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THE EXPANSION OF THE HUMAN RIGHTS AGENDA IN SRI LANKA

INDIVIDUAL & GROUP POLITICAL RIGHTS IN SRI LANKA'S PEACE, & THE PEACE PROCESS

SRI LANKA'S ETHNIC CONFLICT: INDIVIDUAL & COLLECTIVE RIGHTS

DOMESTIC VIOLENCE

EXPANDING THE HUMAN RIGHTS AGENDA IN SRI LANKA WITH REGARD TO ECONOMIC & SOCIAL RIGHTS

THE IMPACT OF THE POST TSUNAMI MECHANISMS ON MINORITY GROUPS

Centre for the Study of Human Rights
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INTRODUCTION

Welcome to the second edition of the first volume of the CSHR Journal of Human Rights. Following the success of the introductory volume launched in December 2005, this edition too 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 2005. The papers are the result of presentations made at this programme, on the Expansion of the Human Rights Agenda in Sri Lanka. They highlight the important current and relevant aspects of Human Rights, broadly under the areas of Individual Group and Political Rights, Gender Concerns, Economic and Social Cultural Rights and Human Rights issues pertaining to those affected by the tsunami.

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
October 2006

TABLE OF CONTENTS

THE EXPANSION OF THE HUMAN RIGHTS AGENDA IN SRI LANKA

Justice Shiranee Tilakawardane[*]

It is important for all of us who are gathered here to speak a common language. The commonality, with which we are all bound together today, is the quest for justice. Now all of us are united, we have a passion to see that Sri Lanka can be on the global map, as a country which has a great sense of justice, whether it is in the society or whether it is within the courts of law. Now another language of more recent vintage is the language of Human Rights. This is the common denominator which has fostered a dialogue, there is a common language that we talk, and that is the language we are going to speak here today. To me, this is the most precious language, the language that is a key to understanding, and that is the language of Human Rights.

Since the second world war, there has been a global emphasis on Human Rights and that is because of the atrocities that were committed at the time. It was thought that with regard to the crimes committed against the Jewish people, that there would never again be any such terrible killings of innocent people. Then we had Kosovo, Bosnia, Rwanda, and Kigali where these crimes are recurring. Even in Sri Lanka in 1983, Human Rights were totally disregarded. There are numerous links between national Human Rights guarantees and international documents, and such links are reflected in the similar language, the organization and principles of many Human Rights guarantees. If you see that language and the wordings of the preamble the ideals are the protection of people. There is a commonality.

Chief Justice Bhagwati of India, who I greatly admire spoke of the Judiciary, and said that the judiciary is not an un-chartered sea in this exercise of judicial interpretation. Law making, as the constitutional values and international Human Rights instruments, serves as a beacon of light. Human Rights are a beacon of light, a lodestar to guide and provide direction to the judges and these documents represent the will of the people and the aspirations of the world community. In participating in such a wide dialogue and through the decisions that we make, today there is what is termed as human globalization. The Tsunami created a discussion of international aid. Today, barriers are being crossed by the language of Human Rights. Human Rights is a language that crosses national borders, without geographical limitations and in that way, thousands of people who are being affected cry out for their Human Rights to be cherished. On the other hand, there are people who are fighting, and we are a part of that army that is fighting for rights of people for Human Rights to be upward.

There is another thing that is coming into play. That is the explosion and the advent of the computer age, coupled with other such issues, which the world is talking about today. The serious consideration of the death penalty is a matter of concern for those of us who are working on Human Rights. We know that the death penalty has never in the long term caused any difference to the crime in a country. In order to reduce crime in this country we need to focus on swift detection, excellent investigation, no delays in the courts, prompt conviction and maximum sentences that are fairly high, which are not litigated and which are carried out so that the crime follows the sentence. These are things that are important for us to realise, these are the deep issues. The death sentence has been introduced and re-introduced in many countries throughout the world but with it have come other changes. With it has come the taking away of the backlog of cases,

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advanced investigation methods, forensic medicine. These have led to a greater conviction.

There is also another problem; our investigations have revealed that there could be a tendency for police forces to introduce evidence. Sometimes people who are not guilty of an offence are known to have been convicted of those offences. This occurs predominantly in third world countries. A study in America revealed that millions of people are in jail, and the findings revealed that most of these people are poor and coloured. So does justice really happen or is it that the law is applicable only against the poor the unprotected and the underprivileged? So these are the social dynamic forces, which we have to think about without merely adding our voices to the issue of the death penalty.

Now with the adoption of the Universal Declaration of Human Rights, many nations of the world at that time which had multi nationality, multi ethnicity, cultural diversity and stratification, agreed on a set of principles that all human beings should live by. Sometimes when we study the law we lose sight of what the law is. The law is a very simple practical thing; it does not require a section of the Penal Code as amended by different law numbers, etc. It is a very simple code for living. What is said is that Human Rights are considered to be fundamental to all human beings by the sole fact that they are human beings. So it would not matter if this police officer is old, it would not matter if those students are very young, it would not matter if there are very elderly people who perhaps are physically disabled, it does not matter if you are a ch.'d or a woman or a person of a minority race or a person of some different disability, because you are born a human being you are guaranteed rights, and these guarantees all relate to the human dignity of men and women. Is it not true that if we lose our dignity we sometimes are very upset as when someone speaks badly to us? It is about human dignity. Human Rights are after all literally the rights one has, simply because one is human. But this deceptively simple idea has profound social and political consequences.

Women in remote villages have little knowledge that they have rights. They are less aware of the laws pertaining to rape. When they are advised not to wash themselves after being raped, because it destroys evidence, they are unaware of this fact. The first act they perform after an act of rape on them or their children is to bathe them. Human Rights is not the language of people in the legal echelons of power, but it is the language of the poor.

It is important to involve Deputy Inspector Generals of the Police in such programmes relating to Human Rights. Deputy Inspector Generals wield a lot of power and they can control those police officers who are harassing these people.

Therefore, the recognition of Human Rights is the recognition of the inherent dignity of all people. The term dignity has come to signify an idea of a legal right today possessed by all persons entitled to be secure in their personhood and recognized as such by all governments. Can we individually exercise these rights? We have to depend on governments to protect us. Who are the governments really? The governments include the people who hold power, the universities who talk about it, who dialogue about it, who build ideology, who could decide without fear or favour.

Dignity is an effort to identify something about the relationship between the State and the individuals or groups that entails respect for humans. It is not only for one to be free from material injury by the State, but also to be free from harm through lack of respect and therefore, not to be subjected to indignities by the State.

Dignity, is also used to describe humans' capacity to make decisions about their own lives. Is it not it wonderful that we can make decisions about our life, except those who are subject to unnecessary pleasures, unnecessary interferences from those who are after all elected leaders? We hope that eventually the people will stand up and seek what is right. The 'people' is not some unknown person sitting in an armchair, the 'people' is not some president or government or politician. The people are you. You, I, we are the 'people'. Every incident of disrespect we see to, every incident of unfairness, discrimination we see; our silence is what nails the coffin. It is silence, that is why I hope that as Human Rights activists we will know that the first thing one has to do is to break the silence, to speak out however softly. Sometimes one may have to shout it from the top of platforms, sometimes gently say it down in those little hills, in little valleys, say it gently, say it softly but never give in to the enormous forces that are around us.

Men, women and children are to be treated with the same respect and consideration, independently of the circumstances of their birth and personal characteristics and beliefs. So when one gives money to a beggar, remember that he / she is also a human being, and that therefore it is important to smile. Human dignity is the lens through which all those fundamental rights take life. They become a life through the lens of Human Rights. The promotion and protection of human dignity is the core of society, which is just and human. Human dignity implies justice, but something more than justice, justice with compassion. It is not about fees of lawyers, it is not about positions of power. It is about compassion, compassion for my brothers and sisters on this earth, whether that brother and sister is a labourer or whoever it maybe. We have to approach justice, and I implore you all, wherever you work, however your circumstances are, especially young people, we have to approach this justice, which we all want in our country, by trying to feel the sense of pain of those who are the victims of discrimination and disadvantage. As much as we should, we ought to have a feeling for injustice, if we want to effectively pursue justice based Human Rights. Therefore, we must aspire to a society where no one is left behind, in which equality is not only an ideal and a constitutional norm, but a reality in which we extend a hand to those who are disadvantaged and discriminated, in which we build bridges rather than erect walls in the pursuit of justice of all, in a multi cultural society. Nobody should be relegated to the margins of society. It is a question of human dignity coming from human understanding, and if we do not have that, we are somewhere less than a human ourselves. We, therefore, need a culture of respect in place of a culture of contempt, a culture of Human Rights in place of a culture of hate. By the mobilization of the constituency of conscience, the tragedies that have come to define our time can be stopped and prevented if we really believe in the dignity of men, women and children. This is something so relevant to those of us who are in the armed forces, and I hope the police, the army and navy, because you know that the putting on of a uniform sometimes really seems to put one into some area, penumbra, which has no obligations but only has power. But the greatest thing about power is how you use that power. There can be no peace in this country without justice, no freedom without Human Rights, no sustainable development, which affects yours and my salaries without the rule of law. Crucial to the law, is recognition and appreciation of the reality of our differences while accommodating these differences, which is the essence of true equality, inequality is the negation of human dignity and it is injustice.

