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OBJECTIVES

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

In this issue we focus on issues of gender equality and gender discrimination. We also publish an update of the activities of the core group on the Law & Economy; and reviews of a book on Lon Fulller, and a documentary on prostitution.

GENDER EQUALITY

IN THIS ISSUE

SEXUAL HARASSMENT : WOMEN'S PARANOIA OR REALITY?

by

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It took the Clarence Thomas 'affair' in a far away land for us to wake up from our complacency (or is it apathy?). It made us take a hard look at the incidence of the degrading practice of sexual harassment in our own country although one can justifiably maintain that it has plagued our society for a very long time. Well, one can be philosophical about it and say 'better late than never.' Now that it is finally gaining a great deal of attention, all concerned parties should grasp this as a fine opportunity to adopt concrete measures to address the issue.

Sexual harassment can take various forms. It can cover a spectrum of conduct ranging from lewd looks and comments to unwanted physical contact, even to rape, the most egregious form of sexual harassment. Worldwide surveys on the incidence of sexual harassment unequivocally point to the fact that in most cases the harasser is a male in a position of authority while the harassee is a female in a subordinate position. The superior/subordinate position could be described not only in terms of the employment hierarchy, but in terms of physical superiority/inferiority and especially in terms of the gender hierarchy where a woman is always made to feel inferior even though she may enjoy the same employment and educational status as the man who harasses her.

In some countries such as the U.S. increasing numbers of men (14% of men in the work place according to 1987 U.S. Merit Systems Protection Board Statistics) are also complaining of sexual harassment. Of course, it also has to be pointed out that harassment of a sexual nature also covers 'intra-gender' (as opposed to 'inter-gender') situations where homosexual men and women harass members of the same sex. It could be maintained that it is important to analyse this subject not solely as a gender issue but primarily as one affecting persons, whatever gender they belong to, as sexual beings: it contemplates situations where persons are harassed using sexual degradation as a weapon. However, one cannot escape the fact that most of the victims of sexual harassment are women.

Sexual harassment is a universal malady. Not only persons in 'decadent' Western societies but also those in 'highly moral' traditional societies are subjected to this evil in varying degrees and forms. In fact, it would not be an exaggeration to state that women living in traditional societies are more likely to be harassed frequently because of well entrenched gender stereotypes and a patriarchal male ethos. As more and more women enter the workplace and educational institutions, shedding their traditional role of homemaker, ill-treatment of women also spills out from the home front to the public arena. The general image of the woman as a sex object when she is not playing the role of the mother and nurturer seems to amount, in many men's mind, to a carte blanche to use or taunt her as they please. The fact that most women are employed in the lower rungs of the employment hierarchy makes them easy prey.

THE PAINFUL REALITY

Some societies have become conscious of and sensitive to the deleterious effects of sexual harassment (especially when there are adverse economic consequences) and have attempted through legal and other measures to curb its occurrence. Many others seem to be blissfully oblivious of its existence or have accepted it as an inevitable fact of life--the karma of the oppressed. Action or inaction on this subject, just as in the case of other areas of women's rights, depends to a great degree on the effectiveness of the women's movement in a given country. Sadly, Sri Lanka falls into the category of countries with an almost defunct women's movement, wracked by ideological confusion and rivalry. As a result there is an appalling lack of consciousness and a consequent paucity of empirical data and literature on a subject like sexual harassment which daily affects

the lives of thousands of women in an intimate way. The few studies that are available are on work conditions in the Industrial Processing Zones (IPZs) in Sri Lanka[1].

