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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 main feature in the first issue of Volume IV of the Fortnightly Review consists of a comprehensive survey of the Human Rights perspectives of Asian countries, related to statements made at the Asian Regional Human Rights Conference, Bangkok, March 1993. It is followed by an article on Minority Rights, focussing on the ethnic Vietnamese minority in Cambodia. Finally we feature the rights of another disadvantaged group, women, and the changing laws on abortion in some 'First World' countries.

ASIA/CAMBODIA/WOMEN

NATIONAL POSITIONS ON HUMAN RIGHTS

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The Asian Perspective on Human Rights

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I.

The title of my talk notwithstanding, there is not one but many Asian perspectives on human rights. It is easy to believe that there is a distinct Asian approach to human rights, because some government leaders speak as if they represent the whole continent when they make their pronouncements on human rights. This view is reinforced because they claim that their views are based on perspectives which emerge from the Asian culture or Asian realities. The gist of their position is that human rights as propounded in the west are founded on individualism and therefore have no relevance to Asia which is based on the primacy of the community. It is also sometimes argued that economic underdevelopment renders most of the political and civil rights (emphasized in the west) irrelevant in Asia. Indeed, it is sometimes alleged that such rights are dangerous in view of fragmented nationalism and fragile statehood.

It would be surprising if there were indeed one Asian perspective, since neither Asian culture nor Asian realities are homogenous throughout the continent. All the world's major religions are represented in Asia, and are in one place or another state religions (or enjoy a comparable status: Christianity in the Philippines, Islam in Malaysia, Hinduism in Nepal and Buddhism in Sri Lanka and Thailand). To this list we may add political ideologies like socialism, democracy or feudalism which animate peoples and governments of the region. Even apart from religious differences, there are other factors which have produced a rich diversity of cultures. A culture, moreover, is not static and many accounts given of Asian culture are probably true of an age long ago. Nor are the economic circumstances of all the Asian countries similar. Japan, Singapore and Hong Kong are among the world's most prosperous countries, while there is grinding poverty in Bangladesh, India and the Philippines. The economic and political systems in Asia likewise show a remarkable diversity, ranging from semi-feudal kingdoms in Kuwait and Saudi Arabia, through military dictatorships in Burma and Cambodia, effectively one party regimes in Singapore and Indonesia, communist regimes in China and Vietnam, ambiguous democracies in Malaysia and Sri Lanka, to well established democracies like India. There are similarly differences in their economic systems, ranging from tribal subsistence economies in parts of Indonesia through highly developed market economies of Singapore, Hong Kong and Taiwan and the mixed economy model of India to the planned economies of China and Vietnam. Perceptions of human rights are undoubtedly reflective of these conditions, and suggest that they would vary from country to country.

Perceptions of human rights are also reflective of social and class positions in society. What conveys an apparent picture of a uniform Asian perspective on human rights is that is the perspective of a particular group, that of the ruling elites which gets international attention. What unites these elites is their notion of governance and the expediency of their rule. For the most part the political systems they represent are not open or democratic, and their publicly expressed views on human rights are an emanation of these

systems, of the need to justify authoritarianism and repression. It is their views which are given wide publicity domestically and internationally.

There are other Asian voices as well. There are, admittedly somewhat muted or censored, the voices of the oppressed and the marginalised. There are the passionate voices of indigenous peoples whose cultures are destroyed by governments which claim to be the custodians of Asian cultures; they speak in a language which finds few resonances even in the west (because their language is threatening to the system of the market). There is the voice, rising in intensity, of the middle classes, with a stake in affluence whose new found prosperity and economic enterprise shows to them the virtues of the legal protection of property and the rule of law. There are the strident voices of ethnic minorities who seek collective autonomies which challenge the governments' claims of political monopoly and state sovereignty. There are the well modulated voices of the non-governmental organizations, which provide the most consistent and coherent alternative view of human rights to that of governments.

The unity of governments is more apparent than real. Some of the governments which joined in the Bangkok communique in the Asian regional preparatory meeting for the Vienna World Conference on human rights did themselves a disservice, for their domestic record, and their commitment to human rights, is better than one might think from it. India is one example. Along with some other states, it is committed to human rights by its constitutional instruments, has a strong and independent judiciary, and despite problems and setbacks tries hard to maintain human rights. The reason for presenting a united front is not unconnected with a perceived North-South confrontation (as is evident from the Bangkok Governmental Declaration, which stressed the need to avoid the application of "double standards" in the implementation of human rights and its "politicisation"). Asian governments feel that since the end of the cold war, the west has focused its attention on what it perceives to be the "undemocratic" nature of third world polities. In Africa and Latin America the western concern with human rights is seen to be an instrument for the establishment or strengthening of the market, in an attempt to restrict the interventions of the state in economic relations. In Asia, however, the key economies are heavily market oriented, and for the most part are successful. Even China is now turning to the market, which is widely credited for its economic success. So the emphasis on human rights is not necessary as a spur to the market (and indeed, as I explore later, the relationship between the market and human rights is problematic).

Some Asian governments consider that the western pressure on them for an improvement in human rights is connected with the project of western global hegemony. This is to be achieved partly through the universalisation of western values and aspirations, and partly through the disorientation of Asian state and political systems (and the consequent negative effect on their burgeoning economies). They have fashioned their response accordingly. There is some danger in this internationalisation of the Asian debate on human rights. It shifts the focus away from the practices of Asian governments and the restrictions on human rights. It enables the governments to attack as western stooges indigenous supporters of human rights. It leads to spurious stereotypes, of "orientalism" and "occidentalism", with either defensive Eastern counterparts of western universalism or aggressive retreat into an imagined part or culture. It politicises the question of human rights in an unproductive way.

II.

I turn first to "official" views of human rights of a number of influential Asian countries (Singapore, China, Malaysia, Indonesia). These views have developed primarily in response to two contingencies: the imperatives of control, and confrontation with western pretensions. They are therefore formulated somewhat defensively. It also means, because they are an engagement and a debate with the west, that they are formulated in universalistic terms, in the usual discourse of human rights. Several ingredients constitute the official view I am discussing. One which flows directly from both the contingencies is the assertion of "domestic jurisdiction" over human rights. Human rights are encapsulated within state sovereignty; the national treatment of human rights is no concern of other states or the international community. Self-determination, a concept which has been used to advance claims of human rights, is regarded as irrelevant to independent states. This position runs contrary to the contemporary view that human rights are a matter of international concern and that its gross violations entitle the international community to intervene in domestic situations to redress violations. In its "White Paper" Human Rights in China (1991), the Chinese government stated that "Despite its international aspect, the issue of human rights falls by and large within the sovereignty of each state". The Chinese delegation to the UN Commission on Human Rights at its meeting in February 1993 urged that the World Conference in Vienna should "reiterate the principle of state sovereignty contained in the UN Charter and international law which is the basis for the realisation of human rights. Only when the state sovereignty is fully respected can the implementation of human rights be really ensured." This is also pre-eminently the position of the other countries mentioned above.

