

# *The Journal of* Law, Social Justice & Global Development

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

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### Article Information

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**Issue:** 25: 2020: General Issue

This article was published on: **10 May 2021**

**Keywords:** Sri Lanka; democracy; rights; ESCR; justice; peace

**Journal ISSN:** 1467-0437 **Article DOI:** 10.31273/LGD.2019.2504

### Abstract

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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.

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## 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 the 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 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’ was 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)<sup>1</sup> in May 2010 in response to intense pressure from the United Nations and the wider international community, there was no serious attempt at introspection or rectification on the part of the perpetrators of unbridled violence on all sides, including the then government.

Since the change of government in January 2015, there has been a limited attempt to institute Transitional Justice<sup>2</sup> mechanisms (e.g. the setting-up of the Office on Missing Persons and the Office for Reparations<sup>3</sup> to address 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 has been publicly campaigning against the incorporation of ESCR in the proposed new Constitution. The objections against inclusion of ESCR are: (1) that the enforcement and fulfilment of ESCR are best left to democratic processes through the elected executive and legislative branches of the government and not through the unelected judicial branch; (2) that the unelected judiciary should not be allowed to trespass into the policymaking processes of a democratic polity; (3) the incompetence of the judiciary to adjudicate on fiscal and monetary policies of the government; and (4) that 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 for Analysis

### *The Intersectionality of Transitional Justice and Economic, Social, and 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)

The former United Nations High Commissioner for Human Rights, Louise Arbour, has 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

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

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

<sup>3</sup> The Office on Missing Persons [[https://imadr.org/wordpress/wp-content/uploads/2016/09/Sri-Lanka\\_OMP-Act-No.-14\\_2016.pdf](https://imadr.org/wordpress/wp-content/uploads/2016/09/Sri-Lanka_OMP-Act-No.-14_2016.pdf)]; The Office for Reparations: <http://www.reppia.gov.lk/web/index.php?lang=en>

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).

The four pillars of transitional justice processes are: (1) *Accountability* for 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* which should be provided to partially compensate for material losses incurred by victims of the conflict (the ‘right to reparations’); and (4) *Ensuring non-recurrence* of conflict by various means of reconciliation efforts and enshrining of legal guarantees (the ‘right to non-recurrence’) (OHCHR, 2014: 5).<sup>4</sup>

Although other truth commissions (beginning with the establishment of the Truth and Reconciliation Commission (TRC) in South Africa in 1996) up until 2005 have primarily or solely focused on the violations of civil and political rights (prior to conflict as well as during conflict), the Commission for Reception, Truth, and Reconciliation in Timor-Leste (formerly known as East Timor) in its 2005 report also embedded for the first time violations of economic, social, and cultural rights (predating as well as during conflict—that is, the causes and consequences of conflict) into its remit (OHCHR 2014: 17–18). For example, the Commission for Reception, Truth, and Reconciliation in Timor-Leste discovered that, out of a total of 102,800 deaths caused by conflict from 25th April, 1974 to 25th October, 1999, only 18,600 (a mere 18 percent) were due to killings, while the overwhelming majority (82 percent) was due to ‘hunger and illness’, especially during the famine of 1978–1979 (OHCHR 2014: 18). Whilst killing constituted violation of the right to life (a civil and political right), death due to hunger and illness, of course, constituted violation of economic and social rights.

*The Indivisibility of Civil and Political Rights (CPR) and Economic, Social, and Cultural Rights (ESCR)* In order to transform provisions of the Universal Declaration of Human Rights (UDHR) into legally binding obligations, the UN in 1966 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). The CPR as enshrined in the ICCPR are referred to as ‘first-generation rights’, and the ESCR as enshrined in the ICESCR as ‘second generation rights’. These two types of rights are fundamentally interdependent and are *sine qua non* for the functional fulfilment of both types.

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 aim 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 patronage/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).

<sup>4</sup> Ibid.

