



CONSTITUTIONALIZING ECONOMIC AND SOCIAL RIGHTS IN SRI LANKA

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Global Backdrop

One of the features of modern constitution making is the inclusion of enforceable economic and social rights alongside civil and political rights in the Bill of Rights. Where many of the previous constitutions, especially those in the global South, placed economic and social rights as part of the Directive Principles of State Policy, several modern constitutions now give both categories of rights equal value and make them both justiciable.

This trend in modern constitution making reflects developments at the international level. Since the Vienna World Conference in 1993, there have been several attempts at the international level to eradicate the hierarchy between these different categories of rights and to introduce a level of parity. The adoption of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights in 2008 and the adoption of the International Convention on the Rights of Persons with Disabilities, where both sets of rights were integrated, have added to these efforts. This has been supported by the General Comments and Recommendations from several of the UN Treaty Bodies.

Accompanying these trends at the international level is the huge burst of litigation around economic and social rights. In common law countries and in civil law countries, in the global North, and in the global South, and in almost all regions of the world, courts have begun to interpret economic and social rights and provide remedies. This has happened in two ways.

In those countries where there is no explicit charter of economic and social rights, courts have recognized these rights by implication and through a process of interpretation. South Asia provides an illustration of this approach.¹ Most of the countries in South Asia do not explicitly recognize socio-economic rights in their constitutions, barring a few labour related rights. Yet this has not prevented the courts of Bangladesh, India, Pakistan and Sri Lanka from giving effect to socio-economic rights by way of constitutional interpretation.

In other countries like Argentina, Brazil, Colombia and South Africa, the constitution recognizes economic and social rights and this has provided a stronger conceptual base for courts from those countries to recognize these rights. Several regional human rights bodies have also begun to interpret economic and social rights as part of their work.²

Previously, the debates in this area revolved around whether economic and social rights were capable of supervision and review through the courts. Today, the debates have moved on. Today, the debates centre on how the courts can best recognize these rights; what new remedies the courts should devise to ensure effective implementation; how

¹ See Mario Gomez, 'From Rhetoric to Realization: Delivering Socio-Economic Rights Through Courts and Commissions' in Raj Kumar and Srivasta (eds), *Human Rights and Development: Law, Policy and Governance* (LexisNexis 2006) 65 – 94.

² See generally Malcolm Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International Law* (Cambridge University Press 2008) and Malcolm Langford *Litigating Economic, and Cultural Rights: Achievements, Challenges and Strategies* (Centre on Housing Rights and Evictions 2003).

they can be enforced against private actors; and how courts should balance progressive realization with immediate implementation.³

Constitutional Reform in Sri Lanka

Viewed against these global developments, one would have assumed that the debate on constitutionalizing economic and social rights in Sri Lanka was ‘done and dusted’. The Draft Constitution of 2000 and the Draft Bill of Rights of 2006 guarantee a gamut of ESCRs as well group rights. Both sets of proposals provides for judicial enforcement on the basis of progressive realization. It would have been safe to have assumed that Sri Lanka too would follow the same pattern as part of its current constitutional reform process. However, this does not seem to be the case and there is still some doubt as to whether Sri Lanka should explicitly constitutionalize economic and social rights. The report of the Public Representations Committee (PRC), which entertained proposals from the public on constitutions reforms, makes detailed recommendations in favour of constitutionalising ESCRs. Based on the proposals received, the report recommends the judicial enforcement of these rights. Some of these proposals are discussed in a subsequent section.

Within this context, this paper explores the competing arguments on constitutionalizing economic and social rights, discusses some of the global and Sri Lankan jurisprudence and proposes some options for Sri Lanka.

Progressive Realization v Immediate Enforcement

One of the features of the international formulations of economic and social rights is the progressive nature attached to most of these rights. According to the International Covenant on Economic, Social and Cultural Rights (ICESCR), the rights are subject to the qualification that their ‘full’ realization must be progressively achieved according to maximum available resources.⁴ Despite this formulation the Committee on Economic, Social and Cultural Rights has identified the following rights in the ICESCR as being capable of immediate implementation:

Non-discrimination in the enjoyment of rights⁵

Fair and equal wages; equal pay for equal work by men and women⁶

The right to form trade unions and the right to strike⁷

The protection of children from economic and social exploitation⁸

³Mario Gomez, ‘Implementing Socio-Economic Rights in the New Constitution of Nepal’ in Bipin Adhikari (ed) *Nepal: Design Options for the New Constitution* (Nepal Constitution Foundation Tribhuvan University Faculty of Law 2010) 306 – 318.

⁴Article 2 of the ICESCR.

⁵Article 3 *ibid.*

⁶Article 7(a)(i) *ibid.*

⁷Article 8 *ibid.*

⁸Article 10(3) *ibid.*

Compulsory primary education⁹

The right of parents to choose schools for their children¹⁰

Right to establish and direct schools¹¹

Freedom for scientific research and creative activity¹²

The Committee has also noted that a state where significant numbers are deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education, would prima facie be failing to discharge its obligations under the Covenant.¹³

One of the challenges for human rights lawyers, judges and social movements, is to strike an appropriate balance between the progressive realization of these rights and their immediate enforceability. This is a challenge both at the stage of constitutional formulation and at the stage of argument and judicial interpretation. The South African Bill of Rights remains a source of much inspiration. Although much has been written and spoken about it, the way the South African constitution entrenches economic and social rights provides guidance for any other constitution making exercise.

One of the key points about the South African constitution is the distinction the constitution draws between one category of economic and social rights that are immediately enforceable and another set of rights that is to be implemented progressively, reasonably and in accordance with available resources.

Thus the right to emergency medical treatment; the right to a basic education and the right against forced evictions are among those rights that are subject to immediate implementation. In these cases, the state cannot argue that the lack of resources prevents it from guaranteeing these rights immediately since the constitutional right is couched in categorical terms.

Other rights such as the right to adequate housing; the right to health care services; reproductive health care; sufficient food and water, and to further education are to be realized progressively.¹⁴ The constitution recognizes that these rights cannot be enforced immediately and instead requires the state to take reasonable measures, within available resources, to achieve the realization of these rights in a progressive way.

The Arguments against Economic and Social Rights

Constitutionalizing economic and social rights does raise several questions. The following is a summary of some of the objections against economic and social rights:

Economic and social rights are ambiguous and cannot give rise to concrete legal claims. They vary depending on the state of economic progress of a country.

⁹ Article 13(2)(a) *ibid.*

¹⁰ Article 13(3) *ibid.*

¹¹ Article 13(4) *ibid.*

¹² Article 15(3) *ibid.*

¹³ General Comment No 3, 1990 by the Committee on Economic, Social and Cultural Rights.

¹⁴ See sections 26, 27 and 29 of the Constitution of South Africa.

Economic and social rights are not rights in the same way civil and political rights are. They should influence policy but are not legally enforceable rights and hence cannot lay a claim to constitutional recognition.

Social and economic matters are best dealt with by the legislature and through democratic contestation. It would violate the separation of powers doctrine should the judiciary be given the power to enforce them and determine governmental priorities. Including economic and social rights in the Constitution gives an unelected and unaccountable group of persons the power to adjudicate claims which are best left to the legislature and the executive.

Judges have no expertise to decide on economic and social issues.

The following section deals with some of the competing arguments around economic and social rights.

Critiques of Economic and Social Rights

The most fundamental critique of the inclusion of social and economic rights in constitutions is the argument that they, being 'positive' rights, are not rights at all and should not be recognized by the state. According to this view, a negative right is a 'right to be free from government', while a positive right is a right to compel provision of a government service.¹⁵ According to Roger Pilon, the right to be provided with assistance compels others -- the taxpayers from whom the government takes the needed funds -- to provide that service. He argues that this compulsion conflicts with the individual right to freedom -- that is, the right to be free from compulsion -- and that rights that can exist in conflict are logically incoherent and therefore cannot be rights.¹⁶ However, supporters of social and economic rights have responded by arguing that rights cannot be easily divided into categories. They say that rights that are widely seen as negative also require government action; for example, the right to life requires the state to spend resources to protect its citizens from threats to their lives, and the right to property requires the state to enforce laws against trespassing.¹⁷ Thus, such 'compulsion' of private citizens is not a unique property of so-called negative rights. Conversely, social rights can sometimes be 'negative.' Frank Michelman offers the example of a court protecting the right to housing by striking down laws that artificially inflate the price, or reduce the availability, of housing.¹⁸

Another critique of economic and social rights is that they interfere with core democratic processes. Aryeh Neier, a co-founder of Human Rights Watch, argues that the distribution of resources is a central political issue within any society, and should, therefore, be

¹⁵ Frank B. Cross, 'The Error of Positive Rights', 48(2001) *UCLA LRev* 857, 864.

¹⁶ Pilon, 1979a, 1184-85.

¹⁷ See Cass R. Sunstein, 'Confusing Rights: A Reply to Hoco' 10(1) (2005) *The Independent Review* 133, 146 (arguing that the right to property defined in the 5th Amendment of the U.S. Constitution requires the government to protect property rights, not to refrain from itself violating them).

¹⁸ Frank Michelman 'The Constitution, Social Rights, and Liberal Political Justification', 1 *Int'l J Const L* 13 (2003) 17.

subject to democratic contestation.¹⁹ He claims that removing economic questions from the democratic process ‘carve[s] the heart out of that process’, and represents a transfer of power from the electorate to an elite group (legal experts). He argues that the same problems do not arise by constitutionalizing civil and political rights because they are settled ethical questions that should not be subject to debate -- no government should be allowed to torture, for example, and there is no question that the legality of torture should not be open to political compromise.²⁰

Neier is also concerned that the variability of social rights may undermine civil and political rights. Social rights are context-dependent. The degree to which a state can and should fulfil economic and social rights varies based on the country’s level of development. He argues that, therefore, recognizing social rights as rights may threaten the absolute character of political rights, as authoritarian governments will argue that, just as social rights are limited by development, political rights need to be determined and limited by specific social and political conditions. Thus, Neier fears that compromises regarding the fulfilment of social rights will ‘legitimize compromises as far as civil and political rights are concerned’.²¹

Other scholars, however, suggest that economic and social rights are not as negotiable as Neier contends. Samuel Moyn notes that, although the General Comment 3 to the International Convention on Economic, Social, and Cultural Rights acknowledges that these rights are subject to progressive realization, the Comment places on states an affirmative obligation to immediately take steps toward realization. The Comment also requires states to provide a minimum core of protection for at least some economic and social rights.²²

Another argument against social and economic rights is that courts lack the institutional capacity needed to effectively adjudicate these rights. Frank Cross suggests that social rights are consequentialist -- meaning that the outcome rather than the intent of government programs is what matters -- and that, in deciding social rights cases, courts are thus ‘called upon to command a policy that will reach a given end.’²³ He offers the right to health as an example. A court, in adjudicating a right to health case, would need to determine whether a government policy satisfies the right to health, and, if it finds that it does not, command the government to implement a policy that satisfies the right. However, he notes that health-care policy is extremely complex -- any health care policy will have strengths and weaknesses, as well as a financial cost -- and argues that, due to the judiciary’s relative lack of access to information compared to the legislature or executive branches, ‘it is unclear that the judiciary is the best branch for making wise decisions about positive rights’.²⁴

Other scholars, however, have responded by noting that the enforcement of constitutional protections of civil and political rights can also involve courts in

¹⁹Aryeh Neier, ‘Social and Economic Rights: A Critique’ 13(2) (2006) Human Rights Brief 1, 2.