Another element in the official view is the relativity of rights, determined by the economic and political circumstances of each country. The Bangkok Governmental Declaration "recognises that while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional peculiarities and various historical, cultural and religious backgrounds". This stance reflects the position in the Chinese White Paper which states that "the evolution of the situation in regard to human rights is circumscribed by the historical, social, economic and cultural conditions of various nations, and involves a process of historical development. Owing to tremendous differences in historical background, social system, cultural tradition and economic development, countries differ in their understanding and practice of human rights." The Chinese use this framework to establish the priority of social and economic rights in their country, and much of the Paper is taken up with an account of the ending of pre-Communist regime practices of feudalism and other forms of human exploitation and the steady progress since in nutrition, education, health, the position of women and the disabled. Other countries too have used the state of national economic development as explanations for the failure fully to guarantee the complete range of human rights ("to eat their fill and dress warmly were the fundamental demands of the Chinese people who had long suffered cold and hunger").

There are two major implications of this relativist position on human rights. The first relates to conditionalities of political stability; and the other to the primacy of economic development.

The implications of the first represent restrictions on civil and political rights. A forthright statement of this position is to be found in pronouncements of the Singapore Government following the detention of various social workers and activists in May 1987. I quote here from one such statement (dated 24 June 1987 and addressed by the Minister for Home Affairs to US Congressmen who had written to complain about the detentions). It compared the "resilience and cohesiveness" and shared values of the US nation (which

presumably makes possible the tolerance of human rights) to the fragility and heterogeneity of Singapore. "We are vulnerable to powerful centrifugal forces and volatile emotional tides. Like many other developing countries, Singapore's major problem of nationhood is simply to stay united as one viable nation. In our short history, Singapore has repeatedly encountered subversive threats from within and without. To combat these threats to the nation, the usual procedures of court trials, which apply in Singapore to most criminal cases, have proved totally inadequate. The very secrecy of covert operations precludes garnering evidence to meet the standards of the criminal law for conviction. In many cases of racial agitation, the process of trial itself will provide further opportunity for inflammatory rabble rousing. Singapore cannot be ruled in any other way. Preventive detention is not a blemish marring our record; it is a necessary power underpinning our freedom." (Another aspect of Singapore by-passing the formal legal system, with its guarantees of fairness, not discussed in the minister's statement, is the taped and doctored "confessions" extracted from the detainees under some coercion, and then shown on the national television as proof of guilt and calculated to destroy their credibility and dignity.) These remarks were directed at a justification of administrative powers of detention without any kind of trial, but similar arguments have been used to justify other curtailments of civil rights, like the right to associate and assemble, of peaceful marches, of speech and expression. The Chinese Paper says that the people's right to subsistence will be threatened in the event of social turmoil or other disasters, and that it is the fundamental wish and demand of the Chinese people and a long term, urgent task of the Chinese government to maintain national stability and concentrate their efforts on developing productive forces.

The economic backwardness of Asia has been used to establish the primacy of economic development over human rights. The argument is, in part, that civil and political rights are neither meaningful nor feasible in conditions of want or poverty. Therefore the first priority of state policy must be to promote economic development. It is implied that economic development may well require restrictions on human rights, both to provide a secure political framework in which it can be pursued and to remove obstacles in its way (e.g., through forced movement of people from lands required for "development"). The opposition of human rights and development is assumed rather than proved by argument and illustration. It is also used to establish the priority as between different kinds of rights, in which civil and political rights occupy a lowly position (in part a response to an argument that human rights are indivisible, and all of them enjoy an equal status).

The emphasis these governments purportedly place on economic development has led them to support the right to development. This right is a matter of considerable contention internationally, with developing countries arraigned on the side supporting it, and most developed countries united in their opposition to it. It certainly does not have the quality of other kinds of rights, which inhere in individuals or groups and for the most part are entitlements against the state. Nevertheless the General Assembly of the United Nations adopted, in the face of abstentions by most western states, a Declaration on the Right to Development on 4 December 1986. The Declaration ties the realisation of human rights in the developing countries to international economic aid for them and gives to "peoples" (presumably meaning "states") the right to "participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised". In return for these several concessions are made in emphasising the indivisibility of rights and the claims of individuals to full participation in development and in the fair distribution of the benefits resulting from it.

The Declaration is a fuzzy document, trying to be all things to all persons. So while there are sections of it which can be used to advance the (more traditional) cause of human rights, the gist of it is an attempt to establish reasons for the failure of the realisation of human rights in the international economic and political systems (including encroachments on the principle and practice of self determination), while affirming that the primary responsibility for human rights is vested in states as part of their sovereignty. In other words, the rich countries must provide economic assistance to the poor countries, but must not question their human rights situation. (The western riposte to the Declaration has been a massive imposition of political conditionalities on economic assistance and indeed, in the case of China, on economic relations and co-operation). The Declaration is also an attempt to provide an alternative framework for the international discourse on human rights. It shifts the focus from domestic arenas (where most violations of human rights take place) to the international, and takes attention away from specific rights, for example, speech, assembly, social welfare to an ambiguous portmanteau right of development, for which in the nature of third world affairs, the state must take the responsibility in defining and implementing it. Through the Declaration, Asian governments seek to promote the ideology of developmentalism, which justifies repression at home and the evasion of responsibility abroad.

Another Asian initiative in changing the framework for the discourse on human rights is even more fundamental. The approaches discussed so far have taken the western discourse as the main framework and have advanced qualifications to it or provided justification for derogation from its values. Some governments have put forward the argument that the cultural matrix within which relations between individuals and the state are embedded are fundamentally different in Asia from that in the West. This matrix governs the nature and salience of human rights. This approach has been taken up aggressively in Singapore and Malaysia (less so in China, where the government's residual loyalty to Marxist thought is inconsistent with the adoption of this cultural approach, especially since so much of it is based on semi-feudal thought in Asia).

I take as the basis of my discussion of this point an official statement of the government of Singapore, Shared Values (1991). The context of this White Paper is a concern of the government that the cultural values of its people are under attack from foreign ideas and values. It poses the rhetorical question, "Can we build a nation of Singaporeans, in Southeast Asia, on the basis of values and concepts native to other peoples, living in other environments?" It goes on, "If we are not to lose our bearings, we should preserve the cultural heritage of each of our communities, and uphold certain common values which capture the essence of being a Singaporean". It then finds certain perceptions and values which are common to the different ethnic communities of Singapore and which also distinguish them from society in the west. The key section of the Paper is devoted to a discussion of the relationship between the individual and society. Disputing the proposition that values are universal and common to all mankind, it states that there is a major difference between Asian and Western values in the balance each strikes between the individual and the community; Asian societies emphasise the interest of the community, while Western societies stress the rights of the individual. The Singapore society has always weighted group interests more heavily than individual ones. "This balance has strengthened social cohesion, and enabled Singaporeans to pull together to surmount difficult challenges collectively, more successfully than other societies. An emphasis on the community has been a key survival value for Singapore."

The core values of Asian society are identified as placing society above self, upholding the family as the building block of society, and resolving major issues through consensus instead of contention. There is a strong element of Confucianism in this elaboration, although the government denies that the values it propagates are purely Confucian. It, however, picks up an element of Confucian teaching as particularly relevant to Singapore. "The concept of government by honourable men (*junzi*), who have a duty to do right for the people, and who have the trust and respect of the population, fits us better than the Western idea that a government should be given as limited powers as possible, and should always be treated with suspicion unless proven otherwise." The supremacy of political authorities is emphasised by the first of the Shared Values, "Nation before Community". Another aspect of Asian values, implicit though not explicit in the Paper, is the importance of duty as a counterpoint to right. The cohesion of society as well as the fulfillment of the individual is secured through a chain and hierarchy of duties. (The primacy of the notion of duty is emphasised elaborately both in the Chinese and Indian constitutions).

