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OF KALI BORN
WOMEN, VIOLENCE AND THE LAW

By
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(A paper given at ICES Seminar on Women and Violence, Kandy, March 9th 1991)

Kali is the Goddess of Retributive Justice. Professor Gananath Obeyesekere, interviewing women who go to the goddess with their problems asked them why they do not find redress in a court of law. They looked bewildered– the goddess would understand their problems but a Court of Law...well they were not quite sure...

Adrienne Rich, the well known feminist poet writes:

> Throughout patriarchal mythology, dream symbolism, theology, language, two ideas flow side by side: one that the female body is impure, corrupt, the site of discharges, bleedings, dangerous to masculinity, a source of moral and physical contamination, "the devil's way". On the other hand, as mother, the woman beneficent, sacred pure, asexual, nourishing, and the physical potential for motherhood– that same body with its bleedings and mysteries– is her single destiny and justification in life. In order to maintain two such notions, each in its contradictory purity, the masculine imagination has had to divide women, to see us, and force us to see ourselves, as polarised into good or evil, fertile or barren, pure or impure.[1]

The law is no exception. This is particularly evident in the approach of law to violence against women. The chaste virgin or mother has to be protected...the impure, independent woman has to be shamed. This dichotomy of perception will help us understand many of the law's attitudes and many of the reasons why the law has failed to give redress to women who are victims of violence.

Women are singled out for violent treatment for a variety of reasons. First, because of her sexuality and gender, she is subject to rape, female circumcision or genital mutilation, female infanticide, and sex-related crimes. These are fundamentally connected to a society's construction of female sexuality and its role in social hierarchy. Second, a woman is subject to violence because of her relationship to a man, domestic violence, dowry deaths, sati, crimes of honour etc... These are animated by a society's concept of woman as the property and dependent of a male protector– first her father and then her husband. Thirdly, violence is

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directed against women because of the social group to which she belongs. In times of war, riots, class and caste violence, women are victims of violence and rape because to rape a woman is to humiliate her community. Again this is linked to male perceptions of female sexuality and women as the property of another man. To attack HER is to betray your enemy's vulnerability. Finally, there have been studies into the Nazi experience in Germany which have attempted to show that there is a correlation between militarisation and authoritarian social forms and increased violence against special types of women.[2]

Now what does the law do about these categories of violence against women. The answer is precious little. One of the main reasons is the private-public distinction which pervades all aspects of the law. "A man's home is his castle" - the slogan must have been written by a male lawyer for the law treads warily into private homes. "The sanctity of the family" another slogan, is a very real obstacle in the case of women and violence. The basic assumption behind this approach is that what happens in the home is a private affair and the law should only intervene if it becomes a public nuisance- such as when a woman screams hysterically through the night when her husband is beating her up, depriving her neighbors of sleep. The same is true about sexual relations between men and women; it is therefore not ironic that prostitution in Sri Lanka is controlled by the Vagrancy Ordinance which is again an aspect of public nuisance.

This approach is true not only in the area of violence against women but also in the area of marriage and children. After all, the different personal laws are a reminder that all men may be equal but all women are not- a lot depends on whether she is born to a Kandyan, Muslim or Tamil or a "general" family. Again, the notion that not only is a man's home his castle but ethnicity his special kingdom. The law respects them both at the expense of the women who live in the same society.

The purpose of the paper is not to present a comprehensive analysis of all types of crimes where a woman is victim but to raise issues about the gaps in the law and its inadequacy to deal with many of these problems because of the nature of the legal assumptions and the structure of the judicial system.

Let us begin with an area where the law has actually tried to intervene, and that is the area of rape. Section 364 of the Penal Code defines rape as "sexual intercourse between a man and a woman without her consent or against her will". In addition it specifies that intercourse with a girl under the age of twelve is rape with or without her consent.[3] But in actual fact what happens when the cases come to court?

First, there is a general rule of thumb- no injury, no rape. The woman who is being raped must show utmost resistance to the point of risking her life. There are exceptions, in the case of blackmail, deception or state of shock.[4] But for the normal case unless the woman has clawed and maimed her assailant, she had better not bring her case to court.

Secondly, there is what Brenda Cossman in a recent article calls a hierarchy of rape.[5] If you are a girl under the age of eighteen, who was a virgin and was raped by a man from a lower class or a minority race or caste group then you can be sure to get a conviction. But if you are an independent, lower class woman, of middle age, raped by an acquaintance then it is better that you nurse your wounds at home. If, in any case, you have had past sexual experience and this experience has been with anyone except your husband, then of course the lawyer, the judge, and the jury will be made to believe that you asked for it. Kamilini Wijetilleke in her article, "A Socio-Legal Overview of Rape as a form of Violence" gives ample example of Cossman's propositions in the Sri Lanka context.[6] In Sri Lanka, the testimony of the rape victim need not be corroborated in theory but in actual fact the court would caution the jury that it would be unsafe to act on the uncorroborated evidence of the victim unless there is corroboration of some material fact in the victim's evidence.[7] However, in related crimes such as abduction, kidnapping, etc... where the victim is not always female, corroboration is not required.[8]

Kamalini, in her article, ends her discussion with an unreported case of a woman, of the lower income group who goes to a police officer and complains that when she went to a government office in search of an officer, she was raped by the security guards. The security guards, friends of the police officer, claimed that the woman was loitering so they abused her- and the woman was arrested under the Vagrancy Ordinance for prostitution.[9]

This is not to say that there have been no changes. While the Sri Lanka law and cases with regard to rape have been static our neighboring country India has actually enacted sweeping legislation following on certain revelations and incidents in Bihar and Maharashthra.[10] The most important piece of legislation in this context, not only does away with corroboration and evidence with regard to a woman's past sexual conduct, but also in the case of women raped in state institutions, ie. custodial rape, the burden of proof shifts and those in power have to prove that a rape did not take place.[11] This is particularly true with regard to police stations, mental institutions and other such places where the authorities are custodians on behalf of the state.

