a rigid classification of economic, social, and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.⁴³

Regarding the treatment of the ICESCR in domestic courts, the CESCR observed as follows: 'Within the limits of the appropriate exercise of their functions of judicial review, courts should take account of Covenant rights where this is necessary to ensure that the State's conduct is consistent with its obligations under the Covenant'. Fact Sheet No 33 of the UN Office of the High Commissioner for Human Rights (OHCHR) states that since policy review is not policymaking, judicial review of government policies with respect to ESC rights is clearly permissible. By referring to the South African judicial practice, the Fact Sheet states that it is also possible for a court to assess the progressive realisation of ESC rights.⁴⁴

4 Recognition of ESC Rights in Bangladesh

The recognition of ESC rights is essential for their practical realisation. At the national level, ESC rights are generally recognised by incorporation in either the Constitution or the framework of national policies. Though not judicially enforceable, Bangladesh has recognised ESC rights in the text of its Constitution

43 UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No 9: The Domestic Application of the Covenant, 3 December 1998, E/C.12/1998/24. <www.refworld.org/docid/47a7079d6.html>.

44 UN Office of the High Commissioner for Human Rights (OHCHR), 'Fact Sheet No 33, Frequently Asked Questions on Economic, Social and Cultural Rights' (OHCHR, December 2008) <www.refworld.org/docid/499176e62.html> accessed 1 December 2021.

and incorporated them under Fundamental Principles of State Policy.⁴⁵ As a result, in situations where the government of Bangladesh fails to respond to any violation of ESC rights, the Supreme Court can issue appropriate directions to the respective agencies of the Government to take remedial measures. This is usually done by the Court either *suo moto* or in writ petitions by way of public interest litigation (PIL).⁴⁶ 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. To date, a good number of cases involving violations of ESC rights have been decided by the Supreme Court of Bangladesh. However, unfortunately, it has often been the case that the Bangladesh government alleges various excuses to not follow the court directives, such as lack of adequate financial resources and institutional capacity. This approach seriously undermines the effective realisation of ESC rights in Bangladesh. The government of Bangladesh should take measures to ensure the equitable and effective use of available resources on a priority basis.

4.1 *Constitutional Framework of ESC Rights in Bangladesh*

The Constitution of Bangladesh was adopted by the Constituent Assembly on 4 November 1972 and came into force on 16 December 1972. It is regarded as the supreme law of the land, and Parliament has no right to pass any law that is inconsistent with the provisions of the Constitution.⁴⁷ The Preamble of the Constitution defines Bangladesh as a secular democratic country and declares that the high ideals of nationalism, socialism, democracy and secularism shall be the fundamental principles of the Constitution. It further states that ‘it shall be a fundamental aim of the State 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’. Article 7(1) adds that all powers of the Republic belong to the people and that power should be exercised by the government on behalf of the people by or under the authority of the Constitution.⁴⁸ The Constitution refers to ESC rights in Part II (arts 8–25) and describes such rights as ‘fundamental principles of state policy’. Article 8(2) of the Constitution, however, specifies that these principles ‘shall not be judicially enforceable’—in other words, they are not legally binding.

45 Constitution of Bangladesh (n 39), art 8.2.

46 Article 102 of the Bangladesh Constitution, *ibid*, allows for public interest litigation in Bangladesh.

47 *ibid* art 7.2.

48 *ibid*.

4.1.1 Right to Shelter

Article 15 states:

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 securing to its citizens— (a) the provision of the basic necessities of life, including food, clothing, shelter, education and medical care...⁴⁹

Pursuant to this responsibility, the government of Bangladesh adopted numerous housing policies. For example, in 1993, the government formulated the first ever housing policy of the country. The policy recognised housing as one of the three basic primary needs of citizens and acknowledged it to be as important as food and clothing.⁵⁰ This policy was amended in 1999, with particular focus on ensuring housing for all citizens including the underprivileged, destitute, and middle- and low-income groups of people. The housing policy was later restructured in 2008 to ensure adequate housing for all citizens. The National Housing Policy of Bangladesh, revised in 2016, provides guidelines from social, economic and environmental viewpoints to ensure suitable housing for all.

4.1.2 Right to Work

The Constitution of Bangladesh affirms the right to work at a reasonable wage.⁵¹ Article 20 (1) states that work is ‘a right, a duty and a matter of honour for every citizen who is capable of working, and everyone shall be paid for his work on the basis of the principle “from each according to his abilities, to each according to his work”’. Article 20(2) further states: ‘[t]he State shall endeavour to create conditions in which, as a general principle, persons shall not be able to enjoy unearned incomes, and in which human labour in every form, intellectual and physical, shall become a fuller expression of creative endeavour and of the human personality.’⁵²

The government of Bangladesh enacted several laws and policies for the protection of workers’ rights in line with international instruments. For

⁴⁹ *ibid* art 15.

⁵⁰ Mohammed Saiful Islam, ‘Inclusive Urban Development in Dhaka: Review of the National Housing Policy, Bangladesh’ (2014) Retrieved from <<https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.1042.9038&rep=rep1&type=pdf>> accessed 7 December 2021.

⁵¹ Constitution of Bangladesh (n 39) art 15(b).

