



# LAW AND SOCIETY TRUST

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## Fortnightly Review

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### OBJECTIVES

The Law and Society Trust Fortnightly Review keeps the wider Law and Society community informed about the activities of the Trust, and about important events of legal interest and personalities associated with the Trust.

### THE AYODHYA ISSUE

By Thomas Abraham Jnr.

The political crisis that has been triggered off by the efforts of Hindu organisations to build a temple on the site of a mosque at Ayodhya has done more than just bring down the V.P. Singh government. It has raised disturbing questions about the future of secularism in India. It also makes one uncomfortably aware of the fact that a secular state is an aberration in this part of the world, where the norm is for religion to be closely woven into the framework of the state. With an over 90 percent Hindu majority, how has India managed to stay secular so long, and how strong are the pressures within Indian society for the creation of a more overtly Hindu state?

The Ayodhya issue has brought to the surface all the questions that underlie majority-minority relations in plural societies. Not surprisingly, there are parallels between the political behaviour of the main protagonists in the Ayodhya dispute and Sinhalese and Tamil political forces in Sri Lanka. The same genre of arguments that have been used in the Ayodhya dispute have been used in Sri Lanka as well by Sinhalese and Tamils in support of their political claims. For one, there has been the use of mythology and dubious historical evidence to support contemporary political positions. Then there has been the use of religion as a tool of political mobilisation in a multi religious society, leading inevitably to a weakening of the bonds that allow disparate social groups to remain within a single nation state.

Before looking at these questions, it is useful to first run over the chain of events that led to the crisis at Ayodhya. Ayodhya, a small provincial town in the northern state of Uttar Pradesh is sacred to Hindus as the birthplace of Lord Rama. Whether Rama was a historical figure, and whether present day Ayodhya was his birthplace is a question historians are divided on. Prof. Harbans Mukhia of Jawaharlal Nehru University in a recent article in the Hindu points out that even assuming Rama was a historical rather than a mythological figure, there is no archaeological evidence

to show that present day Ayodhya existed at the time that Rama was supposed to have ruled as king.

But whatever the historical evidence or lack of it, what is relevant is that millions of Hindus believe devoutly that Ayodhya is the sacred "Ram janambhoomi" or birth place of Ram, and in issues such as this, what people implicitly believe to be the truth is far more important than the actual truth. It also follows that political disputes that are based on deeply held religious beliefs and myths, cannot be resolved through a recourse to scientific argument.

What is known is that in the sixteenth century, Mir Baqi, a courtier of the first Mughal emperor Babar built a mosque at Ayodhya which came to be known as the Babri Masjid. Hindus believe that the mosque was built at the site of a temple marking the birthplace of Rama. In the 19th century, disputes began to arise between Hindus and Muslims over the mosque; a compromise was reached where both sets of worshippers used adjoining areas within the mosque compound.

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NO. 1

The existence of a mosque on the site of an ancient Hindu temple evidently rankled in the minds of militant Hindus, and in December 1949, a group of men broke into the mosque and placed an idol of Ram inside. To avoid a full fledged row, the government locked the mosque and stopped all worship by both Hindus and Muslims. In 1986 however, a district court ordered the locks to be opened, and Hindus began worshipping at the temple.

At the same time, Hindu groups began to intensify their demands for the mosque to be demolished so that a new temple to Ram could be built. The Bharatiya Janatha party, a right of centre Hindu nationalist grouping, saw this as an issue over which it could further its political prospects by mobilising Hindus. On September 12, the party president, L.K. Advani began a journey to Ayodhya from the western port town of Somnath to begin the construction of the temple. Thousands of enthusiastic volunteers, many of them carrying bows and tridents, the symbols of militant Hinduism, followed his triumphal procession, which was also accompanied by clashes between his followers and Muslims.

Constructing the temple would have meant destroying the mosque first, something that no government that claimed to represent India's hundred million Muslims could afford to allow. Advani was arrested, and police fired on his supporters when they tried to enter the mosque. The BJP withdrew its support to the V.P. Singh government, opening a new chapter in Indian politics.

