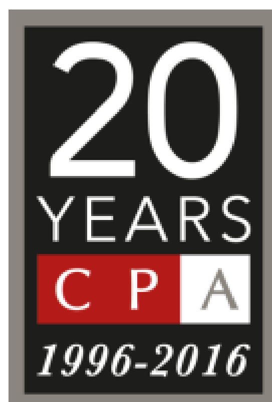

THE CASE AGAINST CONSTITUTIONALISING JUSTICIABLE SOCIOECONOMIC RIGHTS IN SRI LANKA

CPA Working Papers on Constitutional Reform No.12, January 2017

Asanga Welikala[1]

Centre for Policy Alternatives | www.cpalanka.org

[1] **Author's Note**: Due to pressures of time in publishing this Working Paper in line with developments in the constitution-making process, I have been unable to fully reference the discussion or provide a bibliography. For the same reason, I have also been forced to excise a number of key theoretical sections that were previously in contemplation, including on the ideas of liberal universalism and the relationship between rights and pluralism, democratic disagreement and constitutional pre-commitments, republicanism, political versus legal entrenchment, and political constitutionalism in the context of a parliamentary state. The paper therefore reads like an extended opinion piece, for which I apologise. I would, however, be happy to provide supporting evidence and authorities to any interested reader wishing to pursue further reading, including authorities that are contrary to the theses of this paper.

About the Author: Dr Asanga Welikala is Lecturer in Public Law at the School of Law, University of Edinburgh, and the Associate Director of the Edinburgh Centre for Constitutional Law. He is Research Associate of the Institute of Commonwealth Studies, University of London, and Research Fellow of the Centre for Policy Alternatives.

The Centre for Policy Alternatives (CPA) was formed in the firm belief that there is an urgent need to strengthen institution- and capacity-building for good governance and conflict transformation in Sri Lanka and that non-partisan civil society groups have an important and constructive contribution to make to this process. The primary role envisaged for the Centre in the field of public policy is a pro-active and interventionary one, aimed at the dissemination and advocacy of policy alternatives for non-violent conflict resolution and democratic governance. Accordingly, the work of the Centre involves a major research component through which the policy alternatives advocated are identified and developed.

This Working Paper is available for free download from www.constitutionalreforms.org. If cited or quoted, reference should be made to the Centre for Policy Alternatives, the name(s) of the author(s), the title and the number of the Working Paper.

© Centre for Policy Alternatives and the author(s)

> *"Constitutions are made in terms of the stage of development in which any given society or country has arrived. In terms of that stage of development it looks upon things, and for any generation of people to imagine that it can so completely project*

itself into the infinity of the future so as to be able to decide in its own generation that it will constrain a future generation forever within the confines of its own postulates is to make the mistake of thinking that any human collectivity is the equivalent of the divinity. It is not."

– Colvin R. de Silva, 1968

"*…the ceaseless identification of restraints on majority rule…as the overriding responsibility of jurists…in obtaining from judges…the advances popular politics fail to deliver; in the abandonment of institutional reconstruction to rare and magical moments of national refoundation; in an ideal of deliberative democracy as most acceptable when closest in style to a polite conversation among gentlemen in an eighteenth-century drawing room…*"

– Roberto Unger, 1996

1. Introduction

The introduction of a new bill of rights is a central element of the current Sri Lankan constitutional reform process, and indeed, the design and content of constitutionally protected fundamental rights have been in the forefront of constitutional reform debates since before independence. The deterioration of rights protection especially after the advent of the republican constitutions – ironically so since these constitutions were the first in our constitutional history to recognise an explicit catalogue of rights – has added impetus to the demand for a new and stronger bill of rights. In practical terms, the need for a strengthened regime of rights was underscored most emphatically by the numerous abuses that long years of ethnic conflict in the north-east and sporadic insurgencies in the south gave rise to. Since the 1990s especially, due both to global constitutional design trends and the greater prominence accorded to international human rights law in the post-Cold War world, this has increasingly involved a demand for the inclusion of socioeconomic rights in the Sri Lankan constitution. The demand was nurtured by the left-liberal character of much Sri Lankan rights activism, inspired by such examples as the Indian social rights movements and judicial activism and the South African constitution, as well as to an extent by the social democratic or populist orientation of parties in government during this period. Thus, the various constitutional reform proposals and draft bills produced during the administrations of Presidents Kumaratunga and Rajapaksa contemplated the inclusion of socioeconomic rights in a new constitution.

The significant expansion of the scope of a constitutional bill of rights that is implied by the inclusion of socioeconomic rights seems to have occurred quite effortlessly within reform discourse during this period, and to the extent that any genuine debate was undertaken about the theoretical and practical implications of this discursive shift, sceptics were distinctly in a very small and largely inaudible minority. Perhaps the sceptics felt that this was a benign concession in a larger project of building support for constitutional reform which had more pressing and difficult matters like power-sharing to address, or perhaps, and more culpably, they did not exercise themselves too strenuously in thinking through the subliminal but serious implications this represented for the whole enterprise of constitution-making in Sri Lanka. Constitutionalising

justiciable socioeconomic rights, after all, implicates major questions including the model of national society that is to be given constitutional expression and form, the nature of the state and its role in the life of the community, the nature and extent of individual autonomy, and even the exercise of sovereignty and the separation of powers, in terms of the necessary recalibration of the judicial role within the constitutional system demanded by making socioeconomic claims justiciable as constitutional rights.

Nevertheless, when the change of government occurred and the current reforms process started in 2015, everyone and especially the proponents of socioeconomic rights assumed that this was a settled and uncontroversial matter within the broader reform movement, with the only question being to decide upon the extent and form of the socioeconomic rights to be constitutionalised. However, the sceptical minority, more energetically than in the past, has sought to reopen the surface reformist consensus on socioeconomic rights in recent months. Given the gravity of the constitutional implications of this issue, and the fact that genuine disagreement is not only legitimate but also requires negotiation and compromise in a democracy, it is only right and reasonable that sceptics have sought to ask critical questions of the strategy of constitutionalisation in realising the democratic aims that we all seek to achieve from good government in terms of social and economic development.

These efforts, however, have been met with incomprehension and incredulity by the advocates of socioeconomic rights – which is perhaps understandable given the context outlined above – but their consternation has sometimes taken a shrill and overzealous tone that implies a disturbing attitude to democratic choices in constitutional design, and which has unnecessarily raised the emotional stakes of democratic disagreement. Reason and argument rather than stock ideological assertions and attacks on the motives of sceptics must inform the negotiation of this disagreement in the current constitution-making exercise.

