



CSHR

HUMAN RIGHTS JOURNAL

Volume 1. Issue 1. 2005



HUMAN RIGHTS: CHALLENGES
AND OPPORTUNITIES FOR SRI
LANKA

COMMENTS ON CHALLENGES
AND OPPORTUNITIES FOR SRI
LANKA

IS THERE A FUNDAMENTAL
RIGHT TO EDUCATION?

HUMAN RIGHTS AND
EDUCATION: CHALLENGES
AND OPPORTUNITIES

COMMENTS ON THE HUMAN
DEVELOPMENT REPORT 2004

HUMAN RIGHTS AND HEALTH

HUMAN RIGHTS AND
CONFLICT RESOLUTION

HUMAN RIGHTS AND PEACE

EDITORIAL BOARD

Prof. Ravindra Fernando, Editor-in-Chief
MBBS, MD, FCCP, FCGP, FRCP (Lond), FRCP (Glasgow)
FRCP (Edin), FRCPath (UK), DMJ (Lond)

Prof. T. Hettiarachchy, Vice Chancellor
BA (Cey), MA (Mcmaster, Canada), PhD (London)

Ms. Nehama Jayewardene, LLM (UK), Attorney-at-Law

Ms. Nilani de Silva, BA, MSPD (Aust)

Ms. Nirmala Perera, LL.B (Hons) (Colombo), M Phil (Colombo),
Attorney-at-Law

CSHR HUMAN RIGHTS JOURNAL

VOLUME 1, ISSUE 1 2005

CENTRE FOR THE STUDY OF HUMAN RIGHTS
UNIVERSITY OF COLOMBO
FACULTY OF LAW
TEL 2500879, FAX 2598462
EMAIL : cshr@sltnet.lk
WEBSITE : www.cshr.org

ISSN : 1391-8397

© CENTRE FOR THE STUDY OF HUMAN RIGHTS

COVER DESIGN AND LAYOUT

Mahesha Abeywickrema

FOREWORD

Recognizing the lacuna of a comprehensive collection of academic material on the subject of Human Rights, the Centre for the Study of Human Rights has commenced the publication of the CSHR Human Rights Journal.

The Centre which is a part of the University of Colombo, is essentially a civilian organization working in the field of Human Rights, but not limited in its scope to the university community. Because of this vantage position, the Centre is able to draw upon academic expertise on current issues faced by society.

The first issue of this journal is a collection of presentations made by skilled resource persons who are well known in their respective areas of Human Rights. These presentations were made at the Centre's Human Rights Day Celebrations in 2004.

The publication of this journal is made possible through funds received by the Equal Access to Justice Project of the United Nations Development Programme.

It is hoped that this issue will mark the beginning of a collection of academic output that will raise pertinent issues and inspire intellectual discourse.

Prof. Ravindra Fernando
Director
Centre for the Study of Human Rights
Editor in Chief

TABLE OF CONTENTS

	Page
HUMAN RIGHTS: CHALLENGES AND OPPORTUNITIES FOR SRI LANKA Dr. Radhika Coomaraswamy	1
COMMENTS ON CHALLENGES AND OPPORTUNITIES FOR SRI LANKA Christine Spoerel	7
IS THERE A FUNDAMENTAL RIGHT TO EDUCATION? Justice Mark Fernando	8
HUMAN RIGHTS AND EDUCATION: CHALLENGES AND OPPORTUNITIES Prof. Swarna Wijetunge	13
COMMENTS ON THE HUMAN DEVELOPMENT REPORT 2004 Ambika Satkunanathan	17
HUMAN RIGHTS AND HEALTH Prof. Ravindra Fernando	23
HUMAN RIGHTS AND CONFLICT RESOLUTION Dr. Kumar Rupesinghe	27
HUMAN RIGHTS AND PEACE Dr. P. Saravanamuttu	30

CSHR JOURNAL OF HUMAN RIGHTS

INTRODUCTION

It is with great pleasure that I introduce the first volume of the CSHR Journal of Human Rights. This introductory volume includes a collection of articles, which were the subject of discussion at the Centre for the Study of Human Rights' celebration of Human Rights Day 2004. The papers are the result of presentations made on this date, on some of the challenges to the implementation of the human rights framework in Sri Lanka. They highlight the important current and relevant aspects of Human Rights, broadly under the areas of Development, Peace and Education.

Dr. Radhika Coomaraswamy's presentation briefly sets out the history of the International Human Rights movement and then sets out its present context along with the challenges faced in Sri Lanka. She describes the emergence of the lack of due process, the challenge of cultural relativism with specific reference to the Asian region and the threat of non state actors. She also clearly sets out the aspect of globalisation and its impact on trafficking and human smuggling and the need to focus on social and economic rights. Dr. Coomaraswamy further reveals her fears on the imposition of the 72 hour rule and the implementation of the death penalty.

The next contribution is of Christine Spoerel's. She re echoes the words of the United Nation's Secretary General in stating that we are at critical cross roads in the protection of human rights and the rule of law in general. She also commends the new developments in the international legal framework.

Human Rights and Education

Justice Mark Fernando is perhaps the most suitable person to comment on the issue of a Fundamental Right to Education. In his contribution, Justice Fernando suggests that a lack of public awareness of the right to education has resulted in many problems. He sets out the complexities of what is commonly known as free education. Justice Fernando claims that even without a formal recognition of a right to education the Courts have recognised rights connected with education in a number of matters.

Professor Swarna Wijetunge also contributes to the session on Human Rights and Education, by highlighting that the need for education in the area of Human Rights be promoted. She also suggests that there is a need for mainstreaming Human Rights in any process of education. Addressing her attention towards education being an agency of social control, she raises a pertinent question "are we consistently using education for empowerment or are we using it as a means of repression?"

Human Rights and Development

Ambika Sathkunanathan submitted her paper titled "Comments on the Human Development Report 2004". She begins her comments by reflecting on the meaning of the right to development, attempting to elucidate links between the right to development and cultural liberty. She also gives a South Asian perspective to the themes discussed in the Human Development Report, with a special focus on women and the difficulties encountered by them in their attempts to balance group rights within the framework of universal human rights. She also discusses the impact of globalisation on identity and cultural liberty as discussed in the Human Development Report.

Professor Ravindra Fernando continues on the theme of development by discussing the impact of Human Rights and Health. He suggests that budgetary constraints have led to the unequal access of health care. He also gives a clear situation of the consequence of an inefficient healthcare system on development, by elucidating the restrictive laws on abortion, poor housing, sanitary facilities and nutrition.

Human Rights and Conflict Resolution

Dr. Kumar Rupesinghe's contribution of his reflections on the 25 year old journey in Conflict Resolution and Human Rights forms the next contribution to this journal. He explained the progress of Human Rights in the international arena and states that it is significant that governments are held accountable to the people and that they have a State obligation to respect Human Rights. He next comments on the Peace Movement and comments that there are few international mechanisms that would resolve internal armed conflict. He also makes reference to prioritising the credibility and legitimacy of a mediator in internal armed conflict. Dr. Rupesinghe's concluding queries on what action can be taken under conditions of stalemate are perhaps apt for Sri Lanka at present.

Dr. P. Saravanamuttu makes the final contribution to the compilation with his expertise on Peace in the Sri Lankan context. His contribution commences by stressing the importance of public support towards a peace agreement and in order for that to take place it is necessary for the strengthening of Human Rights. He also refers to the gross violations of the ceasefire agreement and the limited role of the Sri Lanka Monitoring Mission. He deliberates on whether the prioritisation of the Human Rights agenda would result in the losing out on the possibility of maintaining a cease fire agreement. He also refers to the involvement of socio-economic circumstances in which people are living in connection with Human Rights.

I hope that you find this publication a useful, resourceful and informative tool to the ongoing debate regarding the important areas of concern in Sri Lanka and International Human Rights Law and policy.

Nehama Jayewardene
November 2005

HUMAN RIGHTS: CHALLENGES AND OPPORTUNITIES FOR SRI LANKA

*Dr. Radhika Coomaraswamy**

When considering International Human Rights at the International level we can observe three phases. Firstly between 1947 and 1968 this was about setting standards for Human Rights. The International Covenant on Civil and Political Rights, International Covenant on Economic and Social Rights, etc., they were all written at that time and Human Rights was the main focus of the international activity. Basically new standards needed to be set that we now take for granted.

The second phase from 1968 to 1989 was when the International system began to monitor human rights violations. This was an exercise that the United Nations initially refused. Subsequently the Special Rapporteur on torture and the working group on arbitrary detention and other committees with regard to International Treaty bodies were set up.

The third phase was the golden era between 1989 and September 11, 2001 where International Human Rights movements as well as local movements flourished all over the world. There were multiple special Rapporteurs, lots of activity and lot of organisations.

Today, in the fourth phase, post September 11, we are in a different Human Rights environment internationally and that will affect us locally as well. First is this War on Terror. Mary Robinson, the former Head of the High Commission for Human Rights said that the mere characterization of what we are doing as a War on Terror is wrong. Because when you say 'War on Terror' it means that you can use the kind of force that has been used in Afghanistan and Iraq. She said terror should be dealt with as a criminal operation through the use of international co-operation by Police

Forces and not seen as a war. I think by characterising what we are undergoing as a war on terror, the balance that has always existed between national security and human rights that had emerged in the 1980s is now tilting towards National Security. There is now an acceptance of the notion of preventive war, the use of force even when one has no immediate threats. Some people argue that this may have been an extension of humanitarian intervention but that is something that disturbs many of us, the emergence of the doctrine of the Preventive Use of Force. Additionally, there is this new notion of what I would call Non Persons Enemy Combat or Unlawful Combat which are somehow outside the protection of international law, because they have been characterised in this manner and then kept in places like animals in some places like Iraq and Afghanistan. This is also a terribly disturbing phenomenon where earlier no such categorising existed and people were not treated without rights, treated as non-persons international.

There is an emergence of the lack of due process, the military tribunal set up in the United States tries these people, and they have the same prosecutor and defence counsellor, both from the army. Serious problems of due process with regard to the military entrepreneurs emerge. Then there is an emergence of draconian legislation both in immigration as well as to fight these issues. Preventive, detention, strong immigration procedures and surveillance they even have the power to go into libraries to find out what books people borrow. So enormous powers of surveillance exist under the anti-terrorist laws. For those of us who have worked in Human Rights for a long time, civil and political rights were the bedrock of human rights. We have taken them so much for granted that we are now talking about social and economic rights and all the other rights. So now those very rights that have been in existence for nearly two centuries and developed so strongly are under threat internationally and perhaps even locally. One of the big challenges of the next decade is to nationally and internationally hold our ground not to give in to this

* Chairperson,
Human Rights Commission, Sri Lanka

draconian way of looking at Wars on Terror or terrorist traps, but go back to a reasonable and principled approach of dealing with issues of terrorism and criminal act.

The second challenge we face globally that is relevant to Sri Lanka is the challenge of cultural relativism. This is one of the issues very specifically in the Asian region that has been a problem. Asian governments have argued that in Asia, Human Rights are not culturally relevant. In Asia duties are more important than rights, communities are more important than individuals and development is more important than rights again. This challenge to Human Rights has also to be dealt with effectively. To point out the duties that are present, they are the criminal law of the country. That we can do it through codes of conduct and this is particularly problematic because when you value communities over individuals it's usually the right of women that suffer and women's rights that are deeply affected by cultural relativism, whether its female genital mutilation or the personal laws of our own country and it is very much the argument of cultural relativism that deny women those rights. Thus the challenge is to point to the world that the core of Human Rights is relevant to all religions and all cultures. If you really go into the spirit of all the religions of the world and if you don't go into their cores but to the spirits, they are all based on the notion of human dignity and human rights and we have to recognize that there is a false dichotomy between human rights and culture. The core of human rights is absolutely essential if we have decided to become a modern democracy whatever it says in the religions of the past. So that is the second challenge internationally.

The third challenge internationally is Non State actors. We are finding all around the world armed groups, multinational corporations, and a whole host of people who operate across borders and who deal with human beings and who have no accountability in terms of human rights. Traditionally as you know, in human rights there is a notion of State responsibility that is only States are violators of human rights. But more and more

people are arguing that we must develop a framework of accountability for non state actors. Now to some extent international humanitarian law has begun to develop that accountability. The International Criminal Court and the Geneva Conventions developed the notion of individual criminal responsibility for war crimes and crimes against humanity. But multinational corporations and other private actors, how do we deal with those issues? I think the Pinochet case which was in existence a few years back brought to light again this notion of how we can use international humanitarian law at an international level to deal with some of these violations. Non state actors then are the third challenge that we face and the need for human rights to deal with these issues.

