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ECONOMIC AND SOCIAL RIGHTS, JUSTICE AND THE LAW

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Economic and Social Rights, Justice and the Law

JUANITA ARULANANTHAM & THIAGI PIYADASA

This issue of the Review focuses on economic and social rights. The contributions in this issue speak to important debates in the context of both constitutional reform as well as transitional justice.

The Public Representations Committee on Constitutional Reforms (PRCCR) was unambiguous in its recommendation that Sri Lanka should enshrine a wide range of socio economic rights in its Bill of Rights. Readers may recall Asanga Welikala's arguments in the July issue of the Review cautioning against such a move, highlighting the dangers of emphasising legal mechanisms over political mechanisms for the protection of economic and social rights. In contrast, in this issue of the Review, Gehan Gunatilleke argues that the new Constitution ought to make economic and social rights justiciable with the stipulation that the role of judges in this regard ought to be defined precisely and cautiously. To this end, he argues that these 'positive' rights - in contrast to civil and political 'negative' rights - be enumerated within the bounds of minimum core obligations and the idea of progressive realization of rights.

Gunatilleke further distinguishes the question of justiciability and enforceability of socio economic rights – a distinction that is somewhat muddled, if not lost altogether, in the prevailing debate in Sri Lanka. The question, indeed, is not whether economic and social rights must be enforceable or not. Rather, it is whether making these rights justiciable – and constitutionally justiciable – is

the most effective way of enforcing them. Making economic and social rights justiciable, i.e. legally enforceable, necessarily makes them vulnerable to legal restrictions.

Further, as Welikala argues, 'the expansion of the constitutional Bill of Rights to include socio economic rights engenders unrealistic expectations, they are often unaffordable in a developing society, (and) they involve policy decisions by unelected judges...'. The potential negative implications of this on the rule of law, democracy and constitutionalism itself must also be considered.

In light of these factors, consideration must also be given to the wide reach of Article 12 of Sri Lanka's existing Constitution – the fundamental right to equality and equal protection of the law. Sri Lanka's Supreme Court has further recognized that an action that is 'unreasonable' is also a violation of Article 12. This provision has already repeatedly been used to challenge discrimination in the realization of economic and social rights. Gunatilleke's discussion concerning the use of provisions of 'reasonableness' and 'non discrimination' for the protection of economic and social rights is useful to consider in this regard.

The submission on behalf of the Up-Country Tamils to the Consultation Task Force on Reconciliation Mechanisms (CTF) starkly underlines however, how a reliance only on political mechanisms has also resulted in entrenched patterns of exclusion

and other negative consequences. Thus, even though health and education as scheme-based entitlements in Sri Lanka are arguably far more widely accessible than even in some so-called developed countries, there are several enduring fault-lines and shortcomings that warrant serious consideration. The submission to the CTF is a critique of liberal notions of violence, conflict, and justice. The demand to address nearly two centuries of structural violence at the intersection of ethnicity, class, caste, and gender poses many challenges to the pre-determined four-way segmentation (based on mechanisms) transitional justice agenda. These claims will be a crucial touchstone for the relevant and inclusive nature of justice in Sri Lanka.

This issue also includes an article by Evert Waeterloos and Sara Janssens on the South African experience of land reform and rural development. The issues discussed here are of particular interest to Sri Lanka, especially given the cultural and political significance of land and its role in Sri Lanka's decades long ethnic conflict. Restitution of lands of Tamil and Muslim peoples in particular, are far from being resolved despite being high on the political and justice agenda. Waeterloos and Janssens provide valuable insights from South Africa by drawing attention to the need for a balance between restitution and redistribution to ensure stability, development, and justice in the long term. Their call to link land rights and livelihoods, and ensure that restoration of rights in land is accompanied by a) an approach to land as a multi-functional resource and b) an alignment between restitution-related rights and meeting needs that demand redistribution, are especially germane to the debates around land and agrarian relations in post-war North and East Sri Lanka as well as Up-Country Tamil people's claims to land.

It is in the same vein that the submission by the Law & Society Trust to the CTF on economic reparations assumes significance. Given the economic crisis in the post-war North and East, the idea of 'transformative reparations' and integrating reparations with economic and social policy is especially relevant.

The contributions in this issue thus highlight matters that are particularly timely for Sri Lanka today. The subject of social and economic rights is one that will assume significance in the months to come, as Sri Lanka grapples with issues of constitutional reform and transitional justice.

Obligations, Aspirations and Justiciability: Constitutionalising Socioeconomic Rights in Sri Lanka

GEHAN GUNATILLEKE

Discussing the obligations of the state to progressively realize economic, social and cultural (ESC) rights, the author argues that Sri Lanka's new Constitution ought to make ESC rights justiciable, and that the role of judges ought to be defined precisely and cautiously. Gunatilleke recommends that the constitutional text differentiate between a state's minimum core obligations, which are not contingent on the availability of resources, and its general obligations to progressively realise ESC rights.

1. Introduction

The constitutional status of economic, social and cultural (ESC) rights has been a subject of intense debate among human rights scholars and practitioners. This debate is featured in recent discussions concerning constitutional reform in Sri Lanka. The question of whether to make ESC rights justiciable under the new Constitution now vexes Sri Lanka's constitution-makers.

This article confronts this question by surveying the normative and political arguments pertaining to the justiciability of ESC rights. It is presented in three sections. The first section deals with certain normative developments in international and comparative human rights law. It discusses the state's obligation to make ESC rights enforceable under domestic law, and locates justiciability within this obligation. The second section discusses the final report of Sri Lanka's Public Representations Committee on Constitutional Reform, and contends that the new Constitution ought to reflect the people's aspirations in terms of ESC rights. The third and final section of this article examines the specific role of judges in rights adjudication. Building on this author's previous work, this section attempts to set out certain parameters within which courts should enforce ESC rights.

The article accordingly argues that Sri Lanka's new Constitution ought to make ESC rights justiciable, that the role of judges ought to be defined precisely and cautiously, and that the constitutional text ought to lend itself towards such precision and caution.

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2. The State's Obligation to make ESC Rights Justiciable

2.1 Positive and negative rights

The 1993 Vienna Declaration and Programme of Action cemented the view that human rights were 'universal, indivisible, interdependent and interrelated.'¹ The idea that ESC rights are equal in status and importance to their civil and political counterparts has since enjoyed broad and steadily expanding support. Yet it would be impossible to maintain that there is consensus on the matter. Legal and constitutional scholars continue to argue that treating needs such as health, education and housing as 'rights' 'undermines the enjoyment of individual freedom, [and] distorts the functioning of free markets.'² Scholars such as Cass Sunstein have argued that recognising ESC rights provides 'an excuse to downgrade the importance of civil and political rights.'³ Regardless of whether one agrees with this view, the obligations concerning ESC rights are often more complex than those relating to civil and political rights. This complexity has certain features worth discussing further.

The relevance of resources has characterised ESC rights as requiring positive action. Yet Victor Abramovich and Christian Curtis challenge the claim that ESC rights are merely 'positive rights'.⁴ They argue that ESC rights demand 'not only affirmative actions to guarantee and promote, but also require that the state respect and protect.'⁵ The authors cite the example of the right to food to illustrate the point. On the one hand, the state must not expropriate land from a community that depends on such land for its livelihood. On the other, the state has an obligation to protect communities from the actions of third parties, such as dominant economic groups, to prevent deprivations of food. Such illustrations cast serious doubts over claims that ESC rights are merely 'positive rights' to be fulfilled depending on the availability of resources.

Nevertheless, it is difficult to ignore the general tendency for ESC rights to require scarce resources. This tendency makes state obligations with respect to ESC rights relatively more complex compared to obligations relating to civil and political rights. For example, the right to education invariably involves allocating resources towards building schools and training teachers, while the freedom of expression may not necessarily involve such costs. Meanwhile the interdependence of rights is difficult to dispute—a matter that we will return to later in this article.

2.2 Progressive realisation and minimum core obligations

If the obligation to guarantee ESC rights is indeed more complex, it may be important to define the precise contours of this obligation. Two international legal sources are useful in this regard.

First, Article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) articulates the general obligation of states with respect to ESC rights:⁶

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures (emphasis added).

The idea of progressive realisation sets ESC rights apart from civil and political rights, as it reflects the fact that states are not obliged to immediately fulfil all ESC rights. This apparent leeway provided to states is more often linked to the resources needed to achieving the 'full realisation' of ESC rights. Thus, for example, the state is not required

to provide adequate housing to all persons immediately. It instead has an obligation to utilise ‘available resources’ to fulfil the right to adequate housing progressively until the right is eventually fully realised.

By contrast, the state cannot seek to ‘progressively’ protect and promote civil and political rights. They are instantly owed to citizens and are not contingent on resources. For example, the state cannot claim to work towards protecting the freedom from torture. It must set out to do so immediately by refraining from the practice, prohibiting it under law and investigating, prosecuting and punishing offenders. The questions of resources—except in the context of preventive measures and law enforcement—do not apply to the immediate obligations with respect to guaranteeing the freedom from torture. Hence any attempt to enumerate ESC rights must take adequate account of this idea of progressive realisation.

Second, the UN Committee on Economic Social and Cultural Rights has clarified and elaborated upon the obligations of states with respect to ensuring progressive realisation. It is noted that the Committee’s views do not have the same force as binding international treaty law. Yet the Committee is mandated to interpret and clarify the ICESCR. Hence its general comments must be treated as authoritative. In General Comment No. 3, the Committee observes that the state bears two types of obligations with respect to ESC rights: obligations of ‘conduct’ and obligations of ‘result’.⁷

The Committee also clarifies that the state’s obligations entail two important undertakings. First, states must undertake to ‘guarantee’ that relevant rights can be exercised without discrimination. Second, the state must undertake ‘to take steps’ to fulfil these rights.⁸ The means by which the obligation ‘to take steps’ is satisfied include ‘all appropriate means, including particularly the adoption of legislative measures.’⁹ The Committee

thus recognises ‘that in many instances legislation is highly desirable and even indispensable.’¹⁰ Yet the adoption of legislative measures is by no means exhaustive. Other measures such as administrative, financial, educational and social measures are also required.

The Committee has also expounded upon the concept of progressive realisation, which ‘constitutes a recognition of the fact that full realisation of all [ESC] rights will generally not be able to be achieved in a short period of time.’¹¹ It has observed that the phrase ‘progressive realisation’ should be interpreted purposefully in the light of the *raison d’être* of the Covenant, which is ‘to establish clear obligations...in respect of the full realisation of the rights in question.’¹² The Committee accordingly points to the existence of a ‘minimum core obligation’ in respect of each Covenant right. It explains that a State in which a significant portion of the population is deprived of basic needs such as food, essential primary healthcare, basic shelter, and the most basic forms of education is ‘failing to discharge its obligations under the Covenant.’¹³ Hence it concludes that without minimum core obligations, the Covenant would be deprived of its *raison d’être*.

It is clear that states have a duty to achieve the ‘ends’ of respecting, protecting and fulfilling ESC rights with a specific focus on minimum core obligations. Yet there is a residual debate on the ‘means’ through which such a duty may be discharged. Hence the question remains as to whether measures adopted in this regard should include judicial remedies for the enforcement of ESC rights. The idea of justiciability arises in this specific context.

2.3 Assessing the case for justiciability

‘Justiciability’ is distinguishable from ‘enforceability’.¹⁴ It is usually defined as involving a ‘real controversy’ that is ‘appropriate for judicial

determination'.¹⁵ Hence the state's obligation to enforce ESC rights must be distinguished from the debate on the appropriateness of judicial intervention in the course of such enforcement. International instruments appear to leave the matter open. Article 8 of the Universal Declaration of Human Rights (UDHR) states: 'Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the constitution or by the law.'¹⁶ Hence the UDHR does not draw a distinction between civil and political rights and ESC rights, provided such rights are recognised by law. Meanwhile, Article 2(3)(b) of the International Covenant on Civil and Political Rights (ICCPR) specifically requires states to develop the possibilities of judicial remedies,¹⁷ whereas such a provision is not found in the ICESCR. Thus justiciability of ESC rights remains a subject of debate among scholars and policymakers.

Some scholars have argued against justiciability despite acknowledging state duties in respect of ESC rights. Aryeh Neier and Dennis Davis for instance contend that judges lack the democratic legitimacy and the competence to adjudicate on ESC rights.¹⁸ They argue that the need for effective remedies should not be confused with judicial remedies, and that administrative remedies and the 'democratic process' is better suited to enforcing ESC rights. It is accordingly argued that the '[g]reater flexibility and responsiveness of some those techniques can be better suited than litigation for achieving the goals of [ESC rights]'.¹⁹ The two main arguments against justiciability perhaps warrant further discussion.

First, it is argued that unelected officials ought not to adjudicate on the allocation of scarce resources, which is the democratic majority's 'moral right'.²⁰ Neier argues that by adjudicating on ESC rights, 'we get into territory that is unmanageable through the judicial process and that intrudes fundamentally into an area where the democratic

process ought to prevail.'²¹ He accordingly insists that all stakeholders must be consulted when resolving questions of distributive justice and that such consultation cannot take place when rights are adjudicated upon through courts.