In entering this somewhat fraught debate, therefore, the aims of this Working Paper are as follows. Firstly, I wish to clarify the terms of what is a very cluttered debate. This involves stating clearly what is in fact in dispute: the related but distinct concepts of recognising socioeconomic claims as *constitutional rights* and making them susceptible to *judicial enforcement*, and the relative merits of both in consideration of all the circumstances. But it also involves cleaning out a veritable Augean stable of pernicious misconceptions; for example, that proponents of justiciable socioeconomic rights have a monopoly over a social conscience and social justice, and that the sceptics care nothing about equity and fairness. Having done so, secondly, I wish to reconstruct the best possible case for each side of this argument, in the crucial context of a broader question: why do we actually need a constitutional bill of rights in Sri Lanka? This allows us, thirdly, to weigh the merits of each set of arguments against concrete politico-constitutional realities rather than ideological fantasies and inappropriate comparative analogies, and to do so fairly by conceding what is strong and weak about each. I will conclude this assessment by restating the case as to why, on balance, constitutionalising justiciable socioeconomic rights in Sri Lanka is neither necessary nor desirable. In doing so, I will point out the areas in which we need much more objective theoretical clarity than we have had so far – as opposed to the subjective clarity of ideological assertions which are only helpful to those predisposed to each competing approach in this debate – if we are

to enact a constitution that has the capacity to endure in Sri Lankan conditions and ensure the ends of constitutional democracy.

2. Clearing the Field: The Terms of the Debate

Sri Lankan newspapers and news websites nowadays are full of articles and interviews in which an ever-expanding catalogue of rights is being mooted for inclusion in the new constitution, with prominence invariably given to promises of ever more exotic socioeconomic rights. Likewise, bodies associated with the formal constitution-making process, dominated by proponents of these rights, like the Public Representation Committee and the Constitutional Assembly's Subcommittee on Fundamental Rights, as well as more permanent institutions like the Human Rights Commission, have added the patina of an official imprimatur to the demand for inclusion of these rights in the new constitution. The Sri Lankan media has demonstrated itself wholly incapable of subjecting at least the more extravagant of these claims to the faintest standard of critical scrutiny. The result, presumably, is that the public is led to believe that with the conferral of all these new and bounteous rights, their island shall move forward into a broad and sunlit constitutional upland and a future of endless milk and honey. I am, of course, being facetious, but only in order to make a serious point: it is both a disingenuous ploy and a dangerous gambit to raise public expectations of a constitution in this way. In this paper, I hope to show why I think this.

At the risk of triteness, however, let us remind ourselves at the beginning that this is a debate among friends. Aside from the disagreement over justiciable socioeconomic rights under discussion here, most if not all of those who are joined in debate on this question are those who supported or actively participated in the political change of 2015 that stemmed the tide of populist authoritarianism, and share a broadly liberal, democratic, and pluralistic vision of the constitutional state that we seek to build in Sri Lanka. While therefore we share a commitment to peace and power-sharing, the rule of law and good government, we may differ on the economic model of growth and development we support, and we certainly differ on the role of constitutional devices, including rights and courts, in the task of governing and policy-making in meeting those ends. Undergirding this debate therefore are differing approaches, dispositions, convictions, and preferences about the means to achieve what are otherwise shared social and economic goals. Whether one believes in free markets or a planned economy, a concern for issues of poverty and underdevelopment, including a sense of outrage that this is where we are seven decades after independence, is a shared concern among Sri Lankan reformists. Those of a socialist or social democratic bent may be convinced, for their own reasons, that economic liberalism is inequitable and indifferent to social needs. But that conviction alone, however strongly held, does nothing to displace the fact that those who argue for limited government and free enterprise do so because they see these constitutional and economic policies as the best way to lift our society out of poverty and dependency. For the latter, a truly capitalist society is not one characterised by a wealthy few and the deprived many, but a society in which the conditions of political and legal equality are set down so that wealth creation, consumption, saving, investment, and property ownership become a mass phenomenon. This is not a social order geared to the promotion of greed, venality, and irresponsible individualism, but one that is deeply rooted in the moral value of human freedom and dignity. It in fact treats individuals and their potential for self-

advancement with far more respect than do economic theories that place a paternalistic state at the centre of social life, and in this way, it is a far more democratic view of society and social development than one in which it is assumed a well-meaning elite in control of the state (including courts and lawyers operationalising a socioeconomic bill of rights) would always know better about what is good for all. Other moral commitments to compassion and the welfare of those less fortunate are very much part of this worldview, except that it is understood that compassion is an empty promise unless society has the wealth to look after the vulnerable. It is also arguably a worldview that is more at home in the cultural ethos of an island society that has a very long history of trade and social intercourse with the rest of the world.

Similarly, one of the consequences of this specific disagreement occurring within a broader spectrum of constitutional agreement is that the implications of fine legal distinctions become extremely important. Thus, for example, documents like the Vienna Declaration and Programme of Action (1993) are cited by proponents of socioeconomic rights in support of all manner of propositions, without disclosure or acknowledgement of the fact that this Declaration and Programme is 'soft' rather than 'hard' (binding) international law. Now for sceptics, this is a crucial distinction. We do not contend that 'soft international law' can be disregarded at will; that would involve a repudiation of the Universal Declaration of Human Rights (1948), the most outstanding example of soft international law. Indeed, depending on the specific instrument or practice under discussion, and the requirements of those applying it, some soft law may even be binding. Like the proponents, we regard soft law as an important element of international law that states must endeavour to follow especially where human rights are concerned – as a clarification of existing law, an interpretative consensus on a treaty, or as reflecting a formative stage of the *opinio juris* or state practice that may eventually become binding customary law. But the fact that it remains, for the moment, soft law suggests that there is an interpretative margin or a flexibility of application that we may avail of, should we think, in consideration of all the circumstances, that our constitutional needs require responses that may deviate, without rejecting outright, from any proposition of soft international law. Seen this way, it becomes clear that we can engage constructively and more imaginatively with international law in our constitution-making exercise, without regarding everything, especially in relation to international human rights law, as infrangible, and worse, cast in stone. The latter view is not only a fundamentally inaccurate view of the nature of international law, but also has the effect of fossilising it. And in failing to appropriately reflect these nuances in the positions they take, proponents are also misleading the public and distorting the frame of debate on socioeconomic rights. Public institutions like the Human Rights Commission have an especial duty to avoid this pitfall.

