

**Master of Human Rights and Democratisation (MHRD) –2016/17  
Local Programme**

**Keynote speech by Prof. Camena Guneratne  
Dean, Faculty of Humanities and Social Sciences  
Open University of Sri Lanka**

**ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN THE CONTEXT OF SUSTAINABLE  
DEVELOPMENT'**

**Introduction**

I would like to speak on the importance of economic social and cultural rights in the context of sustainable development.

**Sustainable Development**

The principle of sustainability originated in the environmental sphere. According to the classic definition contained in the report “Our Common Future,” it is development that meets the needs of the present without compromising the ability of future generations to meet their own needs. While acknowledging that development was necessary, the definition emphasized the need for environmental sustainability in the process. Therefore the emphasis and concern was initially on environmental protection rather than on human development.

The principle evolved over time and its focus shifted from that of environmental protection to a rather more balanced notion. This shift took place through a series of global conferences spanning several decades, – the UN Conference on the Human Environment held in Stockholm in 1972, the UN conference on Environment and Development held in Rio de Janeiro in 1992, (20 years later), the World Summit on Sustainable Development held in Johannesburg, South Africa in 2002, (ten years after that), and most recently in 2012 the Rio+20 Conference again held in Rio de Janeiro, titled the UN Conference on Sustainable Development. The titles of the conferences indicate how the principle evolved with its focus on environmental protection shifting towards human development. It is now commonly accepted that there are three pre-requisites of sustainable development - it must be ecologically sustainable, economically viable and socially equitable. In this context I would like to focus on the third aspect – that development must be socially equitable.

## The Right to Development

I would not like to discuss the right to development.

While the concept of sustainable development evolved in the international environmental sphere, almost simultaneously the right to development came into being in the international human rights sphere. The idea of the right had originated several decades earlier, with the increase in membership of newly independent developing countries in the United Nations. The international framework and discourse on development was initiated when the General Assembly adopted the UN Declaration on the Right to Development in 1986.

What exactly is this right and what does it entail?

Article 1 of the Declaration states that (I quote) “The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.” The Declaration also gives States the primary responsibility for the creation of national and international conditions favourable to the realization of the right.

The Declaration recognizes that (I quote) “development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting there from.”

Those two statements do not actually tell us specifically what it is all about. The right is now an established norm of international law but is still shrouded in ambiguity and both its nature and contents, and applicability, have been contested. It is still challenged on the grounds as to whether the right is in fact a human right, and if so, whether it is an enforceable right or whether it merely constitutes soft law.

Arjun Sengupta, the former Independent Expert on the Right to Development has written extensively on these questions. In regard to the question as to whether the right is in fact a human right, he argues forcefully that it is a universal human right which is capable of implementation. He acknowledges that the Declaration itself is not a legally binding instrument and cannot be enforced, but reiterates that this however does not prevent the right from being recognized as a human right. He notes that a positivist view holds that if rights are not legally enforceable they cannot be regarded as human rights, but only as social aspirations or statements of objectives. He argues however, that this view confuses human rights with legal rights. Human rights precede law and are not derived from law per

se but from human dignity. Thus a right can be recognised as such in international law even though it may not be legally enforceable. I will come back to this argument.

Another argument in favour of the rights is that although the Declaration constitutes soft law, writers argue that the legal foundation of the right can be derived from the International Bill of Rights which is binding on the parties that have ratified them. The basis for this argument is found in the Vienna Declaration and Programme of Action adopted at the Vienna Conference on Human Rights of 1993, where the right to development was endorsed. Article 10 of the Vienna Declaration declares that the Conference reaffirms the right to development, as established in the Declaration as a universal and inalienable right and an integral part of fundamental human rights. Sengupta has reiterated that a political consensus on the status of the right was achieved in Vienna and “In effect the right to development emerged as a human right which integrated economic, social, and cultural rights with civil and political rights in the manner that was envisaged at the beginning of the post–World War II human rights movement.” He has maintained that this consensus was substantiated by successive declarations at later global conferences on human rights and development, and the right has in effect gained the status of customary international law.

Some of these declarations include the Copenhagen Declaration on Social Development of 1995, the Johannesburg Declaration on Sustainable Development of 2002 and most recently the outcome document of the Rio+20 conference in 2012 titled “the future we want.”