The individual does not disappear altogether as a bearer of rights in the Singapore Paper. However, characteristically the concern with the individual is expressed more in terms of the obligations of the community to look after its less advantaged members. (In Singapore there is a twist to this, in that the "community" in question is the ethnic community of the individual, not the state, "to avoid the dependent mentality and severe social problems of a welfare state as experienced in many developed states", laying the foundations of a kind of community corporatism in the wake of declining popularity of the ruling party, showing how much these questions are viewed in that country from the perspectives of governance and management).

Cultural "embeddedness" is not the only justification for this view of the relationship between the individual and the community and the interposition of the family. It is also said to be rooted in more pragmatic considerations. The White Paper hints at this, but it has been developed elsewhere. In at least Southeast Asia, there is a strongly held view that an authoritarian political system is the secret of its economic success (a point I have already mentioned earlier), and the frequent Singaporean mocking of the democratic efforts of the Philippines (with a rather inefficient economy) is advanced as proof of it. But there is also the belief that it is not the individual but the family (tied in to a network of clan associations and relationships) which has been at the forefront of the phenomenal economic success of the region. There appears to be the view of a significant number of people (primarily but not only among the business community as is well evidenced in the debates in Hong Kong) that this combination of authoritarian rule and family and kinship networks lies at the root of economic success. This model (which reverses the normal understanding of the relationship between the market, individualism and the rule of law) is seen as threatened by democracy and human rights (in a neat reversal of western perceptions of the positive link between the market and human rights). Hence democracy and human rights are not high on many people's agenda.

III.

Before I turn to other Asian voices, I offer a brief critique of my own of some aspects of the official perspectives I have outlined above (although, as I discuss later, these views are not entirely devoid of merit). The "communitarian" argument suffers from at least two weaknesses. First, it overstates the "individualism" of western society and traditions of thought. Even within western liberalism, there are strands of analysis which assert claims of the community (for example Rousseau); and most western human rights instruments

allow limitations on and derogations from human rights in the public interest, or for reasons of state. Western courts regularly engage in the task of balancing the respective interests of the individual and the community. Furthermore, liberalism does not exhaust western political thought or practice. There is social democracy, which emphasises collective and economic rights, and Marxism, which elevates the community to a high moral order, is also reflective of an important school of western thought. There is much celebration in western political thought of "civil society".

Secondly, Asian governments (notwithstanding the attempt in the Singapore Paper to distinguish the "nation" and the community) fall into the easy but wrong assumption that they or the state are the "community". (A similar conflation occurs in the African Charter of Human and Peoples' Rights). Nothing can be more destructive of the community than this conflation. The community and state are different institutions, and to some extent in a contrary juxtaposition. The community, for the most part, depends on popular norms developed through forms of consensus and which are enforced through mediation and persuasion. The state is an imposition on society, and unless humanised and democratised (as it has not been in most of Asia), it relies on edicts, military, coercion and sanctions. It is the tension between them which has underpinned human rights. In the name of the community, most Asian governments have stifled social and political initiatives of private groups. Most of them have draconian legislation like the British colonially inspired Societies Act which gives the government pervasive control over civil society. Similarly rights to assemble and march peacefully have been mortgaged to the government. Governments have destroyed many communities in the name of development or state stability, and the consistent refusal of most of them to recognise that there are indigenous peoples among their population (who have a right to preserve their traditional culture, economy and beliefs) is but one demonstration of their lack of commitment to the real community. The vitality of the community comes from the exercise of the rights to organise, meet, debate and protest, dismissed as "liberal" rights by these governments. It is ironic that the "community" is much more lively and significant in the supposedly individualistically orientated western states than in Asian states which are in the custody of governments which pay lip service to the primacy of the community (even to the extent, as in Singapore, of defining values for the community!). (Nor is the tight regulation of society as in Singapore and Malaysia particularly Confucian).

Another attack on the community comes from the economic policies of the governments. As I have mentioned, for the most part these are market policies. Although Asian capitalism appears to rely on the family and clan associations, there is little doubt that it weakens the community and its cohesion. The organising matrix of the market is not the same as that of the community. Nor are its values or methods particularly "communitarian". The moving frontier of the market, seeking new resources, has been particularly disruptive of communities which have managed to preserve intact a great deal of their culture and organisation during the colonial and post-colonial periods. Market policies have relied greatly on multi-national capital and corporations, which have brought new values and tastes, and are increasingly integrating their economies and elites into a global economy and culture. Indeed it is these very considerations which prompted the Singapore White Paper, but the contradictions of official policies largely escaped its authors. It totally ignored the impact, indeed the onslaught, of modern technologies on traditional communities.

A final point is the contradiction between claims of a consensus and harmonious society and the extensive arming of the state apparatus. The pervasive use of draconian legislation like administrative detention, disestablishment of societies, press censorship, sedition etc., belies claims to respect alternative views,

promote a dialogue, and seek consensus. The contemporary state intolerance of opposition is inconsistent with traditional communal values and processes. I fear that the contemporary state processes in Asia are worse than the much derided adversarial processes of the west, which at least ensure that all parties get a fair hearing.

IV.

Non-official voices are many. For reasons of space, I concentrate on the views of the ngos. But there are other voices that must be taken into account. The views on human rights of the most oppressed are not articulated, or when articulated, are not heard. They are the worst victims of the denial of human rights, and in desperation they turn to violence or other dramatic challenges to authority. An important and articulate group are intellectuals who are alienated from the state, and for the most part are not apologists for the regime. Intellectuals respond to and engage in international debates; and like the ngos they form networks with their counterparts in other parts of the world. Like the ngos they have a commitment to human rights and democracy (even in China there is a growing and vibrant academic community with a keen interest in human rights and constitutionalism). They are less ready to accept western conceptions in totality, and attempt to relate questions of human rights to specific national conditions.

An authoritative statement of the position of Asian ngos was issued on 27 March 1993 on the occasion of the Asian intergovernmental conference on human rights preceding the Vienna World Conference. It endorsed its commitment to the view that human rights are universal, and are equally rooted in different cultures. While it supported cultural pluralism, it condemned those cultural practices which derogate from universally accepted human rights. Since in its view human rights are of universal concern and universal value, it does not regard the advocacy of human rights as an encroachment upon national sovereignty. Indeed it recommends international co-operation and solidarity for the promotion of human rights, as a refutation of claims of national sovereignty over human rights issues. The ngo signatories of the statement support the principle of the indivisibility and interdependence of human rights.

If in these perspectives the view of the ngos are at variance with those of governments, there is some common ground on other points. The ngos attribute the poor state of human rights to the international economic order, whose reform through structural changes as well as the adoption of a Convention on the Right to Development, they urge. Unlike the governments, they see a much closer connection with domestic oppression and international exploitation, in the collaboration of local economic and political elites with multinational corporations and aid agencies. Unlike the governments, they are critical of the consequences of the market system. They share with governments the desire to establish a broad framework for the analysis of human rights, but their framework (unlike that of governments which is informed by a statist view of development) is suffused with notions of social justice, eradication of poverty through equitable distribution of resources and the empowerment of people, especially of women and other disadvantaged communities.

