

The Imperative for Justiciability of Economic, Social, and Cultural Rights in Post-Civil War Sri Lanka

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Abstract

Between 2015 and 2019 Sri Lanka has been in the process of drafting a new Constitution in the aftermath of the civil war that lasted from 1983 to 2009. In spite of the very high human development in Sri Lanka, public expenditures on education and health as a proportion of the GDP have declined since the 1960s. Besides, it is argued that democracy in Sri Lanka is patronage cum greed based, and hence a case is made for inculcating a merit cum need based democracy for which justiciability of Economic, Social, and Cultural Rights (ESCR) is a sine qua non. Moreover, we argue a case for incorporating ESCR as justiciable rights in the proposed new Constitution not only on its own right but also as a means of durable peace-building in the aftermath of a savage civil war.

Introduction

The year 2019 marked the tenth anniversary of the end of the long drawn out civil war in Sri Lanka (1983-2009) that ended in May 2009, after the total military defeat of the Liberation Tigers of Tamil Eelam (LTTE - aka Tamil Tigers) by the security forces. For the first five and a half years after the end of the civil war (i.e. until December 2014) there was no serious attempt to address the abuses endured by the victims of the civil war on all sides of the Sri Lankan society (especially civilians), simply because the then government had the audacity to deny that abuses ever took place (for example, "zero civilian casualties" has been the oft repeated mantra of the then government).

In spite of the fact that the Government of Sri Lanka set up a Lessons Learnt and Reconciliation Commission (LLRC)¹ in May 2010 in response to intense pressure from the United Nations and the wider international community, there was no serious attempt of introspection or rectification on the part of the perpetrators of unbridled violence on all sides, including by the then Government of Sri Lanka.

Since the change of government in January 2015, there has been limited attempt to institute Transitional Justice² mechanisms (e.g. setting-up of the Office on Missing Persons https://imadr.org/wordpress/wp-content/uploads/2016/09/Sri-Lanka_OMP-Act-No.-14_2016.pdf and the Office for Reparations <http://www.reppia.gov.lk/web/index.php?lang=en>) to address the past abuses and draw lessons therefrom in order to prevent recurrence of such abuses in the future.

Sri Lanka has been in the process of drafting its third Constitution since independence from the British colonial rule on February 04, 1948; the first being the Republican Constitution of 1972 and the second being the 1978 Constitution. The process of Constitution drafting between 2015 and 2019 has been unique because of its public consultations throughout the country. There has been a groundswell of support for the incorporation of Economic, Social, and Cultural Rights (ESCR) in the proposed new Constitution as a justiciable right (with judicial enforcement) during the course of these public consultations by the Public Representations Committee on Constitutional Reform. The specific rights incorporated in the ESCR are the (1) right to education, (2) right to health, (3) right to housing, (4) right to food, and the (5) right to work.

However, a small but vociferous group of legal professionals and scholars in Sri Lanka have been publicly campaigning against the incorporation of the ESCR in the proposed

¹ Lessons Learnt and Reconciliation Commission (LLRC) Report, November 2011.
<http://www.slembassyusa.org/downloads/LLRC-REPORT.pdf>

² International Center for Transitional Justice, "What is Transitional Justice?"
<https://www.ictj.org/about/transitional-justice>

new Constitution. The objections for inclusion of ESCR are that (1) the enforcement and fulfillment of the ESCR is best left to the democratic processes through the elected Executive and Legislature branches of the government and not through the unelected Judiciary branch of the government, (2) the unelected judiciary should not be allowed to trespass into policy making process of a democratic polity, (3) incompetence of the judiciary to adjudicate on fiscal and monetary policies of the government, and (4) the legal enforcement of ESCR would be financially costly to the exchequer. (See also Landau, 2012: 221, for similar grounds for opposition to ESCR in Columbia, for example).

A Framework of Analysis

The Intersectionality of Transitional Justice and Economic, Social & Cultural Rights

The United Nations has defined Transitional Justice as "the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation." (Office of the High Commissioner for Human Rights (OHCHR), 2014: 5)³

The former United Nations High Commissioner for Human Rights, Louise Arbour, had observed that "transitional justice must have the ambition to assist the transformation of oppressed societies into free ones by addressing the injustices of the past through measures that will procure an equitable future. It must reach to—but also beyond—the crimes and abuses committed during the conflict that led to the transition, and it must address the human rights violations that predated the conflict and caused or contributed to it." (Arbour, 2007, quoted in OHCHR, 2014: 1)

³ International Center for Transitional Justice, "What is Transitional Justice?" <https://www.ictj.org/about/transitional-justice>

The four pillars of the Transitional Justice processes are: (1) ACCOUNTABILITY to the abuses of human rights during the course of the conflict by investigating and punishing the perpetrators of such abuses (the right to accountability), (2) TRUTH SEEKING to identify the root causes as well as the consequences of the conflict (the right to the truth), (3) REPARATIONS should be provided to partially compensate for the material losses incurred by the victims of the conflict (the right to reparations), (4) ENSURING NON-RECURRENCE of the conflict by various means of reconciliation efforts and enshrining legal guarantees to ensure non-recurrence (the right to non-recurrence). (OHCHR, 2014: 5)

Although, the Truth Commissions (beginning with the establishment of the Truth and Reconciliation Commission (TRC) in South Africa in 1996) until 2005 have primarily or solely focused on the violations of civil and political rights (prior to the conflict as well as during the course of the conflict), the Commission for Reception, Truth and Reconciliation in Timor-Leste (formerly known as East Timor) in its report dated 2005 has for the first time embedded the violations of economic, social, and cultural rights (predating the conflict as well as during the course of the conflict; that is, the causes and the consequences of the conflict) as well into its remit (OHCHR 2014: 17-18). For example, the Commission for Reception, Truth and Reconciliation in Timor-Leste discovered that out of the total of 102,800 deaths caused as a result of the conflict during the period between April 25, 1974 and October 25, 1999, only 18,600 (mere 18%) was due to killings while the overwhelming majority (82%) was due to "hunger and illness", especially during the famine of 1978-1979 (OHCHR 2014: 18). Whilst the former (killings) constitutes violations of the right to life (a civil and political right), the latter (deaths due to hunger and illness), of course, constitutes violations of economic and social rights.

