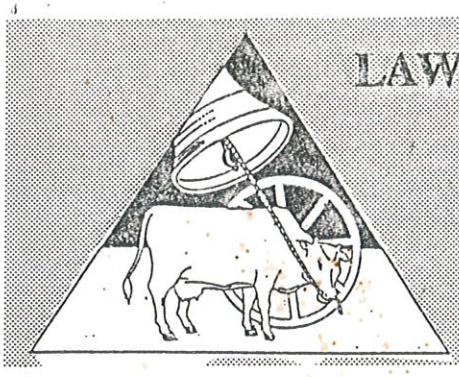

LAW AND SOCIETY TRUST

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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.

NATIONAL PARALEGAL TRAINERS PROGRAM

By
Asita Obeyesekere and Shantha Pieris

The Law and Society Trust (LST), in conjunction with the International Commission of Jurists (ICJ), held its first "National Paralegal Trainers Program" at Subodhi, Piliyandala, from 7 - 14 March 1991. The program was a continuation of the work begun at the ICJ-Union for Civil Liberty sponsored Paralegal Trainers Workshop, held in Thailand from 7-17 January 1991, and designed to popularize the concept of paralegalism in South Asia. (See LST Review March 14, 1991). The National level workshop at Piliyandala, however, while using the basic model and concepts formulated during the Thailand workshop, sought to simultaneously adapt it to the conditions of Sri Lanka. The primary objective of this programme was to introduce the concept of paralegalism to NGO workers in Sri Lanka and to provide them with the necessary skills and knowledge needed to assist their communities as well as to train other paralegal trainers. By replicating this type of training program, a national paralegal network providing assistance to rural communities throughout the country could be established.

The workshop was conducted jointly by three local trainers- Shantha Pieris (LST), Pathma Nagendran (Lawyers for Human Rights and Development), and Dharshini Polonowita (Rural Women's Organizations Network)- two foreign resource persons- D.J. Ravindran (India) and Hector Solimon (Philippines), along with the assistance of all the LST staff. Participants included 5 law students from the University of Colombo and 19 NGO representatives from the following organizations: the Movement for Inter-Racial Justice and Equality, the Christian Workers Fellowship, the International Center for Ethnic Studies, Save the Children Fund, World Vision Limited, the Environmental Foundation, Sarvodaya, INFORM, Samasevaya, and the Ceylon Social Institute. The training sessions were divided into morning (from 8.30 am -12.30 pm), afternoon (2.30-6.00 pm), and when necessary evening sessions(7.00-8.30 pm). Topics covered were communication skills, societal analysis, group dynamics, negotiation, planning and evaluating a model program, and law. The language medium of the workshop was primarily Sinhalese, with English translations provided to assist the foreign participants. Course material was available in Sinhalese, Tamil and English.

In order to familiarize the participants with a basic knowledge of paralegalism and paralegal work, each trainee received prior to the start of the workshop a

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copy of the ICJ "Handbook on Training Paralegals." This handbook defined the paralegal worker as "a person with basic knowledge of law and procedures" who would assist the rural communities in such areas as dispute settlement, mediation, reconciliation, and awareness of their rights.

The first step towards holding a successful workshop was to make the participants familiar and comfortable with each other. Thus the priority for the initial stages of the workshop was the group building process. As the basis of any paralegal work or training program must be participation of all members, it was necessary to overcome any inhibitions or reticence of the participants. This group building effort also extended to the interactions between the participants and the trainers. The participants' contributions and suggestions for the workshop was as vital to its success as the notions of the trainers.

The first day of the workshop was therefore spent in getting participants settled and comfortable in their venue and on the group building process. The trainers relied on various types of activities such as name games (activities where the objective is to learn each others names), pairing off into groups of two and giving brief interviews, and short role plays to facilitate this process. In addition two participants were selected to be rapporteurs and were given the responsibility of taking notes on the proceedings of the workshop. Finally the participants were divided into four groups, with each having the responsibility of providing the evening entertainment on a particular day.

On the second day the formal sessions began with a continuation of the group building process and an appraisal of the participants own expectations of the workshop. Since the goal was to have an interactive workshop, the participants were not given a pre-set program. The participants expectations and ideas would be incorporated as best as possible into the format designed by the trainers.

In addition it was necessary to determine participants attitudes towards the law. Given the turbulent conditions of the country over the past few years, it was thought that some participants would view the law cynically and question its value as a resource of empowerment. In fact the majority of the attitudes expressed by the participants toward the law were overwhelmingly negative. After obtaining these impressions, the trainers presented two fact based case studies where the law had been used effectively under difficult conditions. The purpose of this exercise was to demonstrate that despite prevailing conditions, the law used creatively could still be an effective tool for empowerment.