The ngos also part company with governments in their assessment of the state of human rights, which they find marked by massive and terrible violations of these rights and pervasive lawlessness on the part of state authorities. They deplore the militarisation of their governments and societies which is a primary cause of these violations. Their prescription for the ills of their countries is thorough going democracy and an unambiguous recognition and enforcement of human rights.

V.

It is clear that it is no longer possible for Asian governments, ngos or scholars to ignore the international discourse of human rights. Nor have they chosen to do so. Even China has engaged vigorously in this discourse, refusing to accept a purely defensive position even in the face of criticism about the massacre in Tianenman Square, arbitrary detention, extensive use of capital punishment, and prison labour. It has instead opted to establish the legitimacy of a distinctive approach to human rights. Other countries have also tried to establish a distinctive Asian approach. This is surely a proper position, for the context of human rights is delineated by the social and economic conditions of the place and the time. So-called universal human rights of the west have evolved over a long period of European history, responding to the changing configurations of power and the tasks of each epoch of history. Claims of universality and indivisibility of rights are hard to sustain in the face of the west's history of the oppression of its own people and of others, with slavery which once enjoyed religious approbation, abuse of child labour, the exploitation of colonies and the other degradations of imperialism and racism. Nor is the process complete. Social welfare rights were acknowledged only in this century, and the appalling degradation of the environment has now set the stage for a new conception of rights and responsibilities, in which the community will have to be accorded a key position as a bearer of rights as well as duties. There is no reason why contemporary concerns and fads in the west should define the parameters of international discourse in and aspirations of human rights.

If human rights have to be located in their social and economic contexts, what are the appropriate features that constitute the context for them in Asia? We should first perhaps abandon the search for a set of features that explain the whole Asian context, since there is such a marked diversity among Asian countries. There appears to be no common context between the small, urbanised, economically prosperous Singapore and the vast, impoverished, largely rural India. I have already indicated that the attempt to establish a common context through the invocation of a common and distinctive culture is spurious. I do not argue that culture is irrelevant, but that the implications drawn from it by governments are disingenuous.

If one may generalise (despite my preceding remarks), the following specifics of the Asian situation stand out. The first point is that the function of human rights (and discourse on them) in Asia is quite different from that in the west. Human rights in the west have responded to the configurations of power and economic relationships as they have evolved over a long period. They are consequently consistent with the patterns and structures of authority, and people's aspirations as well as expectations. There are no serious competing paradigms of political organisation. The role of human rights is to fine tune the administrative and judicial systems and fortify rights and freedoms that are largely uncontroversial. In Asia, on the other hand, human rights have a transformative potential. They are a constant challenge to vested interests and authority in societies riven by enormous disparities of wealth and power, with traditions of authoritarianism and the helplessness of disadvantaged communities, of militarization and the conjunction of corrupt politicians and predatory domestic and international capital. Human rights are therefore a terrain for struggle for power and the conceptions of good society. It is for this precise reason that Asian governments have engaged in the debate with the west which I outlined above; the real audience is, of course, their own people.

The second point is that there are massive violations of human rights in Asia; of women and children, of lower castes and otherwise disadvantaged communities, of ethnic minorities, of workers. Violations range

over the whole conspectus of human rights; civil and political rights, as well as cultural, social and economic; there are mass killings and widespread disappearances; torture; wide displacements of communities from their traditional abode; arbitrary detentions and extensive censorship of thought and expression. The state is a major culprit, brutalising whole populations, but massive violations also take place in and through civil society, sometimes with the connivance of the state, and frequently reflecting feudalistic and patriarchal dimensions of culture. Social conflicts, particularly those stemming from ethnic difference, have politicised and militarised civil society in many states.

The third point is that despite these violations, human rights consciousness is low. Explanations for this paradox may lie in the weight of oppression over centuries, a fatalistic acceptance of one's miseries, obstacles placed in the way of those who would seek to make explicit to the downtrodden the causes of their oppression. It certainly lies in the ethnic divisions of societies; ethnic consciousness can dull human rights consciousness, for the oppression of others is frequently viewed as their just rewards. A major challenge to human rights workers is undoubtedly this ethnic consciousness, which compels a perception of outsiders as less than human. Another cause of low human rights consciousness may be widespread poverty. Poverty is a great cause of denial of human rights. The international system refuses to accept this reality – for largely political reasons. It refuses to acknowledge that poverty destroys human dignity; and without human dignity there can be no human rights; or indeed the capacity to challenge the system of oppression.

Thus economic development is undoubtedly important. But not just any kind of economic development. Economic growth must be accompanied by a wide measure of egalitarianism, the protection of the rights of workers, particularly migrant workers, and democratic practices at work places. Nor must economic growth be undertaken at the expense of land, customs and autonomy of long settled communities. Unless these and other community concerns are safeguarded in the process of economic growth, development is perverse and adds to the violations of human rights and dignity.

A further point about human rights in Asia is that challenges to their violations are not individual based but group or class based. This is particularly the case in multi-ethnic states. The protection of human rights is therefore pursued through the group. This fact, and that the state is a major violator of human rights, suggests strategies that are different from the traditional western approaches, which are legalistic and court centred. Asian strategies cannot realistically be court centred, however favourably the judiciaries may be disposed towards human rights (and for the most part they are not). Human rights conscientisation and mobilisation based on connections between them and their oppression are a fundamental starting point (connections which neither local governments nor the west are anxious should be made).

Nor must the terrain of struggle be purely domestic. Despite the resistance of governments, the realisation of human rights in each country is intimately tied to wider global forces (particularly in the contemporary world wide pursuit of marketisation). Even today many governments in the third world are surrogates for external economic and political interests, and it is necessary to take the battle to the homelands of these interests, just as it is necessary to recruit foreign interests to put pressure on domestic governments which deny their people the right to participate in decisions affecting their own destiny. Fruitful Asian perspectives on human rights must therefore transcend obfuscation of culturalism, locate human rights in the contingencies of their political economy, and urge struggle domestically as well as globally since no economies now are purely national.

**CAMBODIA: SOME THOUGHTS ON THE POLEMICS OF
MINORITY RIGHTS WITH SPECIAL REFERENCE
TO THE CASE OF ETHNIC VIETNAMESE**

by

Sasanka Perera

In this brief descriptive analysis I would attempt to place the notion of minority rights as viewed by Cambodians in the context of the larger issue of human rights. I would focus my attention particularly on the rights and status of the ethnic Vietnamese minority because by definition theirs is a precarious existence, and they are the more visible and consistent target of ethnically motivated violence.