The Indivisibility of Civil and Political Rights (CPR) and the Economic, Social & Cultural Rights (ESCR)

In order to transform provisions of the Universal Declaration Human Rights (UDHR) into legally binding obligations, the United Nations adopted two International Covenants, namely, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR) in 1966. The CPR as incorporated in the ICCPR are referred to as the first generation rights and the ESCR incorporated in the ICESCR are referred to as the second generation rights. These two types of rights are fundamentally interdependent and are *sine qua non* for the functional fulfillment of both types of rights.

The ICESCR addresses a number of specific rights, including the right to an adequate standard of living, to education, to self-determination, and to participation in cultural life. Further, it specifies equal rights for women and men, the right to work, to form and join trade unions, to have just and favourable conditions for work, the right to the best standards of physical and mental health, to social security and social insurance, and to enjoy the benefits of scientific progress (Leckie and Gallagher, 2011: 3).

Objectives

The overall objective of this policy research paper is to advance evidence-based analyses and critically informed arguments in favour of the incorporation of economic, social, and cultural rights in the proposed new Constitution of Sri Lanka towards building an inclusive society promoting shared prosperity grounded on meritocracy cum needs based democracy (as opposed to the present matronage/patronage cum greed based democracy - further on this below) after a quarter-century of savage civil war. Thus, we aim to argue a case for the inclusion of ESCR in the proposed new Constitution not only on its own right, but also as a means of transitional justice and peace-building in a war-torn country. Specifically, the justiciability of ESCR is proposed as a means of ensuring non-recurrence of the past armed conflict (the fourth pillar of the transitional justice processes).

The specific objectives of this policy research paper are to: (1) firstly, outline the status of Sri Lanka vis-à-vis ESCR as reflected in the Social and Economic Rights Fulfillment (SERF) Index compiled by the University of Connecticut in the United States of America, (2) secondly, to provide statistical and other evidences pertaining to Sri Lanka to demonstrate the inadequacy of SERF Index to gauge the real status of a country in terms of realisation of ESCR, (3) thirdly, to provide evidences of greed cum matronage/patronage based practices of democratic governance in Sri Lanka, and (4) finally, to counter the arguments advanced by the antagonists of incorporation of ESCR as a justiciable right in the proposed new Constitution of Sri Lanka, drawing from the international experiences on the judicial enforcement of ESCR.

Social and Economic Rights Fulfillment Index

The Social and Economic Rights Fulfillment (SERF) Index is compiled at the University of Connecticut in the United States of America (USA). The SERF Index was pioneered by a Development Economist Prof. Sakiko Fukuda-Paar and her colleagues.

The SERF Index, perhaps useful for bench-marking fulfillment of social and economic rights in a country as a whole, it may not capture the intra-country imbalances in such fulfillment. Therefore, the SERF Index should not be construed as an all encompassing indicator of the realisation of social and economic rights of ALL the citizens of any country. Moreover, the quality of educational, health, housing, food, and employment rights enjoyed by the citizens could not be captured by the SERF Index for understandable reasons, which is a drawback of this measure. However, the SERF Index is a reasonably indicative measure for policy analyses and discourses.

The SERF Index for Sri Lanka has increased from 70.48 in 1985 to 86.70 in 2015. While the improvement or rise in SERF Index has been phenomenal between 1985 and 2005 (rising from 70.48 in 1985 to 82.01 in 1995, and 85.17 in 2005), the rise has moderated between 2005 and 2015 (marginally increasing from 85.17 in 2005 to 86.70

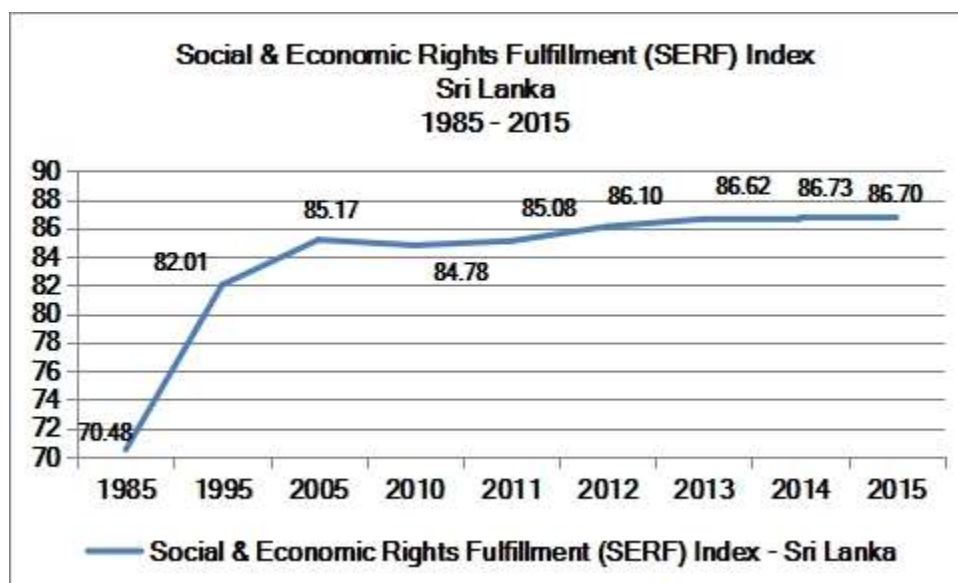
in 2015), most likely because of the effect of higher base. (See the following Figure 1 and Table 1)