If you and I carried the torch of Human Rights, we will really mean what we say. Today, we will probably have to give up something so that this country will be a better country. We see leaders and I hear this every day, when one switches on the radio, some

political leader is talking about war or peace. War and peace are not events, the transition from war to peace is a hazardous journey fraught with many barriers and we can even begin to embark on that journey only if we have what is called transitional justice. Because only with transitional justice that we can re-define what economics, what equities, what good governance is in the light of this journey that we are undertaking from war to peace. If we are going to do that, the core of transitional justice is Human Rights, and I hope that this simple idea will be understood by all of us; by all those in power, so that we will realize that it is a metamorphosis of ourselves and our systems that ultimately will bring us from war to peace; and peace is justice, justice equality, and equality can only be taken and reached, if the Human Rights is a core determining factor.

INFORMATION

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INDIVIDUAL AND GROUP POLITICAL RIGHTS IN SRI LANKA'S PEACE, AND THE PEACE PROCESS

Professor Jayadeva Uyangoda[♦]

When should the question of Human Rights be addressed in a Peace Process which is meant to facilitate a peace settlement between the State and a counter state actor in a possible transition from civil law to peace? What type of Human Rights should take precedence over others? Should there be a hierarchy of rights at all that will have an order of priority in a Peace Process? These are some of the questions that emerged in Sri Lanka's now stalled Peace Process that began in early 2002. These are questions that have not been adequately explored in Sri Lanka's academic or political debates on the recent Peace Process. I believe that an exploration is necessary to advance the interest of Sri Lanka's Peace Process and particularly the interest of peace, democracy and conflict transformation. When Sri Lanka's Peace Process of early 2002 began, there was a concern expressed by Human Rights activists that the Ceasefire Agreement signed in February 2002 did not have an adequate Human Rights safeguard framework, particularly in relation to the behaviour of the LTTE. There was also initial concern that Human Rights were not in the negotiation agenda. Some critics of the 2002 Peace Process even suggested that in the absence of a strong Human Rights framework, a possible settlement agreement between the Government and the LTTE might result in what has been called a totalitarian peace devoid of Human Rights, pluralism and democracy in Sri Lanka's Northern and Eastern Provinces. Reports of LTTE's continuous recruitment into its military cadre, of under aged children, was one of the major Human Rights concerns taken up by LTTE critics as well as those who were sceptical about the 2002 Peace Process.

The alleged attacks by LTTE cadres on Muslims in the Eastern Province also led to a Human Rights concern in areas where the LTTE could establish its administrative and military presence. The theme of Human Rights eventually entered the negotiation agenda. This was due to two major reasons. Firstly, the pressure from the Sri Lankan Human Rights bodies on the Norwegian facilitators to include Human Rights in the Agenda was too intense to ignore. Secondly the liberal Peace Agenda that the international community pursued in Sri Lanka had Human Rights and democracy among its key concerns. On the question of Human Rights however, there was a fundamental disagreement between the LTTE and all the others involved in Sri Lanka's Peace Process. It was about the perennial question of Civil and Political Rights versus Group Rights. Interestingly, these differences did not lead to a major controversy during the negotiation process.

There was an agreement to request an external independent consultant to assist the negotiating parties to propose, what was called at the time a 'Road Map' for Human Rights. Ian Martin, the former Secretary General of Amnesty International, was soon asked to work out this road map for Human Rights. Ian Martin came to Sri Lanka in mid 2002, met the Government and the LTTE, as well as Civil Society representatives in Colombo. The Civil Society groups, whom Ian Martin met on this issue, emphasized primarily and essentially matters relating to civil and political rights under the Ceasefire Agreement as well as under the future settlement agreement. Only a few individuals

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raised the question of group rights. At the sixth round of negotiations held in Hakone, in Japan, there emerged an agreement to ask Mr. Ian Martin to prepare a Human Rights Road Map focusing on three areas, they were:-

1 Drafting of a Declaration on Human Rights and Humanitarian Principles,
2 A Human Rights program for LTTE cadres as well as Government officials,
3 For personnel - for the strengthening of the Human Rights Commission to enable it to monitor Human Rights, throughout the country.

The Hakone talks took place from 18-21 March 2003. Since the LTTE boycotted the subject of negotiations, because there was a complex story, there was no further aspiration into the Human Rights issue or Ian Martin's proposals.

In the absence of negotiations, the Human Rights issue took a greater relevance, when in early 2004, the LTTE split and the Eastern Commander led a revolt. The split led to a new spiral of violence, killings, counter killings and ultimately what we now know as a shadow war between the LTTE on the one hand, the Karuna faction and anti LTTE paramilitary on the other. In this context, the question of Human Rights has become one of the major spheres of the LTTE's political vulnerability, as well as its claim to political legitimacy. Human Rights have been an extremely important theme in Sri Lanka's political debate during the past two decades. Particularly in relation to the ethnic conflict issues, Human Rights have been a part of what one may call political struggles. Therefore, they were never neutral, neither were they purely legal concerns. The Tamil nationalists justified their arms struggle on the grounds that the Sri Lankan State had denied Human Rights for the Tamil people. The international community blamed the Sri Lankan State in the 1980s and early 1990s for its repeated denial of what was called minority rights. Many Human Rights groups in Sri Lanka exposed the Sri Lankan State's Human Rights violations by documenting them and by lobbying before the international forum. Some Sinhalese Nationalist groups in turn accused the Human Rights groups in Colombo of being pro-Tamil and anti-State. In the mid 90's onwards, Human Rights became an aspect of the aid conditionality that the donor community imposed on the Sri Lankan government. Commitment to the improvement of Human Rights was a condition that the Sri Lankan Government had to prove by both word and deed at the Annual Review of the International Aid Policy to Sri Lanka. Thus, issues of Human Rights have been a policy tool as well as a political instrument. Its most pernicious outcome was the use of Human Rights in the political demonization of respective parties to the ethnic conflict. In the political debate in the recent past the Sri Lankan Government as well as the LTTE has used the issue of Human Rights as a political weapon to internationally demonize each other.

For example, in this campaign to secure an international ban on the LTTE, the Sri Lankan Government used the Human Rights issue as an effective propaganda and political weapon similar to the way in which the LTTE had previously used the Human Rights violation of the Government, as a weapon to discredit the Sri Lankan State internationally. Then in 2002 and after, political groups hostile to the LTTE have been using the violation of Human Rights to discredit the LTTE's commitment to peace. This background makes it necessary for us, who are interested in exploring the rift between Human Rights and peace to relocate and to re-conceptualize the issues of Human Rights outside the party stand and divisive political and ideological debate. In other words, we need to re-politicize the question of Human Rights in the Peace Process.

When the question of group rights was raised in the political debate on the Peace Process of 2002, the LTTE was initially reluctant to

include Human Rights in the negotiation agenda. There were many reasons for this reluctance. But there was an interesting argument put forward by the LTTE to justify their claim, an argument that the liberal Human Rights community dismissed as untenable. The LTTE took up the position that national rights of the Tamil people should take precedence over individual rights of Tamil citizens there. This is indeed a position that emanates from our specific theoretical understanding of rights shared by both Marxists and Nationalists. It accords priority to group rights over individual, civil and political rights, particularly in the sphere of what they call the 'ongoing struggle.' They usually believe that civil and political rights in the absence of group rights would weaken both the movement and the struggle. The struggle phase, as this argument goes, does not provide the best timing to adhere to a régime of individual, civil and political rights. +According to this argument, the time comes once the political goals are achieved.

