

Economic and social rights in the new constitution: A terrible idea

PROMINENT individuals and NGOs now clamour for economic and social rights in the new constitution. They want them incorporated as “fundamental rights” in a new Bill of Rights.

To quote a recent Daily FT column, such rights would cover “education, food, water, adequate housing, social security, a living wage, decent and safe work, freedom from forced evictions, and a safe, clean and healthy environment.” Alongside basic civic and political freedoms, these would be the State’s “hard” obligations, not just “soft” or aspirational goals. In other words, these rights would be justiciable, subject to judicial review and enforceable in the courts.

This is a terrible idea. It is guaranteed to defeat these advocates’ aims. But first consider constitutional precedents here and abroad.

Part III of the International Covenant on Economic, Social and Cultural Rights (ICESCR) encompasses the rights mentioned above. Its intent is aspirational: governments are expected to make progress towards realising these goals, but without hard, justiciable inter-intra-national enforcement.

The European Social Charter is similar. The South African Constitution – a favourite for Sri Lankan constitutional activists – contains economic and social rights, but its language is more aspirational than justiciable. The Indian Constitution states explicitly that economic and social rights are the State’s policy prerogatives, and should not be enforced by any court. That is also true of the Sri Lankan Constitutions of 1972 and 1978.

What could be wrong with these rights? Why shouldn’t they be justiciable? Surely we are all in favour of universal access to decent education, health care, food, water, housing, wages, conditions of work and social security, and to a clean environment. The arguments against are both philosophical and practical. I will review both.

First to philosophy

First to philosophy. Early modern constitutions focused on civic rights to guarantee the freedom of speech, assembly and association. Classic examples are the English Bill of Rights following the Glorious Revolution of 1689, and – for many the touchstone – the Bill of Rights in the US Constitution. Political rights, notably democracy through the extension of the franchise to all adults, came later. Economic rights were also embedded de jure or de facto.

These guaranteed freedom from state intervention for producers and consumers, embodied in



Sri Lanka needs a new constitution that safeguards civic, political and economic freedoms

the freedom of trade, freedom of contract, and the freedom of individuals to own, buy and sell property. These were mostly private-law rights, developed especially in the English common-law tradition that was exported to British colonies. They had quasi-constitutional effect. In the USA, the courts interpreted the Constitution’s Commerce Clause to restrict the State’s encroachment on private property rights until the New Deal in the 1930s.

Until the twentieth century, civic and economic rights were liberal rights. Following John Locke, the father of modern liberalism, such rights protect “negative” freedom: the freedom to do as one wishes, except where specifically prohibited so as not to restrict others’ freedom. John Stuart Mill explicitly defined freedom in this negative sense in his *On Liberty*. Negative rules protect individuals’ freedom by restricting power – the power of private parties and the power of the state.

Only after the Second World War did a different conception of rights and freedom find its way into constitutions. The UN Charter’s chapter on international economic and social cooperation, and the subsequent ICESCR, opened the door to positive economic, social and cultural rights – “positive” in that rights are provided for explicitly or prescribed, as opposed to negative rights that only proscribe specific actions. This presents wide vistas for collective action, especially for the state to provide and guarantee

education, food, water, health care, housing, decent wages, labour and environmental standards, and other things besides. The list could be never-ending.

Rather than limiting the state, positive rights are an open sesame for its expansion. Amartya Sen and

John Rawls are the most influential modern theorists of positive rights. The Lockean rights tradition is classical liberal; Sen and Rawls belong to a collectivist, social-democratic tradition of distributive justice that goes back to Aristotle.

Now I will put my cards on the table. I am a classical liberal. For me, negative rights are paramount. That subsumes civic, political and economic rights. In my ideal constitution, freedoms to trade, domestically and internationally, to strike contracts, and to own and dispose of property, would be justiciable. Of course that would severely curtail the powers of the state. But I appreciate this is a minority view everywhere around the world. Enforcing such rights would lack popular consent and legitimacy. Therefore I have to argue for policies and laws to expand economic freedom in the public square.