Table 1
Social and Economic Rights Fulfillment (SERF) Index of Sri Lanka
1985 - 2015

SRI LANKA (LKA)	1985	1995	2005	2010	2011	2012	2013	2014	2015
SERF Index	70.48	812.01	85.17	84.78	85.08	86.10	86.62	86.73	86.70
Rank	N.A	N.A	15 (out of 76)	19 (out of 86)	21 (out of 88)	20 (out of 90)	19 (out of 87)	19 (out of 85)	15 (out of 79)
GDP Per Capita (2011 PPP) USD	N.A	N.A	6527	8563	9213	9980	10239	10642	11048

Source: Economic and Social Rights Empowerment Initiative, University of Connecticut, Connecticut, USA.
http://serfindex.uconn.edu/wp-content/uploads/sites/1843/2017/04/Core_2005to2015.pdf
<http://serfindex.uconn.edu/wp-content/uploads/sites/1843/2016/08/SERF-Historical-Trends-Core-Countries.pdf>

Figure 1
Social and Economic Fulfillment Index of Sri Lanka 1985 - 2015



Source: Derived from Table 1

According to the latest available data, Sri Lanka ranked fifteenth out of seventy-nine developing countries in terms of SERF Index in 2015. (See Table 1)

The sub-components of the SERF Index for Sri Lanka are catalogued in Table 2. Accordingly, the indices for education and housing rights fulfillment are the greatest out of the five sub-components such as the right to education, health, housing, food, and work.

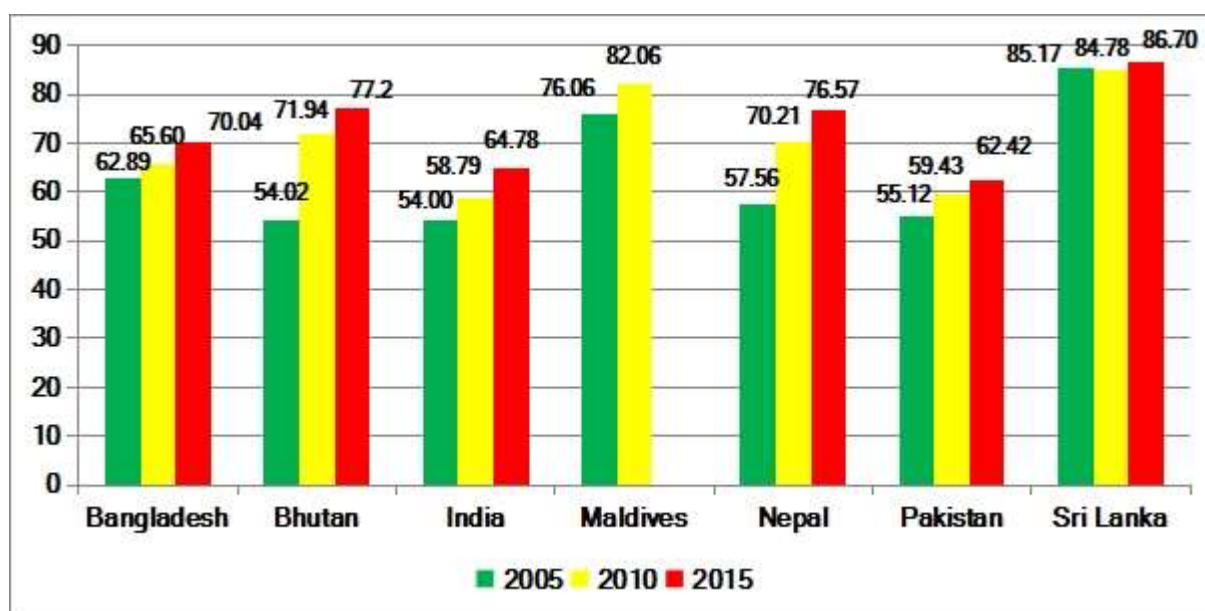
Table 2
Sub Components of the Social and Economic Rights Fulfillment (SERF) Index of Sri Lanka
1985 - 2015

SRI LANKA (LKA)	1985	1995	2005	2010	2011	2012	2013	2014	2015
Right to Education Index	N.A	N.A	N.A	90.81	91.54	89.26	90.48	90.00	90.00
Right to Health Index	91.36	91.98	83.19	83.96	83.80	83.64	83.72	83.78	83.78
Right to Housing Index	N.A	N.A	85.15	89.83	90.73	91.82	93.08	94.04	93.93
Right to Food Index	N.A	N.A	79.82	76.52	76.52	82.44	82.44	82.44	82.44
Right to Work Index	61.49	58.38	67.91	82.78	82.78	83.37	83.37	83.37	83.37

Source: Economic and Social Rights Empowerment Initiative, University of Connecticut, Connecticut, USA.
http://serfindex.uconn.edu/wp-content/uploads/sites/1843/2017/04/Core_2005to2015.pdf
<http://serfindex.uconn.edu/wp-content/uploads/sites/1843/2016/08/SERF-Historical-Trends-Core-Countries.pdf>

The universal free education and universal free public health services coupled with many economic and social welfare programmes throughout the post-independence period have elevated Sri Lanka to such a high ranking on its own right and more so in comparison to other South Asian countries. (See the following Figure 2 and Table 3)

Figure 2
Social and Economic Fulfillment Index of South Asian Countries 2005 - 2015



