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**Interaction of Constitutional Jurisprudence and Pro-poor Policy in  
Sri Lanka**

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# Interaction of Constitutional Jurisprudence and Pro-poor Policy in Sri Lanka

- Rasika Mendis<sup>1</sup>

## Abstract:

*Sri Lanka has a long tradition of endorsing and implementing pro-poor policies in some its key sectors of development, notably in the sectors of health and education. Sri Lanka's second Republican Constitution of 1978, popularly associated with 'liberal democratic' policies, endorsed a policy framework premised on principles of justice, welfare and the equitable distribution of resources (among other things), in its 'directive principles of State policy'. In addition, the Constitution contains a chapter on 'justiciable' fundamental rights, setting out a human rights jurisprudence with immense potential for promoting the progressive well-being of the population.*

*Pro-poor policy implementation is currently confronted with several challenges, especially with Sri Lanka's transition to a 'middle income country'. While Sri Lanka has achieved considerable social development over the years, as measured by the indicators of the Millennium Development Goals, indicators measuring 'equality', point to increasing development disparities among Sri Lanka's population and among its different sectors (urban, rural and estate). There is however, much learning from the past that can inform an inquiry of pro-poor policy implementation, despite constant friction with liberal economic policies associated with the 1978 Constitution.*

*Sri Lanka's Constitutional jurisprudence however, has had little interaction with its policy environment, and remains largely detached from Sri Lanka's pro-poor policy implementation. There is hence, a need for the pro-poor policy ethos to capture the imagination of Sri Lanka's Constitutional and legal jurisprudence; such that the 'relevance' of pro-poor policy implementation is re-defined within Sri Lanka's dynamic socio-economic environment. This paper seeks to inquire into interactions of Sri Lanka's Constitutional jurisprudence in defining and implementing pro-poor policy implementation, and the transformative potential of Constitutional provision to promote and influence a pro-poor policy ethos that is progressively more equitable and relevant to current development dynamics. In this regard, the paper will also attempt outline the normative justifications for better legislative and judicial engagement with pro-poor policy implementation in Sri Lanka.*

Key words: Pro-poor policies, transformational development, normative framework, deliberative policy analysis

## I. Introduction

Sri Lanka's post-independence socio-economic development trajectory has been impressive, especially in terms of key socio-economic indicators. Successive governments, though divergent in their political priorities, have remained focused on mobilising pro-poor socio-economic development among the populace; with the result that Sri Lanka currently ranks 73 of 197 countries in the Human Development Index, reflecting a more progressive human development in the South Asian region (UNDP, 2014). While welfare spending declined during the 30 year long civil war that ended in 2009, Sri Lanka was

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among the top achievers of the Millennium Development Goals (MDGs) at the end of their implementation in 2015. However, there is concern if Sri Lanka's policy gains in the past can inform and benefit current developmental aspirations, and mobilize transformational socio-economic development that is both equitable and sustainable.

While pro-poor development has been driven by socialist as well as liberal socio-politics and economics, it is not the intention of this paper to engage in the relative merits and demerits of these several approaches. It will refer to these developments, where relevant to the discussion. The thrust of the discussion is to ascertain the scope and potential of Sri Lanka's Constitutional jurisprudence to pervade and influence Sri Lanka's policy arena. That is, to evaluate the body of law and judicial precedent generated through the instrumentality of the Sri Lanka's Constitution, in an attempt to define its scope and relevance to a discourse of continued pro-poor implementation in Sri Lanka's dynamic development context (outlined below).

The discussions of the paper will confine itself to analyze the provisions of the second republican Constitution of Sri Lanka, namely the Constitution of the Democratic Socialist Republic of Sri Lanka brought to effect in 1978 (herein referred to as the Constitution of Sri Lanka). The present Constitution and, as well as the first republican Constitution of 1972, provide a normative foundation for the continued implementation of pro-poor policies in its articulation of fundamental rights, and in outlining Directive Principles of State Policy (hereinafter referred to as the 'directive principles').

Among its discussions, the paper will outline why a discourse on Constitutional jurisprudence is relevant to Sri Lanka's pro-poor policy context. The transformative potential of this jurisprudence will be examined in comparison to the Constitutional jurisprudence of India, which has similar provision in its Constitution of 1949 (hereinafter referred to as the Indian Constitution). The paper will attempt to examine the relative contribution of Sri Lanka's judiciary (and where relevant, the legislature), in promoting a progressive implementation of the Constitutional vision of social justice and welfare embodied within its directive principles. It will then examine the progressive relevance of Sri Lanka's enforceable fundamental rights jurisprudence to the achievement and advancement of pro-poor policy. Pertinent to also consider the scope of judicial activism, its capacity to innovate and be relevant to a develop dynamic that holds much uncertainty for poor and the vulnerable.