One cannot dismiss these developments as being peculiar only to India; the well chronicled Ratnapura Rape case[12] and the Anuradhapura Prison case[13] show clearly that there is a great deal of violence directed against women in custody in Sri Lanka but our legal reformers have not chosen to adopt the Indian mode.

Rape is an area of the law where the state attempts to be interventionist but in actuality fails to give redress. Kamalini Wijayatilake argues that social and legal

attitudes are the main reason for this failure– the shame attached to the crime prevents reporting, legal attitudes with regard to consent and resistance prevent conviction,. There has been much research into this aspect and perhaps Susan Brownmiller in her book Against our Will which is a historical study of rape attempts to give some answers.

Her argument is that marriage and family as an institution rest not only on the need for human bonding, the positive aspect, but also on the fear of rape. Female fear of rape makes her seek a male protector. One only needs to be a young woman walking alone along the streets of Colombo to know instinctively what she means. And the law has historically reflected this. She studies in detail Ancient Babylonian Law, the Code of Hammurabi right up to Blackstone and she comes to the conclusion that Rape entered the Law Books through the back door as a property crime of man against man.[14] Woman was viewed as the property. I can think of many who would argue, that is the western approach to woman. I don't know whether one can make those distinctions, but even if that were true, it does not apply in the case of the law because the provisions of the Penal Code and the law of rape come directly out of that so called Western tradition. As Blackstone forewarned, one must be skeptical of women who claim that they are "ravished" by men, especially "if she be of evil fame and stands unsupported by others."[15]

Having explored an area where the law has dared to intervene, only to fail, let us go onto another area where law enforcement is particularly timid, and that is the area of domestic violence. I gather that Women in Need is conducting a comprehensive survey on Domestic Violence but I am unaware of their published findings. The ICES studies presented at this seminar based on samples in the Kandy district in one Kandyan village and one state point to a high incidence of domestic violence in both contexts linked to the abuse of alcohol as well as other factors. The only published findings are by Dr. Saravanapavananthan who gave questionnaires to sixty women who came to Jaffna hospital after being assaulted by their husbands.

The findings published in the Forensic Science International Journal in 1982[16] showed that most of these women had been married for ten years or more before they came either to the hospital or went to the police. Over 67% had been attacked with a weapon and the injuries were primarily to the head and upper limbs. Eighty per cent of the assaults were after alcohol and 20% related to accusations of extra-marital affairs on the part of one of the spouses. A third of the women were illiterate, two thirds had some schooling but none had a university education. Sepali Kottegoda in her work in the South also reveals that there was widespread domestic violence in the areas she surveyed.[17]

Police, law enforcement authorities and the Courts do not like to enforce the law of assault in cases of domestic violence. There are many reason for this. Cases chronicled in the U.S. show how when police officers come to the home to take the husband away, the wife often switches sides when she realizes that her male protector is about to be charged in courts.[18] For reasons of economics, dependence and children, wives are reluctant to go the full length of the adversarial process which our judicial system envisages.

In that sense the Anglo-American system of justice appears to be particularly unsuited for crimes of domestic violence. The reluctance of police officers to enter the domestic arena, the reluctance of wives to enter the adversarial process and see their husbands sentenced all complicate the legal and judicial proceedings. In Sri Lanka we take this inadequacy for granted as one of those realities we have to live with. But in other countries there have been some major areas of reform.

In North America and Europe, there are now special units of Policemen and Policewomen trained to deal with issues of domestic violence. These units have been set up since the 1970's and specialize in intervening in domestic squabbles. The squads go into a home where there is domestic violence. They are trained by psychiatrists and psychologists to identify different types of violent behaviour. They attempt to assess whether the assailant is a habitual offender or if there is a possibility of rehabilitation. In the case of the former, they prosecute, regardless of the wife's opinion; in the case of the latter they get a court order requiring the assailant to come to the police station on a regular basis for counselling by a psychiatrist or psychologist, either alone or with his wife. This type of approach ensures a dual pronged approach; ie. where the offender is deserving of punitive sanction, the police insist that he be tried in a court of law; in less extreme cases, they pursue the strategy of rehabilitation, especially if they feel that the marriage can be saved and that the violence can be stopped.This is of course police action in theory, but many women's groups have welcomed this type of policing.[19]

In addition to the above, since the 1970's domestic violence is dealt with at the community level by the setting up of half way houses, or shelters. In Sri Lanka we have Women in Need as well as Lanka Sumatrayo where women who are victims of such violence can go to a place to spend some time receiving advice and counselling. This has been seen as a major breakthrough in domestic violence. After a period, the woman herself can choose whether to file action against her husband, for assault or for divorce depending on her preference.

What these recent experiments of the 1970's and 80's show is that the law alone cannot face up to the problem of violence against women. There has to be a concerted effort of the law enforcement authorities, the community as well as judicial officers if the problem is to be tackled in a realistic manner.