Source: Derived from Table 3

Table 3
Social and Economic Rights Fulfillment (SERF) Index of South Asian Countries
2005 - 2015

	2005	2010	2015
Bangladesh (BGD)			
SERF Index	62.89	65.60	70.04
Rank	(46)	(54)	(43)
GDP Per Capita (2011 PPP) \$	1937	2451	3137
Bhutan (BTN)			
SERF Index	54.02	71.94	77.20
Rank	(63)	(41)	(34)
GDP Per Capita (2011 PPP) \$	4560	6486	7861
India (IND)			
SERF Index	54.00	58.79	64.78
Rank	(64)	(66)	(57)
GDP Per Capita (2011 PPP) \$	3213	4405	5730
Maldives (MDV)			
SERF Index	76.06	82.06	N.A
Rank	(31)	(26)	N.A
GDP Per Capita (2011 PPP) \$	7961	10514	11994
Nepal (NPL)			
SERF Index	57.56	70.21	76.57
Rank	(57)	(44)	(35)
GDP Per Capita (2011 PPP) \$	1693	1997	2312
Pakistan (PAK)			
SERF Index	55.12	59.43	62.42
Rank	(60)	(62)	(62)
GDP Per Capita (2011 PPP) \$	4028	4297	4706
Sri Lanka (LKA)			
SERF Index	85.17	84.78	86.70
Rank	(15)	(19)	(15)
GDP Per Capita (2011 PPP) \$	6527	8563	11048

Source: Economic and Social Rights Empowerment Initiative, University of Connecticut, Connecticut, USA.
<http://serfindex.uconn.edu/2017-international-serf-index-downloads/>

Inadequacy of SERF Index for Policy

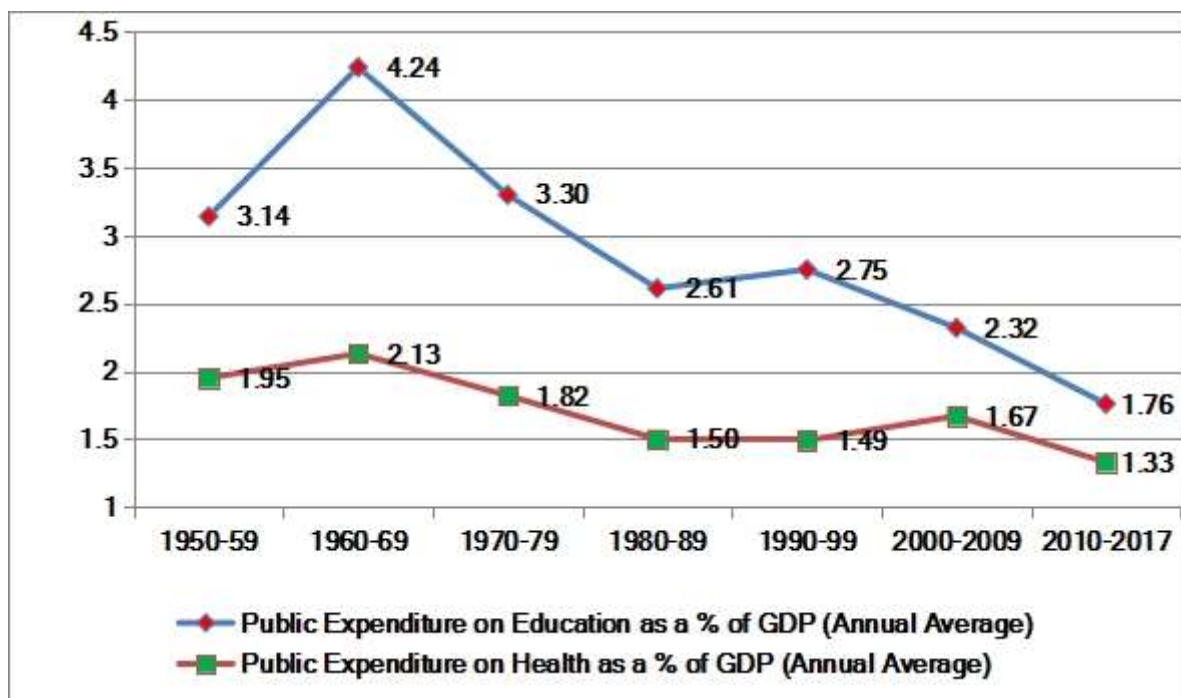
Progressive Decline in Public Expenditure on Education and Health

The average annual public expenditure on education as a percentage of the Gross Domestic Product (GDP) has been progressively declining from the peak of 4.24% during the decade 1960-1969 to just 1.76 during the eight-year period 2010-2017. The average annual public expenditure on education as a percentage of the GDP has nearly halved from 3.14% during the first decade after independence (1950-1959) to just

1.76% during the eight years of post-civil-war period (2010-2017). (See the following Figure 3 and Table 4)

Similarly, the average annual public expenditure on health as a percentage of the GDP has declined from the peak of 2.13% during 1960-1969 to 1.33% during 2010-2017. The average annual public expenditure on health as a percentage of the GDP dropped from 1.95% during the first decade after independence (1950-1959) to 1.33% in the first eight years after the end of the civil war (2010-2017). The average annual public expenditure on health as a percentage of the GDP has dropped significantly from 2.13% during the second decade after independence (1960-1969) to just 1.33% during the eight years of post-civil-war period (2010-2017) (See the following Figure 3 and Table 4)

Figure 3
Public Expenditures on Education and Health in Sri Lanka 1950- 2017



Source: Derived from Table 1

Table 4
Public Expenditure on Education and Health as a percentage of GDP in Sri Lanka
1950 - 2017

Annual Average for the ten-year period	Expenditure on Education as a percentage of the GDP (Annual Average)	Expenditure on Health as a percentage of the GDP (Annual Average)
1950 - 59	3.14	1.95
1960 - 69	4.24	2.13
1970 - 79	3.30	1.82
1980 - 89	2.61	1.50
1990 - 99	2.75	1.49
2000 - 2009	2.32	1.67
2010 - 2017 (Eight Years)	1.76	1.33

Source: Central Bank of Sri Lanka, Online Data Library. <https://www.cbsl.lk/eResearch/> accessed on July 14, 2018.