## **2. Contextual Background and Challenges to Pro-poor Development**

The following is an outline of Sri Lanka's current development status, the trajectory of its pro-poor policy implementation in the past, and current challenges to the implementation of pro-poor policy.

### ***Notable socio-economic achievements in the recent past***

Among Sri Lanka's notable socio-economic achievements in the recent past, is the – decline of national poverty from 26% in 1990/91 to 6.7% in 2012 (United Nations, 2015). The World Bank's report on 'Poverty and Welfare in Sri Lanka' attributes Sri Lanka's reduction in poverty to sustained and pro-poor economic growth from 2002 to 2012/13', capturing the years immediately before and after the civil war. And in these years, the per capita consumption of the bottom 40% of households grew by 3.3%. The extreme poverty decreased from 13% in 2012 to 3% in 2012/13 (2016, p.23).

National level progress in key sectors, such as education and health, has been substantial. In the education sector, Sri Lanka has achieved a near universal primary education at 99.7% with a 100%

completion rate of those enrolled in primary education (UNDP, 2014). Youth literacy fall short of 100% at 97.8%, but is the second highest in the region, with gender parity in education, and a higher ratio of females in both secondary and tertiary education (UNDP, 2014). Sri Lanka's health sector, has achieved a near universal immunization coverage, and a consistent decline in infant and maternal mortality. Sri Lanka exceeded its MDG targets for access to improved sanitation facilities and safe drinking water (United Nations, 2015).

In parallel to these developments the Sri Lankan economy has demonstrated a resilience that is rare for a post-conflict economy. Despite several external and domestic challenges, the per capita GDP grew by 5.6% in the years 2002 to 2012/13 (World Bank, p.23), spanning a time shortly before the ending of the conflict and shortly afterwards. Despite a 'balance of payment crisis' during the last stages of the war, Sri Lanka has now achieved a certain macro-economic stability. In 2010, Sri Lanka attained the status of a 'middle income country', as defined by the World Bank according to its measures of Gross National Income (GNI).<sup>2</sup> In keeping with the demands of this status, and in view to achieving a 'high income' status in the near future, a current priority is to consolidate economic growth and implement credible growth stabilization policies. Among other economic priorities is the need to renew inflows of Foreign Direct Investment (FDI) that would fuel a diversification of its manufacturing and service sectors, which has in the recent past overtaken Sri Lanka's traditional agricultural sector as the main contributor to national GDP. Privatisation and private sector investment, which has hitherto been confined to a few sectors, notably tourism and property development, is identified and promoted by the government and key financial institutions, as the solution to expanding Sri Lanka's service sector; including health and education services, which has until now been predominantly public sector driven.

### ***Political and economic foundations for pro-poor advancement***

The social and economic resilience demonstrated by Sri Lanka in its recent past, has been progressively supported by developments that have their foundations in pre-independent Sri Lanka.

Sri Lanka received universal franchise in 1931, the second country in the world to grant the vote to all its population, including the rural poor, the vulnerable and across gender, caste and ethnicities. It enabled Sri Lanka's rural peasantry to engage in representative politics and hold local level politicians accountable to progressive policy formulation, creating the impetus for pro-poor policy development. Hence, the political autonomy of the people was accompanied by measures for social development; among them decentralized health care and education services that would reach the impoverished and the poorest of the poor. A rudimentary health care service that were initiated to address the eradication of malaria, progressively evolved into a free health care system for both preventive and curative services, comprising district-based hospitals and village level medical officers and other grass-roots institutional structures (Meegama, 2013, p. 212-225). Developments in the education sector were initiated prior to independence with commissions to establish schools in town council areas, subsequently expanded to rural areas, and primary education being made compulsory (Little, 2013, 10).<sup>3</sup> The government currently implements a compulsory education policy, though it has not translated into a legislation.

In addition, agricultural reforms tied to socialist policies have been implemented to meet the nutritional needs and food security of the rural poor and agricultural peasantry. The impact of these socialist

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<sup>2</sup> Gross National Income

<sup>3</sup> These developments tie into Sri Lanka's historical commitment to educational development across gender, especially among the higher castes

reforms on land, within Sri Lanka's post-colonial 'dual economy' comprising of a "modern plantation sector" and "traditional peasant agriculture at near subsistence levels", was two-fold. It was both to distribute State land among the small scale peasant farmer, and to vest in the State, large-scale estate lands in excess of a prescribed ceiling with the aim of pro-poor re-distribution and the State centered management of land.<sup>4</sup> Together with other additional incentives for the advancement of rural agriculture and income distribution, these developments would serve to up-lift and empower rural agricultural communities (Marga Institute, 1974).

All of the above policy initiatives and reforms mobilized a progressive development and resilience that is apparent in current statistics. Most often referred to as redistributive welfare measures, the term 'pro-poor' was rarely adopted in discussions of Sri Lanka's post-colonial socio-economic development. Leading up to the 1970s, the then finance minister, J.R Jayawardena referred to Sri Lanka as a 'social service State' given that, as much as 40% of its expenditure was being spent on social services (Marga Institute, 1974).<sup>5</sup> However, there would be constant contention between Sri Lanka's welfare expenditure and initiative for the adoption and implementation of liberal economic policies.

