

# RIGHT TO EDUCATION AS AN ECONOMIC, SOCIAL, CULTURAL RIGHT IN SRI LANKA

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## Abstract

This report explores the economic, social, cultural Right to Education in Sri Lanka. The report begins with an analysis of the Right to Education in the Universal Declaration of Human Rights (UDHR) and in the International Covenant on Economic, Social and Cultural Rights (ICESCR). Then the report analyses the Right to Education as an ESCR in the South African and Colombian jurisdictions followed by an analysis of the Right to Education in Sri Lanka. Subsequently the report focuses on the international obligations undertaken by Sri Lanka pertaining to ESCRs and the judicial activism in incorporating international standards pertaining to the Right to Education in Sri Lanka.

## Right to Education in the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights

The Vienna Declaration and Program of Action<sup>2</sup> adopted by consensus by 171 States

participating in the World Conference on Human Rights held in Vienna in June 1993 declared that ‘All human rights are universal, indivisible and interdependent and interrelated’.<sup>3</sup> Article 22 of the UDHR stipulates that everyone’s rights to social, economic and cultural rights are “indispensable” for the “free development of his personality”.<sup>4</sup> The United Nations General Assembly proclaimed the years 1995-2004 as the World Decade for Human Rights Education.<sup>5</sup> The Universal Declaration of Human Rights declares the Right to Education while the International Covenant on Economic, Social and Cultural Rights further states that the State is the main actor responsible for implementing this right.<sup>6</sup>

In the exact words of Eleanor Roosevelt<sup>7</sup>, “UDHR is not a treaty; it is not an international agreement. It is not, and does not purport to be a statement of law, or of legal obligation. It is a declaration of basic principles of human rights and freedoms, to be stamped with the approval of the

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<sup>2</sup> Vienna Declaration and Programme of Action

<sup>3</sup> ‘Need to incorporate economic, social and cultural rights in Sri Lanka’s future Constitution’ Daily Mirror (Colombo, 25 October 2016)

<sup>4</sup> Art 22 UDHR

<sup>5</sup> Richard Pierre Claude, ‘The Right to Education and Human Rights Education’ (2005) 2 SUR - Int’l J on Hum Rts 37

<sup>6</sup> Kate Halvorsen ‘Notes on the Realization of the Human Right to Education’ (1990) 12

Human Rights Quarterly

<<https://www.jstor.org/stable/762529>>

accessed 14 February 2020

<sup>7</sup> Chair of the UN Commission on Human Rights during the drafting of the Declaration

General Assembly by formal vote of its members, and to serve as a common standard of achievement for all peoples of all nations.” Principles initially considered by the international community to be “only” goals or aspirations can develop into binding norms over time, if they become accepted as customary international law.<sup>8</sup> Thus, many of the Universal Declaration’s provisions have become incorporated into customary international law which is binding on all states. Article 26 of the UDHR does not only refer to primary education. It states that technical and professional education must be made generally available and higher education too on the basis of merit.<sup>9</sup>

The articles of the UDHR paved the way for the ICESCR.<sup>10</sup> Everyone is equally entitled to the Right to Education irrespective of race, ethnicity, gender, age, nationality, religion, socio-economic condition, health status, disabilities and sexual orientation.<sup>11</sup> The exercise of the Right to Education enables the individual to experience the

benefit of other rights, including both economic, social and cultural rights, and civil and political rights.<sup>12</sup> Yet social and economic rights are dependent on the availability and distribution of resources unlike civil and political rights.<sup>13</sup>

CESCR is the body of independent experts that monitors implementation of ICESCR by State parties.<sup>14</sup> Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR) was entered into force on 5 May 2013.<sup>15</sup> It allows the CESCR to receive and consider communications from individuals or groups who are victims of violations of any ESC rights of the ICESCR under the jurisdiction of a State party to the Covenant.<sup>16</sup> The Committee will only consider a communication after all available domestic remedies have been exhausted, unless domestic remedies are unreasonably prolonged.<sup>17</sup> The Human Rights Council

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8 Hurst Hannum , ‘The UDHR in National and International Law’ (1998) 3 Health and Human Rights, Fiftieth Anniversary of the Universal Declaration of Human Rights

<<https://www.jstor.org/stable/4065305>>  
accessed 14 February 2020

9Tristan McCowan, ‘Reframing the universal right to education’ (2010) 46 Comparative Education