⁵² *ibid* art 20(2).

example, in 2006, the government enacted a comprehensive labour law titled The Bangladesh Labour Act 2006 to consolidate and amend the laws relating to employment of workers, relations between workers and employers, payment of wages and compensation for injuries to workers, and other matters related to labour.⁵³ The Ministry of Labour and Employment formulated The Domestic Workers Protection and Welfare Policy in 2015 to ensure the rights of domestic workers and their social security.⁵⁴ However, despite the clear commitment of the government to foster a healthy work environment, there still exists a pattern of labour law violations in Bangladesh's garment factories. These include unsafe factories, unpaid overtime, lack of benefits, and gender discrimination. Additionally, many forms of labour exploitation continue to exist in the private sector that ranges from underpayment and excessive working hours to dangerous and abusive working conditions.

4.1.3 Right to Education

Article 15 (a) of the Bangladesh Constitution recognises the right to education as a basic need. Article 17 guarantees free and compulsory education and states:

The State shall adopt effective measures for the purpose of - (a) establishing a uniform, mass oriented and universal system of education and extending free and compulsory education to all children to such stage as may be determined by law; (b) relating education to the needs of society and producing properly trained and motivated citizens to serve those needs; (c) removing illiteracy within such time as may be determined by law.⁵⁵

With the Primary Education (Compulsory) Act 1990,⁵⁶ the government of Bangladesh made it compulsory for all children between the ages of six and ten to receive primary education. The Government adopted the National Education Policy in 2010 providing, among many other things, free compulsory primary education up to class eight, a uniform syllabus in secondary education, the formation of a permanent Education Commission, and formulation

53 The Bangladesh Labour Act 2006, No XLII of 2006.

54 Domestic Workers Protection and Welfare Policy 2015, under Ministry of Labour and Employment. Government of the Peoples Republic of Bangladesh <http://www.idwfed.org/en/updates/bangladesh-cabinet-clears-draft-policy-to-protect-domestic-workers-rights/bangladesh_dw_policy2015_adopteddoc.pdf> accessed 8 December 2021.

55 Constitution of Bangladesh (n 39), art 17.

56 Act No XXVII of 1990

of integrated education law.⁵⁷ Recently, the Ministry of Education drafted and proposed the Education Act 2020, which is still under review and open for public opinion and comments.

4.1.4 Right to Food

The right to food is a basic need of all human beings. Despite the constitutional recognition many people in Bangladesh are deprived of this basic right due to the unequal distribution of food, low-income levels, rising food prices and lack of necessary assets and access to land.⁵⁸ The right to food is an unenforceable right but regarded as a fundamental principle of state policy in the Constitution of Bangladesh.⁵⁹ Apart from this constitutional connotation, the government of Bangladesh has enacted laws and policies to uphold the right to food. The core legislation is The Safe Food Act 2013,⁶⁰ which came into effect in 2015 to maintain and preserve food safety in all appropriate areas. For this purpose, several institutional mechanisms have been established, including the Bangladesh Safe Food Authority, National Food Safety Management Advisory Council, Central Food Safety Management Coordination Committee, and Pure Food Court. These institutions are working to achieve the aims of The Safe Food Act. Among other food laws, the Essentials Articles (Price Control and Anti-Hoarding) Act 1953,⁶¹ the Control of Essential Commodities Act 1956,⁶² and the Essential Commodities Act 1957⁶³ define food as an essential commodity and contain provisions to control food prices, production, treatment, transport, supply, distribution and disposal. Apart from these laws, the government has adopted certain food policies, such as the National Food Policy 1988, the National Food Policy (NFP) 2006 and the National Food Policy Plan of Action (2008–2015) to increase food production, decrease poverty and ensure sustainable food security.⁶⁴ However, these laws and policies are silent on the issues of food access, availability and affordability, all of which are essential conditions of the right to food.

57 Ali Riaz and Mohammad Sajjadur Rahman (eds), *Routledge Handbook of Contemporary Bangladesh* (Routledge, 2016) 138

58 Abdullah Al Faruque, 'From Basic Need To Basic Right: Right To Food In Context' (The National Human Rights Commission 2014).

59 Constitution of Bangladesh (n 39), art 15.

60 The Food Safety Act 2013, No XLIII d.

61 Essentials Articles (Price Control and Anti-Hoarding) Act 1953, No XXII of 1953.

62 The Control of Essential Commodities Act 1956, No I of 1956.

63 The Essential Commodities Act 1957, No III of 1957.

64 Faruque (n 58).

5 Realization of Economic, Social and Cultural Rights: The Bangladesh Perspective

ESC rights are subject to 'progressive realisation' under the terms of the ICESCR.⁶⁵ Article 2(1) obliges States parties to progressively ensure the full realisation of such rights using the 'maximum of its available resources'. The concept of progressive realisation of ESC rights requires a proactive approach, necessitating the state to undertake all possible measures to implement these rights.⁶⁶ The reference to 'resource availability' reflects recognition that resource limitations may hamper states from fully realising ESC rights. Thus, the state cannot on the ground of lack of resources overlook provision of the minimum remedies for the violation of the ESC rights of its citizens. Lack of sufficient resources does not absolve states of the 'minimum core obligation'⁶⁷ to ensure, as a matter of priority, 'minimum essential levels of each of the rights' recognised in the ICESCR.⁶⁸ Failure to ensure such minimum essential levels of rights is considered a *prima facie* violation of the ICESCR. In such cases, the burden of proof rests on the state concerned to justify its actions by demonstrating that it has made every possible effort to use all resources at its disposal towards satisfying the minimum core obligations.

