Peradeniya Law Journal (2025), Vol. 1
ISSN: 3084-8784
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Constitutional Protection of Economic, Social & Cultural Rights: A Choice or a Democratic Imperative?[1]

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It is an honour to be invited to deliver the Third Sir Ivor Jennings Memorial Oration organised by the Department of Law of the University of Peradeniya. With the first two orations having been delivered by legal stalwarts Prof Savitri Goonesekere and Prof Philip Alston, I know that theirs is a tough act to follow.

I speak to you today not in my capacity as a serving Judge of an Indian constitutional court but as a student of law. Two decades of law practice followed by 17 years of being on the Bench have shaped my understanding of the evolving jurisprudence of human rights in general and the Economic, Social, and Cultural (ESC) rights in particular. What I propose to share with you stems largely from my experience of litigating some of the ESC rights in Indian courts and later being part of Benches that decided ESC rights cases. The usual caveat applies. These are my personal views and do not represent the views of the institution I belong to at present.

Let me sketch out the scheme of today's lecture. I first set out the context by referring to empirical studies showing where we are as two developing countries that are democratic republics and neighbours in South Asia and the post-COVID-19 pandemic scenario. Basically, I am answering the question, "where are we?" In the first part of the lecture, I discuss how the international human rights law instruments came about and how the written Constitutions of both our countries have accounted for them. Here, I am seeking to answer the question, "how did we get here?" You may find this academic, but then I am in an academic space, and some of you may be students wanting to know more about the domain of human rights and ESC rights in particular.

[1] This is an edited text of the 3rd Sir Ivor Jennings Memorial Oration held on 7 March 2023, University of Peradeniya. [Editors' Note: The Sir Ivor Jennings Memorial Oration is an annual oration organized by the Department of Law, University of Peradeniya, to provide a platform to distinguished legal academics and jurists to share cutting-edge ideas on public law.]
[2] LL.M., Ph D.; (then) Chief Justice, High Court of Orissa, India.

I next move on to the role of the Indian judiciary in realising some of these rights. I am here presuming that some of you in Sri Lanka might want to know what lawyers and judges have done in India to realise the potential of ESC rights in the Constitution? Some of you in the audience in Peradeniya may have read about these cases. I may fill you in on my perspective on them in a broad general sense. Fourthly, I speak on the importance of the grassroots work of civil society organisations and mass movements in India in bringing about laws and court decisions in the area of ESC rights. I also touch upon the role of international human rights laws and the bodies set up to develop their understanding. In the fifth segment, I focus on one particular case in the Indian Supreme Court that upheld the claims of a particularly vulnerable tribal group who resisted the taking over of their natural resources for mining purposes. Just in case the audience begins to wonder if this is all about the good news, with no understanding of the politics behind the evolution of international human rights law, I dwell in the sixth part of my lecture on the critiques of the present system of protection and enforcement of human rights internationally and in the realm of ESC rights in particular. It adds to the various ways of thinking about the advantages and disadvantages of constitutionalising ESC rights in a formal, structured way. The last part of the lecture dwells on the tasks ahead of us in building a safe and better world for all of us. So, let's begin.

I

The context of today's lecture needs to be understood. Where do we stand as a world and as two democratic nations in South Asia? In preparing for today's lecture, I came across two important studies of economic and social progress worldwide which I believe are relevant. One is the Human Development Report (HDR) brought out by the UNDP every year for over a decade now. The 2022 Report is titled 'Uncertain Times, Unsettled Lives: Shaping our future in a transforming world."[3] The authors (and there are many of them across several disciplines) explain in the introduction to the Report that "Layers of uncertainty are stacking up and interacting to unsettle our lives in unprecedented ways. People have faced diseases, wars and environmental disruptions before. But the confluence of destabilizing planetary pressures with growing inequalities, sweeping societal transformations to ease those pressures and widespread polarization present new, complex, interacting sources of uncertainty for the world and everyone in it. That is the new normal."[4] And may I dare say, political instability, persecution of ethnic and religious minorities resulting in large-scale

[3] See: https://hdr.undp.org/content/human-development-report-2021-22
[4] See 'Human Development Report 2021-22', available at: https://www.undp.org/india/human-development-report-2021-22, at p.1.

internal displacement and cross-border migration are adding to the pressures and stresses of human lives.

The Human Development Report ('HDR') states how, the world over, the Human Development Index (HDI) has dropped consecutively in the last two years. The HDI is a summary measure for assessing long-term progress in three basic dimensions of human development:

a long and healthy life;
access to knowledge; and
a decent standard of living.

The HDR enumerates a series of factors that explain the contemporary and historical contexts that resulted in this drop in the HDI values. One is the increasing distress across global populations – related to planetary changes, associated inequalities, political polarisations and new industrial transitions. Artificial intelligence, genomic editing and digital development have also been changing fundamental aspects of human existence, and these technological changes outpace human ability to grasp their social implications. The HDR noted that collective violence, which includes political violence, is generally a cause of increased mental distress, particularly among transgender and non-binary youth.[5] The HDR also highlights the growing inequality in society and continued gender disparity in the areas of education, employment, and participation in politics. India's HDI Rank in 2021 was 131 out of 191 countries, whereas Sri Lanka's rank was 72. Both countries face challenges of inequality, poverty, and environmental sustainability.

The second significant study is the Social Progress Index.[5] The 2022 version, which is the 8th since 2014, uses 12 components and 60 indicators to measure the social performance of 169 countries fully and an additional 27 countries partially. In the words of its authors, the report "helps us understand how people across the world are living, who is being left behind, and how to accelerate progress."[6] Social progress is defined as "the capacity of a society to meet the basic human needs of its citizens, establish the building blocks that allow citizens and communities to enhance and sustain the quality of their lives, and create the conditions for all individuals to reach their full potential."[7] The SPI focuses on outcomes and not inputs and is delinked from GDP. It acknowledges that economic development does not automatically accompany social development,

[5] See: https://hdr.undp.org/data-center/human-development-index#/indicies/HDI
[6] See 'Global Social Progress Index', available at: https://www.socialprogress.org/index/global/results/, at p 3.
[7] See: https://www.socialprogress.org/index/global/methodology/

and the demand for better lives, with greater equality alongside a cleaner environment, has heightened in the preceding years.