<<https://www.jstor.org/stable/25800021>>  
accessed 14 February 2020

10 Global Citizenship Commission, The Universal Declaration of Human Rights in the 21st Century in Gordon Brown (ed), Book Subtitle: A Living Document in a Changing World Book (Open Book Publishers 2016)

<<https://www.jstor.org/stable/j.ctt1bpmb7v.12>>

11 'Interim Report on the Right to Education' (2006) 7 Asia-Pac J on Hum Rts & L 110

12 Ibid

13 Global Citizenship Commission, The Universal Declaration of Human Rights in the 21st Century in Gordon Brown (ed), Book Subtitle: A Living Document in a Changing World Book (Open Book Publishers 2016) <<https://www.jstor.org/stable/j.ctt1bpmb7v.12>>

14 Handbook on International Covenant on Economic, Social and Cultural Rights (2015) Published by PWESCR (Programme on Women’s Economic, Social and Cultural Rights)

15 Ibid

16 Ibid

17 Ibid

appoints Special Rapporteurs to address specific country situations.<sup>18</sup>

## **Right to Education as an ESCR in South African and Colombian jurisdictions**

### **South Africa**

The South African Constitution states that “everyone has the right to a basic education, including adult basic education; and to further education, which the state, through reasonable measures, must make progressively available and accessible.”<sup>19</sup>

#### **In *Governing Body of the Juma Masjid Primary School v. Juma Masjid Trust*<sup>20</sup>**

the Court identified that the right to basic education imposes on private parties, a duty to respect, and not interfere in its exercise. The Court also distinguished the constitutional right to basic education from higher education, stating that unlike the right to higher education, which the State is obligated to make progressively available, the right to basic education is “immediately realizable.” While in *Madzodzo et al v. Minister of Basic Education et al* the Court identified that the right to basic education is also “an empowerment right”. The High Court ordered the government to ensure that all schools identified in an audit as having furniture shortages to be provided adequate age and grade appropriate furniture which would enable each child at the identified schools to have his or her own reading and writing space.

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<sup>18</sup> Ibid

<sup>19</sup> Constitution of the Republic of South Africa, Art 29.

<sup>20</sup> [2011] ZACC 13

<sup>21</sup>Case no: 18678/2007

Furthermore, in *Western Cape Forum for Intellectual Disability v. Government of the Republic of South Africa & Government of the Province of Western Cape*<sup>21</sup> the complaint alleged that the educational needs of children with severe and profound intellectual disabilities were not being adequately met by the South African and Western Cape governments. Here the Court considers both the positive and negative dimensions of the Right to Education and concludes that the State policy violated children's rights in both respects. In fact, the Court discovered that the State's policy infringed on the rights of the severely disabled children in respect to their Right to Education, right to equality and right to dignity.

### **Colombia**

The Colombian Constitution describes education as an “individual right” and states that “education will be free of charge in the State institutions...” and that “it is the responsibility of the State...to guarantee an adequate supply of the service, and to guarantee for minors the conditions necessary for their access to and retention in the educational system.”<sup>22</sup> Article 67 defines “education as compulsory for children between five and fifteen years of age and it is free unless parents are able to pay.” In addition, the Constitution of 1991 requests the Ministry of Education to present a national educational plan every 10 years to be implemented across the country.<sup>23</sup>

<sup>22</sup> Constitution of Colombia, Art 67.

<sup>23</sup> Cabrera Pena, Juliana, "Education in Post-Conflict Colombia" (2018).*Master's Theses*. 1061.

<https://repository.usfca.edu/thes/1061>

*Julio David Pérez vs. Mayor's Office of Montería*<sup>24</sup> was a writ requesting the appointment of a sign language interpreter to enable students with hearing disabilities to continue their studies. This case led to a review of public policy regarding inclusive education in Colombia. The Constitutional Court concluded that the Right to Education was violated, and granted protection to the fundamental right to inclusive education. In *Piedad Cristina Peña, on behalf of her daughter, María Alejandra Villa, vs. Entidad Promotora de Salud (EPS) Coomeva*<sup>25</sup> the Court made reference to Colombia's obligations under Article 12 of the ICESCR and Article 24 of the Convention on the Rights of Persons with Disabilities (CRPD). The Court ruled that the State must ensure that persons with disabilities are not excluded from educational opportunities on the basis of their disability. The Constitutional Court resorted to international human rights law instruments to highlight the interrelationship between the rights to health and to education in order to protect the rights of persons with disabilities.