The fourth area internationally is globalisation. One aspect of globalisation is that people are on the move all over the world. Women especially are migrating in large numbers back and forth, bringing up issues such as trafficking etc. The most vulnerable people in the world today are the undocumented migrants who live in many parts of the world who really live outside the framework of rights and the law. Because they are so vulnerable they are the victims of trafficking, human smuggling and victims of a whole host of violations. An International Human Rights framework has yet to really develop a system of monitoring with regard to that and specially now after the war on terror when these strict migration regimes have been imposed.

Another aspect of globalisation is that the multilateral institutions do not focus on social and economic rights. As I have mentioned earlier, the poverty figures are very alarming in Sri Lanka showing a sense of disparity and increase in the absolute number of poor. And again we have to focus on social and economic rights and that is a challenge. How we lessen the gap between the rich and the poor and how we ensure that education and health institutions will assist in giving people the services that they need and how they can be accountable in doing so. So those I think are the international challenges.

Let me speak now about Sri Lanka. Now in Sri Lanka of course we don't have to worry so much about cultural relativism, even though we do in everyday lives. We operate basically in the framework of consent. Sri Lanka has consented to be bound by the international instrument of Human Rights. We have signed everything practically, we have signed the Universal Declaration of Human Rights, the International Covenant on Economic Social and Cultural Rights, the Convention against Torture, the Convention on the Rights of the Child, the Convention on the Elimination of all Forms of Discrimination against Women. We have consented to be bound and we must make sure that our obligations mean something, it's not just something that is on paper.

One of the issues that came up before the Human Rights Commission recently is that we have seen an increase in the reported number of cases of torture. Now this could be because the number of torture cases have increased or it could be because now there are very active NGOs working in the field and therefore, reported cases have increased. We don't know what the reason is but I think it's perhaps a combination of both. Now if we look at the Gerard Perera case we see the issue we face. Gerard Perera was a man who lived in Gampaha. There was an alleged drug dealer who had the same name. The Police arrested the present innocent Gerard Perera, they tortured him very badly that he entered into a coma. Then his family brought the case before the Supreme Court and he was awarded the largest compensation that was ever paid for torture and, when his perpetrators were being brought before the courts, about ten days before that he was shot dead. Now this case is shocking, it's so shocking that the Human Rights Commission had to take very strong action in terms of monitoring what is going on with regard to this case. Torture may leave a huge blemish on our international reputation.

The Human Rights Committee of the ICCPR invoked Rule 70 last year and said that we have to report within an year as to what we have done against torture because normally we report every four years but they invoked

this rule. I believe that torture is widespread and systematic and to a certain extent there is some truth in that in the sense that due to perhaps lack of training or other reason, torture is often the first method of investigation at the local level Police Station. Now we must say that Sri Lanka has tried to respond to this issue with effective legislation and many of the judgments of the Supreme Courts on the torture cases have been quite exemplary. There have also been 38 cases filed with regard to perpetrators, but the cases still keep coming. Now as a result of this, we at the Human Rights Commission have decided to adopt a zero tolerance policy on torture. That involves speaking to the IGP on training on Human Rights, training on investigation methods, the interdiction of officers, getting samples of DNA testing in the country and to start a system of surprise visits to all custodial institutions especially jails and detention centres, to ensure that torture does not take place. But despite these efforts there is, as I said still case after case coming on our desks and now we see a very dangerous scenario a resistance from the police and security operators.

In a recent seminar, where they were asked what the three main obstacles for Crime prevention are, Human Rights Commission came first. The belief that the Human Rights Commission and Human Rights Institutions are pushing too hard and posing a false dichotomy between Human Rights and Crime fighting. Human Rights are also fighting Crime because one of the issues on Human Rights is the issue of impunity. There is a belief under the so-called Velasquez doctrine that if ever a country does not prevent, punish and prosecute those who commit violence or disappearances or anything, there is impunity in the country for crime that is a human rights violation. It's not that Human Rights people are against these practices. It is just that we feel that due process should take place.

Primarily, if you observe the Gerard Perera case, we believe it is wrong to torture people inherently because there is the right to freedom from torture. What about the Gerard Perera case where you get the wrong person

and torture him into a coma? It's safeguarding the innocent that becomes the issue, so to some extent we must not put this false dichotomy. I think a 72-hour rule being imposed; given the nature of how Police conduct investigations is not a good idea. I think there would be widespread abuse. If they had learnt other investigation methods besides torture and we bring this in, then that is different, but to bring in a 72 hour rule given the present methods of investigations and torture and levels of torture, we are playing with fire and there will be a great deal of abuse.

It is the same with the death penalty. The Human Rights Commission has taken a stand against the death penalty. When the previous government tried to impose the death penalty we came out very strongly and they dropped the idea. This government too has a hasty response. First it flies in the face of the spirit of our international obligations and the death penalty further brutalises the society and it adds to the cycle of violence, it gives the society an even more violent face. You have to realise there again if we are sure that our system of justice will punish the right people. What if there is a mistaken identity? What we need is not the death penalty but to make sure that those who commit crimes are actually punished. In this country a large amount of people who enjoy impunity are not punished. If you are a politician, a member of the armed group in the North and East, a very powerful businessman, a member of an organised crime, unless it's a very specific case like the Judge's case, the cases don't get punished as the police say 'No evidence'. "Why is that there is no evidence?" Sometimes when a whole hall full of people are there, a whole bus full of people have watched and they just don't get punished. The issue is to punish them by putting them in jail; we have only a 10% conviction rate. So what we are saying is instead of bringing the death penalty for the 10% get the other 90% also in jail. That should be the emphasis of the criminal justice system. Not trying to do hasty things such as death penalty. These are the things I firmly believe in.

The second issue that has come up before the Human Rights Commission is the question of equality. The vast majority of our cases 80% are those wanting promotions, transfers, pensions, and people within the government service who feel frustrated and are unhappy. The Supreme Court by giving a broad reading of Article 12 has argued that only an arbitrary or unreasonable act is a violation of Human Rights and this really shouldn't be in my opinion in Human Rights, this should be in labour law and administrative appeal, but due to politicisation of our government services and corruption many of these cases end up before us. Raja Goonesekere has argued that we have to re-think how we are dealing with these cases of frustration and unhappiness in the government sector. I think we have to address the government sector service with a view of restructuring it so as to allow for services to be rendered.

With regard to Article 12, we also receive complaints from some Tamil citizens about the use of language, especially in the North and East. Tamil Police Officers find it difficult to serve in the North and East. Given the situation, they would become targets so this becomes a big issue. So people complain in Sinhala when they don't understand it. Thus steps need to be taken to ensure that Tamil speaking officers are there in the North and East.

The third area of interest for us is Custodial Institutions. The other day the Commission received a complaint about the Meth Sevana, which is a Women's Detention Home. We went there and we were really quite horrified to see what was going on in these homes. First there is no date maintained of when the women arrived or when they are scheduled to leave. They are just put there as a consequence of committing minor crimes such as begging and sex work. There are also the mentally ill who are not receiving adequate care. We have started a campaign to try and get these Detention Homes better served. So we have decided on surprise visits to Custodial Institutions such as Children's Homes, Women's Homes, Prisons and Psychiatric Homes. We are trying to convince some of the

donors to give us some vehicles so that we can do this better. This is one of the things we want to do very strongly. We feel custodial visits are very important and to some extent we are still looking for the resources to regularly visit these institutions go through a checklist and see that things are done.

The other issue that comes up are social and economic issues. The latest statistics from the Census and Statistics Department on poverty are extremely alarming. They show that poverty in Colombo and Kandy has halved, that means the poor people in Colombo and Kandy are half but in Moneragala, Badulla, Sabaragamuwa, Uva Province, Matale District, etc., there are more poor people today than 10 years ago. In Anuradhapura and Hambantota the same number of people. So this is a very alarming disparity within the country. The open economy policies to some extent tend to neglect education and health services. We did a fact-finding mission to Anuradhapura hospital a few months ago because of the complaints received. So the great challenge is to see how we are going to vindicate the social and economic rights of the people, the right to food, security, health, education, water and to equality in order to lessen the disparity in our country.

We also have especially vulnerable groups in the country that cause problems. There are the IDPs, we have a project on that, relief for communities that are marginalised and who have basic problems, state bureaucracy and also groups basically surviving and living in conditions that are not acceptable. We have the issue of women migrant workers, an issue that was raised earlier that also is a problem and also how the Foreign Ministry deals with this issue in those countries and how we push for allowing freedom of movement. Some of these women do improve their lives but at the same time prevent abuse with regard to this situation.

Another issue that has come up of course is the religious conversion issue, which is another challenge. I think the Human Rights Commission intervened in the Supreme Courts when the Bill came forward saying that the Bill

did violate international and national standards and that conversion is a very complicated process, and requiring people to register conversions etc. is a violation of the freedom of thought and to some extent we have to find other ways of resolving these conflicts. We have to talk to each other, there must be dialogue, and it must be moved at a level in which communities learn to tolerate and respect each other because I think that one community fears that the other community becomes very prosperous and have freedom of thought. So these have to be resolved not at a legal level because laws passed to resolve these conflicts don't work. When you have freedom of thought issues, you try to regulate it, there is no way that can happen, that is the history of the world. These have to be resolved through other mechanisms of cooperation, consultation, etc.

Then we have the issues of the North and East since the ceasefire they have been involved in a number of complaints against the security forces though their issues lead into rogue elements with the security forces and PTA detainees, whereas the general rule that all pre-cease fire issues of Human Rights with regard to the Security Forces do not exist, the only issue relating to the Security Forces is the high security zones. We have three hundred cases filed in the Jaffna office with regard to high security zones. That of course is an issue where the Human Rights Commission has told the Ministry of Defence that land can be taken for security reasons but alternative accommodation or compensation should be paid which is the rule with regard to taking over of property. Then of course we have constant complaints against LTTE, complaint of political killings, abductions, child recruitment and taxation. Our Eastern Province Report done after a fact finding mission to the Eastern province has detailed these and that is available with us if you wish. What we do is that we refer the cases to the SLMM and sometimes we try and talk to the LTTE political officers but we do not feel that we are in any way making a dent and changing situations and that is why in the Eastern Province Report we have asked for Human Rights agreement between the parties

with international monitoring for the North and East. Mr. Ian Martin who was Adviser to the Peace Process had drawn up some form of Human Rights agreement before the Peace Process collapsed. That is very important if the Peace Process is to continue that should be one item on the Agenda otherwise the situation especially in the East looks extremely bleak.

Finally, the issue on the Rule of Law. The Human Rights Commission has agreed that there has been a collapse of the legal system. Marga Institute in a study has shown the public confidence in the Police according to the surveys, is less than 10%. But public confidence in the Judiciary is around 70% so that is very interesting. People still have faith in the Judiciary and yet in that same survey they showed delays, corruption of officials and abuse of power and. So there is a general sense that institutions of justice require reform and re-thinking and also look at them in a Human Rights basis. How can you vindicate Human Rights unless you have a system of the Rule of Law? I think, we have decided to set up a high powered committee to look into these recommendations and hope it will be in operation by January or February. Mr Raja Goonesekere has agreed to Chair the Committee and we will look at Police Reforms, Judicial Reforms, Reforms within the Attorney General's Department and see from a Human Rights perspective what reforms should take place.

In final conclusion, let me say that we are faced with enormous challenges, the number of grievances, complaints and violations are enormous, the Institutions have been set up to deal with these crises. The only way we can move forward is with some sense of constructive engagement and partnership between Government, NGO and the Security Forces. As we tell the IGP we don't see ourselves only pointing fingers, we see working together to solve what is really a problem that appears to be at the root of a lot of the concerns in this country and not only of Human Rights but also of Justice.

GUIDELINES FOR CONTRIBUTORS

The Editors welcome the submission of manuscripts for publication.

Articles should be 3000- 4000 words, and should be in relation to an aspect of Human Rights, Human Rights development, International Humanitarian Law, Conflict Resolution, Human Rights Law – case notes. They should also not have been published before.

Book and Movie Reviews relevant to the field of Human Rights are also welcome but the article should not exceed 1500 words.

All submissions are subject to a two stage review. Articles should be sent to Editor- in-Chief of the CSHR Human Rights Journal to assess the suitability of the article for the journal. If accepted articles are anonymously peer reviewed. It is anticipated that this process should take 10 weeks.

Submissions should be mailed (2 hardcopies plus 3.5" disk) to the Editor in Chief, CSHR Human Rights Journal, Centre for the Study of Human Rights, Law Faculty Building, University of Colombo, Reid Avenue, Colombo 7.