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

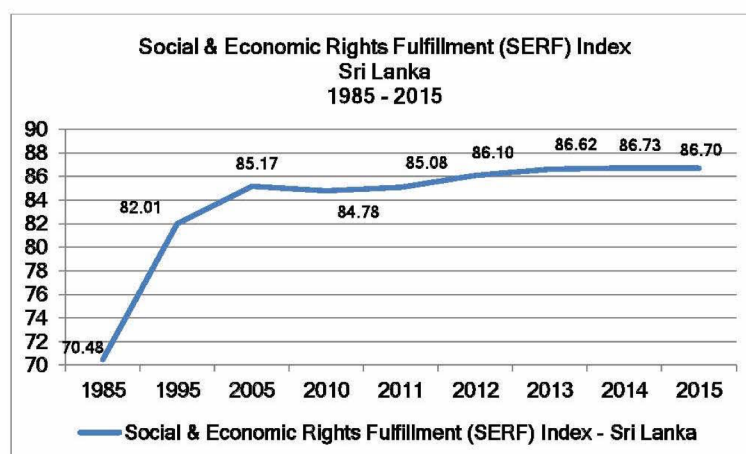
*The Social and Economic Rights Fulfilment Index*  
The Social and Economic Rights Fulfilment (SERF) Index was compiled at the University of Connecticut and pioneered by a development economist, Professor Sakiko Fukuda-Paar and her colleagues. Yet the Index, though perhaps useful for bench-marking fulfilment of social and economic rights in a country as a whole, might not capture the domestic imbalances in such apparent fulfilment. The Index should not therefore be construed as an all-encompassing indicator of the realisation of the social and economic rights of all the citizens of any given country. Moreover, the

quality of educational, health, housing, food, and employment rights enjoyed by citizens cannot for understandable reasons be captured by the SERF Index, which is a drawback. The Index is however, a reasonably indicative measure for policy analyses and discourses.

The SERF Index for Sri Lanka increased from 70.48 in 1985 to 86.70 in 2015. While the improvement (or rise) was phenomenal between 1985 and 2005 (rising from 70.48 in 1985 to 82.01 in 1995, and to 85.17 in 2005), that rise was moderate between 2005 and 2015 (marginally increasing, from 85.17 to 86.70), most likely because of the higher starting point (see below, Figure 1 and Table 1 in the Appendix: *note all tables are in the Appendix*).

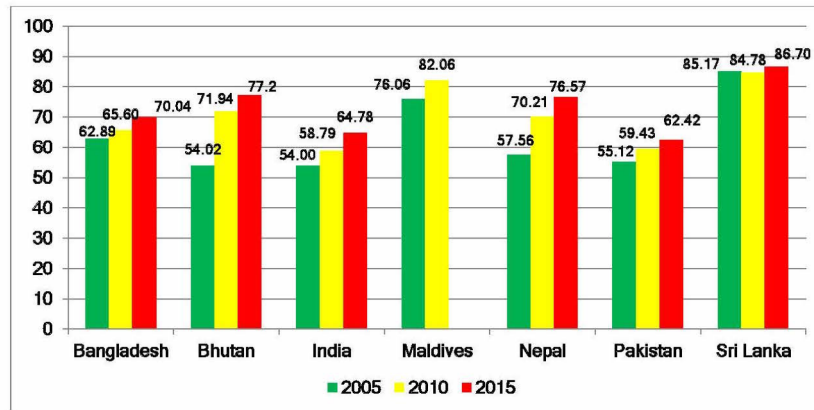
According to the latest available data, in 2015 Sri Lanka ranked 15 out of 79 developing countries in terms of their SERF Index (see Table 1). The five sub-components of the SERF Index for Sri Lanka are set out in Table 2; the indices for education and housing rights fulfilment are the highest of the five. It is universal free education and universal free public health services, coupled with many economic and social welfare programmes throughout the post-Independence period, which have elevated Sri Lanka to such a high ranking in its own right—and even more so in comparison to other South Asian countries (see following page, Figure 2, and Table 3 in the Appendix).

