

# LAW AND SOCIETY TRUST

## 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.*

*In this issue we feature surveys of the Human Rights situation in Bhutan and Pakistan; the latest report on Women and Economic Rights in the Asia Pacific region; steps taken to protect the rights of children under new amendments to the Adoption of Children Ordinance; and a satirical poem on excesses committed in the name of security by a Malaysian poet.*

## Human Rights Issues in South Asia

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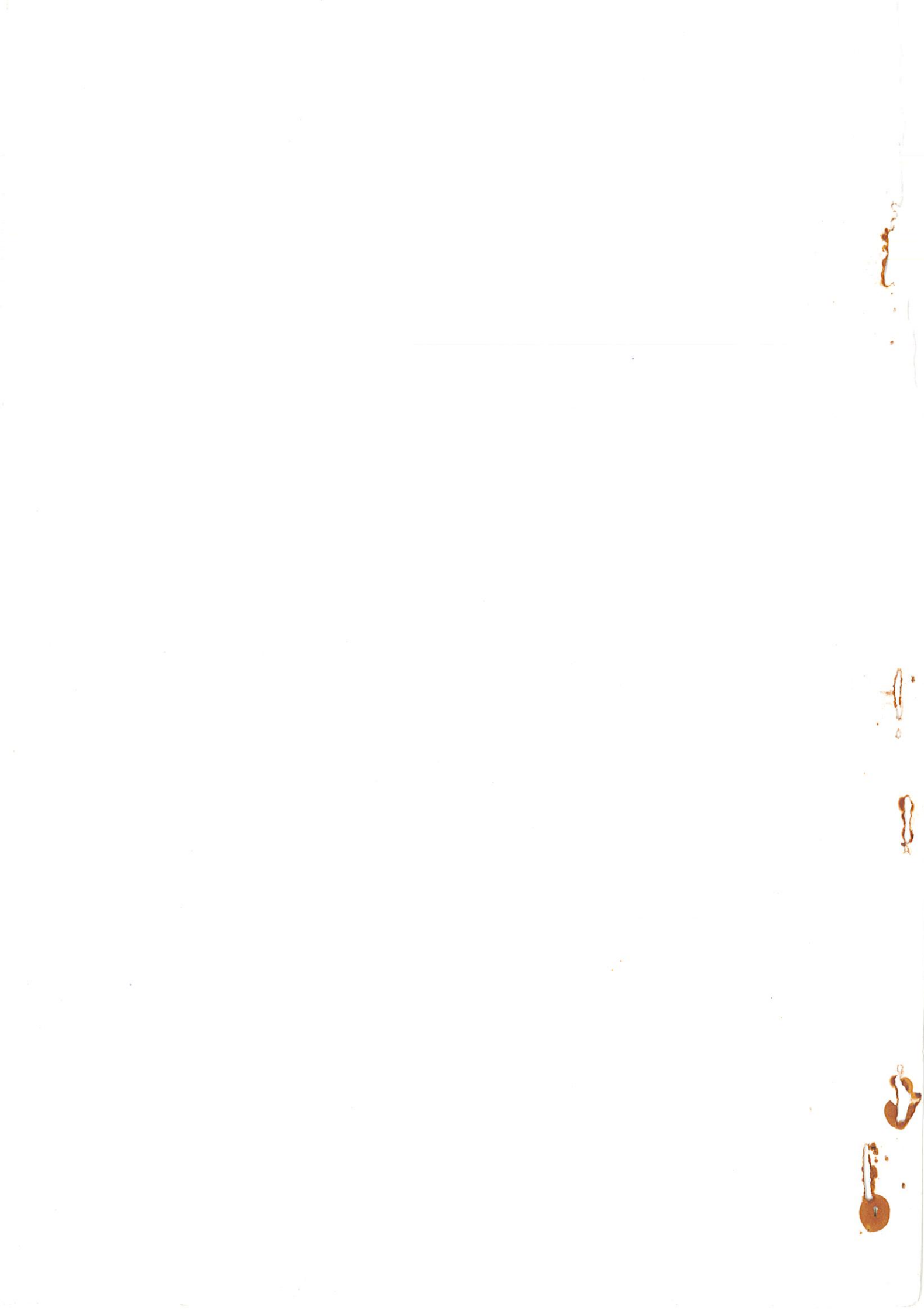
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## BHUTAN:

### SOME HUMAN RIGHTS PERSPECTIVES

by

Clarence J Dias

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#### Preface

Recently, two Reports have been released depicting the human rights situation in Bhutan. The first of these Reports has been prepared by the People's Forum for Human Rights, Bhutan (PFHR) which is made up of Bhutanese citizens forced to flee repression in their own country who are valiantly pursuing their struggles abroad for democracy and human rights in Bhutan. Their report is truly personal drawing upon their own experiences, their own sufferings and also their own courage and prepared by INSEC (the Informal Sector Research Center), a Nepal NGO which, having played crucial roles in Nepal's own struggles for human rights and democracy, is now devoting its attention and resources to provide vital and much-needed support to PFHR (Bhutan) and the thousands of Bhutan refugees now seeking shelter in Nepal.

This note seeks to undertake two tasks:

1. It examines the factual assertions made in the two above mentioned Reports in terms of the norms and standards of international human rights law.
2. It explores roles that concerned people and human rights NGOs in the SAARC countries can and must play if human rights are to be upheld not only in Bhutan but in the entire SAARC region.

#### II.

##### Bhutan and International Human Rights Law

Bhutan, as a member of the United Nations, is clearly bound to adhere to the Universal Declaration of Human Rights. However, Bhutan has a poor record when it comes to signing, ratifying, and implementing the various international human rights covenants and conventions that have come into existence since the adoption of the Universal Declaration. Those covenants and conventions set the human rights standards for any civilized member of the world community of nations. Yet it is notable that of the 75 human rights instruments listed in the UNESCO Chart, as of March 31, 1990, Bhutan had signed only one (the Convention on Elimination of all Forms of Discrimination against Women) and had failed to subscribe to any of the Red Cross Conventions.

Below, we roster the factual assertions made in the two Reports on Bhutan and assess their human rights implications:

1. The enactment, since 1985, of a series of "Nationalization" policies and laws which discriminate against the Southern Bhutanese who are primarily a community of Nepali ethnic origin. Such laws violate the non-discrimination provisions contained in Articles 1, 2 and 7 of the Universal Declaration. Further laws, insisting that people of Nepalese origin provide written proof of their citizenship before 1958, are alleged to be tantamount to disenfranchisement of them, given the fact that villagers had "never been granted any document to indicate their citizenship before the initiation of the 1985 policy" (PFHR Report, page 2). This would amount to a clear violation of Article 15 (right to nationality) and Article 7 (equal protection) of the Universal Declaration.