As regards the Social Progress Index (SPI) in 2022, Sri Lanka ranks 74th out of 169 countries with an overall score of 69.22. India ranks 110th out of 169 countries with an overall score of 60.19.

The COVID-19 pandemic that held the world in its grip for most of 2020 and the whole of 2021 exposed the governance fault lines in many a democratic republic. The systemic failures to address the vulnerabilities of the already marginalised sections of society came to the fore whether it was the public healthcare, education, livelihoods of the poor, of farmers, fisherfolk and those eking out their livelihoods in certain types of industries that were particularly adversely affected, e.g., tourism, hospitality and entertainment. The absence of a social security net in most countries of the Global South exacerbated the problems of the poor and marginalised including migrant labour and refugees. The CESCR has observed that the COVID-19 crisis has adversely affected several economic, social, and cultural rights, including the rights to health, food, shelter, and education. This is therefore another important context in which we proceed to examine the evolution of the jurisprudence of ESC rights in our countries.

II

Now that the context has been delineated, let us get down to the main theme of the lecture. On 10th December 1948, in the first major development in the post-World War II era, the United Nations General Assembly adopted the Universal Declaration of Human Rights (UDHR) recognising all humans as being "born free and equal in dignity and rights" regardless of "nationality, place of residence, gender, national or ethnic origin, colour, or religion, language, or any other status" and affirming their 'basic rights and fundamental freedoms'.8 18 years later, on 16th December, 1966, the UN General Assembly adopted two multi-lateral treaties.[9] One was the International Covenant on Civil and Political Rights that requires ratifying State parties to respect the civil and political rights of individuals, including the right to life, freedom of religion, freedom of speech, freedom of assembly, right to privacy, right against arbitrary arrests, detention and torture, electoral rights, and rights to due process and a fair trial. As of June 2022, the Covenant has 173 State parties.

[8] See: https://www.un.org/en/about-us/universal-declaration-of-human-rights
[9] United Nations General Assembly Resolution 2200, 16 December 1966.

On the same day the International Covenant on Economic, Social and Cultural Rights (ICESCR) was adopted, which requires the ratifying States to work toward the granting of economic, social, and cultural rights.[10] The economic rights grouping includes the right to work, fair wages and safe working conditions, the right to form and join trade unions; social rights include the right to social security, the right to family, the right to health, the right to food, the right to housing, the right to property, to a decent standard of living. Cultural rights include the right to education and to take part in cultural life. As of July 2020, the ICESCR had 171 parties. Each of these Covenants has a complaints mechanism and a Committee that reviews country reports.[11] The UDHR and these two Covenants constitute the International Bill of Human Rights.

Among the prominent features that distinguish the ICCPR from the ICESCR is that the former speaks of what is largely perceived to be the State's negative obligations whereas the ICESCR emphasises the state's positive obligations. The other distinction drawn is in the implementation of those obligations. Article 2 of the ICESCR speaks of 'progressive realisation' of the ESC rights by States.[12] Further, unlike the ICCPR which speaks of individual states having to fulfil obligations within their territories, the ICESCR emphasises international co-operation. The General Comments prepared by the Committee on ESC Rights have interpreted the expression 'progressive realisation' to mean that State parties have "to take steps, individually and through international assistance and co-operation," to the "maximum of available resources, with a view to achieving progressively the full realization of the rights recognized."13 Further, these steps should be "deliberate, concrete, and targeted as clearly as possible" toward meeting the obligations. In the context of 'realization' of these rights, the Committee has identified certain rights and obligations that require immediate implementation. These include protecting children from economic and social exploitation, including enacting legislation that provides for a minimum age for employment and punishes dangerous working conditions for children; providing free and compulsory education; providing all workers with fair wages; and so on. In other words, the State will not usually be permitted to plead financial hardship in making available the above rights.

[10] See: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights

[11] See: https://legal.un.org/avl/ha/icescr/icescr.html#:~:text=In%20practice%2C%20both%20Covenants%20bind,remains%20out%20of%20this%20scheme at p. 6.

[12] See: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights, Article 2.

[13] Ibid.

The underlying premise of ESC rights is the respect for human dignity. As we noted earlier, the ICESCR recognizes the obligation of the States to respect, protect and fulfil these rights. When we say 'respect,' it implies that States do not interfere with the enjoyment of the right through their policies and decisions.[14] For instance, the sanctioning of polluting industries along the river bank or on the coast would directly affect the rights of the inhabitants to drinking water, groundwater or the fisher folk with the rights to livelihood. The obligation to 'protect' requires the State to prevent other actors from interfering with the enjoyment of the rights.[15] This would include non-State actors like business corporations and companies both domestic and multinational, from depriving persons of the rights to access to resources, to housing, to health and so on. While these are negative obligations, the obligation to fulfil has a positive connotation. It requires States to actively take steps to create conditions for full enjoyment by individuals of the economic, social and cultural rights. This would again mean affirmative action programs that increase the ambit of the availability of basic needs and necessities. One could think of the mid-day meal scheme, which ensures a minimum quantity of nutritious food to children studying in Government schools and the provision of clean drinking water to all households, and so on.

The Constitutions of both India and Sri Lanka have similar features. The Indian Constitution was adopted on 26 November 1949, seventeen years prior to the ICESCR and the Sri Lankan Constitution on 21 July 1977, eleven years after the ICESCR. The Preamble to the Indian Constitution and the Svasti of the Sri Lankan Constitution proclaim that each of the countries is a democratic socialist republic.[16]In both Constitutions, the Chapter on the Directive Principles of State Policy (DPs) is placed in a separate Chapter, distinct from the one on Fundamental Rights. The tone and tenor of their provisions are similar.[17] Both Constitutions accord primacy to the DPs as guiding state policies. The DPs of both Constitutions seek to provide the people a just social order through equitable distribution of the material resources of the community to subserve the common good. They seek to provide the basic survival rights to health, food, decent living conditions, and equality of opportunity.

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[14] See: https://www.un.org/en/about-us/udhr/foundation-of-international-human-rights-law#:~:text=The%20obligation%20to%20respect%20means,groups%20against%20human%20rights%20abuses

[15] See: https://www.icj.org/chapter-2-esc-rights-under-international-law-and-the-role-of-judicial-and-quasi-judicial-bodies-2/2-3-identifying-breaches-of-international-obligations-of-states-pertaining-to-esc-rights/2-3-1-state-obligations-stemming-from-international-law/#:~:text=The%20obligation%20to%20protect%20requires,or%20in%20German%2C%20Drittwirkung

[16] The Constitution of Sri Lanka, 1978, Preamble.