This is a matter for electoral politics, not constitutional amendment, at least until there is sufficient popular support for constitutional reforms. These, then, are the parameters of liberal democracy, which balances liberal rights with popular will.

To positive rights

Now turn to positive rights.

FT Quote

“I would ask self-professed liberals and good-governance activists to think again. Don’t be fellow travellers and useful idiots of diehard collectivists who want to take this back to the 1970s, when living standards were in precipitous decline, with bread queues and hunger marches. To repeat, economic and social rights in the new constitution is a terrible idea. I cannot think of a better way to promote bad governance. All clear-thinking, public-spirited citizens should oppose it.”

And here I will combine philosophical with practical objections. Like most people I would like to see better education, health care, wages, housing and so on for everyone, especially for those who have been deprived of them. But I think the best way to provide these “goods” is through a free-market economy, with maximal freedom to save, invest, be entrepreneurial, and create jobs and wealth. Only prosperity allows for sustainably higher incomes, and better educated, better housed and healthier people. That is the lesson from the West and East Asian Tiger economies.

Positive rights are problematic because they are inherently subjective. What is a “fair” or “living” wage? What is “decent” education, housing or health care? What is a “clean” environment? We can all wish for them in a very general sense. But there is no objective way of pinning them down in concrete situations. Making them hard laws, stretching to fundamental rights in a constitution, invites all sorts of arbitrary government

and judicial interventions. It would restrict economic freedom, and it could be disastrous for economic welfare.

Constitutionalising high wages (above prevailing productivity levels), and high expenditure on education, health care and other public services, would stall the market’s wealth-generating engine. Interest groups demanding more “rights” would swarm around politicians, officials and judges like bears to a honeypot. More interventions – higher taxes, more borrowing, price controls, trade protection – would follow. Some well-organised, politically connected minorities might benefit, but everybody else – the broad majority of ordinary people – would lose out.

What about trade-offs among all these “rights”? Advocates assume positive rights – a list as long as Jack the Beanstalk – are “free”. They are not: they all have economic costs. So should a relatively poor country like Sri Lanka trade-off better education for worse wages or housing? Or the other way round? Again, these are inherently subjective decisions; they cannot be subject to an objective rule. And where would it end? Shouldn’t rights extend to the constitutional right to happiness? That could mean all sorts of things, and invite never-ending interventions from a state “that knows best” to restrict individuals’ freedoms “for their own good”. This is the slippery slope to Hayek’s Road to Serfdom. It is also the road to collective destitution.

Other practical objections

There are other practical objections. Judges are wholly incompetent to prescribe economic and social policy. How on earth would they know what wages to set, and what educational, housing and environmental standards to enforce? In a democracy, these are

matters for public argument, elections and elected representatives’ decisions. Giving judges the final say would undermine democracy itself.

Finally, constitutionalising economic and social rights would centralise power even further. The powers of provincial and local councils would be clipped – at precisely the time when Sri Lanka needs a new constitution that decentralises power closer to the citizen.

Sri Lanka needs a new constitution that safeguards civic, political and economic freedoms. Many contribute to constitution-drafting. Some are political and legal experts, but economic literacy is conspicuously lacking. Some constitution-drafters say they are political liberals, but few, if any, are economic liberals. In fact most are economic collectivists. Some advocates of economic and social rights in the new constitution are unabashed socialists who disdain free markets and love command-and-control economics. Others are more sympathetic to a well-functioning market economy. All sing the hymn of Yahapalanaya.

I would ask self-professed liberals and good-governance activists to think again. Don’t be fellow travellers and useful idiots of diehard collectivists who want to take this back to the 1970s, when living standards were in precipitous decline, with bread queues and hunger marches. To repeat, economic and social rights in the new constitution is a terrible idea. I cannot think of a better way to promote bad governance. All clear-thinking, public-spirited citizens should oppose it.

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My View



Global Economics

By Razeen Sally

The mess in SriLankan Airlines is getting worse!