2. When a delegation of Southern Bhutanese government officials (including Teknath Rizal and a few senior civil servants made a representation to government to review and reconsider the above policies, the act was labelled "high treason" and Mr. Rizal was forced to resign his post as a Royal Advisory Councillor and flee the country. This violates Article 19 (freedom of opinion and expression), Article 12 (arbitrary interference with privacy) and Article 10 (right to fair hearing) of the Universal Declaration. Subsequently, Mr. Rizal and two of his associates "were abducted from Nepal by agents of the government of Bhutan and are now under confinement in Bhutanese prisons" (PFHR Report, page 2). This violates Article 13 (freedom of movement and right to leave and return to one's own country) of the Universal Declaration.

3. The introduction of laws making compulsory "the wearing of national dress at all times"; deleting the Nepalese language from the school curriculum, and banning the practice of the Hindu religion in public places (PFHR Report, page 2), violates Article 1 (equality in dignity and rights), Article 2 (non-discrimination), Article 18 (which includes freedom to manifest religion in public or private), Article 26 (right to education including parents' prior right to choose the kind of education that shall be given to their children) and Article 27 (cultural rights) of the Universal Declaration.

4. When, as a reaction to the above discriminatory laws, students and citizens of Southern Bhutan protested peaceably and commenced a human rights movement, the government of Bhutan responded with a wave of arrests, detention without trial and torture in clear contravention of Article 3 (right to life, liberty and security of person) Article 5 (torture), Article 9 (arbitrary arrest and detention), Article 10 (fair hearing), Article 12 (arbitrary interference with privacy and home), Article 19 (freedom of opinion and expression); Article 20 (freedom of assembly and association); and Article 21 (right to participate in government).

5. "During the months of September and October 1990, the public of the southern districts held a series of peaceful rallies to vent their grievances against the excesses of the Royal Government" (PFHR Report, page 2). The government officially termed the act as "dissidence" and cracked down on those who had participated in the rallies terminating civil servants without any pension benefit, arresting a number of the participants. "Further all schools, hospitals and postal services were closed to Southern Bhutanese as a form of mass 'punishment' for having participated in the demonstrations. These services remain closed to date" (PFHR Report, page 3). These acts, in addition to violating all the Articles of the Universal Declaration enumerated under (4) above, also violate Article 25 (right to health) and Article 26 (right to education) as well as Article 2 (non-discrimination).

6. After October 1990, the southern belt of Bhutan has been declared as a "disturbed" area and is now under the control of the Royal Bhutan Army and security forces. There are reports of widespread and repeated gang rapes by the security forces; of midnight raids; of burning of houses; of looting of valuables. The victim testimonies contained in the INSEC Report allege a pattern of violence directed especially against women to punish them for the acts of male dissident members of their family. A law has been enacted, summarily, depriving not only any dissident of citizenship rights but so, too, all members of the dissident's family. The repeated gang rapes have resulted in several of the women becoming pregnant. Contempt for human dignity is also alleged in the behaviour of the security forces who are reported to force villagers to carry their own valuables to the camp of the security forces where they are illegally confiscated. It is claimed that a deliberate reign of terror has been launched by the security forces to intimidate and silence all dissent and to crush all opposition. The victim testimonies allege not only gross violations of all human rights but contempt for human dignity and humanity. There are reports of entire villages being burned to the ground with the security forces compelling the owners of the houses to light the fires often with their family members still inside and released only at the last minute.

7. As a result, thousands of refugees have fled the country and seek refuge in camps in India and Nepal. Their plight is pitiful. They are hunted down both by the police of the country and by the Bhutan army. At least one instance has been recorded of some 819 refugees being forcibly returned from Assam and delivered into the hands of the Bhutanese army. This act not only violates well-established principles of international law but also violates the terms of the Indo-Bhutan treaty. The most urgent requirement is for funds to purchase food and medicines, the absence of which will lead to starvation and death in the refugee camps.

8. Meanwhile, the alleged atrocities go uninvestigated in Southern Bhutan and the refugee toll in Nepal is expected to rise from 2,000 to 10,000 in the very near future. Racial discrimination continues in South Bhutan where all development activities have been suspended in the last year; supplies of necessities like salt and cooking oil are being controlled. Income of businesses in the South who sold produce to Third World countries through the State trading agency have been blocked. All grants and permissions for South Bhutanese students and officials attending schools and seminars abroad have been cancelled. No independent media is allowed access to the area so alleged atrocities go unreported. Instead, the official newspaper attributes all atrocities to anti-national terrorists. They claim that several security force members have been killed by the terrorists. But thus far they have not been able to release a single name of those alleged killed.

### III.

#### Towards a SAARC Peoples Response

Bhutan, as a member of the United Nations, the Non-aligned movement, and SAARC cannot evade its responsibilities. Moreover, what happens in Bhutan is of deep and abiding concern to the peoples of all the SAARC countries. If the violation of human rights is allowed to continue unabated in Bhutan, we will be inviting similar violations in our own countries and genocidal violence against our own ethnic minorities. If we turn a blind eye to the desperate plight of thousands of Bhutanese refugees we will be denying ourselves that most basic of all human rights – the right to be human.

At an urgent minimum, we the peoples of the SAARC region acting individually, collectively and through our own human rights and other NGOs need to embark on a number of activities:

1. We need to contribute to and help facilitate immediate and effective relief and rehabilitation for the Bhutanese refugees in our countries. We need humanitarian initiatives both to ensure their physical security and integrity and their material well-being.
2. Our constitutional experts and human rights lawyers need to undertake a critical review of Bhutan's constitutions and laws in terms of their compliance with the standards of international human rights law. We cannot allow the "rule of law" to be replaced by the absolute and autocratic Law of the Ruler--in Bhutan and indeed in our own countries as well.
3. We need to mount a SAARC fact-finding mission which can visit Bhutan as well as the refugee camps. Access to Southern Bhutan is likely to prove to be very difficult if not impossible. But the effort must be made.
4. We need to organize in each of our countries, a series of public meetings to:
  - (a) inform our people of the situation in Bhutan;
  - (b) generate public sympathy and support and to raise the financial and human resources needed for effective relief and rehabilitation programs for the Bhutan refugees;
  - (c) petition our own governments to mediate and intervene in the most constructive way possible, or at the very least to refrain from providing encouragement and support to those violating human rights in Southern Bhutan;
  - (d) organize demonstrations and protests which will bear eloquent testimony to the fact that despite all odds, the people of SAARC will exercise their own freedom of expression to rise to the defense of those whose freedoms are in peril;
  - (e) devise appropriate action strategies and action campaigns to support the struggles of the Bhutanese people for human rights and genuine democracy.