Comparative literature on sexual harassment point to the fact that most of the studies are on the incidence and effects of harassment in the workplace and educational institutions. Legal regimes governing the subject also concentrate primarily on those two settings. The consequences of harassment in those contexts, both in terms of emotional damage and tangible losses, are very grave indeed. Many women either leave their jobs or give up educational programmes unable to cope with the humiliation and/or to seek redress. As Professor Catherine Mckinnon points out[2] often the victim, as in the case of a rape victim, is the one who is under indictment. The trauma of having to bare details of one's humiliation in public and having to answer irrelevant questions about one's sexual history and habits inhibit many from coming out into the open. So they simply quit, leaving the harasser to find other victims and perpetuate the cycle with impunity. Or else, as in the case of Professor Anita Hill, who alleged sexual harassment by a U.S. Supreme Court nominee in a place no less than the U.S. Equal Employment Opportunity Commission, the harassee swallows her pride and stays on uncomplaining lest she lose her hardly-won job or academic scholarship. The boss/harasser is the invincible guy at the top anyway--so why even bother to complain?

In the case of Professor Hill, the Senate Judiciary Committee which conducted the confirmation hearing had a 'problem' with her credibility because she stuck to her job in spite of the harassment. If there was a greater degree of awareness of and sensitivity to the problems faced by victims of sexual harassment among the Senators (the Judiciary Committee is all male), their line of questioning would certainly not have further victimized the alleged victim. Considering the stigma attaching to the woman in such instances, why would a university Professor put her career and reputation in jeopardy needlessly by alleging sexual harassment in nationally televised proceedings? On the contrary, the Senators' sympathy for the alleged harasser seemed to have grown by leaps and bounds. Hopefully, the anger and pain of Professor Hill will not be in vain, for she helped focus attention on a malady that hitherto received little or no attention in many societies.

a) Sexual Harassment in Institutions of Education

In a survey taken by the Faculty of Arts and Sciences at Harvard University made public in 1983, as many as 34 percent of female undergraduates, 41 percent of female graduate students and 49 percent of the nontenured women on the faculty who answered the survey reported experiencing some form of sexual harassment since arriving at Harvard[3]. The respected Indian women's journal **MANUSHI** reports on the incidence of sexual harassment of graduate research students by their supervisors (who can make or break the career of a student) in the University of Delhi. Reportedly, several students there were driven to extreme desperation by being compelled to choose between complying with the sexual demands of their supervisors or foregoing the degrees they were reading for[4]. According to the report, several cases of student suicides in one of the departments of the university were suspected to be the direct result of depression and desperation caused by pressure exerted by the sexual demands of their venerated 'gurus'.

An informal discussion among faculty and students on sexual harassment organized by the Legal Aid Center of the Faculty of Law, University of Colombo shed some light on the perceptions and observations of students[5] on the general incidence of sexual harassment in our society. The most articulate were the female students. We were told that according to their experiences (it seemed that a majority of the students had no experience as employees) sexual harassment was most prevalent in the public transport system. Mostly it would take place in crowded buses and would take the form of very crude acts of physical harassment. Many women also complained of the lewd looks and comments they would get while walking along streets; this was especially so if they were garbed in non-traditional attire such as short skirts or tight pants. They expressed anger at the role many men have assumed as moral purveyors of society when they themselves are hardly beyond reproach.

It also transpired that not all is well within the hallowed portals of academe. Once again, a number of female students complained of advances made by male lecturers and the helplessness of their hapless victims because the harasser is in a position to play God come examination time. They also complained of the lack of grievance settlement and counselling mechanisms within the university system. Harassment in a controlled and formal environment like that of the university, we were told, was more subtle and damaging.

Interestingly, but perhaps not surprisingly, when the male students were asked whether they have ever experienced sexual harassment, there was absolute silence on their part. Men, after all, are also victims of social conditioning. However, when the issue of sexual harassment during the ragging season was taken up there was an acknowledgement that, to varying degrees, both men and women are subject to harassment of a sexual nature. One student made the point that most often 'fresher' male students are harassed by senior male students. A lecturer interjected that in some of the 'prestigious' male schools in the capital such harassment was a common occurrence as well.