During the following session (day 3, Morning) Hector Solimon and D.J. Ravindran spoke of the Philippine and Indian experiences in using law as a resource. Each related the success and failures of their programs, and the relation these had to the Sri Lankan context. Mr. Ravindran then discussed three perspectives of the law and their viability as a method of empowerment. The first, the radical approach, sees change in the law as only possible following change in the societal structures. Here law cannot be used by the oppressed; it can only oppress them. The liberal approach by contrast sees law itself as a tool for social change. Yet it assumes that the law is neutral, and that by acquiring the proper skills and resources, the oppressed can use the law to their advantage. The third approach, central to paralegalism, sees law as both oppressive and liberating, but emphasizes the need to use law for mobilizing the disadvantaged. Formulated as part of the critique against the "top down" developmental approach, it stresses a self reliant, participatory process for the people and views law as a tool the community must use to protect its rights.

Touching on this theme of the need for creating self reliance, Mr. Ravindran spoke on the inadequacy of merely providing the rural communities with legal aid to solve their problems. While this approach does provide some relief, it has its drawbacks, namely creating a dependency on lawyers and the courts. Legal resources must move away from this court centered, litigation oriented approach and formulate an approach stressing self reliance. It must enable the people themselves to decide when and how to have recourse to law. De-professionalizing of the law by breaking the legal professions monopoly over legal knowledge and skills and developing that knowledge in the community, the articulation of grievances in all forums and not just the courts, and the search for alternative methods of dispute resolution are some ways of creating this empowerment. If existing laws are inadequate or repressive, legal resources must develop the peoples' own critical ability to analyse and assess the laws, and if needed, think of creative ways of resolution and/or transformation. An appeal to higher standards of laws (human rights), evaluation of the risks and benefits of particular courses of action, networking and solidarity at all levels are techniques which can be used by the communities to advance their position.

Mr. Solimon focussed his discussion on the tactics adopted by Philippine paralegal workers. He spoke on how NGO's, social and community workers had changed their tactics on the use of law as the Philippine government changed from the highly authoritarian and repressive Marcos regime to the democratic Aquino government. This proved a particularly valuable instruction in the creative use of law and the necessity of adapting legal tactics to the prevailing climate.

The afternoon session consisted of a group discussion on paralegalism and in particular the skills and attitudes needed for paralegal workers. The need for paralegalism to be a liberating strategy, with the paralegals acting as facilitators for the community was underscored. All final decisions and actions should ideally to be taken by the community as a whole.

The second half of the workshop (days 4-6) focussed primarily on the development of specific paralegal skills and acquiring knowledge of the relevant laws. These

included communications, group dynamics, societal analysis, negotiation, leadership, training methods, and planning a model program. The primary teaching vehicle was the use of activities followed by group discussions.

During the session on communications, the trainers focussed on the general principles of discussion leading. This was thought to be a particularly important area as much of paralegal work would involve group discussions, and these in turn would play a key role in creating attitudes of independence and self reliance in the community. Some of the paralegal responsibilities in the area would be defining the parameters of the discussion, letting the group have the freedom to express their own thoughts fully while yet maintaining control of the subject, remaining impartial, and controlling the discussion through use of questions.

Leadership was another area important in paralegal work. Given the difficulty in defining leadership precisely, three broad formulations were discussed. The first, authoritarian leadership, is a "top down" approach with the leader making the decisions and subsequently presenting it to the group. With the second form of leadership, consultative, the leader presents decisions subject to change through consultation. While calling on members to make the decision, the leader still has final control. With the third conception, enabling leadership, the leader defines the limits, but the group members decide on the course of action and finalize all decisions. By assessing the problem facing the community and the course of action needed, the paralegal can determine the appropriate type of leadership required.

Group dynamics, the study of the forces acting within a group of people, was also examined. One activity used to illustrate the mechanics of group dynamics was to select a few of the participants to engage in a discussion of a particular topic, while the others observed and noted the functioning of the proceedings. Cohesiveness of the group, climate of the proceedings, the type of leadership, time pressures, goals, and behavior were some of the aspects identified by the observers. This was followed by a discussion on the role of the paralegal in identifying the group dynamics and acting accordingly.