Recognising its constitutional commitment to human rights, Bangladesh acceded to the ICESCR in 1998.⁶⁹ However, it has made some reservations to certain fundamental provisions that limit the application of the ICESCR at the domestic level.⁷⁰ Specifically, the reservations to Articles 2 and 3 of the ICESCR have largely undermined the realisation of ESC rights. Bangladesh has also made reservations to Article 7 (the right to the enjoyment of just and favourable conditions of work) and Article 8 (the right to form a trade union) to the effect that these articles will be applied in a way that conforms to the constitutional provision and other existing relevant laws of Bangladesh. With

65 ICESCR (n 7) art 2(1); see Committee on Economic, Social and Cultural Rights (CESCR), General Comment 3: The Nature of States Parties' Obligations, UN Doc. E/1991/23, annex III at 86 (1990).

66 Report of the UN High Commissioner for Human Rights to the 2007 Substantive Session of ECOSOC focusing to the Issue of Progressive Realization of Economic, Social and Cultural rights, UN Doc E/2007/82 (25 June 2007).

67 For a discussion on the minimum core approach, see Katherine Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' (2008) 33 *Yale Journal of International Law* 113.

68 UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3: The Nature of States Parties' Obligations E/1991/23 (14 December 1990), [10].

69 Faruque (n 16) 52.

70 Shadheen Malik, 'International Human Rights Norms and Recent Ratification of International Human Rights Norms in Bangladesh' (1999) 1 *Law Vision* 10.

respect to the reservations regarding Articles 10 (the right to protection and assistance to family) and 13 (the right to education), they have sought to implement these articles progressively, depending on resource availability and the socio-economic conditions of the country.⁷¹ Though these reservations have weakened the protection of ESC rights in Bangladesh, the Supreme Court has attempted to address ESC rights abuses in several PIL cases, to implement the Fundamental Principles of State Policy (FPSP) for the exercise and enjoyment of fundamental rights. This has included both positive and negative remedies for ESC rights violations.

6 Judicial Implementation of ESC Rights in Bangladesh

Judicial implementation of ESC rights is still debateable in South Asian jurisdictions. The enforceability and justiciability of ESC rights is more developed in Latin America, Eastern Europe and Africa, when compared to South Asia. South Asian countries have followed a more restrictive approach to the justiciability of ESC rights due to constitutional obligations and the inadequacy of domestic laws.⁷² However, PIL procedures have enabled some litigants to obtain remedies for the violation of collective rights.⁷³ The implementation of ESC rights is a lengthy process and will depend on the state's legal system. The term justiciability refers to the litigant's ability to claim a remedy for the violation of rights that are prescribed in the domestic law and national constitution.⁷⁴

There is a variance of arguments among scholars concerning the justiciability of ESC rights and how they can provide immediate remedies to affected groups of people. For example, the civil law system is more flexible and better equipped than the common law jurisprudence to provide urgent and immediate relief to individual applicants.⁷⁵ In the common law system, international treaties are not directly applicable in the domestic legal jurisdiction until they are incorporated into domestic laws. There is a constitutional restriction in Bangladesh on directly enforcing ESC rights to give urgent relief to the affected people.

71 Faruque (n 16) 53.

72 Beth A Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (CUP 2009).

73 Malcolm Langford, 'Domestic Adjudication and Economic, Social and Cultural Rights: A Socio Legal Review' (2009) 6 *International Journal of Human Rights* 95.

74 David M Walker, *The Oxford Companion to Law* (OUP 1980) 694.

75 Langford (n 73).

The Constitution of Bangladesh has accommodated ESC rights in the categories of non-judicially enforceable rights inserted in Part II termed FPSP, more specifically in Articles 15 (provisions for necessities), 17 (right to education), and 18 (right to health). When the court adjudicates all constitutional cases the court will issue an order causing the concerned authority to take necessary measures to resolve the issue. The court has no authoritative power to make law but has the power to interpret the constitutional provisions and other laws when dealing with the cases. Vast powers are bestowed in the hands of the executive and legislature to make and implement the law. The Court has taken a restrictive approach in ESC rights cases due to Article 8(2) of the Constitution, which explicitly states that such cases 'shall not be judicially enforceable'. However, the other part of this Article is worth mentioning, namely, that the state shall make laws to enforce ESC rights and the court can interpret the Constitution and other laws in Bangladesh while dealing with FPSP cases that in turn engages ESC rights. Therefore, it appears that enforcement of ESC rights is closely related to the question of judicial enforceability of those rights.⁷⁶ The adjudication of ESC rights cases in this South Asian jurisdiction is still controversial due to questions of the appropriate role of judges in a constitutional democracy.⁷⁷ Many critics have argued that judges have neither the constitutional mandate nor the institutional competency to hand down orders that impact on the government's socio-economic policy programme.⁷⁸ Therefore the implementation of ESC rights largely remains in the domain of the legislature and hands of the executive. The judges should at least be cautious when dealing with ESC rights cases and when assessing or monitoring whether the government would meaningfully implement the court's orders.⁷⁹

