



Sonargaon University (SU)

Research Monograph

On

“Constitutionalism Without Constitutional Culture: Explaining the Fragility of Rule of Law in Bangladesh”

Research Monograph Submitted for the partial fulfillment of the award of the degree

in

LL.B (Hon's)

Department of Law

Sonargaon University (SU)

Submitted To

Md. Sagor Hossain

Lecturer

Department of Law

Sonargaon University (SU)

Submitted by

Arman Haque

ID No. LL.B 2203027008

Program: LL.B (Hon's)

Department of Law

Sonargaon University (SU)

Date of Submission: 25th June, 2026

Letter of Transmittal

To

Md. Sagor Hossain

Lecturer

Department of Law

Sonargaon University (SU)

Subject: Submission of Research Monograph on “**Constitutionalism Without Constitutional Culture: Explaining the Fragility of Rule of Law in Bangladesh**”

Dear Sir,

This is a great pleasure to submit the Research Monograph on “**Constitutionalism Without Constitutional Culture: Explaining the Fragility of Rule of Law in Bangladesh**” as a partial requirement for the fulfillment of my LL.B course under the Department of Law of the Sonargaon University (SU).

I have given due efforts to make this Research Monograph as fruitful one and to make it as informative as possible. I hope that this paper will not be the formality of academic course completion rather it will be a source of information for other purpose on this topic.

Yours sincerely

.....
Arman Haque

ID No. LL.B 2203027008

Program: LL.B (Hon’s)

Department of Law

Sonargaon University (SU)

Declaration

I do hereby declare that the Research Monograph Title “**Constitutionalism Without Constitutional Culture: Explaining the Fragility of Rule of Law in Bangladesh**” prepared solely by me and which has been submitted to the department of Law, Sonargaon University (SU) for achieving the LL.B (Hon’s) Degree. This is an original work of mine. No part of this research, in any way or in form, has been submitted to any University or Institution for any Degree, Diploma or for other similar purposes.

.....
Arman Haque

ID No. LL.B 2203027008

Program: LL.B (Hon’s)

Department of Law

Sonargaon University (SU)

Supervisor Certificate

This is to certify that the work presented in this dissertation is based on the work, carried out by the author herself under my supervision in Department of Law, Sonargaon University (SU).

It is also certifying that the work presented here is original and suitable for submission as the style and contents, for fulfillment of LL.B. program.

.....
Md. Sagor Hossain

Lecturer

Department of Law

Sonargaon University (SU)

Acknowledgement

I am deeply grateful to Almighty Allah for providing me everything that required for completing my research work. I am thankful to my supervisor **Md. Sagor Hossain** for instructing me how to prepare a Research Monograph and his famous Books lectures on this subject help me to complete my task sincerely.

For giving me the opportunity and support to complete this research on **“Constitutionalism Without Constitutional Culture: Explaining the Fragility of Rule of Law in Bangladesh”**. I am very grateful to him for his proper guidance, helpful discussions, constructive criticism, valuable editorial assistance and advice during the preparation of this research paper. Without his help, it was almost impossible for me to complete the research work. I would like to convey my heartiest respect and special thanks to him. I am also thankful to him for helping me in terms of methodology procedure of the research paper. I would like to express my gratefulness to my friends as well as wishers to me for their motivation from the beginning of my research work.

Thank you

Arman Haque

ABSTRACT

The implementation of Constitutionalism Without Constitutional Culture: Explaining the Fragility of Rule of Law in Bangladesh 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.

Contents

Chapter-01

Introduction

1.1 Introduction	01
1.2 The Purpose of Study	02
1.3 Statement of the problem	03
1.4 Scope of the Study	03
1.5 Research Questions	03
1.6 Limitations of the Study	04

Chapter-2

Historical Background

2.1 Constitutionalism Without Constitutional Culture	05
2.2 The Constitution of Bangladesh has accommodated esc rights	05

Chapter-3

Constitutionalism Without Constitutional Culture

3.1 Right to Work and Rights at Work	10
3.2 Land Rights and Right to Property	10
3.3 Right to Health	11
3.4 Constitutionalism Without Constitutional Culture: A Comparative Analysis	12

