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Economic, Social, and Cultural Rights: South Africa's Experience and the International Context

An LKI Roundtable with Justice Moseneke
former Deputy Chief Justice of South Africa

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Three key takeaways from the round table with Justice Dikgang Moseneke -

- 1. Economic, social and cultural rights (ESCR) in a country's constitution advances that country's international standing, as it demonstrates that the state has assumed its obligations to international law and to fundamental rights.**
 - 2. ESCR enables citizens and the judiciary to foster accountability and transparency in governance.**
 - 3. Implementing ESCR in a constitution is a dynamic process, which requires courts to constantly study the evolution and integration of rights into domestic law.**
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Introduction

- Justice Moseneke, former Deputy Chief Justice of South Africa, addressed a Foreign Policy Round Table at LKI on “Economic, Social, Cultural Rights: South Africa's Experience and the International Context” on 30th June 2017.
- The roundtable was attended by the High Commissioner of South Africa, members of the [Steering Committee](#) of the Constitutional Assembly, members of the [Panel of Experts](#) appointed by the Constitutional Assembly, officials of the Prime Minister's Office, the Commonwealth Secretariat, Chairperson of the Human Rights Commission of Sri Lanka, heads of think tanks, members of academic institutions, and the private sector.
- The roundtable was moderated by Dr. Dinusha Panditaratne, Executive Director of LKI.

Takeaways from Justice Moseneke's Presentation:

Reasons for including Economic, Social and Cultural Rights in the South African Constitution

- South Africa's democracy was facilitated by global support and solidarity. This influenced the nation's understanding of international relations, from which stem ESCR.
- Including ESCR in South Africa's constitution was a way for the country to transition from a 'pariah' state (under apartheid) to one aligned with international law and norms.
- Apartheid left many South Africans vulnerable and in poverty, providing a further rationale for incorporating ESCR into the constitution; ESCR are included in South Africa's constitution to ensure survival, rather than as 'luxury'.
- ESCR were included to foster transparency and accountability in post-apartheid South Africa.

The Role of International Law in South African Jurisprudence

- South Africa continues to be inspired by humanitarian norms and standards, and strives to incorporate these into its own constitutional decisions.

- Customary international law is a part of South African law unless it contravenes South Africa's constitution.
- South Africa's constitutional courts track human rights treaties and other laws around the world (e.g. European Union Charter of Fundamental Rights), and consider how to incorporate those developments into South Africa's understanding of a just society.
- The chapter on fundamental right (Bill of Rights) in the constitution requires courts to consider international law, and allows courts to consider foreign domestic law.
- Consistent with international law, the actual realisation of ESCR is subject to two concepts: (1) progressive realisation, and (2) subject to available resources. For example:
 - The government can say that it cannot realise the right now but will do so in the future (progressive realisation), or that it does not have the resources to realise the right (subject to available resources); and
 - If the government argues the former (progressive realisation), it must submit a plan that demonstrates how it will realise that right in the future.
- The wording of ESCR in the constitution provides additional limits. For example, a person has a right to *access* housing, not a right to housing per se. If they can access housing by their own means, they are not entitled to enforce the right i.e. they must demonstrate a need.

Critique of including Economic, Social and Cultural Rights in the Constitution

- It has been argued that ESCR allows courts to intrude on parliament's budgetary role.
- However, judicial decisions on ESCR operate at the periphery of the budgeting process. Courts do not stipulate that the budget must be implemented in a certain way.
- Courts can only require the government to commit to a plan that *will* deliver a public good, and realise an economic, social or cultural right within a reasonable time.

Takeaways from the Discussion:

Selection of South African judges

- In South Africa, the Judicial Service Commission selects candidates who are suitable to become judges. The President of South Africa then selects from a list of candidates provided by the Judicial Service Commission.
- Selected judges must abide by rules and regulations, enforced by a Judicial Conduct Committee. For instance:
 - No judge may become a member of a political party;
 - No judge may accept benefits/gifts, apart from the income that they earn; and
 - A judge must recuse himself of any matters where he/she is in conflict.

Sri Lankan Judicial Context and ESCR

- The potential for judges to overreach in their decisions, especially when senior judges are of uneven quality, is one factor that argues against giving them more powers of judicial review i.e. more power to review laws and policies set by an elected government (who can at least be voted out).

- An alternative to the current system of limited judicial review under the Sri Lankan constitution and the system of full judicial review like in South Africa is to allow judges to make ‘declarative’ pronouncements (as opposed to directive pronouncements). These would allow a court to declare that a law or policy is inconsistent with a constitutional right, but not invalidate that law or policy. Once a court makes such a declarative pronouncement, it would be up to the legislature or executive to change the law or policy.
- Such a system is currently used in the United Kingdom, where judges can make a declaration of incompatibility under the Human Rights Act, when they find a law inconsistent with the European Convention on Human Rights. It is then up to parliament to amend the offending law, which in practice has been consistently done.
- It is questionable, however, whether such a system would work in Sri Lanka, given the political context and therefore, the higher likelihood that parliament would ignore the declarative pronouncement.

Sri Lankan Political Context and ESCR

- A major concern in Sri Lanka is the extent of political discretion / corruption.
- It is vital to develop a fixed and clear ‘separation of powers’ between the legislative, executive, and judicial powers, so that each acts as a check and balance on the other two powers.
- If Sri Lanka has a system similar to countries like Norway, Sweden, and Denmark, it may not need to have ESCR written into the constitution.
 - In Scandinavia, taxes are high but tax revenue gets distributed very efficiently and is tightly managed.
 - This system results in a large middle class and relatively equal society. If Sri Lanka develops a similar system, it would not be necessary to include ESCR in the constitution.

Audio of the presentation available at:

SoundCloud. (2017). *LKI Foreign Policy Round Table - Justice Moseneke On ESC Rights ZA's Experience & the Intl. Context*. https://soundcloud.com/lk_institute/lki-foreign-policy-round-table-justice-moseneke-on-esc-rights-zas-experience-the-intl-context

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