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Making Economic, Social and Cultural Rights a Reality: Implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR) from a Sri Lankan Perspective

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Introduction

The rights consciences from a Sri Lankan perspective can be traced to the periods in which kings ruled the country, where it is well documented that, even kings have punished their sons for the breach of law¹. In a modern context, special reference was made regarding the minority rights under the Soulbury Constitution of 1947 under Article 29(2) where the majority was precluded from legislating against the protected interests of the minorities. The 1972² Constitution, hailed as the first *sui generis* Constitution of the country, while recognizing that its citizens are to be afforded with a set of fundamental rights, nonetheless omitted to provide specific provisions for the vindication of such rights. The current Constitution of 1978³ on the other hand not only recognized a set of fundamental rights under Chapter III of the Constitution, it also made provisions for the vindication of fundamental rights by granting the exclusive jurisdiction to the Supreme Court to deal with breaches of fundamental rights due to executive or administrative actions or omission, where the aggrieved party by her/his own or through an attorney-at-law on his behalf could make a petition to the Supreme Court within one month

from the breach or imminent breach of her/his recognized fundamental rights.

While the 1978 Constitution did recognize a set of fundamental rights, one of the main criticisms levelled at the granted rights relates to the fact that, the recognized rights have failed to give adequate recognition to economic, social and cultural rights, whereas it has comparatively done a satisfactory recognizing civil and political rights.⁴ On a negative note, the fundamental rights chapter does not even recognize the right to life, and it was through judicial decisions that the right to life had been recognized in Sri Lanka, not as a positive one, but in the negative form of not depriving one's life without following the proper procedures of law. In the case of *Sriyani Silva v. Iddamalgoda*⁵ the Court held that, 'Articles 11 and 13(4) by necessary implication recognize the right to life'. However, since the right to life is only recognized by implication, the Sri Lankan Judiciary is handicapped from expanding the set of recognized rights under the Constitution, whereas for example, the Indian Judiciary has been able to expand the fabric of fundamental rights that have been recognized under the Constitution to include new rights through making expansive interpretations of the right to life which is directly recognized under the Indian

¹ Merlin Peris, 'King Kelanitissa's Crime' [1987] Journal of the Royal Asiatic Society of Sri Lanka Vol 32, 91.

² 1972 Constitution of the Socialist Democratic Republic of Sri Lanka.

³ 1978 Constitution of the Democratic Socialist Republic of Sri Lanka

⁴ M. Gomez, C. Hartnett and D. Samararatne, 'Constitutionalizing Economic and Social Rights in Sri Lanka' [2016] CPA Working Papers on Constitutional Reform No. 7.

⁵ [2003] Vol 2 Sri L R 63.



Constitution under Article 21.⁶ The renaissance of economic and social rights is reflected in the lively conversation concerning the philosophical foundations of subsistence rights, as well as in a burgeoning literature on how the provision of basic needs ought to be addressed through rights protections and constitutional jurisprudence.⁷

ICESCR and Sri Lanka

Sri Lanka is a famous country for both signing and ratifying international treaties, in particular the human rights treaties. When it comes to the ICESCR, Sri Lanka has ratified covenant on 11th June 1980 and has made no objections or reservation concerning the covenant. While this being so, Sri Lanka has not taken any initiative to incorporate the rights enunciated under the covenant at the domestic level even after four decades from ratification. While the Draft Constitution of 2000 and other Constitutional reforms suggested during the period of 2015-2019 made reference to the importance of incorporating economic and social rights in particular concerning a new fundamental rights chapter of a new Constitution to be enacted in the future, such endeavour have only been decorative pieces employed at pleasing the people after making such promises at the elections. The Committee on ICESCR has continuously questioned the steps taken (or lack of them) by the Sri Lankan. The concluding observations made by the committee at its forty-fifth meeting remarks that, 'it expresses concern that the State party's report, which was submitted with a 15-year delay, contained limited information, disaggregated data or relevant statistics on the practical implementation of Covenant rights in the State party. The Committee regrets that the State party did not provide responses to half of the Committee's list of issues The Committee calls

upon the State party to ensure full compliance of its next periodic report with the Committee's reporting guidelines so as to enable a full assessment of the degree of implementation of Covenant rights in the State party.⁸

Even regarding the subsequent communications made by Sri Lanka, the main question still unresolved remains with the fact that, it had failed to do anything concrete in bringing the rights and duties recognized under ICESCR at the domestic level. In this background, it becomes imperative to study the reasons as to why an enabling legislation is required to bring the rights and duties recognized under the ICESCR. While bringing in a new fundamental rights chapter inclusive of the economic, social and cultural rights recognized under the convention may seem like the ultimate goal, in absence of such and the difficulties associated with such an action, making an enabling legislation would seem the optimal solution.