The submissions should be typed double spaced. Page margins should be 1 inch on all sides. It should contain no identifying markings, but be accompanied by a covering letter which should set out the name(s), address(es) and details of the author(s), together with a word count for the article.

The submission is to be formatted in accordance with the style guide of the journal. It is the author's responsibility to check the accuracy and spelling of references and information such as names, cases and citations. Selected submissions will be sent back to authors for editing if they do not meet the standards stipulated.

COMMENTS ON CHALLENGES AND OPPORTUNITIES FOR SRI LANKA

*Christine Spoerel**

This is a good time to reflect on the challenges and opportunities for human rights both internationally and here in Sri Lanka. As the Secretary General of the United Nations observed during his opening address this year, to the General Assembly, we have reached critical cross roads in the protection of human rights and the rule of law in general.

On the one hand, we have seen important new developments in the international legal framework to protect Human Rights. After ten long years the Migrant Workers' Convention long championed by Sri Lanka has come into force. New optional protocols have been developed on the prevention of torture and the protection of children in armed conflict and the protection of children from exploitation. The International Criminal Court has now become operational and is conducting investigations in countries such as Uganda and the Democratic Republic of Congo. A new High Commissioner for Human Rights, Louise Arbour, has taken office along with a strong new team of UN Special rapporteurs addressing different human rights concerns. The Security Council commemorated the 10th Anniversary of the Rwanda Genocide with a pledge of 'never again'.

But at the same time, in this new age of global terrorism, we have seen attacks on civilians of unspeakable barbarity. We have seen many States respond hastily with measures that put at risk long established safeguards for Human Rights. We have watched unspeakable atrocities unfold in the darker region of Sudan and abuses continue in many conflicts worldwide. We see the continuing surge of poverty that denies the most basic rights to countless millions world wide. Here too in Sri

Lanka, Human Rights are at something of a crossroad. Without doubt, two years of ceasefire has brought respite for millions of civilians so terribly affected by Sri Lanka's long civil war. But in the absence of further progress in the peace process, these gains have not been adequately consolidated and secured. In the meantime, abuses continue not least in the form of political killings and the military recruitment of children. At the same time the very institutions that should be the cornerstones of Human Rights protection, such as the Parliament, Judiciary and Law Enforcement systems are under strain.

So it is a very timely programme that has been organised by the Centre for the Study of Human Rights and this distinguished group has gathered to participate to reflect on the challenges and opportunities facing Human Rights in Sri Lanka. The essential questions you face at the national level are an echo of those on the international stage. How can the International Human Rights standards to which we are all committed, be effectively implemented and enforced on the ground and how can we turn the power of human rights discourse and the tools it gives us to tackling the root causes of conflicts and poverty. The equal access to justice project supporting today's activities is our local forum for addressing such issues.

* *Deputy Resident Representative,
United Nations Development Programme*

IS THERE A FUNDAMENTAL RIGHT TO EDUCATION?

*Justice Mark Fernando**

Many problems have arisen owing to the fact that there is a lack of awareness on the part of ordinary people that they do have rights in education. Now we have a situation where a large number of schools for instance, do not enjoy anything like the facilities which a minority of schools enjoy. Teachers are not the best paid people in our society, children learn bad examples from their parents and therefore there are lots of problems in education. Problems which have surfaced are an indication of a failure in the system of education in the past. Therefore, the problem that faces us is to see how we can remedy those failures. I think it is important that people should realise that they have rights to education and demand that the State fulfils those rights.

A part of the problem arises from what is looked on as free education. Actually education is not free, after all parents pay their taxes like everybody else directly or indirectly and they therefore, cover the cost of education. But because this expression is used, parents also think that they have not paid for their children's education, therefore they have no rights. That is why I think it is important that you should realise that indeed there is a right to education. Now where do you find this fundamental right to education? If you look at the Constitution we will find there is no express recognition of any fundamental right to education. There is a passing reference in one of the directive principles of State Policy to universal and equal access to education but it does not mention either free education or the quality of education. So today, my endeavour will be, to look at the problem of the right to education not as a Judge deciding whether one exists, but rather as an Advocate arguing that the law must recognise the right to education.

Even without a formal recognition of a right to education, the Courts have recognised rights connected with education in a number of matters. I think you would be amazed as indeed I was when I started listing it out, to see the extent to which rights have been recognised. To give examples for instance, in the area of school admissions, parents who feel that their child has been wrongly kept out of school, have made fundamental rights applications complaining of unequal treatment in order to get their children admitted to school. We have similar problems in relation to admission to the Universities. There is a district quota system, the underprivileged district quota. There are arguments as to whether it should be raw marks or the Z score. There have been two A Level Exams for one year and how does one admit according to the different exams? There have also been problems in regard to adequate disclosure of marks of students, so there are a whole host of problems connected with University admissions which have been dealt with under the fundamental rights of equality and equal treatment. Recently the Law College entrance was the subject of either a writ application or a fundamental right application, again a right in education. In the medical field, questions in relation to the medic's list for Interns, examinations for foreign graduates, postgraduate qualifications, these matters have come up as rights in education. On one occasion I even had to deal with a case where a student complained that she had not been awarded a degree although under the rule, she was entitled to it and she succeeded. The question of the autonomy of Universities and academic freedom has come up. The question of ragging has come up. A large number of cases have come up involving principals and teachers, salary scales, appointments, transfers, disciplinary control and so on. So a whole host of matters have been dealt with and relief granted even without an expressed fundamental right to education.

Now where do we seek this fundamental right and what is its extent? My first argument would be that the International Covenant on Economic, Social and Cultural Rights does give a right to education. You see before you

* *Retired Justice of the Supreme Court of Sri Lanka*

three Articles on that Covenant, Article 2 which imposes on every State the duty to achieve progressively all the rights in the covenant, Article 13 deals with right to education, and I think it might need education to be directed to the full development of the human personality and sense of dignity and it can strengthen the respect for human rights and fundamental freedoms. And in the area of primary, secondary and higher education you see not only is the right recognised, it must be hopefully, progressively free and it must be accessible to all who are qualified. And that sets out a set of principles which would be very useful if recognised as a fundamental right. In order to argue that Article 13 forms part of our lot, it is my contention here that the fundamental rights which the Constitution recognises are not only those which are enumerated expressly in Chapter III.

Chapter III lists freedom of speech, freedom from torture, equality and so on but not a word about education. If you look at Article 3, it does not give people sovereignty, it does not give them fundamental rights or the franchise. Article 3 recognises that people already possess the sovereignty in Sri Lanka and among the sovereignty that they possess are the fundamental rights. So all fundamental rights are included in Article 3.

Article 4 (d) gives specific recognition to those fundamental rights which are expressly recognised. So when Article 3 refers to fundamental rights, it refers to a much bigger category of fundamental rights. Article 4(d) refers only to those specifically covered and on that interpretation of these two provisions we can argue that the sovereignty of the people does include the right to education. It may be argued 'Where do you draw the line, is everything included?' Perhaps not, but at least those rights which Sri Lanka has accepted by acceding to these International Conventions, those can legitimately be regarded as being included in Article 3. So the right to education then is one of those fundamental rights which form part of the sovereignty of the people and are therefore, protected by the Constitution even though not with the specific remedies provided for in Chapter III. Now this is

reinforced by other provisions of the Constitution.

Article 27 is not one of those articles which citizens are entitled as a right to ask the Court to enforce because Article 29 says these provisions do not confer or impose legal rights, obligations and obligations and are not enforceable in any court. So maybe the citizen has no right to go and ask a Court to recognise anything in those directive principles. But as Article 27 (1) shows, these are the principles which must guide the Parliament, the President and the Cabinet in the enactment of laws and governance of Sri Lanka. So therefore, Article 13 of the International Covenant on Economic Social and Cultural Rights is one of the matters which must guide the legislature and the executive in the governance of Sri Lanka. Should the Judiciary say that it only binds Parliament - the Executive and not the Judiciary my argument is the Judiciary must say these are the principles which govern the legislature and the executive and the judiciary has the discretion to see that these are observed by these institutions. So it is an option which the Courts have through the directive principles of State policy to give effect to Article 27 (2) (h) which is the complete eradication of illiteracy and the assurance to all persons the right to the universal and equal access to education at all levels. So the argument based on Article 3 and Article 4 is also reinforced by Article 27 and Article 27 (2) (h).

There is also a third argument which is available based on Article 12. Article 12 embodies the principle of equality that all persons are equal before the law and are entitled to equal protection of the law. What is meant by the law there? At one time the view was expressed that the law means only Statute Law but now a much wider view has been taken. It includes Statute Law, it includes regulations, and it includes notifications, practices and so on. Now it is one step further from that to argue that the law in Article 12 is not confined to national law and national rules and regulations but includes also international law, a decision of international tribunals and so on.

The third limb of the argument is that the protection of the law to which citizens are entitled, includes the protection of international law and the decisions or international courts and tribunals and especially the international covenants because the international covenants are in the international sphere, much like a Bill of Rights in our Constitution in relation to the rest of the body of law of the system. In other words, the Bill of Rights in any Constitution is a superior law to other laws. In the same way, International Covenants must be regarded as a superior law to other international law. So the protection of the law that we are entitled to, includes the protection of international law.

Now I had occasion once in a case, to interpret Article 27 (15). That is a question of somebody's civic rights, political rights, but in the course of that judgement I observed that if the State must promote, must endeavour to foster respect for international law and keep your dealings among nations. It doesn't make sense if they can ignore those obligations when it comes to dealing with your own citizens. It is implied in Article 27(15) that the State is also bound to respect international law in its dealings with citizens. On that basis, the provision was somewhat doubtful, I said, looking at the International Covenant, however, there is no doubt. I gave effect to the International Covenant. Recently that matter was in a different context, the subject of decision by an International Tribunal, namely the Human Rights Committee, established under the International Covenant on Civil and Political Rights. Now the International Covenant on Civil and Political Rights is the sister Covenant to the Economic, Social and Cultural Rights and it deals with Civil Rights only. Unlike the other Covenant, there is a body which has some powers of enforcement, an interpretation to Human Rights Committee set up under that Covenant. And a complaint was made in a recent case, by a journalist, Mr. Victor Ivan of the 'Ravaya' that his fundamental rights had been violated. I will not go into the details of that case but ultimately the Human Rights Committee held about 6 months ago, that his right to a speedy trial in respect of criminal defamation charges

had been infringed and ordered the State to give compensation. Now the significance of that decision is the right to a speedy trial as such is not recognised in our constitutional provisions. What is more at the time he filed his application in the Supreme Court in Sri Lanka only a delay of a month or two had taken place so there was no undue delay at the time his case was disposed of at the Supreme Court. But by the time the Human Rights Committee dealt with the problem six years had elapsed and the case had still not been disposed. So the Committee took into account the fundamental right which was not, as a matter of law, expressly a part of the Constitution, and a violation which had not occurred at the time the Courts in Sri Lanka dealt with it, but which occurred only subsequently and gave relief. That to my mind is an express recognition that the rights in the Covenant, by virtue of Article 2 of that Covenant, that Courts and other institutions in Sri Lanka must give effect to it. So therefore, my contention is, that for a variety of reasons these rights form part of the enforceable human rights of Sri Lanka. It is in that context that we should look at the right to education and the problems connected with that.

Now I mentioned to you a list of instances of violations where courts had granted relief not on the basis of right to education but to right to equality and so on. Most of those were individual grievances but much has to be done in relation to what may be called collective grievances. For instance, the gross disparity in the financial provisions that is made for schools in the backward and disadvantaged areas and the schools in the cities in the privileged areas. Now under one of the provisions of the 13th amendment Article 154 (r), there is a Finance Commission which has been set up to apportion money granted by government between the different provinces. A useful provision that has been made in Article 154 (r) is that the Finance Commission must recommend to the President, the principles on which funds granted by government shall be apportioned between the provinces and, that in formulating such principles, they must act with the objective of achieving balanced regional development and

taking into account the need to reduce social and economic disparities. So therefore, there is already provision which recognises that material resources of the State must be equitably apportioned among the provinces and perhaps even with some favour to the under privileged areas because there is a need to reduce the existing social and economic disparities. In that context, Article 13 of the International Covenant is again relevant. Article 13 (2) (e) says, among other things, that the material conditions of teaching staff shall be continuously improved. I am sure teachers will be happy to hear that their special needs have been given recognition but if it is possible to argue that Article 13 is part of our law well Article 13 (2) (e) is also part of our law, and as a general issue the question of the material conditions of teaching staff, teachers including principals and all others connected with teaching has to be given effect.