Sengupta also says that while the controversy regarding the right to development is not completely settled, the focus now is more on its implementation rather than a debate as to its status. While acknowledging that the declaration does not have the status of the two Covenants and cannot be enforceable in a legal system, he reiterates, “That still does not detract from the responsibility of states, nationally or internationally, as well as of other individuals and agencies of the international community to realize the right to development.” A mechanism to ensure and monitor compliance may be necessary and while it may not have the same status as a treaty body, it can still contribute to the realization of the right “through peer pressure, democratic persuasion and the commitment of civil society.”

### **Is the Right to Development Enforceable and/or Justiciable?**

This year 2016 is the 30<sup>th</sup> anniversary of the right and in the present context of the constitutional amendment process which is ongoing we come to a crucial question – should this right- or the specific rights subsumed within it - be incorporated in the bill of rights in the new constitution? This is the question that I would like to explore.

There has always been a great deal of skepticism surrounding the right. Notwithstanding the arguments of those like Arjun Sengupta, to many the right is imprecise, undefinable and not

capable of implementation. Development has different meanings to different people and of course to governments. It has been argued that the right could open the doors to demands for anything and everything and could potentially interfere with state policy making, particularly if it were justiciable. It would enable the judiciary to encroach on the jurisdiction of the legislature and the executive, it would make what are essentially political decisions justiciable, and economic policies would be formulated through the courts. These are some of the arguments against constitutionalizing the right.

How valid are these arguments?

To begin with there are very strong arguments for the view that the right to development is a specific and enforceable right. Over the three decades since the Declaration the right has evolved and is now recognized as one of the third generation of human rights, the others include the right to a healthy environment, the right to peace and the right to self-determination. It is founded on the provisions of the Charter of the United Nations, the Universal Declaration on Human Rights and the two International Human Rights Covenants. As I have reiterated the right to development reflects the universality and indivisibility of human rights and it is clear that it encompasses the full gamut of the first two generations of rights – i.e. both civil and political and economic, social and cultural.

There is no doubt or debate over the clarity and enforceability of civil and political rights or whether they are justiciable. Such rights have been included in both republican constitutions of Sri Lanka and it is a given that they are included in the new constitution. The controversy lies in the realm of the economic and social rights and whether these should be part of the constitution, and these are the rights I will be referring to in this discussion.

To begin with what are these socio-economic rights? The answer can be found among others in the Johannesburg Declaration of 2002 which stated that human dignity is bounded on the rights to clean water, sanitation, adequate shelter, energy, health care, food security and the protection of biodiversity, and the eradication of poverty. And one must add education to the list of what is essentially the basic requirements for a person to have a life of dignity and fulfillment.

The question therefore is - Are these rights imprecise and undefinable and therefore legally unenforceable?

I would argue that they are not. Over the years the judiciaries of several countries have been ruling on these rights, especially in our part of the world – and particularly in India. Although these rights are in the non-enforceable chapter on Directive Principles of State Policy of the Indian Constitution these has not deterred the Indian Supreme Court from ruling on them. The Court has done so through Article 21 on the right to life, holding that this right includes the right to a life of dignity. I will not cite the many cases on this point as I am sure that everyone is familiar with them. In Sri Lanka too one can argue that our courts

have litigated on socio-economic rights. The Eppawela judgment was in fact a discourse on developmental policy though it was filed under the cover of civil and political rights - Article 12 on the right to equality, 14(1) (g) on the right to a lawful livelihood and Article 14 (1)(h) on the right to choose one's place of residence in Sri Lanka. There is barely a discussion of the latter two rights per se, though the court held that those rights were violated. Many cases filed on environmental grounds have in fact challenged development policies which adversely affect the environment and individuals. This in fact demonstrates that the distinction between the two categories of rights are often blurred.

Apart from national jurisprudence, there is a significant body of international jurisprudence on these rights. Much of these has emanated from the General Comments of the Committee on Economic, Social and Cultural Rights. These General Comments interpret the substance of these rights and provide guidance to governments in their implementation. They include topics such as the right to just and favourable conditions of work, the right to social security, the equal right of men and women to the enjoyment of all economic, social and cultural rights, The right to water, the right to the highest attainable standard of health, the right to adequate food and to adequate housing, and the rights of older persons. They would also provide guidance to courts in the event that they are called upon to determine questions on these rights.