These are perfectly natural and legitimate differences in a democracy, provided that disagreement is treated with tolerance and respect. Impugning the motives or the moral integrity of those challenging a majority viewpoint or what is regarded as a settled consensus is not the way to address disagreement. For example, rubbishing someone who opposes the dominant socioeconomic rights consensus with the ill-defined epithet 'neoliberal' is, and is meant to be, plainly pejorative. Even if the person so disparaged does not take exception to the characterisation, it is unhelpful because it does not tell us anything about why an economic system that has delivered the greatest prosperity to the greatest number for several centuries is necessarily antithetical to fair and equitable

development, and why whatever alternative economic model the disparager holds dear ought to be accepted by everyone else. It is only helpful in galvanising those already predisposed against whatever it is that is meant by neoliberalism, and in this way, the cheap use of such terms merely entrenches disagreement without doing anything to help persuade the other side – or more likely, and in greater numbers, those on the fence – of the choice to be made.

Providing a partial explanation of this mode of political debate is the prevailing confusion over the difference between *assertions* and *arguments* and between *ideology* and *theory*. We have a surfeit of advocacy from those already convinced about the desirability of justiciable socioeconomic rights, mainly asserting convictions they already hold, illustrated by comparative examples or by appeals to international law that selectively help their viewpoint. An assertion, however, is no substitute for an argument in constitutional discourse (and sprinkling articles, statements, and petitions with Latin legal maxims does not magically render an assertion an argument). Among other things, an argument, properly so called, requires constitutional comparisons to be methodologically and substantively sound, for constitutional propositions to be thoroughly contextualised to the specific conditions and challenges to which they are addressed, and critically, to deal honestly and rigorously with empirical facts and alternative theories that challenge as well as support the propositions of the argument. But by and large, what we find is an endless repetition of the same assertions and ideological preferences, coupled with a steadfast refusal to engage with opposing viewpoints except to dismiss or denigrate them, and in some regrettable cases, dark allusions to elitist conspiracies to rob the people of their rights, all perhaps in the expectation that everyone would be bored into submission through a process of attrition.

It is not that advocacy is invalid as a form of political contestation, far from it. Pressure groups and associations of the like-minded are crucial to the marketplace of ideas in a democracy. The problem is that in Sri Lanka this is the *sole* mode of constitutional debate, with little or no difference between the way a constitutional law academic would make an argument to the way an NGO would present a policy brief. The result is a very brittle form of constitutional discourse (and because dominated by lawyers, inordinately obsessed with rights and courts) lacking in depth, nuance, rigour, and imagination about both facts and norms. There are of course exceptions to this dominant way of making the case amongst the proponents, and I will return to the better arguments made by them more fully below.

Closely associated to this is the role of ideology in this debate, which works out in several different ways, the most important of which is the blurred line between ideology and – to the extent any exists – theory in Sri Lankan constitutional discourse. In this context, ideology is a set of beliefs and preferences which determines one's dispositions to constitutional choices that may or not be objectively true or tested, but are nonetheless deeply held and acted upon. Building constitutional theory, on the other hand, is both a very different and infinitely more difficult task, involving highly skilled applications of methodology, research, explanation, analysis, and prescription that can survive a high level of critical scrutiny through work characterised by the core academic competences of detachment, transparency, and integrity. Although, optimally, constitutional choices should be a wholesome blend of both, in Sri Lanka, as elsewhere, such choices are very often much more the product of ideology rather than properly constructed theory, and

this will have a crucial bearing on the quality of the constitutional choices made in the current reform exercise.

It is not controversial to observe that much of the inspiration for proponents of socioeconomic rights derives from various strands of centre-left ideology. Many are also university teachers of human rights law, fundamental rights law practitioners, trades unionists, and human rights NGO activists. There is obviously nothing wrong with any of this, except in relation to three material consequences for the nature of constitutional discourse and disagreement. The first is that the centre-left has a tendency to believe that it has a special and sometimes exclusive authority to speak on behalf of the more vulnerable sections of society. Assuming without conceding the truth of this in other spheres of policy, it has a pronouncedly distorting effect on constitutional politics, because the appropriation of moral superiority by one side leads to the exclusion by fiat of other views, without having to take the trouble to invalidate them through reason. The observations above with regard to neoliberalism illustrates this point, where the left pretends – and in places like Sri Lanka, many bystanders accept – that liberal economics has no regard for the poor and the vulnerable. Once economic liberalism is de-legitimated in this way, politically liberal perspectives on constitutional design choices with regard to a bill of rights can also be easily swept away. The constitutional reform debate that ensues – with no serious defence of principles like limited government and individual autonomy allowed an airing – is a debate that is skewed in favour of more communitarian and statist perspectives. The unfairness of this is patent; but it is also a strikingly sub-optimal method of producing ideas for constitutional reform.

The second consequence arises from the common social and professional profile of socioeconomic rights defenders. As mostly a community of academics, activists, left party members, trade unionists, and lawyers, they are immersed in an echo chamber of rights activism and abstract notions of socioeconomic justice. While their idealism is noble, it would not be too harsh to say that they would have minimal familiarity and virtually no understanding of the different worlds of business and entrepreneurship, as well as government and governing. (In this context, party political activism, or advisory posts to ministries, or academic administration in state universities, or membership of de-politicisation institutions, are completely different species of politics which yield no experience or understanding of the constitutional task of *governing*.) Indeed, some would wear the lack of association with government as a badge of honour, while others would deem deep suspicion and even hostility to business an article of faith. Thus, justiciable socioeconomic rights, with pervasive economic consequences, are defended by people who lack much comprehension of the two biggest actors in any national economy: the private sector and the state. Aside from the fact that the wealthiest countries in the world deliver the highest living standards to their citizens without ever having recognised socioeconomic claims in the form of human rights – and the countries with such rights are some of the poorest, most unequal, and badly governed – it would not be stretching the point to hold that there is a major economic and financial knowledge gap in the case for justiciable socioeconomic rights.

The third point in this connection relates to an alternative tradition within the left itself that is highly sceptical and even distrustful of constitutionalising socioeconomic rights. Its existence completely undermines the current proponents' attempt to portray their position on socioeconomic rights as some sort of post-ideological, post-political,

normative consensus that is above and beyond any respectable contestation. The advocacy of justiciable socioeconomic rights is nested within a broader theory and doctrine of liberal constitutionalism that came to prominence with the end of the Cold War, and the 'third wave' of constitutional transformations which gave plentiful opportunities for this model to be put into practice the world over. Any qualms about the dominance of American constitutional thought in shaping this model were quickly dissipated by the fact that it was mainly informed by American scholarship of the liberal left then at the peak of its influence, and perhaps more importantly, by its adoption in such inspirational examples of constitution-making as post-apartheid South Africa. With the death of the Soviet Union and socialism in retreat, this was a bandwagon that many intellectually orphaned former socialists enthusiastically joined (although not, it would seem, shedding ingrained habits of analytical and prescriptive determinism in the process). The assurance of socioeconomic rights in the (then) new model of global constitutionalism would have attended to their commitments to redistributive justice and state-centred view of economic life, and this happy marriage between left-liberalism and democratic socialism is what perpetuates the discourse of justiciable socioeconomic rights to this day in places like Sri Lanka. And mysteriously, as evinced in the writings of the Sri Lankan advocates, several probative critiques of this model that have dominated legal and political theory scholarship elsewhere for several decades now have failed to penetrate Sri Lankan constitutional discourse at all. This is remarkable, because some of the most sophisticated critiques of this model of constitutionalism today emanate, not so much from liberal or conservative thought, as from leftist, anti-elitist, republican and agonist theorists. And it is even more remarkable because the canonical leaders of the heroic age of the Sri Lankan left presaged all this very explicitly.