Perhaps this experience from the success of dealing with many cases of domestic violence can show us some

insight into other areas of the law with regard to women and violence. Already in North America, Europe, South East Asia and India there are Rape shelters. Whenever a rape is reported the policeman immediately calls women working at these shelters. The women accompany the police to question the victim: they advise and counsel her as to the possibility of bringing legal action and in the eventuality that the woman agrees the shelter works closely with her and the prosecuting attorney in bringing cases to book. The film The Accused which recently won many academy awards chronicles this process in detail.

So what we see emerging in the area of violence is a "third force". Traditionally in law, there is the victim and her lawyer, and the perpetrator and his lawyer battling it out in a court of law in what is often a "no holds barred" confrontation. Given the structure of the judicial system and social mores, the woman has very little chance of succeeding. This third force, the community shelters, help cushion women from the starkness of the adversarial process envisioned by the law. In the first place, they counsel women as to the options available. They also stand by the women if they wish to go to courts. With that kind of support and intermediary advice, a woman is more likely to seek justice and redress than if she is left alone. This third force then is perhaps the most important development in feminist law and together with social workers, women lawyers in many countries are succeeding in increasing the number of cases and convictions with regard to cases of violence on women.

In addition to the crimes of rape and domestic violence which are common to all cultures there are crimes of violence against women which are culture specific. In Sri Lanka we have been spared many of the horrors of North Indian Hindu cultures such as Rajput Satis or Dowry deaths. Since many of marriages both with regard to Sinhalese and Tamils remain kinship based, the extremity of violence of the North Indian experience has not affected us. In addition Buddhist influence on Sinhalese society may have mitigated against culture specific types of violence. In any event, the question remains, how does the state respond without being accused of ethnic chauvinism and without flaming ethnic passions? When culture and ethnicity become tied up with violence against women there are truly difficult problems.

For example when Roop Kanwar committed Sati in the open in Rajasthan in 1987, the Women's Movement called a national rally of 25,000 women to protest. The next week, the Rajputs pulled out 500,000 to support Sati and saw the Women's Movement as part of the cultural imperialism of the "Hindi belt". Luckily, the law makers in Rajasthan and the Central Government decided to outlaw Sati for reasons beyond the immediate concerns of the Rajputs.[20]

Besides violence against women which is culture specific, South Asia is increasingly becoming an area for generalized violence of all kinds, especially ethnic, caste and class violence. In this context whether they be riots or ethnic wars, women are often the first victims. The Bangladesh War has been a well chronicled case study of the extremities of this kind of violence. The reports of Reverend Kentaro Buma, of the World Council of Churches, Aubrey Menen of the New York Times and the Bangladesh Central Organization for Women's Rehabilitation confirm that the figures for the number of Bangladeshi women raped was 200,000 as the lowest estimate and 400,000 at the highest. Suicide rates among these women were particularly high by methods ranging from rat poison to drowning.[21]

Bangladesh may have been an extreme case but it is well chronicled. However, throughout South Asia there have been little wars, riots, settlement killings, minor insurgencies etc... and the toll of violence against women as well as men is so high that it challenges the basic concepts of the right to life and dignity.

In such situations, it is a well known quote that during times of war, the laws are silent. There can be no legal recourse except after the fact and then governments are eager to put the violence behind them and not open a Pandora's Box. The need to ensure that the State Security Forces do not engage in such acts and to ensure that they intervene decisively and impartially in any context of civil strife are the only protection that women have during times of war and civil strife. Increasingly women are beginning to feel that they cannot wait till the men, either on behalf of the state or some violent non-state actor, acquire a sense of ethics and there is often spontaneous action against such incidents. In some cases when a rape is feared women in the neighboring houses come out in the streets and clang their pots and make a huge din so that commanding officers are brought to the scene to take control of some of their errant cadres.[22] Women's peace groups, different assortments of Mothers' Fronts, daughters of the nation etc... have been created under different covers. Some are controversial, others are not. But, from different vantage points they carry the same message. For when the laws are silent, as they inevitably are during times of war and strife, the only expression left is the expression of moral outrage.

Finally we come to shame. Anthropologists have in recent times separated societies into litigious societies and shame oriented societies. Litigious societies are those in which rights are forcibly vindicated in law courts or in the political process. Shame oriented societies have a parallel code to the legal system which conditions responses in certain areas of social life. One may debate the validity of the distinction in terms of societies, but there is no doubt that in the area of women and violence shame is an important component. It prevents women from disclosing the truth and therefore prevents vindication of their rights under any legal system, no matter how progressive it may be in content and form. How does one tackle shame, for it runs deep especially in small societies such as ours? I remember the film made by one of ICES directors about illegitimacy- the women consented to talk about their problems only so long as the film was not shown in Sri Lanka. Shame then will always be a factor which will

stand in the way of progress and unless the community and the family become support bases, it is unlikely that it will disappear from our social life. A woman who is raped, violated or maimed brings shame upon herself and her family for many in traditional societies believe that she did not have the spiritual power to ward off the evil. As woman is seen as a spiritual center, violence in the family is an aspect of her failure to gain the blessings of the gods. So the silence. As Yasmin Gooneratne recounts in a poem:-

> Betrayed by life into a loveless chamber
> O may my twitching hands that touch and pleasure nothing,
> my shaken gaze
> leaping from emptiness to emptiness,
> and my body, shrivelling quietly beside the aching cavern
> where my soul stood,
> never reveal that there has taken place
> an act of violence.[23]

(Notes: See Page 10)

THE "SPECIAL 301" PROVISIONS OF THE 1988 TRADE ACT; INTELLECTUAL PROPERTY, UNILATERAL RETALIATION AND INDO-US TRADE

By Jay Erstling & Jennifer Thambayah

On August 23, 1988, President Reagan signed into law the Omnibus Trade and Competitiveness Act of 1988[1] (1988 Trade Act). In enacting the legislation, Congress vented its "festering frustration"[2] with the direction and results of U.S. trade policy, and sought more potent solutions to alleviate America's growing trade woes.[3] Among the most controversial and important changes brought about by the 1988 Trade Act are the "Special 301" provisions,[4] which attempt to open foreign markets to U.S. exports and investment by threatening retaliation against inadequate and ineffective protection abroad for intellectual property rights.