Another way of framing the ethno-nationalist argument concerning Human Rights, is that the self-determination rights in the sense of internal self rule, should take precedence over civil and political rights. It needs to be noted that in Sri Lanka's debate during the Peace Process, there has not been adequate response to this particular argument which was explicitly present in the LTTE's position. I believe that the dismissal of the ethno-nationalist argument for the priority of self-determination rights is not the correct way to strengthen Human Rights in the Peace Process. The liberal legalistic argument for the primacy of civil and political rights during the negotiation process, is as Sri Lanka's own experience demonstrates, grossly inadequate to deal with the LTTE's argument for self rule as self determination. The Human Rights community needs to reframe its argument for Human Rights in order to create discursive conditions to educate, linking the Peace Process with Human Rights. Why is it that the liberal Human Rights approach to peace and Human Rights in Sri Lanka has been ineffective? One major reason is that it has generated political resistance, because it was a part of the political reform package that was seen as being imposed from outside and from above. Nationalists, whether they are Tamil or Sinhalese, whether LTTE, JVP or JHU are not always ready to accept externally imposed conditions of civility and civilization. As much as the Sinhalese Nationalists were hostile to a peace settlement which they saw as being imposed by external forces, the Tamil Nationalists engaged in the Peace Process of 2002 were obviously reluctant to accept externally imposed conditions of peace unless they themselves could reframe those conditions in their own terms. My argument is that both the international community that pushed for a particular peace agenda in Sri Lanka, and the liberal Human Rights community which had not developed an approach that could present the civil and political rights argument in the discourse that could accommodate or at least constructively respond to the self determination claim for the LTTE. This in a way supports the limits of both the global liberal agenda for peace, as well as the political programme for peace shared by many liberal Human Rights groups in Sri Lanka or in Colombo.

Now, this backdrop makes it necessary to develop a critique of the liberal peace agenda, democracy and Human Rights, as well as a critique of the LTTE's agenda for peace, democracy and Human Rights. In developing this critique, we must not lose sight of the fact that the idea of peace. has been and will continue to be the thoroughly contested concept in Sri Lanka. There has been a process of what one may call instrumentalisation of peace, the use of the idea of peace, for competing political goals and agendas. The politics of peace is that it produces it on gains and losses. To many in Sri Lanka peace is a still a zero sum process. It has not yet produced a sustainable win-win framework. This provides an enduring background for instrumentalising peace. To

escape from the danger of falling back to the instrumentalisation of peace, we need to recognize that peace in the context of civil war in Sri Lanka, can best be a historical condition that cannot be imposed from above. Human Rights and democracy need to be seen as conditions that can develop under conditions of transition from civil war to a historical context of post civil war. The transition from civil war to post civil war perhaps requires a protracted period of no war. It may well be a phase of incomplete, imperfect and even illiberal peace. How can this political risk of imperfect or illiberal peace be addressed? In answering the above question, it is crucial to recognize that with the LTTE on one side and the Sri Lankan State on the other side, and of course with the international community and liberal Human Rights groups having competing approaches, an early resolution of this fundamental difference is not just possible; it requires what some revisionist liberal political theories which have recently been called 'dialogic engagement' between the national self determination approach to Human Rights and democracy, and the liberal State approach to Human Rights and democracy. It should be a genuine dialogue across differences in a framework of pluralistic solidarity. However, the Peace Process in 2002 did not provide conditions for such an engagement, because the previous peace processes mostly were based on two limited premises. The first is that a political settlement was to be an outcome of a brief engagement between the Sri Lankan State and the LTTE. The Peace Process was conceived in a limited historical frame. Secondly, almost all parties looked at the outcome of political engagement as a strategic peace. Peace as some kind of zero sum outcome which shc ıld serve the strategic interest of one party agai st the other. In the transition from civil war, a better way to conceive peace is through the lens of transformation. The transformation of all major actors of the State as well as the LTTE, or the LTTE as well as the States. The transformation of peace has a better capacity and flexibility to incorporate democracy and Human Rights to a sustainable peace agenda.

What I am proposing here, is the need for a new conceptual framework for linking peace with democracy and Human Rights. It calls for the recognition of the historical specificities of the question of democracy and Human Rights under conditions of civil war transition. It suggests that there should not be a radical separation between group rights and individual rights, but it argues for recognition of the legitimacy of self-determination as a group right that the Peace Process should politically address. It also calls for a framework that can creatively synthesize the self-determination claims of all communities, Tamils, Muslims and the other local and regional minorities with a broader liberal framework of rights that recognize and does not vitiate ethno-cultural specificities. This is a challenge that liberal constitutionalism should negotiate creatively. The fact that liberal constitutionalism in Sri Lanka is still a practice without foundations of a pluralist political theory should not deter us. One way to overcome this difficulty is to broaden the practice. I propose that the Human Rights community in Colombo initiates a direct dialogue with the LTTE on issues of peace, democracy and Human Rights with some intellectual empathy towards the Tamil claim for internal self-determination. The moral here is a very simple one, mutual transformation is a better path to peace than trying to impose transformation on others.

SRI LANKA'S ETHNIC CONFLICT: INDIVIDUAL AND COLLECTIVE RIGHTS.

Mr. Rohan Edrisinha[♦]

I would like to suggest firstly that if we look at the history of Sri Lanka's ethnic conflict, secondly if we look at the possible constitutional options for conflict resolution in relation to that conflict and also thirdly, if we look at some of the contemporary challenges facing the Peace Process we will see that one of the key issues is this tension, between individual and group rights. Perhaps Sri Lanka's Human Rights community needs to focus more and deliberate upon these issues in greater depth. Sri Lanka, I think has a tradition even with respect to constitution law in general or sometimes ignoring constitutional first principles, or designing constitutions which are motivated by an obsession with executive convenience. I think that sometimes that same sort of mind set has influenced the Human Rights community's attitude to the Peace Process as well. I think that this is dangerous for several reasons because firstly it is contra productive because it does not ultimately help the Peace Process if our goal is a realization of peace with justice and dignity. Secondly, it also erodes public confidence in the Peace Process and I think that the results of the last Presidential Elections reminds us of the fact that you need to have or retain public confidence in the Peace Process.

I want to make a few attempts to defend liberal constitutionalism. One does not think that the Human Rights community has a difficult task in Sri Lanka to try and stage ship as it were between two sets of very dangerous rocks. On the one hand we have people in Sri Lanka, particularly within the Sinhalese community who do not accept that Sri Lanka has an ethnic conflict, who do not seem to appreciate the evolution of Tamil nationalism, who are fearful of federalism, autonomy, the notion of group rights, who have a kind of unitarian-majoritarian mind set. The legal community is a classic example of this, and some of our political leaders as well. We have to affirm the relevance and the importance of group rights. But there is a danger that in affirming group rights and collective rights, we do so to such an extent that it undermines individual rights. Since the Human Rights community has largely over-lapped with the peace community, they tend to look at things perhaps from a conflict resolution perspective. Insufficient attention has been focused on the importance of individual rights. And certainly though the Ceasefire Agreement has achieved a number of positive things, there have been political assassinations, there has been child recruitment, the liquidation of traitors and various other undemocratic practices which have been justified in the name of Tamil National Liberation. So we have scholars and media persons suggesting that group rights are more important than individual rights. You are talking about the rights of the collective, you are not talking about individual rights which are egocentric and about the self, and therefore, the group rights are somehow morally superior to individual rights. Now I think that this is very dangerous. With reference to the peace talks, I should say that Ian Martin drafted a Human Rights declaration for the parties which went out of its way to deal with some of the concerns and fears of the LTTE. If one reads the draft that Ian Martin prepared, the phrase 'civil and political rights' was not mentioned at all. The phrase 'economic, social and cultural rights' was mentioned repeatedly. The emphasis was on rights such as health, education, etc. Ian Martin was very conscious indeed of trying to

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understand the LTTE and develop something that was not seen as threatening to the LTTE. With reference to this whole notion about Human Rights, some of them being external, I think we have to re-visit the notion that the West emphasizes individual rights, the East emphasizes group rights and collective rights. We need to examine that a little bit more, and ask ourselves whether there is not a great respect for individual rights, even within our religious and cultural traditions in Asia.

The next point that I would like to make, is that when viewing Sri Lanka's constitutional history, our politicians and members of the legal community at a certain level had no problem recognizing the concept of group rights. In British times, we had group representation, communal representation and this was considered a factor for the North, until we switched to territorial representation. In the Soulbury Constitution, Section 29, (2), dealt with group rights terms, and not in individual rights terms, even though it was drafted in the mid forties. If you look at some of the constitutional issues that have exacerbated Sri Lanka's ethnic conflicts with language and citizenship which could be possibly described as group rights, if you look at the main Tamil political parties in talking about federalism and autonomy for a very long time, and then, Article 16 of our constitution validates all existing laws even though it is inconsistent with the Bill of Rights. What is the justification for that clause? The recognition of group rights, the rights of communities, the personal laws of this country.