²⁰Ibid.

²¹Ibid 3.

²²Samuel Moyn ‘Social Rights: Threshold Issues and ESCR Principles’ Harvard Law School, Cambridge. 14 Apr. 2016. Lecture.

²³Frank B. Cross, ‘The Error of Positive Rights’, 48(2001) UCLA L Rev 857, 902.

²⁴Ibid 905.

complicated policy decisions. In the United States, for example, the complexities of education policy did not prevent courts from enforcing school desegregation.²⁵ Moreover, courts can uphold their responsibility to enforce social rights while limiting their involvement in policy decisions by providing individualized remedies to plaintiffs.²⁶

Additionally, the Constitutional Court of South Africa has pioneered a 'dialogical' form of social rights enforcement -- 'weak form review' -- where the Court identifies violations of social rights but refrains from prescribing specific remedies, instead requiring the political branches of government to find and implement new policies that will protect the right. Cass Sunstein and Mark Tushnet have praised this approach, arguing that it is the best way to enforce social rights without expanding courts' powers at the expense of the political branches of government.^{27 28} In practice, however, this model has its own problems which will be discussed below.

A final critique, developed by David Landau, focuses on the real-world outcomes of social rights protections. Landau argues that the incorporation of these rights into constitutions produces jurisprudence that disproportionately benefits the upper and middle classes rather than socially and economically marginalized groups.²⁹ He contends that this is a result of two factors: First, contrary to the expectations of many theorists, courts are often pro-majoritarian actors that favour middle class groups in order to gain their political support³⁰; second, prevailing judicial ideologies and the realities of limited resources produce rulings that fail to benefit the lower classes.³¹

Landau argues that constitutional courts dealing with social rights issues have adopted two main approaches toward enforcement: an individualized model where courts uphold the rights of individual petitioners but avoid applying remedies that would have systemic effects, and a negative injunction model in which courts strike down cuts to benefits in favour of maintaining the status quo.³² He suggests that courts use these models in the application of social rights because they closely resemble 'more traditional modes of judicial review', and 'allow courts to carry out social rights enforcement... without worrying that they will be seen as overreaching beyond the traditional tasks of courts'.³³ However, he argues that both models tend to benefit higher income groups.³⁴

According to Landau, the middle and upper classes are more likely to benefit from individualized enforcement because, being educated, they are more likely to be aware of their rights, and, due to their greater financial resources, they have better access to legal

²⁵Malcolm Langford, 'The Justiciability of Social Rights: From Theory to Practice', in Malcolm Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* 35-37 (Cambridge University Press 2008).

²⁶Kent Roach, 'The Challenges of Crafting Remedies for Violations of Socio-economic Rights', in *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* 46.

²⁷Cass Sunstein, *Designing Democracy: What Constitutions Do* (Oxford University Press 2003) 221-37.

²⁸Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press 2009) 227, 264.

²⁹David Landau, 'The Reality of Social Rights Enforcement', 53 (2012) Harv Int'l LJ 189.

³⁰Ibid.

³¹Ibid.

³²Ibid 190.

³³Ibid 199.

³⁴Ibid.

representation.³⁵ Additionally, negative injunctions tend to benefit the middle class rather than the poor because governments usually attempt to cut social programs that benefit the middle class before cutting those aimed at the poor. Therefore, the first rights litigation to come before the courts aims to protect middle-class entitlements.³⁶ Moreover, Landau argues that courts are often populist, 'issuing decisions that are calculated... to gain strong support from the middle class groups'. He explains that, for example, courts are often willing to issue injunctions against austerity measures that harm the middle class because they 'have the support of the median voter when they do so, which may insulate them from retaliation'.³⁷

Landau, however, argues that courts can effectively protect the poor through the use of structural injunctions. Structural injunctions, he explains, are structural orders from the court 'to the bureaucracy in order to make it change policy in an area'.³⁸ These 'super-strong remedies' benefit the poor by 'transform[ing] bureaucratic practice'.³⁹ However, Landau also suggests that such injunctions only work well in specific contexts.⁴⁰ Structural injunctions will be discussed further below.

The Jurisprudence

While scholars and policy makers have debated the value of including economic and social rights in the constitution, courts in many parts of the world, have already begun developing a substantial body of jurisprudence. The global jurisprudence clearly establishes that these economic and social rights are capable of judicial enforcement and are not as vague as some scholars make it out to be. This section discusses some of the global jurisprudence and the next section looks at how the Sri Lankan judiciary has approached economic and social rights even though these rights do not form part of the Bill of Rights of the current constitution.

Before we proceed to an analysis of the case law two points are worth noting. The South African and Indian jurisprudence – especially the cases of *Grootboom*, *Mazibuko* and *Francis Coralie Mullin* - have established at the least this, that states cannot evade their 'basic' or 'minimum' obligations by pleading a lack of resources. Economic and social rights although they entail the expenditure of resources, also entail a threshold level below which state conduct cannot sink.

The case law also notes that the concept of progressive achievement encapsulated in these rights enables courts to monitor their realization over a period of time. In the case of economic and social rights, state obligations are unlikely to be static, but are likely to change to reflect the progressive nature of the rights. Cases from South Africa, Colombia, and Brazil illustrate the challenges of judicial enforcement of social and economic rights.

³⁵ Ibid 200.

³⁶ Ibid.

³⁷ Ibid 200.

³⁸ Ibid 223.

³⁹ Ibid 190.

⁴⁰ Ibid 236.

South Africa

The Constitutional Court of South Africa first addressed the right to health in *Soobramoney v. Minister of Health*.⁴¹ The case involved a petitioner who required weekly dialysis—and was generally in very poor health, with a life expectancy of 18 months even with treatment—who was denied treatment at a government hospital. The hospital only had the resources to provide dialysis to 78 patients per week, and gave priority to patients with better prognoses than Mr. Soobramoney.⁴²

Soobramoney then petitioned the High Court at Durban, which ordered the hospital to provide treatment.⁴³ On appeal, the Constitutional Court reversed the decision, rejecting Soobramoney’s argument that dialysis qualified as ‘emergency medical treatment’—an absolute right under the Constitution—holding that kidney dialysis is instead a more routine form of healthcare to which the government must only “provide reasonable access.”⁴⁴ Judge Richard Goldstone, who sat on the Court at the time, recalls that the Court was cognizant of resource limitations, explaining that “[i]n the judges’ conference room, it was noted that ordering more dialysis machines would open the door to situations where individuals could demand non-emergency treatments that would cost hospitals significant amounts of money.”⁴⁵

Thus, the Court found that the language contained in Section 27 of the South African Constitution, requiring that “the state take reasonable legislative and other measures, within its available resources” to realize the right to health, allowed the judiciary to determine whether the state’s refusal to provide dialysis to everyone in need of it was, in light of resource constraints, reasonable. Mirja Trilsch argues that this allowance for reasonable realization is fully consistent with the ICESCR, and that the drafters of the South African Constitution, in fact, “clearly drew inspiration from [the Convention].”⁴⁶ The language of the PRC’s proposal also seems to allow courts to employ a reasonableness test. The right to enjoy “the highest attainable standards of... health care,”⁴⁷ leaves unclear the question of what standard is attainable, which would allow Sri Lankan courts to balance the right to health against the resources available to state health care providers. The final constitutional language framing economic and social rights will determine the degree of freedom that courts will have in finding this balance.

⁴¹ *Soobramoney v Minister of Health* (Kwazulu-Natal) (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997)

⁴² Richard J. Goldstone, ‘A South African Perspective on Social and Economic Rights’, (2006) Hum Rts Brief, 4, 5.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ Mirja Trilsch, ‘What’s the use of socio-economic rights in a constitution? - Taking a look at the South African experience’ 42(4) (2009) *Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America*, 552, 556.

⁴⁷ Report of the Public Representations Committee (April 2016) 100.

Government of the Republic of South Africa v. Grootboom,⁴⁸ decided two years after *Sooibramoney*, remains one of classic cases in the area. In *Grootboom*, the Constitutional Court of South Africa ruled that the eviction of 900 residents from informal homes on private land intended for the construction of formal low-cost housing constituted a violation of the constitutional right to shelter. The court ruled that section 26 of the Constitution, recognizing a right to 'access to adequate housing' imposed on the state at least a negative obligation to avoid depriving the residents of access to housing.⁴⁹

The Court also applied a reasonableness test to the government's housing policies and found the failure to provide access to temporary shelter to those without homes to be unreasonable.⁵⁰ According to the Court there were three elements of the state's obligation in relation to the right to housing: (1) to take reasonable measures; (2) to achieve the progressive realization of the right; and (3) to do so within available resources. This required that the state put in place a coherent public housing programme that was aimed at progressively realising the right to housing. The measures that the state put in place must also be capable of being reasonably implemented.

To meet the test of reasonableness the measures taken by the state must take into account short, medium and long term needs and pay special attention to housing crises. It should be sensitive to the circumstances of all groups in society and those groups who are most in need should not be ignored. Thus although the programme may be statistically successful, it must pay attention to the needs of all groups to pass the test of reasonableness.

The Court observed that in this case there was no provision in the state's housing programme to meet the needs of those who were in desperate need or who were in situations of crisis. People in desperate need were those who had no access to land, no roof over their heads, people who were living in intolerable conditions and people who were in crisis because of natural disasters such as floods and fires, or because their homes were under threat of demolition.⁵¹

The Court therefore held that the state was required to act to meet its obligations under section 26 and issued a declaratory order that formally obligated the government provide relief to homeless persons without access to shelter.⁵² With this ruling, the Court introduced 'weak-form review', which, as noted above, has been praised by several legal theorists. However, in the years since the decision, South African and American scholars have argued that, despite its innovative jurisprudence, *Grootboom* decision did not produce its intended effect. The South African government, they contend, did not revise its policies in response to the decision, and has, in fact, done very little to expand access to housing.⁵³ Some of these scholars have advocated the alternative practice of 'engagement,' in which the court orders the state to negotiate with the plaintiffs to reach

⁴⁸ *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000). (Hereafter *Grootboom*)

⁴⁹ *Ibid* 34.

⁵⁰ *Ibid* 52-53.