5. We need to work together to evolve and implement concrete strategies aimed at:

- (a) creating pressure on the Bhutanese authorities to halt human rights violations and look into and halt the alleged atrocities being perpetrated by the Bhutanese forces;
- (b) securing the release of the detainees and the cessation of torture;
- (c) protecting the properties of Bhutanese now in exile;
- (d) securing the reopening of schools and hospitals and the resumption of supplies of health services and essential commodities in Southern Bhutan;
- (e) utilizing existing mechanisms within the UN human rights system to demand that the Bhutan government respect the UN Charter and the Universal Declaration of Human Rights; comply with all the standards of international human rights law; desist immediately from genocidal violence directed against a specific ethnic community in Bhutan; and repeal all of its racial and ethnically discriminatory policies, laws and practices.

The future of Bhutan may well portend the future of all peoples of SAARC. It therefore behoves us all to make common cause and "go not gently into the night -- But rage, rage against the dying of the light".

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# REPORT ON THE REGIONAL FORUM ON WOMEN AND ECONOMIC RIGHTS

ORGANIZED BY THE ASIA PACIFIC FORUM ON WOMEN, LAW  
AND DEVELOPMENT AND LAW AND SOCIETY TRUST  
2 - 4 AUGUST 1991 - COLOMBO

Countries that participated - Bangladesh, Fiji, India, Indonesia, Japan, Korea, Malaysia, Nepal, Pakistan, Philippines, Sri Lanka, Thailand.

Regional Co-ordinator - Nimalka Fernando

Law and Society Trust Participant - Nandini Samarasinghe

## Introduction

New forms of international capital and new and innovative processes of production have begun to threaten many of the fundamental economic rights that women workers have been struggling for throughout the 19th and 20th centuries. The economic rights that are being threatened include the right to organize, the right to a fair wage, the right to adequate and entitled leave, the right to reasonable hours of work, and the right to maternity benefits. These rights are now being threatened by flexible production processes which emphasise home-based production and subcontracting. They also result in the isolation of women in their homes and thereby prevent freedom of association and organization.

In the agrarian sector, in Malaysia for example, the lands are given to farmers, but they have to work at paying back the loan to get actual title to land, by producing for the multi-national company, according to the specifics laid out by the multi-national company. In the plantation sector, new forms of contract labour have emerged to supersede the existing system. In the Philippines, for example, home-based production with regard to papermache toys is also on a piece-rate basis according to the regulation laid down.

What concerns us is that this part-time, piece work, unprotected by any form of labour legislation is a fundamental challenge to all the international and national standards which protect the economic rights of women. While recognizing that the international economy is undergoing major changes and while new methods of exploitation are emerging, it is imperative to recognize these changes and to formulate new and creative methods of resistance to face the current crisis.

These dramatic changes in the international production processes of the multi-national corporations are augmented by the policies set out by international lending institutions. Many of the important economic decisions of our States in the last few decades have been dictated by international lending institutions. Therefore the question was raised as to whether our countries even enjoy the economic rights of self-determination. We are not unaware of the serious constraints placed on developing countries in terms of resource, technology and skilled personnel. However, we feel that a total abdication of policy planning to a specific model coming out of the metropolitan countries cannot be the answer. Given this lack of manoeuvrability, we seriously question the freedom of our governments to formulate legislation which will truly protect the rights of women workers against the interests of international capital.

In many countries of Asia, women do not enjoy the right to economic self-reliance due to religious and cultural factors. It is ironic that these cultural factors are often exploited to maximize female productivity. Home-based production and subcontracting in its more recent innovations are an example of this type of exploitation.

One aspect that has to be noted with concern is that though the role of women in the economic system has grown, it has been an "invisible" role in that it has been unrecognized in the legal systems and by government policies. This is also reflected by the fact that a woman's household work is not reflected in the economic indicators. Thus her right to a share of the family resources and income is not recognized. This invisibility further marginalises women.

It must also be noted that many of the countries of Asia have developed aspects of a "national security state"; that the ordinary laws of the land are superseded by emergency regulations, "Black Laws" with their specific attempts to suppress the labour movement, and internal security acts which are draconian in character. This "security" consciousness is also present at places of work for many of the free trade zones and other sectors which are attracting capital investments, e.g. plantations, agribusiness, etc. This atmosphere of security has a challenging effect on the work and activities of workers especially with regard to the right to organize and to make demands in the work place. In that sense, the struggle for economic rights is also part of the struggle for democratic rights in our societies. They cannot be seen in isolation.

### **Industrial Sector**

During the discussion held at the present Forum, the following concerns were expressed with regard to recent developments in the industrial sector:-

- a) the denial of the right to organize and unionize especially in the FTZs and home-based production industries. In this context we note with serious concern the encouragement of the concept of inhouse unions as opposed to broad based unions, especially when the leaders of these inhouse unions are being picked and trained by the management.
- b) the non-implementation of labour laws in the sphere of minimum wage, maternity benefits, equal pay, leave, etc.
- c) revoking certain types of legislation which guarantee international standards of dignity and equality, e.g. night work.
- d) the abdication of the judicial process and the setting up of administrative tribunals directly under the executive to determine labour disputes, thus depriving women workers of independent and impartial adjudication. In addition rules and regulations with regard to the industrial sector are increasingly being formulated by executive action without the advice and consent of parliament. This deprives workers of the protection of the democratic process.
- e) we also note that there is a lack of participation and gender awareness within the trade union system. Despite the fact that female labour has entered into the labour force in large numbers, the trade union movements in our respective countries have not come to terms with this new reality either by organizing these women, or by bringing women into decision-making levels within the trade unions.
- f) the female labour in the FTZs are facing serious health hazards due to lack of regulated working times, protective gear and equipment used which have serious effects on women's health.

### **Agricultural Sector**

A woman's right to land was seen as a very important right in the agricultural sector. In most of our societies land is often linked to security and power. It is therefore important to see how the land laws and personal laws operate in our respective countries with regard to women's right in property.