With reference to the political developments regarding the Peace Process if you look at all the Tamil political parties, they have subscribed to what are known as the simple principles which basically are nationalism and self determination. And in that context any realistic solution for Sri Lanka has got to address those issues. In that context I would like to say that the Oslo Declaration of 2002, is therefore an extremely significant breakthrough. The problem in the simple principles is that they talk about concepts like nationhood, self-determination and homeland which has no fixed legal meaning, which are vague, and the Oslo Declaration clarified some of that ambiguity by talking about federalism, internal self-determination, a united Sri Lanka, areas of historic of habitation of the Tamil people, and finally the fact that the Agreement should be agreeable to all communities, which I think is code for the fact that the Muslim community has also got to accept a political solution. This is the logical, and the reasonable accommodation of the aspirations of the Tamil people, perhaps while recognizing the rights of the other communities. I think, the difficult question is how does the Human Rights community in Sri Lanka address the kind of strong Tamil ethno-nationalism, which is reflected in the position of the LTTE? We have to recognize though we have taken it for granted, that the LTTE has achieved its success through military success. That is what makes this situation quite different to the situation in Quebec. Now generally the Human Rights community and the Peace community in Sri Lanka have viewed this sympathetically, and not expressed the outrage that would normally happen in other countries of the use of violence and terrorism to achieve political objectives, because they have taken the view that the democratic options have been so close. Then there is this strong obsession with ethno-nationalism within a particular territory, the homeland concept. Anyone who is outside the homeland is not really someone for whom these so-called liberation movements have any commitment. If there is any dissent, it is suppressed. There is no respect for pluralism. And instead of discussing this and thinking of some alternative, I would be much more conservative, and say that one has to affirm the sort of international principles that we have received up to now, that individual rights and group rights are equally important. This is not going to be easy either, but it is necessary. The LTTE's ideological cousins in the South like the JVP and the JHU, also have a similar

mindset. If you talk about Tamil aspirations sympathetically you are not a proper Sinhalese, you are a traitor, the whole question of you being alien. The dangerous issues that came up in the recent Presidential Elections, does Ranil Wickramasinghe think in Sinhalese or think in some other language? I think it heightens or emphasizes the danger of emphasizing group rights at the expense of individual rights. I would like to make a plea that we do not abandon, or at least we put this very firmly on the table in the dialogue, that this inter-dependence and the indivisibility of individual and group rights, bearing in mind that the concept of self-determination must surely have linkages with principles of democracy, principles of freedom, principles of human agency. After all that is what the word 'self-determination' is all about. And I think what we need to do is perhaps engage in the dialogue, and bring in what would be called the 'boring and conservative liberal constitutional perspective' over what I would like to call 'the liberal and the international law perspective', which emphasizes that individual rights and group rights are both equally important.

DOMESTIC VIOLENCE

Ms. Dhara Wijetilleke[♦]

Let me put this in perspective, that today is 'Human Rights Day' and we are talking about the Domestic Violence Act. Maybe this audience is too intelligent to ask the question, but the question maybe asked 'Domestic Violence and Human Rights' what is the link? Actually, Human Rights and Women's Rights are indivisible. Obviously, governments are obliged to uphold the Human Rights of individuals on an equal basis, that goes without saying. And the Human Rights of women must be identified in its unique context, and the State is obliged to protect women in both the private and public spheres, because women are particularly vulnerable to Human Rights abuse in the private sphere, with regard to issues such as sexuality, marriage and reproduction. Even with regard to issues of concern, such as inheritance and custody rights, rights of children, now this new concept of "due diligence" has come in. There are standards that must be established with regard to the effort that the State must put in, to have the real practical and realistic recognition of these rights. Abuse of Women's Human Rights is often kept silent, and thereby the challenge to promote these rights is particularly more serious. In the early stages of international law, gender based violence was not recognized as a Human Rights concern. It was really a development that took place over the years, due to the very active participation of women activists. Even in the 1907 Hague Convention, rape was coded as a violation of family honour and rights. This basically invoked male entitlement and female chastity, which is not something that can be condoned. 'Rape' was cast as a moral offence, and not necessarily a kind of violence. In 1979, we had the famous CEDAW, the UN Convention on the

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Elimination of All Forms of Discrimination Against Women CEDAW was adopted by the UN in 1979, Sri Lanka ratified it without any reservations and in 1992, CEDAW adopted a very important general recommendation 19, which recognized that gender based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedom on a basis of equality with men. Since then, it was necessary to focus on gender based violence. States that report to the committee were required to report on efforts that were taken, in particular with regard to what has been done in the area of combating violence against women.

Over the years, activists in a series of UN Conferences and others have challenged the exclusion of gender based violence, Women's Rights from the Human Rights agenda. The turning point really came in 1993 at the World Conference on Human Rights in Vienna, which prioritized violence against women, and gender mainstreaming in the overall Human Rights picture. Much more recently, the Rome Statute established the International Criminal Court (ICC), the World's first Criminal Court, with jurisdiction over genocide, war crimes, crimes against humanity etc., recognized gender based violence as a Human Rights concern and codified it as among the gravest international crimes. The ICC establishes international norms and that is how it impacts on domestic efforts and domestic legislation, because it establishes them for the operation of a global justice system worldwide, and this standard supports domestic law reforms as well, so there is much inspiration to be drawn by that.

In 1995, Sri Lanka enacted a series of amendments. Gender based violence and violence against children received focus in Sri Lanka's criminal law, and there were several amendments into the criminal law régime of our country from 1995 onwards. Right now, what do we have to deal with domestic violence? We have two different methods. The civil law remedy which deals with both physical abuse and emotional abuse that is provided by the Domestic Violence Act No 34 of 2005. We also have the criminal law, which we have always had, which deals with physical abuse only. The criminal law régime is provided for in the substantive law, which is provided for in the Penal Code. The Criminal Procedure Code deals with the process. The Penal Code deals with offences against affecting the human body, physical abuse, and it requires that an investigation be conducted leading to the filing of an action in court. The finding of court is required, that is either finding of guilty or not guilty and punishment ensues if guilty. The Domestic Violence Act No. 34 of 2005, is that which provides for civil remedy. It is very new, it was signed by the Speaker on the 3rd of October and was passed on August 9th, but it was not easy, as it was debated in the parliament for 2 days, and even on the second day, there were some members of parliament who were asking if that could be postponed because there was so much opposition to what they perceive to be a mechanism that inspired a break up of the family. In other words, if women and children were allowed to go to court against the male partner or the father, to deal with violent situations, that would result in the break up of the family.

The main features of the Domestic Violence Act are that it is essentially a civil remedy. It is gender neutral and what is meant by that is even men can go to court to complain or to obtain get a protection order against the omissions of a woman. It does not disturb the criminal law remedies, and one hopes the police will take particular note of this. It must not be seen as an alternative to the existing criminal process, but as supporting and supplementing the criminal process. It focuses on ensuring the safety of the aggrieved person and therein lies the major difference and the end result is not punishment of the perpetrator. Punishment is provided for only if court orders are violated. The essential ingredients of the Act in order to make to use

of the provisions of the Act there should be an offensive act which should have been committed by a person who stands within certain identified degrees of relationships. What commission and what omission constitute domestic violence? Domestic violence could be physical abuse, or emotional abuse. Emotional abuse is not known to the criminal law, physical abuse is what is already there in the Penal Code. This is something a lot of people could not understand. We should have a separate domestic violence offence. There is actually no need to re-invent the wheel and create new offences because the offences are there in the Penal Code. Every possible commission or omission which amounts to an offence, which constitutes an offence, which results in physical abuse, is recognized in the Penal Code. In fact, one member of parliament argued that the scope of the Act was too narrow, not realizing that it could never be wide, because if there is anything that can be done in the home environment which is not recognized in the Penal Code as an offence, then right now everything that amounts to unacceptable conduct is recognized in the Penal Code as an offence, in Chapter 16, which deals with offences against the human body.

In addition to offences against the human body, criminal intimidation and extortion have been added to the list, and therefore, the scope of the Act is very exhaustive and wide.

Emotional abuse is as said not a criminal offence and is not known to the Penal Code, it is defined in the Act as a pattern of cruel, inhuman, degrading or humiliating conduct of a serious nature directed towards the victim.