Chapter-4

Enforceability of Economic, Social and Cultural Rights

4.1 Responsibility and Obligations of State Parties Under ICESCR	16
4.2 Optional Protocol to the ICESCR	17
4.3 Violence against women as a human rights violation	20

Chapter-5

Conclusion, Recommendations

5.1 Conclusion	24
5.2 Recommendations	25
Reference	26

Chapter-01

Introduction

1.1 Introduction

Constitutionalism Without Constitutional Culture Explaining the Fragility of Rule of Law in Bangladesh 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. The most universal human rights document, namely the Universal Declaration of Human Rights (udhr) provides ‘a common standard of achievement’ of all nations² and seeks to universalise the recognition and realisation of esc rights along with civil and political rights.³ 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)⁴ and the International Covenant on Economic, Social and Cultural Rights (icescr).⁵ 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’. 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 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

¹ Traditionally, a common view was that civil and political rights impose negative obligations and economic, social and cultural (esc) rights impose positive obligations. > accessed 11 December 2021.

² *ibid* Preamble.

³ The Universal Declaration of Human Rights: A Common Standard of Achievement (Martinus Nijhoff Publishers 1999).

⁴ 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).

⁵ International Covenant on Economic, Social and Cultural Rights, (adopted 16 December 1966, entered into force 3 January 1976) 993 unts 3 (icescr).

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.⁶

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.⁷

1.2 The Purpose of Study

In our constitution, the economic, social, and cultural rights have been referred to as the "Constitutionalism Without Constitutional Culture: Explaining the Fragility of Rule of Law in Bangladesh" and discussed between Articles 8 and 25 in Part II. It is especially mentionable that in our constitution, Article 8(2) states that these are not judicially enforceable.

⁶ *Economic, Social and Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social and Cultural Rights* (Interrights 2004).

⁷ *The International Covenant of Economic, Social and Cultural Rights: A perspective on its Development* (Clarendon Press 1998).

The most significant issue in our constitution is that ESC rights are not laws but just principles of state policy. Now, what is a principle? The answer is that principles are those that cannot compel the state, even if they are not judicially enforceable.

1.3 Statement of the problem

In every society there is violation which implies its citizen not get proper social right, economical right and cultural right. Proper implementation and adoption of judicial enforcement can reduce this violation rate and established social peace. Step mentioned in the above might not perfect but it might be small starting and ensure social, culture & economical right for the people living in the society.

1.4 Scope of the Study

Economic, social and cultural rights are those human rights relating to the workplace, social security, family life, participation in cultural life, and access to housing, food, Academicus -International Scientific Journal water, health care and education . Although economic, social and cultural rights may be expressed differently from country to country or from one instrument to another. The basic rights include in this category are:

Workers' rights; -

The right to social security and social protection; -

Protection of and assistance to the family; -

The right to an adequate standard of living; -

The right to health; -

The right to education; -

Cultural rights.

1.5 Research Questions

Research questions are the specific questions that a researcher sets to figure out the certain answers he/she is looking for. The author tries to set some vital questions for finding out the impact of corporate social responsibility on organizational performance. Those research questions are in below:

- ✓ What are the significance of Constitutionalism Without Constitutional Culture: Explaining the Fragility of Rule of Law in Bangladesh?

- ✓ How does the Constitutionalism Without Constitutional Culture:
Explaining the Fragility of Rule of Law in Bangladesh?
- ✓ Are there certain Constitutionalism Without Constitutional Culture:
Explaining the Fragility of Rule of Law in Bangladesh?
- ✓ What are the impacts of Constitutionalism Without Constitutional Culture:
Explaining the Fragility of Rule of Law in Bangladesh?

1.6 Limitations of the Study

In case of completing the research, the author will face various limitations. The most common limitations are faced regarding the time, money and resource. The research was developed to be as much accurate as possible in spite of the present limitations of time, money and resource. Other than that, there is limitation of knowledge that I sincerely request my respected supervisor to consider. Through effective planning and proper minimization of the inputs the author managed to formulate satisfying output from the research.

Chapter-2

Historical Background

2.1 Constitutionalism Without Constitutional Culture

Judicial implementation of esc rights is still debatable 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.⁸ However, pil procedures have enabled some litigants to obtain remedies for the violation of collective rights.⁹ 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.¹⁰

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.¹¹ In the common law system, international treaties are not directly applicable in the domestic legal jurisdiction until they work.