Coverage of the relevant laws was perhaps one of the most important areas of the paralegal workshop. Unfortunately, given the time constraints and the diversity of interests and sectors represented, the trainers were unable to provide legal knowledge in all the requested areas. To accommodate as wide a range of interests as possible however, the trainers focussed on four areas of law which would have the widest appeal– civil procedure, criminal procedure, environmental law, and family/child law. Participants were assigned to one of the groups (depending on their interests), supplied with necessary pamphlets and documents, and asked to chart the sections in the law they thought to be the most relevant to their work. These charts were later presented to the others. In addition, the trainers provided for practicing lawyers to address the group on the different areas. Ainsley Samarajeewa of MIRJE spoke on civil and criminal procedure and industrial law, Pathma Nagendran spoke on family law, and Desmond Fernando discussed the respective roles and relationships between the lawyers and the paralegals.

In the final stage of the workshop, participants were asked to plan their own training programme. This exercise enabled the participants to think in practical terms about the sectors to target, the activities to use and what subjects and the laws to focus on. In addition it helped the trainers to assess how much the participants have learned. Finally, perhaps, it helped reinforce to the participants the notion that this workshop is the beginning, not the end of their paralegal work. The important work will be done by the participants themselves through conducting other workshops.

An important note was the success of the various "entertainment committees" during the workshop. Each committee came up with extremely innovative and creative forms of entertainment. These included skits, plays, action games and other activities all invariably involving participation of the whole group. Not only did the committees provide relaxing and enjoyable evening entertainment for the group, but they also greatly facilitated the group building process, an important component of the workshop.

In evaluating the workshop, there were admittedly areas for improvement. Future workshops should include a greater focus on imparting knowledge of the laws, and perhaps recruit participants from a single sector (i.e. free trade zone, plantation sector) for a sharper focus on the socio–legal problems in a given area. Despite some deficiencies however, the programme was, on the whole, a success. In addition to imparting the concept of paralegalism the workshop was successful in reorienting attitudes towards the law. However it was emphasized that the important work remained to be done. While the training programme provided the initial step in introducing the concept of paralegalism to Sri Lanka, the ultimate success or failure of the program itself will be determined by the participants efforts at promoting the concept of paralegalism on a national scale.

THE ROLE OF THE JUDGE IN THE LAW MAKING PROCESS

by Rangita de Silva

"There was a time when it was thought almost indecent to suggest that judges make law – they only declare it. Those with a taste for fairy tales seem to have thought that in some Aladdin's cave there is hidden the common, law in all its splendour and that on a judge's appointment there descends on him knowledge of the magic words 'open sesame'. Bad decisions are given

when the judge has muddled the password and the wrong door opens. But we do not believe in fairy tales any more."

– Lord Reid –

Since the early 20th century, the critical study of the forms of reasoning, by which courts decide cases has been a principal concern of jurists. From this ferment has emerged a diversity of theories regarding the process of adjudication.

Contrasts are drawn between logic and experience as in Justice Wendell Holmes' famous dictum that the life of the law has not been `logic' but `experience' or between `deductivism' or `formalism' on the one hand and `creative choice' or `intuitive knowledge' on the other.

What is of crucial importance is that cases do not arise in a vacuum but amidst a multiplicity of diverse considerations which include a wide variety of individual and social interests, political aims and standards of morality and justice. In many cases judges marshall in support of their decisions a plurality of such considerations and balance or weigh them to determine priorities among them. The same considerations enter into the use of precedents when courts must choose between alternative rules. Justice Holmes one of the earliest proponents of the realists school has stated that "The prophecies of what the courts will do in fact and nothing more pretentious is what I mean by law."

Thus Holmes' "Revolt against Formalism" could be described as born of a wish to cross off sterile, arbitrary, decisions and to substitute for formalism a vivid, realistic emphasis on experience, life and growth. Thus the laissez faire interpretation of the due process clause of the constitution erecting freedom of contract into an absolute principle and striking down in its name social welfare legislation, was stigmatized as a vice of formalism, black letter law, excessive use of "slot machine" logic or mechanical jurisprudence.

This was a savage indictment against the freezing of any single interpretation of a rule of law into a fixed premise immune from revision to be used in all preceding cases. It was a purely regressive method of adjudication according to which particular decisions owed their legal justifications to their relation to exclusively legal rules. On the other hand the Realists and Sociologists urged upon judges an imaginative and creative form of adjudication where legal rules could be innovatively modified or rejected according to the needs of an ever shifting social landscape. Justice Holmes insists that judicial change and the development of the law have been based on the judges "instinctive preference" and inarticulate convictions in response to "felt necessities" of the time after weighing of what he terms "considerations of social advantage".

In considering different theories of judicial reasoning the first of these concerns matters of descriptive psychology to the extent that assertions in this field go beyond the ambit of what is termed excessively logical mechanical slot machine justice to that of empirical generalizations.