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



Source: Derived from Table 1

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



Source: Derived from Table 3

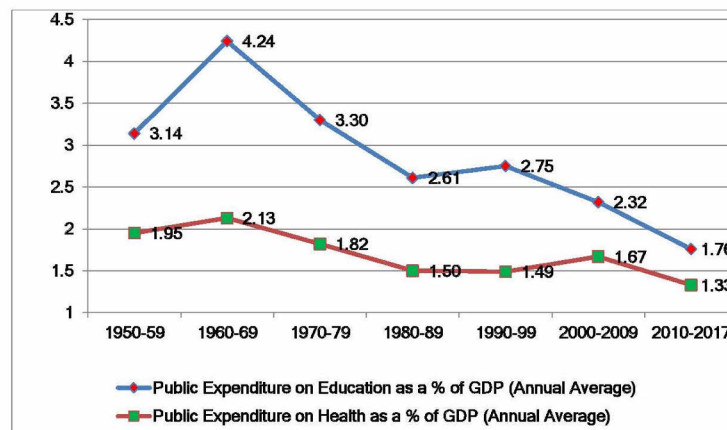
### Inadequacy of the SERF Index for Policy

#### *Progressive Decline in Public Expenditure on Education and Health*

Average annual public expenditure on education as a percentage of Gross Domestic Product (GDP) declined progressively from a peak of 4.24 percent during the decade 1960–1969 to just 1.76 percent during the eight-year period 2010–2017. Average annual public expenditure on education as a percentage of GDP nearly halved from 3.14 percent during the first decade after Independence (1950–1959) to just 1.76 percent during the first eight years after the Civil War (2010–2017) (see below Figure 3, and Table 4).

Similarly, average annual public expenditure on health as a percentage of GDP declined from a peak of 2.13 percent during 1960–1969 to 1.33 percent 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 below, Figure 3 and Table 4 in the Appendix).

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



Source: Derived from Table 1



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

In spite of the progressive decline of public expenditure on education and health since Independence, Sri Lanka's SERF Index continued to rise, especially between 1985 and 2005.

There are inequalities in public expenditure on health in different provinces. According to Fernando et al (2009: 38), per capita public health expenditure in 2006 was lowest in Sabaragamuwa Province (at 1,643 Sri Lankan rupees (LKR)), followed by Eastern (LKR 1,717), North Central (LKR 1,768), and Southern Province (LKR 1,907); whereas the highest expenditure was in Central Province (LKR 2,537) followed by Western Province (LKR 2,318). These discrepancies in per capita public expenditure on health could, however, be due to the different health conditions of the populations in different provinces rather than deliberate discrimination by the government.

#### *Gender Deficit*

In spite of the relatively high educational level of women in comparison to men in Sri Lanka, and 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). (Admittedly, the 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 high human development found in Sri Lanka compared to the rest of South Asia, malnutrition and undernourishment are very high among children and lactating women across the

country, and 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 and 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 the world's first woman Prime Minister in 1960), democratic governance in Sri Lanka has been by and large based on matronage/patronage (in terms of caste, class, ethnicity, family, gender, religion, etc) and greed, as opposed to governance based on merit-cum-need (see Kumarasingham 2014 for the politics of patronage in Ceylon 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) has argued of voters at elections in Pakistan's Punjab Province that the prospect of the most effective delivery of patronage (either candidate and/or political party) is the main criterion on which 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 (quoted in Martin 2014: 419)).

Not just in Pakistan but most likely in other South Asian countries as well, the democratic franchise is exercised based on perceptions of which party or politician might potentially afford most patronage to 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, 'leader-patron', or 'leader-follower') underpinned by 'blood and interests' in lieu of political philosophy and policies (Kumarasingham 2014: 166–67). 'Leader-centric' politics permeated all political parties—left to right, from majority community parties to minority community parties—and policy was secondary (Kumarasingham 2014: 182). Thus, 'a parochial political class solidified by kinship and patronage rather than political party and professionalism' hijacked the body politic first of Ceylon (1948–1972) (Kumarasingham 2014: 181) and then of Sri Lanka (1972 to date). Whilst a political philosophy- and policy-based politics would represent competitive, deliberative, or discursive democracy, personalities- and patronage-based politics represents authoritarian, feudal, or oligarchic democracy.