2.2 The Constitution of Bangladesh has accommodated esc rights:

The Constitution of Bangladesh has accommodated esc rights in the categories of non-judicially enforceable rights inserted in Part ii termed fops, 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.

⁸ Beth A Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (cup 2009).

⁹ Malcolm Langford, 'Domestic Adjudication and Economic, Social and Cultural Rights: A Socio Legal Review' (2009) 6 International Journal of Human Rights 95.

¹⁰ David M Walker, *The Oxford Companion to Law* (oup 1980) 694.

¹¹ Langford (n 73).

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 fsp 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.¹² 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.¹³ 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.¹⁴

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 fsp. 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.

In *Sheikh Abdus Sabur v Returning Officer*,¹⁵ 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

¹² 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.

¹³ Anashri Pillay, ‘Toward Effective Social and Economic Rights Adjudication: The Role of Meaningful engagement’ (2012) 10 International Journal of Constitution Law 733. 78 *ibid*.

¹⁴ *ibid*.

¹⁵ [1988] 41 dlr (ad) 30.

judicially enforceable'. Notably, this case involved the validity of a provision in a local Government law¹⁶ 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*,¹⁷ the Appellate Division adopted a straightforward approach to non-justiciability of the fsp 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.¹⁸

However, the court has since affirmed that the fsp, though judicially unenforceable, are 'fundamental to the governance of the country' and impose an obligation upon the government to act in accordance with them.¹⁹ The court 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 fsp indefinitely.²⁰

Despite the conservative judicial attitude towards the justiciability of the fsp, there have been a number of judgments, where the Supreme Court indirectly enforced esc

¹⁶ dlr (ad) 165.

¹⁷ [1991] 20 bcl (ad) 319.

¹⁸ *Kudrat-E-Elahi Panir and Others v Bangladesh* [1991] 20 bcl (ad) 319, [6].

¹⁹ *Wahab v Secretary Ministry of Land* (1996) 1 mlr (hc) 338.

²⁰ *Masdar Hossain and others v Bangladesh* (1999) 20 bld (ad) 104.

rights by linking it to judicially enforceable fundamental rights. For example, in *Professor Nurul Islam v Bangladesh* (cigarette advertising case), 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), 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 Igrd*, 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.²¹ In *Dr Mohiuddin Farooque v Bangladesh* (Radioactive milk case),²² 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 fpmps. In the country’s first pil case (*Dr Mohiuddin Farooque v Bangladesh*, popularly known as the ‘Flood Action Plan Case’),²³ the Appellate Division expanded the meaning of the fundamental right to life under Articles 31 and 32 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

²¹ 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*).

²² (1996) 48 dlr (hcd) 438.

²³ *Mohiuddin Farooque v Bangladesh* (Judgment) [1996] 48 dlr hcd 438.

from the citizens in case of health treatment at hospitals, clinics and doctors' chambers.²⁴

In *Ain o Salish Kendra (ask) v Government of Bangladesh*,²⁵ the High Court Division sought to 'strike a balance between social justice and the government's administrative regime',²⁶ 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.²⁷ In 2009, to prevent widespread food adulteration, the High Court Division in *Human Rights and Peace for Bangladesh v Bangladesh (the Pure Food Case)* 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.

Invisible Work

Tanning of animal hides is a major export earning industry in the State of Tamil Nadu, India. Tanning is listed as one of the most hazardous industries in the state's Factories Act; it is considered seven times more hazardous than the next industry on the list. Employment of children and women in this industry is banned. A study on the tanning industry in the state found, however, that a large number of women are employed in contravention of the law. They are also involved in the most hazardous stage of production. Since their employment is illegal, it is hidden. They are never recorded as workers, so they have no rights or any form of protection under the existing industrial laws.

²⁴ (2010) 5 mlr (ad) 457.

²⁵ [1999] 19 bld 488.

²⁶ 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.

²⁷ *bsehr v Bangladesh* (2001) 53 dlr (hcd) 63.