The Old Left and especially the most proficient constitutionalists in that tradition – Colvin R. de Silva and N.M. Perera – were, as is well known, strongly opposed to the idea of constitutionalising rights. When they had the opportunity of their lifetimes to put their constitutional ideas into practice in the process of creating the first republic in 1970-72, they bowed to pressure to introduce a bill of fundamental rights. However, their reluctance is demonstrated in how attenuated the fundamental rights provisions were in the 1972 Constitution and how ambiguous and weak their justiciability. And of course, they conspicuously steered well clear of making any of the significant socioeconomic rights justiciable. Their successors in the Old Left parties today have generally tried to explain De Silva and Perera's scepticism away as a regrettable corollary of their commitment, as men of their time and British education, to the doctrine of parliamentary sovereignty. There is considerable truth in this to the extent that for de Silva and Perera, a popularly elected and representative Parliament, and not the courts dominated by an elite class, had to be supreme if the socialist revolution was to be instantiated through institutional means. But the rejection today of de Silva and Perera's views is more dismissive, and does not take proper account of the conceptual basis of their scepticism. In my view, this unjustly underestimates the widely read, deeply normative, comparatively informed, and richly textured intellectual convictions that informed the constitutional postures of these men, particularly when contrasted with the mechanical borrowing and anodyne reasoning that characterises the constitutional doctrine of today's left-liberals.

Most importantly, this historical left tradition thoroughly undermines the tendency of the modern left-liberals to monopolise constitutional discourse in relation to what is 'right'

(in the sense of *recht* or *droit*) in terms of the question of justiciable constitutional rights. In other words, the existence of both this older Sri Lankan left tradition as well as a multiplicity of alternative leftist and other views on this question in the world today tells us that the currently dominant Sri Lankan perspective, despite masquerading vigorously as a national and even international consensus, is as ideologically particularistic as any other. If that is true, then it would seem we need much stronger justifications – and humbler attitudes – from today's proponents of socioeconomic rights. Moreover, the claims made that socioeconomic rights are essential to the building of a common citizenship are manifestly absurd, if the proponents' view is merely one among a range of viewpoints concerning the content of Sri Lankan nationhood. To the extent that the argument is about the constitutionalisation of rights, it does not represent a substantive consensus on the ideal society, although as I will point out below – and this is a critical point – there is in fact a deep, consistent, and politically entrenched social consensus about the state provision of welfare, which makes the whole question of constitutionalisation redundant. In other words, then, the case for constitutionalising socioeconomic rights as a central element of Sri Lankan citizenship is not merely a case of an ideological viewpoint trying to disguise itself as a national consensus, but it also traduces the much more important value of political pluralism that ought to inform the constitutional organisation of a highly diverse society.

My final preliminary point is about strategic considerations in managing a constitutional reform process. This is an issue that crops up with particular force in the context, noted earlier, that the debate over justiciable socioeconomic rights is actually conducted *among* reformists *within* a broader reform consensus. The point is made to the sceptics that raising awkward questions would endanger the success of the reform exercise as a whole, because opponents of reform would seize upon these disagreements for tactical advantage. It is true that the political victories of 2015 are precarious, that the forces of chauvinism and authoritarianism are down but not out, that the anti-reform opposition is more often than not unscrupulous, and that the new constitution can be won or lost in the coming referendum. Sometimes if not always, however, issues of constitutional principle are so fundamental that they must be addressed openly and comprehensively, even if doing so might seem strategically or tactically unwise due to the potential of anti-reform forces to exploit such differences to their own ends. Whether or not to constitutionalise justiciable socioeconomic rights is just such an issue, engaging as has been noted, the deepest challenges of constitutionalism. Joining democratic debate about such issues, and the freedom to persuade rather than force people to make particular political and constitutional choices, was what the regime change of 2015 was all about. Demanding silence or the self-suppression of dissenting views on strategic grounds is no less illegitimate today than when *diktats* from the Ministry of Defence determined the nature and content of public discourse.

I have made these extensive preliminary remarks because they relate to the manner in which we ought to negotiate our disagreement over the strategy of constitutionalising justiciable socioeconomic rights. The form of the debate is often as important as its substance. Establishing fair terms of engagement rids us of sideshow distractions and allows us to conduct an honest and robust debate that is capable of informing enlightened choices in the making of our third republican constitution.

3. The Sri Lankan Proponents' Case for Constitutionalising Justiciable Socioeconomic Rights: A Recapitulation

It is necessary to be clear about what is exactly being advocated by the proponents of constitutionalising justiciable socioeconomic rights, and their underlying reasons, in order to be able to critique the point. In this section, I will reconstruct a summary of the best possible argument in favour of socioeconomic rights, before offering a critique of it in the following sections. The summary is based on actual arguments made by proponents in the Sri Lankan debate, and as such – and especially due to the dominance of ideology and activism, and the dearth of constitutional theory – it is not a general and comprehensive summary of all the best possible arguments that can perhaps be made for the proposition.

According to the proponents, Sri Lanka must follow the most progressive possible interpretation of the current state of international human rights law in the design of the bill of rights in the new constitution. International human rights law recognises not only civil and political rights but also social, economic, and cultural rights. These categories of rights are today regarded as universal, indivisible, and interdependent, and it would be departing from international standards if the Sri Lankan constitution were to make a distinction between them by making only civil and political rights justiciable. Accordingly, older distinctions such as between first and second generation rights or between negative and positive rights are no longer valid.

Socioeconomic claims are no more regarded as merely aspirational goals. Thus, older constitutional design approaches such as relegating them to non-justiciable directive principles are no longer valid, and even in constitutions that adopt this device, judiciaries have found innovative ways of giving effect to the socioeconomic obligations of the state. Now socioeconomic rights are fully enforceable and states have an immediate duty to provide at least the core minimum requirements, and undertake further commitments, ideally at both constitutional and international law, to the progressive realisation, subject to available resources, of the full range of socioeconomic rights over time. Beyond the minimum core, in taking measures for progressive realisation, policy-making and implementation must meet public law standards including reasonableness and proportionality. The failure to provide especially the minimum core cannot be justified by executive or legislative discretion by reference to broader economic or developmental goals, or the protection of private law rights.