In this context, given the scarcity of land, some participants pointed out the possibility that women's collective ownership of land may be an alternative strategy in certain countries. The type of experimentation which led to the Grammin Bank with regard to credit may be appropriate in the context of land and land use.

It was also pointed out that the major settlement and colonization schemes under large development projects discriminated against women since a man was regarded as the head of household and all services and credit facilities were in his name as was the title to land. This discrimination has been exposed in many fora but remedial action has not been taken.

The inability of the legal system to assist women in their daily existence was brought out by the Indian case studies. There were instances where community based extra legal remedies were preferred to recourse to the



legal system. It was felt that implementation of the legal and police machinery would not bring any relief to the women concerned. As a result they resorted to extra-legal action. If extra-legal action is the only alternative strategy available, we must ensure that such action safeguards due process and human rights standards. It must be realized that extra-legal action in these instances is always a reaction and also highlights the inability of the law to deliver justice at the local level.

### **Plantation Sector**

In most Asian countries, plantation labour is predominantly female, brought into the country from another cultural context. This often results in a situation of triple discrimination of race, class and gender. The discussion also brought to the surface the fact that women in these sectors need gender sensitization in the areas of health, education and control of income. It has also been pointed out that plantation labour in some countries are still paid on a piece-rate and that there is a struggle being waged for a monthly wage. It was also noted that there was a move towards increasing privatization and contractual labour, thus depriving plantation workers of a regulatory framework with regard to social security benefits for which they have fought for the past few decades.

### **The Tribal Sector**

The tribal community of Asia has been increasingly marginalised by the development process. Their access to and control of land and resources has been diminishing over the last few decades. Regulations and government projects have been the major reasons for this disempowerment of the tribal sector. It is also important to reaffirm the tribal women's right to property which existed earlier in tribal custom and practice. Laws and regulations must be enhanced to protect the rights of tribal women and the community, and all development programmes in tribal areas must be evaluated with regard to their impact on the livelihood of those tribal groups.

### **Migrant Workers**

The migrant workers have been placed in a vulnerable situation both within and outside Asia. Women migrant workers include housemaids, entertainers, bartenders and workers in the sex industry. Their vulnerability is heightened by the fact that they are often drawn into and used for criminal activity such as drug trafficking, prostitution and smuggling of prohibited articles by middlemen. There is the demand for women to become migrant workers due to a lack of economic opportunities in their respective countries, as well as State policies which actively encourage women to become migrant workers for their foreign exchange remittances. Given the fact that the States in Asia have actively encouraged this process of migration, we feel that there is an absolute responsibility on their part to help set international standards and mechanisms for both the host and home countries with regard to the protection and safeguarding of migrant labour. It is also imperative that these States enact national legislation and set up procedures which will prevent the exploitation of these women.

### **Informal Sector**

Women dominate the informal sector. It is therefore not surprising that it is the least regulated and most unprotected sector in the economy. In addition, the recent changes in production processes are now serving to informalise the formal sector through home-based production and subcontracting. Self-help programmes that are an integral part of the informal sector have not made women self-reliant. We feel that the informal sector is an important area which requires our special attention. Though activist groups have been involved in this sector, legal reform and changes in this area have not been looked into by women lawyers. In this context it is important that activists and lawyers work closely together to try and develop an appropriate framework of legislation which will protect the economic rights of women.

### **Conclusion**

In conclusion, it is important to evaluate the success and the failures of the women's movement with regard to the economic rights of women.

The global crisis is having an adverse effect on national policies as well as on alternative strategies at the local level. Rapid changes in the global economy and political repression at the national level have prevented women workers from effectively responding to the challenges posed with regard to economic rights.

Alternative development models in the 60's and 70's attempted to ameliorate the conditions of women by formal changes in the law and administrative action. Economic Rights was seen in a limited sense as social benefits or handouts of the State. Today that is not enough.

It is now imperative that we develop new strategies to empower women. These strategies should attempt to use the law as a means to create awareness and to mobilize women and/or collective action. The new dimensions of global capital require innovative responses from women in the region. We hope new approaches with regard to the empowerment of women will enable them to become creative and equal partners in the future transformation of our societies.

## **HUMAN RIGHTS IN PAKISTAN: A REVIEW**

by

**Rangita de Silva**

*An essay – review commenting on the following recent publications:*

- \* *State of Human Rights in Pakistan 1990 – published by the Human Rights Commission of Pakistan*
- \* *Human Rights Commission of Pakistan Newsletter – April 1991*
- \* *Human Rights Commission of Pakistan Newsletter – July 1991*

In the same era that humanity reaches into space, countless people are being brutalized by their own government. State terrorism lingers on as an accepted practice violating all notions of human rights. As Martin Luther King once said – Its a strange era which has produced "Guided Missiles and Misguided Men".

It is ironic that in the tail end of the 20th century, despite the great awareness of human rights and the advances in international recognition of the importance and value of human rights protection, human rights continue to be systematically violated by almost all governments.

In the last three decades considerable progress has been made in the definition and elaboration of human rights, numerous conventions have been adopted and ratified at the international and regional level, and at the national level through constitutions and other legislation. The progress in their implementation has however been slow. The record of human rights in South East Asia has been poor. It has to be admitted that in some countries the record has been deplorable. This is glaringly so in the turbulent Pakistan political scene.

To outline the Pakistan crisis, President Ghulam Ishaq Khan dismissed the government of Prime Minister Benazir Bhutto, in August 1990 and dissolved the national and provincial assemblies. A state of emergency was declared but no emergency legislation was promulgated. An interim government was appointed until elections

in October which were won by the Islamic Democratic Alliance. Mian Nawaz Sharif became Prime Minister in November and the state of emergency was then lifted.

Criminal and ethnic violence continued in the Sind province where hundreds of people were killed. In February rivalry between the ruling Pakistan People Party and the opposition led to conflict in Karachi in which supporters of each group kidnapped, imprisoned, tortured or killed members of the other.

Shortly after the dismissal of the PPP government in August, investigations led to charges of corruption against former Prime Minister Benazir Bhutto and several of her former ministers. Bhutto's husband Asif Ali Zardari was arrested in October and charged with several offences including involvement in a kidnapping case.

Several aides and associates of former Prime Minister Benazir Bhutto and her husband were detained without charge or trial in Karachi under the Maintenance of Public Order Ordinance (M.P.O.)

The Sind High Court ruled that some of these detentions were unlawful. Criminal charges were then brought against those held in custody until granted bail. Other PPP members were detained under the MPO. Both under the PPP government in June and under the IJI government in December, the Sind provincial authorities allegedly arrested hundreds of political opponents during a campaign against crime. After the change of government they were repeatedly charged with offences which could not be substantiated, and then placed under 30 day detention orders under the MPO.