A common complaint surfacing throughout the discussion was the lack of awareness and institutional mechanisms to redress grievances springing from sexual harassment. Not only was this discussion an eye-opener but it was also one of the rare occasions in which the faculty and students had a straight-faced discussion on a subject related to sexuality with seriousness and candour.

b) Sexual Harassment in the Workplace

A 1987 survey by the U.S. Merit Systems Protection Board indicated that 42 per cent female and 14 percent male federal workers in the U.S. reported sexual harassment. Only 5 percent of all those experiencing sexual harassment took any kind of formal action[6]. As mentioned above, the only form of information available on the occurrence of sexual harassment in the workplace in Sri Lanka pertains exclusively to the goings on in the IPZs. Dep Weerasinghe in a study done on the Katunayake IPZ in 1988 records the high level of contempt with which women workers in the factories are treated by the settled population in the area[7]. Most factory workers in the KIPZ are young single women between 16-30 years of age who migrate to the zone from rural areas in search of employment. They provide cheap skilled labour much in demand by foreign investors. Weerasinghe points out that these women are looked on as 'loose' women who have broken away from the traditional protective environment of the home and therefore are fair game for any type of 'fun' men want to have with them.

During a personal interview I had with her, Weerasinghe recounted various instances when men on bicycles would pinch or squeeze women workers walking to or from factories as they passed by. Most often such behaviour would be accompanied by profane language. According to her personal observations during the time she spent in the KPIZ conducting her research, that type of sexual degradation is a daily reality to most women workers.Several cases of rape have also been reported from the zone. This pitiful assertion of masculinity, observes Weerasinghe, is exercised with an overall air of male bravado. The fact that shoddy treatment is meted out to women workers by the factory management and the smug conviction that the women would not take legal action (not that the law is very strong in this area) further embolden these perverse Romeos.

c) Sexual Harassment during armed conflict

Another pernicious form of sexual harassment that seems to be widely prevalent in many parts of the world is harassment perpetrated by armed groups which are parties to the ever increasing number of military conflicts. Reports of rape, and other forms of physical violations of women in war zones
are very common. Sri Lanka's own military conflicts also have seen their share of sexual degradation by men in arms[8].

RATIONALIZATION OF PERVERSITY

During the discussion at the Faculty of Law, students came up with several possible reasons as to why harassers behave the way they do:

a) that in a traditional society like ours men do not have sufficient opportunities to satisfy their sexual desires as do men in Western societies; hence, the harassment in packed buses and similar places;

b) there is resentment engendered by women taking up jobs traditionally held by men;

c) men think women 'ask for it' if they wear revealing clothes or act in a manner contrary to traditional norms.

Those rationalizations are all steeped in traditional sexual stereotypes of both men and women--stereotypes which are further reinforced by the mass media, especially advertisements. Women are the demure docile species who, as tradition dictates, should cover their bodies well. They also do not, or should not, have sexual desires. Men are the aggressive players in the public arena who have uncontrollable libido. Sexism is mistaken for sexuality; hence, the conclusion that unsatiated male sexual desire drives men to act in a perverse manner. Those stereotypes undoubtedly degrade both sexes.

Another factor which emerges from the above rationalizations is the level of intolerance in our society, and for that matter most societies, when it comes to gender behaviour patterns; the moment you become 'different' others have the right to be judgmental and even be crude. Therefore, goes the argument, if a female wears a mini skirt to campus she is 'asking for it' and should be fatalistic about it.

AGENTS OF CHANGE

All of us are but creatures of specific cultural conditioning. When that conditioning fosters intolerance it invariably gives rise to tension and conflict. This is true not only with regard to gender relations, but also with regard to ethnic relations, racial relations, cultural relations, inter-religious relations and the like. So how do we change an ethos of intolerance?

As a person with a legal training, I would maintain that law is the most peaceful tool of social change. Unlike human behaviour and attitudes, the law can aspire to embody the ideal. The law can nudge people into checking their action and eventually their attitudes as did U.S. civil rights legislation.