⁵¹ *Ibid* 52.

⁵² *Ibid* 96.

⁵³ See Theunis Roux, 'Principle and Pragmatism on the Constitutional Court of South Africa', 7(2009) *Int'l J Const L* 106, 136.

a mutually acceptable solution.⁵⁴ Others argue that weak form review is a useful starting point, but that apex courts' powers to enforce their directives need to be somewhat stronger.⁵⁵ Rosalind Dixon, for example, contends that weak form review is desirable because it allows constitutional 'dialogue' between courts and the legislature. However, she argues that courts need to have 'a much greater capacity and responsibility to counter legislative blockages to the realization of constitutional rights' but that they should nonetheless still 'defer to legislative sequels that evidence clear and considered disagreement with their rulings'.⁵⁶

Colombia and Brazil

A similar notion of 'vulnerability' or 'crisis' has had a bearing on the way the Colombian Constitutional Court has interpreted economic and social rights. Colombia entrenched economic and social rights in its 1991 Constitution and entrusted the Constitutional Court with the task of safeguarding the 'integrity and supremacy of the constitution'. Since then the Constitutional Court has begun to develop these rights in an imaginative way. While many of the socio-economic rights are progressive in nature the Court has held that some of the rights may be immediately enforceable given the right set of circumstances.⁵⁷

Where it could be established that the violation will affect fundamental rights such as the right to life, personal dignity or integrity; or where there was a violation of the minimum conditions for a dignified life; or where there was an unconstitutional state of affairs, then the Constitutional Court of Colombia has shown a willingness to immediately enforce socio-economic rights.

For example, although the right to social security is not immediately enforceable, the Colombian Constitutional Court has recognized that the right may be immediately applicable in the following circumstances:

- Where the individual is in a situation of manifest vulnerability because of his or her economic, mental or physical situation
- Where there is no possibility for the individual or his or her family to take action to remedy the situation
- Where the state has the possibility to remedy or mitigate the situation
- Where the state's inaction or omission will affect the individual's ability to enjoy minimum conditions of a dignified life

⁵⁴Brian Ray, 'Engagement's Possibilities and Limits as a Socioeconomic Rights Remedy', 9(2010) Wash U Glob Stud L Rev 399.

⁵⁵See Rosalind Dixon, 'Creating Dialogue about Socioeconomic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited', 5 (2007) Int'l J Const L 391.

⁵⁶ See *ibid*, 393.

⁵⁷ See Magdalena Sepulveda, 'The Constitutional Court's Role in Addressing Social Injustice' in Malcolm Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International Law* (Cambridge University Press, 2008) 144.

If these conditions are met the Court has shown a willingness to order the state to immediately comply with the duty to provide social assistance.⁵⁸

'Human dignity' has also attracted the Indian courts. While the Indian Supreme Court has acknowledged that economic and social rights were resource linked and bore a close strong link with a country's level of economic achievement, it has observed that there were minimum levels below which even these rights could not sink. One of those threshold levels was the concept of human dignity.⁵⁹

The Colombian Constitutional Court has also used the notion of an 'unconstitutional state of affairs' to enforce socio-economic rights.⁶⁰ The Court has found that an unconstitutional state of affairs will exist where:

There are systematic and widespread violations of several constitutional rights that affect a significant number of people
The violations of these rights cannot be attributed to only one State authority, but are due to structural deficiencies.

In these situations the court has encouraged collaboration among different state agencies to resolve the unconstitutional state of affairs. We saw above that the Committee on Economic, Social and Cultural Rights took a similar stance in its General Comment No 3. What the jurisprudence from South Africa, Colombia and India show, is that, although many economic and social are progressive in nature, in some cases, the violation may be of such a nature as to require immediate implementation.

In Colombia and Brazil, judicial protection of social rights has often taken the form of individual enforcement. The 1991 Colombian Constitution created a streamlined judicial procedure that allowed individuals to bring suits alleging violations of their constitutional rights. The procedure, the *tutela*, was designed to allow individuals to bring suit without the assistance of an attorney,⁶¹ and allowed any person to bring forth a claim alleging a violation of his or her individual rights, the rights of a group, or the rights of a vulnerable person.⁶² The procedure guaranteed a fact judicial process; lower courts had to decide cases within 10 days, and appeals courts within 20.⁶³ Moreover, under the *tutela* scheme, "any judge was qualified to order the government to take specific actions to protect the [petitioner's] right,"⁶⁴ and government officials were required to immediately provide funds for the court-ordered medical treatment or risk being found in contempt of court.⁶⁵

⁵⁸ See Sepulveda (n 58).

⁵⁹ *Francis Coralie Mullin v The Administrator, Union Territory of Delhi* (1981) 2 SCR 516 at 529.

⁶⁰ See Sepulveda (n 58).

⁶¹ Landau (n 30) 185.

⁶² Katharine G. Young & Julieta Lemaitre, 'The Comparative Fortunes of the Right to Health: Two Tales of Justiciability in Colombia and South Africa', 26(2013) Harv Hum Rts J 179, 185 (hereafter Young & Lemaitre).

⁶³ Landau (n 30) 205.

⁶⁴ Young & Lemaitre (n 63) 185.

⁶⁵ Colleen Flood & Aeyal Gross, 'Litigating the Right to Health: What Can We Learn from a Comparative Law and Health Care Systems Approach?' 16(2) (December 2014) Health and Human Rights, Health Rights Litigation 62, 68. (Hereafter Flood & Gross)

Tutelas quickly became a vehicle for individual enforcement of social rights; courts had, in the words of a Colombian judge, no capacity to ‘hold for all those who find themselves in the same situation as the petitioner’.⁶⁶ While an effective remedy for relief on an individual basis, the *tutela* had significant judicial efficiency costs. There were 2,725,361 *tutela* decisions between 1999 and 2010, a substantial component of which dealt with health (41.5% in 2008).⁶⁷ Additionally, according to Colleen Flood and Aeyal Gross, the combination of the individual nature of the decisions and the fact that they were immediately binding on the government cause the Colombian government to lose its “bargaining power to negotiate prices (with drug companies, hospitals, physicians, and other providers),” leading to “galloping public sector costs put the entire universal system at risk.”⁶⁸ Moreover, David Landau explains that “*tutelas* dealing with health care and pensions eventually came to dominate the docket of the [Constitutional] Court’.⁶⁹ Landau argues that the practice disproportionately benefited wealthier groups, contending that ‘[b]ecause middle and upper class groups were much more likely to know their rights and to be able to afford to go to court, they naturally filed the bulk of the claims’.⁷⁰

The right to health is also included in the Brazilian constitution⁷¹, and Brazilian courts have, as in Colombia, typically protected the right on an individual basis.⁷² Landau notes that, in Brazil, ‘[c]ase law appears to pay little attention either to resource limitations or to the economic position of the petitioner in these individual cases’, and argues that the courts’ failure to adjudicate the right to health with cognizance of the systemic context or with any consideration of individual plaintiffs’ ability to pay for healthcare produces immense inefficiencies.⁷³

Octavio Luiz Motta Ferraz argues that this failure by the courts to take individual circumstances into consideration has also produced gross inequalities in healthcare provision. According to Ferraz, in Brazil, “all that a claimant must do to win his or her case under this interpretation is to prove that he or she has an unsatisfied health need as documented by a doctor’s prescription.”⁷⁴ Mirroring Colombia, all studies of Brazilian health-rights adjudications have noted “a high prevalence of individual claims rather than collective claims and an extremely high success rate for claimants.”⁷⁵ The Brazilian federal government and the governments of Brazilian states substantially increased their healthcare budget to comply with court orders.⁷⁶ Ferraz argues that this shows that “Brazilian courts have been interfering with public health policy through right-to-health litigation by issuing daily orders that compel the state to provide drugs and other health

⁶⁶Landau (n 30) 215.

⁶⁷ Young & Lemaitre (n 63) 186.

⁶⁸ Flood & Gross (n 66) 68.

⁶⁹ Landau (n 30) 209.

⁷⁰ Ibid 214.

⁷¹Brazilian Constitution of 1988, Art. 6. (Stating that “[e]ducation, health, nutrition, labor, housing, leisure, security, social security, protection of motherhood and childhood and assistance to the destitute, are social rights, in accordance with this Constitution.”)

⁷²See Florian F. Hoffmann & Fernando R.N.M. Bentes, ‘Accountability for Social and Economic Rights in Brazil, in *Courting Social Justice*; in Varun Gauri & Daniel M. Brinks (eds) *Courting Social Justice* (Cambridge University Press 2008) 100.

⁷³Landau, (n 30) 231.

⁷⁴ Octavio Luiz Motta Ferraz, ‘The Right to Health in the Courts of Brazil: Worsening Health Inequities?’ 11(2) (2009) *Health and Human Rights* 33, 35. (Hereafter Ferraz)

⁷⁵ Ibid 36.

⁷⁶ Ibid.

treatments to thousands of patients,”⁷⁷ and that the effect of these rulings has been to seriously undermine government healthcare planning, because “[b]udgets and health policy plans must be changed daily, shifting resources from the areas and policies for which they were targeted, in order to cover the new expenditure created by court order.”⁷⁸ Moreover, Ferraz holds that because, as in Colombia, it is easier for those with resources and education to take advantage of the legal system, higher income groups have disproportionately benefited from right-to-health litigation.⁷⁹

India

The Indian Supreme Court is notable for experimenting with structural remedies to rights violations. In *People's Union for Civil Liberties v. Union of India & Others*, an NGO challenged the Indian government's grain distribution policies, arguing that they violated the right to be free from hunger (an extension of the constitutional right to life). To protect the farming industry, the government was refusing to distribute grain reserves despite famine conditions existing in parts of the country. The Indian Supreme Court held in favor of the NGO, and then took the additional step of establishing its oversight of grain distribution. The Court ordered the creation of a series of distribution programs to ensure that the grain reached poor families.⁸⁰ ⁸¹ The Court directed affected states to ensure that all Public Distribution System shops were reopened and to “identify families below poverty line in a time-bound schedule and information was sought on the implementation of various government schemes that were meant to help people cope with the crisis.”⁸² Additionally, the Court ordered the government to recognize the benefits provided under eight food programmes as an entitlement, and, furthermore, ordered state governments in affected regions “to provide cooked mid-day meals for all children in government and government-assisted schools.”⁸³ Landau describes the intervention as highly successful, and argues that the experience indicates that structural injunctions can work very well, at least in specific circumstances. He suggests that “courts might be better at building new public policies than at attempting to work within already established and entrenched policies and bureaucracies’.”⁸⁴

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ *Ibid.* 39-40.

⁸⁰ Landau (n 30) 236-37.

⁸¹ Lauren Birchfield & Jessica Corsi, ‘Between Starvation and Globalization: Realizing the Right to Food in India’, 31(2010) *Mich J Int'l L* 691, 700.