The MPO empowers the authorities to detain prisoners without trial up to 3 months if they are considered to be "acting in any manner prejudicial to public safety or the maintenance of public Order". Under Article 10 of the constitution, a review board can extend such detentions up to a limit of 8 or 12 months, depending on the grounds for detention.

The President passed 3 Ordinances which affected the application of the death penalty, and a fourth which reintroduced Special Courts for Speedy Trials with the power to sentence convicted prisoners to death. Ordinances promulgated in August and September removed the powers of the President and provincial governors under the Pakistan Penal Code to commute death sentences for murder without the consent of the victims' heirs. The 3rd Ordinance, issued in December made kidnapping for ransom an offence punishable by death.

Special Courts for Speedy Trials which can condemn prisoners to death after trials lasting only a few days, were reintroduced to have jurisdiction over crimes which "shock the conscience". The procedure adopted by the Courts do not conform to international fair trial standards. The procedures of the Special Courts for the suppression of Terrorist Activities too do not wholly confirm to international fair trial standards.

Pakistan has one of the highest "death row" prison populations in the world. In addition to ordinary Criminal Courts and Special Military Courts during martial law, the death penalty, can also be imposed by the Federal Sharia Court which follows the Islamic Code of Justice and by Special Courts for Speedy Trials that pass sentences in a matter of days.

#### State of Human Rights in Pakistan 1990

This report on the state of Human Rights in Pakistan during 1990 is the first of such annual surveys HRCP intends to publish every year.

The Report begins with a brief survey of the political situation which reveals the fragile nature of Pakistan's democratic institutions. 1990 August witnessed the dismissal of the National Assembly elected hardly 2 years back, without clear instructions that it had lost the confidence of the Assembly.

Though a general election was held within the statutory time limit, its credibility was rendered doubtful by the unbridled freedom allowed to a particular party, to place another party at a disadvantage.

Further, attention has been drawn to discrimination towards minorities, which was inherent in the system of separate electorates and, against women who lost their quota of reserved seats in the National and Provincial Assemblies.

The Islamisation of laws is the high light of the statutory changes that were made in 1990. Under the Criminal Law (Amendment) Ordinance (No. IV of 1990), proposed by the Shariat Appellate Bench of the Supreme Court, the sentence of death awarded under the Penal Code, relating to murder and physical injury cannot be commuted to life imprisonment, without the consent of the heirs of the victim.

The Qisas & Diyat Ordinance (Second Amendment) Ordinance No. VII of 1990 – promulgated on September 5 –> has had far reaching effect, replacing 40 sections of the Penal Code. In 1989 the Shariat Appellate Bench ruled that 40 sections of the Pakistan Penal Code were repugnant to Islam and should be struck down. The Qisas & Diyat Ordinance has come under several criticisms on the ground that the punishments provided in it conflict with UN conventions dealing with degrading and inhuman punishments, such as the Universal Declaration of Human Rights, the UN Torture Convention, The International Covenant on Civil and Political Rights and the standard minimum Rules for the Treatment of Prisoners.

The Qisas and Diyat Ordinance defines the categories of bodily hurt. The punishment for most kinds of hurt is compensation or imprisonment. Certain kinds of hurt can be subject to Qisas punishment which would be equal punishment for the offence committed.

"Punishment by causing similar hurt at the same part of the body of the convict as he had caused to the victim or by causing his death if he has committed intentional killing."

The Ordinance also requires that Qisas punishment be carried out by a medical officer. The Medical Officer is required to examine the offender before-hand, and to ensure that punishment "does not cause the death of the offender or exceed the hurt caused by him to the victims. Though the belief was held that doctors have a religious obligation to participate in the execution of these persons, this was followed by protest by local human rights organizations.

Another provision of the Ordinance which has been a subject of international concern and revulsion is that the government acquires the authority to flog and execute convicts in public instead of in prison houses.

The Ordinance promulgated to set up special tribunals to punish holders of elective office has been criticised on several grounds, that the action taken against prisoners seeking election places them in an unfavourable light especially in cases where proceedings could be concluded before the polling and that the discretion available to the referring authority to select persons to be proceeded against could not be arbitrarily exercised.

The index in determining whether social pressures are being taken into consideration is the volume and variety of legislation. At best, legislation should reflect the intensity of progressive political, social and economic pressures and not the reactionary forces of society.

The HRCP also registers its criticism of the suppression of Terrorist Activities (Special Court's) Act, which inhibits the trial process to the disadvantage of the accused, and allows too little time to the investigating officer to conclude his report within 14 days – which might result in the investigating officer extracting confessions under duress. The curbing of adjournment and denial of bail facilities are also not "fair and just" standards.

As far as Law and Order was concerned the situation has been smouldering for such a long time that it seems likely to explode now. In Sindh alone the government was paid 200 million in compensation for those who died in ethnic violence.

During the period up to August 6th, when the PPP government was dismissed by a presidential order, an orgy of politically – oriented violence was unleashed. The student population created most of the trouble and breaches of law. Student Unions mostly got divided along ethnic lines and accumulated their respective stock piles of arms.

With the change of government on August 6th, the ethnic-oriented violence began suddenly to ebb, but kidnapping and dacoities and urban sniping became rampant. Apart from mob violence a large number of people were killed by the police in armed "encounters". In the Pucca Qila incident in Hyderabad in May the police in a rash bid to control mob violence ended up with spilling the blood of over 70 people. The reports of police excesses, incidences of illegal confinements and custodial violence remain at a very high level, cases of detention in private houses jailed for no offence, detention without trial, juveniles in jails, and gross violation of legal standards and torture and degrading punishments, reported deaths in Police custody and torture of prisoners have been proliferating at an alarming rate.

The HRCP survey makes further exploration and forays into other but often ignored areas of Human Rights Violations.

The HRCP has done a comprehensive survey on the position of women. The constitutional provision of reserved seats for women in the national and provincial legislations expired after the end of the stipulated 10 year period. As a result 43 seats have lapsed. The discrimination embodied in the Hudood Ordinance has been variously condemned by Amnesty International. Another drawback is that the United Nations Convention on the Elimination of Discrimination against women has not been ratified by Pakistan.