This paper first provides an overview of "Special 301", next looks at how the provisions have been applied worldwide, and then focuses on the operation of "Special 301" in India, one of the countries singled out for alleged intellectual property abuses under the new legislation.

Overview of "Special 301"

The "Special 301" provisions amend and expand section 301 of the Trade Act of 1974.[5] Their purpose is "to provide for the development of an overall strategy to ensure adequate and effective protection of intellectual property rights and fair and equitable market access for United States persons that rely on protection of intellectual property rights."[6] To achieve that purpose, the provisions establish a special procedure requiring the United States Trade Representative (USTR) to identify each year those countries that do not adequately and effectively protect intellectual property rights or that deny fair and equitable market access to products protected by intellectual property rights.[7] Countries that have been identified are designated as "priority foreign countries"[8] and become subject to the imposition of trade sanctions.[9]

The provisions mandate the method to be used by the USTR in identifying priority foreign countries. The USTR must consult with appropriate Federal agencies, including the Copyright and Patent Offices, consider information and petitions furnished by interested persons, and take into account the conclusions reached in the annual National Trade Estimate Report on Foreign Trade Barrier (NTE report).[10] The purpose of the NTE report, which is submitted to Congress by the USTR, is to identify and analyze foreign acts, policies, or practices that constitute significant barriers to, or distortions of, trade.[11]

The provisions also make clear that the USTR's authority should be used sparingly as only the countries with the "most onerous or egregious acts, policies, or practices" may be identified.[12] Examples include countries whose practices have the greatest actual or potential adverse impact on U.S. products, countries that have not entered into good faith negotiations to eliminate intellectual property problems, or countries that are not making significant progress in bilateral or multilateral intellectual property negotiations. Of particular importance to Congress in designating the last criterion was whether foreign countries were "participating constructively" in multilateral fora such as the General Agreement on Tariffs and Trade (GATT) "Uruguay Round" negotiations on trade related aspects of intellectual property (TRIPS).[13]

The USTR has thirty days following his/her submission of the NTE report to Congress to identify priority foreign countries. Once an identification has been made the USTR is required, within an additional thirty days, to initiate a section 301 investigation unless he/she determines that such an investigation would be detrimental to US economic interests. In that case, however, the USTR must justify his/her decision in writing to Congress and must specify the economic interests that would be adversely affected by the investigation.[14]

The purpose of a section 301 investigation is two fold: to determine whether any of the cited acts, policies or practices of the priority foreign country is "unreasonable or discriminatory and burdens or restricts United States commerce",[15] and, if so, to recommend appropriate trade sanctions to remedy the abuse.[16] In carrying out the investigation, the USTR must request consultations with the priority foreign country as well as seek the advice of appropriate Government agencies and interested persons.[17] Although the time limit for all other section 301 investigations is at least 12 months from the date of initiation, investigations brought under the "Special 301" provisions are on the "fast track" and

must, in most cases, be completed within six months.[18]

If the USTR determines that trade sanctions are necessary and appropriate, he/she has a powerful array from which to choose. For example, the USTR may recommend suspension of trade agreement concessions, the imposition of duties, and the withdrawal of designation under the General System of Preferences.[19] Subject to specific directions from the President, the USTR must implement his/her recommendations within the following 30 days.[20]

Application of the "Special 301" provisions

To satisfy the statutory deadlines, the USTR made her first determination under the "Special 301" provisions on May 25, 1989. "Because of significant progress made in various negotiations,"[21] particularly the conclusion of a "framework" agreement in the GATT TRIPS negotiations,[22] the USTR decided not to identify priority foreign countries, and initiate the section 301 investigation procedure. Instead, she singled out 25 countries, whose practices, in her view, deserved "Special attention.... because they maintain intellectual property-related practices or barriers to market access that are of particular concern."[23] She placed 17 of those countries on a "Watch List", and announced that the United States would "step up its efforts to resolve problems" attributed to those countries.[24] The remaining eight countries, whose practices were considered to suffer from the most serious problems, were named to a "Priority Watch List." The Priority Watch List countries were Brazil, India, Mexico, People's Republic of China, Republic of Korea, Saudi Arabia, Taiwan, and Thailand.[25]

For each country included on the Priority Watch List, the USTR outlined and accelerated action plan to resolve outstanding issues, and declared her intention to pursue the plans during the following 150 days. She further stated that she would review the status of the Priority Watch List countries not later than November 1, 1989, taking into account the extent to which the objectives of the accelerated action plans [had] been achieved."[26] Although the plans differed in detail from country to country, in general they called for the broadening of the scope of patentable subject matter, the introduction or expansion of the grant of copyright protection, stepped up enforcement against intellectual property piracy, and "constructive participation" in multilateral intellectual property negotiations.[27]