Moreover, *Decision C-376/10 of the Colombian Constitutional Court* restates that human rights treaties and comments by bodies regarding economic, social and cultural rights are part of the Colombian legal system. The plaintiffs filed a constitutional claim arguing that Law 115 of 1994 did not comply with international

human rights standards by allowing for the option to charge fees on primary education. The Court found this law to be unenforceable, considering that fees may not be applied to official primary education, but only to secondary and higher education levels. According to the Court, charging fees in the primary education level could become a barrier to accessing the education system.

### **Right to Education as an ESCR in Sri Lanka**

Sri Lanka has a history of having socio-economic welfare systems in place, without it being necessarily in the constitution.<sup>26</sup> Although economic, social and cultural rights are not constitutionalized, citizens have access to free education, which signifies that the State recognizes ESC rights.<sup>27</sup> Socio-economic rights are also 'rights'.<sup>28</sup> The Right to Education is both guaranteed by Article 13(2) of ICESCR and Article 28(1) of Convention on the Rights of the Child (CRC).

Through the CRC, the Committee on the Elimination of Discrimination against Women (CEDAW) and other covenants, there has been considerable reinforcement of the justiciability of ESC rights over the years. Social and economic rights are dependent on the availability and distribution of resources, unlike civil and political rights.<sup>29</sup> In addition, social and

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<sup>24</sup>File T-2650185

<sup>25</sup>File T-2.500.563

<sup>26</sup> Amra Ismail, 'Constitutionalising economic, social and cultural' Daily Mirror (Colombo, 25 April 2017)

<sup>27</sup> Ibid

<sup>28</sup>Amal De Chikera, 'Are Socio-economic rights, rights?' (Groundviews, 4 December 2017) <<https://groundviews.org/2017/04/12/are-socio-economic-rights-rights/>> accessed 8 April 2020

<sup>29</sup> Global Citizenship Commission, The Universal Declaration of Human Rights in the

economic rights are linked to civil and political rights because respect for human dignity requires that both be upheld.

These rights entail both positive and negative obligations.<sup>30</sup>

Justiciability of the Right to Education is inseparable from the justiciability of other rights, such as the right to non-discrimination and the right to information.<sup>31</sup> The Right to Education has been recognized by the Sri Lankan judiciary through the wide interpretation of the right to equality.<sup>32</sup> Yet some argue that Courts lack the institutional capacity required to effectively adjudicate these rights.<sup>33</sup> School admissions and university admissions have been challenged before Court on the basis of violation of the right to equal treatment before the law. Sri Lanka is a state party to the International Covenant on Economic, Social and Cultural Rights (ICESCR) since 1980. But as stated by the monitoring UN Committee on Economic, Social and Cultural Rights in its concluding observations of 2010, “the Covenant has not been given full effect in the domestic legal order and although some of its

provisions are justiciable before the Supreme Court, they are rarely invoked.”<sup>34</sup>

### **International obligations undertaken by Sri Lanka pertaining to ESCRs**

The Constitution reform process was a great opportunity for ESC rights to be made enforceable. The Public Representations Committee’s (PRC) report clearly showed the aspirations of the people in relation to the various dimensions of rights. Accordingly, not only did people want their civil and political rights guaranteed, but they also wanted other rights such as the access to education ensured.<sup>35</sup> Under Chapter 12 titled ‘Fundamental Rights’, the PRC report recommends the inclusion of education among other ESC needs into the new constitution.<sup>36</sup> The Sub-Committee on Fundamental Rights of the Constitutional Assembly of Sri Lanka in its recently published report also emphasizes the relevance of introducing justiciable economic, social and cultural rights in the national constitution.<sup>37</sup>

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21st Century in Gordon Brown (ed), Book Subtitle: A Living Document in a Changing World Book (Open Book Publishers 2016) <<https://www.jstor.org/stable/j.ctt1bpmb7v.12>>

<sup>30</sup> Amra Ismail, ‘Constitutionalising economic, social and cultural’ Daily Mirror (Colombo, 25 April 2017)