#### **HRCP News letter – April 1991**

This report begins with the debate over the 'Death Penalty'. Pakistan is one of the few countries in the world which believes in drawing blood for blood. The Death Penalty is meted out for kidnapping, minors hijacking, abetting, mentioning and speaking disrespectfully of the Prophet. Death by stoning is provided for adultery.

Under an Order passed by the Federal Shariat Court in October 1990, whoever is convicted for contempt of the Holy Prophet of Islam will be punished with death, while the alternative sentence of imprisonment for life would cease to have effect from 30th April 1991.

The Pakistan Section of Amnesty International, the Human Rights Commission of Pakistan and other NGO Organizations have joined to issue the following statement, against capital punishment – "Execution of a murderer does not bring back the victim and is no compensation or consolation for the family of the victim. It also subjects the family of the executed person to the same prolonged suffering as faced by the family of the murdered one".

The death penalty is also a violation of the Universal Declaration of Human Rights. Article 3 of that declaration enshrines the right to life, and Article 5 forbids cruel, inhuman and degrading punishments. It is a matter of deep concern that when the death penalty has been rejected by most countries, and every year more countries join the march towards a world without executions, Pakistan still holds on to archaic notions of punishment. In fact 40% of all countries in the world, have abolished capital punishments in law or practice as experience shows that the death penalty yields no special influence to reduce crime, only brutalizing those involved in the process. As Arthur Koestler effectively put it – "The gallows is not a machine of death, but a symbol. It is the symbol of terror, cruelty and irreverence for life, the common denominator of primitive savagery, medieval fanaticism and modern totalitarianism. In brief capital punishment is the pre meditated and cold blooded killing of a human being by the state."

The News letter makes a cameo presentation of the Prison – system, especially the ordeal of Juvenile Prisoners including gruesome news clippings of the treatment received by Juvenile undertrial prisoners in Punjab jails which includes a high incidence of child abuse. The conditions of detention are deplorable and many of them are subjected to sexual abuse.

An interesting feature of the Commission Report is the section on the environment. It has become a subject of increasing concern that gases like carbon dioxide, methane and chloroform carbons are increasing in the earth's atmosphere. It is now widely believed that these gases will trap heat and produce the green house effect. This global poisoning could destabilize the world's climate.

The Centre for Science & Environment, an independent environment policy research institute based in New Delhi, has stated that the U.N. Environment Programme has spread disinformation about the negative contribution of developing countries.

In recent times western nations have been carrying out a sustained propaganda campaign that deforestation in developing countries and the generation of methane through irrigated rice farming and keeping of cattle also have contributed to global warming. The Centre for Science and Environment hold that the conclusions are based on patently unfair mathematical jugglery, where global politics masquerade in the name of Science.

#### **HRCP News letter – July 1991**

A feature article on the Shariat Bill and the Non-Muslims in Pakistan registers strong protest over the Islamisation of the country begun after the take over by General Zia in July 1977.

Since the time of the promulgation of the Hudood Ordinance and the Law of Evidence, the rights of the non Muslims in the country have deteriorated considerably. Whereas the rights of the minorities are protected by the existing constitutional and judicial principles, the Shariat Bill, having a Supra-Constitutional character would jeopardise those Fundamental Rights of minorities. Since all the country's laws are to be Islamized the process is bound to have a severe impact on Policy-making in all secular fields, especially in the fields of education, economy and the media.

In the long course of human experience democracy has proven itself the only form of social arrangement which adequately respects human diversity. Legislation of this nature is reflective of an anti-democratic tradition.

An article on Press Control deals with pressures on newspapers and magazines, when the press is muffled by Orwellian Laws.

All parties have to share the blame for destroying the credibility of currently published Newspapers. Newspaper publishers and editors will have to accept that they have made the biggest mistake by bowing down to the pressures of various political and militant groups.

The freedom of the Press sank to a low ebb following the ouster of the PPP regime and during the run up to the general elections in late October. The government controlled electronic media continues to be used by the ruling party.

The HRCP Report concludes with a series of resolutions on various issues like the Freedom of the Press, The Law & Order situation, Religious intolerance in Kashmir, On the minorities, Traffic in foreign girls, Plight of Iraqis, On capital punishment Children in Prisons, Crimes against women, Bounded labour and Prison Reform. The Human Rights Commission also strongly deploras the persistent failure of the government of Pakistan to sign and ratify the 2 covenants on Civil & Political and Economic and Cultural Rights as well as the optional protocol. Failure to ratify the basic components of the International Bill of Rights impedes the enlargement of fundamental rights – inscribed in the constitution of Pakistan – and their being brought into conformity with international standards.

#### **Conclusion**

For the last 4 decades, peace, disarmament, freedom from want, development and human rights have been the central themes of international concern. Though the Magna Carter and later the Declarations of the Rights of Man laid the foundations for human rights, the terms itself gained international recognition only after the 2nd W.W. and the birth of the U.N. In the words of the Universal Declaration of Human Rights "recognition of the inherent dignity of all members of the human family is the foundation of freedom, justice and peace in the world".

Human Rights are the nucleus of international activism today. They have become a "household word" all over the world. The tendency is towards one system of universally accepted values. The United Nations Charter,

the Universal Declaration of Human Rights, the covenants on Civil & Political and on Economic, Social and Cultural Rights, together with other U.N. conventions, have provided the normative framework for this trend. The impact of these legal instruments has permeated the political systems, constitutions and domestic law of all countries. This trend has generated a growing struggle in all corners of the world in favour of recognition, protection and respect for human rights.

International activism has paved the way for regional action and concern for human rights. The European Convention on Human Rights, The Inter American Convention and the African Charter are illustrations of this trend.

In Asia, the diversity of people and political systems, conflicting cultures, co-existence of different religions, thousands of minority groups, different levels of economic development and the negative effects of colonialism are all factors which have made it difficult for the Asian region to establish a uniform policy on Human Rights.

Though there have been many attempts to formulate a Human Rights Charter for the Asian Region, none have yet materialized. There is no regional governmental or non governmental "watch dog" to monitor human rights abuses on a regional basis. Nor is there any inter-governmental body to advise states on human rights policies. Consequently international human rights organizations have a responsibility to pay greater attention to the situation not only in Pakistan but in the whole of Asia.

The struggle for the respect of human rights is an exacting one. Once the general principles have been defined, the Conventions adopted and ratified, what remains to be done by the sovereign states is to put the newly accepted obligations into practice. Without losing time.

## ADOPTION AMENDMENTS

by

Jill Grime

Once again adoption is in the news and it is fashionable to talk about children's rights.

There have recently been reports in the press about a newly drafted bill (published on 14 May 1991), aimed at controlling foreign adoption and the "baby trade".