By INSIDER

WE Sri Lankans were used to regularly hearing of the frolics of the former President’s brother-in-law Nishantha Wickramasinghe. Often we used to see him in the newspapers flanked by SriLankan Airlines hostesses.

Though the Financial Times bravely many times exposed the excesses, nothing much happened. MPs Harsha de Silva and Ravi Karunanayake would often be heard in Parliament exposing the malpractices of the leadership at that time.

The Board was packed with people like Sanath Ukwatte, Nihal Jayamanne PC and JKH Chief Susantha Rathnayake to give credibility to the transactions and the scandalous purchases of aircrafts. Aircrafts that were purchased by the Board were for 17 hours of flying.

SriLankan Airlines had no landing rights to the USA or Canada or New Zealand to make use of such aircraft. But despite that, the aircrafts were endorsed by the Board and bought causing losses amount-



President Maithripala Sirisena



SriLankan Airlines Chairman Ajith Dias



SriLankan Airlines CEO Suren Ratwatte

ing to millions of US Dollars. The Board members who wanted free tickets said nothing but went along with the Chairman.

While MP Johnston Fernando was arrested by the FCID for using Rs. 5 Million from a State institution for election propaganda, the ex-SriLankan Board members are still at large after squandering billions of rupees of the taxpayers’ money.

When it was discovered in 2015 after President Sirisena assumed office that SriLankan Airlines had made a loss of over Rs. 60 billion for nine months of 2014, when our social welfare budget for a year was

less than of the half of that loss, there was so much of anger vented on social media against the former regime. Many people expected the CEO, Chairman and the Board to be prosecuted for gross abuse of power and mismanagement within a few months. What happened instead, the entire saga got swept under the carpet.

The Government appointed Prime Minister’s close friend Ajith Dias, a garment manufacturer, to lead the bankrupt airline. The Chairman had no experience or qualification whatsoever to run an airline making losses of bil-

ions, and, to make it worse, the Government appointed the brother of a former UNP Chairman who was responsible for the UNF Government’s downfall in 2004, an airline pilot, as CEO of the debt-ridden airline for a six-figure salary.

The impact of that decision has been disastrous for the airline. An airline pilot does not have the experience to turnaround a bankrupt airline. What the airline needed was another Harry Jayewardene or a Peter Hill to put the airline back into shape.

To make matters worse, the majority of the Directors

appointed to the Board had no experience whatsoever to give guidance to the management. All in all, it has been a disaster for the airline.

Insiders say Rakitha Jayawardana did a much better job because he had airline management experience and should be brought back to supervise the inexperienced Ratwatte. The discipline of the airline under Ratwatte has gone from bad to worse. We hear of sex scandals in the cockpit, the CEO who believes he is untouchable as long as his brother is around, is either fighting the pilots or abusing them. Drunkard pilots, work to rule and closing down of routes are the order of the day.

The biggest problem the airline is facing today is due to the indecisiveness, lack of experience and incompetence of the Board. The majority on the Board have got appointed because of their connections to the Prime Minister. Insiders say the airline by now would have recovered if decisions were taken on time, the Minister was more assertive and people who knew the industry and finance experts were appointed.

Insiders say the former CEO Kapila Chandrasena, the former Chairman and Board are getting away unscathed because of the connections they have either with the current Board or due to business connections.

The President and the SLFP watch helplessly while the party goes on unchecked by the UNP-led Government. Analysts say if the Government is serious about resurrecting the airline, they at least now need to professionalise the Board and allow the Board to take decisions.

The Finance Minister who claims that he cannot bridge the budget deficit as the owner of the airline must first fix the hole in the airline before he raises taxes in the country. The President who promised change should not watch helplessly; he needs to wake up and ensure his Government delivers what he promised.

All Sri Lankans want to see the spectre of abuse and mismanagement becoming a thing of the past because the airline it is not the private property of the Chairman or the CEO. SriLankan Airlines belongs to the people of Sri Lanka.