The status of human rights in Cambodia is, and has been for a considerable time a low priority for its governments. With the entry of UNTAC into Cambodian politics with its promises of peace, prosperity, and political stability the situation has not improved much. Of course one could always argue that in the context of the on-going international debate, or rather the politics of disagreement between Western and Asian governments regarding what is meant by human rights, the Cambodians themselves may consider their human rights situation as tolerable despite what the West may think. However, by whatever standard they use, Cambodians instinctively do understand what human rights basically is, as do most other humans. The peasants I have talked to may lack the trained legal mind to argue their cases in incomprehensible legalese or the ability to frame their aspirations in terms of abstract concepts. But they do know that their lives are a mess, mostly due to political violence. They also know that the situation can, and hopefully should be improved. Such interests played a significant role in the successful voter participation in the recently concluded elections. But arguably, in a society where the human rights situation has yet to improve, the conditions of minority rights ought to be worse. They are, at least in the context of the ethnic Vietnamese minority. Generally speaking, the other minorities are not particularly worse off than the rest of the Cambodians.

Cambodia is one of the most homogeneous societies in the region in terms of ethnicity and religion. About 90% of the people are Buddhist, most of whom are Khmers. Among the ethno-religious minorities are Cham Muslims, Chinese, Hmong, Khmer Krom, Khmer Loeu, Christians and ethnic Vietnamese. The rights of minorities have been recognized by all the major parties, particularly by the CPP and FUNCINPEC which collectively form the current Cambodian government. However, as I would attempt to show later what is meant by official statements are at best vague or dubious which can be differentially interpreted under different political conditions. More importantly, what ultimately matters is what the average Cambodian thinks should be the rights and obligations of minorities.

Perceptions of History and the Demonization of the Vietnamese:

How the ethnic Vietnamese are viewed by Khmers must be understood in the context of where they are placed in the popular Khmer historical discourse, and the manner in which the Khmers interpret history,

and how the contemporary socio-political realities are clouded by that historical consciousness. In the Khmer historical consciousness the collective memory of Vietnamese aggression, expansionism and involvement in Cambodia remain alive, and has a direct correlation with the current Khmer perception of ethnic Vietnamese. Of course the Thais have also been longstanding regional aggressors who at one point occupied large areas of Cambodian territory including the area where the famous temple Angkor Wat stands, and exercised direct control over the Cambodian rulers. In fact by the beginning of the 19th century both Thailand and Vietnam exercised a form of dual suzerainty over Cambodia. But the Thais are not viewed with the same contempt as is the case with the Vietnamese. One reason for this is Vietnam's continued involvement in Cambodian politics even after the withdrawal of the French colonial regime in 1970. Sharp cultural differences as well as pre 19th century attempts by some Vietnamese rulers to eradicate Cambodian customs and cultural practices in the areas under their control also helped in the further demonization of the Vietnamese, and such memories continued to indicate the direction of future relations.

In 1840 the Cambodians launched an attack against the better armed Vietnamese using what may be called guerrilla tactics today, and forced them to retreat from Phnom Penh in to the Mekong Delta. This is an event that is remarkably alive in the collective Cambodian conscience. Ancient regional history is not the only cause that helped deteriorate relations with the Vietnamese. The Cambodians, especially middle class elements were also bitter over the French colonial actions of staffing middle and lower levels of the colonial civil administration with Vietnamese officials, an act which was seen as placing the traditional enemy within the country's administrative system.

Since these times the anti Vietnamese sentiment has remained alive as evidenced in the numerous punitive actions taken against them, sometimes with the support of the state. For example after becoming the leader of Cambodia in 1970, Lon Nol allowed his subordinates to launch a series of planned punitive actions against the Vietnamese in the country in May and April 1970, when thousands were killed. Massacres of ethnic Vietnamese by the Khmer Rouge were also documented in the period immediately preceding the recently concluded elections. In this latest context there were very few sympathizers among the majority Khmers, including within the human rights community, a situation I shall comment on later. Pol Pot's and the Khmer Rouge's anti Vietnamese stand is also well documented in the numerous cross border shellings and expeditions the Khmer Rouge launched, particularly in August and September 1977. Interestingly, despite their atrocious human rights record, one basis on which some Cambodians identify with the Khmer Rouge is their virulent anti-Vietnamese sentiment and action.

In reality the Cambodians were spared further excesses under the Khmer Rouge reign of terror because of the Vietnamese invasion of December 1978. But as a result of Vietnam's prolonged occupation spanning over a decade the invasion's positive contribution to the Cambodian people was soon forgotten. The occupation came to be viewed not as the force that halted Pol Pot's genocidal politics, but as an unwarranted military intervention and more importantly the unpleasant repetition of history. So ultimately, even that episode failed to improve the image of Vietnam or the Vietnamese minority in Cambodia. In the final analysis the ethnic Vietnamese in Cambodia are viewed as a fifth column of Vietnam, clearly not an enviable position to be in.

Vietnamese Minority Today: Khmer Perceptions:

As I have stated earlier, it does not seem that Khmers' relations with non-Vietnamese minorities are particularly problematic. In any event contradictions in the manner how Khmers view different minorities are obvious. Whatever the modalities of sociological analysis, the Khmers seem to recognize two categories of minorities – the ethnic Vietnamese and others. The Vietnamese are always a negative category, and all the negative comments and incidents regarding minorities I have personally recorded are in reference to the Vietnamese. On the main highway between Phnom Penh and the Province of Kompong Chhnang are a number of highly visible Cham Muslim communities. Their visibility is pronounced by the head-dress of the women and the domes of the gleaming new mosques that are springing up by the roadside (I counted at least ten). The Chams as a group were specifically persecuted by the Khmer Rouge as were the Vietnamese. But I failed to get any negative comments about the phenomenon of newly emerging mosques or the Cham in general from the peasants in the bordering Buddhist village or our guides and interpreters. On many occasions they are referred to as people who were persecuted by the Khmer Rouge. When Muslim voters turned up at polling stations in Buddhist temples in Kompong Chhnang, they were not viewed or treated in any hostile manner by the incumbent Buddhist monks or the laity. My queries as to who they were, were answered by such comments as "Oh, they are Cham people," "They live in the next commune," "They are Muslims." Clearly there was no hint of hostility. This however, does not mean that hostility with the Chams does not exist. It simply means that levels of hostility are not significant enough to emerge in daily life or popular discourse of the Khmer.

But this amiability changed in all references to the Vietnamese. For instance, in one polling station (#302 Located at Wat Khasam in Commune Sankat in Kompong Chhnang polling agents from political parties such as FUNCINPEC, BLDP, and even the CPP (which at that point continued to receive aid from the government of Vietnam, and owed the genesis of their political power in Cambodia to the Vietnamese military) bitterly complained that a group of Vietnamese had attempted to vote and were allowed to do so by the international polling station officers and the UNTAC military and police posted at the station. The fact that they were legitimate citizens of Cambodia, carrying authentic identity papers issued by UNTAC (a valued possession in Cambodia) with a legal right to vote on the basis of conditions agreed upon by Cambodian leaders simply did not enter the conscience of the protestors. The political socialization has assured that the Vietnamese are the traditional enemies, and simply did not have the right to vote or even exist in Cambodia. On many occasions, when we travelled past Vietnamese settlements the statements from some of the Cambodians accompanying us were clearly negative. This attitude did not change when we visited the sites of two settlements that were mostly deserted in the context of rising anti-Vietnamese sentiments and action. Many we talked to, including a person working for one of the human rights groups stated that "things will be easier if they (the Vietnamese) leave".