Arguing for an Enabling Legislation on ICESCR

Despite the much-emphasized indivisibility of human rights, economic, social and cultural rights have long been seen as the poor cousins of civil and political rights. The different trajectory of each category of rights was set by the splintering of human rights into the two separate covenants of 1966, in the protracted and complicated process of juridifying the Universal Declaration of Human Rights (UDHR) of 1948. The story is well known. Civil and political rights were largely seen as immediately applicable and typically justiciable, whereas economic, social and cultural rights were viewed as subject only to progressive realization through measures of state policy. Civil and political rights were often viewed as negative freedoms from state interference, whereas economic, social and cultural rights were thought to involve positive obligations on the

⁶ Armin Rosencranz and Shyam Divan, *Environmental Law and Policy in India: Cases, Materials* (2nd edn, OUP 2002).

⁷ C. Jung, R. Hirschl, R. and E. Rosevear 'Economic and social rights in national constitutions' [2014] *The American Journal of Comparative Law*, 62(4), 1043.

⁸ UN Committee on Economic, Social and Cultural Rights (CESCR), *Consideration of reports submitted by States parties under articles 16 and 17 of the Covenant: Concluding observations of the Committee on Economic, Social and Cultural Rights: Sri Lanka*, 9 December 2010, E/C.12/LKA/CO/2-4, available at: <https://www.refworld.org/docid/4ef880f52.html> [accessed 16 July 2021].



state, which in turn implied politically sensitive claims on public resources. Hunt⁹ also observes that, most bills of rights focus on civil and political rights, such as the prohibition against torture and freedom of expression. They rarely include economic, social and cultural rights, like the rights to education and health services. Of course, the line between these two categories sometimes called first generation and second-generation rights is blurred.

As mentioned above, the set of recognized rights under the 1978 Constitution of Sri Lanka is limited in focus with protecting many of the civil and political rights. For example, Article 12 deals with equality and non-discrimination, Article 13 is designed to protect the rights of accused and of fair trial with a presumption of innocence until proven guilty. The Constitution also guarantees the freedom of expression, right to information, right to assembly, right to movement and other related rights therein under Article 14 of the Constitution. While most of

these rights relate to civil and political ones, when it comes to economic, social, and cultural rights there is a deficiency in their recognition. For example, while Article 14 recognizes a right to engage in any lawful trade, there is no corresponding duty upon the government to create such an environment where there will be government provided opportunities at securing some lawful employment.

The directive principles are an important policy guideline which contains strategies that could be utilized in bringing economic, social and cultural rights into the Sri Lankan domain. For example, these directives provide that the government should endeavour to promote the welfare of citizens, provide adequate standards of living, aim at rapid development, equitable distribution of the resources ensuring that the concentration of wealth and means of production are at the detriment to the common and similar provisions which could be utilized at realizing economic and social rights in

particular. However, there is one major drawback in relying on these set of directive principles as they are made incapable of creating or expanding any rights which are already recognized under the Constitution, as the directive principles are made nonjusticiable, meaning that no one has a right to enforce what is stated under the directive principles under Article 29 of the Constitution. This is also well documented in the list of issues in relation to the fifth periodic report of Sri Lanka, where the committee questions whether 'it would still be possible to bring the proposed bill into full conformity with the rights laid out in the International Covenant on Economic, Social and Cultural Rights, and whether the rights proposed in the bill will be justiciable, especially in the light of the provisions of article 29 of the current Constitution, whereby what are considered as Covenant rights do not confer or impose legal rights or obligations and are not enforceable in any court or tribunal'.¹⁰

It is to be noted that, when it comes to this non-compliance of Sri Lanka, one of the arguments that could be brought forward is that, the covenant itself does not make it mandatory for each country to give effect to the recognized rights in the same equal manner as with some of the other international human rights treaties such as the The Convention on the Prevention and Punishment of the Crime of Genocide of 1948. Instead, the ICESCR obliges the countries to progressively achieve the recognition and implementation of the recognized rights under the covenant as specified under Article 2. The said Article 2 also dictates that, the full realization of the rights recognized under the covenant shall be realized through all appropriate means, including particularly the adoption of legislative measures. Therefore, while recognizing that different countries may decide differently on the nature and the extent of the rights to be recognized and implemented in its own territory, the need for doing so through

⁹ Paul Hunt, 'Reclaiming Economic, Social and Cultural Rights' [1993] 1 Waikato L. Rev 14.

¹⁰ UN Committee on Economic, Social and Cultural Rights (CESCR), *List of issues in relation to the fifth periodic report of Sri Lanka*, 7 November 2016, E/C.12/LKA/Q/5, available at: <https://www.refworld.org/docid/5881ea394.html> [accessed 16 July 2021].



legislative measures is kind of a uniform obligation casted upon all the countries.