Second, it is argued that the judiciary lacks the necessary resources and technical expertise to interpret and enforce ESC rights.²² Typically, it is contended that the executive and legislative branches of government have superior fact-finding and reporting tools at its disposal to make decisions concerning resource allocation. Cécile Fabre explains that this argument is made because judges 'do not have adequate training and the information-gathering tools that are required to decide...whether a particular individual got the resources the constitution entitles him to have.'²³

These objections are based on certain presumptions about the effectiveness of the democratic process and the ability of courts to access expertise. On the one hand, these objections presume that the legislative and executive organs of government are accountable to the general public, and that these organs function according to principles of equality and non-discrimination at the structural level. If this presumption is rebutted, the idea that a separate 'independent' organ could play a 'countermajoritarian' role to check legislative and executive power seems reasonable. Thus even if judges play only a limited role in the vindication of ESC rights, there is no basis to deny the constitutionalisation of ESC rights altogether.²⁴ On the other hand, it is often presumed that courts cannot adequately access expertise and develop competencies on questions of resource allocation. To the contrary, courts are already developing such competencies. A number of jurisdictions, including the United Kingdom,²⁵ South Africa and India²⁶ have witnessed courts successfully navigate the difficult terrain of resource allocation without venturing outside the limits of its competence.²⁷

Amy Kapczynski and Jonathan Berger offer the following conclusion with respect to the South African experience:

In a series of cases that have become milestones in the global debate over socio-economic rights, the Constitutional Court has declared that such rights, as they are enshrined in the South African Constitution, are fully justiciable, and in fact that South African courts are obliged to test the constitutional adequacy of the government's programs against these guarantees and to provide adequate remedies for all constitutional violations.²⁸

Moreover, in *Olga Tellis v. Bombay Municipal Corporation*,²⁹ the Supreme Court of India analysed the issue of enforcing ESC rights under the Indian Constitution. The Court offered an expansive interpretation of the right to life in order to implicitly read in ESC rights such as the right to a livelihood. It held:

If there is an obligation upon the State to secure to the citizens an adequate means of livelihood and the right to work, it would be sheer pedantry to exclude the right to livelihood from the content of the right to life. The State may not, by affirmative action, be compellable to provide adequate means of livelihood or work to the citizens. But, any person, who is deprived of his right to livelihood except according to just and fair procedure established by law, can challenge the deprivation as offending the right to life conferred by Article 21.

Meanwhile, the Committee on Economic, Social and Cultural Rights reinforces the need for making judicial remedies available, though not always as the first resort. It observes that whenever an ESC right 'cannot be made fully effective without some role

for the judiciary, judicial remedies are necessary.'³⁰ Hence there appears to be an emerging consensus that judicial remedies must at least be available for ESC rights claims when other remedies are ineffective. Scholars such as Tara Melish accordingly insist that questions of justiciability ought not to be determined by which category a right falls under, but rather by whether a claim fulfils the 'elements of a justiciable controversy'.³¹ Thus, depending on the nature of the claim, ESC rights can and should be just as justiciable as their civil and political counterparts.

3. The People's Aspirations for ESC Rights

3.1 ESC rights under the current Constitution

The Sri Lankan Constitution does not contain enforceable ESC rights. Instead, it contains a chapter on the directive principles of state policy, which lists certain policy priorities of the state. These directive principles refer to certain ESC rights such as 'adequate food, clothing and housing'³² and 'the right to universal and equal access to education at all levels'.³³ However, the Constitution does not provide a route through which the contents of these directive principles could be enforced. In fact, Article 29 of the Constitution states that they 'do not confer or impose legal rights or obligations and are not enforceable in any court or tribunal' and that '[n]o question of inconsistency with such provisions shall be raised in any court or tribunal'. Thus a violation of any directive principle cannot be presented to a court for adjudication.

In practice, the directive principles have been referred to, and to some extent, have been relied upon in certain fundamental rights cases. A good example of this practice is the *Eppawela* case, although the directive principle considered in the case dealt with the environment rather than a conventional ESC right.³⁴

In this case, the Government of Sri Lanka sought to enter into a Mineral Investment Agreement with a U.S. based multinational company in respect of a deposit of phosphate rock at Eppawela in the Anuradhapura district. The petitioners were residents of Eppawela who engaged in cultivation and owned land in the area. They complained to the Supreme Court of Sri Lanka that their fundamental rights under Articles 12 (1), 14 (1) (g) and 14 (1) (h) of the Constitution³⁵ were imminently infringed by the proposed agreement.

The Court held that there was in fact an imminent infringement of the petitioners' rights guaranteed by the Constitution. In reaching its decision, the Court relied on the directive principle of state policy contained in Article 27(14) of the Constitution, which reads: 'The State shall protect, preserve and improve the environment for the benefit of the community.' Yet directive principles still remain entirely non-justiciable, as they cannot in themselves form the substance of litigation.

By contrast, Indian courts have 'redefined the relationship between fundamental rights and directive principles.'³⁶ The Indian Supreme Court has accordingly approached fundamental rights and directive principles in a more integral manner, thereby affording certain directive principles the status of fundamental rights.³⁷ Such an approach is not evident in the Sri Lankan context.

3.2 The reform initiative

An opportunity has presented itself to address this lacuna in Sri Lanka's constitutional jurisprudence. Sri Lanka is currently in the process of broad constitutional reform. Maithripala Sirisena was elected to the office of president in January 2015 with a mandate to abolish the executive presidency. The Nineteenth Amendment to the Constitution was enacted soon thereafter; it substantially reduced the powers of the executive president and re-

established an independent Constitutional Council to recommend appointments to key institutions and offices. The United National Front for Good Governance (UNFGG) later secured a parliamentary majority at the general election of August 2015 with a further mandate to deliver constitutional reform.

The reform agenda prompted the establishment of a Constitutional Assembly to enable the whole of Parliament to sit as one Assembly tasked with debating and promulgating a new Constitution. The Speaker of Parliament presided over the first sitting of the Assembly in April 2016. Moreover, a Steering Committee consisting of twenty-one members of parliament was appointed with the Prime Minister as its Chairman.

Meanwhile, a Public Representations Committee on Constitutional Reform (PRC) was appointed in late 2015. The Committee completed public consultations in May 2016 and produced an important report containing public views on constitutional reform including on fundamental rights. Hence the report offers insights into the public's aspirations with respect to ESC rights. These views warrant brief discussion.

The report makes the broader observation that the rights enunciated in the ICESCR ought to be reflected in the Bill of Rights of the new Constitution.³⁸ This observation clearly advances a view that ESC rights ought to be enumerated in the Constitution. Several specific rights are then mentioned in the report. The report first recommends that the 'right to life' be included in the Bill of Rights, as 'many [fundamental/human rights], such as the right to health, education [and] housing...flows from this basic right to life' [sic].³⁹ The report then offers an articulation of those specific ESC rights. It recommends that the right to healthcare be formulated in the following terms:

The Constitution guarantees to its citizens that the enjoyment of the highest attainable standards of physical, mental and social health care. Every citizen has the right to a standard of living adequate for the health and wellbeing including access to medical care, preventive services and drinking water [sic].

This ‘positive’ articulation of the right to health is followed by a ‘negative’ articulation: ‘No person may be denied emergency medical treatment’.⁴⁰ As discussed later in this section, such a dual articulation appears to distinguish between the general obligations pertaining to the ESC right and the minimum core obligation with respect to that right. Yet this approach to acknowledging both the ‘positive’ and ‘negative’ features of ESC rights is undermined by a carelessly formulated recommendation: ‘Ensure a balance between a focus on negative rights (protection from the state) and positive rights (entitlements to government protection and aid such as sustenance, shelter, education, health, employment)’.⁴¹

The recommendation reinforces the dichotomisation of rights and prescribes a ‘balancing’ approach, which insinuates a competition of sorts between civil and political rights and ESC rights. Such an approach neglects to acknowledge the indivisibility and interdependence of rights. Yet the recommendation may merely be one that is clumsily formulated rather than one intended to undo advances in human rights discourse since the Vienna Declaration.

Next, the report catalogues several ESC rights including the right to food, water, housing and social security.⁴² Unfortunately, this section of the report is poorly produced, as it merely lists these rights and fails to comment further on the actual views of the public. Yet the report does expand on the right to education while noting that ‘many of the submissions [it] received referred to the need

to protect Sri Lanka’s policy of free education.’⁴³ The report accordingly recommends the following clause to be included in the Constitution:

Every person has the right to education which shall be directed to full development of the human personality and the sense of its dignity and to the strengthening of respect for democracy, human rights and fundamental freedoms.⁴⁴

The report proceeds to recommend the inclusion of the ‘right to a primary, secondary and tertiary education at the cost of the State’ [sic]. Unlike the recommended framework on the right to healthcare, no part of the right to education is articulated in ‘negative’ terms or in a manner that signals the irrelevance of resource availability. Hence the report does not explicitly acknowledge the minimum core obligation with respect to the right to education.

Overall, the observations and recommendations contained in the report with respect to ESC rights are useful in terms of establishing a clear public demand for ESC rights in Sri Lanka. Such demands point towards the need to make these rights enforceable. The question then arises as to which institutional mechanisms are most appropriate in terms of ensuring enforceability.

On the one hand, Sri Lanka’s electorate has prioritised ESC rights fulfilment at successive elections. The recent manifestos of Maithripala Sirisena⁴⁵ and the 60 Month Plan of the UNFGG⁴⁶ clearly include references to ESC rights. In fact, the President’s manifesto includes specific chapters on healthcare and education, and commits to providing housing for those in need of shelter. These electoral demands and promises form part of the long history of the Sri Lankan welfare state. Hence the democratic process has made ESC rights enforceable to some extent even without explicit constitutionalisation of such rights.

On the other hand, majoritarian processes may not be sufficient to ensure the meaningful realisation of ESC rights. These processes may also lead to situations where a government reneges on its own electoral promises in terms of fulfilling ESC rights. A good example of this danger is reflected in the campaign launched by the Federation of University Teachers' Associations to protest government under-spending on education.⁴⁷ Though the campaign was in many ways successful in drawing attention to the issue of under-spending, it did little to increase spending in subsequent government budgets.⁴⁸ Hence there is a case for making judicial remedies available where political processes are inadequate.

The PRC only deals with justiciability in a tangential manner. Yet it observes: 'There were strong submissions from people requesting that the Directive Principles should be justiciable.'⁴⁹ Hence there is little doubt that the people of Sri Lanka demand the justiciability of ESC rights. Such justiciability must be an essential constitutional feature if reformers wish to meaningfully realise the people's aspirations.

4. Defining the Scope of Justiciability

4.1 Framing ESC rights

The precise contours of the justiciability of ESC rights must be carefully defined in the text of the Constitution. As discussed in the first section of this article, despite the false dichotomisation of 'positive' and 'negative' rights, the fulfilment of ESC rights is confronted with inevitable questions of scarce resources. Thus it is important that the constitutional framework on justiciability fits the nature of the state's obligations with respect to the constituent elements of each ESC right. In essence, the framework must be capable of responding to both the state's minimum core obligations and its general obligations in respect of each ESC right.

The PRC's recommendation on the right to health care separates the state's minimum core obligations and general obligations by stating the former in 'negative' terms—as a matter of non-denial—and the latter in 'positive' terms—as a matter of positive conduct. This formulation emulates Section 27 of the South African Constitution:

- (1) Everyone has the right to have access to -
 - (a) health care services, including reproductive health care;
 - (b) sufficient food and water; and
 - (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
- (3) No one may be refused emergency medical treatment.

The South African Constitution has similar provisions on the right to housing and the right to education. These provisions clearly illustrate the approach of separating the two types of state obligations. Section 26 of the South African Constitution provides:

- (1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

This articulation of the right to adequate housing is framed as a general obligation, which is subject to 'available resources' and the overall approach of progressive realisation. Yet subsection (3) of this section provides:

- (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

This component of the right to housing is framed in ‘negative’ terms in order to convey the minimum core obligations of the state with respect to the right to housing. It is clear that adequacy of resources and the idea of progressive realisation are inapplicable in this regard, as these obligations accrue immediately and regardless of resources. Meanwhile, Section 29(1) of the South African Constitution provides that everyone has the right:

- (a) to a basic education, including adult basic education; and
- (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.

This section also separates the minimum core obligations of the state from its general obligations in terms of the right to education. Both elements are articulated in ‘positive’ terms. Yet subsection (a) clearly provides for an immediate obligation in terms of ‘basic education’, which is the state’s minimum core obligation with respect to education. By contrast, the state only has an obligation to fulfil the right to further education ‘progressively’. Hence there is a clear distinction drawn between the minimum core obligations of the state and its general obligations—which are subject to resource constraints. This distinction has a vital bearing on the justiciability of ESC rights in practice.

4.2 Queue jumping and trade-offs

It is reiterated that the justiciability of ESC rights is desirable both in terms of the state’s international

obligations and the need to fulfil the aspirations of the Sri Lankan people. Yet the precise parameters and conditions for such justiciability need to be carefully defined in light of at least two concerns relating to resource constraints: queue jumping and trade-offs.⁵⁰ These concerns give rise to certain contexts in which judges must exercise restraint in the adjudication of ESC rights. At the outset, it may be necessary to clarify that such concerns ought not to detract from the state’s minimum core obligations, as such obligations accrue regardless of the availability of resources. Hence queue jumping and trade-offs are valid concerns in terms of a state’s general obligations to fulfil ESC rights.

Tara Melish describes queue jumping as ‘the strategic use of rights-based litigation to jump to the head of a line in accessing scarce entitlements.’⁵¹ A number of critical legal scholars have in fact argued that queue jumping undermines distributive justice. For example, David Kennedy argues:

A right or entitlement is a trump card. In emancipating itself, the right holder is, in effect queue jumping. But recognizing, implementing, and enforcing rights is distributional work. Encouraging people to imagine themselves as right holders, and rights as absolute, makes the negotiation of distributive arrangements among individuals and groups less likely and less tenable. There is no one to triage among rights and right holders—except the state. The absolutist legal vocabulary of rights makes it hard to assess distribution among favoured and less-favoured right holders and forecloses development of a political process for trade-offs among them, leaving only the vague suspicion that the more privileged get theirs at the expense of the less privileged.⁵²

This contention—though an exaggeration when applied to the minimum core obligations of the

state—remains valid when applied to the state’s general policy choices with respect to ESC rights fulfilment. For example, a number of communities in Sri Lanka need electricity. Hence litigating the issue on behalf of any one of those communities may result in queue jumping wherein the litigating community jumps to the head of the queue through a court’s involvement.