Chapter-3

Constitutionalism Without Constitutional Culture

3.1 Right to Work and Rights at Work

From a gender perspective, the meaning of work would be changed to include unpaid work at home, on the family farm, and elsewhere, work that is currently not valued by society. A redefinition of work would recognize women's productive labor and enable women to profitably engage in home-based work.²⁸

Women are currently relegated to low-paid and low-skilled jobs; this needs to be rectified. A fresh perspective would help ensure that women have flexible working hours and that they are reintegrated into the labor force after time off for marriage and childbirth without penalization for absence²⁹.

Rights at work would include protection from sexual harassment in the work place, trade unions and labor organizations. They would also include provision of nursing breaks for breast-feeding mothers, and establishment of crèches and day-care centers; separate toilet facilities and free access to them; provision of dayrooms for rest and recognition of menstruation-related health problems as the basis of rest breaks; and ensuring participation of women in trade unions by holding meetings at times that are convenient to women. (See Module 10 for more on the right to work and rights at work.)

3.2 Land Rights and Right to Property

Women's claims to land bring into question their capacity to enjoy equal rights in every sphere—civil, political, economic, social and cultural. Women's rights to equal inheritance, to equal shares of matrimonial property, to recognition as legitimate and legal owners of land and property, who can buy, sell, lease and raise loans on the basis of that property, are denied all over the world, in a wide range of cultures and communities. (See Module 18.)

²⁸ United Nations Development Programme, Human Development Report 1995 (New York: Oxford University Press, 1995), 1.

²⁹ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No.

3.3 Right to Health

A gender perspective on health is not the same as focusing on women's health or, even more narrowly, on health conditions exclusively experienced by women as a consequence of their biology. The following passage provides a useful summary of key issues:

A gendered perspective on health includes, besides examining differences in health needs, looking at differences between women and men in risk factors and determinants, severity and duration, differences in perceptions of illness, in access to and utilization of health services, and in health outcomes.³⁰

The heaviest burden of ill-health is borne by those who are most deprived, not just economically, but also in terms of capabilities, such as literacy levels and access to information. Substantial evidence exists to indicate that in almost all societies, women and men have differing roles and responsibilities within the family and in society, different social realities, and unequal access and control over resources. It therefore follows that gender is an important social determinant of health. Gender differences are observed in every stratum of society, and within every social group, across different castes, races, ethnic or religious groups.

A number of tools have been developed for monitoring how engendered a health programme is. Some of the major questions to be asked include

- does the programme address gender differentials in health risks, health information and access to health services?
- does the programme load all responsibilities for improved health on women rather than also involving men? does the programme add to women's work load?
- does the programme perpetuate gender biases?
- will the programme contribute to redressing inequities in health by gender across various sections of the population?
- does the programme address and help narrow gender gaps in terms of distribution of responsibilities and power among health personnel ?

³⁰ Ibid.

See Module 14 for more on the right to health.

3.4 Constitutionalism Without Constitutional Culture: 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.³¹ Another reason for non-justiciability of esc rights is their nature, which is concerned more with policy than law.³² 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.³³ In some cases, the court makes a number of orders with respect to the implementation of its judgments.³⁴ 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.³⁵

³¹ *Kudrat-E-Elahi Panir and Others v Bangladesh* 44 dlr (ad) 319.

³² 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.

³³ 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.

³⁴ *M C Mehta v Union of India* (2002) 4 scc 356.

³⁵ *Sheela Barse v Union of India* air 1986 sc 1773; *cehat v Union of India* air 2003 sc 3309.

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.’³⁶ 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.

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.³⁷ Additionally, it would be instructive if the Supreme Court of 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

³⁶ *Government of the Republic of South Africa v Grootboom* [2000] zacc 2001 (1) sa 46 (cc), 2000 (11) bclr 1169 (cc) [41].

³⁷ 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.

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. 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. The court’s primary responsibility is to ensure justice and strengthen the protection mechanism against the despotism of the majority.’³⁸ 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. 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.³⁹

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 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

³⁸ Malcolm Langford, ‘The justiciability of Social Rights: From Practice to Theory’ in *Social Rights Jurisprudence* (n 92) 13.

³⁹ Ida Elisabeth Koch, ‘The Justiciability of Indivisible Rights’ (2003) 72 *Nordic Journal of International Law* 3.

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.⁴⁰ Audrey Chapman opined that there are various ways to enforce esc rights without forcing a state to launch a new social programme,⁴¹ 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.