Given the demonized image of the ethnic Vietnamese, and the Khmers' negative perception of them as the traditional enemies in their historical consciousness, the precarious position of the Vietnamese in the midst of the Khmers is not difficult to understand. Part of the argument is that they have been the cause of most of Cambodia's ills, both in ancient and modern times. As such notions of any Vietnamese rights necessarily do not enter the realm of Khmer thinking. At best the contemporary ethnic Vietnamese are an immigrant group of recent origin with a clearly demarcated homeland in Vietnam to which they should return. Their rights, duties etc. are to be found there, not in Cambodia. It is interesting how certain political party manifestos view the position of minorities in general and the Vietnamese in particular. For instance consider

what the FUNCINPEC has to say. It must be noted that what they and other political parties say, is as important as what they do not say:

"All citizens, regardless of their ethnic origin, are equal before the law. They enjoy the same rights and are bound by the same obligations." (FUNCINPEC, September 1992:18)

"The rights of all ethnic minorities (Muslim Khmers, Sino-Khmer Khmers Loeu...) are guaranteed and protected. Their languages, cultures and religions are recognized." FUNCINPEC, September 1992: 18)

"Concerning compatriot Muslims, Khmer Krom, Sino-Cambodians, Khmer Loeu and others, I would like to emphasize that, above all, you are Cambodians. Your diversity contributes to Cambodia's rich cultural heritage – I would like reaffirm my absolute opposition to all forms of racial discrimination---" (change from a speech by Prince Norodom Ranariddh, President of FUNCINPEC on 4 March 1992)

Despite all the assurances, it is interesting that in the incomplete list of minorities underlined in the quotations above are no references to the Vietnamese. This cannot be an accident given the fact that the Vietnamese are a significant and visible minority who are also regular targets of ethnically motivated attacks. If anybody needed to be reassured, it was the Vietnamese. However, no mainstream Cambodian leader is willing to take such a stand in public. Attitudes and perceptions implicit above becomes clearer when such seemingly accidental lapses are placed in the context of more explicit statements such as the following:

It (Cambodia) emands the total and effective withdrawal of all categories of Vietnamese forces The problem of Vietnamese citizens illegally settled in Cambodia will be resolved according to the provisions of international law and with full respect for humanitarian principles while privileging the legitimate interests of the Khmer people." (FUNCINPEC, September 1992: 27)

"In the domain of education and culture, an independent Cambodia having rediscovered its authentic Khmer roots must envisage measures to rid itself of Vietnamese and communist influences in those areas where the national culture has been the most perverted." (FUNCINPEC, September 1992: 14)

Taken together the two quotations above reflect more accurately the average Cambodian perceptions about the Vietnamese minority, and how vague documents such as the FUNCINPEC (and CPP) manifesto is, allowing adequate room for manipulating and reinterpreting key clauses when necessary. In terms of the above quotes all ethnic Vietnamese can be considered "Vietnamese citizens illegally settled in Cambodia." As I have already noted this is exactly the manner in which many Cambodians view the Vietnamese – as illegal aliens who need to be deported. Even more ominous is the reference to cultural cleansing in the second quotation. Let me now consider certain statements in the CPP manifesto:

"All ethnic minorities living in Cambodia enjoy equal rights. Any acts of racial contempt, oppression and discrimination are prohibited. Language, writing and good traditions of ethnic minorities are respected." (CPP, March 1993: 5)

"The Cambodian People's Party will issue an immigration law which takes in to consideration a number of factors such as historical political circumstances, views on universally recognized human rights, and the necessary needs of the society in some areas." (CPP, March 1993: 6)

Clearly the ideas expressed in the CPP manifesto are not much different from what appeared in the FUNCINPEC document. In terms of the first quote almost anything that the Khmers find unacceptable can be construed as "bad traditions" of minorities, and accordingly legally or otherwise dealt with. The reference to an immigration law in the second quote is also a reference to the Vietnamese who are the only minority group clearly considered as an immigrant and alien group by the Khmers. Thus on the basis of "historical and political circumstances" the Vietnamese can be construed as traditional aggressors or recent immigrants who should be deported to their land of origin. Further discrimination can be directed against them on the basis of certain "necessary needs of the society." For example, many Khmers consider the Vietnamese as relentless exploiters of their economic resources such as fishing areas and the construction industry. Thus expelling them from such areas of the economy can be initiated or in the very least suggested in order to open up employment opportunities to Khmers or "to liberate the economy from the clutches of foreign elements." Such action can easily be construed as "necessary needs of the society." Significantly all of these seemingly drastic scenarios have been often suggested by many Khmers I talked to.

What the above discussion indicates is that in general most Khmers, inclusive of major political parties consider the ethnic Vietnamese presence in Cambodia as a negative development. Unfortunately, as a result the nascent human rights groups which are primarily Khmer enterprises also do not directly address the issue. Like politicians, they dare not, given the emotive implications associated with it, and in the context of the Khmer imagination of the present and their perceptions of the past. After the recent massacre of Vietnamese civilians purportedly by the Khmer Rouge guerrillas, the four Cambodian human rights groups issued a joint statement in May 1993 condemning the attack. However, such joint statements and the sentiments of the leaders of these human rights groups do not reflect the thinking of the average Cambodians, who ultimately constitute the cadre of these groups themselves. In a number of interviews some of these cadres or average Cambodians working closely with the human rights groups simply did not consider that Vietnamese rights were at issue as they (the Vietnamese) should have been in Vietnam. More poignant is the experience of a well-known human rights educator at a recent peace march in Phnom Penh:

"The march was progressing peacefully, with many monks and young people taking part – Then I saw an old Vietnamese man pushing a bicycle walking in the procession. A policeman ordered him to stop, dragged him off the street and kept him standing by the side of the road, not allowing him to proceed with the march. I wanted to cross the road and intervene on his behalf. But I realized I was Khmer, and had to operate within Cambodian rules and ways of dealing with things. So I did not intervene, knowing very well that what was happening was wrong."

Similar sentiments were expressed by a well known Buddhist monk, who in addition to his spiritual and ritual obligations also functions as an adviser to one of the new human rights groups based in Phnom Penh. He stressed that human rights is not alien to Buddhism, and education in this field must be conducted with reference to Buddhism and Khmer culture. But the rights and all perceptions of Vietnamese minority were clouded with Cambodia's collective memory of the past. In his view the hatred towards the Vietnamese stem from their actions in the pre colonial past as well as the recent invasion (which dislodged Pol Pot, and installed the former SOC government). He further noted that the Vietnamese have had expansionist ideas

throughout history up to now, and that Cambodians should not encourage foreign intervention, but rather must solve their own problems. It is interesting that the monk, like many Cambodians does not make a distinct differentiation between the ethnic Vietnamese minority in Cambodia, and the Vietnamese in Vietnam.

Significantly, he believes that the majority of the current ethnic Vietnamese population arrived in the country after 1979 consequent to the Vietnamese invasion, and that immigration laws should be enacted to repatriate them. While some Vietnamese soldiers and civilians who arrived after the invasion did settle in Cambodia there are no reliable statistics to verify the extent of this phenomenon. However, it seems unlikely that the majority of the ethnic Vietnamese present in the country now, arrived after 1979. But in situations like these what matters are perceptions, not realities. In any case perceptions are seen as realities. The monk also stressed that there were no Buddhist organizations to help the Vietnamese. As Khmers such involvement was deemed impossible. But he contended that UNTAC could help – in drafting immigration regulations and in the hoped – for repatriation programme.