The risks of queue jumping are illustrated in the criticism of the Constitutional Court of Colombia for its decisions in the ‘overseas treatment cases’.⁵³ In these cases, the Court ordered the Colombian state to pay for expensive overseas medical treatment for individual litigants, where (1) their life or health was affected, (2) they were unable to pay for the treatment themselves, and (3) the treatment was not available in Colombia. The Court has been heavily criticised for ‘consciously ignoring resource constraints...’⁵⁴

The Constitutional Court of South Africa by contrast has endeavoured to avoid queue jumping ‘by viewing individual claims for discrete remedies in the larger context of what the State is reasonably doing to ensure access to a reasonably moving queue within a rational plan of action.’⁵⁵ For example, in *Soobramoney v. Minister of Health, KwaZulu-Natal*, the Court observed that it would ‘be slow to interfere with rational decisions taken in good faith by the political organs.’⁵⁶ The case concerned an individual with late-stage kidney failure in need of dialysis. The individual had been turned away from his local hospital because he did not meet the criteria for rationing time on the hospital’s limited number of dialysis machines. The Court held that the hospital’s guidelines limiting access were reasonable and non-discriminatory. It held that limited resources would at times require the state to ‘adopt a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society.’⁵⁷ This is a good example of where, despite the justiciability of

ESC rights, the judiciary exercised restraint in order to avoid queue jumping.⁵⁸ Accordingly, a standard of ‘reasonableness’ may be useful to understand precisely when judges ought to intervene in ESC rights matters and when they ought to restrain themselves to avoid queue jumping.

The justiciability of ESC rights may also be constrained by concerns over trade-offs. Unlike queue jumping, where individuals or groups compete for the same interests, trade-offs involve ‘competition between different segments of society for the allocation of resources towards different interests.’⁵⁹ For example, one group may demand allocation of resources for more hospitals in their area, whereas another group may demand the construction of better roads. These claims invariably involve ‘vexing’ trade-offs, as more money for road development inevitably means less for health and education.⁶⁰

It is thus contended that judges should play no part in the policy choices of the government—choices that are better determined through a democratic political process. Yet courts may still need to be vigilant in distinguishing between ‘fundamental’ trade-offs and the ‘vexing’ trade-offs contemplated in macroeconomic choices. For instance, could a government deny primary education in order to build its war machine? In this sense, fundamental trade-offs involve a state’s minimum core obligations in respect of ESC rights.

In the TAC case, the South African Constitutional Court held that the government was violating the Constitution by failing to provide a public sector programme to prevent mother-to-child transmission (PMTCT) of HIV.⁶¹ It held that the government had ‘breached the express constitutional guarantee of access to health care services, in particular the state’s positive obligations in respect of that right’ by failing to develop and implement a comprehensive PMTCT programme.⁶² It accordingly ordered the

government to adopt measures to ensure access to PMTCT services ‘without delay’.⁶⁵ Yet the Court did not define those measures, as it observed that judges ‘are not institutionally equipped to make... wide-ranging factual and political enquiries.’⁶⁴

This case illustrates the distinction between the fundamental trade-offs that courts ought to have a role in assessing, and the more vexing trade-offs that courts ought not to interfere with. The Constitutional Court understood that no amount of resource constraints justified the government’s failure to provide a PMTCT programme given the fact that nearly 90,000 children were born with HIV in South Africa in 1999 alone.⁶⁵ Refusing to do so would have amounted to a fundamental trade-off between basic health care and other state interests. Hence the Court found it appropriate to intervene to the extent that it could direct the government to design and implement a PMTCT programme. Yet the Court appeared to understand that the trade-offs beyond this minimum core are more vexing in nature, and restrained itself from prescribing specific measures.

4.3 Interdependence of rights

Meanwhile, interdependence between civil and political rights and ESC rights must be borne in mind when judges select their approaches to adjudication. Judicial restraint is most often inappropriate in the context of civil and political rights adjudication. The concept of interdependence accordingly justifies the extension of such an ‘activist’ approach to ESC rights adjudication in certain specific contexts. This interaction takes place at two levels.

On the one hand, at a general level, certain civil and political rights such as the freedom of the press, the freedom of speech and expression and the freedom of political participation ensure that the existing political process is geared to facilitate the equitable allocation of resources. Amartya Sen

observes that, at least since the end of the Second World War, no famine has occurred in countries that guarantee ‘democratic accountability and the ability to communicate freely.’⁶⁶ He points to a positive correlation between the vindication of civil and political rights and the realisation of ESC rights, and provides an empirical basis for the notion of interdependence. He accordingly observes that there is a socio economic value in vindicating civil and political rights. Hence judges must be proactive in safeguarding civil and political rights—both for their own sake and for the sake of ESC rights that are dependent on their protection and promotion.

On the other hand, at a more specific level, traditional civil and political rights such as the rights to equality and non-discrimination serve to facilitate the fulfilment of ESC rights. Such facilitation takes place in relation to two important concepts: reasonableness and non-discrimination.

4.4 Reasonableness and non-discrimination

The ‘reasonableness’ test has been used widely in the South African context. In *Government of the Republic of South Africa and Others v. Grootboom and Others*,⁶⁷ members of an informal ‘squatter’ settlement facing eviction sued the government under Section 26 of the South African Constitution, which guarantees the right to housing.⁶⁸ The Constitutional Court of South Africa applied the doctrine of ‘reasonableness’ to hold that the proposed eviction violated the constitutional rights of the petitioners. It further held that the fulfilment of the minimum core of any given ESC right is relevant ‘in determining whether measures adopted by the State are reasonable.’⁶⁹ The doctrine of ‘reasonableness’ has found its way into the equal protection jurisprudence of Sri Lanka as well. In *Wickremasinghe v. Ceylon Petroleum Corporation and Others*,⁷⁰ the Supreme Court held that the essence of the equal protection doctrine was to ensure ‘reasonableness’.⁷¹ It opined:

If the legislation or the executive or administrative action in question is... reasonable and not arbitrary, it necessarily follows that all persons similarly circumstanced will be treated alike, being the end result of applying the guarantee of equality.⁷²

Meanwhile, non-discrimination has also become an important facet of ESC rights adjudication. James Cavallaro and Emily Schaffer contend that the advantage of using the non-discrimination principle is that the court ‘may rely on a fundamentally civil right to expand protection of [ESC] rights.’⁷³ They argue that the judiciary ought to focus on contentious ESC rights cases that permit ‘expanding constructions of the idea of discrimination.’⁷⁴ Two examples may be cited to illustrate this approach. In *Abdulaziz, Cabales and Balkandali v. The United Kingdom*,⁷⁵ the petitioners argued that the refusal to grant residence to their male spouses where similarly situated female spouses would have been granted residence violated Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).⁷⁶ The European Court of Human Rights (ECtHR) upheld the petitioners’ claim despite the government’s argument that it had a rational basis for the policy, as there was evidence to suggest that male immigrants were more likely to seek work than female immigrants. Moreover, in *Schuler-Zgraggen v. Switzerland*,⁷⁷ the ECtHR applied the principle of non-discrimination to review the denial of unemployment benefits to a married woman with a two-year old child. The state sought to justify the denial on the grounds that she was unlikely to seek employment outside her home. Yet the Court pointed out that a childless man, by contrast, would have been afforded the same unemployment benefits. The Court accordingly held that the policy violated Article 14 of the ECHR, and observed that ‘economic rights that would not otherwise be protected by the Convention would be guaranteed against discriminatory application.’⁷⁸

In addition to the concepts of reasonableness and non-discrimination, it should be briefly noted that the concept of ‘substantive equality’ serves to impose positive duties on the state to ensure ‘equality of results’ or *de facto* equality for historically marginalised groups. Sandra Fredman observes that substantive equality recognises that ‘treating people alike despite pre-existing disadvantage or discrimination can simply perpetuate inequality.’⁷⁹ Hence she argues that ‘substantive equality must include some positive duties’,⁸⁰ and that it may take the form of affirmative action or temporary special measures.⁸¹ While this conception of equality is still within the domain of civil and political rights, the positive duties envisaged invariably involve ESC rights. Quotas for disadvantaged groups in school and university admissions are good examples of how these positive duties could involve ESC rights. Hence judges could also rely on civil and political rights concepts such as substantive equality to fulfil the ESC rights of vulnerable and marginalised groups.

4.5 A model for determining the scope of justiciability

In *Judicial Activism Revisited: Reflecting on the Role of Judges in enforcing Economic, Social and Cultural Rights* (2010), this author proposed a model for defining the role of judges in ESC rights adjudication. The foregoing discussion could therefore be captured succinctly by this model, which is presented in the figure below. This model acknowledges the generally proactive role judges must play in the realm of civil and political rights. It also acknowledges distinctions between the state’s minimum core obligations and its general obligations, and attempts to grapple with concerns of queue jumping and trade-offs. The figure below illustrates the proposed model.

Figure 1: Model for Determining Judicial Involvement

	Level of Judicial Involvement		
	Deferential	Vigilant	Activist
Type of rights / policy issue			Civil and political rights issue
	ESC rights issue – Vexing trade-offs	ESC rights issue – Minimum core obligations (Reasonableness test)	ESC rights issue – ex facie discriminatory (Non-discrimination standard)

This model suggests that judges should adopt three approaches to rights adjudication, each of which is dependant on the type of right or policy issue under adjudication. The first two approaches are appropriate in the context of policy trade-offs that are not *ex facie* discriminatory. Where such trade-offs are vexing in nature and involve complex questions of resource allocation, the courts ought to defer to policymakers to avoid queue jumping. This approach appears to have been adopted in *Soobramoney*. Where such trade offs are of a more fundamental nature and involve the state’s minimum core obligations, the courts ought to be more vigilant. In such cases, it is justifiable for judges to scrutinise government policy on the basis of ‘reasonableness’. It could hold in certain instances that the government’s failure to allocate adequate resources to meet at least this minimum core is ‘unreasonable’. The *TAF* and *Grootboom* cases fall within this particular approach. The final approach to adjudication can be described as more ‘proactive’ or even ‘activist’. Such an approach is warranted in cases dealing with civil and political rights. Yet certain types of ESC rights cases also warrant such an approach, particularly if the policies under scrutiny are ex

facie discriminatory. This approach was seen in *Abdulaziz* and *Schuler-Zraggen*.

Although one might accept that ESC rights ought to be justiciable under Sri Lanka’s constitutional framework, judges ought not to adopt a ‘one size fits all’ approach to ESC rights adjudication. Instead, the nature of the rights claim and the policy choices under scrutiny ought to determine a court’s approach. At least three distinct types of judicial approaches accordingly emerge: deferential, vigilant and activist. It is thus through internalisation and appropriate application of these approaches that a meaningful ESC rights jurisprudence could be developed.

5. Conclusion

This article has attempted to grapple with three features of the debate on constitutionalising ESC rights. It began by presenting a case for recognising the well-established obligations of the state with respect to ESC rights, particularly at the international level. The state has certain minimum core obligations with respect to each ESC right, and such obligations must be contrasted with the general obligation of states to progressively realise ESC rights based on the availability of resources. The article then proceeded to argue that these state obligations are reinforced by the aspirations of the Sri Lankan people. The findings and recommendations of the PRC appear to confirm that the people not only demand the recognition and enumeration of ESC rights, but that they also demand a full range of means to ensure enforcement—including judicial remedies. The important question of the justiciability of ESC rights emerges in this context.

The foregoing analysis suggests that the idea of justiciability of ESC rights requires further deconstruction. Judges simply cannot adopt the same approach to deal with all ESC rights cases. The appropriateness of the approach is entirely contingent

on the nature of the state's obligations and policies at stake. A model for defining the judicial approach appropriate in each case could be developed to offer some clarity in this regard. First, vexing trade-offs that involve complex policy choices pertaining to the allocation of resources ought to be treated with deference. It is contended that judges must not facilitate queue jumping, but must instead permit the democratic political process to determine such questions. Second, courts must be vigilant when the policy choices under scrutiny involve a state's minimum core obligations. For instance, when basic health, primary education and basic shelter are at stake, courts ought to inquire into the 'reasonableness' of the state's policies in terms of resource allocation. Finally, when a state policy or practice is *ex facie* discriminatory, courts have a duty to adopt a more proactive role. They must be willing to strike down a policy and uphold the rights to equality and non-discrimination, both of which cut across the gamut of civil and political rights and ESC rights. Moreover, it is through jurisprudence that recognis-

es and advances the interdependence of all rights that a holistic vision of human rights may be realised.

It is crucial that constitutional reformers in Sri Lanka confront the complexities involved in the enforcement of ESC rights, and design a Bill of Rights that can facilitate a complex approach to ESC rights adjudication. It is hence strongly recommended that the constitutional text differentiate between a state's minimum core obligations, which are not contingent on the availability of resources, and its general obligations to progressively realise ESC rights. This careful demarcation will assist courts in developing jurisprudence on ESC rights that is appropriately deferential, vigilant and activist. It is through this important interface between the political process and the judiciary that the fulfilment of ESC rights is best served.

NOTES

¹ See UN General Assembly, Vienna Declaration and Programme of Action, 12 July 1993, A/CONF.157/23, para.5.

² See Cass R. Sunstein, 'Against Positive Rights' (1993) 2(1) *East European Constitutional Review* 35.

³ *Ibid.*

⁴ Courtis, 'Hacia la exigibilidad de los derechos económicos, sociales y culturales. Estándares internacionales y criterios de aplicación ante los tribunales locales', in Martin Abregdi & Christian Courtis (eds.), *La Aplicación De Los Tratados Intenacionales Sobre Derechos Humanos Por Los Tribunales Locales* (1997) 283-350, at 287, translated and reproduced in James L. Cavallaro & Emily J. Schaffer, 'Less is More: Rethinking Supranational Litigation of Economic and Social Rights in

the Americas' (2005) 56 *Hastings Law Journal* 217, at 253

⁵ *Ibid.*

⁶ The International Covenant on Economic, Social and Cultural Rights (ICESCR), GA Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966).

⁷ See Committee on Economic, Social and Cultural Rights, General Comment No. 3 (1990), UN Doc. E/1991/23, Annex III, para. 1.