In the present legal landscape, the Supreme Court of Bangladesh took a more restrictive approach in adjudicating ESC rights cases. The Supreme Court should apply an equitable strategy while interpreting the constitutional provisions concerning FPSP. It has been observed over the years and in a number of ESC rights cases, the Supreme Court of Bangladesh has emphasised more on constitutional limitations rather than methodical interpretation of the relevant provisions of the Constitution. For example, a number of cases will be discussed briefly below.

76 Reajul Hasan Shohag and ABM Asrafuzzaman, 'Enforcing Socio-economic Rights Judicially: Experiments in Bangladesh India and South Africa' (2012) 111 Northern University Journal of Law 89.

77 Anashri Pillay, 'Toward Effective Social and Economic Rights Adjudication: The Role of Meaningful engagement' (2012) 10 International Journal of Constitution Law 733.

78 *ibid.*

79 *ibid.*

In *Sheikh Abdus Sabur v Returning Officer*,⁸⁰ Shahabuddin Ahmed J commented on Article 9, which obliges the State to encourage local governments to observe that '[t]hese principles, though they must be applied by the State in making laws, are not judicially enforceable'. Notably, this case involved the validity of a provision in a local Government law⁸¹ on the ground of an alleged violation of the equality clause under Article 27 of the Constitution. Similarly, in *Saleemullah v Bangladesh*,⁸² the court held that the Government's decision to participate in the UN-sponsored multinational force to Haiti did not derogate from Article 25. In *Bangladesh v Winifred Rubi & Others*,⁸³ the Appellate Division of the Bangladesh Supreme Court held that an incidental inquiry relating to state policy of education under Article 17 was unwarranted by constitutional law on the ground the 'Directive Principles of State Policy' are not enforceable in a court of law. In *Anwar Hossain v Bangladesh*⁸⁴ (popularly known as the '8th Amendment Case') Badrul Haider J observed: 'Though the directive principles are not enforceable by any Court, the Principles laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.' In *Kudrat-E-Elahi Panir and Others v Bangladesh*,⁸⁵ the Appellate Division adopted a straightforward approach to non-justiciability of the FPSP and held:

The reason for not making these principles judicially enforceable is obvious. They are in the nature of people's programme for socio-economic development of the country in peaceful manner, not overnight, but gradually. Implementation of these programmes requires resources, technical know-how and many other things including mass education. Whether all these pre-requisites for a peaceful socio-economic revolution exist is for the state to decide.⁸⁶

However, the court has since affirmed that the FPSPs, though judicially unenforceable, are 'fundamental to the governance of the country' and impose an obligation upon the government to act in accordance with them.⁸⁷ The court

80 [1988] 41 DLR (AD) 30.

81 Section 7(2) of the Local Government (Union Parishads) Ordinance 1983 provided for disqualification of loan-defaulters in election.

82 47 DLR 218.

83 34 DLR (AD) 164.

84 41 DLR (AD) 165.

85 [1991] 20 BLC (AD) 319.

86 *Kudrat-E-Elahi Panir and Others v Bangladesh* [1991] 20 BLC (AD) 319, [6].

87 *Wahab v Secretary Ministry of Land* (1996) 1 MLR (HC) 338.

has also observed that the use of the word 'shall' in Article 8(2) makes the provision compulsory and binding and does not allow the state to continue to ignore the FPSPs indefinitely.⁸⁸

Despite the conservative judicial attitude towards the justiciability of the FPSPs, there have been a number of judgments, where the Supreme Court indirectly enforced ESC rights by linking it to judicially enforceable fundamental rights. For example, in *Professor Nurul Islam v Bangladesh* (cigarette advertising case),⁸⁹ the High Court Division considered the state obligation to improve public health and nutrition (Article 18) with its relevance to the right to life under Article 32 and imposed a ban on all types of advertisements of tobacco products in print and electronic media. In *Dr Mohiuddin Farooque v Bangladesh* (Industrial Pollution Case),⁹⁰ the court established the same link and issued various directions to different government departments to ensure a pollution-free environment. In *Rabia Bhuiyan v Ministry of LGRD*,⁹¹ the Appellate Division of the Supreme Court held that failure to ensure the provision of safe drinking water was a violation of fundamental rights (the right to life as guaranteed under Articles 31 and 32) and the State policy (Articles 15 and 18, which provides for state obligations to ensure basic necessities and improve public health). Taking note of widespread arsenic contamination of groundwater, the court laid down guidelines for the state to ensure safe drinking water to the people by referring to relevant General Comments of the CESCR.⁹² In *Dr Mohiuddin Farooque v Bangladesh* (Radioactive milk case),⁹³ the court, taking into account Article 18, interpreted the constitutional right to life to include 'the protection of health and normal longevity of an ordinary human being', and prevented the release of skimmed milk that contained radioactive material. It is evident from the court's jurisprudence that the Constitution has been interpreted as imposing a negative obligation upon the state to enforce the FPSPs.⁹⁴ In the country's first PIL case (*Dr Mohiuddin Farooque v Bangladesh*, popularly known as the 'Flood Action Plan Case'),⁹⁵ the Appellate Division expanded the meaning of the fundamental right to life under Articles 31 and 32

88 *Masdar Hossain and others v Bangladesh* (1999) 20 BLD (AD) 104.