The non-mandatory nature of the DPs is signified by the use of the expression 'the State shall strive to' in Article 38 in the Indian Constitution.[18] Article 27 (2) of the Sri Lankan Constitution, on the other hand, begins with the expression 'the State is pledged to establish', and in Articles 27 (3) to (15) consistently uses the expression 'the State shall' while describing the State's obligations.[19] Yet, it is evident that these obligations were not intended in either Constitution to be enforceable in a court of law. There is an express provision (Art 29 in the Sri Lankan Constitution and Art 37 of the Indian Constitution) that states that the DPs are non-justiciable and not enforceable as such in a court of law.

According to Dr. B. R. Ambedkar, who is widely acknowledged as the prime mover in the drafting of the Indian Constitution, the DPs were to encapsulate a 'socialist pattern of economic democracy' where the benefits of economic development were to accrue to the relatively less privileged classes of society and not result in common detriment.[20] This was keeping in view the fact that: "On the social plane, we have in India a society based on the principle of graded inequality. We have a society in which there are some who have immense wealth as against many who live in abject poverty."[21]

During the making of the Indian Constitution, some of the members of the Constituent Assembly expressed disappointment that the basic survival rights that guarantee the right to dignity of the individual were being relegated to the non-justiciable DPs. When the first draft of the Constitution was tabled in March 1947, Dr. B. R. Ambedkar had advocated that they should be made enforceable in a court of law. Later, however, in November 1948, when the revised draft was being discussed he sought to explain the shift in the stand of the Drafting Committee by saying:[22]

> *If it is said that the Directive Principles have no legal force behind them, I am prepared to admit it. But I am not prepared to admit that they have no sort of binding force at all. Nor am I prepared to concede that they are useless because they have no binding force in law.*
>
> *The Draft Constitution as framed only provides a machinery for the government of the country. It is not a contrivance to install any particular party in power as has been done in some countries. Who should be in power is left to be determined by the people, as it must be, if the system is to satisfy the tests of democracy. But whoever captures*

[18] The Constitution of India, 1950, Article 38.
[19] The Constitution of Sri Lanka, 1978, Article 27(2).
[20] The Constitution of India, 1950, Article 39 (c).
[21] The speech by B.R. Ambedkar to the Constituent Assembly on November 25, 1949 while tabling the final draft of the Indian Constitution.
[22] The Constituent Assembly Debates, 4th November, 1948.

> *power will not be free to do what he likes with it. In the exercise of it, he will have to respect these instruments of instructions which are called Directive Principles. He cannot ignore them. He may not have to answer for their breach in a Court of Law. But he will certainly have to answer for them before the electorate at election time. What great value these directive principles possess will be realized better when the forces of right contrive to capture power.*

This prophecy of Dr. Ambedkar has, in the Indian context, proved to be largely true as I shall explain as we go along. But this concern over the mistaken notion that the ESC rights are merely pious aspirational rights has been voiced by the Committee on ESC rights and international human rights scholars who have been at pains to emphasise the universality, interdependence and non-divisibility of the two sets of rights, viz., the ones enshrined in the ICCPR and the ICESCR.

Hector Gros Espiell, an Uruguayan jurist who served in the Inter-American Court of Human Rights, notes that:[23]

> *Only the full recognition of all of these rights can guarantee the real existence of any one of them, since without the effective enjoyment of economic, social and cultural rights, civil and political rights are reduced to merely formal categories. Conversely, without the reality of civil and political rights, without effective liberty understood in its broadest sense, economic, social and cultural rights in turn lack any real significance.*"

Indian public intellectual and Nobel laureate Prof. Amartya Sen has this to say:[24]

> *The negation of economic liberty, in the form of extreme poverty, makes individuals vulnerable to violations of other forms of liberty...The negation of economic liberty implies the negation of social and political liberty.*

III

In realising the potential of ESC rights, that have been constitutionalised in both our countries, the judiciary has an important role to play. Moving from a position, in the early years of the Constitution, that the DPs and FRs are in two separate 'compartments', the Indian Supreme Court in the early 1970s began to acknowledge their interdependence.[25] They were stated to be complementary and supplementary to each other. In the famous *Kesavananda Bharati* case,[26] in which the Indian Supreme Court identified the 'basic features' of the Constitution which

[23] Hector Gros Espiell, 'The Indivisibility and Interdependence of Human Rights' (1986), p. 16.
[24] Amartya Sen, *Development as Freedom* (1999), p. 8.
[25] D.D. Basu, *Shorter Constitution of India* (2003), p. 444.
[26] (1973) 4 SCC 225

were held to be inviolable and non-derogable, the Indian Supreme Court characterised the FRs and the DPs as being the 'conscience of the Constitution.'[27] It said: "In building up a just social order, it is sometimes imperative that the fundamental rights should be subordinated to the directive principles."[28] The Court was prepared thereafter to expand the ambit of fundamental rights by using the DPs. In the context of upholding the exclusion from the benefit of reservation of those in the 'creamy layer' of an underprivileged group, the Supreme Court held that: "Merely because DPSPs are non-justiciable, they are not subordinate to FRs."[29]

The Indian Supreme Court, as well as the Indian High Courts, have, through a series of pronouncements, read into the context of the right to life the basic minimum core elements of the economic and social rights, the denial of which would deprive a person of a life with dignity.[30] At the time of the making of the Indian Constitution, the ESC rights were placed in Part-IV and made 'non-justiciable' with the intention of permitting only a deferential or weak form of judicial review that would view decisions of the State in the realm of ESC rights as being in the domain of 'policy', and therefore out of bounds for the Courts.[31] However, as the jurisprudence around ESC rights evolved, not in small measure due to intervention by constitutional courts in their Public Interest Litigation (PIL) jurisdiction, many of these 'policy' assurances were able to be reinterpreted as enforceable entitlements with the aid of Article 21 of the Constitution and have helped shape legislation.[32]