It is also noteworthy that the public expenditure on education has always been significantly greater than the public expenditure on health, especially during the four decades between 1960 and 1999. However, the gap between the public expenditures on education and health has significantly narrowed in the new millennium; i.e. from 2000 to 2017. (See the following Figure 3 and Table 4)

In spite of the progressive decline of public expenditures on education and health since independence, the SERF Index of Sri Lanka has continued to rise, especially between 1985 and 2005.

There are inequalities in public expenditures on health in different provinces. According to Fernando, et al, (2009: 38), the per capita public health expenditure in 2006 was lowest in the Sabaragamuwa Province (LKR (Lankan rupees) 1,643); followed by Eastern (LKR 1,717), North Central (LKR 1,768), and Southern Province (LKR 1,907), whereas the highest expenditure was in the Central Province (LKR 2,537) followed by in

the Western Province (LKR 2,318). However, the foregoing discrepancies in per capita public expenditures on health could be due to the different health conditions of the populations in different provinces rather than due to deliberate discrimination by the government.

Gender Deficit

In spite of the relatively higher educational levels of women in comparison to men in Sri Lanka and higher educational levels of Sri Lankan women in comparison to women in other South Asian countries, the labour force participation rate of women in Sri Lanka is one of the lowest in South Asia. (See Nayar, et al, 2012) Further, the labour force participation of women in the Eastern and Northern Provinces are the lowest within the country. (See Sarvananthan, 2015: 23)

We accept the fact that labour force participation rate is not the only criterion by which the impediments to upward mobility of women in the economy and society should be judged. However, due to brevity of space, it is the only impediment highlighted here as an example.

Unequal Human Development

In spite of the highest human development in Sri Lanka compared to rest of South Asia, malnutrition/undernourishment are very high among children and lactating women across the country, and the human development is far below the national average in the hill-country among the plantation Tamil community, among the Muslim minority community throughout the country, and in the former armed conflict-affected provinces and the adjacent districts. (See UNDP, 2012&1998)

Democratic Deficit

Although Sri Lanka was the first country in South Asia to have exercised universal franchise in 1933 and one of the first countries in the world to let women exercise their franchise in the democratic process under colonial rule as well as during the post-colonial native rule (including the election of world's first woman Prime Minister in 1960), the democratic governance in Sri Lanka has been by and large based on patronage (in terms of caste, class, ethnicity, family, gender, religion, etc) cum greed as opposed to one based on merit cum need. (See Kumarasingham, 2014, for the politics of patronage in Ceylon; that is, during the early post-independence period)

Democracy in South Asia appears to be paradoxical and in its infancy, so to speak. Andrew Roberts Wilder (1999) argued that the voters at elections in the Punjab Province in Pakistan perceived that the prospective most effective deliverer of patronage (either the candidate and/or the political party) is the main criteria on which their voting is based.

"Look, we get elected because we are *ba asr log* [effective people] in our area. People vote for me because they perceive me as someone who can help them. And what help do they seek from me? Somebody's brother has committed a murder and he comes to me and I protect him from the authorities. Somebody's son is a matric fail and I get him a job as a teacher or a government servant. Somebody's nephew had been caught thieving and I protect him. This sort of thing. That is my power. This is what they perceive as power. You know, somebody has not paid up their loan and I try to have the payment delayed, etc. That means that I get elected because I am doing all the wrong things . . . My skill is that laws don't mean anything to me, and that I can cut right across them and help people whether they are in the right or in the wrong. If somebody's son is first class, he's not coming to me to get him a job. If somebody has merit they very rarely come to me - occasionally they come to me. But it's the real wrongdoers who come to me." (Anonymous politician quoted in Wilder, 1999: 204, which is quoted in Martin, 2014: 419)

It is not just in Pakistan, most likely in other South Asian countries as well, the democratic franchise is exercised by the voters based on the perception which political party or the politician could potentially afford most patronage to the voters. The British High Commissioner in Ceylon in 1955 had succinctly observed that "elections are very largely a conflict of personalities over the distribution of government patronage and services" (quoted in Kumarasingham, 2014: 181), which is most likely the case even today (see below).

The art and science of politics in Sri Lanka in the early independence period as well as today were/are personalities and patronage (patron-client or "leader-patron" or "leader-follower") underpinned by "blood and interests" in lieu of political philosophy and policies (Kumarasingham, 2014: 166-167). The "leader-centric" politics permeated all political parties - left to right, majority community parties to minority communities' parties - where policy was secondary (Kumarasingham, 2014: 182). Thus, "a parochial political class solidified by kinship and patronage rather than political party and professionalism" has hijacked the body politics of Ceylon (1948-1972) (Kumarasingham, 2014: 181) and Sri Lanka (1972 - to date).

Whilst political philosophy and policies based politics would represent competitive or deliberative or discursive democracy, personalities and patronage based politics represent authoritarian or feudal or oligarchic democracy.

Sri Lanka is a majoritarian democracy with very little protections to the interests of the minority communities or marginalised groups of people (including in terms of gender and sexuality). The majoritarian democracy was first enshrined in the Constitution of 1972 (undoing the Constitutional safeguards afforded to the minority communities in the first Constitution enacted during the colonial rule) and retained in the Constitution of 1978 that is in operation until today. Sri Lanka should transform into a constitutional democracy where Constitution becomes supreme and not the elected majoritarian

legislature or the executive which are structurally biased in favour of the majority community, majority decision-making, and the rule of patronage.