⁸ *Ibid.* paras.1 and 2.

⁹ ICESCR, Article 2(1).

¹⁰ General Comment No. 3, *op. cit.* at para.3. The Committee explains: 'For example, it may be difficult to combat discrimination effectively in the absence of a sound legislative foundation for the necessary measures. In fields such as health, the protection of children and mothers, and education, as well

as in respect of the matters dealt within articles 6 to 9, legislation may also be an indispensable element for many purposes.'

¹¹ *Ibid.* para.9.

¹² *Ibid.*

¹³ *Ibid.* para.10.

¹⁴ Philip Alston & Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9(2) *Human Rights Quarterly* 156, at 169.

¹⁵ T.J Bodie TJ, *Politics and the Emergence of an Activist International Court of Justice* (Greenwood Publishing Group: 1995) at 2; Black's Law Dictionary (2nd Edition) (West Publishing Co: 2001).

¹⁶ Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), article 8.

¹⁷ International Covenant on Civil

- and Political Rights, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966).
- ¹⁸ Aryeh Neier, 'Social and Economic Rights: A Critique' (2006) 13(2) *Human Rights Brief* 1, at 1; Dennis Davis, 'The Case Against the Inclusion of Socioeconomic Demands in a Bill of Rights Except as Directive Principles' (1992) 8 *South African Journal of Human Rights* 475, at 475.
- ¹⁹ Henry J. Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals: Text and Materials* (3rd ed.) (2008), at 313. Also see Michael J. Dennis & David P. Stewart, 'Justiciability of Economic, Social and Cultural Rights: Should there be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, Health?' (2004) 98 *American Journal of International Law* 462, at 467. The authors observe: 'The call for formal, binding, case-by case adjudication seems to us an example of overreaching legal positivism, borne of the myth that judicial or quasi-judicial processes intrinsically produce better, more insightful policy choices than, for example, their legislative counterparts.'
- ²⁰ Cécile Fabre, 'Constitutionalising Social Rights' (1998) 6 *Journal of Political Philosophy* 263, at 280.
- ²¹ Aryeh Neier, 'Social and Economic Rights: A Critique' (2006) 13(2) *Human Rights Brief*, at 1.
- ²² See Dennis M. Davis, 'The Case Against the Inclusion of Socio-Economic Demands in a Bill of Rights Except as Directive Principles' (1992) 8 *South African Journal of Human Rights* 475.
- ²³ Fabre, *op. cit.* at 281.
- ²⁴ *Ibid.* 283.
- ²⁵ *Ibid.* at 282.
- ²⁶ Amy Kapczynski & Jonathan M. Berger, 'The Story of the TAC Case: The Potential and Limits of Socio-Economic Rights Litigation' in South Africa in D. Hurwitz, M. Satterthwaite and D. Ford, *Human Rights Advocacy Stories* (2009), at 55.
- ²⁷ The Committee on Economic, Social and Cultural Rights has also recognised the growing trend in ESC rights adjudication. It observes: 'It is sometimes suggested that matters involving the allocation of resources should be left to the political authorities rather than the courts. While the respective competences of the various branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters which have important resource implications.' See Committee on Economic, Social and Cultural Rights, General Comment No.9 (1998), UN Doc.E/1999/22, Annex IV, para.10.
- ²⁸ Kapczynski & Berger, *op. cit.* 18, at 53. Also see Eric C. Christiansen, 'Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court' (2007) 38 *Columbia Human Rights Law Review* 321, at 321.
- ²⁹ [1986] AIR SC 180.
- ³⁰ Committee on Economic, Social and Cultural Rights, General Comment No.9 (1998), UN Doc.E/1999/22, Annex IV, para.9
- ³¹ Tara Melish, 'Rethinking the 'Less is More' Thesis: Supranational Litigation of Economic, Social and Cultural Rights in the Americas' (2007) 39 *New York University Journal of International Law and Politics* 171, at 178.
- ³² Constitution of Sri Lanka, Article 27(2)(c).
- ³³ *Ibid.* Article 27(2)(h).
- ³⁴ *Bulankulama and Others v. Secretary, Ministry of Industrial Development and Others* [2000] 3 Sri. L.R. 243. Also see *R. Haputhantrige v. B.L. Karunawathie and Others*, SC (F.R.) 10/07, S.C. Minutes 29 March 2007. In this case, the Court held that the non-justiciability of Chapter VI of the Constitution did not bar the use of the Directive Principles to interpret other provisions of the Constitution. Hence it was held: '[T]he restriction added at the end in Article 29 should not detract from the noble aspirations and objectives contained in the Directive Principles of State Policy, lest they become as illusive as a mirage in the desert.'
- ³⁵ Article 12(1) provides: 'All persons are equal before the law and are entitled to the equal protection of the law.' Article 14(1)(g) provides: '[Every citizen is entitled to] the freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise', and Article 14(1)(h) provides: '[Every citizen is entitled to] the freedom of movement and of choosing his residence within Sri Lanka.'
- ³⁶ Henry J. Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals: Text and Materials* (3rd ed.) (2008), at 322.
- ³⁷ See *Olga Tellis v. Bombay Municipal Corporation* [1986] AIR SC 180.
- ³⁸ Public Representations Committee on Constitutional Reform, *Report on Public Representations on Constitutional Reform* (May 2016), at 91.
- ³⁹ *Ibid.* at 94.
- ⁴⁰ *Ibid.* at 100-101.
- ⁴¹ *Ibid.* at 126.
- ⁴² *Ibid.* at 101.
- ⁴³ *Ibid.*
- ⁴⁴ *Ibid.* at 102.
- ⁴⁵ New Democratic Front, *A Compassionate Maithri: Governance – A Stable Country* (December 2014), at 35, 39 and 21.

- ⁴⁶ United National Front for Good Governance, *A New Country in 60 Months: Five Point Plan* (July 2015).
- ⁴⁷ Federation of University Teachers' Associations, *6% of GDP for Education: Who is telling the truth?* (July 2012).
- ⁴⁸ Development Finance International, *Trends in Government Expenditure for Public Education, 2011-13*
- ⁴⁹ Public Representations Committee on Constitutional Reform, *op. cit.* at 90. (UNESCO 2015), at 10.
- ⁵⁰ For an in-depth discussion on queue jumping and trade-offs see Gehan Gunatilleke, 'Judicial Activism Revisited: Reflecting on the Role of Judges in enforcing Economic, Social and Cultural Rights' (2010) 1 *Junior Bar Law Review* 21.
- ⁵¹ Tara Melish, 'Rethinking the 'Less is More' Thesis: Supranational Litigation of Economic, Social and Cultural Rights in the Americas' (2007) 39 *New York University Journal of International Law and Politics* 171, at 182.
- ⁵² See David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (2004), at 17. Furthermore, Peter Gabel and Paul Harris argue: 'an excessive preoccupation with "rights-consciousness" tends in the long run to reinforce alienation and powerlessness, because the appeal to rights inherently affirms that the source of social power resides in the State rather than in the people themselves.' See Peter Gabel & Paul Harris, 'Building Power and Breaking Images: Critical Legal Theory and the Practice of Law' (1982-83) 11 *New York University Review of Law and Social Change* 369, at 375.
- ⁵³ See for example, Judgment T-1207/01, 16.11.2001 (Colombia.); Judgment T-165/95, 18.9.1995 (Colombia.); Judgment No. SU-225/98, 10.3.1998 (Colombia.); Judgment T-236/98, 16.3.1998 (Colombia.).
- ⁵⁴ Melish *op. cit.* at 331.
- ⁵⁵ *Ibid.*
- ⁵⁶ [1998] (1) SA 765 (CC) (South Africa).
- ⁵⁷ *Ibid.* at para.31.
- ⁵⁸ Gunatilleke, *op. cit.* at 32.
- ⁵⁹ *Ibid.*
- ⁶⁰ Varun Gauri, 'Social Rights and Economics: Claims to Health Care and Education in Developing Countries' (2004) 32(3) *World Development* 465, at 472-473. The author observes: 'Sorting out the various claims and counterclaims in a large population is, from the rights perspective, inevitably an activity without a formula, and one that relies on judgment guided by principle...As a result of complexities like these, when making policy proposals, some rights advocates tend for the sake of simplicity to fall back on modest versions of social rights...and argue that, globally, resources are available to fulfil at least some basic rights without having to confront the most vexing tradeoffs.'
- ⁶¹ See TAC (No.2) [2002] (5) SA 721 (CC) (South Africa).
- ⁶² Amy Kapczynski & Jonathan M. Berger, *op. cit.*, at 45-46.
- ⁶³ TAC (No.2) [2002] (5) SA, at para.135.
- ⁶⁴ *Ibid.* para.37.
- ⁶⁵ *Ibid.* paras.27-39.
- ⁶⁶ *Ibid.* See Amartya Sen, *Development as Freedom* (2000); *Hunger and Entitlements* (1987); *Poverty and Famines* (1981).
- ⁶⁷ [2001] (1) SA 46 (CC) (S. Afr.).
- ⁶⁸ Constitution of the Republic of South Africa (1996), Section 26.
- ⁶⁹ *Ibid.* It is noted that Section 26(3) of the South African Constitution provides: 'No one may be evicted from their home...', which may be considered the minimum core obligation with respect to the right to housing.
- ⁷⁰ [2001] 2 Sri. L.R. 409. The petitioner in this case had entered into an agreement with the Corporation for a dealership in petroleum products. The Corporation subsequently terminated the agreement without furnishing reasonable grounds for doing so. The Supreme Court held that the state's action infringed the petitioner's rights under Article 12(1) of the Constitution.
- ⁷¹ *Ibid.* at 414.
- ⁷² *Ibid.*
- ⁷³ Cavallaro & Schaffer, *op. cit.* at 271.
- ⁷⁴ *Ibid.*
- ⁷⁵ [1985] 7 EHRR 471. The petitioners in this case were non-native, permanent residents of the United Kingdom and sought to question distinctions in British immigration policy that effectively denied the right of entry to their male spouses where female spouses would have been granted residence.
- ⁷⁶ Article 14 states: 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'
- ⁷⁷ [1993] EHRR 405.
- ⁷⁸ See Cavallaro & Schaffer, *op. cit.* at 257.
- ⁷⁹ Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press 2008) at 178.
- ⁸⁰ *Ibid.*
- ⁸¹ For a good explanation of the concepts of affirmative action and temporary special measures, see the UN Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW), *General Recommendation No. 25, on Article 4, para. 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures*, UN Doc. No. HRI/GEN/1/Rev.7. (2004).

Land Reform and Rural Development in South Africa: The Need for Further Complementarity and Coherence Between Rights and Needs-based Approaches

EVERT WAETERLOOS AND SARA JANSSENS

This article discusses a need for a balance between a rights and needs-based approach to land reform and rural development in addressing transitional justice, reconciliation and inequalities in South Africa. In doing so the authors highlight some lessons for other countries in the process of addressing historically and structurally unequal rural development.

1. South Africa's Land Reform Policies: A Rights-based Reconstruction

Present day South Africa cannot be discussed outside of the country's specific historical path of colonial dispossession and apartheid segregation. Since the Natives Land Act of 1913 and up until 1994, when the first democratic elections after the Apartheid era were held, black people were formally excluded from secure access to land. Fourteen million blacks gathered in the former Bantustans and reserves—occupying only 13 per cent of the country's area. The large majority of them engaged in one way or another in small-scale farming activities, mainly for subsistence. The 'white' privately owned countryside on the other hand comprised 68 per cent of the overall land area of the country. Around 60,000 white commercial farms contributed about 95 per cent of South Africa's total agricultural production. South Africa's policy of food self-sufficiency was characterized by agricultural surplus and export amidst food shortage, or 'hunger and malnutrition next to the granary.'¹ In countries with such highly unequal land distribution, there are strong arguments pertaining to equity, balanced economic growth, job creation, poverty reduction and conflict prevention that favour the redistribution of land from the rich to the poor or from large to small farmers.²

The land reform policies of South Africa's first democratic government begin with the post-Apartheid 1994 Reconstruction and Development Programme (RDP), which saw land reform as 'the central and driving force of a programme of rural development' and set a specific target of redistributing 30 per cent of agricultural land by 1999.³ The 30 per cent redistribution target was

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first proposed in the 1993 World Bank document “Options for land reform and rural restructuring in South Africa”. According to this document, the main economic impact of a well-executed land reform programme would not only come from a more intensive use of agricultural land; it would, more importantly, come from multiple livelihoods created by a more dynamic local peri-urban and rural economy, and a substantial increase in small family farms.⁴

The RDP’s proposals for cautious market-based land reform show the post-Soviet influence of neo-liberal discourse in the World Bank and among allied South African academics. The RDP was also heavily marked by the compromises negotiated in the early nineties to facilitate the peaceful regime change. It was necessary to meet the redistributive demands of the liberation struggle, while at the same time avoiding the flight of capital and skills from the country or a right-wing uprising.⁵

The 1997 White Paper on South African Land Policy⁶ elaborates, in addition to the redistribution pillar, the tenure reform and restitution pillars of South Africa’s land reform programme. Under the restitution pillar a legal and administrative process was established, governed by the Restitution of Land Rights Act No. 22 of 1994, to restore rights in land to people who can prove that they were dispossessed of such rights after 19 June 1913 due to racist laws or policies of former governments. Successful land claims can be settled with the return of land, alternative land, payment of cash or other forms of compensation. Tenure reform on the other hand has two distinct aspects to it, one dealing with improving the security of tenure for those living on other people’s land, primarily farm dwellers on commercial farms, and another aimed at providing legally secure tenure for people living on communal land, primarily in the former Bantustans.