At the same time, one has to be acutely aware of the fact that laws do not operate in a vacuum. So many other factors have to come into play for the effective implementation of laws, however good they may be. Public awareness of the laws, access to legal services, independence and impartiality of the Judiciary, social sensitivity on the part of judges, lawyers and law enforcement personnel are some of the key factors. All those key players are, after all, members of the larger society. Even if laws are enacted to punish sexual harassers they would not have the desired effect if society in general is not conscious of and sensitive to the problems faced by the harassee. Just as traditional cultural norms incriminate the raped woman, so also in the case of sexual harassment the victim could be further victimized by the system. It is submitted, therefore, that good laws coupled with educational programmes to conscientise the public are a must if any headway is to be made in eradicating this menace.

A HISTORY OF INACTION

As mentioned earlier, very little literature or studies on the subject of sexual harassment exist in Sri Lanka. That fact reflects the lack of consciousness or apathy even among women's groups. Not surprisingly, no specific legislation has been enacted to deal with the subject. Often, legislation comes about when interest groups agitate for it.

If a victim of sexual harassment in Sri Lanka wanted to seek legal redress for the wrong done, there is very little one can go by. Sections 341 (criminal force), 342 (assault--but mere words do not amount to assault), 343 (criminal force otherwise than on grave and sudden provocation) and 345 (assault or use of criminal force to a woman with intent to outrage her modesty) of the Penal Code can be of some assistance. But how can one obtain relief when the harassment is more insidious and non-physical, where for instance a boss or a co-worker asks for sexual favours or passes crude comments involving one's anatomy?

It is submitted that the Constitutional Bill of Rights could be used in limited situations. Where it could be established that sexual harassment takes place in a public sector workplace or an educational institution and no disciplinary action is taken against the harassor/s it may be possible to successfully invoke the guarantee against cruel, inhuman or degrading treatment (Article 11). Certainly, sexual harassment is cruel, inhuman and degrading. Possibly, the non-discrimination clause of the Constitution (Article 12) could be used as well when sexual harassment also amounts to sex-based discrimination. Where a victim loses a job or is deprived of a

promotion for not giving into the sexual demands of a superior, could it not be argued that she was discriminated against on the basis of sex? If she were a man she would not be in that predicament. There are no reported judicial precedents in this area. At a time when there is a great degree of discussion and debate on the effective interpretation of the Bill of Rights, such arguments should be further explored, especially in the absence of legislation on the subject.

On the whole, the possibilities of obtaining adequate redress under extant law are extremely limited. There is an urgent need for legislation which provides adequate redress for the detrimental consequences of sexual harassment and also deterrent punitive measures against harassers.

LESSONS FROM COMPARATIVE LEGISLATION

In designing laws to deal with the problem of sexual harassment, guidance could be obtained from comparative laws enacted in other countries. Laws in the U.S.A. and U.K. will be discussed briefly.

a) Legislation in the U.S.

In the USA Titles VII and IX of the Civil Rights Act of 1964 have been interpreted by U.S. courts to prohibit sexual harassment in the workplace and educational institutions respectively. Title VII prohibits terms of employment which are not genuinely and reasonably related to performance on the job [9]. Title IX provides that no person shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational programme or activity receiving federal financial assistance on the basis of sex.

The Equal Employment Opportunity Commission (of which Justice Clarence Thomas was at one point the chief) guidelines define sexual harassment as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature, occurring under any of three conditions: when submission is either explicitly or implicitly a term or condition of employment; when submission or rejection of the conduct is the basis for employment decisions affecting the individual, or when the conduct has either the purpose or effect of substantially interfering with the individual's work performance or creating an intimidating, hostile or offensive working environment.