On November 1, 1989, the USTR announced the results of her review: she downgraded the status of the Republic of Korea, Saudi Arabia and Taiwan from the priority Watch List to the secondary Watch List; but left Brazil, India, Mexico, the People's Republic of China, and Thailand on the Priority List for continued close scrutiny. The rationale for the USTR's decision was that the three downgraded countries had all displayed "significant commitments to changing their intellectual property policies."[28] The USTR was impressed that Saudi Arabia had pledged to enact a copyright law compatible with the obligations of the Berne Convention, an important copyright treaty recently ratified by the United States,[29] that Taiwan was working to modify its copyright laws and to resolve a dispute over alleged pirating of videotapes, and that the Republic of Korea had created an intellectual property task force and increased the use of police to deter intellectual property piracy.[30]

The USTR's decision to downgrade the three countries was met with only lukewarm support by American industry. The greatest skepticism was voiced by the International Intellectual Property Alliance (IIPA), a prominent US trade association coalition that represents more than 1,600 companies in the recording, publishing, computer software, motion picture and music publishing industries. According to the IIPA, no country on the Priority Watch List had made significant progress to warrant downgrading, and two countries on the secondary Watch List – Malaysia and Turkey – deserved to be added to the Priority List for reluctance to correct alleged intellectual property wrongs.[31]

Despite the opinion of the IIPA, the USTR declared that she was "encouraged by the genuine progress made in the protection of intellectual property by our trading partners."[32] She will soon have another opportunity for comment as the next deadline for identifications under the "Special 301" provisions is April 30, 1990.

Based on the USTR's findings, it may be argued that the "Special 301" provisions are succeeding in encouraging increased awareness and higher levels of intellectual property protection. The provisions have not, however, been universally greeted with warmth and understanding. In the remaining Priority Watch List countries, the provisions have encountered resistance and criticism. Particularly disturbing to the provisions critics is that the United States seems to have ignored prevailing standards of international law by allowing for unilateral retaliation without regard to GATT dispute resolution procedure,[33] and by attempting to impose norms of intellectual property protection stricter than those required by existing treaties.[34] Among the voices of criticism, the strongest and most compelling have come from India.

(Notes: See Page 11, 12)

Law and Society Trust and its Contacts Series

By Angela Hussain

THE INTERNATIONAL SERVICE FOR HUMAN RIGHTS, GENEVA

Geneva is the world centre for Human Rights. It is the European headquarters of the UN, and the home of the UN Centre for Human Rights, the privately funded creation of a number of human rights bodies, which receives over 300,000 individual complaints of violations of human rights every year, from all parts of the world.

Other organizations with interests in human rights based in Geneva are the ILO (International Labor Organization), UNHCR (the UN High Commissioner for Refugees), WHO (World Health Organization), the International Committee of the Red Cross (ICRC), and the WCC (World Council of Churches). It follows that dozens of important human rights meetings are held in Geneva every year. Among them are the meetings of the UN Commission on Human Rights (whose work is supported by the Centre of Human Rights, although the two organizations are different), its Sub-Commission on the Prevention of Discrimination and Protection of Minorities and the Treaty Bodies.

The International Service for Human Rights supports and promotes the work on human rights done by all such bodies. Its Director who is also editor of its quarterly magazine the Human Rights Monitor is Adrien-Claude Zoller. It is governed by an Executive Council, and has in addition a Consultative Council with members drawn from all over the world. Its Secretariat is made up for three permanent staff members. During sessions of the UN Commission and Sub-Commission the permanent staff is augmented by volunteers and interns. This no-profits international association renders most valuable assistance to defenders of human rights astray in the complexities of international procedures which have to be followed before witnesses can testify. ISHR performs many other services. It offers practical information on meetings taking place in Geneva. It helps in transmitting information and complaints from NGO's and field workers promoting human rights to the UN or its specialized agencies as appropriate. It supplies secretarial assistance and documentation for participants in meetings. It gives guidance and training in international procedures, and has even prepared a programme for visitors. The work of ISHR is best understood by looking at its journal, the Human Rights Monitor, a quarterly which covers all activities relating to human rights, featuring articles printed twice, in English and in French.

The Human Rights Monitor comments editorially on the lead human rights story of the time. Its pages also give readers notice of the forthcoming sessions of the various commissions, sub-commissions and committees held in Geneva, for eg. meetings on Human Rights, on Economic Social and Cultural Rights, of the UN Research Institute for Social Development, on the Prevention of Discrimination and Protection of Minorities etc., and it briefs NGO's and states on procedures involved in participating in these meetings or in applying for consultative status. After the sessions are held, it prints analytical reports of the proceedings. It publicizes the examination by the experts of the Human Rights Committee of each State Report UN member countries have to submit periodically. Readers of the Human Rights Monitor can keep abreast of every country's progress or lapses. To sum up, the journal is an invaluable source of impartial and independent coverage of the global scene vis-a-vis human rights.

From a selection of recent issues, here are examples of how the Human Rights Monitor highlights UN efforts to promote human rights.