In the popular account or what Walker⁷ calls the ‘master narrative’ of land dispossession, black people were excluded since the Native Land Act of

1913 and subsequent legislation from secure access to 87 per cent of the overall land area. However in the ‘domain of the actual’, numerous particular histories of dispossession, resistance or accommodation coexist. All these different histories cover a range of tenure forms, relationships to land, and include overlapping and often competing rights and claims. Such diversity and multiplicity explains why time is required for proper beneficiary identification, participation and institutional development. Unlike the official objective to redistribute 30 per cent of ‘white-owned’ agricultural land, there were no hectares set as a target for the restitution pillar of South Africa’s land reform programme. With the slow progress of land reform, official statistics have over the years been accounting for both redistribution as well as restitution land transactions. Between 1994 and 2013, the redistribution pillar had clocked 4.4 million hectares, while the restitution pillar was responsible for the transfer or compensation of 3.3 million hectares at the end of 2015.⁸ This means that only about 10 per cent of 80 million hectares of ‘white agricultural land’ has been reallocated through the publicly funded land reform programmes, instead of the target of 30 per cent. Ownership of land in South Africa remains therefore highly skewed and concentrated.

Several social, political and economic concerns have been raised regarding the slow trajectory of South Africa’s land reform programmes. As du Toit⁹ points out more generally, the concept of land acts as an empty signifier, a field of meaning available for appropriation by different political projects. He lists the four most common narratives in South Africa’s recent history of land reform and rural development. The first discourse treats land reform as a vehicle for national reconciliation, restorative justice and reparation. A second one uses the framework of human rights violations, and emphasizes the need to protect and empower the marginalized and vulnerable through security of tenure. A third discourse centres on land for national food security and economic efficiency, with the view to create a deracialized, efficient, and

globally integrated commercial agricultural sector. The fourth is the one which views land as a resource to kick-start rural development at large, beyond mere agricultural production. The combination of these four narratives in a meta-narrative of post-Apartheid normalization and reconciliation, explains why the country has difficulties in dealing with the inherent contradictions and tensions.

2. Towards a Needs-based Agrarian Transformation

While the restitution pillar articulates the intents of a restorative land rights justice programme, the government's initial and various recently amended redistribution policies try to address the land needs of the previously disenfranchised black populace for purposes of socio-economic equity, agricultural and rural economic development. In reply to the slow process of land reform, government policies for land reform and rural development since 2009 aim to transform South Africa's rural space, economy and society. Based on the principles of the Comprehensive Rural Development Programme (CRDP) of 2009, policies developed since then have pursued the objective of 'agrarian transformation', which is 'a rapid and fundamental change in the relations (systems and patterns of ownership and control) of land, livestock, cropping and community'.

The CRDP frames this as an anti-colonial struggle for the repossession of lost land and restoration of the centrality of indigenous culture.¹⁰ A three-pronged strategy of land reform, production and livelihoods support, and economic and social infrastructure development is deployed to facilitate integrated development and social cohesion through participatory approaches. In the same vein the recent National Development Plan (NDP) aims to eliminate income poverty and reduce inequality by 2030. The NDP calls for an integrated and inclusive rural economy to which land reform, job creation and agricultural production need to contribute. Household food security and food trade surplus are to be realised, of which one-third is to be produced by small-scale farmers.¹¹

3. Restitution of Rights in Land Re-emphasized as a Vehicle for Transitional Justice

The seminal Restitution of Land Rights Act of 1994 was one of the first pieces of legislation of the new post-Apartheid democratic government. It adopted a rights-based approach to restoring the land rights of people and communities dispossessed due to racially discriminatory laws and practices since the Natives' Land Act of 1913. By the cut-off date of December 1998, a total number of 79,996 claims had been lodged with the governmental Commission on Restitution of Land Rights ('Commission' or 'CRLR'). As of November 2015, up to 78,483 land claims were reported as settled; 59,758 of these were finalised as claimants had received the determined compensation. These settled claims have benefited 1.94 million people or 390,621 households (both original victims and their descendants). The Commission has not published recent updates on the outstanding claims from the first round, but in 2014 it still noted 8471 claims outstanding or only partially settled.¹² Especially in the first few years, the progress of settling claims was indeed very slow as it was a fully legally driven process. All claims had to be assessed by the Land Claims Court; it was later that it was turned into an administrative process whereby the Commission settled claims, and only disputed ones had to pass through court.

The recent Restitution of Land Rights Amendment Act of 2014 re-emphasizes restitution of land rights as a vehicle for transitional justice. The Act provides a renewed opportunity for people who missed the initial cut-off date of 1998 to lodge land claims until 30 June 2019. Meanwhile the Commission continues to settle outstanding claims. The rationale for the reopening is that potential claimants missed the initial deadline. Claimants became victims of fraudulent claim practices, were not (well) informed about the programme or its criteria, or lacked the capacity and means to lodge a claim due to reasons such as illiteracy, poverty, or the inaccessibility of government offices. It is expected that a further

400,000 valid land claims may be lodged.¹⁵ In 2015/2016 143,720 new claims have already been received since the reopening.¹⁴

While original targets were probably unrealistic, resolving restitution claims has proven to be immensely complex and time consuming. This is due to the extensive time period under review, the intricacies of oral testimonies, conflicts between stakeholders and changes in land use and demography.¹⁵ In addition, underfunding, unrealistic deadlines, and the lack of coordinated support for beneficiaries have hampered the restitution programme.¹⁶

The restitution programme and in particular the reopening of the lodgement process, has sparked fierce criticism from various corners. Some land activists fear that the reopening jeopardises the settlement of outstanding claims, that tribal leaders will claim land individually on behalf of their communities, and that capacity and public funds necessary to manage the programme is inadequate.¹⁷ Commercial farmer organisations on the other hand criticise the renewed opportunity to lodge claims as a threat to commercial farming and investment security, pointing to disappointing production levels on farms restituted thus far.¹⁸

In reply to such concerns, the South African Constitutional Court declared on the 28th of July 2016 the Restitution of Land Rights Amendment Act of 2014 invalid, largely due to an insufficient degree of public participation.¹⁹ The Court ordered that all claims lodged after the 1st of July 2014 should be put on hold until earlier claims are settled, and that new appropriate legislation should be produced within the next two years.

4. Towards Coherent and Complementary Restorative and Redistributive Justice

The general question remains whether and under which circumstances the renewed emphasis on rights-based restorative justice will

complement rather than compete with the needs-based redistributive justice perspective of land redistribution and social and infrastructural rural development promoted since 2009. Contradictions loom especially where new claims may again cast a shadow of temporary uncertainty of land rights over the productive use and development of operating enterprises, including already redistributed ones. A careful assessment of such possible contradictions is required to make a firm choice - where necessary - between rights and needs-based approaches to land reform and rural development. The significant but complex programme of restoring rights in land - sometimes dispossessed up to 100 years ago - must not jeopardize programmes of inclusive social and economic development based on needs for access to land of approximately the past 20 years.

With 22.6 per cent of households experiencing (severely) inadequate access to food in 2015,²⁰ an unemployment rate of 26.7 per cent mostly among the youth (38%) in 2016,²¹ a strategic public sector commitment towards job creation in the agricultural and rural service sectors through for instance district-based hubs of processing, marketing, credit and retail facilities ('AgriParks') for smallholder farmers, and through capacity support to around 300,000 black commercially-oriented smallholder farmers, the need for a strategic complementarity and coherence of land reform and rural development pillars is clear.²² The rights-based restitution approaches need therefore to be more clearly aligned with other recent redistributive and economic development policies. The need for complementarity of the reopening of restitution claims with the recently initiated identification at district level of 20 per cent of redistributable land, beneficiaries and enterprises by multi-stakeholder 'District Land Reform Committees' is a case in point.

We can at this early stage only conclude by outlining a few critical points of attention for the reopened restitution process to contribute to such complementarity and coherence:

1. New claims with the highest added value in terms of restorative justice should be prioritised, rather than 'numbers' in terms of hectares, claims or individuals as has been done in the past. This implies adhering to a strict interpretation of the criteria espoused to warrant the reopening: historic 'Betterment Schemes' and areas where communication was obviously insufficient or corruption was reported.
2. The Commission should inform aspiring claimants realistically and transparently regarding the complexities and protracted time frames of settling claims.
3. Increase the Commission's implementation and facilitation capacity to ensure screening and settling of claims within a clearly established and communicated time frame. Invest especially in multi-actor planning and programming, including mediation and conflict resolution strategies.
4. Safeguard institutional transparency and accountability more effectively (e.g. monitor and tackle corruption, improve information management and timely dissemination, etc.). Use multi-actor fora at district level to address issues of restitution and other land reform and rural development programmes comprehensively (e.g. District Land Reform Committees).
5. Align the prioritisation of claims with the drivers of the rural economy and sustainable human settlements as identified in the NDP. Claims that decongest neighbouring overpopulated areas (e.g. vicinity to communal areas, towns, and rural growth points) and/or have no immediate negative impact on high (potential) agricultural production enterprises should receive priority.
6. Improve the flexible integration of criteria of needs-based land reform and rural development programmes into the rights-based restitution programme in communally governed group

claims. Provide for instance selective and gradual enterprise support to young and aspiring individual rural producers of not only agricultural products but also of rural based services (e.g. marketing, transport, finance).

5. Conclusion: Striking a Strategic and Coherent Balance

South Africa is deeply unequal in terms of distribution of income, assets and opportunities, and deeply racialized in cultural and social terms. The agrarian question in South Africa remains at the cutting edge of the debate between arguments of transitional justice, socio-economic equity and macro-economic efficiency of agriculture and especially smallholder production. Or, in other words, between advocates of rights - and needs-based approaches to rural economic transformation. Proponents of the reopening of the restitution programme argue that this is vital to move on with reconciliation, stability, and peace in South Africa. For critics, it is a populist step back which dodges tough questions about long-term macro-economic strategies and complementarity with other land reform and rural development initiatives which prioritise smallholder producers.

This article highlights points of attention for rights- and needs-based approaches to land reform and rural development to address reconciliation and inequalities in South Africa in a more complementary and effective manner. In brief, the new restitution round should apply a very selective approach to restorative justice and focus strictly on the most pressing arguments for the reopening. Furthermore, the restitution programme should strive for far more complementarity and coherence with the redistributive programmes of land reform and rural development. The capacity of the public administration to facilitate and manage the many challenges entailed in land reform and rural development effectively and in collaboration with civil society and private sector, is an area of serious concern. The same applies to sourcing finance for

such a multi-pronged transformative exercise. The (stalled) reopening of the restitution programme deserves therefore a more strategic response from national and international stakeholders in support of further policy complementarity and coherence, rather than merely viewing it as a case of shifting the political spotlight away from solid long-term macro-economic strategies.

Lastly, four generic lessons can be distilled for other countries in the process of addressing historical and structural unequal rural development paths. Firstly, that restitution of rights in land is both in its technical and political dimensions, a very complex and time consuming mechanism to redress violations of land rights and livelihoods. Secondly, that the restoration of rights in land cannot be isolated from the (re)productive use of this multi-functional resource. Thirdly, that rights- and needs-based approaches only provide a relevant contribution to rural economic transformation if they are mutually aligned and strategically balanced

for purposes of coherence, complementarity and effectiveness. This implies that on the one hand a more selective prioritisation of rights-based interventions is made in view of the country's most pressing social, political and historic sensitivities. And that on the other hand, an effective interplay with the needs of present-day livelihood strategies and capabilities, especially those of the younger rural populations, is sought, in order to safeguard the inclusivity of rural policies as well as the efficiency of the contribution of (small) agricultural producers and rural service providers to the macro-economy. Finally, new challenges such as increasing regional inequalities, population pressure on the resource base, and uncertainties in the economic and climatic contexts drive further towards such strategic complementarities, coherencies and balances between the historic and formal rights of rural populations and the continuously evolving needs of the geographic and functional areas they live in.

NOTES

- ¹ J. Kirsten and J. van Zyl, 'Defining Small-Scale Farmers in the South African Context', *Agrekon*, 37:4, 1998, p.551-562; and Walker, C, 'The Limits to Land Reform: Rethinking 'the Land Question,' (2005) *Journal of Southern African Studies*, 31(4), pp.805-824.
- ² World Bank, World Development Report 2008. Agriculture for Development, Washington DC: International Bank for Reconstruction and Development/ World Bank: Washington, 1997.
- ³ GoSA, *White Paper on Reconstruction and Development*, Parliament of the Republic of South Africa: Cape Town, 1994.
- ⁴ R. van den Brink, G. Thomas, H. Binswanger, J. Bruce and F. Byamugisha, *Consensus, Confusion, and Controversy. Selected Land Reform Issues in Sub-Saharan Africa*. World Bank Working Paper No.71, World Bank: Washington, 2006.
- ⁵ R. Hall, 'Transforming rural South Africa? Taking stock of land reform', in L. Ntsebeza, and R. Hall (Eds.) *The Land Question in South Africa. The Challenge of Transformation and Redistribution*. Human Sciences Research Council: Cape Town. 2007, pp.87-106
- ⁶ GoSA, (1997) *White Paper on South African Land Policy*, Department of Land Affairs: Pretoria.
- ⁷ C. Walker, 'The Limits to Land Reform: Rethinking 'the Land Question,' (2005) 31(4) *Journal of Southern African Studies*, pp.805-824.
- ⁸ GoSA, (2012) Mid-term Review of the Department of Rural Development and Land Reform, DRDLR: Pretoria; SAIRR (South African Institute of Race Relations) (2014), South Africa Survey 2013, South African Institute of Race Relations: Johannesburg
- ⁹ A. du Toit, 'Real Acts, Imagined Landscapes: Reflections on the Discourses of Land Reform in South Africa after 1994', (2013) 13 (1) *Journal of Agrarian Change*, pp. 16-22.
- ¹⁰ GoSA, (2009) *The Comprehensive Rural Development Programme Framework*, Ministry of Rural Development and Land Reform: Pretoria.
- ¹¹ GoSA, (2012) National Development 2030. Our future - make it work, National Planning Commission - The Presidency: Pretoria.
- ¹² Commission on Restitution of Land Rights (2016), Annual Report 2015/2016, DRDLR: Pretoria
- ¹³ GoSA, (2013) Department of Rural development and Land Reform: Regulatory Impact Assessment Report for Proposed Draft Restitution Policy: Re-Opening of Lodgement of Claims, DRDLR: Pretoria.