Let me also take some other disparities, the UGC statistics for the year 2001 show that State expenditure on primary and secondary education works out to something like Rs.6000-6500 per student per annum. Now you will be surprised to know as I was surprised, when it comes to University education, the State spends approximately Rs.100,000 per student per year. The overall figure is roughly 5.2 billion rupees on recurrent and capital expenditure for 12 Universities other than the Open University and, they cater to roughly 52,000 students so that makes Rs.100,000 per student. Now in that context, we need to ask how we can obtain the quality of education that such expenditure could justify. Sixteen times expenditure on a school child is spent on the University undergraduates. Do other Universities provide that kind of quality? The right to education is not made as the right to education on itself, but to the quality of education as well.

Another question arises from Article 13 as to the access to education. The statistics are that around 175,000 students sit for the Advanced Level Exams. In the year 2000/2001, 75,000 students were eligible for admission but of that number only 12,000 students were admitted. So there is then a question of accessibility.

Maybe you do not have to provide for all 75,000 students but shouldn't a much greater proportion than 12,000 be admitted. So again therefore, these are issues not for individual action but for collective action, question of teachers' conditions, question of expenditure and quality and the question of access. This is another interesting problem that you might think over, as a result of all students who are not eligible or the majority eligible not getting admission, a vast number of students go abroad for education. I would estimate at least 3000 Sri Lankan students studying abroad and they, their parents or relatives spend about a million rupees a year on that education. As a result of the system not providing greater access to eligible students the country loses something like 3 million rupees in foreign exchange every year. So we spend 5.2 million on educating 50,000 students and lose foreign resources to the extent of Rupees 3 million or more by way of a drain on our foreign exchange. Now that compares with what migrant workers earn for Sri Lanka. It is estimated that around 800,000 to 1 million migrant workers remit around a million dollars every year, to the economy of Sri Lanka. A substantial part of that goes out for this kind of education. I am not against foreign education but the point is that the failure of the system to provide quality education and fair access to education has resulted in this wastage of resources. So those are some of the issues which need to be faced in the context of the right to education and I would suggest that we should not be timid about advocating a right to education. We should assert that there is a right, internationally recognised by implication if not expressly by incorporation of the Charter of Conventions, also recognised in Sri Lanka, and all institutions connected with fundamental rights such as the Human Rights Commission, maybe the Ombudsman as well as the Courts, should be reminded of the existence of this right and its implication.

In conclusion, I wish to add one more comment that Human Rights, Democracy, Electoral System, Environmental Rights all these issues of public concerns should be made part of the syllabus for the Ordinary Level Examination in all schools. If that kind of

exercise is done, if interesting, accurate and meaningful chapters on each of these issues is included in the text books at nominal cost, only of preparation of the text, the entire teaching process will be undertaken by the State Education system and 300-350 thousand students will benefit each year from that. Every student that will come from a family of 4-5 will influence at least two adults in the household. If the parents are discussing some issue which has a fundamental rights aspect the child will be able to advise the parents what he/she has learnt about the fundamental rights in school. If the text book also shows what and where your remedies are the child will educate the parents as to where advice can be got and how remedies can be sought and so forth. So this is a simple, inexpensive solution to a major aspect of Human Rights Education.

STYLE GUIDE

Spelling -	Is in accordance with the Oxford English Dictionary.
Dates -	Should be in the form '09 September 2005'.
Abbreviations-	Minimise the use of full stops. For example 'p' not 'p.', 'UN' not 'U.N.'
Quotations	Of less than 30 words should stand within the text in single inverted commas. A quotation within a quotation should have double inverted commas. Quotations of more than 30 words should be set in 9 point with an indent, without quotation marks. A quotation within this should be further indented or contained within single inverted commas.

HUMAN RIGHTS AND EDUCATION : CHALLENGES AND OPPORTUNITIES

*Prof. Swarna Wijetunge**

How important is education for Human Rights and in particular to ensure that Human Rights is promoted and safeguarded? The last decade from 1995 to 2004 was declared as the United Nations decade of Human Rights Education and we are at the tail end of that decade and United Nations Human Rights Commission has also decided that with effect from 2005 there should be a Human Rights Education Programme. Interestingly enough, after a decade of experience with calling an entire decade a Human Rights decade there is some dissatisfaction with how over the decade Human Rights education has progressed. So now the Commission has decided to split it up into more manageable, more directed and focused segments. Thus the first 2 years i.e. 2005-2007 have been earmarked as Human Rights Education through primary and secondary education. So globally the focusing is that all countries, all nations, focus specifically on Human Rights education through their primary and secondary education systems. One more important historical event over that last decade was the appointment of a special Rapporteur on the Rights to Education. I have highlighted these three points to indicate how important education is in the area of Human Rights in general, particularly in promoting Human Rights globally.

If we look at the nexus, the link between Human Rights and education you can conceptualise it in different ways and I will bring out these four things.

1. The right to education. 'Is there a Fundamental Right to Education?' (The right to education which we consider as one of the foremost priorities to human life).

2. Then we have a very broad spectrum of human rights education which was what the entire decade was about. How do we promote human rights education in all formal, informal and in all spheres of activity?
3. I hope to focus on 'Human Rights in Education.' Do the processes and agencies of education ensure human rights? The entire process of education from child rearing to university education to any other education system we have in place. Do we ensure rights of the learner or whoever participates in this process are the learners or the individual's rights being safeguarded, ensured and looked at by the processes of education?
4. 'Human Rights through Education', once again we expect the processes of education and through education that Human Rights would be ensured, safeguarded and promoted. Does that happen all the time and do we consciously ensure that these things happen in the system of education in a very broad inclusive sense?

In this presentation I take this perspective that 'Human Rights in Education' is a prerequisite for Human Rights education. My contention is that it is the processes of education within a society that mould people and therefore, if we want to ensure Human Rights, we need to look at what takes place within the processes of education, be it formal or informal, be it child rearing or very formal institutionalised education systems. So what happens in education then will determine whether Human Rights are safeguarded or not. I am very cynical, although an educator and have been in the system over the last so many years, when observing our system, what happens inside homes and unfortunately inside our Parliament, our highest body of governance, we begin to wonder whether this process has been effective and done the country proud by all the processes that are in place. The call then is for mainstreaming Human Rights in

* Faculty of Education, University of Colombo

education, in any process of education in any educative process.

In order to do that we need:

- i) The full recognition of the right to education, which is, considered a fundamental right of a human right to education.
- ii) Safeguards for Human Rights and Fundamental Freedom in Education. We need to take a very hard, analytical, critical look at systems of education and how we educate, and do we in that process safeguard human rights and fundamental freedom of individuals?
- iii) Adaptation of schooling to enhance Human Rights through education. We need to do a lot of soul searching, re-thinking, and re-vamping of systems in order to do this. What you live is what you learn. That is something that we in education repeat often. So what you live in systems of education in schools, in homes, in other places where education is taking place it's something that is ongoing, continuous, very comprehensive so what you live in those places that are responsible for education and is what we will end up in learning.

Unless we have a very clear vision of the inter relationship between the right to education and rights in education promoting Human Rights education or Human Rights through education is impossible.

So in order to ensure these, the following things should be there.

We need to consider if the methods used in education are consistent with the messages that we are giving? We say in the education system, co-operative education is very important. We are trying to implement this. In

1997 and effective from 1998, a set of education reforms have been put in place in the system in Sri Lanka from primary through secondary schools. In primary curriculum in primary education reforms, activity based co-operative learning is the key focal point that children should learn. Children in the primary grades should be seated in a way that facilitates co-operative learning. We find that in Grade 1 classes while children are seated facing each other and when some written work is given, some children cover their written work so that the children seated next to them cannot copy their work.

At the University too the same thing happens. When we give reference and ask the students to refer a particular book the first student who goes to the library and refers the book puts it back in a different shelf so that the other students are unable to get the book and only he refers the book whenever he needs it and hides it. So how have we ended up in our education system? So we need to ask 'are our methods and our messages congruent and is there a conflict between these two? If so, we need to take a hard look at it and see why it is like that.

The Institutional Environment of Schools and the processes of teaching and learning must be consistent with the objectives of peace, co-operation, justice, human rights and ecological sustainability. So these are some of the most fundamental human rights that we are trying to put in place in the system and ensure that these get sustained. So we need to look at institutional environments of schools, the management of schools, and the administration of schools the way schools are run, what happens inside schools and whether they are consistent with these idealised objectives of human rights.

We need to question many myths in education. Education is widely perceived as inherently good. Particularly in our culture we believe that education is the path to everything that we aspire for our children, our younger generations, from social mobility to anything under the sun, we think that education is the avenue or the root for every thing that we

aspire for our children. 'Is this a myth or a reality? Now based on myth No. 1 we have myth No.2. Therefore getting all children to school is then equated with their right to education. This is one example, in the Faculty of Education where I teach, we have a National Research Centre. In 2003 we conducted a National Achievement, island wide. Some 17,000 children who had completed Grade 4 sat this National Achievement and we have the report out now. We have a sizeable percentage of over 10 percent of the children of this 17,000, who sat this National Achievement getting zero, nought. The three subjects tested were Mother tongue, Mathematics and the English language. So after four years of schooling if 10% of our sample of children ended up getting zero, nought for all three, one or two, then have we ensured their right to education? It is a very valid question we have to face. So we need to look at what we do in our schools and in other educational institutions and take a very hard self assessment of what is happening in schools. So that status quo has to be changed.

This is another section, when abuses of and in education are detected what and how children are taught are asked rarely. We all know that many abuses take place. Abuse of education, abuse in education - there are many ills in the system and when those ills are surfaced and they are broadcast do we ask or investigate what and how children are taught?

We learn too little and too late about abuses of, and in education and they are rarely identified as human rights violations even if whether it is corporal punishment to whatever else happens inside schools, do we seriously raise the question of fundamental rights, human rights? Are we abusing children's human right?

So therefore I proceeded to see whether education can be used to promote empowerment or it can be abused as a means of justifying repression and this is very real. This is just a definition that I have taken from a person here, he wrote in 1998. Education and Law Enforcement have been defined as the two main agencies of social control so we don't

want education to be an agency of social control in a very repressive way. Social Control is very important. We need social control for sustainability of any system but if that is through repressing means, if it is by violating human rights, we need to question that.

I have a list of challenges which is something taken from the National Education Commission there is a report published in 2003. It is a very comprehensive systemic analysis. It emerged out of a comprehensive research based systemic analysis of what ails the system of education, particularly primary secondary education. I have taken all this from the Report of the National Education Commission.

There is an accusation in the Report, sometimes directly and sometimes indirectly, which says that our education system has failed to promote nation building by fostering mutual understanding. It's not totally the school system that is responsible for this, it is the entire educative process within an outside school that is responsible, but part of the responsibility is laid at the door of the schools. That we have not promoted nation building by fostering mutual understanding and it happens because we segregate children in schools in various ways. Even within a school where there are different ethnic groups there is still segregation because different ethnic streams do not mix. So we haven't done that and promoted tolerance and respect for the rich cultural diversity of Sri Lankan society. If we have satisfactorily done that then we wouldn't have been in a twenty year old war in the country. We have failed to ensure social cohesion and stability within the country, we have failed to promote respect for human rights and dignity which is pervasive not limited to the school system, we have failed to promote respect for human life for life in general, to produce good citizens with civic and social responsibility which is obviously the way the system operates, to produce caring individuals with exemplary character and values. The report says that these are the things that ail the system so we need to address these issues in a very conscious

systematic, planned manner, otherwise we will go from bad to worse if don't address the ills of the system.

What are our opportunities in a very broad, inclusive way?

1. Adaptation of schooling to enhance human rights in and through education. So we need to look at our processes of schooling, systems, curriculum, teacher training, and text books. Everything has to be very critically assessed and evaluated through a human rights lens to see where we need to critique, change, revise, and do anew, so we have to adapt schooling to enhance human rights in and through education.
2. Not be confined to school, but promote civil society initiatives to human rights education which should go with reforms in the education systems.
3. Finally is a more broad global vision for the system. Prioritising human development through all agencies and processes of education.

As a person in education who has been working in the system for years, I feel that we need to go back to basics now. Look at human development, are we catering to this crying need in the country to develop humans as potential resources for individual as well as collective good. For human rights for anything at all we need to look at human development. What are we? How are we rearing our children, teaching our children in schools? How are we managing human relationships, interactions, so everything hinges on empowering the human and developing the human from infancy to life long learning? Finally I say, prioritise human development through all agencies and processes of education. It's not a very positive picture I have portrayed but this is the dilemma that we are facing in this country. If systems are corrupt, humans are corrupt, if we feel that we have really gone down in values, ethics, then

we need to take a hard look at ourselves. We need to look at our systems, our processes in place and see what we can do to make changes and to ensure that human rights are safeguarded and enshrined the way they should be.