⁴⁰ Brennan (n 137).

⁴¹ Audrey Chapman, 'A "Violations Approach" for Monitoring the International Covenant on Economic Social and Cultural Rights' (1996) 18 Human Rights Quarterly 23.

Chapter-4

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

4.1 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 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’.⁴² 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. 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.⁴³ This obligation is a ‘programmatic’ obligation under the framework of ESC rights. 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

⁴² Universal Declaration of Human Rights, UNGA Res 217A (III) (10 December 1948) (UDHR)

⁴³ *ibid* Preamble

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.⁴⁴

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. An obligation of conduct requires the state to undertake 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. 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.

4.2 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, 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’. The UN High Commissioner for Human Rights observed that the Optional Protocol closed ‘a historic gap in human rights protection under the international system’. Though both the ICCPR and its Optional Protocol were adopted on the same day, it took 15 years to adopt a protocol for the ICESCR.

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

⁴⁴ 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).

violation of ESC rights to the CESCER and to seek redress for that violation (the individual complaints mechanism). Any such complaint can only be brought by or on behalf of victims who satisfy certain admissibility criteria and are under the jurisdiction of a State party to the Optional Protocol. The inter-state communication procedure allows the CESCER to consider communications by a State Party against another State Party concerning non-fulfillment of ICESCR obligations. The inquiry procedure allows the CESCER to initiate inquiries into 'grave or systemic violations' by a State party of any of the ESC rights. Thus, it is no exaggeration to say that the Optional Protocol provides effective enforcement mechanisms with respect to the violation of ESC rights.⁴⁵

ESC rights play a significant role in improving people's lives and standard of living. Realising people's basic ESC rights contribute to peace and security; therefore, each state has an interest in promoting and protecting these rights. 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.

The judicial enforcement of ESC rights, though debatable, has been an important topic of discussion for quite some time. Many countries tend to include ESC rights in their constitutions in aspirational terms as a duty to protect such rights rather than to guarantee them. 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'. Likewise, the Bangladesh Constitution embodies ESC rights as 'Fundamental Principles of State Policy' but provides that these principles are not judicially enforceable. 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

⁴⁵ 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].

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.

Against this backdrop, there have been inspiring instances of judicial intervention regarding ESC rights violation in several jurisdictions. 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,⁴⁶ 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 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.⁴⁷

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

⁴⁶ 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.

⁴⁷ 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)

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.

4.3 Violence against women as a human rights violation

The phenomenon of violence against women cannot be ignored if human rights are to be examined from a gender perspective. The following is a summary from the Preliminary Report by the Special Rapporteur on Violence against Women, which provides a useful perspective on the subject.⁴⁸

Violence against women, in particular, has inhibited women as a group from enjoying the full benefits of human rights. Women have been vulnerable to acts of violence in the family, in the community and by States . . .

Women are vulnerable to violence because of their female sexuality (resulting in, inter alia, rape and female genital mutilation); because they are related to a man (domestic violence, dowry deaths, sati) or because they belong to a social group, where violence against women becomes a means of humiliation directed at the group (rape in times of armed conflict or ethnic strife). Women are subject to violence in the family (battering, sexual abuse of female children, dowry related violence, incest, deprivation of food, marital rape, female genital mutilation), to violence in the community (rape, sexual abuse, sexual harassment, trafficking in women, forced prostitution) and violence by the State (women in detention and rape during times of armed conflict).

Among the historical power relations responsible for violence against women are the economic and social forces which exploit female labour and the female body. Economically disadvantaged women are more vulnerable to sexual harassment, trafficking and sexual slavery. They are also employed as bonded labour and low-paid labour in many economic enterprises throughout the world. As migrant workers, they often face innumerable hardships in foreign countries. Economic exploitation is an important aspect of modern female labour. In addition, a study of 90 societies in

⁴⁸ Commission on Human Rights, Preliminary Report by the UN Special Rapporteur on Violence against Women, Ms. Radika Coomaraswamy, UN Doc. E/CN.4/1995/42 (1995), 20-21.

relation to wife beating found that economic equality was a key factor which prevented violence against women. Denying women economic power and economic independence is a major cause of violence against women because it prolongs their vulnerability and dependence. Unless economic relations in a society are more equitable towards women, the problem of violence against women will continue.⁴⁹