- ¹⁴ Commission on Restitution of Land Rights, Annual Report 2015/2016, DRDLR: Pretoria, 2016.
- ¹⁵ C. Walker, 'The Limits to Land Reform: Rethinking 'the Land Question'', (2015) 31 (4) *Journal of Southern African Studies*, pp.805-824.
- ¹⁶ K. Kleinbooi, 'South Africa' in Kleinbooi, K. (Ed.), *Review of Land Reforms in Southern Africa*, PLAAS: Bellville, 2010, pp.42-49
- ¹⁷ B. Cousins, R. Hall and A. Dubb, 'The Restitution of Land Rights Amendment Act of 2014 - What are the real implications of reopening land claims?', PLAAS Policy Brief, 34, 2014; http://www.plaas.org.za/plaas-publication/PB34_restitution
- ¹⁸ T. De Jager, (2014) 'Land claims: Reopening Pandora's Box,' <http://www.politicsweb.co.za/news-and-analysis/land-claims-reopening-pandoras-box>,
- ¹⁹ Constitutional Court of South Africa (ConCourt) (2016), *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others* (CCT40/15) [2016] ZACC 22 (28 July 2016); <http://www.saflii.org/za/cases/ZACC/2016/22.html>
- ²⁰ GoSA, (2016) General Household Survey 2015, Stats SA: Pretoria.
- ²¹ GoSA, Quarterly Labour Force Survey: Quarter 1: 2016, Stats SA: Pretoria
- ²² GoSA, (2016) Department of Rural Development and Land Reform: Annual Performance Plan 2016/17, DRDLR: Pretoria.

The Supreme Court Special Determination on the Right to Information Bill – Some Reflections

NAAZIMA KAMARDEEN

The Right to Information Act was passed on 24th June 2016. Several provisions of the Bill were challenged in the Supreme Court in April 2016. This article examines provisions in the Bill that were challenged, the Court's response in its Special Determination, and the status of the Act in promoting the right to information in Sri Lanka.

1. Background

Sri Lanka, though blessed with a chapter on Fundamental Rights in its written Constitution, has not had the privilege of having its own Right to Information Act. Even though the Right to Information has been recognised by the Constitution¹ and implicitly by several other pieces of legislation,² the lack of a specific law on the subject has made it very difficult for the public to assess the transparency of government policy and action. Therefore, the introduction of the Right to Information Act as a key pledge in the 100-day work program of the Sirisena government was seen as a welcome move by those interested in issues of transparency and government accountability. The government, through the 19th Amendment to the Constitution recognized the Right to Information as a fundamental right. The Right to Information Bill was presented in Parliament on 24th March 2016.

Due to its perceived inconsistency with several clauses in the Constitution, the Bill was challenged in the Supreme Court by several constitutional experts, as well as rights-based organisations. The matter was heard on the 5th and 6th of April 2016, and the Special Determination issued. Following the finding by the Court that several clauses of the Bill were inconsistent with the Constitution the Hon Speaker Karu Jayasuriya informed Parliament that either the Bill would require a two-thirds majority in Parliament to become law, or require amendment of those offending clauses, if the Bill were to be passed by a simple majority.

Accordingly, Parliament amended those provisions that were pronounced inconsistent with the Constitution and the Right to Information Act was

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passed on 24th June 2016. This article proposes to examine those provisions in the Bill that were challenged in Court, the Court's response, and the status of the Act in promoting the right to information in Sri Lanka.

2. The Right to Information

Though it is well known that "knowledge is power" and that the key to knowledge is information, the need for information became vital with the explosion of the knowledge economy. With the means of storing, reproducing and transmitting information becoming more sophisticated, so did the means of restricting knowledge. This became particularly true of governmental authorities, that would deny citizens access to certain information that the authorities felt the public should not know, but that the public felt was required in order to make informed choices.

More importantly, information held by governmental authorities has become synonymous with transparency and accountability. In an age where information is required in order to make informed choices, accessing such information often reflects the relative position of the individual within the governmental structure. Therefore, "well-connected" individuals would have the luxury of being able to access important information, and make their choices accordingly, while those outside this chain would be left out, and would be unable to make sound economic, social and political decisions as a result. The issue then moves beyond simple matters of knowledge storage, retrieval or dissemination, but becomes one that is deeply connected to power dynamics and socio-political relations.

Several moves have been made internationally to promote the right to information as a basic human right. In their 2004 Joint Declaration, the three special mandates on freedom of expression at the United Nations (UN), Organisation for Security and Cooperation in Europe (OSCE) and the Organisation of African States (OAS) stated:

The right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions.³

Similarly, the Aarhus Convention (The United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters) which was adopted in 1998 provides for the right to information in an environmental context. The Convention provides for access to environmental information, public participation in decision making, and access to justice to enable the right to review procedures to challenge public decisions that have been made without respecting the two aforementioned rights or environmental law in general.⁴

The new addition to the Fundamental Rights chapter⁵ in Sri Lanka provides for the right to information as follows:

- 14A (1) Every citizen shall have the right of access to any information as provided for by law, being information that is required for the exercise or protection of a citizen's right held by:-
- (a) the State, a Ministry or any Government Department or any statutory body established or created by or under any law;
 - (b) any Ministry of a Minister of the Board of Ministers of a Province or any Department or any statutory body established or created by a statute of a Provincial Council;
 - (c) any local authority; and
 - (d) any other person, who is in possession of such information relating to

any institution referred to in subparagraphs (a) (b) or (c) of this paragraph.

- (2) No restrictions shall be placed on the right declared and recognized by this Article, other than such restrictions prescribed by law as are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals and of the reputation or the rights of others, privacy, prevention of contempt of court, protection of parliamentary privilege, for preventing the disclosure of information communicated in confidence, or for maintaining the authority and impartiality of the judiciary.

3. Key Elements of the RTI Bill that were Challenged and the Court's Response

While the Right to Information (RTI) Bill states in its preamble that “there exists a need to foster a culture of transparency and accountability in public authorities by giving effect to the right of access to information,”⁶ and Sections 3 and 4 operate so as to provide every citizen with this right, it is the opinion of the author that some of the provisions of the Bill have not been drafted in a manner that would have achieved the above. The petitioners in the fundamental rights action drew the court's attention to these provisions. In order to aid better understanding, these will be discussed separately.

3.1 Section 5

Section 5 details a long list of instances where a request for information made under the provisions of the Act could be denied.⁷ These include, among others, personal information,⁸ information that would undermine the defence of the State or its territorial integrity or national security,⁹ and that

would cause serious prejudice to the economy of Sri Lanka by disclosing prematurely decisions to change or continue government economic or financial policies in a wide range of areas ranging from trade secrets to overseas trade agreements.¹⁰ Section 5 was the clause that was referred to the most by the petitioners, who pointed out that curtailing information relating to the economy of Sri Lanka was not included in the exceptions to Article 14(a)(2), and that therefore the permission in Section 5(1)(c) of denial of information relating to economic matters was *ultra vires* the Constitution.

The State however, took a very expansive view of the term “national security” and attempted to include information relating to economic matters into the definition of the term “national security.” This line of reasoning seemed to find favour with the Court, which stated that the term “national security”¹¹ is not a matter of law, but of judgement and policy, to be decided not by the judiciary, but by the Executive. In support of this, the Court cited the dictum of Lord Hoffman in *Secretary of State for the Home Department v. Rehman*.¹² The Court then opined that the term “national security” should be given “an interpretation to ensure that the vital interests of the nation relating to trade secrets and trade agreements are safeguarded.”¹³

In doing so, the Court also effectively counteracted the next argument of the petitioners, which was that Section 5 prevented the people from getting to know the full details of any overseas trade agreements entered into by the government. The petitioners had also pointed out that the combined effect of Section 5(1)(c) of the Bill (denial of information disclosing prematurely decisions to change or continue government policies on, among others, overseas trade agreements) and the inclusion of economic policy in the term “national security” was to prevent overseas trade agreements from being challenged either prior to, or after, their formulation and make them completely immune from public scrutiny.¹⁴ The petitioners had pointed out that this was not a healthy trend, as overseas trade agreements involve

onerous financial and other obligations, which have the potential to fall on taxpayers in Sri Lanka. The Court said that it would decide, when called upon to do so, whether public interest would be jeopardised if the information were disclosed, or whether justice would fail to be administered due to non-disclosure, and make an order accordingly.¹⁵

Based on the above reasoning the Court held that Clauses 5(1) (c) (v) 5(1) (d) and 5(3) – relating to overseas trade agreements, trade secrets and intellectual property – were not inconsistent with any of the provisions of the Constitution.¹⁶

3.2 Other Sections

Some of the other sections that were challenged were sections 6, 8(1), 9(2) (a), 12, 19, 20, 40 and 43. Section 6 was challenged on the basis that it permitted severability of sensitive information from information that could be released. The Court's position was that it was possible that the same document could contain information that could be released and information that could not be released, and that the equitable middle path could be achieved by balancing rights with restrictions. Hence, Court held that this was not unconstitutional. Whether equity should be the basis of consideration of fundamental rights was not an issue considered by Court.

Section 8(1) dealt with a problem in poor translation, where the word "person" was given in the English text as opposed to the correct term "citizen" which appeared in the Sinhala text. Section 9(2) suffered from the same problem, where the word "member of the public" had been put instead of the appropriate term "citizen." The Court recommended that the word "citizen" was the correct one, and that this should be included instead of the other words, which would have widened the scope to include non-citizens.

Section 12, which dealt with the composition of the Right to Information Commission, was challenged

on the basis that the membership should be comprised entirely of retired judicial officers, and not include persons without a legal background, as proposed by the Bill. The Court did not agree with this contention.

Sections 19 and 20 were challenged on the basis that they deemed members of the Commission to be public officers, and proceedings of the Commission to be judicial proceedings. The basis of the contention was that unless a person was appointed by the Public Service Commission they could not be called public officers. Also, since the membership included those without legal expertise, the proceedings should not be deemed to have the force of judicial proceedings. Counsel on behalf of the state agreed that the provision relating to public officers be amended. However, the Court maintained that the fact that a particular proceeding is "deemed" to be a judicial proceeding for a particular purpose, and that purpose only, means that it is not regarded as a judicial proceeding in the ordinary course of matters. Hence, there was no violation of the Constitution on that ground.

Section 40, which provides immunity for public officers who release information that is requested, was challenged on the basis that it might provide immunity to members of the armed forces who release sensitive information, and would otherwise be punishable under laws applicable to the armed forces. The Court rejected this contention on the basis that the release of military information was in any case dealt with under Section 5.

4. Implications of the Court's Ruling:

With respect to Section 5, the Court found that only Section 5(1)(j) – that dealing with information that might be in contempt of court – was unconstitutional. Apart from minor modifications to the other challenged sections that would bring them in line with the Constitution, the Court did not accept that the provisions permitting the state to withhold information relating to overseas trade

agreements were violative of the Constitution. It is submitted that overseas trade agreements have hitherto been one of the most opaque areas of governmental activity. Even where they have resulted in projects within Sri Lanka, the Sri Lankan population has usually been the last to know.¹⁷

This situation was acceptable at least to a certain degree under conditions where there was no right to information. The question may be asked as to what purpose would be served by a Right to Information Act, if no useful information can actually be gained through it? Furthermore, as discussed above, overseas trade agreements have the potential to cause great harm to the country, if they are not properly managed. Information pertaining to these agreements should ideally be available to the general public, who can then form an opinion about governmental policy and action. The RTI Act would have been more useful had it provided for a few exceptional situations in which information pertaining to such agreements might not be made public, instead of providing a blanket cover for all information relating to these agreements. It leaves open the question as to why this was done, and what the government will do in future.

The Court's ruling is particularly disappointing when one considers that the government is presently negotiating the Economic and Technology Cooperation Agreement (ETCA) with India, which proposes to open the widest possible access to the service sector, known as "Mode 4 access." This would enable workers from India to enter the Sri Lankan market, first in the IT and shipyards sector, with a view to expanding to other sectors later on. The Supreme Court ruling has effectively prevented the ETCA from being scrutinised by the public either during its drafting stage, or even after it becomes law. Such a situation did not even exist prior to the RTI Act, where trade agreements could have been challenged by the public. It is ironic that legislation purporting to increase access has the potential to do just the opposite.

The Court's wholehearted acceptance of the near-absurd definition of national security provided by the State is another problematic feature of the judgement. If the Court (or the state for that matter) genuinely felt that issues of economic policy warranted such a high level of securitisation, appropriate justification should have been provided. Such a widening of the definition of national security will permit most matters to be placed beyond public scrutiny, jeopardising many rights of the Sri Lankan public, including the right to livelihood. This is unacceptable when one considers that the commitments given by the government via overseas trade agreements are going to impact the entire Sri Lankan population, probably for generations to come.

5. Conclusion

Though the commitment shown by the government in putting in place a piece of legislation aimed at promoting the right to information is salutary, the loopholes available in the Act even after amendment enable the government to severely curtail the public's access to important and relevant information. Whether this Act will truly serve its purpose, or become another white elephant in the jungle of Sri Lankan legislation, only time will tell.

NOTES

- ¹ In Article 14 A, inserted by the 19th amendment to the Constitution.
- ² The National Environmental Act No 47 of 1980 (as amended) requires the provision of the Environmental Impact Assessment Reports in all three national languages to any interested party, within a stipulated time period.
- ³ Joint Declaration of 6th December 2004. Available at <http://merlin.obs.coe.int/iris/2005/2/article1> accessed 10th July 2016
- ⁴ <http://ec.europa.eu/environment/aarhus/> accessed 10th July 2016
- ⁵ Brought in by the 19th Amendment to the Constitution, passed on 28th April 2015 and certified on 15th May, 2015
- ⁶ Preamble, Right To Information Bill
- ⁷ The RTI Bill, available at http://slpi.lk/wp-content/uploads/2016/07/Right_to_information_English.pdf accessed 11th July 2016.
- ⁸ Section 5(1)(a) of the Bill
- ⁹ Section 5(1)(b) (i) of the Bill
- ¹⁰ Section 5(1)(c) of the Bill
- ¹¹ Vide page 8 of the judgement
- ¹² [2002] 1 All ER 122
- ¹³ Vide page 11 of the judgement
- ¹⁴ Vide page 10 of the judgement
- ¹⁵ Vide page 11 of the judgement
- ¹⁶ *Ibid.*
- ¹⁷ In the Kandalama Hotel Project, for example, the villagers in the area did not know that a hotel was being built until after the foundation was laid. Construction began under heavy police protection.