The second concerns the craft of legal technology or rather judicial technology which Karl Llewellyn terms the "institutional sense" of the law. The third relates to ex post facto rationalization or the justification of decisions – whether reached by careful calculation of logic or precedent or by an "intuitive leap".

According to J.C. Gray another proponent of Realism "whoever hath an absolute authority to interpret any laws, it is he who is truly the law giver and not the person who wrote them".

This obsession with what judges in fact do in America is firstly due to the American Supreme Courts power to review and declare unconstitutional enactments of Congress and State legislation. Secondly the due process clause enumerated in the 5th and 14th amendment providing that no person was to deprived of life, liberty or property without due process, allowed the court a wide leeway of choice. There have been times when this clause has been misused as in the initial period of the Supreme Courts activism between the civil war and the New Deal period, when social and economic welfare legislation was ruled unconstitutional under the due process clause.

This is in the striking phrase of H.L.A. Hart the "Nightmare" view of American jurisprudence where judges have acted as a third legislative chamber. The justices of that period were availing themselves of the due process clause to pass off their personal, political and economic doctrines of laissez – faire, failing to realize that economic liberties are not the only form of liberty.

The converse of the "Nightmare" theory is Dworkins version of the American "Noble Dream" which relates specifically to the concerns and shapes of an individual legal system and the value system pursued through law.

Llewellyn pleading for a "grand style" of judicial decision averred that an outcome of a law case should not be "foredoomed in logic" but decided according to the felt necessities of the case." Even H.L.A. Hart the arch positivist concedes that judges make law in penumbral areas of the law.

To Dworkin a judge must ideally open out wide ranging questions of justice and public morality. In his words a judge should "Develop a theory of the Constitution, in the shape of a complex set of principles and policies that justify a scheme of government.....He must develop that theory by referring alternatively to political philosophy and institutional detail, and must generate possible theories justifying different aspects of the scheme and test the theories against the broader institutions".

Dworkin has provided an effective picture of his reflections on a study of anti slavery and the judicial process. Before the Civil War judges passionately

opposed to slavery nevertheless after much agony enforced the Fugitive Slave Act and ordered slaves who had escaped to free states to be taken back by their masters. To Dworkin these judges who thought it was their judicial duty to follow the clear intention of the legislator were guilty of a failure in jurisprudence. According to Dworkin "The general structure of the American Constitution pre supposed a conception of individual freedom, antagonistic to slavery..... which was more central to law than the transitory policies of the slavery compromise". Thus whether the proprietary rights of a slave owner are to be upheld or not depends upon whether sanctity of property or sanctity of the person is adopted as the ideal. And this choice between competing ideals is a choice made by the judge. Roscoe Pound sees the judge in the guise of a social engineer and law as an instrument of social control whereby conflicting interests are reconciled.

The celebration of judicial activism of the Warren court – whose guiding philosophy was the egalitarian society, translated the general and dormant principles of the American Constitution in a plural society into social reality. Tempering the tyranny of majoritarian power and dismantling the house that racism built, the court imposed equality by judicial fiat – the abolition of school segregation in Brown vs. Board of Education brought in its wake a whole flood tide of desegregation measures. The Brown Case fathered a social upheaval. As a result of this decision which was a revolutionary statement on racial equality, segregation was struck down in parks, golf courses, clubs, bus terminals and restaurants.

Benjamin Cardozo in "The Nature of the Judicial Process" stated that there is in each of us a philosophy which gives coherence and direction to thought and action. Judges according to Cardozo cannot escape this current any more than others. "All their lives, forces which they do not recognize and cannot name, have been tugging at them – inherited instincts, traditional beliefs, acquired convictions and the result is an outlook on life, a conception of social needs a sense of the push and pressure of the cosmos, which, when reasons are balanced, must determine where choice shall fall".

Cardozo's analysis of the judicial process is that deep below consciousness are forces of likes, and dislikes, instincts and emotions, habits and convictions and that these currents which engulf all men do not turn aside and pass the judge. Even though the judge legislates between gaps, he fills the spaces in the law. How far a judge may legislate interstitially and how far creativity is to be constrained will be established by allegiance to the spirit of the law and the practice of the art of judging.

Even though in England there has been no behavioral analysis of judges as in America . Professor J.A.G. Griffith in the Politics of the Judiciary attempts to set out a thesis that the judges of the House of Lords and Court of Appeal have by their education and training acquired a strikingly homogenous collection of attitudes, beliefs and principles, which to them represent the public interest. He postulates that judges find it difficult to be politically neutral because they are placed in positions where most often they have to make political choices. According to Griffith the fact that judges belong to the established authority in society make them illiberal and conservative. The judicial attitudes reflect a particular penchant to private property, for law and order and an aversion towards trade unions, demonstrations and protests and minority opinions.