It is also significant that some countries have in fact legislated on specific rights. Many countries, particularly developed countries have social security laws. In 2013 India passed the National Food Security Act, which aims to provide subsidized food to the population. This year the US Congress passed the Global Food Security Act, which aims to provide support for initiatives across the world to eliminate hunger and malnutrition. Sri Lanka itself has a proud record of progressive social policies that has given us consistently high rankings on the Human Development Index.

Obviously these measures will not provide quick and easy solutions to developmental problems. But one can no longer claim that these rights are vague and ill-defined.

Perhaps one of the strongest arguments for constitutionalizing the right to development including the socio-economic rights is that Sri Lanka had previously committed to the Millennium Development Goals and now to the Sustainable Development Goals. The MDGs were a set of eight goals agreed upon by world leaders to be achieved by 2015. Sri Lanka achieved most of the targets well ahead of schedule though there were disparities between regions. Sri Lanka achieved the target of halving poverty at the national level seven years before 2015 and has almost achieved universal primary education and has also met the target for the proportion of people with access to safe drinking water and basic sanitation.

In the post 2015 agenda the MDGs have been re-placed by the Sustainable Development Goals to which Sri Lanka is also committed. This was the main outcome of the Rio+20

conference of 2012. To date 17 SDGs have been identified, which relate to among others poverty, food security, sustainable agriculture, education, water and sanitation, energy, productive employment and decent work, sustainable industrialization, peaceful and inclusive societies and access to justice for all. These 169 targets are a blend of civil and political and socio economic rights. The SDGs are broader and more comprehensive than the MDGs and encompass more specific aspects of development. The three pronged definition of the principle of sustainable development – environmental, social and economic – would enable more focused strategies and identifiable targets and indicators than the MDGs.

The SDGs thus open up spaces to re-vitalize the push to ensure non discrimination and equity in development in law and policy and implementation strategies. For example, in the light of the current threats to development and human well being posed by climate change, many countries are revising legislation, or passing new laws, to further climate change adaptation and are also launching programmes for climate change mitigation and adaptation. These laws may cover such aspects as sustainable agriculture, food security, the use and management of and rights to water, and sustainable energy all of which are subsumed in the right to development.

In light of these developments, it is timely that economic and social rights and development and environment rights are built into the constitution as justiciable rights. Over the past 20 years socio-economic rights have been incorporated in several constitutions of the global south, including South Africa (1997), East Timor (2001), Ecuador (2008), Bolivia (2009) and Kenya (2010). Many of these countries have emerged from periods of war and conflict. These conflicts have been usually due to the deprivation of resources and entrenched poverty. This includes Sri Lanka which has seen brutal insurrections and armed conflicts over the past 30 years.

When the current constitution was drafted in 1978 the right to development and socio-economic rights had not received attention. Therefore relegating them to the non-justiciable chapter on Directive Principles was consistent with constitutions of the time. However, 40 years later, failing to incorporate these rights into the bill of rights would be a retrogressive step.

In addition to the right to development, environmental rights are increasingly being embodied in national constitutions. They are not limited to the right to a healthy environment per se and an important body of jurisprudence has expanded such rights to include rights to a life of dignity, to health and medical services, to food and nutrition, drinking water, housing, sanitation, education, labor, employment, and leisure. Environmental rights are also linked to civil and political rights either through constitutional provisions or through judicial decisions and include rights to information on environmental matters, rights to equality and non discrimination, right to freedom of speech, right to participation, right to information, right to freedom of association, right to livelihood and

right to choose one's place of residence. Thus environmental rights also reflect the universality and indivisibility of human rights and can potentially contribute to the development of a jurisprudence on rights and equity in development.

Inclusion of these two categories of rights should not be viewed solely from the perspective of litigation. Including them in the bill of rights will raise awareness of their importance for both the people and other organs of the State. As it has been said it will help to change political cultures and social values. I quote "A constitution is an expressive and declaratory instrument that has an educative role: it may help a society that has emerged from turmoil in a transformative moment to return, in later and less united times, to its first principles, and to be reminded, through its constitution, of the values that it has proclaimed for itself." In the context of post conflict Sri Lanka it is imperative that the transitional justice process addresses the root causes of conflict.

Finally, a powerful argument in favour of building in socio-economic rights into the new constitution is the fact that the Public Representations Committee which heard representations from a range of citizens has categorically recommended it. The views of the people cannot be disregarded.

I will end with the hope that in the not so distant future we will see a visionary and futuristic constitution for Sri Lanka.

Thank you.