Concluding Remarks:

Clearly, the position of the ethnic Vietnamese minority in Cambodia is a perilous one. They live in a land in which they literally have no friends. In the wake of the recent anti-Vietnamese violence an exodus exceeding thousands fled to Vietnam along the Mekong. But many others have stayed on to live in the margins of the Khmer society and perhaps die in the margins. Ideally, the Khmer dominated human rights groups should attempt to help these people in addition to the collective statements condemning violence that they sometimes issue. However, this is not something that can be forced upon them given the sensitive nature of the situations as described in terms of the dilemmas of some of the human rights workers. Any attempt to help the Vietnamese could be construed as unpatriotic and anti-Khmer, undermining the individual existence, as well as institutional credibility of those who attempt it. In the final analysis the Vietnamese have no option but to help themselves, and await a day somewhere in the unforeseeable future when Khmer attitudes may change if political stability is established.

**A LOOK AT ABORTION
IN THE U.S., CANADA, THE U.K. AND AUSTRALIA**

by

Sharmini Mahadevan

Laws regulating abortion in different parts of the world in one way or another accord certain protection to the human embryo. It has been bluntly stated that 'the termination of a pregnancy inevitably involves the death of the foetus'.(1) Thus it would follow that a basic question in the abortion debate is 'whether or not it is a serious moral wrong to kill a human foetus; that is, whether the foetus has a "right to life"'.(2)

Historically, access to abortion has been regulated by the criminal law in a number of states.(3) Some state provisions were more harsh than others and made an abortion illegal, unless done to save or preserve the life or health of the mother.(4)

In Victoria, Australia, section 10(1) of the Crimes Act 1958 in relation to the crime of child destruction provides as follows:

Any person who, with intent to destroy the life of a child capable of being born alive, by any wilful act unlawfully causes such child to die before it has an existence independent of its mother shall be guilty of the indictable offence of child destruction.....

It must be noted that this provision does not protect all foetuses in utero but only those 'capable of being born alive'.

In the United Kingdom, section 1 of the Infant Life (Preservation) Act 1929 states that an abortion may not be carried out upon a foetus 'capable of being born alive'. This would presumably apply to a foetus which is viable or capable of being sustained outside the mother's womb by medical technology. Section 1(1)(a) of the Abortion Act 1967 (U.K.) provides that a pregnancy may be terminated where it has not exceeded its 24th week, on the grounds that its continuance would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family.(5)

Gillian Douglas in her analysis of the position in the United Kingdom writes:

However, there are other grounds for abortion set out in the revised Abortion Act 1967, s.1(1), which have no time-limit, provided that the abortion is carried out by a registered medical practitioner in accordance with the provisions of the 1967 Act. These grounds are, first, where 'the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman'. Secondly, where 'continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated'.(6)

In the United States the debate over abortion has been going on for several years. This debate reached a peak in 1973 with the Supreme Court decision of Roe v Wade.⁽⁷⁾ In this case the constitutionality of the Texas criminal abortion statutes were challenged. These statutes prohibited abortion except with respect to those procured or attempted by medical advice for the purpose of saving the life of the mother.⁽⁸⁾ The United States Supreme Court in Roe v Wade and its companion case Doe v Bolton⁽⁹⁾ `rendered unconstitutional the existing abortion statutes in almost all the states'.⁽¹⁰⁾ With these decisions `the Supreme Court established that any procedural or substantive state interference with first trimester decisions to abort would be constitutionally suspect'.⁽¹¹⁾

The majority of the U.S. Supreme Court in Roe v Wade held that the Texas criminal abortion statutes, which allowed legal abortions only to preserve the life of the mother, were unconstitutional on the basis that they violated a woman's right to privacy.⁽¹²⁾ Blackman J. who delivered the opinion of the Court laid down the following propositions in outlining a trimester scheme based on gestational periods:

- (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgement of the pregnant woman's attending physician.
- (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
- (c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.⁽¹³⁾

One could thus say that the Supreme Court in Roe v Wade `recognized a qualified right to abortion grounded in the judicially developed guarantee of privacy'.⁽¹⁴⁾

The Supreme Court specifically avoided the question of when human life begins. Blackmun J. stated:

We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.⁽¹⁵⁾

However, several arguments were made in the opinion of the majority to the effect that the unborn child is not a person.⁽¹⁶⁾ The court was of the opinion that the state's important and legitimate interest in potential life became compelling only at the point of viability.⁽¹⁷⁾ `This is so because the foetus then presumably has the capability of meaningful life outside the mother's womb'.⁽¹⁸⁾

The use of viability as a determining marker has been criticized as it is not a `fixed characteristic of the foetus' but depends on the development of medical technology able to support the foetus.⁽¹⁹⁾ Weber argues

that 'the shifting stage of medical development cannot provide an inherent, essential difference upon which one might predicate a fundamental distinction between categories of human beings'.(20)

This difficulty was recognized by the United States Supreme Court sixteen years after Roe v Wade in their more recent decision in 1989.(21) In Webster v Reproductive Health Services the constitutionality of a Missouri law regulating abortion was at issue.

The provisions in question were within a passage declaring that life begins at conception, a requirement that abortions performed in the sixteenth week must be done in hospital, a testing requirement for foetus viability for women seeking abortions who are twenty weeks pregnant, and a ban on the use of public employees and facilities for performing or assisting in abortion proceedings.(22)

The Supreme Court reconsidered the State's right to restrict abortions and by a majority stated that the rigid framework of Roe v Wade should be abandoned.(23) The majority of the Supreme Court was of the opinion that a third trimester analysis for viability was inappropriate given the state of medical technology at the time,(24) and saw no reason why the State's interest in protecting human life should become compelling only at the point of viability.(25) The end result being that the qualified right to abortion as recognized in Roe v Wade, which was heavily dependent on viability of the foetus, has been considerably modified and narrowed almost to the point of elimination.(26)

The Supreme Court of Canada in 1988 declared that the provisions of the Criminal Code(27) that made abortion illegal, with the exception of therapeutic abortions necessary to preserve the life or health of the mother, were contrary to section 7 of the Canadian Charter of Rights and Freedoms.(28) 'The provisions were "struck down" as unconstitutional and abortion was no longer a criminal act in Canada'.(29) The Supreme Court concluded that the administrative provisions regulating abortion in the Criminal Code violated a pregnant woman's security of person because they were unreasonably cumbersome and exposed her to 'needless emotional anxiety and physical risk as a result of the uneven, arbitrary, and delayed therapeutic abortion procedures around the country'.(30)

These above cases are predominantly concerned with the rights of the pregnant woman in relation to the embryo or foetus she carries. The fate of these embryos or foetuses can be said to be in 'conflict with the wishes, interests, or rights of the pregnant woman'.(31) Thus, in viewing these cases it is important to keep in mind that they do not hold that 'terminating foetal life is proper, but only that the mother's interest in abortion outweighs the foetus' interest in life'.(32)