INFORMATION

The CSHR Journal of Human Rights is published quarterly by the Centre for the Study of Human Rights, University of Colombo, Sri Lanka. All correspondence should be addressed to the Editor-in-Chief, CSHR Journal of Human Rights, Centre for the Study of Human Rights, Faculty of Law, University of Colombo, Reid Avenue, Colombo 7, Sri Lanka.

Views expressed in articles published in the CSHR Human Rights Journal are those of the individual authors and are not to be attributed to the Journal, its Editorial Board, its Advisory Board or the University of Colombo. The Centre for the Study of Human Rights is not responsible for the accuracy of the data and information included in this publication nor does it accept any consequences for their use. Any queries arising from the contributions should be directed to the authors concerned.

SUBSCRIPTIONS

The CSHR Human Rights Journal is sold at Rs. 150/- per issue.

Subscribers may send a cheque for Rs. 500/- (for 4 issues inclusive of postage) payable to the Centre for the Study of Human Rights.

Overseas subscription rates inclusive of postage

South Asia – US\$ 7

East Asia and South East Asia – US\$ 12

All other regions US\$ 18

COMMENTS ON THE HUMAN DEVELOPMENT REPORT 2004

Ambika Satkunanathan*

Today, I have been asked to speak on human rights and development focusing on the UNDP Human Development Report on Cultural Liberty. I would like to begin by reflecting on the meaning of the right to development before engaging with the UNDP report. The aim of this task is to elucidate the link between the right to development and Cultural Liberty.

It would not be wrong to say the definition of the right to development is one of the most debated in the human rights discourse that has undergone much change over the decades. The UN Independent Expert on the Right to Development defines it, as a right to a particular process of development in which "all human rights and fundamental freedoms can be fully realized". The Independent Expert points out that it is a composite right that includes economic, social and cultural as well as civil and political rights which [and I quote] 'because of their interdependence and indivisibility, are realized together. The integrity of these rights implies that if any one of them is violated, the composite right to development is also violated.'

So what is the relationship between development and issues relating to cultural liberty? The foreword to the UNDP report states that 'human development is first and foremost about allowing people to lead the kind of life they choose and providing them with the tools and opportunities to make those choices'. Undeniably cultural liberty impacts upon the lives of people, in the choices they make or are allowed to make and the opportunities that are available to them and thereby on the right to development. In the words of the UNDP report 'cultural liberty is a vital part of human development because

being able to choose one's identity without losing the respect of others or being excluded from other choices is important in leading a full life.'

I will now draw on themes discussed in the UNDP Human Development Report on Cultural Liberty and engage with them from a South Asian perspective. I therefore will attempt to give an idea of the debates surrounding cultural liberty and diversity in South Asia. In particular, I will focus on issues related to women and the difficulties encountered when attempts are made to balance group rights within the framework of universal human rights.

Identity, what it means, how it is constituted and how it can be accommodated within a democratic framework are questions that form the central concern of the report. In South Asia the discourse on identity is rich and has created a greater understanding of the nuances and complexities that need to be taken into account when formulating solutions to the problems we face today.

A discussion of the impact of colonialism on the construction and reconstruction of identities and social and ethnic groups is important at this juncture, as the effectiveness of campaigns and efforts to empower historically marginalized and discriminated groups depends on a clear understanding of the genesis of the various forms of intolerance, and the factors that have shaped them.

Research has shown that in pre-colonial times people defined themselves based on the commonalities they shared with others rather than on the differences that distinguished them from others.¹ The introduction of the census by the British who understood the prevalent differences between people led to the delineation of communities and the

* Senior Researcher – International Centre for Ethnic Studies, Sri Lanka

¹ Nivedita Menon, 'State, community and the debate on the uniform civil code in India', in Mahmood Mamdani (ed.) *Beyond Rights Talk and Culture Talk: Comparative Essays on the Politics of Rights and Culture*, St. Martin's Press, 2000, p. 81.

creation of majorities and minorities², for example, Hindus and Muslims in India³ and Sinhalese and Tamils in Sri Lanka.⁴ The creation of separate communal electorates in India⁵ and the granting of political representation on an ethnic basis in Sri Lanka⁶ further entrenched and institutionalised ethnic and religious identities. While commonalities between communities were suppressed in order to create differences, as in the case of Tamils and Sinhalese in Sri Lanka,⁷ paradoxically, at the same time certain categories and identities were conflated to create sameness⁸, for example, linguistic commonality was highlighted in the case of Tamils who ignored religious differences. In the post-colonial era the colonial practice of creating monolithic identities and public mobilization on an ethnic basis has been appropriated by various interest groups and put to much the same use; to strengthen divisive identity politics. As summed up by Rajasingham-Senanayake, at present we are witnessing 'ethnicity blindness at the level of the State with politicisation of ethnicity in the national imagination'⁹ coupled with the

'erasure of small/mixed identities'¹⁰ and consolidation of monolithic identities such as Hindu-Muslim, Sinhala-Tamil.

The impact of globalization on identity and cultural liberty is another issue the UNDP report focuses on. In the case of South Asia, countries are resisting the onslaught of globalization and responding to new insecurities and new forms of nationalism and fundamentalism in two ways. One method is identical to the method chosen by certain right-wing, non-progressive groups in the first world – seeking refuge in the creation of a monolithic identity, which erases commonalities and makes "others" of minority groups. The other approach is pandering to global forces by selling local cultures to the world as 'ethnic food' 'ethnic clothing' etc.¹¹ Both processes have an impact on the shaping and formation of 'ethnic' and 'national' identities and emerging forms of nationalism and power struggles between groups.

Aijaz Ahmed a South Asian scholar asks us to be wary of 'social relations of production and possession, which turn every potential for liberation into an instrument of domination'¹². This is a warning that should be heeded where globalization and nationalism are concerned, since both have the power to empower and enslave. He argues that nationalism, which during the colonial period was anti-imperialist in South Asia, has now become a nationalism that is constructed on the 'other' rather than common citizenship.¹³ This construction of nationalism is a response to the breakdown of traditional structures, erosion of sovereignty by the intrusion of global capital and the upward social mobility of hitherto disadvantaged groups. This form of nationalism is desperate to find an alternative

² Nira Wickremasinghe, 'Prelude to Ethnic Politics', *Ethnic Politics in Colonial Sri Lanka*, Vikas Publishing House, New Delhi, 1995, pp. 5-11.

³ Nicolas B Dirks, 'Introduction: The Modernity of Caste', *Castes of Mind*, Princeton University Press, New Jersey, 2001, at pp 14-16.; Supra note 2.

⁴ Dharini Rajasingham-Senanayake, 'Democracy and the Problem of Representation: The Making of Bi-Polar Ethnic Identity in Post/Colonial Sri Lanka', in Joanna Pfaff-Czarnecka and Dharini Rajasingham-Senanayake (eds.) *Ethnic Futures: The State and Identity Politics in Asia*, Sage Publications, 1999, pp 111-112

⁵ Geeta Chowdhry, 'Communalism, nationalism and gender: Bharatiya Janata Party (BJP) and the Hindu Right in India, in Sita Ranchod-Nilsson and Mary Ann Tetreault (eds.) *Women, States & Nationalism: At Home in the Nation?*, Routledge, London & New York, 2000, p. 99.

⁶ Supra note 2.

⁷ 'Democracy and the Problem of Representation: The Making of Bi-Polar Ethnic Identity in Post/Colonial Sri Lanka', in Joanna Pfaff-Czarnecka and Dharini Rajasingham-Senanayake (eds.) *Ethnic Futures: The State and Identity Politics in Asia*, Sage Publications, 1999, pp 112-114.

⁸ Ibid p.114

⁹ Ibid p. 123.

¹⁰ Ibid.

¹¹ John Powell, *United States Globalisation as the Newest Expression of Racial Subordination: International and Intranational Evidence*, International Council on Human Rights Policy, 2001, p.6.

¹² Aijaz Ahmed, 'Globalization and Culture', *On Communalism and Globalization : Offensives of the Far Right*, Three Essays Collective, New Delhi, 2004, p. 114.

¹³ Ibid, xxvi.

that will enable the maintenance of the status quo and existing social hierarchies and privileges. As this form of nationalism seeks to reap the benefits of globalization while protecting traditional values and culture, it maintains a schizophrenic relationship with the phenomenon of globalization and global capital. In their attempts to mobilize people in support of the 'traditional', right-wing groups, create monolithic identities that erase multiplicities, which can lead to the marginalisation and discrimination of minority groups, as in the case of Muslims, Christians and other groups in India. As the creation of an 'authentic' culture with an attendant 'authentic' identity that would facilitate political mobilization of people is an integral part of the campaign to protect traditional values, identity plays a vital role in the formation of the 'new' nationalisms.

The manipulation of the construction and reconstruction of identities is a commonly used strategy in conflicts and power struggles between groups in South Asian countries. As stated earlier, the categorisation of groups and communities in the colonial period through methods, such as the census, reconstructed groups and created artificial ethnic and religious groups with bounded identities. In reality however it has been shown that identity is neither fixed nor bounded but is subject to change over time. Hence, different identities take precedence at different times.¹⁴

As Charles Taylor argues, the identity of a group could be shaped not only by the way it views itself but also by the struggles the group has with others.¹⁵ Sometimes the identity of a group is created, even when the creation of such an identity is fought against by the group whose identity is being created.¹⁶ Arjun Appadurai argues that this

¹⁴ Supra note 4 at 124.

¹⁵ Charles Taylor, 'The Politics of Recognition', in Amy Gutman (ed.) *Multiculturalism: Examining the Politics of Recognition*, Princeton University Press, 1994, p.34.

¹⁶ Zillah Eisenstein, 'Writing bodies on the nation for the globe', in Sita Ranchod-Nilsson and Mary Ann Tetreault (eds.) *Women, States, and Nationalism: At Home in the Nation?*, Routledge, New York, 2000, p 40.

can take place when groups are pushed away from a secular idea of themselves and towards a more fundamental identity.¹⁷ Actual or perceived external threats to their identity could lead groups to construct such an identity, as in the case of the Muslims in the post September 11 period. An identity so constructed is incapable of accommodating multiple identities, as it demands the sacrifice of one identity for another.¹⁸ Further, these identities which ignore multiplicities are "almost always caricatures" and one-dimensional.¹⁹ Such identities lay claim to authenticity by privileging one aspect of any given identity over others as the norm. By doing so, nationalist processes seek to mobilize people around a homogenous identity.

The UNDP Report also gives importance to methods that could be employed to accommodate people's demands for recognition of their language, ethnicity and religion. In South Asia the failure of states to protect and promote the rights of minorities illustrates their inability to deal with identity politics.²⁰ All past and current attempts to find solutions to conflicts between communities and power struggles between social groups have done so within the traditional construct of the nation state by employing different forms of secularism and multiculturalism.

In recent times secularism has become a site of contention and controversy in India due to the rise of Hindu fundamentalism (hindutva) and the consistent erosion of the rights of minority

¹⁷ Arjun Appadurai, 'Patriotism and Its Futures', *Modernity at Large: Cultural Dimensions of Globalization*, Oxford University Press, New Delhi, 1997, p.165.

¹⁸ Geeta Chowdhry, 'Communalism, nationalism and gender: Bharatiya Janata Party (BJP) and the Hindu Right in India', in Sita Ranchod-Nilsson and Mary Ann Tetreault (eds.) *Women, States & Nationalism: At Home in the Nation?*, Routledge, London & New York, 2000, p.100.

¹⁹ Ibid, p.107.