The economic reforms initiated together with Sri Lanka's Constitution of 1978 brought these contentions to the forefront of social and economic policy making. Several years following the introduction of the 1978 Constitution, expert opinion on the above is divided. Some scholars argue that the liberalization of the economy in the late 1970's was without any significant curtailment of the Sri Lanka's pro-poor welfare programme at the 'sectoral level'; that the government was politically committed to achieving economic growth (especially in the agriculture sector) without cutting back on welfare and consumption ((Gunatileke, 1993, p.38). Other scholars contend otherwise; Jayasuriya, in *Welfare and Politics in Sri Lanka* states that the government of 1977 would go on to implement policies that were seen as an - "abandonment of the welfare ideology and a gradual dismantling of the welfare state; an apparent move from the "policy mix of 'welfare and growth' in favour of growth and market oriented safety nets in accordance with the Structural Adjustment Programmes (SAP) of funding agencies such as World Bank" (2000, pp 19). Notably, government expenditure in welfare spending fell from 40% in 1970-77 to 11% in 1981.

However, Gunatileke (1993) points out, that a focus on market oriented policies with the private sector as the 'engine of growth', did not detract the government's response to high levels of poverty and malnutrition (among other social concerns). Where the much anticipated 'trickle-down effect' of market liberalisation didn't deliver, the government implemented social welfare programmes, such as the "janasaviya" programme,<sup>6</sup> for poverty alleviation, with a view to sustained growth.

The contentions between economic liberalization and pro-poor policy implementation are resonant in current developmental debates, as is outlined below.

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<sup>4</sup> Socialist policy developments are captured in the scheme of the Land Reform Act of 1979, and the Paddy Lands Act

<sup>5</sup> For the purposes of this paper, all policy measures designed to benefit the poor, both directly and indirectly, will be collectively referred to as 'pro poor policies'.

<sup>6</sup> Janasaviya programme:

### ***Current challenges for pro-poor socio-economic development***

Sri Lanka's progressive achievements at the national level, when compared with indices of regional and grassroots level development, indicate several contradictions. Key human development and poverty reports of the recent past,<sup>7</sup> outline that Sri Lanka's overall development status is contradicted by disparate of unequal development at the district level and among certain groups. Though poverty has declined markedly at the national level, certain communities and regions indicate distinctly high levels of poverty and deprivation. Hence, the Gini co-efficient measuring 'inequality' has remained stagnant for both household income and expenditure, since 1991. Further, the share of the poorest quintile in national consumption has progressively reduced to 7.2%. Sri Lanka's average 'poverty gap ratio' is 1.2, but in the provinces – Northern, Eastern and Uva, the ratio varies from as much as 2.1–2.6. Thus 'inequality' and vulnerability to poverty and deprivation is an overarching concern for development in Sri Lanka.

In light of this disparate developmental status, it is necessary and expedient to question why, despite concerted effort to reach the poor and the vulnerable, they remain at the periphery of development with little opportunity to benefit from overall developmental progress.

In the meantime, welfare spending in key sectors such as health and education has declined, with increasing concern of the quality of public health care services, and quality issues affecting all tiers of education (Central Bank, 2014). The government, together with key financial institutions such as the World Bank advocate for the private sector to partner in the provision of quality social services. But given that there is little incentive for the private sector to serve and mobilise disadvantaged persons, there is little clarity of the government's pro-poor development policy and strategy.

In the sphere of economics, despite far reaching agriculture reforms, it is currently the lowest contributor to the economy (as opposed to the service and manufacturing sectors); though over 80% of Sri Lanka's rural poor are predominantly engaged in agriculture, of which a considerable percentage constitutions youth. While Sri Lanka is looking to diversify its skill base to attract private investment and greater inflows of foreign direct investment, the current school dropout rate is as much as 14%, of those under 16 years of age (UNDP, 2012).

### **3. Constitutional Consensus for Pro-Policy Implementation**

With respect to Constitutional interaction with Sri Lanka's policy environment, public and social policy making is the pre-dominant domain of the executive and the administrative branches of government. A discourse of judicial interaction, or activism, with respect to pro-poor implementation, is therefore constructed primarily on the premise that the Constitutional is a norm setting instrument, reflecting the aspirations of the peoples to which it applies. Hence, the following discussions explores the potential of Sri Lanka's Constitutional jurisprudence to realize, transformative pro-poor development that is contextually relevant. Constitutional interpretation that articulates a 'relevant' normative framework and policy ethos is of paramount significance to the welfare and progress of the entire populace, especially the poorest of the poor.