Judges tend to regard the interests of state as their own and as part of the established authority act in the interests of the social order and the preservation of the status quo. The only "bold spirit" being Lord Denning who in the guise of a St. George of the law courts seeks to bring justice even at the expense of settled law. Lord Denning is impishly impervious to either precedent or statute if it obscures the path of justice. "The judges do every day makes law, though it is almost heresy to say so. If the truth is recognized then we may hope to escape from the dead hand of the past and consciously mould new principles to meet the needs of the present".

Lord Denning's approach is courageously teleological – where he thinks of the result before he considers the legal reasoning on which it has to be founded. In effect unashamedly "window dressing" his arguments. He is unwilling to await the slow advent of the law commission and Parliament but will remedy the default himself. In Eddis vs.Chichester Lord Denning articulates evocatively "I would rather the courts fill in a gap than wait for Parliament to do it. A judge should ask himself if the makers had come across this ruck how would they have straightened it". Lord Simond, the arch rival of Lord Denning views with horror his avowed infidelity to rules and precedent and castigates this as "naked usurpation of the legislative function".

In the view of Lord Scarman heterodoxy was not the alternative just because it was dignified by the name of reform. "The idea of a judge who regards himself as the dispenser of justice is fine as rhetoric, but in practice it represents a challenge to the supremacy of Parliament".

Even though unelected judges have no legitimate authority to legislate a cynic might indeed argue that it is the independence and non-accountability of the judiciary which makes democracy tolerable and workable. The main reason for judicial activism is the universal failure of legislatures in democracies to evolve many urgent reforms. The rights of prisoners, mental patients, minorities, women and controversial issues such as abortion, euthanasia, capital punishment, freedom of expression and affirmative action can be looked after only by a court of law. Thus if not for the fact that the judiciary has set itself up as the last tottering bastion of democracy, great wrongs would go unabated.

The judges character, habits of life, political, social and economic views would impinge on his decisions.

However much he would try to transcend the personal element in his judicial philosophy, the formed attitudes of mind would always intrude. Lord Radcliffe in "Not in Feather Beds" states that "It is the unexpressed assumptions which are nevertheless very much present, that are often the real hinges of a decision". He articulates picturesquely that it is unreal to think of a judge of experience as if he were a mere hearing aid. The judge being not a machine would bring to his work a philosophy particularly his own. Lord Radcliffe adds that its almost hypocritical to speak of a judge as if each case presented itself to his eye in the advent of the first dawn of creation. "To me fairness of mind cannot involve such innocence as that".

Justice Frankfurter in Rochin vs. California speaks of the "gut feelings" of a judge which is the final propelling force behind the decision according to his or her sense of justice. He holds that in no case can a conviction be brought about if it violates the gut reaction in a judge. This is what H.K. Lucke in "Judicial Impartiality and Judge Made Law" terms the "Sense of touch" – which is the judge's empathic response to the case before him.

Patrick Atiyah in his essay "Judges and Policy" postulates the thesis that judges must and do legislate interstitially but that a veil of mystique should shroud such law making since it is not too desirable that judges be too open about their law making role. In other words arguments of this nature suggest what one may term "saying one thing and doing another" which has a strong flavor of the elitist tradition where law is of an ambiguous nature – a secret cult of a group of high priests of the legal profession and the ritual of the Cult is announced to the public in esoteric jargon. Thus according to Prof. Atiyah the mystique element in law is sacrificed by openly adopting the realist theory.

Lord Devlin tries to strike a compromise by drawing a distinction between judicial activism and judicial dynamism. Accordingly a judge should avoid making law dynamically which requires the application of ideals in advance of the consensus, but should indulge only in activist law making – which would imply drawing out ideas from the public consensus, or the man of the Clapham omnibus.

The issues that affect the law-making process are many and varied but the most important is the role played by the judge. The case of the Speluncean Explorers spun in the imagination of Professor Lon Fuller explores the divergent philosophies of law enumerated by each judge in the mythical court of Trupenny C.J. and reflects how a distillation of different philosophies held by each judge whether based on Natural Law or Positivism could in turn affect the outcome of his decision.

Although the judge has no personal stake in the case, he will nevertheless find his feelings involved vicariously, on behalf of the various dramatis personae. However, if the judge's empathic "sense of touch" is to work in an unbiased manner, it should according to Justice Cardozo be "informed by tradition, methodized by analogy disciplined by system" and thus such a controlled and law trained sense of touch would be in essence a judge's sense of justice.