In relation to identified relationships, we thought we covered everything. It could be by the aggrieved person's spouse or ex-spouse or cohabiting partner or any of these persons of the aggrieved person, or the aggrieved person's spouse or cohabiting partner. The Act was meant to provide remedy to most types of domestic abuse, but we have omitted a situation where a son-in-law abuses the mother-in-law. This is an area one hopes will be included soon by amendment. We keep our eyes and ears open and are quick to introduce amendments when necessary. It is very important to identify the categories of persons that can access courts to obtain a protection order. An aggrieved person is someone against whom an act has been committed or who believes an act is going to be committed. The act could have been committed or likely to be committed by a spouse, ex-spouse, cohabiting partner of the aggrieved person or by a son, daughter, grandson, granddaughter, stepson, stepdaughter any of those descendents, any ascendants, father, mother, grandmother, brother, sister, half brother, half sister, step brother, step sister and so on. We spread the net pretty wide, an aunt or uncle of the aggrieved person or aunt or uncle of the spouse, ex-spouse or the cohabiting partner of the aggrieved person or it could be a son or daughter or child of that uncle or aunt, with essentially a cousin of the aggrieved person or cousin of any of those people or even a child of a nephew or niece.

In order to initiate an application, it should be made to the Magistrate's Court, where either the aggrieved person resided or where the aggressor resides or where the act took place or is likely to take place. An application can be made to the Magistrates Court by an adult, by the aggrieved person himself or herself or by a Police Officer on behalf of the aggrieved person or on behalf of a child. A child is defined to be somebody who is under 18 years. It could be made by a parent or guardian, a person with whom the child resides or a person authorized by the National Child Protection Authority or even a Police Officer. This was the most contentious part of the Bill prior to it being finalized by the Cabinet of Ministers, because there was a huge lobby by Non Governmental Organizations that objected to them being left out. Actually this was discussed and there was

a lot of opposition to NGOs being allowed to make applications on behalf of aggrieved persons, and finally it was decided that they would live with it at the moment and see how it would go on. Not permitting an NGO to make an application on behalf of an aggrieved person does not mean that they have no role to play. There is a lot that they can do. They can draw up the application, counsel the parties, inspire the parties to go to court, provide support services, there is a whole range of support services that can be given by NGOs and therefore, it was unfortunate that the Bill was delayed during one period of time because of this lobby that insisted on them being included.

An application for a protection order can be made either after an act has been committed, which means then it is to prevent a recurrence of such an act or there is fear that such an act is likely to take place. The Form itself is very simple and is included in the Act itself in the form of a schedule. It needs to state the name and address of the victim and of the aggressor and a brief description of the circumstance of the case, and importantly, it is possible to attach affidavits in support of that application. It is not necessary, but if there are persons who are willing to come forward and give affidavits to talk about what has happened and why a Protection Order is necessary, then the Court will make use of that. The whole process consists of a four stages initiated upon the receipt of an application in the Magistrate's Court.

The first step is that the Magistrate's Court is required to forthwith consider the application. The second step is that the Court then must decide as to whether it is appropriate to issue an Interim Protection Order before an inquiry. The important feature in the second step of this is that the Interim Protection Order can be issued before an inquiry and then the Court sets a date for the inquiry and issues a notice to the respondent to come to Court and show cause why he or she should not have a Protection Order against him or her. The third step is the inquiry itself that is conducted by the Magistrate, and finally, the fourth step is the issue of the Court Orders.

In considering the application, it was expected that a very expeditious process like a telephone call to the Court would be sufficient to obtain a Protection Order, because sometimes the violence is imminent. In order to ensure the safety of the victim, it is necessary to act fast, but due to the way things are in Sri Lanka, one has to live with the processes that can afford to be introduced into a legal régime. Therefore, all that one could do is to say that the Court must consider the application forthwith on receipt. It is not necessary that the Court calls witnesses and examines witnesses on oath. The Court can consider the application along with affidavits if they have been filed, and they may examine the applicant or other material witnesses on oath. Other material witnesses would be those who had given affidavits. The Court may, however, determine if it is necessary or not. The presence of the respondent is not necessary either, as the Court may form its determination, and arrive at its determination on the basis of the documentation. The issue of the Interim Protection Order is if the Court considers it necessary. Where the Court considers that an Interim Protection Order is necessary, the Interim Protection Order must be issued forthwith, and that again is very important because the idea is to stop a man/woman in indulging in any offensive conduct, at the earliest.

It is mandatory that the Court must fix the inquiry within fourteen days of receiving the application. The Court is then required to notify the respondent to come to Court for the inquiry and have the orders served on him, to enforce the appearance. At the inquiry, the respondent has an opportunity to be heard. If he/she does not turn up, the inquiry can be proceeded with in his/her absence.

Interestingly, a provision was built in which says that the respondent, if he is not represented by a lawyer, is not permitted to question the victim directly because one is conscious of the fact that it can be very intimidating when a man who assaults his wife with impunity is equally capable of terrorizing her in Court, no matter what. Therefore, any questions must be directed through the judge. In an inquiry, it is not necessary to prove guilt. It must be emphasized here again, they are not in a criminal process, this is not a criminal régime, it is a civil process and proof of guilt is totally irrelevant. The Court will issue the order if considered necessary, and then serve copies of the order on the respondent, on the victim applicant, and the Officers in Charge of the Police Stations where the victim resides, and where the aggressor resides, because it is very important that the Police should follow up and ensure that the orders are complied. If it is not possible to serve these copies on the respondent, it can be posted in a conspicuous place at his residence.

The Court need not be convinced about the guilt of the respondent. The Court does not need to look for proof beyond reasonable doubt to issue a Protection Order. All that needs to be considered is whether there is an urgent need to prevent the commission of an act of Domestic Violence, and whether there is a need to ensure the safety of the aggrieved person, because the issuance of an order does not mean that the respondent is guilty of an offence. It merely means that there is a very urgent need to safeguard the victim. An Interim Protection Order is issued before inquiry, on the documents even without examining persons on oath, and is in operation until the conclusion of the inquiry. It prohibits essentially the commission of an act of domestic violence. Every respondent knows that he has no right to commit an act of domestic violence or any offence for that matter. Sometimes respondents have to be reminded, and it helps a lot if that reminder comes by way of an order from a Court of law, because most men who abuse women do so because they are cowards and know that the woman cannot hit back or retaliate. This is gender neutral, but women are the victims in a majority of cases. Here, the intervention of the Court or somebody in authority has a lot of meaning. The Interim Protection Order can impose other prohibitions after extracting evidence even at the pre-inquiry stage; the stage at which the Court merely considers the application. The Court can obtain evidence on oath and then issue other prohibitions apart from the prohibition from engaging in the act of domestic violence. The Court may also at its discretion, order a social worker or family counsellor to counsel the parties, and this will be done if the court is satisfied that it is in the interest of the parties to do so. When such an order is made, the Court can make a further order on the parties to require them to go for counselling. This is another important feature which makes the civil process so different from the criminal process, because of this focus on rehabilitation and reform, and where the court may at its discretion order monitoring of observance of the order and ask the identified person to report to Court whether there has been compliance with the Interim Protection Order.

This order can be made to a Social Worker, Family Counsellor and because the Act does not define social worker or family counsellor, it does not necessarily mean that these persons should be those in government service. Even social workers and family counsellors in the private sector in the voluntary offices could be appointed. It could even be a Probation Officer, a Family Health Worker or a Child Rights Probation Officer. Child Rights Probation Officers are appointed under the National Child Protection Authority.

This kind of additional order to monitor the observance of an Interim Protection Order will be issued by Court where Court feels it necessary to prohibit and provide for the immediate safety of the victim. A Protection Order, and that is the one that is issued after

the inquiry, prohibits again the obvious, prohibits commission of an act of domestic violence, it may contain other prohibitions and make supplementary orders. It basically can remain in force for any period up to 12 months. The Court will decide the duration of the order. It can be amended, extended, revoked and all of that on application of either party. Where the application is made by the victim for an amendment, revocation, or variation of the order, then the Court will make sure that it is voluntarily made by the victim, because sometimes again the victim may be intimidated to go to Court and make an application and say that her husband is now behaving perfectly and request the order to be revoked.

Any party who is aggrieved by a Protection Order can appeal to the High Court, but the operation of the order, the validity of the order is not stayed, pending the determination of the appeal unless the High Court gives reasons as to why it is stayed, in writing. So the Protection Order continues to be operative until the appeal is determined.