The October 1989 issue of the Human Rights Monitor featured the Analytical Report on the 41st session of the Sub-Commission for the Prevention of Discrimination and Protection of Minorities held in Geneva in August 1989. The Report carried this introduction - "The session will be remembered for two decisions of historical importance..... Firstly, the introduction of a secret ballot for resolutions on countries, and secondly a vote of censure on China for its brutal suppression of the "Beijing Spring" democratic movement." Editorial clarification of this introduction followed. It was explained that the UN experts have to be safeguarded from pressure and occasional threats when they examine situations of countries where human rights are violated. Officially, these experts do not represent their respective Governments, but in fact they are nominated and elected by their Governments, its civil servants or its diplomats, so their freedom is relative. If his vote does not please his Government because, (particularly in the case of Third World Governments, economically weaker than the big power blocs) economic reprisals may follow, then there could be unfortunate consequences for the expert. At the time when votes were cast publicly, sudden, unexplained changes in the positions taken up by a number of experts had taken place between the time a charge of human rights violations was examined and time votes were counted. There was danger that the credibility of the UN Human Rights Bodies would be eroded unless some modification of existing practice was introduced. A critical moment in the history of international movements to support human rights arrived in 1989. The first UN Human Rights Body to meet after the massacre of unarmed demonstrators in Tienanmen Square by Government troops on June 4th 1989 was the Sub Commission for the Prevention of Discrimination and the Protection of Minorities. The Sub Commission met after the T.V. coverage of the massacre (in contrast to the usual reported violations of human rights) had actually appeared on T.V. screens all over the world, and it could not fail to speak out in this issue. A large majority of the members of the Commission agreed that the only way to safeguard the independence of the experts was to amend its procedures. Accordingly, after the normal public session discussion on the alleged violations, the traditional public vote was replaced by a secret ballot, and the vote of censure on the Tienanmen massacre became possible.

Other resolutions adopted under secret ballot followed. One example was the resolution passed against apartheid in South Africa. Another was the resolution passed against Israel for its actions in the Occupied Territories, especially for its repression of the intifada and violations of international law, on which question an international conference was called for. Yet another example was the resolution passed supporting the Secretary General's efforts to seek a solution to the conflict in East Timor, requesting the Indonesian government to allow human rights organizations to visit Timor, and regretting the increase in cases of execution

and torture.

The December 1989 issue of the Human Rights Monitor reported on recent meetings of the specialized agencies of the UN. The Executive Committee of the High Commission for Refugees held a session from 5th - 13th October at which the budget of the UNHCR was brought under States control. This session was followed by a UNHCR Conference in Indo-Chinese refugees, held on October 16th and 17th. Here is an extract from the Human Rights Monitor on this subject, which shows no bias in favor of the developed countries -

> "The debate focussed on the 56,000 'boat-people' who are in camps in Hong Kong. Great Britain is seeking to reduce the number of refugees in Hong Kong.... According to the British delegation, over 70% of these refugees left their countries for economic reasons, and these could be repatriated, but a number of countries, including the US., oppose this.... The Vietnamese delegation nevertheless stated that it was prepared to negotiate bilateral accords to facilitate voluntary return. Clearly the Hanoi Government is preparing to negotiate the forced return of thousands of Vietnamese."

Here are some UNRISD (United Nations Research Institute for Social Development) findings published in the Human Rights Monitor which are further proof of non-biased judgement - "The current economic reforms in Eastern Europe were at the centre of discussion. These reforms are often approached only from the angle of development of the local economy. UNRISD wants to undertake detailed studies on their social consequences."

The June 1990 issue of the Human Rights Monitor throws light on the search for just solutions to human rights problems in the Middle East and in South Africa. It comments on the long-drawn-out nature of the liberation struggles of the people of Namibia before they could regain their freedom. It expresses satisfaction that the negotiations on the future of Western Sahara between Eritrean movements and the Government of Ethiopia were finally getting under way. It adds "Both the Palestinians and the people of South Africa still have a long way to go on the path to freedom, as several meetings in Geneva made plain. In May 1990, the Security Council had to come to Geneva to be able to hear a statement by PLO President Yasser Arafat. A United States veto finally kept the Council from taking action over the massacre of Palestinian migrant workers in Israel, and the repression unleashed in its wake.

Mr. Nelson Mandela's visit to Geneva (7 - 9 June) featured addresses to the International Labor Conference, the World Council of Churches, and leaders of European anti-apartheid movements. The ANC leader spoke with the authority of one who had known nearly three decades of imprisonment and forced labor in South Africa.

"Mr. Mandela's message in Geneva stressed the importance of keeping up pressure for liberalization... Just as sanctions should be maintained against the present South African regime, so should supervisory machinery in respect of a number of other countries remain in place until, as Mr. Mandela notes, a totally new situation...exists."

The International Service for Human Rights and its journal The Human Rights Monitor are playing their part in keeping up the pressure for liberalization.

BOOK REVIEW

By Jill Grime, Solicitor (UK)

Title : The Girl Child In Sri Lanka

Author : UNICEF, Sri Lanka

Date of Publication : 1990

The stated aim of this short and attractively illustrated booklet is to highlight the concerns and issues involving the girl child in Sri Lanka, in the context of the year of the girl child - 1990.

In this context the booklet gives a succinct outline (in 47 pages 27 of which are used for a series of photographs, and 17 for text and statistics) of the situation of the girl child, with some supporting statistics.

It is unfortunate, given the aim of the booklet, that what emerges is an unbalanced and even a misleading picture of the situation of the girl child.

The introduction states rather surprisingly "within the context of Sri Lanka, there is no apparent gender bias", and the statistics used suggest that there is widespread equality of opportunity. The effect of this statement and the statistics is surely misleading, and could in fact promote complacency rather than the will to act.

In contrast the text does indicate areas of considerable concern, such as:

> deteriorating nutritional status in adolescent girls and expectant mothers;
>
> early marriages and vulnerability to the worst effects of child abuse in the home and in employment;
>
> covert and overt gender discrimination in all sectors: in school, at home, in available employment and economic activity.