According to Justice Brandeis it is difficult for judges to disregard as "judges what they know as men", thus though a judge's legal training will make him imbibe a degree of rationality it cannot obscure wholly his personal value judgement. As set out dramatically by Jerome Frank – "a mind containing no pre conceptions would be a mind incapable of learning anything, corresponding roughly to the psychiatrists description of the feeble minded".

Finally, though judicial decision making should not go to the extremes of Azdak the revolutionary judge in the Caucasian Chalk Circle who sat upon the Statute Book for 2 years, nor is the Court (as has been stated) an assembly of wise persons free to soar on the wings of policy as it sees fit. But it is definitely not an assembly of legal automatons, releasing the law on the slot machine theory of jurisprudence. It hovers somewhere between these two extremes endeavoring not to stray so far from the latter than it endangers its legitimacy nor come so close that it endangers its credibility. In short the judge is a trapeze artiste performing a delicate balance, between invoking justice and not straying too much off course in achieving it.

The thrust of this essay is meant to show that courts always have a conscious choice between two opposing rights and whichever ideal the judge picks on he would be in effect making law. As aptly expressed by Professor Upendra Baxi those who persist in denying the fact that judges do make law are those who wish to preserve their jurisprudential pubescence. For as Justice Cardozo states evocatively, "Law is insatiate in her demands – and those who wish to make or interpret it should make their knowledge as deep as the science and as broad and universal as the culture of their day for she would not be satisfied with less".

LEGAL UPDATE SERIES
CONSUMER PROTECTION (AMENDMENT) BILL

By Jill Grime

The Consumer Protection Amendment Bill, which was issued on the 6 December 1990, is designed to amend the 1979 Consumer Protection Act.

The Bill proposes two significant amendments, by creating an additional criminal offence under the Act, and by specifying minimum penalties for three existing offences.

(1)It is intended that the sale of articles whose label, description or price has been tampered with, will now be an offence under the Act. (Amendment to section 6).

At present only the act of tampering itself an offence. No doubt in many cases it has been difficult to prove

who actually committed the offence, unless they were caught red handed, since a wide range of people could be responsible, and carrying out the act could be easy to conceal.

Now, under the proposed amendment, responsibility for ensuring that all goods are correctly priced and labelled is placed on the vendor, and s/he will be liable if they are not. In effect, therefore, the powers of prosecution where articles have been tampered with have been strengthened, since it is now no longer necessary to tract down the perpetrator. Instead the vendor, who is more obvious, can be prosecuted.

(2)Minimum penalties are prescribed for offences of hoarding or refusal to trade (Amendment to section 28).

Where (A) a trader (i) refuses to sell an article, or (ii) refuses to admit possession of any goods, or (iii) sells articles subject to conditions or B) any person hoards any item, the minimum penalty for a first offence is specified as a fine of 1000 rupees, and for any subsequent offence the minimum penalty is specified as a fine of 3000 rupees.

No other minimum penalties are prescribed under the Act, and maximum penalties remain unchanged.

Presumably this provision will ensure that Courts impose significant fines in cases of this type.

BOOK REVIEW

by Jane Russell

Title: "The Scream of an Illegitimate Voice" a selection of Urdu Poems by Kishwar Naheed. Poems selected by Baidar Bakht and translated into English by Baidar Bahkt, Leslie Lavigne and Derek M. Cohen.

Publishers: Sang-e-Meel Publications, Lahore, Pakistan, 1991.

The substantial volume of poetry represents over 32 years of Ms. Naheed's poetic development. Thirty two years is a considerable length of time in a writer's career and for a poet, it is almost miraculous to find inspiration being sustained almost continuously over three decades. Many poets burn themselves out when young, Rimbaud and Coleridge for example, or find the stresses of life too burdensome for their sensitive spirits and die early or commit suicide. Sri Lanka's finest English language poet, Lakkdasa Wikkremasinghe, himself died young in tragic circumstances like Shelley, with whom he has much in common, drowning accidently in a relatively calm sea.

Kishwar Naheed, however, displays a toughness that loneliness and suffering may scar but apparently cannot breach. Although she confesses that she writes poetry "because I haven't committed suicide" ("Recompense" p. 32), the fighting spirit of the first Ghazal, written when she was just eighteen, is retained through to the last poem in the collection, "The Scream Peeping From Behind The Closed Door", when likening her poetic inspiration to the "rage of the waves" and "the surge of life", she concludes:

> "In the museum of my self
> There are neither statues
> Nor old pictures.
> Water flowing from my eyes,
> Like water spitting occasionally
> From an old rusted fountain,
> Reminds my eyes of the sea foam"

If Kishwar Naheed is finding the source of her inspiration drying up, as the last poem and the relatively meagre contribution of the years 1986 - 90 suggests, this might be a reaction to the very prolific period which began around her thirtieth year. It would seem that her switch from the traditional ghazal form to the Urdu prose-poem around 1970 released her very potent poetic energies.