Submission to the Consultation Task Force on Reconciliation Mechanisms on Economic Reparations

LAW & SOCIETY TRUST

The subject of reparations is a wide one and covers many facets. This submission focuses only on the question of key approaches and principles underlying economic reparations including but not limited to monetary compensation. It draws extensively from literature on reparations produced by the International Centre for Transitional Justice (ICTJ) as well as the work on reimagining reparations in Colombia by Rodrigo Uprimny¹ and others.

Key Approaches and Principles Underlying Economic Reparations

1. Embrace a ‘Transformative Reparations’ Approach and Move Away from a Purely Restorative or Exclusively Individualized Focus

Rather than embrace a purely restorative focus, economic reparations must adopt a transformative focus and not merely seek corrective justice for suffering caused by violations. This entails:

- a) Reimagining the objective of reparations as not merely compensatory but as enabling transformation of the structural conditions of exclusion, vulnerability and unequal power relations.
- b) Ensuring that reparations focus not just on restitution but also redistribution. This is especially true of land rights, where often the focus is narrowly on restitution of property rights while larger structural issues pertaining to landlessness, past and possible future dispossession and political economic or ecological constraints on land becoming meaningfully productive are ignored. Indeed, a failure to balance the redistribution dimension with

the restitution dimension has been a significant factor in land restitution policies in South Africa failing to have the desired impact.²

- c) Ensuring effective integration of reparations with social policy: Social welfare, social protection and development policies have a bearing on immediate minimum fulfillment of the wide range of economic and social rights and it is crucial that a policy on economic reparations is designed so the two complement each other effectively.
- d) Integration of economic reparations measures with social and economic policy, with regard to b) and c) above, must be based on enhancing distributive justice generally, both within the North and East and with respect to other parts of the country.
- e) Economic reparations must not be reduced to safeguarding individualized rights but enhancing economic security and justice at a much broader level. For instance, in the North and East the focus of livelihoods programmes has been individual households but generating mass and secure employment by investing in restarting the Kankesanthurai cement works or the Paranthan chemicals factory or effective functioning of the Valaichchenai paper mills has not been prioritized.
- f) Viewing economic reparations as being an integral part of transforming the broader conditions of exclusion and exploitation also calls for recognition of collective

reparations that may include economic repair measures that focus on entire regions or sub-regions or populations. For example, in Morocco, such a collective reparations policy focused on responding to the harm caused to whole regions affected by marginalization due to conflict and also included affirmative action policies.

- g) Designing of collective reparations must be based on an informed, evidence-based, and participatory assessment that considers the overall impacts on different regions and populations in different ways.

2. Individual Economic Reparations Must Focus on Empowerment and Promoting Economic Justice

Notwithstanding the above, individual economic reparations remain significant and an important part of transitional justice. In determining individual reparations it is important to account for:

- a) The continuing harms from violations suffered rather than the type of violations suffered per se must form the basis for reparations. While administering reparations uniformly to victim survivors by grouping them into classes on the basis of types of harms may be easier and appear to be more consistent, they may not address the specific types of burdens borne by continuing harms from the violations suffered;
- b) Individual reparations must also be based on current needs or social and economic vulnerabilities of victim survivors. In other words, a standard class or categorization of victim survivors will not be adequate as all victim survivors are not necessarily at the same level of vulnerability. While certain minimal threshold amounts may be set, the specific needs and vulnerabilities of victim survivors need to be taken account

of in determining the exact quantum of reparations.

- c) An economic reparations programme can itself create new vulnerabilities in a context like the North and East where vested interests may seek to leverage any expansion in asset base or cash receipts by directing them towards conspicuous consumption or investments that yield profits to these interests rather than enhance long term economic security of victim survivors and their families. The post-war explosion of leasing and hire-purchase, on the back of aggressive marketing, that precipitated high levels of indebtedness in the North is a case in point. The programme must provide for a non-paternalistic and supportive mechanism to help victim survivors maximize the benefits from economic reparations while being respectful of their aspirations.
- d) Criteria for eligibility and entitlements must be adopted and drawn up based on sensitive, informed, participatory and independent assessment of the harms suffered and present vulnerabilities. But the application of the criteria must be transparent and all attempts must be made to ensure the criteria and its application are fully understood. The dignity of victim survivors is paramount and the process of selection and administration must ensure respect and sensitivity towards victim survivors and lean towards maximizing inclusion. There must be an accessible (especially in terms of distance and language of functioning) and effective grievance redressal mechanism for victim survivors to prefer complaints that also includes an appeals mechanism.
- e) In considering reparations for land or individual assets, rather than relying exclusively on certainty of previous ownership and past rights, present needs

and vulnerabilities must be considered. In the same vein it is crucial that individual reparations in the form of regular transfers are also linked to a sound cost of living index.

3. Policy Integration is Critical

The integration of economic reparations measures with social and economic policy as suggested above is not to suggest a blurring of the lines between them. Indeed, reparations must be awarded with full recognition of the harms suffered and wherever possible with clear acknowledgement of responsibility. Victim survivors must also be recognised as a distinct group with a specific history. At the same time, the integration of economic reparations with other social and economic programmes is critical.

- a) Ongoing reconstruction programmes must always be based on maximizing local economic value in different ways for victim survivor communities. For instance, infrastructure and housing reconstruction and development offer important economic opportunities to multiply local value addition and strengthen the local economy. As has been repeatedly pointed out the proposed construction of 65,000 steel pre-fabricated houses by a global multi-national in the North and East would fail to do precisely this and hence approaches like this must be avoided.
- b) The benefits of economic reparations may be amplified or diluted by other social welfare and social security programmes. It is vital that economic reparations are, on the one hand, not made conditional on non-receipt of other routine welfare entitlements and benefits or tied to them in any negative way. In this context, the imposition of quotas on the number of Samurdhi beneficiaries from particular districts or sub-units thereof is a really serious issue for it limits access and will result in serious exclusion errors.
- c) On the other hand, social welfare or anti-poverty programmes must ensure they are sensitive to the experiences of conflict. For example, all available information suggests that the assessments and surveys conducted to determine socio-economic status of households and subsequently their eligibility for benefits under the restructured social welfare system have not really sought information pertinent to the experiences of dispossession and impoverishment related to the war. This essentially means that a distinct experience of impoverishment is not captured by the social policy and welfare system.
- d) Similarly, policy must ensure meaningful accessibility to quality and free healthcare, education, and social security for victim survivor communities to maximize the social and economic opportunities and benefits from reparations. This is especially important where such entitlements may be guaranteed by the state for particular victim survivors or groups or/and their families. In certain Latin American countries the provision of free public health care or public education for victim survivors or their children only became meaningful in the light of the accessibility and quality of these services. It is critical that social services and public provisioning are significantly strengthened to enable communities to maximize the value of reparations offered in the form of guaranteed entitlements.
- e) Policy integration is also crucial to ensure that reparations are effectively and sustainably funded. For example, be it through some form of special taxation or levy, external or domestic grants or loans, economic reparations need to be integrated with fiscal policy. While a tax or levy may also have a redistributive impact,

a highly regressive taxation system as in Sri Lanka may in fact undermine the benefits of economic reparations to poorer and economically weaker households. The key is to render fiscal obligations towards reparations as well as social services and public provisioning of basic entitlements to war affected communities non-negotiable.

4. Gender Dimensions Deserve Particular Attention

Applying a gender lens to the overall economic reparations programme, including through a gender budget analysis, is critical to ensuring that the reparations programme will benefit women. However it is also crucial to ensure that the economic reparations do not embrace traditional gender stereotypes in the modalities of reparation, including further responsabilisation of women by way of assets or approaches that in fact increase their burden.

It is also crucial that reparations transfers and payments are made in ways that women have full access to them. This may also mean, where needed, ensuring investment in building the capacities of women to access banks and other mechanisms in order to access and maximize the benefits of economic reparations.

It is also important that the forms of economic harms distinct to women or that have a disproportionate impact on women are recognised. For example, disruption of education or early marriage in the context of the war had a greater impact on women and girls and subsequently compromised their ability to pursue certain economic opportunities later on in life. Similarly, experience of sexual violence may result in hindering the ability of women and girls to access economic opportunities. Therefore, an economic reparations programme must include an accounting of the gendered nature of harms.

However, here too an intersectional approach is merited and women's experiences of harms and claims for reparations must be considered in relation to other existing disadvantages such as being an ex-combatant or from a marginal caste or being a person with disability or a female head of household. For instance in Morocco, while male ex-political prisoners were celebrated as heroes, female ex-political prisoners were looked upon with suspicion, and the burden of this stigma eventually led to female ex-political prisoners being awarded additional monetary compensation.

NOTES

- * This is a slightly edited version of the original submission to the Consultation Task Force.
- ¹ See, for instance, Maria Paula Saffon and Rodrigo Uprimny (2010) *Distributive Justice and the Restitution of Dispossessed Land in Colombia in Distributive Justice in Transitions*, Morten Bergsmo, César Rodríguez-Garavito, Pablo Kalmanovitz and Maria Paula Saffon (eds), Torkel Opsahl Academic E-Publisher: Oslo.
- ² For more see the contribution by Evert Waeterloos and Sara Janssens in this volume.

Submission to the Consultation Task Force on Reconciliation Mechanisms on the Malaiyaha Makkal (Up-Country People) and Transitional Justice

I. The Ethnic Conflict, War and Malaiyaha Makkal

We welcome the appointment of the Consultation Task Force on Reconciliation Mechanisms (CTF) and its mandate to consult the people on processes and mechanisms for achieving truth, accountability and reconciliation in Sri Lanka. We also acknowledge the pressing need for justice in relation to the many human rights abuses and immense suffering caused by the war, especially in the North and East. At the same time we wish to underline that it is important to re-consider dominant perspectives of the ethnic conflict. These perspectives often tend to ignore the historical fact that the colonial and post-colonial Sri Lankan State has also been responsible for perpetuating systematic exploitation, exclusion and violence against the Malaiyaha Makkal (Up-Country People, also referred to as Indian Tamils, Estate Tamils or the Plantation/Estate Community). Moreover, sections of the political leadership of other minority groups as well as private companies are also complicit in this. Therefore, we want to bring to the attention of the CTF the importance of including the concerns and perspectives of the Malaiyaha Makkal in any process or mechanism for achieving justice and reconciliation in Sri Lanka.

The British colonial State's plantation economy in the Up-Country was built on a system of indenture that effectively meant a form of slavery and forced labour that led to the death, severe impoverishment and brutal exploitation of hundreds of thousands from our community. Rather than mitigate and stop these harms, one of the earliest laws of the post-Independence Sri Lankan state was to enact laws to render the community stateless and disenfranchised. This action, which was supported by significant sections of the minority Tamil and Muslim

political leadership, essentially amounted to a systematic attempt at ethnic cleansing through forced expulsion or deportation. It was the first mass atrocity committed by the Sri Lankan state against an ethnic group and the manifold injustices as a result of it continue, needing legislation as recently as 2003 to address.

Many of our people have also been killed or injured and have had their homes and properties burnt or destroyed in targeted communal violence, often with the connivance of the law enforcement officials. This also precipitated displacement and forced migration to the Vanni and beyond to India. Many of our people who fled to the Vanni following violence against them in the 1970s or in 1981, 1983 and later, were also then subject to discrimination on the basis of caste and identity.

Disgruntled Malaiyaha youth were mobilised and used by the LTTE often as cannon fodder on the frontline. The war also served the cause of imposing further controls on our community within the estates by tightening policing as well as the power over our mobility exercised by estate officials. Under the cover of alleged infiltration by LTTE, the Up-Country areas were also militarised and many youth were killed, disappeared, or tortured. Illegal detentions were made using Emergency Regulations and the notorious Prevention of Terrorism Act. Their extreme insecurity and fear coupled with impoverishment and marginalisation prevented and continues to prevent many in the Up-Country from even speaking out about the extra-judicial killings, disappearances, torture, and illegal detentions of their loved ones.

It is critical that the transitional justice process in Sri Lanka accounts for the nearly 200 years of struc-

tural and other forms of violence against us that has also included sexual violence against women; systematic discrimination on the basis of ethnicity, national origin, gender, caste, and class; deprivation of labour and language rights; and, denial of equal access to land, health, education, and housing.

The Malaiyaha community is also paying a heavy price for the ongoing political economic and ecological crisis in the Up-Country plantations, a condition that has been precipitated by ill-informed short-termist policies of successive governments over many decades as well as the companies, public and private. It is important to note that the plantation economy was very much part of the country's war economy, being an internal periphery characterised by extremely exploitative economic and social relations that contributed significantly to national wealth but received relatively little but poverty in return.

It is crucial that the transitional justice process acknowledge that the structural and other forms of violence and exploitative relations faced by the Malaiyaha Makkal is inextricably connected to the fact we are the only community in Sri Lanka whose lives have long been governed by 'Company Raj'. In our everyday lives we continue to be subjects of Estate Superintendents and worker-subjects rather than full citizens; whether it is securing approval to migrate abroad for work or to change our name or even bury our dead, our everyday lives are governed by the jurisdiction of the company rather than the state. Even the Pradeshiya Sabhas and other officials of state are subject to various restrictions in terms of rendering essential services and undertaking development work.