Comparative constitutional design trends, which Sri Lankan constitution-makers ought to follow, also reflect these developments whereby increasingly, the newer and more progressive constitutions include justiciable socioeconomic rights, or are in the process of doing so. It can no longer be considered sufficient for governments to meet these obligations through ordinary programmes and policies, and it is certainly more desirable to give them constitutional standing as enforceable rights. Moreover, even in jurisdictions where socioeconomic rights are not explicitly justiciable, including Sri Lanka, there is evidence to show that courts have used civil and political rights provisions, or as noted, other directive constitutional principles, to give effect to socioeconomic claims.

Even in the adjudication of civil and political rights courts make decisions with resource allocation implications, and this has led neither to any systemic dysfunction or a

usurpation of the political branches, or of the democratic process. On the contrary, the courts' role, especially where they can make use of constitutional socioeconomic rights, has a disciplining effect on democratic decision-making, so that not only are citizens' rights of the most vulnerable better protected by the politically insulated judiciary, but it also has the effect of improving the quality of governance by forcing the political institutions to justify their decisions more rigorously and by reference to a rights-based framework that diminishes the scope for arbitrary action. Moreover, much less that enervating the democratic process, the constitutional recognition of these rights animates and empowers democratic struggles for the public provision of adequate socioeconomic standards. Such rights-based campaigns can transform clientelist politics and existing structural economic inequities into a more responsive, transparent, and corruption-free form of politics, that is better able to deliver economic redistribution and egalitarian citizenship. The potential for institutional conflict between the judiciary and the other branches has also been exaggerated in the context of judicial enforcement of socioeconomic rights. The formulation of socioeconomic rights itself permits inherent mechanisms for balancing competing interests such as through the doctrines of available resources and progressive realisation. Moreover, in jurisdictions where socioeconomic rights are justiciable, the courts themselves have developed dialogic and restrained approaches to ensuring constitutional rights are respected while at the same time observing a functional separation of powers.

These rationales underpin the recommendations made by successive bodies from the constitutional reform efforts of the Kumaratunga government onwards, through the draft bill of rights of 2009, to the more recent reports of the Public Representation Committee, the Constitutional Assembly's Subcommittee on Fundamental Rights, and statements of the Human Rights Commission, as well as by civil society organisations who have rallied to oppose the insidious attempt by a liberal elite to thwart the constitutionalisation of these rights. The arguments made by opponents of the progressive trend towards constitutionalised socioeconomic rights are entirely invalid. Most are ideological claims based on neoliberal economic thinking that not only has no regard for social justice, inclusion, and civic citizenship, but is also actively opposed to redistributive justice. They are based on preserving an iniquitous existing order of class relations and the protection of elite interests against those of the many. Others are based on outdated legal thinking, such as where a distinction is made between civil and political rights and socioeconomic rights, so as to privilege the former. In any case, the division is spurious and generates injustice, for a rights-based citizenship can only really be achieved by ensuring the enforcement of both types of rights. Concerns about the courts' capacity to engage with complex and multifaceted policy matters, influencing resource allocation choices, and their appropriateness as forums for the negotiation and settlement of deep democratic disagreement on social or moral issues, are overstated if not misleading. Constitutionalising socioeconomic rights are therefore pivotal to defeat these regressive forces, and a truly social democratic new constitution would ensure this outcome.

This brief restatement of the proposition, which I hope is a fair summary, describes the scope and contours of the constitutional project that the proponents of justiciable socioeconomic rights are engaged in. It is plainly ambitious in scale, hoping to transform society, politics, the economic order, and even culture, through a transformative conception of juristocratic constitutionalism. It envisages not merely a 'rights revolution' in terms of the number and extent of the fundamental rights to be given constitutional

recognition, but a revolution in terms of the democratic tradition of the state, from one of competitive group interests to a paradigm of rights-based, activist, citizenship. Seen in its best possible light, even those who disagree with many of the assumptions and especially the ideological orientation of the project can appreciate that this is a response based on some notion of normative virtue to many practical problems of governance and development that have plagued Sri Lanka throughout its post-colonial existence.

Yet – and beyond merely ideological opposition – there are such major gaps in its assumptions, such gaping gulfs between the theory and the practice, such grave conceptual misconceptions, and a near-fatal blindness to Sri Lankan realities induced by excessive ideological faith, that it is impossible and irresponsible accept its theses, unless it is subjected to very specific critical scrutiny and to which its proponents ought to give more credible answers then they have so far. In short, it is time to move this 'debate' from one where one activist and advocate after another takes to the comment pages to repeat hoary old saws, clichés, catchphrases, and buzzwords, to one where they are compelled to actually present a plausible constitutional theory as to why justiciable socioeconomic rights ought to be included in the new constitution. If they are to succeed in doing so, they will, among other things, have to address the points I raise in the next section.

4. The Conceptual Critique of the Case for Constitutionalising Justiciable Socioeconomic Rights

There is – perhaps surprisingly – some common ground to be conceded between the proponents' views and the particular version of the critique that I wish to present in this section. The first point is that the line separating civil and political rights, on the one hand, and socioeconomic rights, on the other, can sometimes be blurred. The right to property, for example, is supported by proponents and opponents alike, albeit for contrasting ideological or philosophical reasons and in differing degrees of commitment. Nonetheless, it is also clear that in both theoretical and practical terms a reasonable distinction can be drawn between types of rights, with the negative liberties represented in civil and political rights being absolutely mandatory to any conception of a democratic state, whilst the positive socioeconomic rights bear none of that obligatory character.

Moreover, the doctrine of indivisibility (i.e., between categories or generations of rights) that is now regarded as a cardinal principle of international human rights law by the Sri Lankan proponents has never been free of academic contestation even within human rights law, and certainly not within constitutional and political theory. From economic liberals to political conservatives, from republican theorists to left-wing critical constitutionalists, the distinction between civil and political rights and socioeconomic rights has been maintained, because it is analytically an important one that has significant substantive consequences for our theorisations of democracy, the state, its main institutions, polity, society, and even political culture. Thus, while it might be conceded that when it comes to the constitutional design of a bill of rights there may be fundamental rights that straddle the divide, it is important nonetheless to main the distinction so as to ensure clarity about what is normatively and practically fundamental to democracy (civil and political rights), and what is not fundamental to it (socioeconomic claims in the form of justiciable constitutional rights), and which are more a set of social, economic, and cultural aspirations driven by ideological values.