89 52 DLR 413.

90 55 DLR 69.

91 59 DLR 176.

92 Iain Byrne and Sarah Hossain 'Economic and Social Rights Case Law of Bangladesh, Nepal, Pakistan and Sri Lanka' in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International Comparative Law* (CUP 2009) 127 (*Social Rights Jurisprudence*).

93 (1996) 48 DLR (HCD) 438.

94 Ebadul Hoque J held that if the obligation relating to public health cannot be enforced, the state can be compelled to remove any risks that endanger public health.

95 *Mohiuddin Farooque v Bangladesh* (Judgment) [1996] 48 DLR HCD 438.

of the Constitution to include the 'right to a healthy environment'. In *National Board of Revenue v Advocate Zulhas Uddin Ahmed*, the Appellate Division held that the intent and spirit of Article 18 is to 'provide minimum health care/medical service to the citizens in order to maintain and improve public health' and declared unconstitutional the provisions of the Value Added Tax Act 1991 for the collection of value added tax from the citizens in case of health treatment at hospitals, clinics and doctors' chambers.⁹⁶

In *Ain o Salish Kendra (ASK) v Government of Bangladesh*,⁹⁷ the High Court Division sought to 'strike a balance between social justice and the government's administrative regime',⁹⁸ and intervened to protect slum dwellers from forced evictions. The court held that the basic necessity of housing is integral to the right to life and livelihood, and accordingly the state must ensure that no one is deprived of these rights without proper notice and rehabilitation measures. In a similar case, the court declared unconstitutional the government's arbitrary eviction of hundreds of sex workers, as such action deprived them of their livelihood and thus their right to life.⁹⁹ In 2009, to prevent widespread food adulteration, the High Court Division in *Human Rights and Peace for Bangladesh v Bangladesh* (the Pure Food Case)¹⁰⁰ directed the government to establish a food court and to appoint an adequate number of food analysts and food inspectors in every district in accordance with the Pure Food Ordinance 1959. The court ordered the government to implement this direction within one year from the judgment and directed the government to report on its progress on a timely basis.

7 Judicial Implementation of ESC Rights in India and South Africa

Like Bangladesh, the Indian Constitution recognises ESC rights as 'Directive Principles of State Policy' (DPSP) which are not directly enforceable in the courts.¹⁰¹ However, the judiciary in India has often invoked these DPSPs as an aid to interpret civil and political rights, which are justiciable under the Constitution. In a number of cases, the Supreme Court recognised the interpretative value of the DPSPs by saying that these principles should be interpreted

96 (2010) 5 MLR (AD) 457.

97 [1999] 19 BLD 488.

98 Abul Hasnat Monjurul Kabir, 'Development and Human Rights: Litigating the Right to Adequate Housing' (2002) 1 Asia Pacific Journal on Human Rights and the Law 97, 115.

99 *BSEHR v Bangladesh* (2001) 53 DLR (HCD) 63.

100 30 BLD (HCD) 125.

101 Constitution of India (n 38) Part IV.

in light of fundamental rights. For example, in *Golaknath v State of Punjab*,¹⁰² the court observed that '[t]he Fundamental Rights and the Directive Principles of the State Policy enshrined in the Constitution formed an integrated scheme and were elastic enough to respond to the changing needs of the society'. In *Mumbai Kamgar Sabha v Abdulbhai Faizullabhai*,¹⁰³ the court observed that '[w]here two judicial choices are available, the construction in conformity with the social philosophy of Part IV has preference'. In another landmark case, *Kesavananda Bharati v State of Kerala*,¹⁰⁴ the court even suggested the supremacy of the DPSPs over fundamental rights and said 'in building up a just social order it is sometimes imperative that the fundamental rights should be subordinate to Directive Principles'.¹⁰⁵

For the purpose of affording judicial protection to ESC rights, the essential approach of the Indian Supreme Court has been to import the DPSPs into the construction of Fundamental Rights. This has been primarily done through broadening the scope of the fundamental right to life under Article 21 of the Constitution. Relying on the concept of human dignity, the Indian Supreme Court has adopted an expansive definition of the right to life to protect certain ESC rights, including the right to adequate nutrition, clothing and shelter, the right to speedy medical assistance, the right to livelihood, and environmental rights. In *Olga Tellis v Bombay Municipal Corporation* (popularly known as the 'Pavement dwellers case')¹⁰⁶ the Supreme Court held that the right to life includes the right to livelihood since, 'if there is an obligation upon the State to secure to citizens an adequate means of livelihood and the right to work, it would be sheer pedantry to exclude the right to livelihood from the content of the right to life'.¹⁰⁷ Similarly in the case of *Bandhua Mukti Morcha v Union of India*,¹⁰⁸ the right to life has been interpreted broadly to include a range of ESC rights. The Supreme Court further explained that the 'right to life' must include the right to health for the enjoyment of human life with dignity. The first ESC rights case in India is the *Municipal Council Ratlam v Vardhichand and Others*,¹⁰⁹ where Supreme Court ordered a municipality to carry out statutory duties and make available water, sanitation and drainage systems. At that time the Supreme Court decision was marked as profoundly conservative, especially

102 1967 AIR 1643.