The basis for this was the viewing the fundamental right to life in Article 21 in an expanded notion encompassing "the bare necessities of life, such as adequate nutrition, clothing, and shelter and facilities for reading, writing and expressing oneself in diverse forms."[33] This led the Court to recognizing the right to livelihood, to health, and to shelter, as being part of the right to life.[34] One other example of using a DP to expand the content of the right to life was the right to education. In a 1993 landmark decision in *J P Unnikrishnan*,[35] the Indian Supreme Court held that after 40 years of being in Chapter IV as a DP (Art 45) the right to free and compulsory education for children up to the age of fourteen had

[27] Ibid.
[28] Ibid, p. 879, para 1707.
[29] *Ashoka Kumar Thakur v. Union of India*, (2008) 6 SCC 1.
[30] *Francis Coralie Mullin v. State* AIR 1981 SC 746.
[31] The Constitution of India, 1950, Article 37.
[32] *Mohini Jain v. State of Karnataka* (1992) 3 SCC 666.
[33] See *Francis Coralie Mullin* (note 30 above).
[34] *Olga Tellis v. Bombay Municipal Corporation* (1985) 3 SCC 545; *Shanti Star Builders v. Narayan K. Totame* (1990) 1 SCC 520.
[35] *State of Andhra Pradesh v. J P Unnikrishnan* (1993) 1 SCC 645.

metamorphosed into a FR.[36] More than a decade later the Parliament endorsed this by inserting Article 21A to provide for a fundamental right to free and compulsory education for children between the ages of six and fourteen years.[37] And to operationalise the fundamental right the Indian Parliament enacted a statute The Right of Children to Free and Compulsory Education Act 2009, which prescribed the minimum norms to be followed in establishing schools at the primary and upper primary levels.[38]

The High Courts and the Indian Supreme Court have been able to require the States to provide justification for denial of access to these basic rights and to not accept the plea of lack of resources.[39] In doing so, the Courts have been enforcing, even if they do not expressly articulate it as such, certain 'minimum core obligations'.[40] This is in the context of the right to health, where it held the right to emergency medical treatment and primary health care as part of the right to life (*Paschim Banga Khet Majoor Samiti case*)[41]; in the context of the right to food, where it recognised the right to minimum nutritional content required for human sustenance (*PUCL* Case)[42] and in the context of shelter, where it upheld the right to procedural fairness in the context of forcible evictions (the *Olga Tellis Case*)[43].

The PIL jurisdiction had its plusses and minuses. While the Courts were able to accommodate the need for some degree of informality as regards procedure, relax the rules of standing, and were able to use the device of Court Commissioners and studies of expert bodies to provide objective factual basis for their intervention, often with the assistance of *amicus curiae*,[44] there was the real possibility of overlooking competing interests, also in public interest, which could produce undesirable outcomes. Further, while the device of 'continuing mandamus'[45] adopted by a PIL Court was useful in keeping an issue alive and visible and helped monitor the implementation of time-bound directions, the dependence on the interest of the particular Bench and the time made available for the case amidst an overburdened docket meant a lack of continuity and inconsistency in approach.

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[36] *Mohini Jain v. State of Karnataka* note 31.
[37] The Constitution (Eighty-sixth Amendment) Act, 2002, Article 21 A.
[38] The Right of Children to Free and Compulsory Education Act, No. 35 of 2009
[39] *State of Kerala v. Arun George,* (2015) 11 SCC 334.
[40] CESCR, General Comment 15.
[41] *Paschim Banga Khet Majoor Samity and Ors. v. State of West Bengal* (1995) 4 SCC 37.
[42] *People's Union for Civil Liberties (PUCL) v. Union of India,* (1997) 1 SCC 301.
[43] 1985 SCC (3) 545.
[44] Oxford English Dictionary, "amicus curiae (n.)", July 2023, available at: https://doi.org/10.1093/OED/5142769378
[45] *Vineet Narain v. Union of India*, (1996) 2 SCC 199.

Another issue that has emerged is that the PIL jurisdiction has been invoked by groups working at cross purposes. A typical example is a court intervention in a PIL at the instance of an environmental protection group which results in loss of livelihoods and access to resources to vulnerable groups like fisher folk or forest dwellers. Another instance is residents in apartments in middle-class urban localities invoking their fundamental right to housing and seeking forced eviction of slums in the neighbourhood, thus depriving the slum-dwellers of their rights to shelter, livelihood and a bundle of associated interdependent ESC and civil and political rights.[46] The Courts have then to ensure that the basic minimum protection of the constitutional guarantees of the slum-dwellers is not sacrificed on the altar of protection of the rights to housing of the apartment-dwellers. A conservative approach could be to ask whether the slum-dwellers have a right to continue to dwell on private or public land? The human rights sensitive approach would be to ask whether prior to their eviction, alternative arrangements have been made to ensure that their displacement does not result in deprivation of a whole bundle of rights apart from the right to shelter which might include the right to health, the right to the livelihood, the right to education of children in the slums and so on. This changed approach signals the importance of respecting the economic and social rights and not viewing them in isolation. The Delhi High Court has in two cases (*Sudama Singh* and *Ajay Maken*),[47] adopted this approach by drawing upon both the international human rights law and South African jurisprudence on meaningful engagement with the affected communities. This has been described by Prof Roberto Gargarella of Argentina as an instance of adoption of a deliberative democratic approach.[48] Nevertheless, the overall contribution of the judiciary to developing a jurisprudence around protection and enforcement of ESC rights cannot be gainsaid.