⁸² Uday Shankar and Divya Tyagi, ‘Socio-Economic Rights in India: Democracy Taking Roots’, 42(4) (2009) *Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America*, 527, 544.

⁸³ *Ibid.*

⁸⁴ Landau (n 30) 189.

Economic and Social Rights in Sri Lanka

This section offers a critical assessment of the respect and protection already afforded to economic and social rights in Sri Lanka. Two main arguments are made in this regard. One is that despite the seeming resistance to the inclusion of economic and social rights in a new constitution, the Sri Lankan state has already accepted responsibility for a considerable set of economic and social rights. The second is that, while the Sri Lankan judiciary has made only modest progress in the enforcement of economic and social rights through interpretation, that judicial contribution has to be viewed in the broader context of a weak judicial culture of defending human rights including the 'core' of civil and political rights, such as the right to be free from arbitrary arrest and detention. In that light, the (albeit weak) attempts made by the judiciary to recognise and to enforce certain economic and social rights assumes some significance.

Cultural Rights in Sri Lanka

The guarantee of cultural rights in the Sri Lankan context can be achieved through existing guarantees of civil and political rights and also through the adoption of effective policies and constitutional guarantees for the devolution of power. The more difficult question in Sri Lanka would be whether the personal laws that are currently enforced will be reformed to ensure respect for the right to equality. It has now been established that the *Tesawalamai* law and the Muslim law in particular contain provisions and practices that violate the right to equality of women and in certain cases does not promote the best interest of the child. It is noteworthy that in terms of resources, since the adoption of the personal laws during the colonial era the state has allocated considerable resources to guarantee the implementation of these rights. In the case of Muslim law this involves the establishment and maintenance of the *Quazi* courts and in the case of Kandyan law it involves the provision of special marriage registration.

A Welfare Economy and Guarantee of Human Rights

Since the late 1930s Sri Lanka has introduced legislation and policy which essentially guaranteed respect for several economic and social rights by the state.⁸⁵ With the introduction of the universal right to vote, and perhaps influenced by the development of a welfare state in the United Kingdom, Sri Lanka too began to adopt strong welfare policies.⁸⁶ The provision of universal access to health care and universal access to primary and secondary education along with legislative policy on labour guaranteed a 'minimum core' of economic social rights from the 1940s. Since then, the state also accepted the responsibility of providing subsidies for identified goods and services along with welfare schemes for poor and/or certain vulnerable segments of society.⁸⁷

⁸⁵ See for instance *Education Act* of 1943 and *Health Act* of 1953. The Department of Social Services was established in 1948.

⁸⁶ Universal franchise was introduced through the Donoughmore Constitution in 1931.

⁸⁷ For instance the current welfare programmes of the state include monthly financial assistance for the 'poorest of the poor' (known as the *Samurdhi* payment); a pension for the elderly; a monthly financial assistance for persons with disability; and subsidies for fuel and fertilizer.

Commitments to social justice and the strengthening of the economy and democracy seem to have influenced policy makers in developing the Sri Lankan welfare state.

Since the introduction of these policies, however, the notion of 'welfare' has morphed into political patronage.⁸⁸ Particularly with the politicization of the public service and the entrenchment of majoritarianism through the 1972 Constitution, political patronage became the main qualification for receiving state welfare. The slow growth of the economy combined with a commitment by the state to maintaining state-sponsored education, health and other subsidies within this social context has spawned an entitlement culture. The lack of economic opportunities and a fairly consistent policy of welfare combine to undermine the agency of the People and provide a fertile context for political patronage to take root.

As discussed in the next section, under the 1978 Constitution, the judiciary has not been able to transform this welfare approach to education, health care and employment to a rights based approach. The jurisprudential developments in comparative jurisdictions and in the international sphere have had minimal (if any) impact on the Sri Lankan judiciary in this regard. The Executive and Legislative branches of government on the other hand were actively transforming the welfare system to one of political patronage during the same time. Particularly after the 1972 Constitution, employment in the public service, access to education and the grant of financial assistance was heavily politicised and political patronage became a primary means of accessing these services.

The judicial enforcement of economic and cultural rights through the proposed new constitution for Sri Lanka therefore assumes significance. On the one hand, it would only be enforcing human rights that have already been recognised and respected through positive undertakings by the state. On the other hand, for judicial enforcement of these rights to be effective, economic and social claims which are mostly being catered to through political patronage must be transformed into claims that can be made as of a right in the political imagination of the people.

Jurisprudence under the 1978 Constitution

The official record of the proceedings in the drafting of the Second Republican Constitution does not reflect a sustained debate on the proposed bill of rights or on the Directive Principles of State Policy. In the submissions that were made before the Select Committee of the National State Assembly that was appointed to 'consider the revision of the constitution', proposals were made in support of the expansion of the FR jurisdiction in comparison to the 1972 Constitution and in support of the provision for the judicial enforcement of those rights. For instance, in the Memorandum of the Sri Lanka Freedom Party it was stated as follows:

The concept of fundamental rights was first introduced into our Constitution in 1972. Since then many significant developments in the field of human rights have taken place at the international level, and a more elaborate definition of fundamental

⁸⁸ See for instance Nira Wickramasinghe, *Sri Lanka in the Modern Age: A History of Contested Identities* (Vijitha Yapa 2006) 305.

*rights is now almost universally accepted. We are of the view, therefore, that a more comprehensive statement of fundamental rights should be formulated for incorporation in the Constitution by reference, in particular, to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights ...*⁸⁹

Proposals were also made for incorporation of all the human rights declared in the UDHR by the Sri Lanka *Vimukthi Balavegaya*.⁹⁰ They further argued that the Court should have the power to strike down legislation that was inconsistent with FR. Curiously, neither the Civil Rights Movement nor the Centre for Society and Religion make a case for the inclusion of economic, social and cultural rights in the Constitution before the Select Committee. The submissions made by those organizations focus on expanding the civil and political rights that had been recognised under the 1972 Constitution and also on emergency powers. The 2000 Draft Constitution and the 2006 draft bill on fundamental rights, however, specifically recognise economic, social and cultural rights and provide for their judicial enforcement.⁹¹ These proposals envisage a strong guarantee of ESCRs and other group rights.

Perhaps reflecting the dominant approach to constitution making at that time, the 1978 Constitution only provided for the enforcement of civil and political rights. Following the model of the Indian (and the earlier Irish) Constitution, economic, social and cultural interests were enumerated in terms of obligations of the state under Directive Principles of State Policy (DPSP) which cannot be subject of judicial enforcement.⁹² This arrangement entrenched in Sri Lankan constitutional discourse affirmed the assumption that economic, social and cultural rights are not capable of judicial enforcement.

The jurisprudence of the Court, spanning almost four decades, reveals a somewhat modest departure from that assumption. That departure is not due to a conscious turn in the judicial mind. Rather it seems to have occurred in fits and starts based on numerous variables. These variables include: judicial personalities; judicial independence; receptivity to international law in the interpretation of domestic law; judicial perceptions of the 'significance' of the issue; judicial comprehension of the scope of a given fundamental right; and civil society activism. This nature of the evolution of Sri Lanka's fundamental rights jurisprudence was met with inadequate awareness, lack of critical debate and weak engagement by wider society. Analytical assessment and debate on the

⁸⁹*Report of the Select Committee of the National State Assembly Appointed to Consider the Revision of the Constitution*, (Parliamentary Series No 14 Second National State Assembly 22 June 1978) 165.

⁹⁰*Ibid* 228.

⁹¹ The Draft Constitution of 2000 recognised the following ESCRs rights – For every person the right to enjoy and promote culture and the use of language (Art 19); right to safe conditions of work (Art 24); right of access to health care including emergency services (Art 25(1)(a)). For every citizen the right to sufficient food and water (Art 25(1)(b)); right to appropriate social assistance (Art 25(1)(c)); protection from arbitrary eviction (Art 25(3)).

The following ESCRs were proposed in the Draft Bill of Rights of 2006 – For every person the right to enjoy and promote culture and use of language (Art 14G); right to education (Art 14O). For every citizen labour rights (Art 14Q); the right to health (Art 14R); right to sufficient food and water (Art 14S(a)); right to adequate housing (Art 14S(b)); right to appropriate social assistance (Art 14S(c)) and a guarantee against arbitrary eviction (Art 14S(2)).

⁹² Art 29 of the Sri Lankan Constitution.

work of the Court was undertaken exceptionally. Conversations regarding judicial enforcement of fundamental rights rarely (if at all) took place outside of the legal profession; leading civil society activists; and pockets of engaged communities in urban and rural locations. The lack of access to the FR jurisdiction in terms of its geographical location; its method and form of functioning; and linguistic exclusivity further added to this isolated existence of the Court's work in the collective imagination of the polity.

Within this broader context, this section identifies some of the characteristics of the FR jurisprudence of the Court particularly in relation to its enforcement of ESCRs through the broadening of its scope to match developments in international human rights law and Sri Lanka's international legal obligations.

Right to Equality

Equal treatment before the law and equal protection under the law is perhaps the FR that has been litigated on the most in Sri Lanka. Of the 337 judgements on Fundamental Rights that have been officially reported between 1978 and 2010, 230 involved determinations related to the right to equality. In some ways, the jurisprudence on this FR reflects the characteristics of the jurisprudence of the Indian SC under the right to life.⁹³ The right to equal treatment before the law has been subject to broad interpretation and it has essentially been a platform from which the judiciary has often exercised a free hand in self-demarcating its FR jurisdiction. That process, however, is riddled with gaps and complications.⁹⁴ Some aspects of these developments are discussed below.

In spite of the high frequency of consideration of the right to equality by the SC the interpretation of this right has been static. The test for the right to equality remains within the confines of reasonable classification and the notion of treating similarly placed individuals similarly. The requirement of establishing that the complainant was treated in a discriminatory manner in comparison to how others who were treated similar to him were situated were treated was abandoned by the Court in the mid-1990s. Considerations of substantive equality have not (yet) informed the jurisprudence of the Court. The reason for this gap perhaps lies in the fact that the Court's jurisprudence on the prohibition of discrimination is almost non-existent. What is curious to note is that while much of the case-law on FR relates to the right to equal treatment before the law, litigation under the prohibition of non-discrimination is paltry to say the least. The cases of *Seneviratne v UGC*⁹⁵ and *Ramupillai v Festus Perera*, in which the Court examined the right to equality, prohibition of discrimination and affirmative action at length remains

⁹³ Art 21 of the Indian Constitution.