There is a wide variety of prohibitions that can be imposed in an Interim Protection Order or a Protection Order. They are quite expensive and they seek only to ensure that the victim and the family of the victim are safe. A respondent could be debarred from entering the residence, workplace, school or any shelter to which the victim may have been sent. The respondent could be prohibited from having any contact with the child, going to the school of the child and prohibited from having access to shared resources of both the victim and the aggrieved person, stalking, committing acts of violence against even those who come to the assistance of aggrieved persons, because they are all in a sense vulnerable to abuse by respondents, engaging in conduct detrimental to the victim or other person or selling the matrimonial home, and thereby making it impossible for the victim to live or have any resources to continue life. In imposing these prohibitions which the Court cannot impose at its will, there are guidelines and the Court is required to consider and have regard to the accommodation needs of the victim and of the children and any hardship that may be caused to the respondent or to any other person in the home. These are matters that the Court must take into account. There was criticism that the court will start issuing orders without any consideration or sympathy for the plight of the respondent, but it is not possible because of this clause.

Supplementary Orders are orders that are made where a Protection Order has been made. After inquiry, and these are made to provide for the immediate safety, health or welfare of the victims. Here again, there are a wide range of Supplementary Orders that can be made. Police could be ordered to go with the aggrieved person to her place of residence to collect her personal belongings or to seize weapons that are with the respondent, and this would be essential if they are to continue to live together. Parties could be ordered to attend rehabilitation therapy sessions, and here again the focus is on the civil nature of this and the focus on the rehabilitation. The Supplementary Orders could place the victim or the aggrieved person in temporary shelters and this is very necessary. Of course there is no provision at all for setting up of shelters in this law. That is not something that a statute can do, and for the implementation of this Act therefore, the support of NGOs and those that will provide shelters is very important.

Supplementary Orders could require persons to monitor the observance of Protection Orders and could require the respondent to provide urgent monetary assistance, because a *gratia* could take up the position, or find "I do not want to go to my house, let her live there". But she may be deprived of income and she may not have any means of livelihood. There is a responsibility then on the respondent through a Supplementary Order to provide urgent monetary assistance. There is also a provision included and this

was done at the committee stage of the Bill; to provide that a respondent would be required by a Supplementary Order issue at Court to make such payments as are necessary to enable the victim, aggrieved person to continue in the residence that he or she occupied. In making Supplementary Orders the Court must consider the financial needs of both the respondent and the victim. So it is not a one-sided thing. Very importantly, even if urgent monetary assistance is to be given, the rights that any party may have under the Maintenance Act is not affected. The weakest part of the Act is with regard to the enforcement of the orders. The law provides the Act, which provides that on violation of a Protection Order, a respondent can be punished by Court but it is dependent on a conviction by Court. I now think that we should have had an easier process because a conviction by Court can be had again after filing charges in Court. That again is going to the criminal régime and in my opinion is not very good.

Supplementary Orders can be made for payment of urgent monetary assistance. Where a respondent defaults to make such a payment, the Court can order the employer to pay money direct to the victim. It is important to understand the difference between the criminal and civil processes that have thus, been set in place. In the criminal process, the safety of the victim is totally irrelevant, there is no focus at all on the safety of the victim, and the objective is to punish the perpetrator, whereas in the civil process, the primary focus is on the safety of the victim. In the criminal process, there is no scope for rehabilitation, in the civil process there is. In the criminal process, there is total dependence on the police to investigate. In the civil process, under the Domestic Violence Act, there is no dependence as such, but certainly police co-operation is obvious. This is one observation that Professor Tissa Vitharana pointed out during the course of the debate in Parliament. This was one of the most important features of the Domestic Violence Act, because it enables parties to make an application on their own, without waiting for a police investigation to be held or completed. When it comes to private issues that takes place within the home, then evidence is not easily forthcoming and proving what happens, what goes on in a home is very difficult, proving it beyond reasonable doubt is even more difficult. There is no proof in the criminal process, where it is the need to prove guilt beyond reasonable doubt. Under the Domestic Violence Act there is no need at all for proof that the perpetrator did commit the act. There is no focus under the criminal law on victim issues of the offence in the Domestic Violence Act. Under the criminal process, the focus is centred on the fact that a crime has been committed and a crime is an offence against society. In the Civil process, under the Domestic Violence Act, it is an act that has been committed which is offensive to the individual. The criminal process ends up with punishment and in the civil process there is no punishment, unless there has been a violation of the Court Order. Now this highlights the two processes because there is so much misunderstanding about what this is all about. How does the civil remedy fit into what is already there? Are these two completely different processes able to live side by side?

Under the Domestic Violence Act, whether it is physical abuse or emotional abuse, this is the process for both, but here, this criminal process can be pursued only in respect of physical abuse. In other words, in respect of offences under the Penal Code and not for emotional abuse.

So in the criminal process, it begins with a complaint to the Police. Police investigation is necessary, Court action, criminal process is followed and punishment if proved.

Here it begins with an application to Court, Interim Protection Order is issued in the first instance on an urgent basis inquiry, formal inquiry, Protection Order, and then at the

terminal point you have a prevention of violence and rehabilitation, both side by side.

The application for a Protection Order is not a reason for the Police not to pursue a Court action in a criminal action. I think there is a certain amount of sensitivity that is needed here.

It is necessary to emphasize that both processes can be pursued at the same time and the Police need to co-operate and identify situations in which it would be best to pursue a criminal case, and situations in which it would be best to wait and observe protection orders first.

One of the criticisms in Parliament, was that the Domestic Violence Act leaves room, gives plenty of scope for family break up. This argument is challenged, because a woman who really wants to break up a family because of violent behaviour on the part of the husband, quite apart from being entitled to, would not waste her time with the Protection Order but would go further than just getting a Protection Order, and make a complaint to the police, and then there is the expectation that the criminal process will be pursued. Whereas, a woman who wants to keep her family together, would ask for a Protection Order in the hope that the man will ultimately be rehabilitated, and at the same time ensure that the family members will be safe from abuse as well.

Now this may be a little difficult in the cultural context and setting in which we live, for persons to perceive that this will happen, but we have to hope that it can.

The civil and criminal processes can be pursued simultaneously and sometimes they must be. Those are the main features of the scope and range of the 'Domestic Violence Act.'

Expanding the Human Rights Agenda in Sri Lanka with regard to Economic & Social Rights

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I would like to share some thoughts on the case of Economic and Social Rights. In the Human Rights world, Economic and Social Rights have been discriminated against for many years. For many years, a violation of a Civil or Political Right was treated with far more importance than a violation of an Economic or Social Right. Now this is evident even in Sri Lanka's constitutional framework. We have a strong social policy that contains a right to education, healthcare and so on. But if one looks at our legal framework and at our constitutional framework, it contains largely Civil and Political Rights, with very few or just one economic or social right being contained in that Bill of Rights. The discrimination that is practiced globally and internationally is also practiced in Sri Lanka, in terms of our constitutional framework.

Now, while we tend to divide Human Rights into different categories, into the category of Women's Rights, into the category of Economic, Social and Cultural Rights, into the category of Civil and Political Rights; in the real world, people experience violations of their rights sometimes as combined violations. A good example is the case of displaced persons. Are these persons displaced by the conflict or by natural disaster? Essentially, displacement is a question of freedom of movement. One is forced to leave his/her situation, forced to leave home against his/her will, but yet one experiences multiple Human Rights violations; security problems, little access to education, healthcare and water among others. If you look at a woman who is sexually harassed at work, she is discriminated against because of her sex. But then, she is also undergoing violations of her rights at work and perhaps depending on the nature of

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the harassment, even her rights of healthcare. It is important also to look at the real world and how people actually experience Human Rights violations. Economic, Social and Cultural Rights draw attention to the interconnectedness of different categories of rights. So for example, if one takes the Right to Education, as the Committee on Economic, Social and Cultural Rights has told us, having a well stocked mind is one of the great pleasures of humankind. The Right to Education has a value on its own. Yet, the Right to Education also helps us to access other rights; helps us to contest an election and when elected, it helps us in deciding who to vote for at elections and also it helps us in accessing facilities such as health care. Economic, Social and Cultural Rights draw attention to the inter-relationship between varieties of rights.