103 (1976) 3 SCC 832.

104 (1973) AIR SC 1461.

105 *ibid* 1951.

106 (1985) 3 SCC 545.

107 *Olga Tellis v Bombay Municipal Corporation* [1985] 3 SCC 545, [2.2].

108 AIR (1984) SC 802.

109 AIR (1980) SC 1622.

in regards to housing, land rights and labour.¹¹⁰ In *Francis Coralie v The Union Territory of Delhi*,¹¹¹ the court interpreted the right to life to include the basic necessities of life such as adequate nutrition, clothing and shelter.

Many Supreme Court decisions upheld the right to adequate housing (shelter) as related to the right to life. For example, in *Ram Prasad v Chairman, Bombay Port Trust*,¹¹² the Supreme Court directed the relevant public authorities not to evict 50 slum dweller families without providing them with alternative shelter or sites.¹¹³ In another housing rights case, *Shantistar Builders v Narayan Khimalal Totame*,¹¹⁴ the Supreme Court demonstrated a much greater willingness to accept a right to 'reasonable accommodation' as a crucial element of the right to life, holding that such right would 'take within its sweep the right to food, the right to decent environment and reasonable accommodation to live in'.¹¹⁵ The right to adequate housing as a distinct constitutional obligation of the state was also reiterated in subsequent cases.¹¹⁶

Advancing the right to health, the Supreme Court in *Paschim Banga Khet Mazdoor Samity v State of West Bengal* held that failure of Government-operated hospitals to provide timely and immediate medical treatment to a person results in a violation of the right to life.¹¹⁷ With respect to the right to education, the Supreme Court in *Mohini Jain v State of Karnataka* reasoned in *obiter dictum* that the right to education was implicit in the right to life and personal liberty and it must be interpreted in the light of the DPSPs.¹¹⁸ In *Unni Krishnan v State of AP*,¹¹⁹ the Supreme Court further clarified the *Mohini Jain dictum* and held that every citizen (child up to the age of 14 years) has a fundamental right to free education, which directly flows from the right to life. Regarding the justiciability of the right to food, the Supreme Court in *People's Union for Civil Liberties (PUCL) v Union of India* (popularly known as the 'PUCL

110 Justice S Muralidhar, 'The expectations and challenges of judicial enforcement of social rights' in *Social Rights Jurisprudence* (n 92).

111 (1981) 1 SCC 60.

112 AIR 89 SCR 1306.

113 Similar views were taken in *Olga Tellis v Bombay Municipal Corporation* (1985) 3 SCC 545 where it was held that pavement dwellers have a right to settlement and a right of hearing before eviction.

114 (1990) 1 SCC 520.

115 See also VR Krishna Iyer, *Law and the Urban Poor in India* (B R Publishing Corporation, [1988]). See *Shantistar Builders v Narayan Khimalal Totame* [1990] 1 SCC 520, [9].

116 *Chameli Singh v State of UP* (1996) 2 SCC 549; *Ahmedabad Municipal Corporation v Nawab Khan Gulab Khan* (1997) 11 SCC 123.

117 [1996] 4 SCC 37

118 1992 SCR (3) 658.

119 AIR 1993 2178 SC.

case'),¹²⁰ ordered the government to identify all destitute people and include them in specific food-based schemes and directed state governments to fully implement these schemes.¹²¹

In South Africa, several decisions of the Constitutional Court have shaped the scope of ESC rights protection. In *Soobramoney v Minister of Health*, the court addressed the issue of resource scarcity in the context of the right to health. The Court held that the right of access to health care was contingent upon available resources, and it is not the function of the court to direct the state to make additional funds available for life-prolonging treatment. In *Minister of Health v Treatment Action Campaign (No 2)*, the court held that it was not reasonable for the government to withhold Nevirapine (a drug to prevent mother-to-child transmission of HIV/AIDS) and observed that the government was constitutionally obliged to plan and implement an effective, comprehensive and progressive programme for the prevention of transmission of HIV.¹²² Accordingly, the Court ordered the government to ensure the availability of the drug to hospitals and clinics and to take reasonable measures to extend the testing facilities throughout the public health sector. Interpreting the right to housing,¹²³ the Constitutional Court in *Government of the Republic of South Africa v Grootboom*¹²⁴ held that the eviction of the respondents from their homes constituted a breach of the state's negative obligation 'to desist from preventing or impairing the right of access to adequate housing'.¹²⁵ With respect to positive obligations, the court acknowledged the progressive realisation of the right of access to adequate housing in the context of limitations of available resources and developed a comprehensive plan to determine state's 'constitutional compliance' of legislative and other measures aimed at achieving realisation of the right. The Court held that the existing housing situation was unacceptable and fell short of the state's obligation to ensure the progressive realisation of the right. Therefore, the court directed the government to formulate and implement a coherent public housing programme 'to provide

120 [2003] 2 SCR 1136.