There have been another group of cases where the natural father has applied for an injunction to restrain the mother of the child from aborting the foetus.(33) In the case of Attorney-General for the State of Queensland (Ex rel. Kerr) and Another v T (34) the applicant sought in the Australian High Court to restrain the respondent from having an abortion. The couple were not married but the respondent was pregnant with the applicant's child. 'One of the arguments advanced by him was that an unborn child is to be regarded as a person whose existence the courts should protect'.(35) Gibbs C. J. in rejecting the application and this argument said that 'a foetus has no right of its own until it is born and has a separate existence from its mother'.(36)

This decision was followed in the Family Court of Australia by Lindenmayer J. (37) In this case a husband estranged from his wife sought an injunction to prevent her from aborting her 15 week old foetus.(38) Lindenmayer J. disallowed the application by the husband. In the course of his judgment he said:

"the fact that the foetus must grow within the wife's body, not the husband's, cannot, in my opinion, be overlooked. To grant the injunction would be to compel the wife to do something in relation to her own body which she does not wish to do. That would be an interference with her freedom to decide her own destiny."(39)

In addition Lindenmayer J. was of the opinion that the unborn child has no legal right to be born which the court can protect because a foetus has no legal personality and is, in law, a non-person.(40)

In the same year the Supreme Court of Canada dealt with this issue. In Tremblay v Daigle(41) the Quebec Superior Court issued an injunction to the applicant restraining the mother of his child from having an abortion.(42) The Court concluded that a foetus was a "human being" under the Quebec Charter of Rights and Freedoms, and consequently was entitled to protection of its right to life'.(43) This result was agreed with by a majority of the Quebec Court of Appeal.(44)

On appeal to the Supreme Court of Canada the decision of the Quebec courts was reversed.(45) The Supreme Court determined that an injunction should not have been issued.(46) The court decided that, given the importance of the issue and the need for guidance for other courts, the matter should be dealt with as a determination of the [legal] status of the foetus.'(47) Essentially the court concluded that 'a foetus was not a "human being" under the Quebec Charter of Rights .. since there was no explicit protection accorded to the foetus in the statute'.(48)

The abortion debate in these countries has demonstrated that when you balance the relative rights of a pregnant woman and her foetus the rights of the woman carrying the child will in most circumstances take precedence over the life of the foetus.(49) This focus on the bodily integrity and desires of a woman is a necessary consequence of the biological fact that it is primarily a woman's body which is involved in the reproductive process. It is she who has responsibility for the nurturing of the foetus while in her womb and for its subsequent birth. It is also she who bears the risks of pregnancy and child birth. Additionally the social function of raising a resulting child is often left solely to her in most communities.

In this light it is surprising that in many countries abortion still remains a criminal act thereby invading a woman's bodily integrity and often subjecting her to sanctions imposed by a male dominated legal and social system. Since it is the woman's body which is primarily involved in the reproductive process it should follow that women should be the primary participants in making decisions concerning that process.

- (1) L. Gillam, 'The Abortion Debate' (1991) 11:1 Bioethics News 39. This however would not apply to situations where labour is induced.
- (2) Ibid

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- (3) M. L. McConnell, 'Sui Generis: The Legal Nature of the Foetus in Canada' (1991) 70 Canadian Bar Review 550; Editorial, Age, 14 July 1989, cited in (1989) Reform 202; Abortion Act 1967 (U.K.).
 - (4) This was the position in Canada prior to R v Morgentaler (1988) 1 S.C.R. 30; in most States in the United States prior to Roe v Wade (1973) 410 U.S. 113; and in most Australian States, see Editorial, *ibid.* It is also the present position in many other jurisdictions.
 - (5) Section 1(1)(a) of the Abortion Act 1967 as revised by section 37 of the Human Fertilisation and Embryology Act 1990. Cited in G. Douglas, 'The Human Fertilisation and Embryology Act 1990' (1991) 21 Family Law 116.
 - (6) Douglas, *ibid.*
 - (7) Roe v Wade (1973) 410 U.S. 113.
 - (8) *Ibid.*
 - (9) (1973) 410 U.S. 179.
 - (10) J. Coates, 'A comparison of United States and Canadian Approaches to the Rights of Privacy and Abortion' (1989) Brooklyn Journal of International Law 768.
 - (11) *Id.* 769.
 - (12) Roe v Wade (1973) 410 U.S. 113.
 - (13) 410 U.S. 113, 164-165 per Blackmun J.
 - (14) Coates (n. 10) 770.
 - (15) 410 U.S. 113, 159 per Blackmun J.
 - (16) 410 U.S. 113, 157-158.
 - (17) *Id.* 163
 - (18) *Ibid.*
 - (19) Gillam (n. 1) 41; see also Douglas (n. 5) 115-116.
 - (20) M. W. Weber, 'The Personhood of Unborn Children: A first Principle in "Surrogate Motherhood" Analysis' (1990) 13:1 Harvard Journal of Law & Public Policy 157. See also Gillam, *ibid.*

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- (21) Webster v Reproductive Health Services (1989) 109 S.Ct. 3040, (1989) 57 L. W. 5023.
- (22) Coates (n. 10) 780.
- (23) See H. A. Finlay, 'Abortion - Right or Crime?' (1990) 10:1 University of Tasmania Law Review 10.
- (24) (1989) 109 S. Ct. 3040, 3056-3057.
- (25) Id. 3057.
- (26) See Finlay (n. 23) 10; Coates (n. 10) 771.
- (27) Criminal Code, R. S. C. 1985, c. C-46, s. 287.
- (28) R v Morgentaler (1989) 1 S.C.R. 30, (1988) 44 D. L. R. (4th) 385 (S.C.C.).
- (29) McConnell (n. 3) 548.
- (30) Coates (n. 10) 791; see also McConnell (n. 3) 550-551.
- (31) L. Kass, 'Making Babies' Revisited' (1979) 54 Public Interest 36.
- (32) M. J. Wurmbrand, 'Frozen Embryos: Moral, Social and Legal Implications' (1986) 59 Southern California Law Review 1093.
- (33) McConnell (n. 3) 552.
- (34) (1983) 57 A. L. J. R. 285.
- (35) P. Kasimba, 'Regulating IVF Human Embryo Experimentation: The Search for a Legal Basis' (1988) 62 Australian Law Journal 133.
- (36) Attorney-General for the State of Queensland (Ex rel. Kerr) and Another v T (1983) 57 A. L. J. R. 285, 286.
- (37) In the marriage of F and F (1989) F. L. C. 92-031. See also: J. G. Starke, 'The problem of the legal status of the foetus in utero' (1989) 63 Australian Law Journal 720.
- (38) (1989) F. L. C. 92-031.
- (39) (1989) F. L. C. 92-031 at 77,438.
- (40) Id. 77,434-77,436.

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- (41) (1989) R.J.Q. 1980 (Que.S.C.).
- (42) See McConnell (n. 3) 552.
- (43) Ibid.
- (44) Tremblay v Daigle (1989) R.J.Q. 1735, (1989) 59 D.L.R. (4th 609 (Que. C.A.) cited in McConnell, id. 553.
- (45) Tremblay v Daigle (1989) 2 S.C.R. 530, (1989) 62 D.L.R. (4th) 634.
- (46) McConnell (n. 3) 553.
- (47) Ibid.
- (48) Ibid.
- (49) See Finlay (n. 23) 15.

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