Significantly, S.P Sathe records in his writings, that the British were somewhat reluctant to include fundamental rights in the Constitutions of its colonies. The British oriented by a system of governance in

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<sup>7</sup>notably; Sri Lanka's Millennium Development Report (2015), Sri Lanka Human Development Reports of 2012 and 2014, and the World Bank poverty assessment report (2016); see references

which parliament is supreme, had every faith that Parliament would enact laws sufficient protect and preserve these rights. It was decided however, that articulation of these rights would benefit those countries without advanced institutions of democracy. The exceptions were Tanzania, Ghana and Sri Lanka ('Ceylon' at the time) (p. 409). Hence, Sri Lanka's first Independent Constitution in 1937 did not articulate specific rights fundamental to its governance. The present Constitution however, grants fundamental rights a foremost place, where it is a means by which the sovereignty of the people is exercised (Article 3). Fundamental rights were made justiciable for the first time, through a prescribed judicial mechanism whereby any individual aggrieved by their violation, may apply to courts for redressal. Notably, the rights which are endorsed by the Constitution of Sri Lanka as being fundamental to its normative ethos are primarily 'civil and political' in nature, including key 'freedoms' and rights that are integral to civil life and liberty.

The directive principles contained in Chapter VI of the Sri Lankan Constitution in contrast, are not enforceable in a court of law, and may not be called into question for any inconsistency, in the manner in which they are applied and implemented (Constitution of 1978, Article 29). Rather, they are a set of principles identified as intrinsic to matters of governance. The Constitution specifies that the directive principles "shall guide Parliament, the President<sup>8</sup> and the Cabinet of Ministers<sup>9</sup> in the enactment of laws and the governance of the country, for the establishment of a just and free society' (Article 27). Hence the Constitution outlines a broad overall goal by which the efficacy of both the legislature and the executive is to be tested, namely in achieving the broad Constitutional vision of a 'just and free society'. The Indian Constitution however, notes that the principles are 'fundamental to governance' and imposes a duty on the State to apply them in the making of laws.

The directive principles provides the most fundamental basis on which to premise a discourse Constitutional engagement with pro-poor policy. The principles are often referred to as 'moral or ethical rights' which are intended to secure political, social and economic justice, though they lack the enforceability that any sense of the word 'rights' warrants (Wickramaratne, p. 39). There are no legal entitlements that accrue to an individual or community by their articulation in the Constitution. Hence their value and utility in 'social transformation' has been the subject of much judicial debate. This is apparent in the case of *the Thirteenth Amendment to the Constitution and Provincial Councils Bill* (Sri Lanka Law Reports, 1987, p. 312), which highlights the relevance of the directive principles, in matters of progressive governance.

The jurisdiction of the Supreme Court was evoked to decide on the Constitutional validity of the Constitutional Bill and the Provincial Councils Bill that sought to devolve executive and legislative powers to the provincial councils. The central contention was whether the Bills would have the effect of altering the sovereign legislative power of Parliament articulated in Article 3 of the Constitution, whose amendment would require a referendum.

In the course of the judgment, it was held that the Provincial Council Bill merely allowed for the making of subordinate legislation that would in no way detract and undermine the supreme legislative authority of Parliament. This position was justified in terms of the directive that calls for the State to – 'strengthen

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<sup>8</sup>The Constitution of 1978 established the 'executive presidency' where the President is the head of the Executive and Head of the State, similar to that of the Constitution of the United States of America; the President is the head of the Cabinet of Ministers [Articles 30(1) and 42 of the Constitution]

<sup>9</sup> Charged with the direction and control of government of the Republic and is collectively responsible to Parliament [Article 43(1)]

and broaden the democratic structure of government, and democratic rights, with a view to affording all peoples the opportunity to participatory governance' (pp. 327).

The determination points to the value based utility of the directive principles in defining and furthering the aspirations of democratic governance as contained in the Constitution of 1978. And in view of its Constitutional role as a guide to the legislature, the validation of the Provincial Bill in reference to the directive principles is a progressive development. However, Justice Wanasundera, questioned the doctrinal relevance of referring to the principles when the body of the Bill itself expressed the purposes for which it was drafted. He opined that that – the principles are only 'ethical or moral principles' that guide the State; any 'legal importance' given to the principles would render the Constriction 'unworkable'. (pp. 355).

The problematic of the 'legal status' or the status of the directive principles within the framework of its Constitution has been progressively addressed by the Indian courts. Initial case determinations in India concerning the directive principles reflected the position somewhat similar to that of Justice Wanasundera in the Thirteenth Amendment case outlined above; in the case of *State of Madras v. Champakan Dorairajan* the court invalidated a system of fixed quotas for admission to medical and engineering college for different communities, including the *Harijans* (Khan, 1996. p 203). This policy decision of the State sought to be implemented on the basis of Article 46 of the Indian Constitution to – 'promote with special care the educational and economic interests of the weaker sections of the people, and in particular, the scheduled castes and tribes where such protection is for the attainment of 'social justice' and protection from all forms of exploitation'. The court was emphatic in its rejection of State's initiative for social reform and affirmative action, on the argument that a policy position based on this directive is invalid in so far it infringes on the fundamental right to equality contained in Part III of the Constitution, and is deemed contrary to the standard envisaged in the realisation of the right in question. It was contended that the validity of the directive principles need to conform and run subsidiary to the realisation of fundamental rights.