IV

However, an objective assessment of the role of the judiciary in shaping ESC jurisprudence in India would place it as one among the significant drivers of change. In the last four decades, there has been a persistent groundswell of mass movements and civil society campaigns around recognition, protection and enforcement of a range of ESC rights. This has contributed in large measure to the legislature in India according statutory recognition to the minimum core elements of economic and social rights by enacting a series of legislations, like the rural employment guarantee legislation,[49] that fixes the daily wage and the

[46] *PG Gupta v. State of Gujarat,* (1995) 2 SCC 182.
[47] *Sudama Singh v. Government of Delhi* (*2010) 168 DLT 218 (DB)*; *Ajay Maken v. Union of India 2019 AIR Online Del 523.*
[48] 'Human Rights, International Courts and Deliberative Democracy', available at: http://hdl.handle.net/2152/4078
[49] Mahatma Gandhi National Rural Employment Guarantee Act, 2005.

number of days of work to afford a decent standard of living to rural households, the National Food Security legislation,[50] that mandates States to provide minimum nutritional levels and within the larger group identify the more vulnerable ones, like children, lactating mothers, the elderly and those living below the poverty line as being entitled to these basic minimum nutritional food. In the context of land acquisition, a newer form of the legislation was enacted in 2013 which sets down the basic minimum standard of what could constitute shelter in a rehabilitation colony and provides for the taking of land to be replaced by arable land.[51] The legislation providing the right to information also came about as a result of sustained campaign by a grassroots movement in Rajasthan.[52]

This 'bottom up approach' to law making also saw the enactment of the FRA in 2016 which recognises the rights of traditional forest dwellers.[53] The slum improvement laws and other transitory laws applicable in major metropolises have acknowledged the acute need for shelter among the millions of homeless persons, including street dwellers, and ordered a moratorium on evictions.[54] Even the right to health has been increasingly acknowledged in State policy as 'entitlements'.[55] These have come through greater awareness, intense campaigns by people's movements.[56]

Another example of a people's movement leading to the making of a law is the Anna Hazare led movement against corruption leading to the passing of the Lok Pal (or Public Ombudsman) Act.[57] You will recall Dr Ambedkar's prophesy that no elected government could afford to ignore the DPs. In the context of the legislations concerning rural employment guarantee and food security, although they were severely criticised by those in the opposition when they were enacted, these were the very legislations that were found a saviour to people even when the opposition in 2009 returned to power in 2014.[58] They provided the necessary cushion to people during the COVID-19 pandemic.[59]

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[50] National Food Security Act, 2013 (NFSA).
[51] Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013.
[52] See: https://mkssindia.org/
[53] Forest Rights Act, 2006.
[54] Slum Areas (Improvement and Clearance) Act, 1956.
[55] For e.g. The National Rural Health Mission, a policy document detailing the health protection entitlements of the rural underprivileged populations. This was expostulated by the Delhi High Court in *Lakshmi Mandal v. Deen Dayal Harinagar Hospital (2010) 172 DLT 9.*
[56] In particular, People's Union for Civil Liberties, the Paschim Banga Khet Majoor Samity and others.
[57] The Lokpal and Lokayuktas Act, 2013; see https://www.lokpal.gov.in/
[58] See note 49.
[59] See: https://rural.gov.in/en/press-release/implementation-mgnregs-during-covid-19-pandemic

ESC rights legislations have also been shaped by the international human rights law instruments themselves. With the enactment of the Protection of Human Rights Act 1993, which set up the National Human Rights Commission,[60] the Indian Parliament has formally incorporated the international covenants into domestic law. Section 2(d) of the Act defines 'human rights' to mean "the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India."[61] Section 2(f) defines 'international covenants' to include both the ICCPR and the ICESCR apart from other treaties ratified by India.[62] The CEDAW, [63] the Child Rights Convention [64] and the Disabilities Rights Convention[65] have influenced the corresponding domestic law in a major way.

The mere enactment of a law is not a complete solution to the problem it seeks to tackle. The law has to be worked, and that too effectively. Selective and half-hearted approaches to implementation can compound the problem. Yet, statutes and Covenants do perform an important task of norm setting. Further, the international Covenants like the ICESCR and ICCPR have helped provide a jurisprudential basis for Courts to identify 'deliberately retrogressive measures' by the State and to apply 'reasonableness standards' in evaluating the actions of the State.[66] They help us understand that principle and not pragmatism has to be the basis for judicial decisions if they have to have a lasting impact. The ICESCR has also underscored the need to provide adequate access to information. For instance, the environmental protection legislation in India mandates the conduct of environmental impact assessment (EIA) hearings and the Land Acquisition Legislation of 2013 mandates the holding of social impact assessment hearings prior to green-signalling projects involving large scale acquisition of land resulting in possible displacement. Courts have been insisting on strict compliance with the procedures in the holding of the EIA hearings which are expected to

[60] The Protection of Human Rights Act, 1993 [as amended by the Protection of Human Rights (Amendment) Act, 2019].
[61] Protection of Human Rights Act 1993, S 2(d).
[62] See: https://www.indiacode.nic.in/handle/123456789/15709#:~:text=India%20Code%3A%20Protection%20of%20Human%20Rights%20Act%2C%201993&text=Long%20Title%3A,connected%20therewith%20or%20incidental%20thereto
[63] The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), 1979.
[64] The Convention on the Rights of the Child, 1989.
[65] The Convention on the Rights of Persons with Disabilities (CRPD).
[66] The decisions of the Supreme Court in *Visaka v. State of Rajasthan* and of the Delhi High Court in *Sudama Singh, Ajay Maken (supra note 46) and Laxmi Mandal (supra note 54)* are some instances.

disseminate adequate information regarding the projects to the affected people prior to their being approved.[67]

Economic and social rights would have little meaning if they are not made available to the most vulnerable groups, whether these are indigenous people whose traditional practices and customs stand recognized and protected under the Constitution, or socially marginalized groups as well as women and children who invariably and disproportionately suffer the adverse impact of policies and decisions of the States that can result in deprivation of economic and social rights. I wish to highlight one positive instance of a vulnerable tribal group in the State of Odisha in India managing to succeed in preserving their rights of access to their places of worship in the face of mounting pressure from a company which was awarded bauxite mining rights in the area.

V

We noted how in 2016 the Indian Parliament enacted the FRA, which recognises the rights of traditional forest dwellers or *adivasis* to reside within forest areas and access its resources for their traditional means of survival. Importantly, it envisages a mandatory consultative process involving prior informed consent, with the affected tribals whose habitats are sought to be taken over for 'development' purposes.[68]

Vedanta Alumina Ltd., a company based in the United Kingdom, proposed to set up in Lanjigarh in Odisha a refinery to manufacture aluminium.[69] The raw material was bauxite, which is available in abundance on the top of the Niyamagiri Hills in the southern district of Rayagada in Odisha. The area is the habitat of the traditional forest dwellers, the Dongria Kondhas. This is a scheduled area protected under the Fifth Schedule to the Indian Constitution.

There were two major questions that arose. One was whether the environmental clearance was rightly granted for the bauxite mining project by the government? The other was whether the permission under the prevailing forest laws could be given for diverting biologically rich forest land for mining purposes? The Dongria Kondhas contended that the top of the Niyamagiri Hills where bauxite was found in abundance, was a sacred place of worship and therefore could not be touched.