⁹⁴ For discussion in this regard see Radhika Coomaraswamy 'The Sri Lankan Judiciary and Fundamental Rights A Realist Critique' (1987) 6 Colombo LR 158; Mario Gomez, 'Fundamental Rights and the Sri Lankan Supreme Court' (1995) 8 Colombo L Rev 73; Mario Gomez 'The Supreme Court in the 1990s - Controlling Public Power through the Law' (2000) VIII (Part II) Bar Association LJ 54; Deepika Udagama, 'The Democratic State and Religious Pluralism: Comparative Constitutionalism and Constitutional Experiences in Sri Lanka' in Khilani S et al (eds), *Comparative Constitutionalism in South Asia* (OUP 2013); Deepika Udagama 'The Sri Lankan Legal Complex and the Liberal Project: Only Thus Far and No More' in Halliday T C et al (eds), *Fates of Political Liberalism in the British Post-Colony: The Politics of the Legal Complex* (CUP 2012); and Mario Gomez, 'Supreme Court Vetoes Ethnic Quotas: An analysis of Ramupillai v Festus Perera', 20 Law & Society Trust Review (1st and 16th July 1991).

⁹⁵ *Seneviratne v UGC* [1978-79-80] 1 Sri LR 170.

an exception in the jurisprudence.⁹⁶ In a social context in which discrimination based on ethnicity, gender and language etc are a routine aspect of the lived realities of the people, particularly in accessing services to meet their economic, social and cultural rights, the lack of deliberation on such questions by way of judicial determinations within the SC's FR jurisdiction is cause for concern.

Right to Education

It has been argued that the right to education has been recognised by the Sri Lankan judiciary through the broad interpretation of the right to equality. School admissions and university admissions have been challenged before the Court on the basis of violation of the right to equal treatment before the law. In fact over the last five years almost all the cases that have been determined under Art 12(1) were petitions that were in relation to school admissions.⁹⁷ In these determinations the Court has observed that the right to education has been 'long' recognised through judicial interpretation.⁹⁸ Both the *Universal Declaration of Human Rights* and the DPSP are cited in making this observation. In 2008, on this basis, the Court went on to redraft the marking scheme for school admissions.⁹⁹ In the University admissions cases the Court relies on the concept of legitimate expectation in addition to the UDHR and the DPSP in recognising a violation of the right to equality where the state is found to have acted arbitrarily.¹⁰⁰

The conclusion of the Court and the remedy offered in these cases are well received by the general public and is popularly understood as instances of judicial enforcement of the right to education. However, the actual judicial advancements made in these determinations are modest. These cases implicitly recognise the right to *access* to education where the right to equality has been violated through a departure from due process. This is further evidenced by the fact that the judicial opinions do not reflect any discussion or assessment of the 'right to education' as described under the ICESCR. These determinations also suggest that the judicial understanding of economic and social rights is minimal and therefore that the extension of the right to equality to include the right of *access* to education is more likely to be a chance extension of the law rather than a result of deliberate and thought-through judicial activism. Furthermore, the remedies offered by these determinations do not impact on the allocation of resources and neither does it review policy developed by 'experts' in administration. Therefore, it would not be accurate to argue that these cases signify the willingness, capacity and legitimacy of the Court to enforce ESCRs.

The lack of capacity and discernment of the Court in recognising and enforcing ESCRs is perhaps demonstrated in an order made by the Court recently. A child who was thought to have HIV/AIDS was denied access to primary education due to pressure brought on the school principals to deny admission to the child. The mother filed a FR petition before

⁹⁶*Ramupillai v Festus Perera* [1991] 1 Sri LR 11.

⁹⁷ See in this regard the chapter on judicial interpretation of fundamental rights in the recent reports of *Sri Lanka: The state of Human Rights* reports published by the Law & Society Trust, Colombo, Sri Lanka.

⁹⁸*Kavirathne v Pushpakumara* (The Z Score case) SC (FR) 29/2012 SC Minutes 25 June 2012.

⁹⁹ *Haputhanthrige v Min of Education* SC(FR) 289/2007.

¹⁰⁰*Samarakoon v UGC* [2005] 1 Sri LR 119; *Kavirathne v Pushpakumara* (The Z Score case) SC (FR) 29/2012 SC Minutes 25 June 2012.

Court seeking access to education. In the meantime, a private school offered to admit the child. In consideration of the acceptance of the offer made by the private school, the Court terminated the case. In doing so, the Court observed that ‘in terms of Art 27(2)(h) the Constitution it is one of the directive principles of state policy to ensure the right to universal and equal access to education at all levels. The Court also wishes to place on record that the state should ensure that the human rights of the people living with HIV/AIDS are promoted, protected and respected and measures to be taken to eliminate discrimination against them.’¹⁰¹ This observation is problematic at several levels. Firstly, it begs the question as to the responsibility of the Court when a FR petition is made. Is the Court’s primary duty to consider whether a FR was violated and, if so, to grant a suitable remedy for such violation, or is it to seek to ensure a ‘resolution’ of the issue complained of? In its order the Court does not refer to any fundamental rights that are implicated in the petition but relies on a DPSP which, in and of itself, cannot be the subject of judicial enforcement. In any event, even if the former view was upheld by the Court, the *de Soysa* case would only amount to the recognition of the right to *access* education.

Environmental Justice

The Court has had a reputation for being active in the area of environmental justice. While environmental issues are not generally considered as an aspect of ESCRs, they are nevertheless relevant for consideration in understanding the Court’s receptivity to factors that result in the expansion of its jurisdiction – such as its receptivity to international law. Moreover ESCRs and environmental rights have in common the foregrounding of collective interests, expert input and resource allocation. From the celebrated judgement in the *Bulankulama* case¹⁰² to the more recent case of *EFL v Mahaweli Authority*,¹⁰³ there is an established line of judicial authorities in which the Court upheld environmental justice. The *Bulankulama* case concerned substantive aspects of environmental law in that the Court considered the actual impact of the proposed mining of phosphate and concluded that its lease was a violation of petitioners’ rights to engage in a lawful occupation and the freedom of movement.

Other cases that upheld environmental justice were similar to the right to education cases in that the Court was primarily engaged in determining whether the procedure employed respected the right to equality. Substantive questions of environmental law were not flagged and discussed by the Court. These cases therefore are examples of procedural justice being upheld with the focus being on the right to equality as opposed to substantive environmental rights.

¹⁰¹*de Soysa v Minister of Education* SC(FR) 77/2016, SC Minutes 14 March 2016.

¹⁰²*Bulankulama v Secy Min of Industrial Development* [2000] 3 Sri LR 243.

¹⁰³*Environmental Foundation Limited v Mahaweli Development Authority* SC(FR) 459/2008 SC Minutes 17 June 2010.

Broad Rules for Standing

In considering enforcement of ESCRs the question of standing is central. In the context of an open economy, violations of ESCRs often have a disproportionate adverse impact on the vulnerable and marginalised in society. Such victims are often unable to initiate litigation except with assistance. Therefore, in the interest of ensuring access to justice, a liberal approach to standing is essential.

The relevant constitutional text allows only the victim or his attorney-at-law to file petitions before the Court.¹⁰⁴ Over time, however, the Court has expanded standing to allow for epistolary petitions; petitions made by civil society organisations; petitions made by individuals in the public interest; and petitions made by next of kin where the victim is deceased.¹⁰⁵ However, the Court has failed to maintain consistency in this liberal approach to standing. For instance, recently, the Court refused leave to proceed to a trade union on the basis that unless a trade union is representing the disadvantaged or those who are marginalised due to a disability it does not have standing.¹⁰⁶ More recently, having refused standing to a foreign company to file a petition alleging a violation of fundamental rights due to violation of tender procedures by the Cabinet, the Court, nevertheless, proceeded to make an order requiring the Cabinet to call for fresh tenders.¹⁰⁷

Enforcement of Directive Principles of State Policy

The explicit prohibition of judicial enforcement of Directive Principles of State Policy (DPSP) has not prevented the judiciary from using these principles to substantiate the judicial enforcement of human rights. Perhaps influenced by the judicial innovations across the Palk Strait, Sri Lankan Courts have given meaning to FR through the prism of DPSP in relation to the right to education, environmental justice and the public trust doctrine.¹⁰⁸

Incorporation and Reliance on International Law

By convention Sri Lanka was deemed to be dualist. Drawing from the traditions of the Commonwealth legal systems, except where enabling legislation has been adopted, international law could not be enforced by the judiciary, even where the state had ratified

¹⁰⁴ Art 126 of the Sri Lankan Constitution.

¹⁰⁵ See further in this regard, Mario Gomez, 'Litigating to Change: Public Interest Litigation in Sri Lanka' [2004] Sri Lanka Law College Review 122.

¹⁰⁶ *Ceylon Electricity Board Accountant's Association v Minister of Power and Energy* SC(FR) 18/2015, SC Minutes 11 March 2016.

¹⁰⁷ *Noble Resources International Pte Ltd v Min of Power and Renewable Energy* SC(FR) 394/2015, SC Minutes 24 June 2016.

¹⁰⁸ See for instance, *Arumugam Vadivelu v OIC Sithambarapuram Refugee Camp Police Post* SC(FR) 44/2002 SC Minutes 5 September 2002 (a citizen's freedom of movement interpreted along with the duty of the state to recognise and protect the family); *Abeysekera v Rubasinghe* [2000] 1 Sri LR 314 (freedom of expression interpreted with the duty of the state to establish a democratic socialist society); *Mediwake v Commissioner of Elections* [2001] 1 Sri LR 177 (right to franchise with the duty to respect international law and treaty obligations).

a treaty. The Constitution of 1978 does not declare the legal system to be dualist, but provisions that require parliamentary approval for foreign investment treaties by parliament have been relied on to argue for implicit recognition of a dualist tradition.¹⁰⁹ Since the adoption of the Constitution, Sri Lanka has gone on to ratify all the major human rights treaties including two optional protocols which allow for individual petitions to be considered by treaty bodies – the Human Rights Committee and the CEDAW Committee. These developments at the international level have led to the growth of a significant body of international obligations that have been accepted by Sri Lanka with regard to its conduct towards those within its jurisdiction, including obligations regarding ESCRs. Moreover the Vienna Convention on Treaties specifies that domestic law (or the absence of it) cannot be used as a justification for non-compliance with a state's international obligations.¹¹⁰

Enabling legislation has been more the exception in Sri Lanka.¹¹¹ Moreover the context of the adoption of these legislative policies and the practice under it suggests that these laws are primarily symbolic gestures to give an impression of incorporation of international human rights law. The lack of convictions under the Torture Act, for instance, is appalling given the high incidence of torture in Sri Lanka.¹¹² It is within this context that direct judicial incorporation of international law assumes significance. Moving away from the observation in the case of *Leelawathie v Min of Defence* where Court rejected the UDHR as an acceptable legal authority in several notable cases Sri Lankan judiciary has given effect to international law in their judicial determinations.¹¹³ These cases involved sustainable development, the right to education, and the right to freedom from torture.¹¹⁴

The determination that the ratification of the Optional Protocol of the ICCPR as being unconstitutional in the case of *Singarasa v AG* has to be discussed within this older and perhaps richer judicial tradition.¹¹⁵ Even though subsequent benches have not relied on this authority in rejecting the relevance of international law to the interpretation of domestic law, as a ruling given by a divisional bench, the *Singarasa* case continues to be a black mark in Sri Lanka's jurisprudence. The reliance on international law by the judiciary since the *Singarasa* case suggests that as far as judicial incorporation of international law is concerned, the case has had only a minimal impact.¹¹⁶

¹⁰⁹ Art 157 of the Sri Lankan Constitution.