The position of the Indian courts has progressed since the *Dorairajan* decision. While there is no judicial sanction for the violation or contradiction of the directive principles, a number of judicial experts have drawn attention to the fundamental character of the directive principles within the scheme of the Indian Constitution, and well as its importance to the political governance of the State. As pointed out by one K.M Panikar that 'while the court may not declare a law void for its non-conformity with the directive principles, or direct the making of legislation, they are bound to evolve, affirm and adopt the principles of interpretation which will further and not hinder the goals set out in the directive principles (p. 200).

And hence, in *Re Kerala Education Bill* the court departed substantially from the position in the *Dorairajan* to attribute to the directive principles some 'constitutional validity'. While not quite contradicting its subordinate status to fundamental rights, the court articulated the principle of 'harmonious construction of fundamental rights and directive principles'; whereby the court is called upon to consider both chapters III and IV as components of one integrated Constitutional scheme. A number of subsequent cases have endorsed this principle. Notably the case of *Golak Nath v State of Punjab*, which states: "the scheme (of the Constitution) is so elastic that all the Directive Principles of State Policy can reasonably be enforced without taking away or abridging the fundamental rights" (Wickramaratne, p.40).

And in the prominent case of *Minerva Mills v Union of India*, the principle of harmonious construction was extended, such that the court relied upon the directive principles to determine the scope and 'reasonableness' of Constitutionally entrenched restrictions on fundamental rights. The determination



sought to give equal Constitutional status to both fundamental rights and directive principles on the argument that – ‘if the balance between the two parts of the Constitution are destroyed, then it destroys an essential element of the basic structure of the Constitution; and to give primacy to one part over the other is to disturb the harmony of the Constitution’ (Wickramaratne, pp. 43)

It is contended at this point, that the relative uncertainty and lack of progressive interpretation of the directive principles in Sri Lanka, may lie in the uncertain ideological base of the Constitution of 1978. Khan quotes Austin on the Indian Constitution, to point out that - ‘despite the permeation of the entire Constitution, by the aim of national renaissance, the core of the commitment to the social revolution lies in Parts III and IV of the Constitution. They are the conscience of the Constitution.... In the directive principles however, one finds an ever clearer statement of the revolution (Austin in Khan, p.202).<sup>10</sup>

The Republican Constitution of 1972, made a clear statement of the significance of the value-base embodied in the principles, that the fundamental rights incorporated therein were made subordinate to the directive principles, such that they could be restricted “for the purpose” of giving effect to the principles. The then socialist government viewed the directive principles as being intrinsic and inviolable to the welfare state, during which time many socialist reforms were effected. In contrast, the Constitution of 1978 effected a ‘curtailment’ of the socialist ethos that is paramount to welfare provision and progressive pro-poor policy formulation, and introduced the ideals of ‘liberal democracy’ intended to leverage Sri Lanka on a path of market liberalization and ‘private sector’ led growth. Thus the core values of the Constitution are reflected in its inviolable fundamental rights, which were intended to drive individual autonomy and economic freedom (Fernando in Welikala, 2015, 331 -369 at p 341). Fernando points out that ‘while the 1978 Con purported to incorporate these aspects and idealism, the 978 Constitution strengthened the executive, to introduce a ‘new type’ of executive, in contrast to the 1972 Constitution that aimed to strengthen the legislature (p.338).

Hence, there is an urgent need for the Constitution of Sri Lanka to determine the core substance of the directive principles, and their relevance to the value base of the overall Constitution. Especially in view of indicators that point to an increasing marginalization and vulnerability among Sri Lanka’s population, that warrant progressive pro-poor policy formulation and a deliberate interventionism. Even as Sri Lanka is looking to Constitutional reform, and possibility the drafting of a new Constitution, it is vitally important for all concerned, in light of policy trends, to review the scope and substance of the directive principles.

#### **4. Fundamental rights litigation and social justice**

This is not to undermine the intrinsic value of fundamental rights, and their scope to ‘temper’ any politicking that may be inherent in policy formulation, which is most often a political project. The efforts of the courts, to articulate the directive principles within entrenched fundamental rights is advantages, both to give effect the principles and also to bring clarity to the scope of ‘freedom’ or ‘entitlement’ envisaged in fundamental rights.