So much for the events. What do they mean for the future of the Indian political system, and specifically for the continuance of a secular state? On the one hand, the BJP's march on Ayodhya was an attempt to arouse Hindus and get them to think and vote as Hindus. Advani was able to arouse large and enthusiastic crowds in his procession across the Hindi heartland, indicating that he had tapped a latent reservoir of Hindu sentiment. Much of the political rhetoric and atmosphere that surrounded the march was regressive, in that it was based on a concept of the Indian nation as a primarily Hindu nation; Muslims and other minorities were the legacy of foreign invasions, and were "outsiders" who lived and prospered in India due to the tolerance of Hindu society. With the retreat of the last invaders of India, Hindu society was gradually reclaiming its lost heritage. Thus the existence of a mosque on the site of one of Hinduism's holiest sites was not just an insult to Hindus, it was in the words of the BJP leader A.B. Vajpayee, "an insult to national honour". equating Hinduism with the Indian nation. This exclusionist ideology, which identifies being Indian with being Hindu has always existed on the fringes of the Indian political spectrum. Has the Ayodhya march moved it closer to centre stage?

Only the next elections will tell. Until now, Hindus have not voted communally for Hindu parties. The BJP, and its predecessor, the Bharatiya Jana Sangh, have never in more than forty years of Independence, got more than 12 percent of the national vote. Had

India's Hindu majority voted en bloc as Hindus, a Hindu party would have an automatic majority.

The main reason for this has been that Hindu society itself is not a monolithic, homogenous bloc. Caste and regional divisions within Hindu society are often greater than divisions between Hindus and non Hindus. The fierce outcry against the job reservation scheme for backward castes demonstrated the fissures within Hindu society. Advani's Ayodhya march was a direct response to these divisions, and was an attempt to bind Hindus together through a consciousness of their common religion.

Secularism in India depends on the Hindu majority staying heterogeneous and diverse, until such time as a truly national Indian identity permeates through society.

## ASIAN TRENDS

### HUMAN RIGHTS PARALEGALS

*By Mario Gomez*

That Sri Lanka needs a new concept of legal aid is obvious. The perception and attitude to legal aid in this country is one of benevolence. Legal aid has been viewed primarily as a handout and has been seen as a way of supplying the financial capacity to indigent clients to initiate and conduct litigation.

This perception flows from our legal culture which has remained largely positivist and legalistic. It flows from a perception by our members of the bar and our legal educators that the legal world consists largely of the courtroom and its surrounding environment. It flows from perception that legal knowledge is the monopoly of the legal profession and the legal community.

However now that law is seen as possessing the potential to help uplift the social and economic standards of society, these traditional attitudes are increasingly under attack in several societies.

### Law, Law Schools and the Community

No more can we hold on to the position that legal knowledge is the monopoly of the legal community. Law should be viewed as the 'monopoly' of the general community. No more can we argue that the obligation of law schools is to feed the legal profession and to produce lawyers; that legal education should only be geared at meeting the needs of the legal community.

Law schools now have a duty to the society at large - at meeting some of the legal needs of the society. A society's right to information, includes the right to receive legal information and skills, since this information and skills possesses the potential to help improve the position and situation of members of society.

Similarly legal aid also needs to be seen, not as a handout but as a right and entitlement. A right to equal access to justice and an entitlement to knowledge and skills that have the potential of improving a person's economic and social status.

## Paralegals

A mechanism now being widely employed as part of this alternative approach to legal aid and lawyering, is the concept of paralegalism. What the concept of paralegalism seeks to do is to impart basic legal skills and expertise to community leaders, social workers and others who will then perform legal functions in their local areas. They will assist lawyers where such assistance is called for, and will substitute for them where it is appropriate.

A paralegal worker, has been defined as a person with basic knowledge of law and procedures, and with the motivation, attitude and skills to:

- conduct education programmes to enable disadvantaged people to become aware of their rights;
- facilitate the creation of a people's organisation to enable them to demand their rights;
- assist in securing mediation and reconciliation in matters in dispute;
- conduct preliminary investigation in cases which have to be referred to a lawyer; and
- assist the lawyer with written statements, required evidence and other relevant information necessary for dealing with such a case (see *'A Handbook on Training Paralegals': Report of a Seminar held in Tag-Tay, Philippines; Ed D J by Ravindran; ICJ Publication*)

The following categories of persons, among others, could be trained as paralegals:

Community leaders, rural youth, social workers, trade union leaders, health workers, priests, religious leaders, law students, young lawyers and student volunteers.

The training given to the paralegals will vary according to the area they live and work in. They are intended, ultimately, to act as catalysts and facilitators in the development process and to help the poor identify the causes of their plight and to help them overcome these causes.

The functions of a paralegal worker then is both reactive and pre-emptive. A paralegal is supposed to react to violations, infringements and conflicts and attempt to offer methods of redress, compensation or resolution. Paralegals also have a pre-emptive role in that he/she has an educative function in trying to prevent violations, infringements and conflict. The paralegal's ultimate function however would be catalytic; in promoting social change and upliftment.