²⁰ D.L. Sheth, 'The Nation-State and Minority Rights', in D.L. Sheth and Gurpreet Mahajan (eds.) *Minority Identities and the Nation State*, Oxford University Press, 1999, pp 19-20 & 26.

groups. Secularism has many avatars²¹, amongst them two forms which take centre place in debates on the subject in the subcontinent; one form which views it as a separation of religion and state, and the other which advocates for political neutrality where religion is concerned.²² As pointed out by Partha Chatterjee, the Hindu Right is comfortable with secularism as it finds no threat in the separation of state from religion in the public sphere, since majority Hindu norms would by default become "the norm" and constitute the mainstream, which the others would be invited to join as equal citizens. Hence, secularism as constructed by Hindu fundamentalists has no space for minority groups. The destruction of the Babri Masjid and ensuing events have led to criticism and claims that secularism is an import of Europe and hence its failure in South Asia is unsurprising.²³ Critics of secularism such as Ashis Nandy point out that it is incapable of dealing with new and emerging 'fears and intolerance' and advocate a non-Western version of secularism, which they claim has 'space for continuous dialogue among religious traditions and between the religion and the secular'.²⁴ Proponents of secularism however find this problematic and point out that the gap in this argument is its failure to see the tolerance inherent in secularism, which has as its aim the settlement of conflicts in recognition that 'the resources of tolerance within traditional religion have exhausted their possibility'.²⁵ They also find the critique problematic for its absolute and total rejection of modernity as immoral, which they point out, ignores the shortcomings of tradition.²⁶

²¹ See *Secularism and Its Critics*, (ed.) Rajeev Bhargava, Oxford University Press, 1998.

²² Rajeev Bhargava, 'What is Secularism For?', in Rajeev Bhargava (ed.) *Secularism and Its Critics*, Oxford University Press, New Delhi, p. 488.

²³ Ashis Nandy, 'The Politics of Secularism and the Recovery of Religious Toleration' in Rajeev Bhargava (ed.) *Secularism and Its Critics*, Oxford University Press, New Delhi, 1998, p. 324.

²⁴ Ibid, p.327.

²⁵ Supra note 24, pp 529-532.

²⁶ Ibid, pp 530-533.

Multiculturalism is another means through which the State has tried to negotiate its relationship with minorities. Even the British practiced a nominal form of multiculturalism in their colonies whereby they allowed communities to govern themselves. This was not due to respect for local cultures or religions, but instead was done with the purpose of making the colonized believe the private sphere was untouched, while highlighting and deepening difference between local communities.²⁷ Although the State has viewed multiculturalism as the solution to managing problematic relations between communities in multi-ethnic, multi-religious states, it has been argued that multiculturalism hardens and essentialises identities and deepens ethnic cleavages and differences²⁸ by its perception of identities as fixed and bounded.²⁹ Thus, rights groups and other entities seeking solutions to the problems of social exclusion and discrimination need to study different forms of multiculturalism and their effects to enable them to formulate strategies that would ensure that the form of multiculturalism practiced challenges dominant ideas (critical multiculturalism) instead of becoming "a tag of ethnic identity and a license for separatism".³⁰

I would now like to focus on the position of women in identity politics and new nationalist movements and the need to ensure that multicultural and other policies that recognise group rights do not infringe upon the rights of women. In order to do this we need to look

²⁷ Lloyd I. Rudolph and Susanne Hoeber Rudolph, 'Living with Multiculturalism: Universalism and Particularism in an Indian Historical Context', in Richard Shweder, Martha Minow, and Hazel Rose Markus (eds.) *Engaging Cultural Differences: The Multicultural Challenges in Liberal Democracies*, Russell Sage Foundation, New York, 2002, pp 45-46.

²⁸ Rajeev Bhargava, 'The Multicultural Framework', in Kushal Deb (ed.) *Mapping Multiculturalism*, Rawat Publications, Jaipur and New Delhi, 2002, p.94

²⁹ Carol Upadhyaya, 'Culture Wars: Anthropological Debate on Multiculturalism' in Kushal Deb (ed.) *Mapping Multiculturalism*, Rawat Publications, Jaipur and New Delhi, 2002, p. 180.

³⁰ Ibid, p. 187.

back a little at the history of nationalist movements.

Nationalist movements that mobilize women on a platform that includes the empowerment of women as part of the broader liberation agenda have used women to further their nationalist agendas. This has nearly always resulted in further marginalisation of women and essentialisation of their identities.³¹ During the colonial period although nationalist movements included women in their struggles, they reconfigured their roles and relegated them to the spiritual sphere- the inside, the private³². The material sphere- the outside was out of bounds to these women who were asked to contribute to the nationalist struggle by preserving the sanctity of the private sphere.³³ The inclusion of women in the nationalist movement was to counter colonial claims of subordination of women due to backward tradition and culture³⁴, which was often used by the British to prove the incapacity of the natives to self-govern. The colonial state therefore sought to improve the situation of the women through social reform.³⁵ The result of these efforts is identical to those of current development processes- reform of traditional laws resulted in robbing women of their traditional rights while failing to address the subordination of women and structural inequality. Similarly, present fundamentalist movements use women in their practice of divisive identity politics. For example, the RSS de-sexualises the Hindu

³¹ Shanaz Rouse, 'Gender, Nationalism(s) and Cultural Identity: Discursive Strategies and Exclusivities', in Kumari Jayawardena and Malathi De Alwis (eds.) *Embodied Violence. Communalising Women's Sexuality in South Asia*, Kali for Women, New Delhi, 1996; Suresh R. Bald, 'The politics of Gandhi's "feminism": constructing "Sitas" for *Swaraj*', in Sita Ranchod-Nilsson and Mary Ann Tetreault (eds.) *Women, States, and Nationalism: At Home in the Nation?*, Routledge, New York, 2000.

³² Ibid.

³³ Partha Chatterjee, 'The Nation and Its Women', *The Nation & its Fragments: Colonial and Postcolonial Histories*, Princeton University Press, 1993, pp 126-132.

³⁴ Ibid.

³⁵ Ibid.

woman whereby she becomes both the mother and the 'rapable' woman who needs the protection of the Hindu state, while the Muslim woman is sexualised and symbolizes the enemy who should be dominated.³⁶ Today, the post-colonial state and even rights movements continue to engage with the issue as it was defined by the colonial state, i.e. as a problem of culture and tradition.³⁷

Multiculturalism too places women in a precarious position. In multicultural states most often communities retain power over areas considered private, i.e. marriage, divorce, and other issues which are related to the determination of group membership, to enable the group to have power over the construction of collective identity which is thought to be important for group survival.³⁸ The paradox is that multiculturalism while empowering certain groups, subordinates certain members of these groups.³⁹ Accommodation of group/community rights can therefore lead to "multicultural vulnerability", where existing hierarchies in communities lead to the violation of the rights of individuals who are in a vulnerable position. Further, multiculturalism entrenches the public-private divide through its acknowledgment of the public status of the identity group and disregard of the status of individuals within these identity groups. Multiculturalism therefore focuses on injustices in the public sphere. Yet, it is in the private sphere that most women experience discrimination as communities continue to define gender roles and regulate the lives of women. Giving power in areas such as family law to identity groups most often places burden on certain members of the group,

³⁶ See *Women and the Hindu Right: A Collection of Essays*, Tanika Sarkar and Urvashi Butalia (eds.), Kali for Women, New Delhi, 1995.

³⁷ Supra note 33.

³⁸ Ayclat.S., "Family Law & the Construction of Collective Identity" *Multicultural Jurisdictions: Cultural Differences and Women's Rights*, Cambridge University Press, 2001. p. 46.

³⁹ Mahajan.G., "Feminism & Multiculturalism", *The Multicultural Path: Issues of Diversity and Discrimination in Democracy*, Sage Publications, 2002, p. 123.

namely women. This is the "paradox of multicultural vulnerability."⁴⁰

The manner in which multiculturalism views individuals is also problematic, as it begins by locating them as part of a particular community, which limits their identity to their cultural group. This approach discounts the fact that women have multiple identities, and are not solely defined by their membership of a particular cultural group.⁴¹

It is through family law that communities regulate the conduct of women, who are viewed by the group as the bearers of cultural values and who through their reproductive activities are mainly responsible for the recreation of the group. This means their freedom to marry, divorce etcetera will be limited and controlled by the group to ensure membership boundaries are maintained.

Tesawalamai the customary law applicable to the Tamil inhabitants of the Northern Province of Sri Lanka is a case that illustrates the tension between community rights and women's rights. According to Tesawalamai the woman does not have absolute power of disposition of her immovable property but requires the written consent of her husband. The husband during the marriage remains the manager of her property.⁴² He is regarded as the sole and permanent attorney of his wife- it is thought that the wife's persona "is merged with that of the husband's". If the husband refuses to give consent the woman can obtain consent from the Family Court in the district in which the woman resides or in which the property is situated.

Due to the conflict in the North many households are female-headed. This means that in the absence of their husbands women are unable to dispose property. If the husband is missing, the woman will not be able to obtain a death certificate and her only option would be to request the courts to give consent

to a property transaction. Here too the woman will face many obstacles. As the court cannot give consent for future property transactions the woman will have to approach the court every time she wishes to deal with her property, which means she will have to incur additional costs relating to lawyers fees etc; and where courts are not functioning she will have no remedy. In addition, the husband's right to sell, mortgage or lease the wife's property disadvantages the woman economically. Considering the socio-economic status of women and the state of the Sri Lankan legal system, it is unlikely the woman will be able to obtain compensation if the husband sells the property against her wishes or without her knowledge.

While reform is urgent we have to also keep in mind that women from besieged communities who might have been subjected to extensive state controls due to their race, ethnicity, class or a similar factor may take refuge in the private sphere of their ethnic/racial/class communities. Their reluctance to support legal reform that impacts on their particular communities highlights the tension between individual rights and the rights of the community. While supporting diversity and right of communities to protect their culture we should ensure that the rights of women are respected and they have the right to make decisions that affect their lives and families.

Finally, I would like to draw a few broad conclusions based on the UNDP Report. The report reiterates the need to recognise multiple identities in formulating solutions to the demands of groups for recognition of their ethnicity or religion or language. It emphasizes the significance of choice and the opportunity to choose how one lives, which can be achieved only by respecting equity in the pursuit of freedom. Most importantly, the report brings home one important fact; that strategies to secure the rights of groups and promote and protect cultural diversity and liberty should ensure that international human rights standards and norms are not violated. In the words of Radhika Coomaraswamy, 'being sensitive to cultural relativism cannot imply putting hard-won battles on human rights up for grabs'.

⁴⁰ Supra note 38, p.3.

⁴¹ Supra note 38, p.135

⁴² Ambika Satkunanathan, *Tesawalamai: Protection of Community Rights or Discrimination of Women?*, Social Scientists Association, 2004, p. 9.

HUMAN RIGHTS AND HEALTH

*Prof. Ravindra Fernando**

The preamble of the Universal Declaration of Human Rights (UDHR) says that human beings shall enjoy freedom of speech and belief and freedom from fear and want which has been proclaimed as the highest aspiration of the common people.

Three aspects of the right to health have been enshrined in the international instruments on Human Rights. They are the declaration of the right to health as a basic human right, the prescription of standards aimed at meeting the health needs of specific groups of persons, and thirdly the prescription of ways and means for implementing the right to health.

Concerns for Human Rights and Health share the common goals of alleviating suffering and promoting the well being of all people. The celebration of the fifty sixth anniversary of the UDHR is an occasion for Institutions that teach and train professionals and community at large like the CSHR to explore and embrace strong links between Human Rights and Health. Health professionals can explore the connections between Health and Human Rights by examining the UDHR and the declarations, conventions and laws that it helped to generate.

Articles 1 and 2 of the UDHR state that all people are born equal in dignity and rights and these rights are guaranteed to everyone. Yet in medicine and public health, dignity and equal rights may be neglected or unevenly protected.

Since independence, expenditure on health services has been high in Sri Lanka, and as a result, in terms of key health indicators such as life expectancy, infant mortality rate, maternal mortality rate, etc. Sri Lanka stands well above

comparable developing countries and is on par with some developed countries.

However, these achievements are now being threatened by emerging and re-emerging communicable and non-communicable diseases, demographic transition, high malnutrition among children, accidents, poisoning, suicide, drug abuse, lack of a clear health policy of all successive governments, financial constraints and weaknesses in the institutional set up and human resource management.

In recent years, governments have not been providing adequate resources due to budgetary constraints, especially due to the war in the North and the East.

Financial constraints have been central to most of these issues in the health sector. These constraints have resulted in staff shortages in the health sector, lack of essential but expensive drugs and poor investigation facilities. Private Nursing Homes and Channel Consultation Services continue to help the rich but the poor cannot afford them. Therefore, there is inequality in health care.

Respect for human dignity is an essential element of health and well being of all people. In clinical settings, failure to respect dignity has stigmatised people with conditions such as HIV/AIDS and those with disabilities has resulted in denial of access to appropriate treatment or subject to inappropriate clinical investigations, unwarranted long term institutionalisation for example, for mentally ill patients.

A few years ago there was uproar for providing surgical treatment for a HIV/AIDS patient in the National Hospital of Sri Lanka. Some media thought that they should not be treated. Today, health personnel as well as the general public are aware of the rights of HIV/AIDS patients to some extent.