The Rule by Patronage

The very foundation of Sri Lankan society is based on patronage (especially elite) and social relationships (Kumarasingham, 2014: 166) and personal followings which mirror the eighteenth-century British society and the then Westminster (Kumarasingham, 2014: 180). Patronage is the source of administrative and political power today, throughout the country, cutting across ethnicities, geographies, and gender (see also Hugland and Piyaarachne, 2009).

The nefarious history of matronage/patronage based partisan policy making (in terms of caste, class, ethnicity, family, gender, geography/place of origin, religion, etc) in the democratic processes of Ceylon led to the first-ever armed rebellion in South Asia and the attempt to overthrow the democratically elected government in then Ceylon in 1971. The popular slogan of rural youths at that time was "*Colombata kiri (milk) apata kakiri (marrow/cucumber)*" (which is translated as, milk for Colombo (folks), but marrow/cucumber for village (folks)). Subsequently, the youths of the largest ethnic minority community rebelled against the Sri Lankan state (beginning 1972) because of the systematic marginalisation of their educational, employment, land, and language rights since 1956 (if not before).

It is not only the governance of the state in Sri Lanka is grounded on matronage/patronage; professional associations, trade unions, past pupils' associations of schools, co-operatives, non-governmental organisations (NGOs), private sector firms, think tanks, religious organisations, media institutions, and the wider civil society (indeed uncivil society) are all governed by matronage/patronage, nepotism, and favouritism (*panthangkarayos*) as opposed to the governance by competence/efficiency criteria based on merit and equality of opportunities.

There are numerous heads of co-operatives (e.g. fisheries cooperatives in the north), NGOs/think tanks (e.g. Sarvodaya, MARGA Institute, the recent past Institute of Policy Studies), trade unions (e.g. Ceylon Teachers' Union, the recent past Ceylon Mercantile Union (CMU), Nurses' Union, religious organisations (e.g. the recent past All Ceylon Hindu Congress), newspaper editors (e.g. editors of the *Sunday Times* and *Sunday Island*), as well as heads of professional associations (e.g. the recent past Government Medical Officers' Association (GMOA), the recent past Sri Lanka Economic Association (SLEA) who remain or have remained in power for well over a decade (sometimes for many decades - e.g. recent past CMU President was in power for more than fifty years), ostensibly re-elected perpetually.

Moreover, employment opportunities in large private companies in Colombo and other metropolitan cities and towns are overwhelmingly favoured for school leavers from the prominent/prestigious schools in the respective cities and towns thereby structurally hindering the upward mobility of rural youths and youths from underprivileged backgrounds or communities who largely attend lesser known schools. Because of this structural bias in the employee recruitment practices of the private corporate sector (e.g. the stranglehold of Royal/Thomian fraternity in Colombo), there is cut-throat competition for admissions to prominent/prestigious schools in the cities and towns across the country involving widespread bribery and corruption (see Transparency International) thereby permanently disadvantaging and dispossessing numerous communities of ordinary citizens.

It is NOT a coincidence that numerous Ministers, Deputy Ministers, and State Ministers in the immediate past government (2015-2019) are alumni of the Royal College in Colombo (a prestigious boys' school representing the affluent and politically powerful classes). Indeed, all the members (except one) of the very first cabinet of independent Ceylon were either educated at Royal College (City of Colombo) or the St. Thomas College (Mount Lavana, a suburb of the City of Colombo). Moreover, the very

first cabinet of independent Ceylon comprised two graduates of the University of Oxford, four graduates of the University of Cambridge, and six graduates of the University of London (Wilson, 1960, quoted in Kumarasingham, 2014: 177). It is this pathological crony capitalism that is holding back Sri Lanka from realising its full potential and not capitalism *per se*.

Moreover, the non-competitive employee recruitment practices of several agencies of the United Nations as well as the diplomatic missions of foreign countries in Sri Lanka are also structurally in favour of the elites of Colombo, Kandy, other urban centres, and the rural elites.

In sum, matronage/patronage is the bloodline and the breadline of the economy, polity, and the society of Sri Lanka (and the erstwhile Ceylon).

Directive Principles versus Justiciable Rights

The legal (and other) professionals who oppose the incorporation of the ESCR in the proposed new Constitution of Sri Lanka argue that the ESCR should be realised through directive principles of the government/s rather than through enshrining ESCR as justiciable rights in the Constitution. However, the antagonists of ESCR do not seem to realise that the Official Languages Act of 1987 in Sri Lanka (proclaiming Tamil as an official language in addition to Sinhala) is not fully implemented even today after thirty years of its enactment.

Argentina, Bangladesh, Colombia, Finland, Hungary, India, Ireland, Kenya, Latvia, the Philippines, South Africa, Switzerland, USA, and Venezuela are some countries where the justiciability and judicial enforce-ability of economic and social rights have been upheld by the judiciary (Nolan, Porter, and Langford, 2007: 4).

Verma (2005) has catalogued numerous case law in a number of countries in all the continents of the world where the judiciary has taken a proactive stance as regards upholding the economic, social, and cultural rights of its citizens; even in many countries where economic, social, and cultural rights are not incorporated into their respective Constitution.

In the circumstance of the Official Languages Act of 1987 not being implemented due to administrative and political apathy, how can the citizens of Sri Lanka expect or trust the directive principles of the state to be implemented faithfully in the case of ESCR? Whilst we do accept that enshrining ESCR as justiciable rights in the proposed new Constitution would not guarantee sincere implementation of the same (see Kaletski, et al, 2016), we would argue that enshrining ESCR as justiciable rights is necessary but not sufficient.