The principle of harmonious construction is especially relevant in jurisdictions where there is little articulation of socio-economic rights, as in the jurisdiction of Sri Lanka. However, very little judicial

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<sup>10</sup> Austin, The Indian Constitution, Cornerstone of a Nation, pp. 50-51

precedent that deals with socio-economic rights or pro-poor policy, in Sri Lanka, refers to the directive principles. The Sri Lankan courts have been slow to demonstrate innovation in the use of the directive principles, and have largely relied on Indian judicial precedent in articulating the normative content of the principles.

#### *Application of reasonable restrictions in the furtherance of pro-poor policy*

Discussed below is one of the few instances in which Sri Lanka's fundamental rights jurisdiction has addressed a question of social policy, with reference to both fundamental rights and the directive principles, in order to further the objectives of social justice and pro-poor equity.

The case of *Seneviratne v University Grants Commission (UGC)* dealt with the question of 'reasonable limitation' of fundamental rights, namely the right to equality articulated in Article 12 of the Constitution. But the core issue for determination concerned the petitioner's access to tertiary education, which he alleges was being denied to him by the unequal application of university admission criteria. The petitioner challenged the 'system of quotas' applied by the national universities admission policy, which allocated 55% of available places to students from revenue districts, based on a ratio that the district population bears to the total population in the country, and another 15% to 12 underprivileged areas; admission on the basis of merit was limited at the time to a mere 30%. The petitioner who would have gained university admission, had it not been for the district quota system, contented that a 'merit based system' should be the only deciding factor in university admissions that allows for 'equal treatment' of all those who aspire to university education

The court upheld the decision of the State to implement the quota system on the basis of 'reasonable classification'. This principle requires that - 'any intelligible differentia which distinguishes a particular group of persons, from those outside the group, is justified on the basis that the differential criteria in question must have a reasonable link with the need for such a classification in the first place'. The court decided that the quota system was 'reasonable' in terms of the larger objects of State policy, and justified the classification of the quota system in reference to the directive principles 27(1) and 27 (2) (h). Namely - 'the attainment in Sri Lanka of a free and just society; and the complete eradication of literacy and the assurance to all persons for the right to universal and equal access to all levels of education' (Constitution of 1978, pp. 17).

Hence, the a departure from 'merit based criteria' to include district quotas and underprivileged quotas was held not to be in violation of the equality clause, in view that it is necessary affirmative action required to reverse historical discrimination arising from the State's tendency to be urban-focused, at the neglect of rural areas. The State was justified in their pursuit of national policy within a framework of substantive equality, though it has been noted that very little evidence was adduced in court to substantiate the 'reasonableness' of the classification in the quota system.

Pertinent to discuss that Sri Lanka has implemented systems of educational quotas based on different classifications, long before the *Seneviratne* case since the 1960s, which have all be subject to much debate and controversy. Classification is often subject to bias and political manipulation, and may not always align with the purported objects of social justice (Mendis, 2004, pp 5-7). The current quota system was implemented as a temporary measure, on the basis of a recommendation by a cabinet sub-committee to gradually phase-off the classification and to increase the merit based intake by 10% each year. In the interim, the State was tasked with the upliftment and empowerment of backward and underprivileged districts. However, several commissions of inquiry and education expert committees

later, the quota system remains; and socio-economic advancement in districts identified as underprivileged has not been significant.<sup>11</sup>

Further, the classification itself is riddled with anomalies and contradictions. Justice Fernando refers to the *Seneviratne* case in the case of *Ramupillai v Minister of Public Administration* (Sri Lanka Law Reports, 1991) a decade later, to express that while he respectfully endorses the States initiative for substantive equality, he has reservations of the ‘Constitutionality of the ‘temporary measure’ with respect to today’s know circumstances’ (Open University of Sri Lanka, 1998, pp. 71). He pointed out that the classification does not take into account, among other things, the plight of ‘deprived schools’ in privileged districts, and the ‘good’ student in the less privileged districts. However, the court has not engaged with the issues of educational quotas since; and review whether the objectives of social equity is in-fact being achieved by the affirmative action of the State. This is not to undermine the State’s initiative to implement substantive measures towards the upliftment of the poor and vulnerable. However, it is apparent in the Sri Lankan context, that it is defeatist to implement a policy for affirmative action, without corresponding policy implementation for social advancement and social justice. That is, a question of substantive equality and affirmative action must constantly be reviewed for its relevance to the social context which demands it.

It is understood that the judiciary is not mandated to direct the formulation of social legislation or social policy; in-fact numerous commentaries point to the inherent dangers in uninformed interpretation by the courts of directive principles and its application to social realities.<sup>12</sup> As pointed out in the case of *Mirzapur Moti*, it is possible just by reference to the directive principles to raise a presumption of ‘reasonableness’ in the restriction of fundamental rights; and therefore the court was emphatic that restrictions are ‘reasonable’ if only they are not in ‘clear conflict’ with the fundamental right in question. However, it is contended that while it is necessary to approach judicial interaction with social policy with caution, the intervention of the courts is necessary and relevant, where larger normative considerations that impact the Constitutional vision of social justice are at stake.