A few weeks before the publication of the bill, it was reported that on 5 April 1991 the Government had ratified the U.N. Declaration of the Rights of the Child, which includes provisions on adoption.

In this article I compare the provisions of the bill to those of the U.N. Convention, and consider what has been achieved and what more could be done in Sri Lanka to protect the rights of adopted children.

The reasons for the bill have been clearly stated by government representatives. The Commissioner for Probation said at a seminar on adoption in April "Under the new legislation it is hoped that all illegal practices such as false mothers appearing before courts, producing fictitious birth certificates and above all trafficking in babies will be eliminated." This hope has been reiterated in the press reports.

The new bill has several positive aspects. It permits controlled foreign adoption and makes it an offence to exchange money in adoption arrangements or to run a "baby farm" for adoption purposes. These provisions are discussed in greater detail in the following paragraphs.

Section 3 of the Adoption of Children Ordinance of 1941 has been amended to include new provisions on foreign adoption, the latest in a series of amendments dating back to 1964.

New subsection 3 (5) (A) (a) provides for an adoption order to be made in favour of a non citizen who is not resident or domiciled in Sri Lanka "if no other person who is a citizen of Sri Lanka and resident and domiciled in Sri Lanka has applied to adopt the child".

This clearly requires local adopters to be given priority and meets the criterion set by Article 21 (b) of the UN Convention. This states that state parties (UN jargon for countries which have ratified the Convention), should recognize "that inter country adoption may be considered as an **alternative** means of child care, if the child cannot be placed in a foster or adoptive family or cannot in any suitable manner be cared for **in the child's country of origin**".

Article 20 (3) contains a related provision which emphasizes the importance of maintaining a child's identity when placing him or her away from home. It states that when solutions for the care of a child are being considered "due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background".

All these provisions suggest that the demand for foreign adoption should be dictated by the child's needs rather than those of the adult adopters. It is unfortunate that the need for **suitable** local adopters is not stressed in subsection 3 (5) (A) (a) however.

A foreign adoption order may only be made in respect of a child who is in "the care custody or control of a person for the time being in charge of an orphanage, home or other institution maintained by the Government" (Section 3(6) as amended by the new bill). This provision therefore ensures that the only children available for foreign adoption come from government institutions. This in turn means that there can be greater control of adoptions by foreigners and that the scope in a trade in children for legal adoption is reduced.

The scope for trading in children is further reduced by the effects of amended sections 27 (A) and 14. These sections make it an offence both to keep in unlawful custody a pregnant woman/mother and child for the purposes of giving such child for adoption, and to exchange any type of consideration with regard to adoption arrangements, unless sanctioned by court. Amended section 4 c further provides that in considering whether an adoption order should be made, a court must inter alia be satisfied that no money has been exchanged in making the adoption arrangements.

Both these sections proscribe privately arranged foreign adoptions, at least in principle.

All these provisions are in accord with the criteria established by Article 21 of the U.N. Convention.

Article 21 (A) requires state parties to "ensure that the adoption of a child is only authorized by competent authorities who determine.... that the adoption is permissible".

Article 21 (D) requires the taking of "all appropriate measures to ensure that in intercountry adoptions the placement does not result in improper financial gain for those involved in it".

Additional safeguards in the case of foreign adoptions are imposed by amended subsection 3(6) and new subsection 10 c. 3(6) requires that a police report on the proposed adopters should be available to the court, in addition to the already necessary home study report. 10 c requires that foreign adopters should provide regular progress reports to the Probation Department after the adoption.

Although, it can be seen that there is much in the new bill to be welcomed, there are also some provisions that cause concern, and many omissions.

Article 3 of the UN Convention sets out the fundamental premise of the whole document. This Article states that "In all undertakings concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, **the best interests of the child shall be a primary consideration**".



By Article 4, any state which ratifies the Convention has undertaken to, in the wording of the unofficial summary accompanying the document, "do all it can to implement the rights contained in the Convention".

Article 21 goes further than Article 3 in the context of adoption. It provides that states which recognize adoption, as Sri Lanka does, "shall ensure that the best interests of the child shall be the paramount consideration" in adoption matters.

Section 4 b of the Adoption Ordinance already contained the requirement that the court should consider the welfare of the child. The subsection stipulates that the court must be satisfied before making an adoption order that "the order will be for the welfare of the child".

The sum effect the UN Convention and subsection 4 b is to lay considerable stress on the importance of the welfare and interests of the child being adopted. It is however hard to reconcile these principles with the approach taken by new subsections 5 A (b) and (c). These require all successful foreign applicants to deposit a lump sum to maintain another child in a governmental or an approved non governmental institution, and impose a quota on the annual number of foreign adoptions.

The amount to be deposited and the mechanism for doing so are not indicated in the amending bill.

Both these provisions approach foreign adoption from a purely economic angle. They seem oddly inconsistent with the section 14 prohibition on all payments in connection with adoptions. The inconsistency is even more marked with respect to Article 21 and its statement that state parties will take all appropriate measures to ensure that the adoptive placement does not result in "improper financial gain for those involved in it". Is it any more proper for the state to gain from adoptions than private individuals, whatever the money obtained will be used for? What is the relationship between the interests of the child concerned and the ability of foreign adopters to pay a deposit? Subsection 5 A b comes perilously close to a state licensed trade in children.

The concept of a quota on foreign adoptions also has economic resonances. Why should there be a quota at all? Is it to force up the price, or to show that Sri Lanka does not export too many of its children? Whatever the justification for the quota, it could have disastrous effects for individual children. What, for example, will happen if suitable foreign adoptive parents have been found for a child and the annual quota is already filled? Will an exception be made in his or her case? If so how many exceptions can there be without rendering the quota system meaningless, in which case why have it any way. Or will the child be left to languish in an institution until the new quota year, and to hope that the adopters have been patient and waited?

Will the new provisions be effective in eradicating the baby trade? On 5 June 1991, the Island carried an article headed "State orphanages unable to cope with foreigners requests to adopt children". Will foreign adopters, frustrated by delays, merely resort to illegal methods for getting children? The whole piece of legislation could be still born.

Another major criticism of the amending bill is that it is a lost opportunity. It fails to make a comprehensive reform of the adoption legislation and on any analysis of the UN Convention the bill does not go far enough.