¹¹⁰ Vienna Convention on Law of Treaties 1969.

¹¹¹ ICCPR Act of 2007 and the CAT Act of 1994 are two examples of enabling legislation in Sri Lanka. These Acts only provide for a limited enforcement of the corresponding treaty obligations.

¹¹² *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act No 22 of 1994.*

¹¹³ *Leelawathie v Minister of Defence* (68) NLR 487.

¹¹⁴ See for instance, *Bulankulama v Min of Industrial Development* [2000] 3 Sri LR 243; *Weerawansa v AG* [2000] 1 Sri LR; *Sriyani Silva v OIC Payagala* [2003] 2 Sri LR 63.

¹¹⁵ *Nallaratnam Singarasa v AG* SC Spl (LA) No 182/99 S C Minutes 15 September 2006.

¹¹⁶ See for instance *Ceylon Tobacco Company PLC v Minister of Health* CA (Writ) 336/2012, CA Minutes 12 May 2014.

Reliance on the International Covenant on Economic, Social and Cultural Rights

The ICESCR itself has been referred to directly in the interpretation of Fundamental Rights by the Court. A notable case is that of *Gerald Perera v OIC, Wattala Police Station*.¹¹⁷ The allegation of torture by the petitioner was upheld by the Court and the award of compensation took into account the costs incurred by the petitioner at a private hospital. It was argued on behalf of the respondents that the petitioner ought to have sought treatment at a state hospital where health care was provided free of charge. In rejecting this argument, the Court observed that a citizen must have the freedom to choose between state and private health care services. This argument was supported through reliance on Art 12 of the ICESCR which recognise everyone's right to the highest attainable standard of health. Consequently Court made an award of Rs 800 000 as compensation. Of that award the state was ordered to pay Rs 650 000 and the rest was ordered to be paid individually by the four respondents in the case.

The compensation award in the *Gerald Perera* case is one of the highest awards made under the FR jurisdiction in Sri Lanka thus far. The Court recognises a right to choose a type of health care and recognises a liability on the part of the state to meet the incurred costs, where an agent of the state has been responsible for the harm for which treatment is sought. The Court takes the view that actual costs incurred should be compensated. The *Gerald Perera* case is an example of the undeniable linkages between the CPRs and ESCRs particularly from the perspective of individuals who experience a violation of their human dignity. In this case Justice Mark Fernando reinforces a judicial view that he had defended earlier in his dissenting opinion in *Saman v Leeladasa* with regard to the manner in which compensation ought to be calculated.¹¹⁸

Obligations of the State as Employer

The right to work is not explicitly recognised in the Sri Lankan Constitution except as a 'negative' freedom to engage in a lawful occupation or profession.¹¹⁹ The Constitution also guarantees the right to engage in trade union activities.¹²⁰ However, guarantee of the right to work in the formal sector is arguably available and effectively so. The right to equality has been used in a consistent and even rigorous way to enforce the right to work within the public service, the Department of Police, in universities etc where the state is essentially the employer. In the private sector, jurisprudential developments in labour tribunals and legislative policies work together to guarantee in very effective ways, the right to work. Sri Lanka is compliant with relevant ILO Conventions and is generally perceived to a legal system within which the law favours the employee over the employer.

Under Art 12, the judiciary has established over the years, several obligations of the state as an employer. These include the duty to adhere to stipulated criteria in recruitment, transfers and promotions; the duty to provide a fair hearing in disciplinary inquiries; and

¹¹⁷*Gerald Perera v OIC Wattala Police Station* SC(FR) 328/2002, SC Minutes 4 April 2003.

¹¹⁸*Saman v Leeladasa* [1989] 1 Sri LR 1.

¹¹⁹ Art 14(1) (g) of the Sri Lankan Constitution.

¹²⁰ Art 14(1)(d) of the Sri Lankan Constitution.

the duty to provide reasons for decisions taken as an employer.¹²¹ These obligations have been extended to the private sector through the Commissioner of Labour who, as an agent of the state, is required to respect the right to equality in decision making.¹²²

In the private sector several rights of workers have been the subject of legislative policy such as maternity benefits; due process guarantees on termination of employment; and minimum wages. The judicial enforcement of these laws have upheld 'just and equitable' considerations and established a high threshold for the employer particularly in the termination of employment. The Court has not shied away from preventing employers from terminating its employees.

It must be acknowledged however that there are certain aspects of employment and work that have not been the subject of legislative policy. At present there is minimal protection against discrimination at the work place or protection for domestic worker. Nevertheless it is possible to argue that to a certain extent the right to work has been guaranteed under the Sri Lankan law and that it has also been the subject of judicial enforcement.

Weak receptivity to 'minority' interests

Legal scholarship on the judicial mind is at a nascent stage in Sri Lanka. The amorphous nature of the law of contempt of court has had a chilling effect on public debate and discussion on the work of the judiciary.¹²³ The preliminary work done in this area suggests that as with its comparative counter-parts, the Sri Lankan judiciary has, by and large, has not led the move for social change but at the most been a follower. Even in the judicial determinations in which civil and political rights were upheld by the Court in challenging political contexts, the judiciary's framing of issues was individualistic. Findings of violations of fundamental rights such as the right to be free from torture or the right to be free from arbitrary arrests and detention have been dealt with in isolation from systemic violations that were being reported before the Court and in (deliberate or unconscious) disregard of the social, economic and cultural contributory factor. Consequently there are hardly any pronouncements by the Court on issues such as ethnicity, gender, caste, disability and class as they play out in Sri Lankan society.

¹²¹ For some recent examples see *Perera v Public Service Commission* SC(FR) 598/2008, SC Minutes 10 March 2011; *Liyanage v Director General of Irrigation* SC(FR) 317/2010 SC Minutes 26 March 2012; *Siriwardene v Minister of Health, Indigenous Medicine, Social Welfare and Women's Affairs* SC(FR) 589/2009, SC Minutes 10 March 2011; *Ranathungage v Commissioner of Labour* SC(FR) 620/2010 SC Minutes 7 May 2013; *Alles v Road Passenger Services Authority, Western Province* SC(FR) 448/2009, 22 February 2003; *Pirashan v University of Peradeniya* SC(FR) 478/2009, 13 February 2013; *Kumarasiri v Secretary Ministry of Education* SC(FR) 277/2009, SC Minutes 28 March 2014; *Isadeen v Director General Customs* SC(FR) 248/2011, SC Minutes 17 December 2014.

¹²² See for instance, *Thiranagamav Madihahewa, Commissioner-General of Labour*[2003] 1 Sri LR 238.

¹²³ The law of contempt of court is drawn from the common law in Sri Lanka.

Making the Case for Judicial Enforcement of Economic and Social Rights¹²⁴

In the Sri Lankan political and economic context, judicial enforcement of economic and social rights is not the 'Pandora's Box' that it is made out to be. This position can be defended on the basis of several arguments which approach the question from the angles of social justice, public spending and democracy.

The first is the 'justice and fairness' argument. Whether it be from the 'original position' behind the 'veil of ignorance' that Rawls described or within the capabilities approach that Sen and Nussbaum have described, it can be said that the state must accept an undertaking to guarantee a minimum level of 'humaneness' for its citizens.¹²⁵ What 'humaneness' would mean would necessarily mean would have to be determined on a case by case basis, but it is reasonable to argue that the judiciary has the expertise and the capacity to make that determination. This argument is strengthened if the view is taken that state funds are 'public funds' which means that it is a given society that accepts this undertaking and that the state acts as an agent that is responsible for executing that undertaking. This view therefore reinforces an idea of ethical responsibility accepted by society towards each other on the basis of empathy and respect for human dignity.

The second is the 'criticality' argument. Where the denial of economic and social rights results in a crisis and endangers life judicial enforcement of economic and social rights ought to be permitted. Under the Optional Protocol of the ICESCR, the threshold for admissibility is 'significant disadvantage'. The criticality test would be a higher threshold in which review by the judiciary is justified on the basis of urgency and the irreversible nature of the impact of the alleged violation. This idea can be comfortably accommodated within a right to life. The right to life would be devoid of meaning if its judicial enforcement does not allow for the granting of remedies to prevent irreversible harm in the context of a crisis – whether it is a public health issue, a natural disaster or an individual case of lack of urgent or emergency health care.

The third is the 'process' argument. This argument is made on the basis of participatory and deliberative democracy. Policy making and implementation along with resource allocation and its distribution has to be transparent, deliberative and accessible in a democratic society. The process of decision making therefore is required to be within a particular culture of decision making. Where those cultural norms are violated, and where human rights are affected as a result, regardless of whether they are ESCRs or not, the judiciary ought to be mandated to review that process. In this instance, the judiciary is in effect fulfilling one of its core functions in liberal democracies which is to defend and police the deliberative democratic space of society. As such, this approach to judicial enforcement can even be accommodated within the right to freedom of expression and the right to information.

The fourth is the 'budget accountability' argument. Where a government allocates funds for spending under different budget items, it is possible to argue that judicial review of

¹²⁴ The authors have benefitted from discussion with Dr Nishan de Mel (Economist and Director of Verite Research, Colombo, Sri Lanka) in identifying and developing arguments presented in this section.

¹²⁵ See in this regard, John Rawls *A Theory of Justice* (Belknap Press of Harvard UP 1971).

whether such allocations were actually spent on those items ought to be possible. Budgetary allocations give rise to legitimate expectations by the world at large and particularly individuals and communities that stand to benefit from such allocation, that such funds will actually be spent as promised. Permitting judicial review in that context therefore will further public accountability and answerability for budgetary allocations. This argument reinforces and compliments the ‘process’ argument.

The fifth is the ‘budget priorities’ argument. This argument takes the ‘budget accountability’ argument a step further. When a government presents a budget apart from holding them accountable for commitments undertaken, it should also be possible to hold them accountable for the distribution of funds among different budgetary items within the relevant time span. The question generally is not whether a government should be held accountable for the way in which it prioritises different items but as to the institution and the process by which they should be held accountable. The traditional view has been that accountability for budgetary decisions is primarily in parliament and secondarily in the political realm. However, with the gradual expansion of the scope of judicial review, it is possible to make the argument that at least where a prima facie case can be made judicial review ought to be permitted. Such an approach to judicial review will permit a more holistic approach to judicial enforcement of human rights at a structural level including the enforcement of ESCRs.