This is especially important in the current policy context of Sri Lanka. It has been noted by administrative experts that Sri Lanka’s public administration has been increasingly subject to random politicking and politicization since independence (Somasundram eds. 1997, pp. 27-29). What was once a ‘golden standard ‘of public administration in South Asia, is now confronted with issues of professionalism, powerlessness and apathy. Understandably, politics is very much a vital component of public and social policy formulation, in any vibrant democracy; however, with overt political interference and the decentralization of party politics, the public administration constantly subject to tensions between rational policy making and politicking. With the result that ‘populist strategies’ have led to policy decisions without reference to the nature and scope of pro-poor policy implementation that is possible in a dynamic and changing context of a markets and a liberal economy (Marga Institute, 1974, pg18). This randomness has affected a realistic negotiation among welfare, employment generation and economic growth that is intrinsic to development that is both equitable and sustainable.<sup>13</sup>

With respect to the education sector, the dominant illustration in this discussion, C.R. DeSilva, a prominent legal academic is of the following view: “Further problems arise, when in the context of a

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<sup>11</sup> Based on the current ratios of the quota system as much as 52% of districts in Sri Lanka are still deemed as educationally underprivileged

<sup>12</sup> See; State Of Gujarat vs Mirzapur Moti Kureshi Kassab, 2005 (unreported) <https://indiankanoon.org/doc/55842/>, accessed June 7, 2017

<sup>13</sup> See; current contextual realities in section 2 of the paper

plural society, each ethnic and religious group tends to evaluate the ratio of university admissions obtained by its members as an index of equality of opportunity or of discrimination. University admissions thus cease to be the exclusive preserve of academics and become the concern of politicians and leaders of various groups and interests” (DeSilva in Mendis, p10).

Partisan interest and politicking is apparent in many of the social sectors in the Sri Lankan context, as also outlined in the contextual background. Sri Lanka has an excellent record in drafting quality legislation and policy documents on every conceivable subject, and notably, with provision to mobilize participatory and inclusive development among the poorest of the poor. But implementation is slow, cumbersome and riddled with institutional and resource constraints. Many policy positions are endorsed by Cabinet, but not translated into legislation, with the result that enforceability and judicial review for Constitutional compliance is not always possible.

Therefore, the Sri Lankan judiciary has scope for increased innovation and activism, in support of public and social policy, as reflected in the directive principles.

#### *Innovative judicial intervention and judicial activism*

The potential for judicial innovation in the enforcement of fundamental rights by the Sri Lankan judiciary is may be contrasted to developments, again in India, where pro-poor policy implementation is arguably necessary and warranted. Some of these developments are highlighted below.

A foremost judicial development or innovation in India has been, the greater initiative to Constitutionalise socio-economic rights. While it hasn't matched up to South Africa's extensive Constitutional reforms, the Constitution of India has gradually expanded its fundamental rights jurisprudence to include socio-economic rights, in response to the needs of socio-economic advancement in its context. There is similarity in development issues affecting both Indian and Sri Lanka, though a comprehensive comparison between two populations with divergent demographics and socio-cultural histories is not always possible. Expert analysis indicates that approximately 25 years after economic liberalization, there is still uncertainty if economic growth has benefited the poor in India. While poverty has fallen in recent years, it has not reduced on par with economic growth, while disparity in human development and equality among the individual States is high (Dev, 2016, pp. 9). Health (especially malnutrition) and educational achievements are disparate across different groups of persons – castes, religious groups, women, and among the underprivileged in both rural and urban sectors (Yazadulla and Yalonetzky, 2010, pp. 3).

In this context, articulation of socio-economic rights would lead to a more deliberative enforcement of social policy, especially aimed at alleviating the plight of those with historical and systemic social disadvantage. For instance, the subsequent inclusion of the right to education (among primary school going children), has led to judicial precedents such as - *Society for Unaided Private Schools of Rajasthan v. Union of India & Another*. In this case, the Indian Constitutional court enforced the application of a 25% quota for the enrolment of underprivileged primary school children in both State run and private schools. The decision of the court identified the greater need for educational advancement in the country, in relation to other rights. By a reasonable reading of constitutionally entrenched restrictions, aimed at the greater good of society, and the directive principles, the court was able to entrench a precedent for the educational advancement of socially deprived groups.

Another prominent difference in the development of Constitutional jurisprudence in India is the explicit recognition of group rights both in its directive principles and fundamental rights jurisprudence. In the above case, and in the case of *State of Kerala v Thomas*, the court endorsed affirmative action for the

social advancement of certain groups. On a reading of Constitutional provisions for differential treatment of backward groups with respect to employment and education, the court was of the opinion that they were not exceptions to the equality clause in Article 14, but rather re-statements of what is intrinsically envisaged by equality in the Constitution (Open University of Sri Lanka, pp. 61).