Sri Lanka is a majoritarian democracy with very little protection of the interests of its minority communities or marginalised groups (including in terms of gender and sexuality). Majoritarian democracy was first enshrined in the Constitution of 1972 (undoing the Constitutional safeguards afforded to minority communities in the first Constitution enacted during the colonial rule) and retained in the Constitution of 1978 that is still in operation today. But Sri Lanka ought to transform

into a constitutional democracy, where the Constitution is supreme and not an elected majoritarian legislature or executive, which are structurally biased in favour of the majority community, majority decision-making, and rule by patronage.

#### *The Rule by Patronage*

The very foundation of Sri Lankan society is based on patronage (especially elite), social relationships (Kumarasingham 2014: 166), and personal followings which mirror eighteenth-century British society and the Westminster of the day (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 Piyarathne 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 Ceylon in 1971. A popular slogan of rural youth at that time was 'Colombata kiri, apata kakiri!' ('milk for Colombo folk, cucumbers for village folk!'). Subsequently, beginning in 1972 the youth of the largest ethnic minority community rebelled against the Sri Lankan state because of its systematic marginalisation of their educational, employment, land, and language rights since 1956 (if not before).

Not only is governance in Sri Lanka grounded on matronage/patronage—professional associations, trade unions, alumni associations, co-operatives, 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 governance by competence and efficiency criteria based on merit and equality of opportunities. Numerous heads of co-operatives (e.g. fisheries co-operatives in the north), of NGOs and think tanks (e.g. Sarvodaya, the MARGA Institute, and the Institute of Policy Studies), of trade unions

(e.g. the Ceylon Teachers' Union, the Ceylon Mercantile Union, and the Nurses' Union), of religious organisations (e.g. the All Ceylon Hindu Congress), of newspapers (e.g. the editors of the Sunday Times and Sunday Island), as well as heads of professional associations (e.g. the Government Medical Officers' Association and the Sri Lanka Economic Association) all remained or remain in power for well over a decade (and sometimes for many decades—a recent CMU President was in power for more than fifty years), ostensibly re-elected in perpetuity.

Moreover, employment opportunities in large private companies in Colombo and other metropolitan cities and towns are overwhelmingly favoured for school leavers from prominent, prestigious schools in their respective locales, thereby structurally hindering the upward mobility of rural youths and those 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 the Royal/Thomian fraternity in Colombo), there is cut-throat competition for admissions to prestigious urban schools, involving widespread bribery and corruption (see Transparency International) and thereby permanently disadvantaging and dispossessing numerous communities of ordinary citizens.

It is no coincidence that numerous ministers, deputy ministers, and state ministers in the immediate past government (2015–2019) were alumni of the Royal College in Colombo (a prestigious boys' school representing the affluent and politically powerful classes). Indeed, all but one of the very first cabinet of independent Ceylon were educated either at Royal College or St. Thomas College in Mount Lavinia, a suburb 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, and other urban centres, and of rural elites. In sum, matronage/patronage is the bloodline and the breadline of the economy, polity, and society of Sri Lanka (and before that of Ceylon)

### Directive Principles versus Justiciable Rights

The legal (and other) professionals who oppose the incorporation of ESCR into the proposed new Constitution of Sri Lanka argue that ESCR should be realised through directive principles of the government rather than through their enshrining as justiciable rights. However, these opponents 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 still not fully implemented even today, thirty years after its enactment.

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

Verma (2005) has catalogued numerous cases, in countries on every continent, where the judiciary has taken a proactive stance as regards upholding the economic, social, and cultural rights of its citizens—even in countries where economic, social, and cultural rights are not incorporated into their respective constitutions.

Given the example of the 1987 Official Languages Act not having been 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 minimally necessary but even then, not sufficient.

#### *Alleged Incompetence of the Judiciary*

The opponents of ESCR as justiciable rights claim that the judiciary in Sri Lanka does not have the competencies to adjudicate on the economic policies of the government. While we partially agree, 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 in matters of commercial law and intellectual property rights. Furthermore, judges habitually weigh intricate technical and medical evidence in cases in all countries, and it would not be difficult for Sri Lanka's to weigh the intricacies of evidence on fiscal and monetary policy, even if that required seeking outside expertise or delegating certain judicial tasks to outside experts (Nolan, Porter, and Langford 2007: 17).