In the context of the historical power relations between men and women, women must also confront the problem that men control the knowledge systems of the world. Whether it be in the field of science, culture, religion or language, men control the accompanying discourse. Women have been excluded from the enterprise of creating symbolic systems or interpreting historical experience. It is this lack of control over knowledge systems which allows them not only to be victims of violence, but to be part of a discourse which often legitimizes or trivializes violence against women. The ability to minimize women's experience of violence ensures that no remedial action is taken by either States or individuals. Part of the campaign to eliminate violence against women must be to challenge the systems of knowledge and the discourse of individuals which trivialize women's experience of violence. Women are also denied access to knowledge because they are refused education in many parts of the world. The right to female education must therefore be the first step towards articulating a more sensitive history of violence against women. In addition to historical power relations, the causes of violence against women are also closely linked to the question of female sexuality. Violence is often used as an instrument to control female sexual behavior. It is for this reason that violence against women often finds sexual expression. Rape, sexual harassment, trafficking, female genital mutilation, all involve forms of violence which are an assault on female sexuality.

Besides history and sexuality, the prevalence of ideologies which justify the subordinate position of women is another cause of violence directed against women. In many ideologies a traditional legitimacy is given to using violence against women in certain instances. In both the developed and the developing world, there have been cultural

⁴⁹ Commission on Human Rights, Preliminary Report by the UN Special Rapporteur on Violence against Women, Ms. Radika Coomaraswamy, UN Doc. E/CN.4/1995/42 (1995), 20-21.

sanctions in the past for husbands chastising or beating their wives in certain circumstances. These sanctions have been included in law codes in different cultural heritages .

The consequences of violence directed against women are difficult to ascertain because the crimes are often invisible and there is very little data on the subject. However, it is very clear that fear is perhaps the greatest consequence. Fear of violence prevents many women from living independent lives. Fear curtails their movements, so that women in many parts of the world do not venture out alone. Fear requires that they dress in a manner that is “unprovocative” so that no one can say that “they asked for it” if they are violently assaulted. Fear of violence requires that they seek out male protection to prevent violence being directed at them. This protection can result in a situation of vulnerability and dependence which is not conducive to women’s empowerment. Women’s potential remains unrealized and energies which could be directed towards the amelioration of society are often stifled.⁵⁰

In certain cultural contexts, especially those in which female genital mutilation is practised, a woman is denied her existence as a sexual being with needs and expectations. This denial of female sexuality through the mutilation of the body has to be seen as a violation of a fundamental human right.

Women who are at the receiving end of violence have serious health problems. In recent times, studies have been conducted on the harmful physical and emotional impact of violence against women, such as on the harmful effects of female genital mutilation on the health of women. Other forms of abuse also result in physical injury to the body of the victim. In addition there are psychological effects. Abused women are subjected to depression and personality disorders. They manifest high levels of anxiety and somatic disorders. These psychological effects have a negative effect on the women as they paralyse them and inhibit their self-determination.

Violence in the family, in particular, has serious consequences for both women and children. Children often show signs of post-trauma stress and have behavioural and emotional disorders.

⁵⁰ Domestic Workers Protection and Welfare Policy 2015, under Ministry of Labour and Employment. Government of the Peoples Republic of Bangladesh

In terms of development, violence prevents women from participating fully in the life of the family and the community and in society. Energies which might be directed towards social good and development are curtailed. Women's potential and their contribution towards development and growth is an important aspect of the development process. Violence against women prevents women as well as society from realizing their full potential.⁵¹

The cost to society in terms of violence against women is phenomenal. Much of the cost is hidden since statistics on this issue are rare. The material cost of the consequences of violence is superseded by the more intangible costs relating to the quality of life, the suppression of human rights and the denial of women's potential to participate fully in their society.⁵²

⁵¹ David M Walker, *The Oxford Companion to Law* (OUP 1980) 694.

⁵² *Ibid.*

Chapter-5

Conclusion, Recommendations

5.1 Conclusion

Social rights are fully justiciable in an increasing number of countries, but the number is not large. Reliance on civil and political rights has been frequent in western and common law countries, where courts are open to broad interpretations of the right to life and rights against torture or discrimination. An important component of promoting more expansive interpretations of these rights is to draw on the interdependence of all rights and to urge the judiciary to interpret constitutions and legislation so as to be consistent with international human rights law. But there are clear limitations. In the US, some advocates believe there is no significant scope for further advances in the law, particularly in a country which has adamantly refused to recognise social rights in international law.