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[67] See, for example, the decision of the Delhi High Court in *Samarth Trust v. Union of India (2010) 117 DRJ 113 (Del).*

[68] The Forest Rights Act.

[69] The facts and the quotes that follow are extracted from the decision of the Supreme Court of India in *Orissa Mining Corporation Ltd v. Ministry of Environment & Forests* [2013] 6 S.C.R. 881.

The expert Committees set up by the Government of India found that the mandatory provisions of the FRA, which required prior informed consent of the tribals through public hearings and consultation had not taken place. Even the alumina refinery had not complied with the conditions of environmental clearance. Interestingly, in the Supreme Court, while the project proponent was supported by the local state government of Odisha, the public interest petitioners were supported in their stand by the central government.

The approach of the Supreme Court of India in this case was refreshingly different. In a judgment delivered in April 2013, it held that the traditional forest dwellers "have a right to maintain their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands." Further, after extensively referring to domestic and international law on the subject, the Court held that if the bauxite mining project, in any way, "affects the religious rights of the Dongria Kondhas, especially their right to worship their deity, known as Niyam Raja, in the hilltop of the Niyamagiri range of hills, that right has to be preserved and protected". It mandated that public hearings had to be held in every one of the 14 villages in the area. A judicial officer was asked to be an observer at every such meeting and to certify that it took place uninfluenced by the project proponent or the state government. The central government was asked to take the final decision after the villagers had put forth their points of view.

The aftermath was that the unanimous view of the villagers was that the permission for the bauxite mining project should be refused. The central government had to therefore also refuse permission. The project proponent, through the state government, tried to petition the Supreme Court again in 2016 for a fresh set of public hearings. The court refused this request.[70]

The Niyamagiri Hills case saw the Indian Supreme Court giving importance to the views of the local affected population and not simply deferring to the executive standpoint on what was the greater common good. The insistence on prior informed consent of the affected population restored the perception of the Court as an institution that will protect and enforce the rights of the less privileged. The resort to international covenants to meaningfully interpret the scope of the rights of indigenous persons to their customary forms of worship and traditions under the domestic law is a significant aspect of the Niyamagiri Hills case.

VI

At this stage I must pause to let some of you gather your thoughts. The Sri Lankans, in the virtual audience, are perhaps wondering: is it all hunky dory in

[70] Order dated 6th May, 2016 of the Supreme Court of India.

India? And how is all this relevant to us here? The Indians in the audience must be wondering too what about the not so good news of the struggles of Indians around ESC rights? And then what about the politics of international human rights law that I had mentioned? Is that relevant? And how?

The Brazilian jurist, Celso Lafer, has observed that the consequence for human rights of an international system of defined polarities – East/West, North/South – has been an ideological battle between civil and political rights (which according to him is the liberal heritage sponsored by the USA) and ESC rights (the social heritage sponsored by the former Soviet Union).[71] It was in this context that "an effort by the Third World to elaborate its own cultural identity, proposing collective rights of cultural identity, such as the right to development", emerged. The UN adopted the Declaration of the Right to Development in 1986, with 146 states voting in favour, 1 against (USA) and 8 abstaining.[72] Allan Rosas, a Finnish jurist who served in the European Court of Justice explains that:[73] "With regard to the content of the right to development, three aspects deserve mention: first, the 1986 Declaration endorses the importance of participation. ... Secondly, the Declaration should be conceived in the context of the basic needs of social justice. ... Thirdly, the Declaration emphasizes both the need to adopt national programs and policies and international cooperation ...".

Interestingly, a study by legal scholars Hakeem Yusuf and Philip Oamen points out how during the making of the ICESCR, Egypt and India were two prominent voices asking for the incorporation of the need for international cooperation pointing out that "the available resources of the smallest and poorest countries even if utilized to the maximum would be insufficient and as a result those countries would have to fall back on international cooperation."[74] Pointing out that the running theme of ICESCR "International Cooperation" which distinguishes it from the ICCPR, a reference is made to the Maastricht principles on extra territorial obligations of states that underscore the importance of that international cooperation for fulfilling ESC Rights.[75]

Over the years, there have been other critiques of the role of international politics in shaping the content of international treaties. One critique views international

[71] Celso Lafer, *Comércio, desarmamento, direitos humanos: reflexões sobre uma experiência diplomática* (São Paulo: Paz e Terra, 1999), p. 145.
[72] See: https://legal.un.org/avl/ha/drd/drd.html
[73] Allan Rosas and Jan Helgeson (Ed.), *Human Rights in a Changing East/West Perspective* (Pinter Publishers, 1990), p. 375.
[74] Hakeem Yusuf and Philip Oamen, 'Realising Economic and Social Rights Beyond Covid-19: The Imperative of International Cooperation', *Indiana International and Comparative Law Review* 32:43.
[75] Ibid.

law as helping to legitimize and sustain "the unequal structures and processes that manifest themselves in the growing North-South divide."[76] Over the years there has developed a Third World Approach to International Law (TWAIL), which views the current configuration of international law as "predatory", as it "legitimizes, reproduces, and sustains the plunder and subordination of the Third World by the West."[77] This is attributed to the origins of international law which is believed to lie in the relationships of power between the coloniser and the colonised, and international law has remained a means of perpetrating these relations for hundreds of years."[78] Thus, the TWAIL perspective seeks to "re-tell, re-write, and reconfigure international law by decentering some of its central myths, such as its Westphalian origins."[79] It believes that "a nationalistic or unilateral approach to the realisation of ESC rights belies the normative underpinning of the rights.[80] Furthermore, the approach also denigrates the experiences of societies and communities that endured slavery and colonialism and the attendant exploitation of their human and material resources.[81] It draws on the work of Prof. Philip Alston, who observed: "*Following centuries of colonial exploitation, developing countries continue to be net providers of resources to the rest of the world.*"[82] TWAIL argues that since "increasing global interdependence has meant that people's lives are much more influenced by events that take place outside of the country, whether it is the spread of disease, depletion of fishing stocks, or fluctuations in international financial flows" there is the need, even in the self-interests of the developed and rich countries, to take more than a passing interest in the wellbeing of the poor countries.[83]