<sup>31</sup> ‘Interim Report on the Right to Education’ (2006) 7 Asia-Pac J on Hum Rts & L 110

<sup>32</sup> Mario Gomez, Conor Hartnett and Dinesha Samararatne ‘Constitutionalizing Economic and Social Rights in Sri Lanka’ (2016) CPA Working Papers on Constitutional Reform No. 7

<sup>33</sup> Ibid

<sup>34</sup> ‘Sri Lanka Urged to Recognise Economic, Social and Cultural Fundamental Rights’ (Sri Lanka BRIEF, 13 January 2017) <<https://srilankabrief.org/2017/01/sri-lanka-urged-to-recognise-economic-social-and-cultural-fundamental-rights/>> accessed 8 April 2020

<sup>35</sup> Amra Ismail, ‘Constitutionalising economic, social and cultural’ Daily Mirror (Colombo, 25 April 2017)

<sup>36</sup> PRC report on FR

<sup>37</sup> ‘Sri Lanka Urged to Recognise Economic, Social and Cultural Fundamental Rights’ (Sri Lanka BRIEF, 13 January 2017)

The most fundamental critique of the inclusion of social and economic rights in the Constitution is the argument that social and economic rights being ‘positive’ rights, are not rights. Hence should not be recognized by the state.<sup>38</sup> A positive right compels the provision of a service by the government. A group of legal professionals have been campaigning against the incorporation of the ESCR in the proposed new Constitution.<sup>39</sup> Legal and other professionals who oppose the incorporation of the ESCR in the proposed new Constitution argue that the ESCR should be realized through directive principles of state policy rather than enshrining them as justiciable rights in the Constitution.<sup>40</sup>

The PRC Report on Public Recommendations on Constitutional Reform advocates the inclusion of several economic and social rights in the new constitution, including the ‘Right to Education’<sup>41</sup> The PRC’s proposal includes a right to “a primary, secondary and tertiary education at the cost of the State.”<sup>42</sup> Yet the limited resources in Sri Lanka are a challenge to the fulfillment of all social and economic rights. Non-Governmental Organizations and other civil society

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<https://srilankabrief.org/2017/01/sri-lanka-urged-to-recognise-economic-social-and-cultural-fundamental-rights/> accessed 8 April 2020

<sup>38</sup> Mario Gomez, Conor Hartnett and Dinesha Samararatne ‘Constitutionalizing Economic and Social Rights in Sri Lanka’ (2016) CPA Working Papers on Constitutional Reform No. 7

<sup>39</sup> Muttukrishna Sarvananthan, ‘Including economic, social and cultural rights in the new Constitution’ The Sunday Times (Colombo, 8 October 2017)

groups are effective actors in holding States accountable for human rights obligations.<sup>43</sup> Reference to ICESCR and General Comments by human rights activists will also help to promote advocacy.<sup>44</sup>

### **Activism of the Supreme Court in incorporating international standards pertaining to the Right to Education in Sri Lanka**

In *Samarakoon v UGC*<sup>45</sup> it was held that the petitioner’s fundamental rights guaranteed by article 12(1) of the Constitution were violated due to the denial of admission of the petitioner to the Medical Faculty based on the policy in the UGC handbook. Here, through the wide interpretation of the right to equality enshrined in Article 12(1) of the Constitution, the Court has recognized the right to access to education, which is not expressly recognized in the Sri Lankan Constitution. In the University admission cases, the Court has also relied on the concept of legitimate expectation in addition to the UDHR and the Directive Principles of State Policy in recognizing a

<sup>40</sup> Ibid

<sup>41</sup> Mario Gomez, Conor Hartnett and Dinesha Samararatne ‘Constitutionalizing Economic and Social Rights in Sri Lanka’ (2016) CPA Working Papers on Constitutional Reform No. 7

<sup>42</sup> PRC Report (n 48) 101

<sup>43</sup> *Handbook on International Covenant on Economic, Social and Cultural Rights* (2015) Published by PWESCR (Programme on Women’s Economic, Social and Cultural Rights)

<sup>44</sup> Ibid

<sup>45</sup> [2005] 1 Sri LR 11

violation of the right to equality where the state is found to have acted arbitrarily.<sup>46</sup>