Similarly, the doctrine of universalism is no less contested. I have little interest in traditional cultural relativism and especially the hyperbolic claims to state sovereignty made by its advocates, but there are much more serious normative arguments as to why universalism must be treated with caution. Of many, perhaps the most important to the present discussion is a point briefly made earlier: the flipside of the argument that socioeconomic rights must be constitutionalised on the ground that they are now part of a universal body of self-contained human rights is that this also serves to morally and legally privilege a homogenising account of the good life for all in a thoroughly heterogeneous Asian society. Once constitutionally entrenched, the hegemony of this thick, monistic vision of the good life emasculates the space for the dynamism and diversity of values, ideas, and the social, cultural, and intellectual mores that could only be produced, by contrast, in a constitutional order that has the value of pluralism at its heart. And again, as noted earlier, it would be an extremely sterile view of international law to understand its interaction with domestic law as a one-way street in which the latter must constantly bow to the dictates of the former. A much richer and useful view of this relationship must be that international and domestic law interact not merely on a basis of parity but also with an element of discordance, and the resulting creative tension enriches them both.

The blurred line has consequences, secondly, for our approach to the judicial role in a constitutional regime of justiciable socioeconomic rights, in particular that courts should not in general make resource allocation decisions or engage in complex and multifaceted policy decisions. Here again there is some common ground, in that it is impossible to maintain that, unless in a culture of extreme judicial deference or weakness, courts do not make decisions with (sometimes significant) resource allocation implications in the adjudication of civil and political rights, or that even in ordinary administrative law adjudication, they do not engage in some measure of weighing up alternative policy preferences. However, here the proponents overplay the opponents' critical arguments, often to a farcical level. The point that opponents make is one of degree: making socioeconomic rights justiciable directly invites the courts to decide on resource allocation questions in such matters as health, education, and housing policy. It is not an incidental consequence of courts enforcing rights that are essential to a democratic society, the economic costs of which are neither anywhere in the scale involved in adjudicating socioeconomic matters, nor indeed are they costs that any society can afford to avoid if it aspires to be a constitutional democracy. Similarly, judicial policy-making is also a matter of degree: justiciable socioeconomic rights require the courts to substantively assess competing alternatives on major issues of public policy, which is what governments and legislatures are elected to do, rather than policing the procedural propriety and the legality of governmental decision-making. The latter is the appropriate judicial role in a constitutional democracy. The courts may go so far as assessing the reasonableness of executive actions and policies but they have neither the substantive competence nor is the judicial decision-making process well-adapted to the task of essentially making policy through adjudicating on socioeconomic rights.

Some proponents have argued that what is contemplated for the courts under a regime of justiciable socioeconomic rights is not a strong-form power of judicial review, whereby they would attempt immediate enforcement of these rights, but rather a weak-form or dialogic model through which policy-making in respect of health, education, housing, etc., can be disciplined by the courts by reference to the standards enshrined in the

constitutional rights, but the ultimate power of implementation would remain with the political branches, and they would continue to retain some discretion over policy choices, due to the doctrines of progressive realisation and available resources. I have some sympathy with this more sophisticated version of the proponents' argument, because I believe that in a parliamentary state that is promised under the new constitution, there ought to be a blend of both political and legal methods of accountability. While strong-form constitutional review is somewhat alien to the Commonwealth tradition of parliamentarism – being a product of the American model of presidentialism and separation of powers – there are parliamentary democracies like India which are comparable to Sri Lanka in which comprehensive judicial review has been adopted because it is felt necessary to strengthen the culture of constitutional government. Sri Lanka would likely adopt a model of comprehensive judicial review in the new constitution, whereby the courts would be able to review not only executive and administrative action, but also strike down legislation at any time for inconsistency with the constitution. If this model is to work, then the courts must have concrete rights in the constitution against which executive action and legislation can be reviewed. From the proponents' point of view, therefore, conceding a dialogic role for the courts undermines their own case, because the public expectation would strongly be that any claim enshrined as a constitutional right ought to be judicially enforceable. To hold out socioeconomic claims as constitutional rights, which would then merely lead to a lot of complex litigation with no immediate outcome in terms of realising those rights, would at best confuse people and at worst generate cynicism and erode the legitimacy of constitutionalism. This has certainly been the case in the much-vaunted case of South Africa.

Demanding a judicial role however limited, through constitutionalising socioeconomic rights, in public policy decisions concerning socioeconomic welfare, on the alternatives of which there would inevitably be reasonable and legitimate disagreements in a democracy, politicises the courts and undermines their authority. Courts have to make concrete decisions on facts before them, in proceedings which involve only a few litigants even in the most liberal regime of *locus standi*. They are not like elected legislatures which represent the whole or at least the vast majority of the interest groups in society, and which therefore have both the legitimacy and the capacity to debate policy choices, and hold governments (which are in turn periodically elected to implement a particular policy programme) to account. There may be some truth to the argument, especially in political cultures that are weak in terms of accountability, that legislatures in particular do not play this role, and that consequently, the judicialisation of political decision-making serves to promote legal accountability where political accountability has failed. However, this is to attempt a shortcut solution through litigation to the much more serious and deep-seated problem of political culture to which we should be paying attention if we are to genuinely promote the instantiation of constitutional democracy in places like Sri Lanka. Judicialisation does not diminish the prominence or importance of the political sphere in a society that is long-accustomed to a very actively participatory if tumultuous and unruly form of democratic politics. If proponents believe their cherished socioeconomic goals should be insulated from the vivid vagaries of this culture of politics, then perhaps they should be paying more attention to reforming this culture through engagement and persuasion rather than trying to force change from above through the strategy of constitutionalisation and thereby promoting the dominance of an elite of lawyers, judges, activists, and de-politicisation institutions.

It is also difficult to understand the proponents' faith in the judiciary – in inverse proportion to their contempt for the political process – when the record of the Sri Lankan Supreme Court over its fundamental rights and constitutional jurisdictions is considered since 1978. Except for a handful of rightly respected judges and their decisions, the court's record is at best mixed, with some startling failures when the country needed it most to stand up to authoritarianism and abuse. Thus, the Sri Lankan court does not enjoy the prestige and legitimacy on which the Indian Supreme Court has traded on since its celebrated defence of the constitution against Indira Gandhi's emergency rule, and upon which the highly interventionist Indian model of juristocracy has been built since the 1970s. The proponents believe juristocracy to be a near-unalloyed good, but their expectations of the Sri Lankan courts would likely be frustrated.