The role of the global multi-national corporations and businesses in dictating the outcomes at the treaty negotiations has also been widely commented upon. In India, the Bhopal Gas Disaster of December 1984 was a stark reminder of our unpreparedness to deal with a situation of mass torts resulting from the careless acts of a multi-national corporation, which was unable to be made accountable for the over 4,000 deaths and several lakh injured as a result of leak of a deadly MIC gas from the plant in Bhopal.[84] Our legal system was unequal to meet the

[76] B. Ikejiaku, (2014), 'International Law is Western Made Global Law: The Perception of Third-World Category', *African Journal of Legal Studies*, *6*(2-3), 337-356.
[77] M. Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier Publishers, 1979).
[78] Ibid.
[79] Yusuf and Oamen (note 74 above).
[80] Ibid.
[81] Ibid.
[82] Global Financial Integrity, 'Financial Flows and Tax Havens: Combining to Limit the Lives of Billions of People' (2015), p. 15.
[83] Ibid.
[84] See S. Muralidhar, 'Unsettling Truths, Untold Tales, The Bhopal Gas Disaster Victims' Twenty Years of Courtroom Struggles for Justice' (2004), available at: http://www.indiaenvironmentportal.org.in/files/w0405.pdf

enormous challenge of enforcing the civil and criminal liability of the MNC, the Union Carbide Corporation.[85] In 2017, the Committee on ESC rights issued a General Comment No. 24, which recognizes the State's obligation to adopt legal and regulatory frameworks that provide for effective oversight of business activities, and to ensure that businesses are held accountable for any violations of human rights. General Comment No. 24 also recognizes the important role of businesses themselves in respecting human rights and emphasizes the need for meaningful engagement and consultation with affected communities in the development and implementation of business activities.[86] It highlights the importance of businesses carrying out human rights due diligence and of providing effective remedies for individuals and communities who have been negatively impacted by their activities.

Gregor Noll, Assistant Professor of International Law at Lund University in Sweden, interrogates what he calls the 'fictions of universality' and the inability of human rights to highlight the plight of refugees and stateless persons who might be rendered bereft of human rights protections that are meant to insulate them from State excesses. He draws attention to the uncertainty that might result if a State chooses to ratify or not ratify treaties, enter reservations to them, and allow or deny monitoring of its performance by neutral bodies. He foresees that "at any point in time and space there will be individuals who are denied pertinent human rights, given that they cannot be identified as human rights obligations incumbent on a State in a position to control their implementation."[87]

As against the demand that human rights have to be 'codified', institutionalized and universalized, Prof. Benjamin Gregg who teaches social and political theory, bats for reconstituting Human Rights through socialization within nation-states by way of organic, grassroots, localized non-elite led movements. Arguing for a bottom-up project of persuasion and self-determination rather than strategies that celebrate the universal validity of Human Rights, Gregg calls for 'constitutionalism' at both domestic and supranational levels without denial of sovereignty, equality of members states as well as stronger shared governance in which states imbibe mutual recognition for their allegiance to human rights.[88]

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[85] See: https://web.archive.org/web/20120518020821/http://www.mp.gov.in/bgtrrdmp/relief.htm

[86] Tara Van Ho (2019), 'General Comment No. 24 (2017) on State Obligations Under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities (CESCR)', 58 International Legal Materials, 872–89.

[87] G. Noll (2005) "The Exclusionary Construction of Human Rights in International Law and Political Theory", available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=495632

[88] Benjamin Gregg, *The Human Rights State: Justice Within and Beyond Sovereign Nations* (2016), p. 214–217.

Salvador Regilme Jr., a Dutch international relations scholar and political scientist, is of the view that to accommodate perspectives from both the Global North and the Global South, our understanding of human rights needs to be reframed, involving a shift from the discourses of *rights* to one of *dignity*.[89] Human dignity should not be considered as ideologically antithetical to human rights. Rather, human dignity encapsulates all forms of human rights claims including civil and political rights, social rights, economic rights, physical integrity rights, and cultural rights, among many others.[90] The notion of dignity avoids the unnecessary political tensions between states and key actors of the North and South. It guarantees equal normative value for both socio-economic rights, which are often dismissed by the global North, and political and civil rights that many regimes in the Global South perceive as less important. By invoking dignity, actors from both the North and the South are placed on equal political footing, and the debate then becomes post-ideological as the terms of conversation shift toward actual policies and governance structures.

Drawing on our innate cultural values and beliefs may also push the human rights agenda forward. Three instances come to mind. When the South African Constitutional Court struck down the death penalty as unconstitutional in the *Makwanyane case* in 1998,[91] the Court drew on the African cultural concept of 'Ubuntu", which has been described as "the capacity in African culture to express compassion, reciprocity, dignity, harmony and humanity in the interests of building and maintaining community with justice and mutual caring."[92] Ubuntu is not just an African philosophy but a spirituality and an ethic of African traditional life. In his work, *No Future Without Forgiveness*,[93] Desmond Tutu describes a person with Ubuntu as one with self-assurance who is open, available to others and affirms them.

Another instance is that in Article 9 of the Sri Lankan Constitution there is a State obligation to protect and foster the *Buddha Sasana*.[94] In the Buddhist technique of Vipassana Meditation emphasis is laid on what is known as *Metta Bhava* which translates as loving kindness towards all beings. The Indian counterpart is the chant which goes like this:

Sarve Bhavantu Sukhinah
Sarve Santu Niraamayaah

[89] S.S.F. Regilme (2018) 'The Global Politics of Human Rights: From Human Rights to Human Dignity?', 40 *International Political Science Review* 279–90.
[90] Ibid.
[91] 1995 (3) SA 391 (CC)
[92] See: https://www.oed.com/dictionary/ubuntu_n
[93] Desmond Tutu, *No Future Without Forgiveness* (Random House, 2012).
[94] The Constitution of Sri Lanka, 1978, Art 9.

Sarve Bhadraanni Pashyantu
Maa Kashcid-Duhkha-Bhaag-Bhavet
Shaantih Shaantih Shaantih

Meaning:

May All be Happy,
May All be Free from Illness.
May All See what is Auspicious,
May no one Suffer.
Peace, Peace, Peace.