This is a departure from the position of the Sri Lankan courts which has expressly rejected group rights from the purview of Article 12, the right to equality. In the *Ramupillai* case, Justice Thambiah expressed that the right guaranteed by Article 12(1) is 'the personal right of any person, and not as belonging to a particular community, such that the rights of a community or cast or of persons professing a particular religion is not envisaged within this article' (p. 66).

It may be the case that Sri Lanka is not as segmented by reason of historical, religious and social factors, as in the case of India; but it is a plural society with its own ethnic, religious and socio-economic divisions. The 1972 Constitution referred to group rights in recognition of this diversity, but the reference was removed from the purview of the current Constitution. This substantially reduces the utility and efficacy of fundamental rights litigation to address current and potential social disadvantages suffered by groups (among other disadvantages), in their quest for social equality and advancement.

The growing body of public interest litigation or social interest litigation is potentially a promising response to current gaps in Sri Lanka's fundamental rights jurisprudence. Judicial activism and innovation demonstrated by the Indian courts with regards public interest litigation, has benefited communities who do not have the knowledge or the means to take advantage of sophisticated adversarial proceedings that fundamental rights litigation demands. There is scope however, for Sri Lankan courts to utilize this nature of litigation for the furtherance of pro-poor advancement and to influence the making of pro-poor policy. Currently, public interest litigation in Sri Lanka is largely confined to actions concerning the environment and in recent times, the discrimination of urban communities in large scale development projects.<sup>14</sup>

## **5. Conclusion: theoretical underpinnings and the way forward**

In the face of uncertain pro-poor policy implementation and random politicking and politicization of policy administration, it is necessary to engage in discourse of deliberative policy analysis that is contextually relevant. The Constitution of Sri Lanka in this regards sets out a normative framework for the generation of systematic and progressive precedent that can guide a process of pro-poor policy making.

The justification for Constitutional jurisprudence as source of normative value-base, is the proposition that the Constitution is the ground-norm (or the "grundnorm") as conceptualized by historical legal theorists. The Sri Lankan Constitution of 1978, articulates aspirational goals in its directive principles of state policy based on precepts of equity, welfare and justice, with end vision of attaining a society defined by precepts justice and freedom. The Sri Lankan judiciary however, has not been forthcoming in its role of articulating and enforcing this Constitutional vision.

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14 *Environmental Foundation Ltd. v. Urban Development Authority*, SCFR 47/2004, Supreme Court Minutes 23.11.2005; *Karunanayake v. Ceylon Petroleum Corporation and Others* SCFR 535/2008 SC Minutes 17.12. 2008; *Bulankulana v Ministry of Industrial Development (Eppawala case)*, Supreme Court Application No. 884 of 1999

Judicial interaction of intervention with pro-poor policy and legislation in Sri Lanka requires, among other things, a re-imagination or re-thinking of the following:

The function of the Constitutional value-base with respect to pro-poor development: Constitutional interpretation needs to be driven by the 'function' that the judiciary attributes to its Constitutional provisions. Whether the end object of the interpretation is the articulation of the norm or principles, or if the provisions must entail a larger utilitarian function. That is, if the judiciary must engage in a norm setting function as opposed to executing a social function with reference to contextual realities. With respect to the progressive implementation of pro-poor policy, it is contended, in light of the discussion, that it is the latter that is relevant to the dynamic socio-economic context of Sri Lanka.

In view that the Constitution of 1978 was formulated through an effort to 'break away' from the previous Constitution of 1972, and did not derive its legitimacy from the prevalent law at the time, it may not be possible to argue in favour of the historical and cultural content of its value base. However, the incorporation of the directive principles (as amended) provides reference to a system of values and principles that reflect continuity from Sri Lanka's socialist past. a basis on which Constitutional jurisprudence may be instrumental in social construction and social justice.

Better define the scope of fundamental rights with reference to Constitutionally entrenched provision: in view of the legal validity attributed to the directive principles in comparative jurisprudence, it is a valuable point of reference by which to better define the scope of fundamental freedoms in a changing society. It is a fallacy, as has been demonstrated by the courts, to assume that fundamental rights can always be interpreted in absolute terms.

As articulated by Arthur Kaufmann<sup>15</sup> -

"The furtherance of freedom, equality and security by the laws is actuated by deep-seated tendencies in human nature. At the same time the view propounded that none of these values lend themselves to endless recognition and protection. It was suggested that anarchist libertarianism, an absolute egalitarianism, and a change-resisting preoccupation with security are self-defeating goals of social policy, because they may easily produce the opposite of what their realisation was meant to accomplish." (Bodenheimer, \_\_\_).

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<sup>15</sup> Kaufmann, A (1963) "the ontological structure of law". 8 Natural Law forum, 79, at 87

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