Subject to the shared sovereignty of a State indifferent or even hostile to our rights as citizens on the one hand and private or public capital interested only in exploiting us as workers on the other, we Malaiyaha Makkal have been systematically and often violently excluded. The ethnic polarizations, tensions and conflict since Independence and the decades long ethnic war coupled with our systemat-

ic exclusion have also served to strengthen the grip of many self-serving and opportunistic political and trade union leaders (especially those who are also leaders in political parties) over the community.

In a post-war context marked by authoritarianism and virulent assertions of Sinhala Buddhist majoritarianism, the threats to the Malaiyaha community have again been rendered invisible due to a combination of systematic invisibility and marginalisation. Thus, for example, while the attack on the mosque in Dambulla in 2013 by a crowd led by Buddhist monks was justifiably condemned by many progressive voices, the attack on and subsequent demolition of a nearby Kali kovil of the Malaiyaha community went largely unnoticed and was consigned to the margins of public and mainstream political discussion.

The socioeconomic realities of the Malaiyaha community: A statistical snapshot

Our people, who constitute 75% of the country's Estate sector population, continue to experience the impact of these historical injustices and wrongs today. According to the 2014 Labour Force Survey, the average monthly wage/ salary of workers in the Estate sector (Rs. 14,906) was more than Rs. 8,000 less than the average monthly salary of a worker from the Rural sector and nearly Rs. 15,000 less than the monthly wage/salary of an Urban sector worker. In spite of these lower wages however, statistics also indicate that the labor force participation is highest in the Estate sector. Furthermore, the labor force participation of women in the estate sector (52%) is significantly higher than their counterparts in the Rural (35%) and Urban (30%) sectors.

In fact, the poverty head-count ratio in the Estate sector (11%) is also noticeably higher than the ratio in Rural (8%) and Urban areas (2%). The effects of these are visible in our education and health indicators. For example, the literacy rate in our community (80%) is significantly lower than the rest of the country. According to the latest Household and

Income Expenditure Survey (HIES), only 2.1% have passed GCE (A/L) and above in the Estate sector while the corresponding figures for the Urban and Rural sectors are 19.7% and 10.9%. Furthermore, the hopes we have of educating our young people continue to be limited by the poverty we face and more and more of our young people are forced to join the labor force at a much earlier age than their counterparts in other sectors. The youth labor force participation (15-19 years old) is at 14% and 15% in urban and rural areas respectively but is 26% in the Estate areas.

Although women participate heavily in labor force, the number of women with a low Body-Mass-Index (BMI) is highest in our sector (Urban 10%, Rural 16%, Estate 19%). Our community also continues to be affected by the inability to own land and housing of our own with nearly 70% of the Estate sector living in line rooms or row houses. While the national percentage of housing units owned by a member of the household has grown from 70% in 1981 to 83% in 2012, in the Estate sector it has only increased to 22% in 2012 from the 1% it was in 1981. According to the latest HIES, 75.9% households in the Estate sector have a toilet exclusive to the household compared to the national average is 89.9%) and only 67.4% households have a source of drinking water within the premises while the data for Urban and Rural sectors is 92% and 79.6% respectively.

In short, all of these statistics demonstrate that the historical injustices perpetrated against the Malaiyaha Makkal continue to shape the lives of our community in significant ways today.

II. Concerns Regarding the Transitional Justice Mechanisms and Processes

Given the historical and present - day context outlined above, we are deeply concerned that the mechanisms envisaged thus far as constituting the architecture of transitional justice may only recognise and focus on certain forms of harms and abuses and within a limited time frame. Moreover we are also concerned that the idea of justice and account-

ability being envisaged may leave little or no room to recognise the multiple and intersecting structural violence whose foundation is ethnic, economic, class and caste based, and also gendered in nature.

We are especially apprehensive that the transitional justice process maybe over-determined by a narrow political economic understanding of the ethnic conflict. Therefore, we stress that in order for a transitional justice process to be meaningful to the Malaiyaha Makkal it needs to account for the justice demands and claims outlined below. We urge the CTF to ensure that its recommendations concerning the design of truth, accountability and reparations mechanisms take full cognizance of the distinct history of structural violence suffered by us at the hands of the State, private and public companies and indeed even other communities.

We fully recognise that many of the issues raised and demands made below do not easily fit the purview of the four pillars as currently envisaged by the government as the transitional justice architecture. But the question that arises is whether transitional justice processes and mechanisms will respond to peoples' lived experiences of different forms of inter-connected harms and violence? Or, are these experiences themselves to be reduced and framed in limited ways to suit the mechanisms? Further, how can there be any 'just' transition if the processes and mechanisms ignore or are disconnected from addressing and transforming the fundamental conditions that reproduce exclusion and violence?

III. Our Demands and Expectations from the Transitional Justice Mechanisms and Processes

In this overall context, we believe, mechanisms for a truth and justice-led transition of the polity, must be designed to address the following justice claims of the Malaiyaha Makkal. Each set of measures we demand inevitably combine truth, accountability and reparations (symbolic and material) though the accent maybe on one or more of these in each set of demands.

1. Acknowledgement and Seeking Forgiveness

1.1. We demand that the Sri Lankan State formally seek forgiveness, not merely issue an apology, from the Malaiyaha Makkal for the following acts of commission and omission:

- a. Rendering our community stateless and disenfranchised by abusing the power of the law;
- b. Forcibly repatriating thousands to India and pushing many thousands into a precarious legal status for decades;
- c. Failing to undo the historical exclusion and deprivation of the community and instead perpetuating patterns of exclusion, poverty, exploitation and failing to protect us from repeated violence.

For the State to seek forgiveness is, we believe, central to restoring our dignity as well as acknowledging responsibility for its role in the multiple violations of human rights faced by Malaiyaha Makkal island-wide. This is also crucial because accountability for the harms, abuse and violations suffered as a result of structural violence cannot be individualized or fragmented and must be fully borne by the State.

1.2. We also call on political and social leaders from the Sri Lankan Tamil and Muslim communities to acknowledge the role played by sections of their own leadership in precipitating the statelessness and disenfranchisement of us Malaiyaha Makkal.

2. Render the Detailed Historical Truths about our Suffering and Resilience

We demand a truth mechanism that will record and render in detail, archive and disseminate appropriately island-wide a detailed documentation, including our oral histories, of the multiple harms and suffering suffered by the Malaiyaha Makkal as well as our resilience and struggles for rights.

Such a truth mechanism must be fully supported by the State but must be led by and contain a significant majority of Malaiyaha Makkal representatives (not politicians but persons of integrity who are conscious of caste, class, gender inequities) and cover all periods beginning with the forced transportation of our ancestors from India. It is especially important that it records in detail the many struggles faced by the community, in and beyond the Up-Country, after Independence and before, during, and after the war, including in relation to:

- a. Statelessness, disenfranchisement and the repatriations in the post-1948 era;
- b. Starvation and sickness in the early 70's owing to restrictions and controls on food;
- c. Experience of violence, evictions and displacement at the hand of State and non-state actors such as in 1965, the early 1970s, 1977, 1981 and 1983, to mention a few;
- d. Violence following the Bindunuweva massacre in 2000;
- e. Displacement and violence experienced by those from the community who sought refuge in the Vanni, Jaffna or elsewhere in the north and east; and,
- f. Women's experiences of exploitation and violence, including forced servitude and sexual abuse.

3. Restoration of Dignity and Respect

We demand a number of steps be taken to restore the dignity and respect of Malaiyaha Makkal, this includes but is not limited to:

- a. Ensuring that textbooks and the teaching of history portrays the community appropriately including:
 - i. Incorporating histories/biographies of those who led the struggle for equality and social and economic justice from within the Up Country community.

- ii. Underlining and addressing clearly the various prejudiced views and stereotypes and derogatory terms on the basis of ethnic origin, caste or economic status through interventions in schools and government offices.
 - b. Stop the romanticisation and commodification of the Malaiyaha Makkal in projecting Sri Lanka, such as pictures and videos of smiling tea-pluckers in tourism advertisements, and ensure more responsible and ethical portrayal of the community and the context.
 - c. Ensure appropriate and sensitive memorialization of our history, our suffering and our resilience.
 - d. Enable re-building confidence in the socio-cultural aspects of our lives by supporting measures to nurture, strengthen and transmit our myriad cultural and aesthetic expressions.
 - e. Take measures to address substance abuse, alcoholism within the community in the context of the many steps outlined here in terms of civil, political, social and economic justice and rights.
 - f. The Department of Census and Statistics must allow us the option of identifying ourselves as Malaiyaha Makkal/Up-Country Tamils rather than identifying us as 'Indian Tamils'. The stigma of being alien, foreign and an incomplete citizen is in fact one reason many of our community prefer to identify themselves as 'Sri Lankan Tamil'.
- a. Immediately transferring all manner of powers and privileges that are presently exercised by estate officials on behalf of officials or institutions of the State to the latter.
 - b. Amending the Pradeshiya Sabha Act and all other laws and regulations that place restrictions on officials or institutions of the State from rendering essential services or carrying out development work.
 - c. The Malaiyaha Makkal must suffer no exclusion or exception from State's responsibility that all other citizen's of Sri Lanka are guaranteed. The State must assume full and total responsibility and ensure formal equality of our people and must cease devolving its responsibilities or powers such that the company, its officials or other bodies exercise authority or power over us as if they were the State.
 - d. The State must place obligations on the companies to support it in development, including by ensuring that tea gardens are appropriately and fully maintained by public and private companies.

4. Enable a Transformation from Workers to Citizens and Ensure Formal Equality

We demand the drawing up and implementation of an agenda to restore full citizenship rights that would cease to leave our people subjects of plantation companies. This includes:

5. Complete Restoration of Rights and Realization of Substantive Equality

We call on State and all other actors to recognise that the full restoration of rights and substantive equality of the Malaiyaha Makkal demands redress for:

- The huge opportunity costs suffered by the community due to deprivation and unequal access to land, housing, education, health, and labour rights;
- The systematic exploitation of our labour for the profit of the State and private companies; and,
- The losses suffered as a result of violence, displacement and other harms.

We are aware that what is needed is a transformation of political economic relations in the Up-Country. A mere recognition of social and economic rights within a system of production relations that is deeply exploitative of our people, their labour and nature will not result in justice for the Malaiyaha Makkal. Therefore is a need for transitional justice mechanisms to be part of a broader comprehensive and transformative development with justice that, in addition to other measures listed in this memorandum, will address the following imperatives:

- a. Secure the community's right to the commons as well as land for homesteads and cultivation.
- b. Ensure the community's right to safe and adequate housing with secure tenure that is not bound with working on plantations.
- c. Enhance access to free and quality public education at the primary, secondary and tertiary levels in Tamil across the Up-country by: situating schools within accessible distances, providing free and timely transport when schools are far, resourcing schools in the Up-Country adequately such as providing computers and other facilities, and ensuring that options and courses in all the streams in Tamil are available and accessible to all students.
- d. Ensure free basic and advanced public health care is accessible across the Up-country by: providing adequate, free and appropriate transport especially for interior estates, especially for pregnant women for example; upgrading proximate primary health care facilities; ensuring quality extension and mobile services reach all settlements; and, ensuring the presence of Tamil speaking nurses and doctors at all levels of the health system.
- e. Strengthen and ensure equal protection of the law for all workers on plantations and address the wide range of concerns

regarding a minimum quantum/number of work days, the fixing and administering of wages, determining workload; remove all inequalities in norms and in practice between male and female workers and remove deficiencies in working conditions; and, set-up Labour Advisory Councils at the Provincial level with fifty per cent women and membership on a rotation basis of trade union representatives.

- f. Guarantee access to social security, including pension payments and safeguard Employment Provident Fund (EPF) from being diverted and ensure prompt payment of EPF by the Labour department.
- g. Ensure that all public services, documents and information is rendered in Tamil and that public officials serving the community are proficient in Tamil.
- h. Ensure representation of women and men from the community in all public services, especially in the Up-Country, including through affirmative action; and,
- i. Safeguard the natural environment in the Up-Country by addressing the fragility wrought by decades of over-exploitation and neglect including by preventing unsustainable practices and ensuring environmentally responsible management of estates by public and private companies.

6. Monitoring Mechanism

We demand that an Independent Commission with representatives (none of whom must be politicians), fifty percent of whom must be women, from the Malaiyaha community be appointed to regularly monitor and report on the implementation of these measures as well as ensure coordination between different agencies and entities responsible.

We demand that all the measures we call for above be urgently undertaken given a situation of protracted emergency that we Malaiyaha Makkal find

ourselves in. We steadfastly appeal to the State as well as other responsible actors to take immediate steps to ensure justice, accountability, and reparations for the historical wrongs that have been perpetrated against our community as well as their continuing manifestations and effects. We demand that the transitional justice process recognise and respond to our demands as claims made not by workers of foreign origin but by a community of full and equal citizens of Sri Lanka.

14 August 2016

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in Sri Lanka

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On Land Reform and Rural
Development in South Africa

Naazima Kamardeen

On the Supreme Court Special
Determination of the Right to
Information Bill

ECONOMIC AND SOCIAL RIGHTS, JUSTICE AND LAW

The October Issue of the Review focuses on economic and social rights in the context of both constitutional reforms and transitional justice. Writing on constitutionalizing economic and social rights, Gehan Gunatilleke argues that these ‘positive’ rights - in contrast to civil and political ‘negative’ rights - be enumerated within the bounds of minimum core obligations and the idea of progressive realization of rights. Evert Waeterloos and Sara Janssens reflect on South Africa’s land reforms and draw attention to the need for a balance between restitution and redistribution to ensure stability, development and justice in the long term. The Issue also carries two submissions to the Consultation Task Force on Reconciliation Mechanisms (CTF) on Economic Reparations, and the Malaiyaha Makkal (Up-Country Tamil people). These submissions highlight the need for ‘transformative reparations’ and the integration of reparations with economic and social policy. Naazima Kamardeen discusses the Supreme Court’s Special Determination on the Right to Information Bill, including the implications of the Court’s opinion that the term “national security” should encompass certain aspects of economic policy.