Article 20 states that "a child temporarily or permanently deprived of its parents... shall be entitled to special protection from the state". The Article requires the state to ensure alternative care for such children, including adoption and fostering. As already mentioned, Article 21 suggests that foreign adoption should only be a last resort and emphasizes the importance of suitable arrangements for both foreign and local adoptions. Unfortunately the new bill focuses almost exclusively on foreign adoptions, with the mixed results mentioned above.

Of course some of the provisions aimed at foreign adoption arrangements will have positive results in the context of local adoptions— the ban on all payments and the sanctions against "baby farms" for example. But many issues have been left unaddressed, including those listed below. These matters need to be considered if the full requirements of the UN Convention are to be implemented.

1. **Registration of custodians.** It is a continuing concern amongst many professionals that the practice of middle class families of keeping young children in their homes as domestic servants is allowed to persist. This

is despite the fact that it is illegal to employ any child under 12 and that there are stringent conditions attached to the employment of a child aged between 12 and 14.

Part II of the Adoption Ordinance, which has never been implemented since its appearance on the statute books in 1941, was an attempt to control the employment of children as domestic servants. It did so by requiring the registration of all children in the custody of people who were not their natural parents.

What is surely necessary is a full review of the "informal arrangements" which fall short adoption and which unless regulated can mean that children are exploited. Unfortunately what the new bill does is tinker with the existing ineffective legislation.

2. **Pre adoption procedures.** At present background information is only required from foreign adopters. There seems to be no justification for not requiring similar information from local adopters. There need to be clear cut and flexible guidelines for the matching of children with adopters, in both local and foreign adoptions, instead of a reliance on the current ad hoc approach. The guidelines could include, for example, (i) an upper age limit on the age of adopters, (ii) the requirement for children to have lived with the adoptive family for an introductory period before the order is made, to allow observation of the parent child relationship.

3. **Counselling.** There needs to be provision of counselling for all parties involved in adoptions, in accordance with Article 21 a.

4. **Consents.** A review of the categories of consents to adoption would be helpful. For example, at present a child over 10 must consent to the adoption. This is a heavy responsibility to place on so young a child, but may at present be the only way in which his or her interests will be considered. Should a child be able to consent, and if so at what age? Again, should a mother's consent be valid immediately after child birth, or should she be given the opportunity to obtain counselling before making a decision?

5. **Progress reports.** The new bill introduces the concept of progress reports in foreign adoptions, but fails to do so for local ones. Once again there can be no clear justification for the different approach, especially in view of Article 25, which establishes the requirement for periodic reviews of all placements made by "the competent authorities".

Even if these issues were to be addressed, and laws passed, there would need to be an effective framework to make them work. Unfortunately press reports would suggest that there are not even sufficient resources to implement the current legislation. Reference has already been made to an article in the Island on 5 June. Another report was carried by the Island on 25 May 1991, headed "Devolution of power caused problems to Department of Probation and Child Care". This quoted the Commissioner for Probation as saying "we need more staff as well as expertise and financial resources".

Most importantly legislation and resources are not enough. Society must address the social issues raised by foreign adoption and adoption in general. Why are there so many children available for adoption in Sri Lanka, and why are so many of them adopted abroad? Social attitudes as well as laws need to be reviewed.

# THE ANIMAL AND INSECT ACT

by

Cecil Rajendra

(from Forum, June 1, 1985)

Finally, in order to ensure  
absolute national security  
they passed the Animal and Insect  
Emergency Control and Discipline Act.

Under this new Act, buffalos  
cows and goats were prohibited  
from grazing in herds of more  
than three, Neither could birds  
flock, nor bees swarm...  
This constituted unlawful assembly.

As they had not obtained prior  
planning permission, mud-wasps  
and swallows were issued with  
summary Notices to Quit. Their  
homes were declared subversive  
extensions to private property.

Monkeys and mynahs were warned  
to stop relaying their noisy  
morning orisons until an official  
Broadcasting License was issued  
by the appropriate Ministry.  
Unmonitored publications and broadcasts  
posed the gravest threats  
in times of a National Emergency.

Similarly, woodpeckers had  
to stop tapping their morsecode  
messages from coconut  
tree-top chempaka trees.

All messages were subject  
to a thorough pre-scrutiny  
by the relevant authorities.

Java sparrows were arrested in  
droves for rumor-mongering.  
Cats (suspected of conspiracy)  
had to be indoors by 9 o' clock.

Cicadas and crickets received  
notification to turn their amplifiers down.  
Ducks could not quack nor turkeys gobble during  
restricted hours. Need I say,  
all dogs- alsatians, daschunds,  
terriers, pointers and even  
little chihuahuas - were muzzled.

In the interests of security  
penguins and zebras were  
ordered to discard their  
non-regulation uniforms.  
The deer had to surrender  
their dangerous antlers.  
Tigers and all carnivores  
with retracted claws were  
sent directly to prison  
for concealing lethal weapons.

And by virtue of Article  
Four, paragraph 2 (b)  
sub-section sixteen,  
under no circumstances  
were elephants allowed  
to break wind between  
the hours of six and six.  
Their farts could easily  
be interpreted as gunshot.  
Might spark off a riot...

A month after the Act  
was properly gazetted  
the birds and insects  
started migrating south  
the animals went north  
and an eerie silence  
handcuffed the forests.

There was now Total Security.

## CALENDAR OF RECENT EVENTS

### Core Group Activities

A seminar on "The Securities Industry and the Stock Market" was held on the 21st of September 1991 under the aegis of the Core Group on Law and Economy of the Law and Society Trust.

Presentations were made by Mr. Namasivayam, Director-General of the Securities & Exchange Commission, Dr. Clive Grey, Fellow of the Harvard Institute of International Development, Mr. Ravi Pieris, General Manager, Colombo Stock Exchange and Mr. Anura Wickremasinghe of Forbes & Walker.

The seminar was open to the public and was well attended. Judging from the response of the participants it was extremely well received.

The seminar was organized by the Law & Society Trust Core Group Co-ordinator Jennifer Thambayah.

### To our readers....

Sri Lankans who wish their names and addresses to be added to our mailing list are kindly requested to pay a subscription of Rs. 125/= for half a year (July - December 1991) or Rs. 250/= for a full year (July 19-91 - June 1992), postage included. Cheques should be made payable to "The Law and Society Trust", at 3, Kynsey Terrace, Colombo 8.

Overseas readers: We would be grateful if you could help to defray postage costs with US \$ 10 for half a year (July - December 1991) or US \$ 20 for one year (July 1991 - December 1992). Members of donor organizations or groups with whom we have existing arrangements for the reciprocal exchange of publications are exempted.