The 'separation of powers' (i.e. executive, judicial, and legislative) 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 those opposed to the justiciability of ESCR in many countries, but they have been debunked by the judiciary in countries including in Canada, France, Ireland, South Africa, and the United States (ibid.).

It is probable that exclusive (or special) courts could be set up, with specially trained justices to adjudicate on matters of ESCR (along the lines of consumer affairs courts in India and other countries). Furthermore, the proposed constitutionalisation of ESCR would have to be as specific as practically possible, in order not to give leeway to the judiciary as well as to the wider legal fraternity to arbitrarily interpret the law. The International Covenant on Economic, Social, and Cultural Rights (ICESCR), for example, mandates or obligates signatory countries towards 'progressive realization [of the rights] utilizing the maximum of available resources'. In our view, 'maximum' here

could be interpreted arbitrarily and needs to be more specifically defined.

#### *The Cost of Legal Enforcement of ESCR*

The argument, advanced by opponents of justiciable ESCR, that legal enforcement of ESCR would be costly to the exchequer is untenable. Public investment in education (for example) will certainly contribute to higher economic growth, while public investment in primary (i.e. preventative) healthcare will reduce the cost of secondary and tertiary (curative) healthcare (see for example Seymour and Pincus 2008: 399). Moreover, the enforcement of civil and political rights also requires substantial public funding by way of maintaining a police force, penal system, and independent judiciary (see for example Mapulanga-Hulston 2002: 40–41). If the legal enforcement of civil and political rights is affordable, why not the legal enforcement of ESCR? Sri Lanka's already very high SERF Index is an indication that legal enforcement of ESCR would not be costly to the exchequer. The contrived fears of opponents of enshrining ESCR are unwarranted and unjustified.

As noted above, the fact that, in spite of a progressive decline in public expenditure on education and health since Independence, Sri Lanka's SERF Index has continued to rise, especially between 1985 and 2005, is an indication that the financial cost of fulfilment of ESCR through judicial action need not be excessive. In any case, the civil, cultural, economic, political, and social rights of citizens cannot and should not be denied to them 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 of 1978 provided for the first time 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 provide mechanisms for adjudication of the economic rights of foreign investors. If such judicial guarantees are necessary to secure foreign trade and investment, why not provide the bare minimum judicial guarantees of economic rights to its citizens?

Moreover, successive governments of Sri Lanka since 1977 have given excessive tax exemptions, tax holidays, and tax incentives to national and international businesses in order to attract foreign direct investment and joint ventures, to fill the growing gap between savings and investments in the country. As a direct consequence of these lavish tax breaks, total tax revenues progressively shrank from 18 percent of GDP in 1987 to 13 percent in 2017 (see Central Bank of Sri Lanka 2018, Special Statistical Appendix Tables 2 & 6). If successive Sri Lankan governments could afford to incur significant loss in total tax revenues, why not bear the cost of the basic educational and health needs of its citizens, expected to be far less than lost tax revenues over those thirty years?

*ESCR as a means of Transitional Justice and Peace-building*

Ceylon and its successor Sri Lanka have from time to time undergone fractures between different ethnic communities, especially between its majority Sinhalese community and largest minority community, the Tamils. 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 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 has since Independence been to transform the country from the unitary state enshrined in its Constitutions into a federal state. From 1972, Tamil youth 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 nation's armed forces in May 2009.

Since 1956, successive governments and democratic political leaders of the Tamils 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 has been in force since 1987 as a result of the Thirteenth Amendment to the 1978 Constitution, brokered by the Government of India. However, in practice certain critical administrative and political powers have not to date been devolved to the provinces, two of which are the administration of land 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 leadership to grant the power of administration of land and law and order to the provincial councils set up under the Thirteenth Amendment to the Constitution.