Do the Courts Lack Expertise?

But what about the argument that judges have no expertise to adjudicate on issues of this nature? In common law countries this would command little strength. In these countries, as opposed to civil law ones, judges sit in judgment upon a variety of issues whether economic and social rights are constitutionalized or not. For example British judges have adjudicated on fishing licenses in the North Sea, the right of a Pakistani immigrant to adopt a child, the rights of doctors to prescribe contraceptive treatment without parental concurrence to children under 16, the validity of milk distribution schemes, the disbursement of research funds for academic research, and the building of airports around residential areas. For many years judges have adjudicated economic and social claims, though not as ‘rights’. The judicial experience is similar in most parts of the common law world including the United States. In child custody cases judges have to decide on where the child’s interests would be best served. To contend that judges have ‘no expertise’ strikes at one of the core features of a democracy: an independent judiciary. A commitment to democracy, the rule of law and constitutionalism means that courts will have the ‘final say’ on a number of crucial matters, irrespective of the ‘expertise’ they carry.

As the Committee on Economic, Social, and Cultural Rights noted in its General Comment No 9:

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 competencies 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.*¹²⁶

The limited resources available to the Sri Lankan state will represent a challenge to the fulfillment of all social and economic rights. A constitution that mandates the immediate and complete enforcement of social rights for the entire population would likely be impossible for any government to uphold. For example, a court, acting sincerely, would need to interpret an absolute protection of the right to health as obligating the state to provide medical treatment to every individual for every illness, which could be well beyond its means. However, treaty law and many national constitutions recognize that limited resources require governments--particularly in developing countries—and allow many rights to be realized over time.

It thus requires states with very limited resources to use whatever resources are available to protect the minimum core, starting with targeted programs to help those most in need.¹²⁷ The Convention allows rights outside of the minimum core to be 'progressively realized.' This requires signatories to take concrete steps to fulfill such rights, but acknowledges that resource constraints prevent immediate realization.¹²⁸ Many national constitutions--such as those of South Africa, Brazil, and Colombia--contain similar language. If the new Sri Lankan Constitution is informed by the same principles, the economic and social rights defined therein will not place an unrealistic burden on future governments, but will nonetheless protect the most vulnerable members of society from extreme hardship and allow Sri Lanka to fulfill its international obligations.

Pluralism and Devolution

One of the root causes of the internal armed-conflict in Sri Lanka was the denial of internal self-determination and discrimination of Tamils. A new constitution therefore must provide for meaningful and effective power sharing that respects and celebrates all aspects of diversity. The constitutional arrangement for devolution of executive and legislative power will have a direct bearing on judicial enforcement of any fundamental right guarantee. If judicial power is to be devolved along with the jurisdiction to enforce these rights, the implications are even more significant.

Respect for economic and social rights depends heavily on central, provincial and local government policy. In the context of a devolved structure, policies for the realization of economic and social rights may be developed at provincial and local level in addition to the national level. Budgetary allocations would be determined by the centre in consultation with the devolved units would have a direct bearing on the degree to which economic and social rights are realized.

¹²⁶ 'The domestic application of the covenant', General Comment No 9 of the Committee on Economic, Social and Cultural Rights, E/C.12/1998/24, CESCR General Comment 9, 3rd December 1998 para 10.

¹²⁷ CESCR General Comment No. 3, para 5.

¹²⁸ CESCR General Comment No. 3, para 7.

In addition to the judicial enforcement of economic and social rights, centre-periphery relations and the development of an independent Finance Commission for the equitable sharing of resources would help in realizing these rights at the provincial level. Judicial enforcement of economic and social rights would provide an additional tier of supervision to ensure that provincial and local units, to be established under the new constitutional dispensation, would exercise their power in accordance with the constitution.

Formal Inclusion v Judicial Interpretation

While the courts of many countries have teased out a chapter on economic and social rights through a process of judicial interpretation, this is clearly not the preferred option. Where an opportunity exists, as it does in the case of Sri Lanka now, to entrench an explicit chapter on economic and social rights then this opportunity must be seized rather than leave it to the courts to develop these rights through an ad hoc process of interpretation.

Within a larger culture in which economic and social rights are serviced through an entrenched system of political patronage, judicial enforcement of those rights is likely to be resisted. Political representatives and political parties might perceive judicial enforcement of economic and social rights as a weakening of their political agency. In the absence of effective reforms for improving legal literacy and access to justice, including legal aid, the community might not be able to perceive judicial enforcement as a strengthening of the possibility of realization of their economic, social and cultural rights.

Remedies

One of the questions courts will face in enforcing economic and social rights is the question of remedies. What remedies are best suited to enforcing these rights and converting a legal judgment into something concrete that can potentially make a difference in the lives of the claimants? One of the criticisms of the judgments from several countries is that these have been hollow victories and several of these judgments have remained in law reports and have not been implemented as a matter of practice.

One particular issue is: how does the court respond to the case before it and also deal with others, similarly situated, who may not be before the court? Beyond this how does the court address the larger structural or systemic issues that can only be redressed over a period of time?

These dilemmas are illustrated by an Indian case on emergency medical treatment. The Indian court found that man who had suffered a head injury as a result of a train accident was entitled to compensation for a violation of the right to life. He had sought emergency treatment in four state hospitals all of which had turned him away. He was then forced to seek treatment at a private hospital at his own cost. The court he said that there was a

violation of the right to emergency medical treatment which was part of the right to life and gave him compensation.¹²⁹

However, the court went to make several recommendations to hospitals on the need for an effective system to cope with emergencies. Monitoring these recommendations has to take place over a period of time and may be an ongoing exercise. Exercising a continuing supervisory jurisdiction over these larger systemic recommendations will stretch the resources of the courts.

Partnerships with independent institutions such as human rights commissions; gender equality commissions and other such bodies may be of use in such circumstances. In some countries the courts have asked these institutions to monitor the implementation of their orders, especially where continuous monitoring is required.

The *Grootboom* case also illustrates these challenges. The claimants in the case sought enforcement of the right to adequate housing. However, there were many other 'Grootboom type' communities who had not come before the court. In devising a remedy the court must clearly be conscious of victims who may not be before the court at that point of time.

How far should the court get involved in the detail or the 'nitty gritty' of a case will also pose a challenge. When Justice Goldstone of the South African Constitutional Court was interviewed after the *Grootboom* case, he said that the court should not get involved in the 'nitty gritty' of a case. The Court could tell the government that it must devise a plan to cope with the housing needs of those in a situation of crisis. However, it should not dictate to the government the details of such a plan. That would be a violation of the separation of powers doctrine, he said.¹³⁰

However, the South African courts have got involved in the 'detail' in at least one case. In the *Mazibuko* case the court held 25 litres of water per day or 6,000 litres per household per month was inadequate. In this case the Court also held that the installation of pre-paid water meters in a poor neighbourhood in Soweto was unconstitutional and asked the local council to increase the daily quota of water to 50 litres a day and discontinue the use of water meters.¹³¹

Indian courts on the other hand have tended to get involved in the detail when they give orders with regard to socio-economic rights, which has attracted the criticism that the court is going beyond its appropriate role.

The Colombian Constitutional Court has on occasions got involved in the detail by ordering the state to provide a dignified retirement home for an elderly man or by asking the state to provide an indigent mentally ill woman with a home, among other cases.¹³²

¹²⁹*Paschim Banga Khet Mazdoor Samity v State of West Bengal* AIR 1996 SC 2426.

¹³⁰ See Mario Gomez, 'From Rhetoric to Realization: Delivering Socio-Economic Rights Through Courts and Commissions' in Raj Kumar and Srivasta (eds.), *Human Rights and Development: Law, Policy and Governance*, (LexisNexis 2006) 65 – 94.

¹³¹*Mazibuko v City of Johannesburg* Case No. 06/13865, High Court of South Africa (Witwatersrand Local Division).

¹³² See Sepulveda (n 58).

Negotiation

Court supervised negotiation has been used by some courts to enforce socio-economic rights. In a case from Argentina a court supervised negotiation process led the local council to agree to provide homes to 180 people who had taken possession of an unoccupied building. Part of that settlement was that in constructing these homes, preference would be given to builders who took at least 20 per cent of their workforce from the homeless community.¹³³

In South Africa too the Constitutional Court asked a local council to engage ‘meaningfully’ prior to evicting people from what was deemed to be unsafe accommodation.¹³⁴

Private Actors

The liability of private actors for violations of socio-economic rights is likely to emerge as a major issue. In South Africa the Bill of Rights applies to private actors in certain conditions. According to Section 8(2) the Bill of Rights ‘binds a natural person and juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right’.¹³⁵ The Colombian Constitutional Court and the English courts have also shown a willingness to enforce orders against private actors, especially where those actors are exercising a public function.

Private actors could be addressed by way of separate legislation (the ‘responsibility to protect’ or the standard of ‘due diligence’) or by making the Bill of Rights directly enforceable against private actors.

The PRC Proposals

The Public Recommendations Committee’s (PRC) Report on Public Recommendations on Constitutional Reform advocates the inclusion of several economic and social rights in the new constitution, including the ‘right to health,’ ‘the right to food, housing, water, and social security,’ and ‘the right to education.’ The language contained in the PRC’s proposal is similar to that contained in several foreign constitutions, including those of South Africa, Colombia, and Brazil. We will explore the wording of the PRC’s proposal and compare it with the rights defined in the three foreign constitutions. It should be noted, however, that (as discussed above), despite these similarities, apex courts in the three countries have interpreted these rights in different ways and have experienced varying degrees of success in their efforts to uphold them.

¹³³*Aguero, Aurelio E v GCBA*, Buenos Aires Administrative Court of Appeals, December 2003.

¹³⁴*Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v. City of Johannesburg and others*, CCT 24/07

¹³⁵Section 8(2) of the Constitution of South Africa.

Health

The PRC's proposed language on the right to health states that "[e]very citizen has the right to a standard of living adequate for the health and wellbeing including access to medical care, preventive services and drinking water"¹³⁶ and that "[n]o person may be denied emergency medical treatment."¹³⁷ Similarly, the 1996 South African Constitution states that "[e]veryone has the right to have access to— (a) health care services," that "[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights," and that "[n]o one may be refused emergency medical treatment."¹³⁸ The Colombian constitution recognizes rights to both individual and community health, stating that "[e]very individual has the right to have access to the integral care of his/her health and that of his/her community."¹³⁹ The Brazilian constitution also includes an expansive right, stating that "[h]ealth is the right of all and the duty of the National Government and shall be guaranteed by social and economic policies aimed at reducing the risk of illness and other maladies and by universal and equal access to all activities and services for its promotion, protection and recovery."¹⁴⁰

Food, water, and shelter

The PRC's proposed bill of rights also recognizes rights to "Food, Water, Housing and Social Security," but the Report dedicates much less space to these rights than to other social rights.¹⁴¹ This may be the result of a lack of consensus among the committee members as to what these rights entail. Alternatively, it may reflect a conscious choice to defer to the courts, allowing the judiciary to frame these rights. The Report's language, which recognizes a right to "[a]n adequate standard of living, including adequate food, water, clothing, and housing,"¹⁴² leaves the definition of 'adequacy' uncertain. This wording appears to require the state to provide individuals with at least enough food, water, clothing, and housing to survive (consistent with the ICESCR's 'minimum core'), but does not indicate whether, or to what degree, 'adequacy' exceeds the level of basic subsistence. This is similar to the wording in South Africa's constitution, which guarantees "sufficient food and water"¹⁴³ but does not define sufficiency. The Colombian constitution guarantees food and water only to pregnant women¹⁴⁴ and children¹⁴⁵, and the Brazilian constitution does not include a right to sustenance at all.