The incorporation of ESC rights within a domestic legal system is clearly an advantage, as the experiences in Latin America and South Africa demonstrate. However, such incorporation means that local remedies must be exhausted before international remedies can be sought. If the judiciary is conservative and slow to resolve issues domestically, this can mean long delays in achieving a successful decision at the international level.

States should ensure that all international human rights treaties covering social rights achieve universal ratification and incorporate these rights in domestic law provisions in order that they should operate directly and immediately within the domestic legal system of each State party, thereby enabling individuals to seek enforcement of their rights before national courts. The states should ensure that domestic human rights institutions have the responsibility and the authority to investigate violations of social rights, to take cases forward to appropriate courts or tribunals and to promote compliance with social rights. A. Haxhiraj -Judicial Enforcement of Economic, Social and Cultural Right 229 Also the judicial decisions consistent with social rights should

be respected, implemented and develop mechanisms to ensure the effective oversight of the process.

5.2 Recommendations

All human rights, whether civil and political—or economic, social and cultural—are interlinked. For example, individuals who cannot read or write often have a harder time in realizing their full potentials than those who can to find work or to take part in political activity. Malnutrition and hunger are less likely to occur where individuals can effectively exercise their right to vote and influence Government priorities.

The UDHR, ratified in 1948, makes no distinction between these rights. A distinction later appeared in the context of cold war tensions between the East and West. This led to the negotiation and adoption of two separate covenants—one on civil and political rights, and another on economic, social and cultural rights.

In recent decades since the Vienna Declaration on Human Rights in 1993, there has been a return to the original architecture of the UDHR, reaffirming the indivisibility of all human rights. At the same time, there has been renewed attention to the importance of economic, social and cultural rights, particularly in the context of the 2030 Agenda for Sustainable Development and addressing and preventing conflicts crisis worldwide, including the COVID-19 pandemic.

Reference

1. <https://www.tbsnews.net/thoughts/bangladesh-constitution-judicial-enforceability-economic-social-and-cultural-rights-7372422>.
2. UNDP Human Development Report 1993, 25, quoted in International Human Rights in Context: Law, Politics and Morals by Henry J. Steiner and Philip Alston, (Oxford: Clarendon Press, 1996), 894.
3. United Nations Development Programme, Human Development Report 1995 (New York: Oxford University Press, 1995), 1.
4. Taken from Report of a Workshop on Integrating Women's Rights in Human Rights Activism (Bangkok: Asian Forum for Human Rights and Development, 1998),
5. Taken from Zimbabwe: Urgent Action Alert, from Sisterhood Is Global website: www.sigi.org/Alert/zimb0699.htm
6. Taken from T.K. Sundari Ravindran, "Engendering Health," seminar (New Delhi, 2000) (forthcoming).
7. Charlotte Bunch, "Transforming Human Rights from a Feminist Perspective," in Women's Rights, Human Rights: International Feminist Perspectives, eds. J.S. Peters and Andrea Wolper (New York: Routledge, 1995), 11-17.
8. Katarina Tomasevski, Women and Human Rights (London: Zed Books, 1993), 1-
9. Narrated by Huma Khan, member of Vanangana, February 2000.
10. Windows to the World: Developing a Curriculum for Rural Women (New Delhi: NIRANTAR, 1997), 3-6.
11. Commission on Human Rights, Preliminary Report by the UN Special Rapporteur on Violence against Women, Ms. Radika Coomaraswamy, UN Doc. E/CN.4/1995/42 (1995), 20-21.
12. Convention on the Political Rights of Women, opened for signature 31 Mar. 1953, entered into force 7 July 1954, 193 UNTS 135.
13. Convention on the Elimination of All Forms of Discrimination against Women, adopted 18 Dec. 1979, GA Res. 34/180, 34 UN GAOR Supp. (No. 46), UN Doc. A/34/46 (1980), 1249 UNTS 13, entered into force 3 Sept. 1981, reprinted in 19 ILM 33 (1980).