And it is here, however, that a more significant weakness or at least paradox in the Sri Lankan proponents' case stands starkly exposed. Among comparable countries in terms of economic and political development, Sri Lanka has famously achieved enviable standards of socioeconomic welfare, including through programmes of free health and education and social housing, incidentally without ever having constitutionalised justiciable socioeconomic rights. This has also been maintained despite chronic economic underperformance and protracted civil conflict since independence, and to the point that even critical reforms to the health and education sectors have never been thought to be politically possible by even the most politically secure 'neoliberal' government. The obvious case in point was the Jayewardene administration which came to power in 1977 on the largest landslide the country has seen, in the wake of a disastrous socialist experiment with state capitalism and in a global context defined by Reagan and Thatcher in which radical neoliberalism was at its zenith. Yet all it did was roll back some of the more preposterous policies of the left, and left intact a mixed economy and a substantial role for the state. Ironically, the successor social democratic Kumaratunga administration undertook more pervasive privatisation than Jayewardene ever managed.

What this tells us about Sri Lanka's political culture is that, in an electorate that was socialised into mass democracy by parties of the left, the people have large expectations of the state in the life of the community. To use an American locution, 'big government' is ingrained in Sri Lankan political imagination and culture. In short, therefore, the welfare state is politically protected from reform or change by the strongest possible measure of entrenchment there can be: a deep and consistent social consensus that the state must continue to deliver upon the socioeconomic claims of the community (even at the peril of ignoring competing economic rationales for growth and development). It is perplexing in this context as to why proponents feel the need so anxiously to constitutionalise these well-entrenched and seemingly unchangeable social claims upon the economic resources of the state. By contrast, successive governments have undertaken ever more vicious attacks on civil and political freedoms and since the 1970s have consistently undermined constitutionalism and democracy, and except for the reformist elections of 1994 and 2015, by and large there has been a remarkable tolerance on the part of the electorate with regard to this assault on political freedom. We thus emerge with a situation in which what is needed is a constitutional strengthening of civil and political rights against political culture's most conspicuous weaknesses, rather than any need to constitutionalise rights that are already guaranteed *de facto* by political culture's strongest and most consistent expectations.

The obvious conclusion in this context therefore is this: if we are serious about introducing a constitutional democracy through the current constitution-making process, we should be focussing on establishing the strongest possible regime of civil and political rights we can, while in the scale of priorities, we should understand that socioeconomic rights are relatively unimportant. Countries such as South Africa and India, perhaps the two cases most cited as exemplars by proponents, made their constitutions and included socioeconomic rights at historical moments when their societies were riven by staggering inequalities. While their regimes of socioeconomic rights have done little or nothing to ameliorate these deep inequalities, it is also worth pointing out that in Sri Lanka we are fortunate not to experience inequalities of that scale. As a middle-income country of manageable size with substantial natural advantages, our challenge of economic development is about greater wealth-creation and performing to our fullest potential; it is not about redressing the evils of apartheid or a regressive caste system.

This leads us to another important set of questions: what is the nature of the state that we are trying to reform through this process of constitution-making, and what is the shape of the state that would replace it? Leaving aside broader issues such as the question of nationhood and ethnic pluralism, what is clear from the proven authoritarian tendency of the post-colonial and especially the republican Sri Lankan state is that this is a state that requires effective limitations on its demonstrated and potential capacity to violate the basic freedoms of the individual. Among other reforms, this requires a more robust bill of rights that widens and deepens constitutional commitments to civil and political rights, including through reaffirming the judiciary's traditional role in a liberal democracy of acting as the guardian of these freedoms. In the new bill of rights, for example, we would need to reformulate our existing freedoms so that they are made consistent at least with the basic standards guaranteed by the International Covenant on Civil and Political Rights (ICCPR), and where necessary, even go further. Thus, new constitutional rights such as access to a lawyer in cases of pre-charge detention (including through resource-consuming guarantees such as Legal Aid), similar access where necessary to a translator, and so on, would be entirely defensible on the ground of restricting the capacity of the state to invade the private sphere. By contrast, the constitutionalisation of socioeconomic rights has the polar opposite effect of *expanding* the state's role, by obliging the executive and legislature to provide welfare measures, and for the judiciary to enforce them, as a set of constitutional duties. This is a categorical and qualitative shift upwards of the ordinary governmental role in taking action to provide welfare, which, as noted, governments already do to a high level as a matter of ordinary politics. Arguing for the expansion of an already overweening and interventionist state seems not merely counterintuitive but also self-defeating from the perspective of the rationale for reform of the Sri Lankan state in respect of its new constitution's bill of rights.

Turning more specifically to the present context, the first point to make is about the nature of the social transition that is to be given effect through the current constitution-making exercise. As I have argued elsewhere, to understand and treat the election results of 2015, and the reform mandate they delivered, as some kind of revolution is a fundamental analytical mistake. A careful and dispassionate reading of the reform mandate tells us that it was for a series of incremental changes, even if some of those

changes – such as the abolition of presidentialism – may seem quite dramatic. Whether a 'rights revolution' was mandated, and especially one involving a major institutional transformation of state, polity, and society in the manner required by the constitutionalisation of justiciable socioeconomic rights, is therefore a question that needs to be treated with considerable scepticism. This is especially so because the electorate takes for granted that no change of government would affect the consensus on the welfare state, and consequently they have little incentive to demand these routine programmes in the form of constitutional rights. Proponents would argue, however, that even a change promise as prominent as the abolition of presidentialism was amorphous, and that electoral mandates may be imaginatively interpreted by reformers. Moreover, they would argue, the introduction of socioeconomic rights has been widely supported by the public consultation exercise conducted by the Public Representations Committee, and as such, a new constitution would more likely pass muster at referendum if it included socioeconomic rights. There is no doubt merit in the argument that an attractive package of new rights would help make the new constitution's other reforms including further devolution more palatable to the electorate. But these arguments also require critical scrutiny for the reasons I discuss below.

There is no reason to doubt the truth of the Public Representation Commission's report that many or most of those who made submissions to it across the island (as opposed to the more multitudinous general public) sought the constitutionalisation of socioeconomic rights. However, in any public consultation exercise, it is natural that people would come forward to demand more and more rights in satisfaction of their multifarious grievances; they are extremely unlikely to demand less rights. It is also likely that many of those who came forward to make submissions were the more organised sections of society who have been indoctrinated in the left-liberal rights discourse mentioned earlier. Constitutional designers, however, must balance these aspirations against both practical realities as well as the coherence and integrity of the constitution as a whole. It would be both incompetent and unscrupulous for any constitution-maker to indiscriminately load the bill of rights with an abundance of rights merely because that would be popular, without having regard to how the constitutional system as a whole is to operate, or other competing normative principles including the limitation of government that is required by a more holistic analysis of Sri Lanka's constitutional needs. The claim therefore that the inclusion of socioeconomic rights is a popular demand must be balanced by these competing demands in any responsible constitution-making exercise.