Additionally, the right to 'adequate' housing contained in the Report appears to be more expansive than its counterparts in the South African and Colombian constitutions. South

¹³⁶ PRC Report (n 48) 100-101.

¹³⁷ Ibid 101.

¹³⁸ Constitution of the Republic of South Africa, S 27.

¹³⁹ Constitution of Colombia, Art 49.

¹⁴⁰ Constitution of Brazil, Art 196.

¹⁴¹ PRC Report (n 48) 101.

¹⁴² Ibid.

¹⁴³ Constitution of the Republic of South Africa, Art 27.

¹⁴⁴ Constitution of Colombia, Art 43.

¹⁴⁵ Ibid, Art 46.

Africa's constitution only recognizes a right to "access to adequate housing,"¹⁴⁶ guaranteeing a right to 'shelter' only to children.¹⁴⁷ The right to 'access' to housing is distinct from the right to housing in that it potentially places less of a burden on the state—it may be fulfilled, for example, if individuals have the option to buy or rent affordable housing on the private market. The Colombian constitution includes a right to "live in dignity" but includes the qualification that "the State will determine the conditions necessary to give effect to this right,"¹⁴⁸ implying a presumption of deference to government policy. Article 6 of the Brazilian constitution includes housing in a list of protected social rights, but provides no definitional language.¹⁴⁹

Education

The PRC's proposal includes a right to "a primary, secondary and tertiary education at the cost of the State."¹⁵⁰ This language appears to recognize an immediate, unequivocal¹⁵¹ right to free education through the college level, which is a much more expansive definition than those included in the South African, Colombian, and Brazilian constitutions. The South African constitution states that "[e]veryone has the right— (a) to a basic education, including adult basic education; and (b) to further education, which the state, through reasonable measures, must make progressively available and accessible."¹⁵² It does not explicate whether the 'basic' education to which everyone is immediately entitled is only a primary education or includes partial or complete secondary education, and, moreover, requires only progressive realization of access to 'further' education. The Colombian constitution describes education as an "individual right" and states that "[e]ducation will be free of charge in the State institutions..." and that "[i]t is the responsibility of the State...to guarantee an adequate supply of the service, and to guarantee for minors the conditions necessary for their access to and retention in the educational system."¹⁵³ This language guarantees free education to minors, but does not appear to recognize a right of access to free post-secondary education. Finally, the Brazilian constitution includes education in its list of social rights, but provides no qualifying language.¹⁵⁴

Thus, the social rights that Report on Public Representations on Constitutional Reform proposes to include in the constitution are included and, to varying degrees, defined in many foreign constitutions—South Africa, Colombia, and Brazil being several apposite examples. However, with respect to several of those rights, the Report advocates the inclusion of innovative language that may render the rights both more clearly defined and stronger than those found in other constitutions.

¹⁴⁶Constitution of the Republic of South Africa, Art 26.

¹⁴⁷ Ibid Art 28.

¹⁴⁸Constitution of Colombia, Art 51.

¹⁴⁹Constitution of Brazil, Art 6.

¹⁵⁰PRC Report (n 48) 101.

¹⁵¹ The phrase "at the cost of the State" appears to imply that the state would be responsible for covering the entire cost of education.

¹⁵²Constitution of the Republic of South Africa, Art 29.

¹⁵³Constitution of Colombia, Art 67.

¹⁵⁴Constitution of Brazil, Art 6.

Conclusion

Should Sri Lanka does proceed to constitutionalize economic and social rights, the following are issues the drafters would need to address:

1. Rights

First among these questions is, what are the economic and social rights that should be included in the Bill of Rights? Apart from the rights contained in international instruments and other Bills of Rights, 'a right to live with dignity' would be useful handle for a future Sri Lankan Court to respond to large scale or widespread violations of economic and social rights, especially to secure immediate implementation of rights in appropriate situations.

2. Immediate Enforcement v Progressive Realization

Perhaps the most challenging concept relates to progressive realization: which of the rights should be subject to progressive realization, and which rights should be made immediately enforceable?

As we have discussed above some economic and social rights must be immediately enforceable. This is the approach taken by many constitutions and the courts of other legal systems, that do recognize a regime of socio-economic rights.

Rights such as the right to a basic education; the right to basic health care; the right to emergency medical treatment; the right to reproductive health care; the right to a minimum supply of water; and the right against forced evictions, should be made immediately enforceable in the new constitution.

Other rights like the right to further education; the right to other forms of health care; the right to housing; and the right to a clean and healthy environment, may be progressively realized in accordance with available resources.

What constitutes basic education; basic health care; reproductive health care; a minimum supply of water; and a forced eviction, is best left for the courts to determine through a process of judicial interpretation.

3. Private Actors

In other areas of the law private action is being reviewed by way of public law review. Private entities are now increasingly performing what were previously deemed to be public functions either on their own, or in partnership with governments. Private action clearly has the capacity to violate rights and where the exercise of private power intersects with an important public interest then there is a case for applying human rights norms to review the exercise of that power.

Private actors may be covered directly by way of the Bill of Rights or by way of separate legislation. The South African Bill of Rights makes provision for actions

against private actors. However, the formulation is ambiguous and may not be a good model to follow. The interpretation provided to the term 'public authority' in the Right to Information Act adopted recently might perhaps be a viable alternative.¹⁵⁵

4. Standing

The Bill of Rights would also need to address the question of standing: who could bring an application for the enforcement of fundamental rights? Here the South African constitution is instructive and allows a range of actors to file action alleging a violation of rights: According to Section 38:

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened The persons who may approach a court are –

- (a) anyone acting in their own interest;*
- (b) anyone acting on behalf of another person who cannot act in their own name;*
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;*
- (d) anyone acting in the public interest; and*
- (e) an association acting in the interest of its members.¹⁵⁶*

5. The Litigation Model

A litigation model that is inclusive and permits third parties to intervene would be more democratic and assist the courts in their task of interpretation. The victim is not always the best placed to argue a case and well-resourced public interest petitioners may be better equipped to present the range of materials that socio-economic rights adjudication requires. The courts should encourage *bona fide* third party interventions including those from the independent institutions such as the Human Rights Commission and the proposed Women's Commission.

6. Remedies

If court orders are to translate into action then the courts should be willing to explore a broad range of new remedies. Permitting the courts to issue a remedy 'that is just and equitable in the circumstances' will enable the court to develop remedies that are appropriate for the enforcement of economic and social rights.

7. The Use of Independent Institutions

The use of the independent institutions to monitor and supervise the implementation of remedies could assist in the implementation of court orders in relation to claimants who come before court and in relation to those who may not be before court. Independent institutions also have the capacity to monitor and

¹⁵⁵ S 43 of the *Right to Information Act* No 12 of 2016.

¹⁵⁶Section 38 of the Constitution of South Africa.

supervise the implementation of broader systemic issues that the court may choose to include as part of its remedy.

As we observed above, the Committee on Economic, Social and Cultural Rights has noted that a state where significant numbers are deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education, would prima facie be failing to discharge its obligations under the Covenant.¹⁵⁷

The South African and Indian jurisprudence – especially the cases of *Grootboom*, *Mazibuko*, and *Francis Coralie Mullin* - have established at the least this that states cannot evade their ‘basic’ or ‘minimum’ obligations by pleading a lack of resources. Economic and social economic rights although they entail the expenditure of resources, also entail a threshold level below which state conduct cannot sink.

At least five arguments can be made in support of providing for judicial enforcement of economic and social rights on the basis of certain grounds:

On grounds of ‘humaneness’ – that the state must ensure that all persons have access to economic and social goods and services that would allow them to live with some measure of dignity and that the judiciary ought to enforce that obligation

On grounds of ‘criticality’ – that where there is a crisis the state should have the responsibility to intervene and where it does not that the judiciary may compel the state

On grounds of ‘process’ – that where the deliberative democratic space has been neglected or denied in the development of policy, allocation of resources etc that the judiciary can intervene in defence of its traditional role as the defender of due process

On grounds of ‘budget accountability’ – that where a government does not fulfil the commitments already made under its budget that the judiciary can hold them to their commitments

On grounds of ‘budget priorities’ – that where there is a prima facie evidence of unreasonableness in the allocation of resources in the budget that the judiciary ought to be able to review executive decisions

In line with the comments of the Committee on Economic, Social and Cultural Rights, the observations of the Public Representations Committee, and taking into account the global jurisprudence on the subject, we would like to suggest that Sri Lanka consider a **four-tiered approach** to the constitutionalizing economic and social rights.

¹⁵⁷ General Comment No 3, 1990.

1. The Constitution should entrench a broad array of economic and social rights including the rights to education, health care, housing, work, and a clean and healthy environment.
2. The Constitution should mandate the state to take reasonable measures, subject to available resources, to progressively implement these rights.
3. The situation of both individuals and groups in situations of crisis, or in a state of particular vulnerability, be taken into account in determining if the state has taken reasonable measures to implement these rights. If there are large numbers not enjoying these rights, or if there is a single individual in a situation of crisis or vulnerability, then the state should be required to justify why this group or individual is not enjoying the benefits of these rights.
4. The rights to emergency health care, basic health care, reproductive health care (including pre and post-natal care), basic education, to a minimum supply of water; and the right against forced evictions, be entrenched separately, be available to all persons, be enforceable immediately, and not be subject to the 'progressive realization' caveat.

The question for modern legal systems is not whether economic and social rights should be part of a constitutional Bill of Rights. That question has been answered positively by many of the world's recent constitutions. Rather the questions that modern legal systems face are; how should the courts interpret these rights? how should the legal regime balance progressive realization with immediate implementation? how does the court ensure that claimants in similar positions are not discriminated against as a result of the court's order? what new remedies should the courts explore? and how can the legal system ensure that remedies are implemented as a matter of practice?

Sri Lanka should take the bold step of including a set of directly enforceable economic and social rights in its new constitution and buttress this with a constitutional remedy that will allow both victims and public interest petitioners to seek relief where these rights are violated.