## Human Rights: Pre-emption and Quick Reaction

The human rights community has traditionally been a 'reactive' community. The violation or the infringement occurs and the activist reacts - trying to offer compensation or redress and document and monitor. While no doubt these functions are important, the human rights communities in Asia are now searching for mechanisms and processes that will attempt to prevent human rights violations and/or react quickly to these violations.

## Quick Reaction Team

The Quick Reaction Team established by the Philippine Commission on Human Rights offers an interesting model.

The Philippine Commission on Human Rights set up in the September of 1988, a Quick Reaction Team (Resolution CHR No A88-050). The Quick Reaction Team (QRT) was set up

'aware of the importance and necessity of establishing a measure to respond to extreme exigency when prompt and immediate action ... is required ... (and) to respond to urgent calls for immediate legal assistance involving cases of human rights violations where serious grave threats to life and limb, liberty and property of a victim is at stake.' (See the Preamble to the Resolution.)

The QRT comprises a lawyer, who acts as the team leader, two investigators and a driver. The Team is activated during weekends and holidays to meet emergencies that arise, and also in cases where mass action like strikes, pickets or demonstrations take place.

On each occasion that the QRT is called upon to respond, the team leader is required to submit a written report to the Commission on Human Rights. The QRT is provided with a telephone hotline, geared only for incoming calls, which could be used by members of the public to inform the team about human rights violations. Attempts are made to disseminate the telephone number among as large a public as possible. The Team is also provided with radio communications facilities to be used by its members, and portable office equipment, which include a camera and cassette recorder.

## Human Rights Paralegals

In seeking to fashion new human rights processes that may be able to respond faster and therefore more effectively, before permanent or fatal damage is caused to the victim, the development of a network of human rights paralegals, that will also have a 'quick reaction' function holds great potential.

In the Sri Lankan context, in which the right to life, the most basic of the rights of them all, has been

rendered illusory, even to members belonging to traditional elites (like the legal community and journalists), the need for procedures to respond to emergencies is particularly important. And in a larger third world context, the need is evident, in a situation in which 'disappearances' and extra-judicial killings have become more the norm, than the exception.

A network of multi-disciplinary paralegal teams - hold the possibility of making a dent, however small, in the scale of these sorts of violations. The team could consist of a lawyer, a doctor and maybe two or three others - who would be charged with responding, in cases where assistance is urgently needed. The team would need to be highly skilled and articulate, and is a function the proposed Human Rights Commission (being currently debated at the All Party Conference) may consider taking on.

These human rights paralegals would focus primarily on violations relating to the life and body of the victim. They would be located in both the urban areas and the rural areas, and will attempt to develop links with the law enforcement and security personnel in their localities. Apart from this 'quick reaction' function, they would perform the more traditional (and also vital) human rights activities like documentation and monitoring, and the provision of legal advice to those whose rights have been violated.

## Post Script

The Trust has scheduled for February 1991, a training programme for paralegal trainers. D.J. Ravindran - former Legal Officer with the International Commission of Jurists - who was actively involved in the ICJ's efforts at propagating this concept, will conduct a two week workshop for the Trust.

This workshop will attempt to create a basic training model for paralegal trainers, which may then be replicated in different areas of the country.

Paralegalism is a new concept to Sri Lanka, but has been successfully used in other Third world countries like the Philippines and India and this workshop in an attempt to institutionalize the concept in Sri Lanka.

## CHANGING ATTITUDES TOWARDS SURROGACY:

### A CONCERN FOR ALL WOMEN

by *Sharmini Mahadevan*

(Continued)

#### PART II

**O**pponents of surrogacy often raise the issue that in surrogacy contracts the child is always affected and that society should "prohibit such arrangements in order to prevent children being born in un-

desirable circumstances".<sup>1</sup> While courts dealing with cases on 'wrongful life' often argue that existence in any form is more precious than non-existence<sup>2</sup>, it is felt that this view should be restricted to situations where the life has already been created. At present there is insufficient data on the effects that the whole surrogate mothering procedure and its potential conflicts will have on the resulting offspring<sup>3</sup>. There is nothing to suggest that this mode of conception and gestation, relinquishment by the uterine mother, and possible custody disputes, will best serve the interests of an unborn child.

Different jurisdictions, sensitive to the complex issues raised by the practice, have at one time or another referred the matter to special Commissions convened to examine the dilemmas implicit in the procedure.