In *Kaviratne v Pushpakumara, Commissioner General of Examinations, Department of Examinations*<sup>47</sup> the Court observes that the Court has from ‘time to time’ recognized the Right to Education by reference to Article 12(1) of the Constitution. The Court makes reference to the Right to Education as described in the UDHR, as well as the obligation to eradicate illiteracy under the Directive Principles of State Policy, in supporting the argument that the right to equality includes the Right to Education. This case suggests that the Court upholds a Right to Education. The recognition of a Right to Education involves very specific substantive obligations on the part of the State as described under the ICESCR which Sri Lanka has acceded to.<sup>48</sup> The Convention allows rights to be ‘progressively realized.’ This requires signatories to take concrete steps to fulfill such rights while acknowledging that constraints in resources hinder immediate realization.

In *Kaviratne v Pushpakumara, Commissioner General of Examinations, Department of Examinations*, and the Supreme Court makes reference to the Right to Education, which is illustrated by Article 26 of the Universal Declaration of Human Rights (UDHR).<sup>49</sup> The Court quotes Article 26(1) of the UDHR which states that “Everyone has the Right to

Education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.” And the Court observes that Article 27(2)(h) of the UDHR which refers to the complete eradication of illiteracy and the assurance to all persons of the right to universal and equal access to Education at all levels has been provided under the Chapter on directive principles of State policy in the Constitution.<sup>50</sup> Moreover, the Court also observes that by way of application of Article 12(1) of the Constitution, the Court had upheld the Right to Education.<sup>51</sup>

Accordingly, in many decisions the Supreme Court had made order not only with regard to the admission of children to Government Schools, but also to National Universities. Therefore, it can be said that the said right has been accepted and acknowledged by Sri Lankan Courts through the provisions embodied in Article 12(1) of the Constitution, although there is no specific provision dealing with the Right to Education in the Constitution, as in the Universal Declaration of Human Rights.

Furthermore, in *De Soyza v Minister of Education*<sup>52</sup>(*HIV/AIDS Case*) the Court highlighted article 27(2)(h) of the Constitution, and recognized that the State should ensure the right to universal and

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<sup>46</sup> Mario Gomez, Conor Hartnett and Dinesha Samararatne ‘Constitutionalizing Economic and Social Rights in Sri Lanka’ (2016) CPA Working Papers on Constitutional Reform No. 7

<sup>47</sup> S.C. (FR) Application No.29/2012

<sup>48</sup> Dinesha Samararatne, ‘Recent Trends in Sri Lanka’s Fundamental Rights Jurisdiction’ (2016) XXII The Bar Association Law Journal

<sup>49</sup> Ibid

<sup>50</sup> Ibid

<sup>51</sup> Ibid

<sup>52</sup> SC(FR) 77/2016, SC Minutes 14 March 2016

equal access to education at all levels, since it is a directive principle of State policy.

### Conclusion

ESCRs transform needs into rights. And in a century where the gap between the rich and the poor is widening, ESCRs are a mechanism for upholding social justice. The situation arisen from the Corona virus pandemic in 2019/2020 is a vivid example of the 'digital divide' between developed nations and developing nations, which alludes to this gap. Not every student has access to the internet and digital apparatuses to engage in online learning. And approximately 1.2 billion students are affected by school closures worldwide due to this pandemic.<sup>53</sup> As the Guardian articulates it, "When the world changes in nine minutes, it rarely changes equally."<sup>54</sup> And, the most economically aggrieved in society will be the most at risk.<sup>55</sup> Hence all children should be provided with technology to learn outside school.<sup>56</sup> And, it is a violation of the Right to Education to deprive certain categories of students from the access to education perpetrated by the 'digital divide' during a pandemic which requires the lockdown of society.

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<sup>53</sup>Aliona Normandin, 'Ensuring the right to education in times of COVID-19' (leidenlawblog, May 01, 2020) <<https://leidenlawblog.nl/articles/ensuring-the-right-to-education-in-times-of-covid-19>> accessed 4 May 2020

<sup>54</sup>Laura McInerney, 'Education was never schools' sole focus. The coronavirus pandemic

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<sup>55</sup>Liz Mineo, 'Time to fix American education with race-for-space resolve' (The Harvard Gazette, 10 April 2020) <<https://news.harvard.edu/gazette/story/2020/04/the-pandemics-impact-on-education/>> accessed 4 May 2020

<sup>56</sup>Ibid



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