Discrimination against ethnic, religious, racial minorities as well as discrimination on the basis of sex, political opinion, immigration status or sexual orientation potentially

**Department of Forensic Medicine and Toxicology, Faculty of Medicine and Director, CSHR, University of Colombo*

threatens the health and well being of people. Discriminative practices threaten physical and mental health and deny people access to health care, deny people appropriate therapies or relegate them to inferior care.

During the war, the Ministry of Health on the advice of the Ministry of Defence restricted sending certain drugs to the North for example a drug called Ergometrine, which is essential to prevent bleeding after child birth, to the north. It was alleged that the Defence Ministry thought that this drug can be used to prevent bleeding after suffering trauma. This is not so. Therefore, the Health Ministry has to get permission from the Defence Ministry for sending this very important drug Ergometrine to the North and the East.

Extreme forms of discrimination exemplified by apartheid, ethnic cleansing and genocide and the resulting devaluation of human beings have had devastating long-term consequences to public health.

In fact, we see today that the health indicators in the North and the East are quite different, quite inferior to the health indicators in the South.

Internally displaced persons in Sri Lanka have health problems that need special attention. Poor housing conditions, under nutrition and lack of health facilities affect the internally displaced.

In many countries women are denied full participation in society and the protection of basic rights. Women work more than two thirds of the world's working hours according to some studies, yet they earn less than 10% of the world's income and own less than 1% of the world's property. Practices that are harmful to their health such as genital mutilation are carried out in some communities to further social policies or cultural traditions.

Garment factory workers in Sri Lanka, because of poor housing and sanitary facilities and under nutrition, suffer. They do not get proper sleep and long working hours affect their

health. These are our future mothers. Tea plantation worker's health also is a matter of concern. I did a study of the upcountry tea plucking women in late 80s which showed a high prevalence of iron deficiency anaemia, goitres, that is swelling of the neck due to an iodine deficient diet, and a high rate of miscarriages, neo-natal mortality and infant mortality.

Violations of human rights exist in design and implementation of some national health policies. Population policies that fail to respect conditions necessary for individual decision making maybe less effective than those that respect autonomy. In the past few decades, governments and international agencies have increasingly recognised that women must be able to make free and informed choices about reproduction. Yet these choices may be infringed upon in the design of health policies, laws and their implementation. The promotion and protection of rights to education, information, privacy and equal rights in marriage and divorce are necessary, if population policies are to be successful.

In Sri Lanka, restrictive laws on abortion affect the health and social well being of women. A pregnancy resulting from even rape or incest cannot be therapeutically terminated and therefore, they have to seek the help of back street abortionists who perform abortions in unsterile, unhygienic conditions leading to pelvic infections and infertility for life. Sadly, it is unlikely that these 120 year old statutes of the Penal Code will be amended for another 120 years due to religious objections. People seeking health care are often denied the independent judgement of health professionals when the State demands that the professionals show great allegiance to the State than to the needs of the patients.

Prisoners, detainees, immigrants and others are especially vulnerable to the effects of these conflicts of interests. This we have seen in the North and the East when tortured victims were produced before a District Medical Officer who had to give a report favourable to the Police or the Army for their personal safety and for their continued work in that area.

These reports have been questioned by the Supreme Court and some of the doctors have been reported to the Sri Lanka Medical Council for action. Article 5 of the UDHR guarantees freedom from torture yet torture has been documented in more than 100 countries around the world including Sri Lanka. Torture causes acute trauma and long lasting physical or psychological suffering to survivors, their loved ones and the society. Physicians become complicit in torture when they certify individuals as being able to withstand torture, falsify or fail to report evidence of torture in detention facilities. Physicians, psychologists and forensic pathologists have been at the forefront of efforts to document and expose the use of torture in several countries and their work has led to the emergence of treatment and preventive programmes throughout the world.

I am pleased to inform you that forensic pathologists in Sri Lanka who met in Kandy early this month at a Training Seminar on Management of Torture, formed an Organisation called 'Physicians for Human Rights in Sri Lanka' to prevent torture and provide treatment and rehabilitation to torture victims and submit comprehensive medical reports to Courts.

Article 19 of the UDHR guarantees freedom of opinion and expression. Promoting and protecting the right to free expression is fundamental to promoting and protecting health. Nations that suppress independence of the health professions and the voices of medical and public health officials compromise their ability to contain the spread of disease, sustain immunisation programmes, address humanitarian agencies, raise alarms about the environmental threats to health and put into place effective health policy and programmes that reach all members of the affected population. Professional associations such as the Sri Lanka Medical Association and Colleges of Medicine in Sri Lanka have maintained a constant dialogue with the Ministry of Health and therefore, at least in that area the voice of the medical profession has not been suppressed in Sri Lanka.

Article 23 of the UDHR guarantees the right to work and just and favourable conditions to work. Inhuman labour practices compromise the health of people. In some countries men, women and children toil under brutalising, unsanitary and hazardous conditions or work for wages insufficient to support their family's basic needs. In Sri Lanka, domestic labour of children under 14 years is affecting their health. Some children are employed in small-scale industrial concerns and farms.

Article 25 of the UDHR guarantees the right to a standard of living adequate for the health and well being of all people and their families including food, clothing, housing, medical care and necessary social services. One fifth of the world's population lives in absolute poverty. In Sri Lanka also poverty that leads to ill health has been a major problem. Despite various poverty alleviation programmes implemented since Independence, about 7% are poor according to the lower poverty line; i.e. the income of US\$ 1 per day. About 45% are poor according to the high poverty line. i.e. US\$ 2 per day. Poverty in the rural areas accounts for 31.3% of people that is more than 3 times than in the urban areas which is 8.6%. We have to remember that 90% of our population live in rural areas.

Article 26 of the UDHR guarantees the right to education. Although education is one of the strongest predictors of health status and an intrinsic quality of well being, more than 900 million adults world over are illiterate, two thirds of whom are women. Fortunately, Sri Lanka has a high literacy rate but a significant number of children less than 14 years still do not go to school.

The preamble of the Constitution of the World Health Organisation states that the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social conditions.

The International Covenant on Economic, Social and Cultural Rights in Article 12 states that the State Parties to the Covenant recognise the right of everyone to enjoy the highest

attainable standard of physical and mental health.

The Convention on the Rights of the Child in Article 24 says that State Parties recognise the right of the child to the enjoyment of the highest attainable standard of health. The important WHO / UNICEF Declaration adopted at the International Conference on Primary Health Care in 1978 also uses similar language. It says that health, which is a state of complete physical, mental and social well being and not merely the absence of disease and infirmity, is a fundamental human right and the attainment of the highest possible level of health is the most important social goal whose realisation requires the action of many other social and economic sectors in addition to the health sector.

The goal of the Conference in 1978 was to have 'Health for all' by the year 2000. However many countries including us did not achieve that goal.

Health and Human Rights are inexplicably linked in a complex symbiotic web. Just as violation of Human Rights can have serious consequences on the individuals or groups, so do health policies of a Government that can violate Human Rights. Similarly, action taken to protect or promote Human Rights can reduce vulnerability and the impact of ill health in a population.

Recognising health as a Human Right promotes not just good health but the recognition of all rights intrinsic to the integrity and dignity of all humans. Locating health in a Human Rights context allows us to identify key health issues within the international and domestic human rights instruments which I just mentioned.

To remind again, they are freedom from torture, freedom from violence, protection from harmful traditional practices, right to participation, right to information, right to privacy, right to benefits from scientific progress, right to education, right to food and nutrition, right to adequate standard of living and right to social security.

The right to health does not mean the right to be healthy; nor does it mean that poor governments must put in place expensive health services for which they have no resources. But it does require governments and public authorities to put in place policies and action plans which lead to available and accessible health care for all in the shortest possible time. To ensure that this happens is a challenge facing both the Human Rights Community and Public Health Professionals.

HUMAN RIGHTS AND CONFLICT RESOLUTION

*Dr. Kumar Rupesinghe**

I would like to share with you my own reflections of a 25 year old journey in Conflict Resolution and Human Rights both in the International Peace Research Institute, the Human Rights Information Documentation Systems Forum for Early Warning, Early Action, International Alert and now the Foundation for Co-existence. Right throughout my career, particularly in relation to Sri Lanka, the issue of Human Rights and Conflict Resolution were the subjects which were of great interest to me. As Secretary General of Internal Alert, I had the opportunity of witnessing more than thirteen deadly conflicts and working in these conflict situations to see how one could try to resolve or mitigate these conflicts. Generally I think we have several great movements which we have inherited. The Human Rights movement is one which has over the century developed a substantive set of rights which have held governments accountable. They refer to individual rights, political killings, torture, detention, disappearances and a large number of such rights and I think the significant point is that governments are held accountable to the people and that they have a State obligation to respect Human Rights, protocols, etcetera.

There has also been a great movement for self determination called the Self Determination Rights from the 19th century up to now. People have decided that they seek through their identities as minorities or as nations, the right to self determination. Either a right to their freedom of expression or the right to a particular area or a territory which they would like to govern or self govern. All these are relevant to Sri Lanka. So the great movement is the International Humanitarian Law, a movement which arose in the 19th century and

* *Executive Director, Foundation for Coexistence, Sri Lanka*

which addressed the suffering of human beings in conditions of war.

Was it possible to discipline war? Was it possible to restrict warfare to the combatants? Was it possible to save the lives of innocent citizens? A large number of protocols were developed about a number of violations, hostage taking, killings, arbitrary detentions and a large number of issues were taken up today by the International Committee of the Red Cross. So we have Amnesty International and a large number of agencies for Human Rights movements and also a large number of agencies who are monitoring the law of war.

The third great movement which I want to focus on is the Peace Movement which again emerged in the 19th century. This century has been trying to focus and work on how to prevent war. If you take United Nations preamble as well as the European Union, it says a nation free of war. There has been a movement out of which the conflict resolution and mediation movements have evolved, basically the movement for arbitration, negotiation and conflict resolution.

It is only recently, 10 or 15 years ago, that the issue of internal arms conflict came up as a matter of discussion. Particularly after the cold war, we witnessed about 32 armed conflicts. Armed conflict defined as a casualty rate of more than 1000 per year. If you go deeper into the statistics we can see that there are about 50 potential civil wars just coming up on the horizon. So we are going to be left with a large number of internal civil wars in the next century. The question is how we address them? There are very few protocols, mechanisms available within the international community for the resolution of internal armed conflicts. Particularly in an age and era where sovereignty and the right and the non interference in the internal affairs of the State, it has become a situation where civil wars can continue over a long period of time without any outside arbitration whether it is in Burundi or Rwanda you can take a large number of cases, the international community does not have the instruments, for example, to intervene until it is invited. So in this situation

what happens? The conflict resolution school is based on the foundation of Human Rights. However, its method and practice differs. It believes primarily in the constructive engagement with both parties. It believes that it is possible particularly in armed conflicts of an internal character that discretionary informal procedures are developed for conflict resolution and transformation. Further mediation in conflict situations imposes certain risks and difficulties, partly because parties who work within conflict situations need to have access to the two parties. This means that one has to have legitimacy and credibility with both sides and that is not easy.

The current discussions about Norway shows very clearly that again perceptions built up even about the credibility of a mediator. The credibility and legitimacy of the facilitator is crucial in particularly internal armed conflicts where the United Nations or another supra body are involved in the conflict. Secondly working in a conflict area also means that you may have to gain access to the parties. A humanitarian agency's experience is continuously to provide part of the relief to the combatants, the whole way in which the question of access has to be devised. So it is in this sense that constructive engagement is seen as a way in which informal engagements happen to transform and develop a sense for Human Rights.

As you all know, Sri Lanka has experienced what I would call a deadly conflict where the numbers of casualties on both sides have not only exceeded a certain amount but that the conflict is dealt by armed large scale armaments by both sides. The first point then is how did this civil war come about? This is due to the denial of the right to self determination. That means the successive governments since 1948 have ignored or denied the rights of minorities in the country to express political participation in the political systems and power sharing mechanisms within politics. This is a fundamental issue for a civil war in this country. We knew what they are, the denial of citizenship rights for the Tamil Plantation workers immediately after Independence, the denial of a fundamental

right of a person's language, the Tamil language and the way in which that whole project was developed was as Mr. J. R. Jayewardene said in Parliament, one of the major factors for the civil war and he said that in a parliamentary debate when discussing the Language Bill at that time that this would lead to a potential civil war.