Aside from the expansion of the state discussed as a general constitutional issue earlier, one of the major concerns with expanding the role of the central government through a national bill of rights that includes socioeconomic rights is about the potential adverse impact it can have on devolution. The new constitution is expected to go beyond the Thirteenth Amendment in providing a devolution settlement to address minority claims to power-sharing, although this will be circumscribed by the dictates of the unitary state. Health, education, and housing are areas on which the Provincial Councils have always complained that the central government frequently encroaches to the detriment of provincial autonomy, and it is important to stress, this is a general complaint made by all, not merely the Northern and Eastern Provincial Councils. It is also important to point out that greater devolution is sought by all Provincial Councils nowadays, and therefore the new constitution's devolution arrangement would have to conceive of devolution not

only as a measure designed to address minority aspirations, although that is important, but also as a more democratising measure of decentralisation that will establish a fairer and more democratic spatial balance in the institutional arrangements of the state as against the over-centralised Sri Lankan state of the past. However, there is a great danger that socioeconomic rights could serve recentralisation through the back door. The implementation of the state's obligations under the national bill of rights would be the constitutional responsibility of the central government. In any case, only it and not the Provincial Councils would possess the resources to discharge the very substantial commitments in implementing socioeconomic rights. In any case of inconsistency of provincial service provision with constitutional socioeconomic rights, the courts would have to enforce the latter against the central government rather than a Provincial Council if it is to have any effect. In this way, what would ordinarily be a devolved competence could be recentralised, thus defeating the purposes of greater devolution: a major rationale for a new constitution. More broadly, the homogenisation of socioeconomic norms impacts both normatively on the value of pluralism in what is a highly diverse society as well as more practically on the case for economic competitiveness that may be made for Provinces taking charge of their own development through greater devolution.

5. The Empirical Critique of the Case for Constitutionalising Justiciable Socioeconomic Rights

The most serious weakness of the proponents' case, and to me, the unanswerable argument against the constitutionalisation of socioeconomic rights arises from the empirical evidence. As noted earlier, the post-Cold War phase of constitution-making around the world saw the widespread use of courts and rights as well as the constitutionalisation of socioeconomic rights. Several decades onwards, and before we embark upon the same path driven by romantic ideals rather than empirical realities, we need to ask ourselves: has this strategy delivered the goods? In some of the most rigorous studies conducted by some of the most highly regarded comparative constitutionalists, the answer has been emphatically a 'no'. Ran Hirschl is ideologically in favour of using rights to advance social justice and his work in this regard is one of the most cited in the comparative literature. His conclusions bear full reproduction:

> "Still, the question remains: What is the actual impact of the constitutionalisation of rights and the establishment of judicial review on advancing progressive notions of distributive justice? ... the effects of constitutionalisation on prevalent patterns of judicial interpretation of rights have been much more nuanced than the firm, but mostly untested and abstract, conventional wisdom would have us believe. On the one hand, the constitutionalisation of rights has proven fairly effective in enhancing the legal status of and public awareness to procedural justice, freedom of expression, and formal equality. On the other hand, courts have been far less accommodative toward claims for positive entitlements, substantive equality, redistribution of resources, and workers' rights.
>
> What is more, the practical impact of constitutionalisation on closing the socioeconomic gap between the haves and the have nots – the traditional winners and losers – has been at best negligible. The constitutionalisation of rights in Canada, New Zealand, Israel, and South Africa has achieved little or no real change

> in arenas such as wealth redistribution, minority political representation, and the equalisation of life conditions. The constitutionalisation of rights has proven virtually futile in mitigating, let alone reversing, wide-ranging social and economic processes of deregulation, privatisation, reduced social spending, and the removal of 'market rigidities.' It has failed to promote the notion that no one can fully enjoy or exercise any classic civil liberties in any meaningful way if he or she lacks the essentials for a healthy and decent life in the first place. It has done little to combat the widening disparities in fundamental living conditions within and among polities. In fact, the constitutionalisation of rights has been associated with precisely the opposite ethos, placing private ownership and other economic freedoms beyond the reach of majoritarian politics and state regulation and thereby planting the seeds for greater, not lesser, disparity in essential life conditions. Even the modest progress in the socioeconomic status of the lower echelons of capitalist society has not been accomplished through the constitutional or judicial spheres, but through the political sphere. Such scattered and sporadic improvements in the status of the worse-off have been essentially 'self-referential' (that is, as compared to past economic rankings of the same group) rather than 'other-referential' (that is, relative to other groups ranked higher on the socioeconomic scale)."[2]

Perhaps nothing more needs be said.

6. Conclusion

In this paper, I have attempted to show that constitutionalising socioeconomic rights in a future bill of rights is not appropriate, necessary, desirable, or useful. At best, they will be ineffectual adornments which would contribute to public cynicism of a dysfunctional constitutional order, at worst, an expensive folly that would retard rather than assist our economic development. I have tried to engage with the best possible arguments of the proponents, and I hope I have demonstrated that the critique and the alternative is the better design option. What we are undergoing is a constitutional reform, not a constitutional revolution. There is no space for rights revolutions in such a process. We have a state that requires to be limited and restructured, so that both the sphere of individual autonomy and the decentralised space for devolved government is given the chance to flourish. We do not need an expansion of the central state. We have a deep political consensus about the welfare state that guarantees the political delivery of services. We do not have a consensus about constitutionalising these claims as rights, and we have no wish to stifle economic freedoms we have, such as they are, under collectivist forms of redistribution. We do not have historic inequalities that require radical constitutional solutions; the ordinary political process is sufficiently responsive to

[2] R. Hirschl (2004) *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, Mass: Harvard UP): pp.150-1. See also R. Hirschl & E. Rosevear, '*Constitutional Law Meets Comparative Politics: Socio-economic Rights and Political Realities*' in T. Campbell, K. Ewing & A. Tomkins (Eds.) (2001) *Sceptical Essays on Human Rights* (Oxford: OUP): Ch.10; D.M. Davis, '*Socioeconomic rights: Do they deliver the goods?*' (2008) *International Journal of Constitutional Law* 6 (3 & 4): pp.687-711; D.M. Davis, '*The Case Against the Inclusion of Socioeconomic Rights in a Bill of Rights except as Directive Principles*' (1992) *South African Journal on Human Rights* 8: pp.475-490; J. Waldron, '*A Right-Based Critique of Constitutional Rights*' (1993) *Oxford Journal of Legal Studies* 13(1): pp.18-51; D. Landau, '*The Reality of Social Rights Enforcement*' (2012) *Harvard International Law Journal* 53(1): pp.190-247.

society's welfare needs. We have weaknesses in our political culture, however, that require constitutional redress, and that involves the strengthening of civil and political freedoms. That is the sole and genuine purpose towards which we must direct our attention, as we design the bill of rights in our third republican constitution.