121 Another case concerning specifically the right to food was *Kishen Pattnayak v State of Orissa* (1989) AIR SC 677. In both cases, the Court recognized the right to food under the right to life (Article 21) and Directive Principle of State Policy concerning nutrition (Article 47).

122 (TAC) [2002] 5 SA 721 (CC).

123 The Constitution of the Republic of South Africa, approved 4 December 1996 and taking effect 4 February 1997, art 26 <<https://www.gov.za/documents/constitution/constitution-republic-south-africa-1996-1>> accessed 19 December 2021.

124 (CCT11/00) [2001] (1) SA 46 (CC).

125 *Government of the Republic of South Africa v Grootboom* (CCT11/00) [2001] (1) SA 46 (CC) [3].

relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations'. In another housing rights case, *Jaftha v Schoeman*,¹²⁶ which involved the negative violation of the right to housing, the court held that the sale and execution of a house without judicial oversight was unconstitutional. In *Khosa v Minister of Social Development*,¹²⁷ the court held unconstitutional the provisions of the Social Assistance Act 1992¹²⁸ that excluded destitute permanent residents from the eligibility of social grants.

8 Justiciability of Economic, Social and Cultural Rights in Bangladesh: A Comparative Analysis

As discussed above, there are many reasons why ESC rights cannot be judicially enforced directly in Bangladesh. The first and most obvious reason is the placement of ESC rights in the Constitution as unenforceable principles of state policy. Since these rights are recognised as merely 'principles' and are not justiciable by courts, any attempt to directly enforce them would violate Article 8(2) of the Constitution. This view was endorsed in past Supreme Court of Bangladesh decisions.¹²⁹ Another reason for non-justiciability of ESC rights is their nature, which is concerned more with policy than law.¹³⁰ However, the Supreme Court took a more pragmatic approach towards protecting ESC rights in Bangladesh, primarily by adopting a broad interpretation of the constitutional right to life in PIL.

Like Bangladesh, the Indian judiciary follows a similar approach in adjudicating ESC rights, namely expanding the boundaries of the right to life. However, the process of giving effect to ESC rights varied in a number of ways. For example, a feature of Indian case law concerning judicial enforcement of ESC rights is the emphasis placed by the Indian Supreme Court on implementing their judgments. The court usually monitors the government's compliance and reviews the steps taken towards implementing their decision.¹³¹ In some

¹²⁶ 2005 (2) SA 140 (CC).

¹²⁷ 2004 (6) SA 505 (CC).

¹²⁸ Act No 59 of 1992.

¹²⁹ *Kudrat-E-Elahi Panir and Others v Bangladesh* 44 DLR (AD) 319.

¹³⁰ EW Vierdag, 'The Legal Nature of Rights Granted by the International Covenant on Economic Social and Cultural Rights (1978)' *Netherlands Yearbook of International Law* 69.

¹³¹ Eg in *Bandhua Mukti Morcha v Union of India* [1997] 10SCC 549, the court required the State Government to submit Periodic Reports on progress in implementing the judgment.

cases, the court makes a number of orders with respect to the implementation of its judgments.¹³² In the PUCL case, for instance, the Supreme Court established its own independent monitoring and reporting system (by appointing independent commissioners) to ensure compliance with the court's orders and to track the government's performance across the country. There are also cases where the court directed the government to enforce existing legislation relating to ESC rights adequately.¹³³

With respect to giving effect to ESC rights, South African courts developed a 'reasonableness review mechanism' through which the court asks itself whether government policies or programmes adopted in relation to a right are justified in discharging the state's positive constitutional obligations of progressively realising that right. In the *Grootboom* case, the Constitutional Court applied this mechanism and noted that '[a] court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable.'¹³⁴ However, the court in this case did not make any order to oversee the progress of implementation of its own order, but rather placed this responsibility on the South African Human Rights Commission. This resulted in a deficient supervision, which allowed the government to produce a profoundly flawed policy response to the judgment.¹³⁵

Having regard to the justiciability of ESC rights, it appears that the South African and Indian courts apply a more effective enforcement mechanism than Bangladesh. The most noticeable in this respect is the extensive use of supervisory jurisdiction. For example, the Indian court's approach to continuously assess and monitor the implementation of food security measures in the PUCL case could be adopted by the Supreme Court of Bangladesh in giving effect to ESC rights. It is submitted that adopting such an approach is necessary for Bangladesh, especially taking into account the Bangladesh government's continued failure to comply with court orders prohibiting forced evictions.¹³⁶ Additionally, it would be instructive if the Supreme Court of

132 *M C Mehta v Union of India* (2002) 4 SCC 356.

133 *Sheela Barse v Union of India* AIR 1986 SC 1773; *CEHAT v Union of India* AIR 2003 SC 3309.

134 *Government of the Republic of South Africa v Grootboom* [2000] ZACC 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) [41].