The unconventionality in the Urdu tradition of the abstract poetic form also suited her philosophy of "fiery feminism" (as it is described in the epilogue, although I would personally consider her sense of outrage at her plight of being a woman in present-day Pakistan to have a more universal message than that of mere feminism:- "Don't worry Naheed that the world's against you" she concludes in her first Ghazal, "Pearls of labour are always wasted". (p.3))

Interestingly enough, Kishwar Naheed was born in Uttar Pradesh and educated at Punjab University. She is a product of South Asia, of the Indian sub-continent, and it is the breadth of her culture - steeped in the Urdu poetic tradition on the one hand and in the culture of the English language on the other (cf. "Listen, Jane Austen" p.29) - which may have endowed her with such extraordinary strength and tenacity. And it is this quality which comes through most powerfully despite seeming lapses in translation: for example, in the poem "I and I", she refers to herself-the-poet as "Another,

> Who even now is like a steam engine:
> Keeps drinking water,
> Vomiting smoke
> And keeps going, keeps going" (p.87)

Ms. Naheed's imagery; the rope that seems a snake in the dark; the lotus blooming in a hostile environment;/the references to the heat, the poverty, the dream, the mirror, the sun and the moon, together with her pre-occupation with death, duty, honour, desire and the content of the ego mark her as authentic a voice of India (by which I mean the entire culture

associated with the sub-continent) as Tagore. But hers is a modern voice: "my country and I were born together" she reminds us ("The Nightmare" p.72) and it is the sudden, concrete image of modern life in Pakistan that startles the reader into wakefulness: For example,

"Those who used to go out on horseback
Were given blessings.
But everyday when we set out
To hang on bus straps
Even our pockets are picked"
("The Privacy of Wounds" p.58).

Even in bemoaning her fate of loneliness, she moves suddenly from a traditional image - "The moon and the mirror told me/How happiness dies slowly/Where the crop of desire is sown and reaped" to an image of a modernizing country - "I was always given that seat in the car/That jolts the most" ("Scrapbook of Dreams" p.128).

The tension between the traditional and the modern is what gives Kishwar Naheed's poetry its cutting edge. But in expressing this tension, which she does most powerfully in her feminist and political poems, Kishwar Naheed is reflecting a message that can be found in the best modern literature and art coming out of not just Asia, but all the traditional societies of Africa and America. The power of tradition, hallowed by time and sanctified by religion, is under siege from a specious technology and the norms of an `equality before the law' democratic ethic. As an educated woman, which necessarily means westernized in the context of today's Pakistan, Kishwar Naheed is daily torn apart by this conflict;

"You can cripple my feet
By shackles of wifehood and modesty;
The fear will still haunt you
That, though I may not walk,
I can still think"
("Anti-Clockwise" p.91)

Oppression of women by custom, religion and male brutality is a recurring theme in her feminist poems: "Walt Whitman once said/That the lower classes/Mistreat their mothers./We are of them/In the third world,/Since our mothers and daughters,/Wives and sisters/Are only fuel/For the furnace of need and lust". (Your Silence, My Crime" p.62), and in earlier poems:

"You really labour
To put women down,
But the desire to grow
Dies neither in the earth
Nor in the woman"
("The Grass is Like Me" p.34)

or "The Auction House" p.35, the auction referred to being that of the Muslim marriage system, where she writes; "Masking hate with kisses/He leaves bruises on my face/To assert/His right to my body".

But the most balanced poem on this theme is undoubtedly "A story" (p.94) in which Kishwar Naheed fuses traditional imagery with a modern feminist philosophy to capture the timeless suffering of women in Islamic societies:

"A child is rocking/On a toy horse.
The horse is wood/And unaware of the touch.
He thrashes it/And for his mastery/Likes himself.
He grows to be a man./Rides the wooden horse again,
And declares his youth by a ceremony.
With the passage of the night/The horse is transformed.
But he who beats it,/Who likes himself,
Remains the same:/Master, rider, husband."