However with one exception (the relatively high level of un-employment in well qualified girls) these concerns

are not illustrated by statistics and are expressed in generalized terms. There is therefore a significant lack of information, either as a result of the wish to be concise, or because information is not available, and indeed what information there is, is contradictory.

Equally it is unfortunate that so much of the booklet is devoted to photographs whose potential is wasted since they are not sufficiently integrated with the text, and are not used to ram home the points made.

One would have hoped for a more balanced, objective and indeed dynamic approach from a body pledged to support the welfare of the world's children.

Much more information is needed before a properly balanced picture can emerge of the status of the girl child, for example in the following areas:

> sectors of employment of girls, especially between 12 and 18, and of women;
>
> relative salaries of children and adults;
>
> incidence of child abuse in the home and in employment, and incidence of unwanted pregnancies, abortions and prostitution in girl minors.

It is equally important to explore the reasons for the differences in perception and treatment of girls and boys, and the consequent effect on girls and women.

There also needs to be a greater definition of terms; what is meant by employment (does it include unwaged work?), what is meant by child abuse, and indeed what is a girl child (female under 18?)

As a discussion document the booklet achieves its aim – it throws up more questions that it answers. Greater analysis and less generalization is essential in order to assist the girl child in the future.

To Our Readers. . . .

We apologize for the non publication in this issue of "Protective Discrimination in India–Part II" by Dr. Devanesan Nesiah, due to circumstances outside the author's control. Part II will be published in a later issue.

NOTES

Of Kali Born – by Radhika Coomaraswamy

1.Adrienne Rich, Of Woman Born, W.W. Norton and Co. New York 1976, p. 13

2.Reich, W. The Mass Psychology of Fascism, Hammondsworth, Pelican, 1972 (first published in 1934)

3.Section 364 of the Penal Code

4.Sections 363 and 364 of the Penal Code

5.Brenda Cossman, The Legal Regulation of Sexuality, Thatched Patio, ICES, Colombo, July–August 1990.

6.K. Wijayatilake, "A Socio–Legal Overview of Rape as a Form of Violence Against Women, CENWOR, Colombo, 1990.

7.King vs. Athukorale, 50 NLR 256

8.K. Wijayatilake, p.6

9.K. Wijayatilake, p.8

10.See sec. 155(4) and 54 of the Indian Evidence Act

11.See Criminal Law (Amendment) Act of 1983

12.Rohini Weerasinge report of Ratnapura Rape case, Voice of Women 1985

13.S. Abeysekere, Report on the Anuradhapura Prison, Women and Media, 1985

14.S. Brownmiller, Against Our Will, Simon and Schuster, New York 1975, p.18

15.Brownmiller, p.30

16.N. Saravanapavananthan, "Wife Battering: A Study of Sixty Cases" in Forensic Science International, 20 (1982) 163 – 166

17.S. Kottegoda, "Wife Beating: The Hidden Crime", ICES, Colombo, 1987

18.D. Black, The Manners and Customs of the Police, p.109 – 132, Yale U. Press, New Haven, 1981

19.B. Cossman, in discussion on "the Legal Regulation of Sexuality," ICES, June 1990

20.The Commission Of Sati (Prevention) Ordinance, 15 December 1987

21.Brownmiller, p.78

22.Eye witness accounts from Nallur Jaffna, Nov. 1987

23.Yasmin Gooneratne, "Yasodhara", in D.C.R. A. Goonetilleka, Modern Sri Lankan Poetry – An Anthology, Delhi, Sri Satguru, 1987

The "Special 301" Provisions NOTES – by Jay Erstling and Jennifer Thamboyah

1.Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100 – 418, August 23, 1988 102 stat. 1107.

2.Hearing on Title II of S. 1860 and S. 1862. Before the senate Comm. on Finance, 99 the Cong., 2d Sess. (1986) (Statement of Chairman Robert Packwood (R.Or.).

3.At the time the 1988 Trade Act was enacted, the annual U.S. trade deficit was estimated to reach $137 billion. for the first time since World War I, the United States became a net debtor at the end of 1985, and has remained so ever since.

4.Pub. L. No. 100–418, title I, section 1303, August 23, 1988. 102 state. 1179 (codified in 19 U.S.C. 2242 and 2411 et seq). [hereinafter cited by reference to the United States Code].

5.Trade and Tariff Act of 1974, 88 State. 1978, 19 U.S.C. 2411 et seq

6.H.R. 3, 100th Cong. 1st Sess., section 1303 (a) (2), Cong. REC. H. 1886 (April 20 1988). The purpose underscores the Congressional finding that "international protection of intellectual property rights is vital to" US competitiveness. Ibid., section 1303 (a) (1).

7.19. U.S.C. 2242 (a)(1)(A) and (B):

"By no later than the date that is 30 days after the date on which the annual report is submitted to Congressional committees under section 2241(b), the United States Trade Representative. . . .shall identify –(1) those foreign countries–(A) deny adequate and effective protection of intellectual property rights, or (B) deny fair and equitable market access to United States persons that rely upon intellectual property protection. . . ."

The procedure appears to be targeted primarily at rooting out purported piracy of US intellectual property rights in the computer software, pharmaceutical, motion picture, and publishing industries.

8.19 R.S.C. 224(a)(2)

9.19 U.S.C. 2411(c). the trade sanctions include suspending, withdrawing, or preventing the application of concessions, or imposing duties or other import restrictions.