Alleged Incompetence of the Judiciary

The antagonists of the ESCR as justiciable rights claim that the judiciary in Sri Lanka does not have the competencies to adjudicate on economic policies of the government. While we partially agree with such claim, we would argue that the judiciary is relatively much better educated, and relatively much more level-headed and rational than most of the politicians and legislators in Sri Lanka. Moreover, judges usually learn a lot on the job and through judicial education, especially on the matters of commercial law and intellectual property rights. Furthermore, the judges do weigh-in intricate technical and medical evidences in many criminal cases in all countries; similarly it would not be difficult to weigh-in fiscal and monetary policy intricacies, even if that requires seeking outside expertise or delegating certain judicial tasks to outside experts (Nolan, Porter, and Langford, 2007: 17).

The separation of powers (among the three branches of a government; executive, judiciary, and the legislature) argument (Nolan, Porter, and Langford, 2007: 13-15;

Landau, 2012: 194) and the alleged incompetence of the judiciary argument (Nolan, Porter, and Langford, 2007: 16-20; Landau, 2012: 194) are very common among people who are opposed to the justiciability of ESCR in many countries, which have been debunked by the judiciary in many countries, including in Canada, France, Ireland, South Africa, and the United States (ibid).

Probably, exclusive (or special) courts could be set-up with specially trained justices to adjudicate on the matters of ESCR (*ala* consumer affairs courts in India and other countries). Furthermore, the proposed constitutionalisation of economic, social, and cultural rights has to be specific as much as practically possible, in order not to give leeway to the judiciary as well as the wider legal fraternity to arbitrarily interpret the law.

For example, the International Covenant on Economic, Social and Cultural Rights (ICESCR) mandates or obligates signatory countries towards "progressive realization (of the rights) utilizing the maximum of available resources". In the view of this author, "maximum" in the foregoing could be interpreted in law arbitrarily, and therefore needs to be more specifically defined.

The Cost of Legal Enforcement of the ESCR

The argument advanced by the antagonists of the justiciable ESCR that the legal enforcement of ESCR will be costly to the exchequer is untenable because public investments in education (for example) will certainly contribute to higher economic growth and public investments in primary health-care (preventive health-care) will reduce the cost of secondary and tertiary health-care (curative health-care) (for example see, Seymour and Pincus, 2008: 399). Moreover, the enforcement of the civil and political rights also requires substantial public funding by way of maintaining a police force, penal system, and an independent judiciary (for example see, Mapulanga-

Hulston, 2002: 40-41). If the legal enforcement of the civil and political rights is affordable, why not the legal enforcement of the economic, social, and cultural rights?

The very high SERF Index of Sri Lanka is an indication that legal enforcement of ESCR would not be costly to the exchequer (because of its already higher position) and therefore the contrived fear/s of the antagonists for enshrining ESCR as justiciable rights is unwarranted and unjustified.

As noted above, the fact that, in spite of progressive decline of public expenditures on education and health since independence, the SERF Index of Sri Lanka has continued to rise, especially between 1985 and 2005, is an indication that the financial cost of fulfillment of economic, social, and cultural rights through judicial action need not be excessive. In any case, the civil, cultural, economic, political, and social rights of the citizens cannot and should not be deprived because of the financial cost involved. In a landmark judgment issued in 1997, the Brazilian Federal Supreme Tribunal held that "the right of the individual ("protection of the inviolable rights to life and health") must always prevail, irrespective of its costs" (see Landau, 2012: 231).

The present Sri Lankan Constitution enacted in 1978, for the first time, provided constitutional guarantees to foreign investors against expropriation or nationalisation of their investment by the government. If the Sri Lankan Constitution could guarantee the economic rights of foreign investors, why not guarantee the economic rights of its citizens? Most trade and investment agreements between different governments do provide mechanisms for adjudication of economic rights of the foreign investors. If such judicial guarantees are necessary to secure foreign trade and investments, why not provide bare minimum judicial guarantees to economic rights for its citizens?

Moreover, successive governments of Sri Lanka since 1977 have given excessive tax holidays and tax incentives to national and international businesses in order to attract foreign direct investments and joint ventures to fill the growing gap between savings

and investments in the country. As a direct consequence of these lavish tax exemptions, holidays, and incentives, the total tax revenue of the government progressively shrunk from 18% of the Gross Domestic Product (GDP) in 1987 to 13% in 2017 (see Central Bank of Sri Lanka, 2018, Special Statistical Appendix Tables 2 & 6).

If the successive Sri Lankan governments could afford to incur progressive significant decline in the total tax revenue, why not bear the cost of basic educational and health needs of its citizens, which is expected to be far less than the lost tax revenue over a period of thirty years?

ESCR as a means of Transitional Justice and Peace-building

Ceylon and its successor Sri Lanka has undergone fractures between different ethnic communities from time to time, especially between its majority Sinhalese community and the single largest minority community; the Tamils of eastern and northern heritage. The educational, employment, land, and language rights of the Tamils, hailing from the Eastern and Northern Provinces of Sri Lanka, have been at the forefront of the ethnic conflict in Sri Lanka since its independence from Great Britain in 1948.

The foremost demand of the democratic political leaders of the Tamil community, since independence, has been to transform the country into a federal state from the unitary state enshrined in the Constitutions of Ceylon and its successor Sri Lanka. The Tamil youths, since 1972, took up arms to carve out a separate sovereign state encompassing the eastern and northern parts of Sri Lanka, which was militarily defeated by the armed forces of Sri Lanka in May 2009.