It is also worth pointing that, Article 2 of the covenant speaks of progressive realization and not of 'no realization' pointing out the inequal distribution of wealth or the lack of resources which are available at the hands of a nation. While the progression may happen at different speeds, the progression needs to occur nonetheless. This simply means that, a country which has taken the responsibility of undertaking to recognize and implement the recognized rights of the covenant must make sure that steps are taken towards the implementation of the economic, social and cultural rights that are recognized under the covenant. This is one of the most debated issues surrounding State parties' implementation of their obligations under the International Covenant on Economic, Social and Cultural Rights (the "ICESCR" or "the Covenant") as the possibility for aggrieved citizens-including particularly vulnerable or disadvantaged ones-to seek redress for violations of their rights under the Covenant.¹¹

Rights to be Recognized under an Enabling Legislation

The need for making an enabling legislation lies in the fact that Sri Lanka adopts a dualist approach when it comes to recognition and implementation of international agreements that have been ratified by the executive. In the case of *Singarasa v Attorney General*¹² the Court held that, '[t]he framework of our Constitution adheres to the dualist theory, the sovereignty of the people of Sri Lanka and the limitation of the power of the President as contained in Article 4(1) read with Article 33 [f] in the discharge of functions for the Republic under customary international law. According to the Dualist theory international law and Municipal law are two separate and independent legal entities one National and the

other International. In Monist theory international law and Municipal law constitute a single legal system'. Hence, in this backdrop, making an enabling legislation for the recognition and implementation of the ICESCR.

While the ICESCR declares that states must take appropriate measures at ensuring the rights enshrined in the covenant based on the available resources, it is to mentioned that lack of resources should not be allowed as a shield for not implementing the said rights in the domestic context. Article 4 of the covenant declares that when imposing restrictions upon these rights, that such restrictions should be kept to a minimum and should only be imposed to promoting the general welfare in a democratic society. This is a valuable guideline which needs to be apprehended in any enabling legislation, since it would be useless to grant rights on one hand and to impose restriction upon the enjoyment of such rights to make them. Article 6(2) is another important provision of the covenant which needs to be introduced. It recognizes the right to 'technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual'. While the fundamental rights chapter recognizes the right to engage in a lawful occupation, there is no corresponding duty upon the State to ensure that individuals are given proper working conditions and their right to occupation is well protected under the law. Article 7 of the covenant declares that, employees should have the right to, fair wages and equal remuneration, decent living, safe and healthy working conditions, equal opportunity for everyone to be promoted in his employment and rest, leisure and reasonable limitation of working hours. These aspects will have to be included in a proposed enabling legislation. The right to social security and social insurance as recognized under Article 9 of the covenant should also be recognized under an enabling

¹¹ Les Allamby, 'Economic, Social and Cultural Rights' [2001] 52 N Ir Legal Q 335.

¹² [2013] 1 Sri L R 245.



legislation, since there are many disparities in the nature and amount of social security schemes made available for those working in the public sector and the private sector, where in particular, the ones working in the private sector are at a distinct disadvantage when compared with those are employed in the public sector.

Article 11 of the covenant recognizes the 'right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions'. This is one crucial aspect to be recognized under an enabling legislation in the absence of a right to life provision granted under the fundamental rights chapter. This is especially so, since the Sri Lankan judiciary has been unable to expand the ambit of the recognized rights under the fundamental rights chapter in the absence of a right to life provision, which has been used by the Indian judiciary in bringing home a wide variety of rights that are not specifically recognized under the Indian constitution. The right of everyone to the enjoyment of the highest attainable standard of physical and mental health recognized under Article 12 of the covenant is yet another crucial right that needs to be recognized under an enabling legislation, since the right to health is not recognized under the fundamental rights chapter, and the importance of such a right has never been felt more, than during these times of the Covid-19 pandemic.

The right to primary, secondary and higher education as recognized under Article 13 of the covenant is required to be recognized in an enabling legislation that is to be implemented since, this is a vital right which can enable to citizens of a country to attain the ultimate goal of higher living standards and the enjoyment of other recognized rights of a country. Education aims at the individual existence as well as at the social relations between individuals and groups. Education in a larger sense also includes instruction and training. Therefore, recognition

of a right to education could help to eradicate many of the issues associated with poverty alleviation and the enjoyment of highest standards of living.

Conclusion

The issue of economic, social and cultural rights has been in the mainstream discourse on human rights after the end of the second world war. Though recognized as coming under the second generation of rights, many of the countries in the world have struggled to ensure these rights, whether by constitutional means or otherwise when compared to their achievements in making real, the civil and political rights. Sri Lanka is also a prime example for this, as its fundamental rights chapter while giving considerable space for the recognition and implementation of civil and political rights, it has failed to recognize and implement economic, social and cultural rights. While the covenant itself states that the progressive realization of the rights recognized in the covenant are to be implemented in the domestic context by each country, depending on the availability of the resources, lack of resources itself will not be a mitigatory ground for failing to implement the recognized rights of the covenant under the domestic context. In this backdrop, making an enabling legislation to give effect to the obligations undertaken by Sri Lanka with the ratification of the covenant seems the only realistic option in bringing these rights home so that the inhabitants of the country can reap the benefits of such rights.

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