The Reports of the New Jersey Commission on Legal and Ethical Problems in the Delivery of Health Care, and of the Australian National Bioethics Consultative Committee, both of which were released this year, are of interest as they recommend a legal regime not totally hostile to the practice of surrogacy.

The New Jersey Commission on Legal and Ethical Problems in the Delivery of Health Care, set up in the wake of the controversial 'Baby M' case,<sup>4</sup> while being opposed to the concept of commercial surrogacy, recognized the difficulties involved in banning the procedure in its entirety.<sup>5</sup> As such the Commission recommended that the State of New Jersey should not enforce any type of surrogacy arrangement, commercial or non-commercial<sup>6</sup>, while calling upon the State to enact legislation to prohibit the practice of commercial surrogacy.<sup>7</sup> In the event of a custody dispute arising pursuant to a surrogacy arrangement the Commission departed from the traditional "best interests" standard and recommended that the State enact legislation establishing "a legal presumption favouring custody by the birth mother, consistent with assuring satisfaction of the needs and welfare of the child."<sup>8</sup> This presumption or rule recognizes the difficulties in discerning, with any accuracy, how a birth mother would feel about relinquishing her child. However, the Commission's underlying objective was to avoid some of the worst features of the best interests standard<sup>9</sup>, while at the same time discouraging the practice of surrogacy.<sup>10</sup>

The Australian National Bioethics Consultative Committee has recently adopted a similar approach in favouring altruistic surrogate arrangements using the technique of artificial insemination.<sup>11</sup> While the Committee recommends that "no formal contracts should be allowed between a surrogate mother and the commissioning couple", it recognizes the need for regulation by licensed agencies in order to provide counselling for the parties involved and to ensure that the surrogate mother is not coerced or pressured.<sup>12</sup> Although the report does not advocate commercial surrogacy, in cases where it occurs, the report is believed to support a system similar to that operating in Victoria, where courts do not recognise surrogate contracts, making them unenforceable in law.<sup>13</sup> Prior to this

report there was almost uniform opposition in Australia to any form of surrogacy.<sup>14</sup>

In the light of these two reports it is possible that we will soon find legislation in the U.S. and Australia not averse to altruistic surrogacy arrangements. Some of us may find it hard to draw a distinction between a child borne to be 'sold' and a child borne for another out of benevolence. In either case the truth is that a woman's womb is being used, and a child is being deliberately created, to satisfy the desires and perceived needs of another. It is the surrogate who will undergo a nine month pregnancy and experience the pangs of relinquishment. It is the child who will be the 'thing produced'. If born with a defect s/he may be treated as "a piece of inferior merchandise; an imperfect creature come into the world as damaged goods",<sup>15</sup> with all the parties probably seeking to avoid being awarded custody of this suddenly unwelcome child.

Perhaps in considering these issues we should keep in mind the words of Edmond Cahn who once wrote:

"To possess the end and not be responsible for the means, to grasp the fruit while disavowing the tree, to escape being told the cost until someone else has paid it irrevocably: this is ... the chief hypocrisy of our time".<sup>16</sup>

<sup>1</sup>See P.Singer and D Wells, *The Reproduction Revolution: New Ways of Making Babies* (Oxford University Press, 1984)119

<sup>2</sup>See Procanick by Procanik v. Gillo, 478 A.2d 755 (N.J.1984)

<sup>3</sup>The Warnock Committee heard arguments to the effect that surrogacy is "potentially damaging to the child whose bonds with the carrying mother, regardless of genetic connections, are held to be strong, welfare must be considered to be of paramount importance." The Committee further felt that the whole process is "degrading to the child" who "will have been bought for money". Report of the Warnock Committee, (Cmnd.9314) 45.

<sup>4</sup>109 N.J. 396,537 A. 2d 1227 (1988).

<sup>5</sup>The argument was put forward that "non-commercial surrogacy contracts should be unenforceable, but should not be legally prohibited, because the negative consequences of of intervention by the State in non-commercial, private and particularly in familial arrangements, and the problems of enforcement in that setting, were so great as to outweigh any potential benefit to society in prohibiting such agreements." See 'Problems and Approaches in Health Care Decision Making: The New Jersey Experience', a Report of the New Jersey Commission on Legal and Ethical Problems in the Delivery of Health Care (1990),329.

<sup>6</sup>See Recommendation 4, id.at 341.

<sup>7</sup>See Recommendation 1, id. at 341.

<sup>8</sup>id. at 342.

<sup>9</sup>The se would include "delays,unnecessary uncertainties, destructive attacks on parenting capacities, and the likelihood of class and economic bias." id.at 327.

<sup>10</sup>ibid.