When one looks at domestic legal systems around the world, one finds that the Economic and Social Rights are being implemented in two broad ways. One is through the explicit recognition of these rights, and the other is through a process of interpretation. So if one looks at some of the new democracies in Latin America and in Africa, after having come out of a process of transition, they have explicitly entrenched these Economic and Social Rights as part of their constitutional framework, and sometimes explicit recognition can be very useful. With regard to a case from Argentina where the explicit recognition of the right to housing in that country's constitution helped poor people access the right to housing. This case related to a group of slum dwellers, people who lived in fairly basic housing conditions who occupied a building in Buenos Aires. They were subsequently charged with criminal occupation and then forced to leave that building. They then lobbied the local government and argued that because of the conditions in which they lived, a local municipality had an obligation in terms of the country's constitution to provide them with minimum housing. The government agreed to do this. It failed in its obligations and then with a public interest firm, this group of people went to Court. The judge visited their habitation and ordered the local municipality to place 500 million US dollars in a Trust Fund, and requested the municipality to put up this group of people in a hotel until such time that they could construct basic housing for them. Therefore, through a process of legal action and dialogue they were able to access basic housing. The court also ordered, that when the municipality called for tenders for the construction of housing, that it evaluate those who tendered, as to who was willing to use at least 20% of the population of those who were homeless. In a process of dialogue and through litigation, the Courts were able to push the Argentinean municipality to be able to provide the right to housing to a group of homeless people. This one case in which the explicit recognition of a Right to Housing in that country's constitution helped the Courts, and actually made a difference in people's lives.

Now the other way in which Economic and Social Rights is being enforced in different countries around the world is through a process of interpretation. The most vibrant example of this is in India, in what we commonly call Public Interest Litigation. Essentially Public Interest Litigation dealt with access to justice. It tried to de-formalize Court procedures, it tried to allow people to appear on behalf of victims, it allowed the initiation of Human Rights applications by means of a letter and so on. The Court took upon itself the burden of trying to find evidence and other sorts of procedural innovations. But beyond that, the Court also expanded its substantive jurisprudence, and this was done principally by interpreting the constitution, the right to life in a broad and expansive way, so as to include a whole range of Economic, Social and Cultural rights.

A good example, is the Delhi pollution case. If anyone had visited Delhi 15 years ago, one would have been struck by the levels of

pollution, especially if one had traveled in a three wheeler. About 5 years ago, however, an environmental activist initiated a Public Interest Litigation case in the Supreme Court of India, arguing that the Delhi Municipality should take immediate steps to reduce the levels of air pollution in that city. The Supreme Court ordered the Delhi Municipality to immediately implement a process of converting public transport to compressed natural gas. They set a time line, and informed the Delhi Municipality resources, without argument, to implement the plan. Today if one visits New Delhi, one can see the vast difference in terms of air quality. All autos, trishaws, buses, taxis and public transport run on what is called "CNG," Compressed Natural Gas, with zero pollution, and clearly there is a huge difference in terms of air quality in that city. Here, the Indian Supreme Court, through a process of interpretation where Socio and Economic Rights are not explicitly contained in that country's constitution, was able to make a difference.

In Europe, the European Court of Human Rights is using a housing rights dimension to the idea of Cruel, Inhuman and Degrading Treatment. For example, if a man is forced to sleep on the streets, if he has irregular access to drinking water and if he has no ability to clean and wash himself, then that can in certain circumstances amount to Cruel, Inhuman and Degrading Treatment. Courts then are trying to interpret Civil and Political Rights in a progressive way, by bringing in a Socio Economic Dimension. Unfortunately in Sri Lanka, we have neither, we do not have an explicit recognition of Economic, Socio and Cultural Rights nor do we have a vibrant jurisprudence. We have a few cases where the Supreme Court has referred to the International Covenant on Economic, Social and Cultural Rights. But we really do not have a coherent jurisprudence in terms of Economic Social and Cultural Rights. We have a few cases like 'Jayasinghe vs. Attorney General', the Eppawela Phosphate case, where they used Economic and Social Rights, but not to the extent that it has been used in the jurisprudence of India. So if one is therefore thinking of expanding the Human Rights Agenda in Sri Lanka, then perhaps, the first challenge is to explicitly incorporate Economic, Social and Cultural Rights as part of our positive share of framework.

We can consider the Charter of Rights based on the Canadian Model. Unfortunately in Sri Lanka, political parties have played games with regard to constitutional reforms, with regard to the conflict, where they have not been able to agree on a common constitutional agenda. Now in one area in which the two major political parties or the three major political parties perhaps right now agree, is with regard to Human Rights, and a Charter of Rights. I would therefore like to submit that one area which we can actually try to get on board is the adoption of Economic, Social and Cultural Rights, through the implementation of a Human Rights Charter that encompasses Women's Rights, Environmental Rights, Economic, Social and Cultural Rights and Civil and Political Rights.

The second challenge, in Sri Lanka is if we are looking at expanding our Human Rights Agenda, is to exploit existing legal provisions. For this, we need to develop the capacity of Non-Governmental Organizations, rights activists and others who are able to take Economic and Social Rights issues before the Court, using the existing constitutional provisions, and using the existing legal provisions.

With regard to the Water Reforms Services Bill, the Sri Lankan Supreme Court and the Sri Lankan Courts in general, are perhaps ready for the development of jurisprudence on Economic, Social and Cultural Rights. The Water Services Bill however, has essentially dealt with the issue of privatization of water and the issue of licenses with regard to different types of water. The Bill was struck down by the Supreme Court on the basis that

the Provincial Councils were not consulted in the publication of this Bill. If one reads the subject, between the lines, there is clearly some discomfort on the part of the vote with regard to the privatization of water resources, and that the privatization of water resources has significant Human Rights implications, which this Bill did not consider. I would thus like to submit that the Courts of Sri Lanka are ready to develop jurisprudence on Human Rights if the Human Rights Lawyers, if Human Rights NGOs and Human Rights Activists are willing to bring these cases before the Court.

What has litigation established globally? States cannot excuse themselves out of performing certain minimum standards or minimum obligations. For example, the Supreme Court of India has said that access to education up to the age of 14 is a basic norm, a basic minimum, and the States cannot say that they do not have resources to provide children access to education up to the age of 14. Similarly, with emergency healthcare, when a man or a woman travels on a train and he or she suffers an accident, then the State has an obligation to provide that man or woman with emergency health treatment; and they cannot excuse themselves by saying that they do not have resources. One thing that Human Rights litigation around the world has done, is to establish a certain threshold, and to argue that there are certain basic necessities in terms of Economic and Social Rights that a State must meet, certain obligations that a State must discharge.

Now what are the disadvantages of litigation? Litigation sometimes tends to deal with the rights of an individual or the rights of a group? If one take the Buenos Aires case for example, that group of 160 people in Argentina was provided access to housing, but still the whole question of homelessness, the larger question of access to housing was not resolved. While litigation resolves the need of one group, it leaves unaddressed the needs of other groups. I think for us, the challenge perhaps is to use litigation to influence social policy and to advocate for change within government. Here is a good example of an Indian case on sexual harassment, but as a result of that case women's groups were able to use the jurisprudence of the Court to argue for social change outside the Courtroom. Litigation is just one aspect of the struggle for implementing Economic and Social Rights. I think we need to use litigation to advocate for change outside the Courtroom. The other problem with litigation of course, is that it raises expectations, and here Public Interest Litigation in India is a good example. We have at the theoretical level, excellent judgments from the High Court and Supreme Courts of India, but many of these judgments have not been implemented at the ground level. Litigation sometimes tends to raise expectations, but at the level of implementation, we need to look at other mechanisms to implement some of these decisions. In South Africa, they are experimenting with using the Human Rights Commission and requesting the Human Rights Commission to monitor Court orders and to make sure that these are implemented. One needs to also be somewhat cautious about litigation. Litigation is only one part of a larger political strategy, while the Human Rights Agenda in this country lobbies for constitutional recognition, it needs to go beyond litigation, to encompass a much larger political agenda, and this agenda should incorporate the following :-

1. Public education and public awareness; certainly CSHR, University of Colombo deserves to be congratulated for identifying Economic and Social Rights as an important theme and having consultations of this nature

2. The other aspect is monitoring and documentation. I think clearly NGOs in Sri Lanka need to develop a capacity to be able to monitor rights violations from an Economic and

Social Rights perspective, and document this in a coherent and easily accessible way

3. Advocating for policy change and advocating with government - Human Rights NGOs and Rights Activists need to be able to develop their skills and capacity to be able to advocate for change

4. Monitor budgets from a Human Rights perspective

To give an example of what is meant, groups in Mexico took the Mexican Healthcare budget over a period of years, and tried to include Human Rights criteria to that healthcare budget. They argued that Human Rights norms globally entail issues of nondiscrimination, equity, availability, accessibility and so on, and they took some of these co-values and applied it to the healthcare budgets of the Mexican government. They looked at how the healthcare budgets were distributed between men and women, between the urban and the rural populations and indigenous populations. They used the Human Rights prisms, Human Rights framework, to analyze budgets; and one would like to suggest that this is also one area in which we should be giving some thought to trying to develop our skills. How can we analyze government budgets with regard to the allocation of resources? I think this is important, because Economic and Social Rights deal a lot with resources, access to resources, and government budgets also deal with resources, how resources are allocated amongst different groups for a particular year. Clearly, there is a need to monitor how governments are distributing resources among the different categories of populations, and to see whether vulnerable populations in our society do really have access to resources or whether resources are being channeled to the more privileged sections of society.