The second aspect is the use of State terror to resolve minority conflicts and self determination conflicts. Wherever state repression has been used to repress identity conflicts and to suppress these conflicts it had led to a major military confrontation. This is because unlike in the eighteenth and nineteenth century, small groups have access to lethal weapons in the open market. There are various ways in which small guerrilla groups may use that repression to develop their own political momentum. So the use of State terror, particularly during the period of 1978 up to 1983 by President J.R. Jayewardene, in fact laid the basis for a military reaction from the Tamil side which led to a militant guerrilla movement.

The third element is the emergence of a militant movement and particularly the emergence of counter terror. In a situation of State terrorism, militant movements all over the world are beginning and are using lethal means of terror of which the suicide bomber has become the classic instrument or weapon of the poor and oppressed. Not only in Sri Lanka, in Palestine, now in Iraq the suicide bomb has been used with lethal effect. The indiscriminate attack on civilians is another issue in Sri Lanka, particularly the bombing in the cities; aerial bombing of the North, all of this has scant respect of civilian lives. The current situation is the Ceasefire Agreement which is based on the recognition that the two sides have military parity. It is based on the acceptance by both sides that they cannot win the war militarily. Both sides accept that they require a third party from outside to mediate in their conflict. Every effort nationally, either by President Premadasa or anybody else to mediate this conflict through internal means has failed. Every time there has been a failure in negotiations, it has seen a massive escalation

of violence. In this situation the Ceasefire Agreement is based on the military balance of power. Any effort by either side to upset this military balance of power will again become a problem as we see now in the Ceasefire Agreement. Some of the violations of the Ceasefire Agreement have been pointed at large number of political killings which are unacceptable, fratricidal killings between Tamils is also the element where the Tamil constituency is engaged in a continuous blood letting amongst themselves which is a major issue that we have to confront.

The third issue is the question of child recruitment but others we have not pointed out so clearly, that is the use of auxiliary forces by the government. In the situation in Batticaloa of which I am very conversant with, the use of paramilitary and auxiliary forces is another issue. The continued denial of collective rights of the people, particularly the right of return of the Tamil refugees and the Muslims who are now in refugee Camps in Puttalam. For 14 years, over 150,000 Muslim refugees have been in Puttalam waiting to return. The violation was committed by the LTTE when they asked the Muslim population of the North to leave Jaffna within 24 hours, that right to return has still not been addressed by the State or by LTTE. Another area of course is the inability of the two parties to engage in anything except the high table. The entire focus of attention today is when will the talks begin? It is in fact a national pastime about the high table but nobody is focusing very much on the small tables. There are many areas, which can be addressed either by the Civil Society or the Institutions too, if you cannot reframe and transform relationships between people who have been torn aside by the war. Trust building, none of this is being addressed by either of the parties.

So what do we do under conditions of stalemate? When there is a situation of no war no peace, and when it is likely to become a frozen conflict where either side is unable to move forward. So finally, it is in this sense that I would argue that we have to take up the issue of small tables. Take up the question of political killings, let us look at the experience

of Guatemala and some other countries. How some of these most complex Human Rights issue were addressed discreetly and informally. So there was a parallel track to the main track where organisations were addressing the issue of political killings. Let us take the question of ethnic fratricide. Who is going to address that issue of reconciliation between these groups? Who can address that issue constructively? Listen to all the sides whether it is EPDP, Karuna, LTTE, to see whether some form of reconciliation could happen discreetly.

Thirdly, Child Recruitment. How can this problem be addressed in a situation where there is a preparation for another war? When one side is arguing quite wrongly that they require replenishing their forces for war preparation, how do you address that issue in a Human Rights dimension?

The fourth question is how do we address Collective Rights of the people? Take the question of Linguistic Rights, even today the use of the Tamil national language is not implemented. There are 15 policemen in the whole of the North East who can speak in Tamil. Therefore Tamil citizens cannot go and make their complaints to a Police Officer in the North East. Even in Badulla and some of the plantation areas the people cannot express and do their business in their own language. Therefore the State has a responsibility for addressing the Collective Rights of the people.

HUMAN RIGHTS AND PEACE

Dr. P. Saravanamuttu

Human Rights are a vital, pivotal aspect of the Peace Process. The first point that needs to be made with regards to this topic is that public support and legitimacy for any kind of peace process is absolutely essential and vital. In terms of being able to galvanise and sustain that public support and legitimacy over a period of time to underpin the efforts towards the Peace Agreement, a Peace Agreement and its implementation, one needs to have due consideration taken of the Human Rights dimensions of the conflict and indeed of the peace. This is why in other areas of conflicts and in peace making one has either striven to integrate the human rights dimensions into peace agreements or alternatively entered into separate human rights agreements to accompany the agreements dealing with the more political aspects of conflict resolution and transformation.

In the Sri Lankan context, I am sure you will agree with me, we are now in a situation best characterised as a 'no war - no peace' situation. We have one agreement - the Ceasefire Agreement, it has a clause which pertains directly to human rights issues. However, there nevertheless has been, gross violations of human rights since the signing of the Ceasefire Agreement. The Sri Lanka monitoring mission which is entrusted to monitoring all aspects of the Ceasefire agreement can only name and shame as far as violations are concerned. They do not have any kind of punitive power as such, their very presence may serve as a deterrent but I think if the record is anything to speak of that certainly has not been the case. So there is therefore, in the Sri Lankan context, a tremendously important crucial vital challenge to address, and that is how the human rights regime, the human rights situation on the ground is improved, strengthened and consolidated because this is

* *Executive Director, Centre for Policy Alternatives, Sri Lanka*

integral, pivotal to a lasting just durable democratic peace.

Now in the debate in the conversation with regard to human rights and peace there have been a number of perspectives which have been around. I may well be simplifying somewhat but I could do that only in order to clarify what these perspectives may well be. I do remember that at the time that we were moving towards some sort of peace agreement be it, or some sort of ceasefire agreement the issue of human rights was considered as been far too controversial.

The argument at that point was that by pushing human rights to the forefront of the agenda one might actually lose out on the possibility of a ceasefire. The argument was that it was too soon to highlight these concerns. But human rights in that respect was so controversial as an issue that one needed to deal with it at a later point when trust and confidence had been built up between the two main protagonists, i.e. the government of Sri Lanka and the LTTE. However, I think as the ceasefire period progressed there was recognition and realisation that something really had to be done with regard to the continuing human rights violations. As a consequence of a fair amount of civil society pressure, lobbying, persuasion, the government and the LTTE agreed to accept a Human Rights Advisor to the Peace Process who is Mr. Ian Martin, former Amnesty International Secretary General. Mr. Martin was charged with the responsibility of coming up with a human rights road map which he presented at one of the rounds of talks between the Government of Sri Lanka and LTTE. They did not accept or take on board with a commitment to implement in full the entirety of this particular road map, but there were some things that came out of it which they agreed upon. One of which was the agreement to move towards the action plan between UNICEF and TRO with regard to children in LTTE areas helped by the LTTE. There is also a commitment to build up capacity in the North and East with regard to human rights monitoring. As a consequence now a LTTE Human Rights Secretariat has

been set up in Killinochchi. So there has been some progress but I think it's awfully inadequate. The argument that I wanted to highlight was an attitude that began by saying that human rights were far too controversial and that if one actually mortgaged the negotiating process to an emphasis on human rights the whole process would be paralysed. Having adopted that kind of perspective, nevertheless, there was a recognition that something more needed to be done.

In addition to that, there is another kind of dichotomy with regard to human rights. There are those who believe very strongly that it is the bottom line below which one cannot go. The sanctity of human life, the importance of human rights in terms of International Covenants, protocols, etcetera. Also pertaining to situations of armed conflicts are an absolutely bare minimum which cannot be transgressed and therefore, there should be no fudging the issue as far as Human Rights are concerned. Moreover the argument is also that one should take human rights, use it as a benchmark or even indeed as the condition for interaction, for assistance, for participation with protagonists in the peace process, that they should be served notice that their record on human rights is going to be taken into account when considering interaction with them. So that is a strong and hard attitude with regard to how human rights need to be factored into the process.

The other attitude is that of constructive engagement of transformation, an argument that says that using human rights as a benchmark, as a condition, etcetera, is only going to raise the hackles of one or the other side that Human Rights is being used as a weapon against them. Therefore, they are going to say that they don't want to come into interaction for insults or allegations to be hurled at them hence they don't want to discuss this but go away. That argument is very much like the first one that I said where the argument was so controversial etcetera that one needs to first build up trust and confidence before one can confront it fully. So that there is, one that can argue that no constructive engagement and transformation.

Human Rights needs to be looked at in a very holistic perspective.

The public imagination with regard to human rights is very much cut true by political assassination, child recruitment, etc. but the argument here is that human rights is much broader. Human Rights also involves socio-economic circumstances in which people are living, human needs in terms of shelter, food, right to education, all of those things need to be taken into account, a more holistic perspective needs to be adopted with regard to them.

So the argument is therefore that one needs to look also at the causes for violations with regard to human rights, the structural weaknesses within the existing system that leads to human rights abuses so that is another way of approaching the whole question of Human Rights. Interestingly enough, whichever approach is taken, there seems to be in fact the social indicator, the polling unit of the Centre for Policy Alternatives only yesterday released its second knowledge attitudes perceptions in that survey of peoples attitudes, etc., with regard to the peace process.

One of the things that clearly comes across overwhelmingly is that all Sri Lankans cutting across age groups, gender, ethnicity, religion, party affiliation, say that there must be independent monitoring of Human Rights and protection of Human Rights in the context of the Peace Process. So there seems to be very much a national consensus to the extent that one could talk about a national consensus on the importance of this issue but it has to be seen in constructive terms and not in destructive terms. The approach to Human Rights is not about solving individual consciences of saying "I stood up against political assassinations" or "I condemned this or that", the approach to Human Rights must be one that has as its objectives, the improvement and the establishment of institutionalisation and a sound and lasting human rights regime both in the South of this country as well as in the North and East of this country.

The Centre for the Study of Human Rights (CSHR) is a University based organization located in the Faculty of Law, University of Colombo. Its mandate is education and research in human rights. The CSHR enjoys its status within the University system, while maintaining considerable autonomy. The Centre is exclusively funded by foreign donors.

For the past twelve years, the CSHR has been a major player in building up a human rights culture in Sri Lanka. It has been responsible for the successful introduction of Human Rights Education to various social and professional groups in the country at different levels, expanding its reach geographically. While continuing its work in the conflict free areas of Sri Lanka, it gradually strengthened its network in the conflict-affected areas as well.

The CSHR's programmes cater to the following groups:

- Primary and Secondary school children
- University Students
- Pre-Service and In-Service teachers
- Community groups
- Army, Navy and Air Force
- Police
- Plantation sector
- Prisoners and prison staff
- Differently-abled persons
- Various professional groups; i.e., doctors, lawyers
- Local government officers at various levels

The CSHR continues to believe in the primary goal of Human Rights Education being an essential component to build a 'culture of Human Rights' throughout society - a culture that embodies peace, respect for diversity, and economic and social justice. This goal is pursued through the content and methods employed in its educational programmes. This view places importance not only on the content of the programmes, but also on ways education seeks to build up attitudes and behaviour patterns that are reflections of a culture of Human Rights.

The CSHR seeks to provide its target groups with not only an understanding of their rights, but also the rights of all peoples, their duties,

obligations and violations of rights. CSHR aims to educate and sensitize persons to their rights and obligations; to research and add to the sum total of knowledge in Human rights; to gather and disseminate information for the use of those who are students or activists in the field of human rights. University students, principally those in the Faculty of Law, University of Colombo, study the subject of Human Rights in-depth and offer it as a subject for the Bachelor of Laws degree. The CSHR's Information Unit is of immense benefit to these students.

The CSHR staff has expanded to 20 in number, reflecting a mix of ages, gender, academic disciplines, special skills and abilities. The team combines its strength to promote and achieve project goals. The Board of Management, comprising senior university academics and eminent Human Rights activists, guides the CSHR in realizing its long-term objectives. The Director, who is a senior academic in the University, monitors and supervises the activities of the CSHR on a part-time basis, while the appointment of a Deputy Director has been an added advantage to the Centre.

The recent evaluation of the CSHR conducted last year, enabled the Centre to have a critical look at itself, identify its strengths and weaknesses and restructure accordingly to plan for the future. Now with renewed identity as a University Centre which plays a significant role in Human Rights Education in the country, it has justified its need for a long-term existence.

The CSHR continues to be recognized as an important institution in the field of Human Rights nationwide, and to a lesser degree, internationally. It has rendered excellent service, met expectations and increased its effectiveness and influence. It moves with renewed confidence with identified and recognized strengths, along the newly planned paths, towards a Human Rights culture of which the foundation stone has already been laid.