Several governments and democratic political leaders of the Tamils, since 1956, have attempted to arrive at a mutually agreeable solution to the enduring ethnic conflict in the country. A partial devolution of administrative and political power to the nine provinces of the island nation has been in force to date as a result of the Thirteenth

Amendment to the 1978 Constitution of Sri Lanka brokered by the Government of India in 1987. However, in practice certain critical administrative and political powers have not been devolved to the provinces to date; two of which are the administration of lands and law and order (by way of setting-up a provincial police force).

As of 2020, there appears to be no sufficient political will among the majority Sinhalese community or its political leaderships to grant the powers of administration of lands and the law and order to the Provincial Councils set-up under the Thirteenth Amendment to the Constitution.

It is almost ten years since the end of the civil war in 2009 and there appears to be no workable political solution to the enduring ethnic conflict in Sri Lanka. Whilst the ultimate goal of the democratic political leadership of the Tamils remains a federal solution, there is an urgent need to work out interim solutions to address the long simmering legitimate grievances of the Tamil minority community.

One such interim solution proposed by this author was fiscal devolution to the Provincial Councils (see Sarvananthan, 2012). In this present policy research paper we would like to propose strictly enforceable economic, social, and cultural rights as another means of an interim solution to the long simmering ethnic conflict in the country. Whereas federalism is a taboo subject in the democratic politics of Sri Lanka, fiscal devolution and constitutionally enforceable economic, social, and cultural rights coupled with an equal opportunities law could be politically palatable to a critical mass of the Sri Lankans.

According to the best of the understanding of this author, transitional justice and peace-building are long processes, and there are different pathways to the realisation of enduring peace in any post-conflict country. Hence, the enshrining of ESCR as justiciable rights in the proposed new Constitution is proposed not only in its own right, but also as a means of conflict resolution in Sri Lanka (i.e. ensuring non-recurrence of

the past armed conflict, which is the fourth pillar of the transitional justice processes).

Thus, justiciable ESCR could be an incremental fulfillment of the aspirations of not only the Tamil minority community, but also other minority communities as well as the marginalised segments of the majority Sinhalese community, and other marginalised segments of the Sri Lankan population such as women and the members of the dispossessed castes.

Moreover, whereas a federal politico-administrative system and fiscal devolution could satisfy the aspirations of the majority of the people of Eastern and Northern Provinces of Sri Lanka, viz. the Tamils, the justiciability of ESCR could provide guarantees to the minority communities within the eastern and northern provinces, viz. the Muslims and the Sinhalese, against any reverse discrimination. Furthermore, constitutionally guaranteed ESCR could address the marginalisation and grievances of the hill-country Tamils (mostly working in the tea and rubber plantations without adequate educational, health, and housing facilities for nearly one-hundred-and-fifty years), the Tamils originating from Eastern and Northern Provinces and the Muslims spread throughout the country, and of course the marginalised segments of the Sinhalese community as well.

Whilst a federal politico-administrative system of government and fiscal devolution could address the inequality between different ethnic communities in the country, the constitutionally guaranteed ESCR rights coupled with strictly enforceable equal opportunities law could address the inequalities based on caste, class, and gender as well (irrespective of one's ethnicity).

There are considerable case law evidences from Brazil, Colombia, and South Africa (for example) that reveal that the greatest beneficiaries of the justiciable ESCR are the middle and upper classes of the society than the poorer classes because of the

former's greater ability to resort to judicial action and individualised enforcement of the law (Landau, 2012: 199-201, 209, 214, 218, 219-220, 230). However, in Colombia there have been instances when justices have used the ESCR law to help more people from the poorer classes by resorting to structural enforcement/injunctions (Landau, 2012: 202-203, 205-206, 208, 210).

Conclusions

According to the Freedom in the World 2013 compiled by the Freedom House in the United States of America (USA), Sri Lanka was one of the fourteen countries which had experienced negative growth in the aggregate score (incorporating political rights and civil liberties) during the five-year period between 2009 and 2013 and was at high risk of social unrest among sixty-five such countries. (Freedom House, 2013)

The ratings for Political Rights (PR) and Civil Liberties (CL) range from 1 to 7, whereby 1 denotes "greatest degree of freedom" and 7 denotes "smallest degree of freedom". The combined average of the PR and CL ratings determines the status of country whether they are free (1.0-2.5), partly free (3.0-5.0), or not free (5.5-7.0). (Freedom House, 2017)

During the 2006 to 2014 period, Sri Lanka's Political Rights (PR) rating was 4 (out of 7) between 2006 and 2010, which deteriorated to 5 (out of 7) between 2011 and 2014. However, the PR rating has improved to 4 during 2015 and further to 3 in 2016. Similarly, the Civil Liberties (CL) rating remained flat at 4 between 2006 and 2013, but deteriorated to 5 in 2014. However, the CL rating has improved to 4 in 2015 and remains the same in 2016. (Freedom House, 2017)

Although there have been marginal improvements in both the political rights and civil liberties ratings of Sri Lanka in 2015 and 2016, it continues to be only a "partly free" country according to the Freedom of the World ranking.

The Civil and Political Rights (CPR) of human beings are intrinsically interconnected with Economic, Social, and Cultural Rights (ESCR); which is what the human rights scholars term "indivisibility of rights" (or "interdependence of rights") or "intersectionality" (of rights) in terms of feminist theory. There is a two-way relationship between the CPR and ESCR; the former rights cannot be fully realised without the realisation of the latter and vice versa.

Therefore, an enforceable equal opportunities law (in terms of caste, class, ethnicity, gender, religion, sexuality, etc) and enshrining of ESCR as justiciable rights in the proposed new Constitution of Sri Lanka are *sine qua non* for developing a perfectly competitive market economy, in addition to fostering an inclusive economy and shared prosperity for ALL the citizens of the country.

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