This short poem, which illustrates nicely Ms. Naheed's use of the short sentence and the taut image which she has employed very effectively in much of her didactic, political poetry as well, presents the translators with few problems. The English translation thus comes vividly alive and attains real power. Unfortunately, this is not the case in longer poems which have a more convoluted imagery and grammar and are infused with complex, subtle ideas. Poor translation in these poems renders the logic of the language inaccessible and obscures the poet's ideas. For example, in "Past on My Shoulders" (p.140), the translation reads: "Pretending to sleep/Is enchanting for a girl,/But for a woman/It is a way of avoiding agony,/Since in such a moment/There is no will of way/For abandonment or prudence". The final two lines make no sense, even allowing for a printer's devil making an `of' out of `or' in the last but one line.

It seems unlikely that a poet of Ms. Naheed's capabilities and courage would wilfully lapse into obscurity. The alternative explanation - that she has been badly served by her translators - is reinforced on several occasions. For example, taking the poem "The Maid" (p.36), the notes inform us that the literal translation of "Maid" in Urdu is "The Sweeper", "the lowest rank of social life in the Indian Subcontinent" (p.159). It is perfectly clear from the text of the poem that Kishwar Naheed meant to evoke the image of the sweeper in order to make the comparison between the sweeper class and the position of women in the sub-continent. To sacrifice such a powerful image to suit bland, ignorant western tastes is to destroy the point of the poem. Again, in the poem "Desert Beyond the Shore" (p.144), the English translation of what must be extremely dense Urdu imagery becomes a mere procession of clotted words: e.g. "No morning/Brings the eyelashes/On the pathway of separation". It is interesting to note however, that Kishwar Naheed's preoccupation with loneliness and her frequent evocation of the desert to suggest loneliness echoes the famous words of the French feminist writer, Violette Le Duc, - "I am a desert talking to myself" - as if to underline the sense of alienation that self-aware women across the globe have in common in the 20th century.

But it is a great pity that a poem of the stature of "Farewell to the Uterus" (p.109), probably the most exceptional poem in the whole collection, should be so marred by inadequate translation.

Because of the lack of clarity in the English, it is difficult to judge the overall standard and development of Kishwar Naheed's poetry - at least where this selection is concerned. Even the title of the book, with its jarring, clumsy phraseology suggestive of the strident virago, seems to bear little relationship to the sad, mellifluous and restrained texture of the poetry itself.

Even when expressing physical violence, Ms. Naheed writes in a tone of compassionate, almost ironic, resignation. Her passive feminism is a far cry from the radical militancy of early feminist writers from the West such as Shulamith Firestone and Germaine Creer, and is the more attractive for questioning the basis of an ego-ridden female assertiveness. "God Is With Those Who Are Patient" is the title of one of her earliest prose-poems (p.15) and it sums up the poet's quintessentially pacifist attitude to life. While railing with righteous indignation against the injustices of the material world she sees around her, Kishwar Naheed loses touch neither with her tradition nor with her spiritual self.

The many shades of personality that go to make up the poet Kishwar Naheed give the collection both depth and range. Poems of love, sexual desire and motherhood are intermingled with political, feminist and satirical verse, and it is the former group that is the more poignant, the more moving. As in the little poem "Deja Vu" (p.41).

> "I once told my mother:
> I hate you.
> I was proud of my courage
> Until today.
> Today, my son told me:
> I hate you.
> My childhood
> Flows in my veins
> As Mercury."

But for many Sri Lankan readers, it is Ms. Naheed's political verse which will draw the sharpest breath; in "Speech No. 27" for example, she refers to the political figure thus:

> "You remember your speeches by their numbers.
> Speech No. 10, to rouse the poor,
> Speech number 15, to awaken awareness in women;
> Speech number 27, to advise writers and thinkers."
>
> (p.44)

And in "The Nightmare", the life of the public servant is characterized as that of the hapless, servile victim:

> "The goat waits for the slaughter/And I for morning/
> When, for telling lies,/I am slaughtered/Daily at my desk,/This is my price./Powdered faces like fresh graves,/Come to see me everyday." (p.72)

Finally, in "Self-Reckoning" we find the message of political messianism satirized in stark terms:

> "After the last politician has killed
> The last man.;
> After the last child has died
> Searching for the last grain of rice;
> After the last drop of blood is spent
> In defence of the motherland;
> After the last word of prayer is spent;
> After the last bullet pierces the chest,
> I will lift my head from the pillow
> And take account of my last breaths." (p.92)

With such a rounded, mature poet, there is something in Kishwar Naheed's work to appeal to every poetaster. This book can therefore be recommended in bringing Kishwar Naheed to a wider audience. But it is to be hoped that its appearance will stimulate other and better translators who can capture and distil the spirit of her poetry more perfectly.

TO OUR READERS

In view of the holiday season, there will be no issue of the Fortnightly Review dated April 16th 1991. Accordingly, the May 1st issue will be issue No. 16.