<sup>11</sup>See 'Report gives backing to surrogacy birthers', *The Age*, 23 June 1990, p.1, cols. 1-5.

<sup>12</sup>ibid.

<sup>13</sup>ibid.

<sup>14</sup>See L Walters, 'Ethics and New Productive Technologies: An International Review of Committee Statements' 17 *Hastings Center Rep.* 4-7 (Special Supp. June 1987). However an Australia-wide survey on surrogate motherhood suggests some support for the practice. See New South Wales Law Reform Commission, 'Artificial Conception - Surrogate Motherhood: Australian Public Opinion Research Report' 1987.

<sup>15</sup>Roger Rosenblatt 'The Babby in the Factory', *Time*, 14 February 1983. 64.

<sup>16</sup>Edmond Cahn, "Drug Experience and the Public Conscience". in Lenore L. Cahn ed., *Confronting Injustice: the Edmond Cahn Reader* (Boston, 1962) 368. 372.

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## Book Review

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### Asian and Pacific Women's Resource and Action Series : HEALTH

by *Sumathi Sivapalasingam*

The first publication of the Asian and Pacific Women's Resource and Action Series on health is the brainchild of Asian Pacific Development Centre (APDC) in collaboration with a variety of women's groups in the area. Following the Nairobi Conference in 1985, APDC and country coordinators from the region sought to bring together information, ideas, perspectives, strategies and action on specific issues concerning women and health. The first of the series, published in 1989, captures and shares the experiences in this field of Asian and Pacific women in the past decade. The book also looks ahead to the necessary strategies and action which need to be seriously considered in the coming decade.

Health, illness and a community's way of dealing with them are closely related to the ability of individuals to perform and fulfill their social roles, as well as their ability to relate to one another in and through these roles. Health, illness and medicine reflect the fundamental values and beliefs of a particular society. Thus in understanding a community's philosophy of health' one gains greater insights into the structure and culture of the society. It is within this framework that women's health is analyzed in the Resource and Action Series. The book starts with a description of health care systems, both allopathic and traditional. Then particular health concerns are dealt with such as maternal mortality, nutrition, work, control of reproduction, psychological health, violence against women, AIDS and various other problems. Basic facts are given on an inter-country basis which allows for valuable comparisons of visions and actions, on which previous documentation has been scarce.

In the Asian and Pacific communities, religion and tradition dictate how women are treated within the family and society. Here are some interesting facts which the book uses to demonstrate the problems women suffer as well as the position of women in these societies:

- Two-thirds of married women in Papua New Guinea are beaten regularly by their husbands.
- Malaysian women attempt suicide more frequently than men and experience more depression.
- Family planning services are not available in Burma, Laos or Kampuchea.
- In Pakistan, 600 women die annually due to health complications during pregnancy.
- More than 5000 deaths of women in Bangladesh were due to illegal abortion in 1979.

These are the realities for many women in the region and these issues have helped to mobilize women and women's groups to take a clear and more vocal stand in the past decade on safeguarding the health of women.

The issues which women's organizations and the government have honed in on vary greatly and reflect the various cultural, religious, geographical and his-

torical realities of individual countries. For example, in some countries women's organizations are focusing on health education (with a new emphasis on the woman's perspective) for rural women. In areas, such as India, the issue of using amniocentesis (sex-determining technique) to have selective abortions if the foetus is female is the leading ethical problem. In more developed areas of the region where resources are available, women's groups are working towards setting up better facilities to help women achieve a higher standard of health. The governments, in some instances, are turning to alternative health care by combining allopathic and traditional forms of medicine.

This publication is a reflection on the health issues of women in the region and is punctuated with graphics, poetry and drawings which provide an impressionistic perspective on the facts and figures given in the text. There is wide ranging documentation of women's experiences and re-thinking on issues critical to women's health.

The Resource and Action book is valuable for interested reader wishing to learn about women's health problems in the region. Women's groups, researchers and policy makers can use this book as a guideline on women's perspectives to use in designing policies, programmes or to fill in gaps of information which thus far have been ignored.

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## November Calendar

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### Core Group Activities

#### 9th November,

Speaker - Mr. L.S. Jayawardena

Topic - Market Aspects of Privatization

#### 16th November,

Speaker - Mr. Anil Moonesinghe

**Topic - The Transport Industry and the New Industrial Policy.**

### TO OUR READERS....

*If you would like to receive further copies of the Law & Society Trust Fortnightly Review, kindly inform the Publications Officer, Law & Society Trust, 8, Kynsey Terrace, Colombo 8.*