Why is it important to look at these different approaches to developing domestic and international jurisprudence around ESC rights? Given that the world itself is multipolar, diverse and in the midst of a huge churning, it is necessary, as a healthy democratic practice, to keep questioning the way we function as societies and states. It is necessary, as serious legal scholars, for us to be aware of the current thinking around the development and evolution of the jurisprudence around ESC rights. This should help shape our strategies for the future.

We may not have a parallel institution like the Inter-State American Court of Human Rights[95] or its African counterpart[96] in Asia or even South Asia, but we could certainly draw on international human rights principles, to shape our jurisprudence. We need to view international human rights law as helping us identify certain core values; like that of human dignity, liberty, equality and non-discrimination, fraternity that should inform all actions at the community, societal and state level. In these times of conflict and turbulence, there is an even greater responsibility on academia, legal professionals and civil society to continue engaging in a dialogue with the major organs of state and help develop and shape public opinion around the protection and enforcement of ESC rights based on their lived experience of working with people in need of care and protection. Holding discussions, seminars and other forms of intellectual activities are an essential part of this exercise.

VII

I must readily concede that what I have spoken of are perhaps the better examples of where strategies around the enforcement of ESC rights have worked. One can safely estimate that for every 'success' in court there may have been

[95] See: https://www.corteidh.or.cr/index.cfm?lang=en
[96] See: https://african-court.org/wpafc/

several prior and later failures. And some of the successes could be 'qualified' successes. We should recall here the critiques around the decisions of *Brown v. Board of Education* of the US Supreme Court,[97] *Grootboom*[98] of the South African Constitutional Court and *Olga Tellis*[99] of the Indian Supreme Court. There is a justified misgiving that in these decisions the Courts only went that far and no further.

Given the political and legal histories of our countries which emerged from colonisation to gain independence, having written constitutions to proclaim our democratic republics was important. Further, it was necessary to clearly delineate the importance we accorded in the *Svasti* of the Sri Lankan Constitution and the Preamble of the Indian Constitution to the core constitutional values of equality, justice, liberty and, human dignity. Guaranteeing constitutional protection to ESC rights was rightly viewed by the constitution makers as an imperative. Without the guidance that the DPs provided for state policy and legislation, and to the Courts, much of the ESC rights jurisprudence that has evolved in our countries in the past six decades may not have come about. This is irrespective of whether we have been able to ensure the availability of ESC rights to all of the people in our countries as that is undoubtedly a work in progress, far from accomplished.

Civil society groups (CSGs) in India, as perhaps elsewhere in the world, are aware that having a law enacted, or having a judgment in their favour, that recognises, protects, and provides a mechanism for enforcement of ESC rights is but the first step in a long struggle for realising the emancipatory function of these instruments of social change. There has to be a continuous engagement with the organs of the State – be it the government of the day, the legislature or the judiciary – to make the law work for the people. CSGs are neither complacent because of their momentary victories nor despondent because of failed attempts at persuading courts and legislatures. They know that this is a work in progress; that coming generations will and should pick up the baton from where they leave it. Fact gathering, demanding accountability, transparency, going back to the Court for enforcement of its decisions are all part of a bouquet of strategies that need to be deployed over a period of time for realising the full potential of the law that has come about as a result of long years of campaigning. Nothing can and should be taken for granted. And there is a teaching that has to be imparted for later generations to keep the democratic traditions alive.

[97] *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).
[98] ZACC 19, 2001 (1) SA 46 (CC).
[99] See Olga Tellis (note 34 above).

This is where the empirical studies which are now available in abundance in the form of reports and studies, two of which were referred to in the beginning, would be useful. These reports help us to ask the right questions and not simply accept what is put out in the public domain by the executive governments or the ruling dispensations. It is only a curious, enquiring and questioning mind that can help pursue the truth and demand accountability of these institutions of democracy. The right effort in the right direction is as important, if not more important notwithstanding that it might not always yield positive results. Persistence and perseverance are the key words. Every effort in the right direction will be a valuable addition to realising the emancipatory potential of the ESC rights enshrined in our written Constitutions.

We must remember that electoral processes by themselves do not bring about governments that believe in deepening democratic practices or policies or, for that matter in the rule of law. History tells us that despots, dictators and demagogues have also come to wield power through free and fair electoral processes. Institutions of representation purporting to symbolize democracy have belied the expectation of governments being for the people, by the people and of the people. This explains the growing demand in protest movements across the world for 'real democracy', one variant of which is what Professor Cass Sunstein characterizes as 'deliberative democracy'.[100] He states that it is a system in which "representatives would be accountable to the public at large." But it is also supposed to be an exercise in introspection both within the citizenry and within government itself.

The democratic spaces in our countries are undoubtedly 'noisy', but it is important that amidst the churning and the chaos we are able to forge forward with a clarity of vision. While a democratic form of government is no doubt an essential prerequisite for the realization of human rights, unless people constantly work the Constitution, keep asserting their rights and freedoms, and demand the recognition, protection and enforcement of ESC rights, the realization of human rights would remain aspirational and not emancipatory. Gandhiji's talisman of remembering the most weak and vulnerable in all our actions and asking if every such action would improve their lives is useful in this context.

[100] Cass R. Sunstein, 'Deliberative Democracy in the Trenches', available at: https://doi.org/10.2139/ssrn.2685195

I would like to end with a quote from Martin Luther King Jr., from his 'I have a Dream' speech, which reminds us of the tasks that lie ahead, and how we must face the challenge:[101]

> *As we walk, we must make the pledge that we shall always march ahead. We cannot turn back. There are those who are asking the devotees of civil rights, 'When will you be satisfied?' We can never be satisfied as long as the Negro is the victim of the unspeakable horrors of police brutality. We can never be satisfied, as long as our bodies, heavy with the fatigue of travel, cannot gain lodging in the motels of the highways and the hotels of the cities. We cannot be satisfied as long as the Negro's basic mobility is from a smaller ghetto to a larger one. We can never be satisfied as long as our children are stripped of their selfhood and robbed of their dignity by signs stating 'For Whites Only'. We cannot be satisfied as long as a Negro in Mississippi cannot vote and a Negro in New York believes he has nothing for which to vote. No, no, we are not satisfied, and we will not be satisfied until justice rolls down like waters and righteousness like a mighty stream.*

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[101] Martin Luther King Jr., 'I Have a Dream' (Speech, Washington D.C., August 28, 1963), para. 16.