This brings us to the question of the Human Rights Commission and other institutions for enforcement of Economic, Social and Cultural Rights. Now Human Rights institutions have two advantages. One is that they are semi-government or quasi-governmental institutions and because of their location between civil society and the State, they are able to access governmental institutions with a sort of ease, compared to a NGO. Secondly, Human Rights Commissions are not confined to complaints. They can issue surveys, they can have public hearings, and they can advise governments to change policy. There are a range of strategies which these commissions can pursue. Clearly, Economic and Social Rights should be upfront on their agenda. Thankfully, the Sri Lankan Human Rights Commission, the new Commission has seen this as a priority, and I believe 2006 is going to be the year of Economic and Social Rights, and I believe they have scheduled public hearings on the issue of Economic and Social Rights in the country.

In South Africa, the Human Rights Commission collaborated with NGOs and the Commission on Gender Equality, to hold country wise hearings on poverty, and to try to identify the most serious obstacles with regard to poverty in that country. Here again, if one looks at expanding the Human Rights Agenda in Sri Lanka, clearly the Human Rights Commission has a role to play, this role is already identified. It is our obligation as Rights Activists and NGOs to try and assist the Human Rights Commission to implement this goal.

To summarize, in terms of Expanding the Human Rights Agenda for Sri Lanka, with regard to Economic, Social and Cultural Rights, I would say first, we need to look at constitutional recognition of these rights, as it is important in enforcement.

Secondly, we need to exploit even in the absence of constitutional recognition, to try

and exploit existing laws, existing legal provisions in terms of enforcing these rights. Here I want to refer to two issues. I think Economic, Social and Cultural Rights requires an input from experts from different people. And if we look at models of litigation that are developing in other countries, the Courts are willing to allow third parties to intervene and provide certain expertise where these issues come up for adjudication. This broadens the range of materials that is available to the Court, when it decides on an issue of Economic, Social and Cultural Rights. Unfortunately in Sri Lanka, Sri Lankan Courts are reluctant to allow a third party who perhaps has no claim or no link with the claimant to come before the Court and make an argument. If one really looks at developing Economic and Social Rights in this country, we would certainly need to look at the intervention of third parties and intervention of experts before cases pending in Court.

The other legal issue that I like to draw your attention to, is the whole idea of equal protection of the law, as a concept which has been developed. One area, which has not been developed, is the idea of equal protection and international law. Does equal protection of the law entail the protections guaranteed by international law? In Sri Lanka, there has been jurisprudence in terms of equal protection. One would see the next step, perhaps as arguing that the equal protection of the law, entails protections guaranteed by international law. There seems to be some trend in this connection with the Courts willing to look at International Covenants. In some cases, and perhaps the next step of this development would be what I am referring to. The challenge before us is in terms of budget monitoring, public education and monitoring Human Rights violations from an Economic and Social Rights perspective.

A fourth challenge would be, to develop the capacity of institutions like the Human Rights Commission to try an implement Economic, Social and Cultural Rights. I think the main advantage of the language of rights, that it helps us in pinpointing accountability and responsibility. If one is looking at the Tsunami, and the failure to provide permanent housing, the rights language helps us in trying to identify the actors who are responsible for this failure. We also need to be cautious that rights are not the complete answer to everything. They are only one part of a wider strategy. There also can be certain problems with using rights. For example, when we use Civil and Political Rights, we are arguing for a weak State, we are arguing that the State should not torture, it should not restrict the rights of free expression, it should not interfere in religion. When we talk about Economic and Social Rights, we are arguing for a strong State. We are saying that the State has certain obligations in this respect, which it should perform. So there is some tension I think which we should acknowledge with regard to Civil and Political Rights on the one hand, and Economic and Social Rights on the other.

In conclusion, I would like to say, that if Human Rights are going to have a meaning in our lives especially in South Asia, then clearly, Human Rights must address issues of education, of housing, of poverty generally, of access to water and a whole range of economic, social and cultural issues. I think, without a desire to address these issues which are fundamental to people's lives in our parts of the world, Human Rights would lose its meaning.

The impact of the Post Tsunami Mechanisms on Minority Groups

Mr. Javed Yusuf ♦

In relation to the Post Tsunami situation, there are two minority groups which have been badly affected by the Tsunami. They are the Tamils and the Muslims who were in the heart of the conflict areas for the last 20 years. The Tsunami and its aftermath, came to a section of society who had already grappled with a lot of problems relating to the violation of Human Rights in the widest possible dimensions, and one of the challenges therefore, was to deal with this natural disaster of such immense magnitude, without losing sight of the already adverse situation that existed. When we look at the Post Tsunami situation, particularly in the conflict areas, we can observe that the delivery mechanisms were problematic, not only because the disaster was so immense and so sudden. Additionally in Sri Lanka, as we all know, whether in the North or South or anywhere in the country, our administrative machinery is rather weak even in normal times, where delivery is concerned. Moreover, when a disaster for which we are totally unprepared occurs, the machinery will find it hard to resolve the problems stemming from it. Fortunately, in the early days, the common humanity that exists in us, made all people respond in a magnificent way, so that I think we would all be justifiably proud in those days of being a Sri Lankan. The way we responded, regardless of whether we were Sinhalese, Tamils, Muslims, whether we were in the North or South, was really a great source of encouragement and self fulfilling. of course, as time went on, we reverted to our usual behaviour. However, this situation accentuated the already existing problem with regard to the State and its interactions with minorities in terms of not receiving what minorities perceive should have been given. This worsened the feeling of discrimination. However, the discrimination was not the main reason for relief reaching people late. Sometime powerful politicians wished to serve their electorates expeditiously, and as such, areas like Matara and Hambantota received aid and assistance much quicker than the areas in the North and East. But this does not detract from the fact of the weakness of an administration to deliver, and thus creating the perception of fuelling already existing perceptions, that minorities are discriminated against, when it comes to receiving their rightful dues from the State. In relation to the response, apart from the relief and reconstruction attempts that the Government and State machinery were taking, the Government attempted to set up the P-TOMS, popularly known as the Post Tsunami Mechanism for Reconstruction, which created again a number of issues which affected the minorities. One of the factors the Government looked at was the structure of building confidence between the Government and the LTTE, with a view to goodwill being generated by working together, and thus supporting the Peace Process. But you had also within that scenario there was a situation where two competing minorities if you like, the Tamil community and the Muslim community were looking at their own positions of identities. The figures showed that in terms of a community, the Muslims were the ones who had suffered the most in terms of loss of life and loss of property. But in designing the mechanisms, Muslims were not made part of the designing. In the representation itself, there were some issues where the Muslims felt that they did not have adequate representation with regard to taking into account that Muslims had suffered the most, but in that mechanism itself also there were non discriminatory clauses and so on, but the overall perception which existed and which has been fostered over years of conflict, also had an impact on the P-TOMS. Particularly, with regard to the Muslim concerns which were agitated and articulated, it took a lot of time in arriving at a final

♦ *Attorney-at-Law*

conclusion. The final agreement however, though it still left the Muslims dissatisfied. Subsequent to the signing, the Supreme Court intervened, but this reveals that constantly, in a situation where the minorities are affected, their needs have to be handled with sensitivity. Whether it be the Tsunami or any other issue, when the minority is part of a conflict and if an attempt is made to redress their grievances, any correction procedures have to be dealt with sensitively, and that is a challenge which always remains and is not easily overcome.

So looking at it today, the post tsunami situation still remains in the sense that there still is a lot to be done. These are some of the challenges that are faced, when one attempts to address minority concerns in relation to disasters or conflicts of any type.

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.

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 thirty (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.