135 David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-economic Rights* (OUP 2007) 254–57.

136 See SM Atia Naznin and Shawkat Alam, 'Judicial Remedies for Forced Slum Evictions in Bangladesh: An Analysis of the Structural Injunction' (2018) 5 *Journal of Law and Society* 99.

Bangladesh adopted or followed the South African reasonableness model, which is more flexible in implementing ESC rights cases. This model would no doubt enhance the realisation of ESC rights, since the courts are expected to apply a reasonableness test to determine what measures the state has taken to comply with its positive duties. Therefore, instead of considering what the state should do or ought to have done in implementing ESC rights, the court would be able to focus more on determining whether the state has acted reasonably in adopting measures that are required to achieve the progressive realisation of those rights.

The problem is that the judiciary cannot play the role of an executive authority. In most developing countries, the head of the executive who tries to take control over the judiciary appoints judges.¹³⁷ Therefore, it is observed that ‘judges [in developing countries] are not responsible to the electorate in the sense that the elected governments are—they should not perform a function where the allocation of the state resources to targeted groups is decided.’¹³⁸ The court’s primary responsibility is to ensure justice and strengthen the protection mechanism against the despotism of the majority.¹³⁹ It is realistic that courts are not able to make law or policy but can review or examine the validity of those laws and policies, whether those laws are contradictory to the Constitution.¹⁴⁰ In developing countries like Bangladesh where the democratic system is in peril, the court will not question the actions of the government, even if carried out unlawfully and illegally.¹⁴¹

It is expected that the Supreme Court of Bangladesh should develop its own model of enforcing ESC rights and can refer to both the South African and Indian approaches. It is submitted that the Supreme Court of Bangladesh can promote ESC rights by displaying an active supervisory judicial role. This supervisory role would allow the court to be involved in policymaking and monitoring whether the government is effectively implementing the policies. Since the Supreme Court of Bangladesh itself cannot redress any alleged violation of ESC rights due to express constitutional restriction, the court should

137 Mariette Brennan, ‘To Adjudicate and Enforce Socio-Economic Rights: South Africa Proves that Domestic Courts are a Viable Option’ (2009) 9(1) *Queensland University of Technology Law and Justice Journal* 73.

138 G Erasmus, ‘Socio-Economic Rights and their Implementation: The Impact of Domestic and International Instruments’ (2004) 32 *International Journal of Legal Information* 243.

139 Malcolm Langford, ‘The justiciability of Social Rights: From Practice to Theory’ in *Social Rights Jurisprudence* (n 92) 13.

140 Langford, *ibid*.

141 Ida Elisabeth Koch, ‘The Justiciability of Indivisible Rights’ (2003) 72 *Nordic Journal of International Law* 3.

consider the international obligations for enforcing ESC rights and interpret the constitutional provision concerning ESC rights logically while taking account of the socio-economic circumstances of the country. Like the South African Court, the Supreme Court of Bangladesh should come to the view that the state has an obligation to respect, protect, and fulfil those rights incorporated in the international treaties to which Bangladesh is a party. Developing countries like Bangladesh are not fully capable of implementing ESC rights for its citizens, despite court directions. The major barrier for the implementation and realisation of ESC rights is political legitimacy, court capability, and inadequacy of available resources. Most of the ESC rights are closely related to fundamental rights. In this way, the court can take a liberal view of the interpretation of constitutional provisions relating to ESC rights that are enshrined in the Fundamental Principles of State policy in Bangladesh.

It is true that the court can enforce some of the ESC rights without severe budgetary impact.¹⁴² Audrey Chapman opined that there are various ways to enforce ESC rights without forcing a state to launch a new social programme,¹⁴³ or to take immediate remedial measures. In cases where the remedy would seriously impose on the state's available resources the court could simply recognise the violation and devise a time-bound action plan for their progressive realisation. Conversely, if the available resources are sufficient to enforce ESC rights, the court could monitor whether the necessary action has been taken by the executive to remedy the violated ESC rights.¹⁴⁴

9 Conclusion

Given the reluctance of many states to acknowledge the legitimacy of ESC rights, the question of justiciability of ESC rights at the national level has emerged as an essential topic both under international and constitutional law. The ICESCR, which is the basis and legal source of ESC rights, obliges states to take all appropriate steps, to the maximum of available resources, to progressively achieve the full realisation of the rights recognised in the Covenant. However, many states have shown their unwillingness to assume this obligation, and in doing so, raise resource constraints as a defence. Also, it is not uncommon that some states interfere with the enjoyment of the ESC rights of

¹⁴² Brennan (n 137).

¹⁴³ Audrey Chapman, 'A "Violations Approach" for Monitoring the International Covenant on Economic Social and Cultural Rights' (1996) 18 *Human Rights Quarterly* 23.

¹⁴⁴ Brennan (n 137) 75.

its citizens. All of this calls for a need to enforce such rights through courts of law. Even though the Constitution of Bangladesh recognised 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 FPSPs in several cases on socio-economic rights violations. However, this article has argued that the Supreme Court should play an even more proactive role in ensuring its orders are duly complied with by the government. The key conclusion of the article is that the Supreme Court should develop its model of giving effect to ESC rights. In doing so, the court can take into account the enforcement mechanisms developed by the Indian judiciary, together with the South African model of reasonableness.