It is more than ten years since the end of the civil war in 2009, yet 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 and 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 paper, we would like to propose strictly enforceable ESCR as another means to an interim solution to the long-simmering ethnic conflict. Whereas federalism is a taboo subject in the democratic politics of Sri Lanka, fiscal devolution and constitutionally enforceable ESCR, coupled with an equal opportunities law, could be politically palatable to a critical mass of Sri Lankans.

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 armed conflict—the fourth pillar of the transitional justice processes).

Justiciable ESCR could thus be an incremental fulfilment of the aspirations of not only the Tamil 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 members of 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—i.e. Tamils—the justiciability of ESCR could provide guarantees to those minority communities within those provinces—i.e. Muslims and Sinhalese—against any reverse discrimination.

Constitutionally guaranteed ESCR could also address the marginalisation and grievances of hill-country Tamils (mostly working for nearly 150 years in the tea and rubber plantations without adequate educational, health, or housing facilities), Tamils originating from Eastern and Northern Provinces, and Muslims spread throughout the country, and of course those 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, constitutionally guaranteed ESCR coupled with strictly enforceable equal opportunities laws could also address inequalities based on caste, class, and gender, irrespective of ethnicity.

There is considerable case-law evidence from Brazil, Colombia, and South Africa (for example) that reveals that the greatest beneficiaries of justiciable ESCR are the middle and upper classes of society even more so than the poor, 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). In Colombia, however, there have been instances when justices have used ESCR law to

help those from the poorer classes by resorting to structural enforcement and injunctions (Landau 2012: 202–203, 205–206, 208, 210).

## Conclusions

According to Freedom in the World 2013, compiled by the USA's Freedom House, Sri Lanka was one of 14 countries which experienced negative growth in their aggregate score on political rights (PR) and civil liberties (CL) during the five-year period between 2009 and 2013, and one of 65 countries at high risk of social unrest (Freedom House 2013). Freedom House's ratings for political rights and civil liberties range from 1 (greatest degree of freedom) to 7 (smallest degree). The combined averages of a nation's PR and CL ratings determine whether it is free (1.0–2.5), partly free (3.0–5.0), or not free (5.5–7.0) (Freedom House 2017).

Between 2006 and 2010, Sri Lanka's PR rating was 4, but this deteriorated to 5 between 2011 and 2014. However, that rating improved to 4 in 2015 and further to 3 in 2016. Its CL rating remained at 4 between 2006 and 2013, deteriorated to 5 in 2014, but improved to 4 in 2015 and remains the same in 2016 (Freedom House, 2017). Although there have been marginal improvements in both its political rights and civil liberties ratings in 2015 and 2016, it continues to be only 'partly free' according to its Freedom of the World ranking.

The Civil and Political Rights (CPR) of human beings are intrinsically interconnected with their ESCR. This is what human rights scholars term 'indivisibility of rights', 'interdependence of rights' (or 'intersectionality' of rights in terms of feminist theory). There is a two-way relationship between CPR and ESCR—neither can be fully realised without the realisation of the other.

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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**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
<b>SERF Index</b>	70.48	812.0 1	85.17	84.78	85.08	86.10	86.62	86.73	86.70
<b>Rank</b>	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)
<b>GDP Per Capita (2011 PPP) USD</b>	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/1843/2017/04/Core_2005to2015.pdf)

**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
<b>Right to Education Index</b>	N.A	N.A	N.A	90.81	91.54	89.26	90.48	90.00	90.00
<b>Right to Health Index</b>	91.36	91.98	83.19	83.96	83.80	83.64	83.72	83.78	83.78
<b>Right to Housing Index</b>	N.A	N.A	85.15	89.83	90.73	91.82	93.08	94.04	93.93
<b>Right to Food Index</b>	N.A	N.A	79.82	76.52	76.52	82.44	82.44	82.44	82.44
<b>Right to Work Index</b>	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/1843/2017/04/Core_2005to2015.pdf)  
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**Table 3**  
**Social and Economic Rights Fulfillment (SERF) Index of South Asian Countries**  
**2005 – 2015**

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

**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.



## Acknowledgements

Constructive and valuable criticisms by four anonymous peer reviewers are gratefully acknowledged by the authors, which have significantly improved the content, quality, and persuasiveness of this policy research paper.

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