10.19 U.S.C. 2242(b)(2). The procedure for establishing the NTE report is defined in 19 U.S.C.2241.

11.19 U.S.C. 2242(B)(1)(A).

12.19 U.S.C. 2242(b)(1)(B) and (C). It may be assumed that Congress intended the terms "good faith negotiations" and "significant progress" to mean accommodations and concessions by America's trading partners.

13.See for example, Main Pursuing U.S. Goals Bilaterally: Intellectual Property and "Special 301", Business America, September 25, 1989, at 6. General Agreement on Tariffs and Trade, October 30, 1947, 61 State. (5) A3, T.I.A.S. No . 1700, 55 U.N.T.S. 187. The TRIPS negotiations originated with a proposal from the United States (see U.S. Proposal for Negotiations on Trade Related Aspects of Intellectual Property Rights, 34 Pat. Trademark & Copyright J. (BNA) 667 (1987); if successful, they will result in the conclusion of a comprehensive code of intellectual property protection that strengthens the current standards of protection and establishes a uniform enforcement mechanism.

14.19 U.S.C. 2412(b)(2). The USTR has the discretion not to institute an investigation if he/she determines that trade sanctions would not be effective in eliminating the intellectual property abuse. 19 U.S.C. 2412(c).

15.19.U.S.C. 2411(b)(1)

16.See supra note 2, pp 118.

17.19 U.S.C. 2413 and 2414 (b)

18.19 U.S.C. 2414(a)(3)(A). The USTR may grant a three month extension if "complex or complicated issues are involved" or if the priority foreign country is "making substantial progress" in providing adequate intellectual property protection. 19 U.S.C. (a)(3)(B)

19.See, supra, note 2, pp 118.

20.19 U.S.C. 2415. The USTR may grant a delay of up to 180 days, however, if substantial progress is being made by the priority foreign country toward reaching "a satisfactory solution with respect to the acts, policies, or practices that are the subject of the action." Ibid.

21.USTR Fact Sheet for "Special 301" on Intellectual Property, 38 Pat. Trademark & Copyright J. (BNA) 131 (1989)

22.In April 1989, the delegates to the TRIPS negotiations reached agreement on a frame work to serve as a guide for the elaboration of a Uruguay Round intellectual property code. The framework text permits the scope of the negotiations to include adequate substantive intellectual property standards, enforcement mechanisms, and a disputes settlement procedure. Many countries, in particular developing ones, opposed the TRIPS negotiations as constituting an unwarranted and illegitimate expansion of GATT jurisdiction; the conclusion of the framework agreement was therefor viewed as an important breakthrough by the USTR.

23.See, supra, note 6.

24.The Watch List countries are: Argentina, Canada, Chile, Colombia, Egypt, Greece, Indonesia, Italy, Japan, Malaysia, Pakistan, Philippines, Portugal, Spain, Turkey, Venezuela, and Yugoslavia. According to the USTR, "no foreign country currently meets every standard for adequate and effective intellectual property protection. . . " Supra, note 6.

25.See, supra note, 6 at 132. Brazil and India, together with Japan, have also been singled out and identified as priority foreign countries under the "Super 301" provisions of the 1988 Trade Act. "Super 301" is broader than "Special 301" and is targeted at countries with a consistent, generalized pattern of "major barriers and trade distorting practices." 19 U.S.C. 2420.

26.See, supra, note 6, pp 119, at 132.

27.Ibid, at 132–133. The accelerated action plan for India is discussed in greater detail, infra.

28.USTR Removes Three Nations From Intellectual Property List, 39. Pat. Trademark & Copyright J.(BNA) 30 at 31 (1989).

29.Berne Convention for the Protection of Literary and Artistic Works. Ironically, it may be argued that US copyright law (17 U.S.C. 101–810) is not fully compatible with the Berne Convention because the US law fails to provide sufficient protection for the"moral rights" of authors as required by the conventions Article 6 bis.

30.See, supra, note 3.

31.Ibid, In IIPA's opinion, Malaysia had been "dragging its heels" concerning the enactment of a new copyright law, and Turkey had "not been forthcoming" in its copyright coverage of sound recordings. While the USTR refused to upgrade the two countries to priority status, she stated that she intended to "step up efforts to make progress with [them] and called their recent attitude toward intellectual property "disturbing." Taiwan, Korea, Saudi Arabia removed from USTR's "Priority Watch List," 3 World Int. Prop. Rep. (BNA) 262 at 263 (1989).

32.3 World Int. Prop. Rep (BNA) at 262(1989).

33.As intellectual property protection is currently outside the scope of GATT Rules, it may be argued that alleged abuses of intellectual property rights may not give rise to actionable trade barriers in conformity with Article 111 of GATT. In this regard see GATT Council Finds that section 337 Discriminates against Foreign Companies, 39 Pat., Trademark & Copyright J. (BNA) 29 (1989).

34. The principal treaties are the Paris Convention for the Protection of Industrial Property and the Berne Convention for the Protection of Literary and Artistic Works. The problem is that "the United States Government has taken the position that the present intellectual property treaties. . . can no longer be regarded as instruments sufficiently responsive to modern protective needs of intellectual property owners and, consequently, the interests of the national economies of the states party to these treaties." Kunz-Hallstein, The United States Proposal for a GATT Agreement on Intellectual Property and the Paris Convention for the Protection of Industrial Property 22 Vand. J. Transnat, L. 265 at 267 (1989). See also U.S. Proposal for Negotiations on Trade Related Aspects of Intellectual Property Rights, 34, Pat., Trademark & Copyright J (BNA) 667 (1987).