Where the harasser is a supervisor the employee is liable even though s/he may have had no knowledge of the fact. However, for other employees, the employer will be liable only if s/he knows or should have known of the harassing conduct, although "immediate and appropriate corrective action" will rebut liability. Courts have also held that it is not necessary for the victim to establish that there was economic harm as a result of harassment[10]. Liability to pay large sums by way of damages has prompted many companies to adopt internal regulations, disciplinary measures and even training to check sexual harassment. Not only does sexual harassment result in economic loss to the employer by way of legal costs and payment of damages but it also affects the morale of the workplace and consequently productivity.

In addition to federal guidelines, many states have also adopted state legislation or regulations outlawing sexual harassment in the workplace[11].

b) Legislation in the U.K.

In the U.K. redress could be obtained under sections 1(1) and 6(2)(b) of the Sex Discrimination Act of 1975. The statute itself does not provide a definition of sexual harassment. In the first case under the Act to reach appellate courts[12] the applicant was awarded Sterling Pounds 3,000 for detriment suffered when two male colleagues mounted a campaign of unpleasantness against her which included sexually offensive behaviour.

Industrial tribunals which entertain complaints under the Act in the first instance have held that sexual harassment includes not only unwelcome acts which involve physical contact of a sexual nature, but also conduct falling short of physical acts; the test to be used in sexual harassment cases is "was the applicant less favorably treated on the ground of her sex than a man would have been treated?"; the test of a reasonable employee should be employed to find out whether an act/s amount to sexual harassment, although a subjective test coupled with an objective test of the reasonable employee should be employed to compute compensation for injury to

feelings; an employer is not vicariously liable for acts of sexual harassment under the Act where the alleged act is outside the sphere of employment[13].

What strikes one about the legislative measures above described is that the employer is made responsible through imposition of vicarious liability to ensure a healthy work environment. Through that device employers are forced to check harassment in places of employment.

While priority may be given to enacting legislation dealing with sexual harassment in the workplace and educational institutions because of the grave consequences following there upon, it is equally necessary to adopt stern measures to deal with harassment in places such as the public transport system.

INTERNATIONAL HUMAN RIGHTS STANDARDS

International human rights standards, to a great extent, reflect universal ideals. By ratifying international human rights conventions countries undertake to translate ideals into reality. Several international human rights documents deal with conditions in the workplace and educational institutions.

Under the International Covenant on Economic, Social and Cultural Rights countries which have ratified it recognize the right of everyone to just and favourable conditions of work including safe and healthy working conditions (Article 7 (b)). Favourable conditions of work should not only include just wages and other economic benefits, but also conditions which enable one to do one's best. The UN Convention on the Elimination of All Forms of Discrimination Against Women require countries which have ratified it to "take all appropriate measures" to ensure equality in education and in the work place (Articles 10 and 11 respectively). Equality cannot be ensured in an environment where one is harassed and made to forego opportunities and benefits because of one's sex. Sri Lanka has ratified both those conventions and has undertaken legal obligations to ensure the implementation of those standards.

EDUCATION

Interestingly, the Convention on the Elimination of Discrimination Against Women also requires States Parties to take all appropriate measures to modify social and cultural patterns of conduct of men and women with a view to eliminating prejudice based on the idea of superiority of either sexes or on stereotypes on men and women (Article 5(a)).

It is imperative that programmes be launched to sensitize the public to the evils of sexual harassment (and in general on violence against women) and the trauma suffered by the victim. Provision of information which destroy traditional stereotypes of men and women is of utmost importance to change general thinking and attitudes governing gender relations. Educating both men and women on these issues should be emphasized because both sexes, to varying degrees, are responsible for the perpetuation of stereotypes. Campaigns could be launched through mass media by concerned organizations. They should nudge institutions such as the Women's Bureau into action. Special programmes should be held in workplaces, schools and universities. Those institutions should be encouraged to adopt grievance settling mechanisms and counselling programmes for the victims to help tide over the humiliation and trauma they have experienced.

As the saying goes `charity begins at home'. It is important for each one of us to evaluate our own values and attitudes. To identify oneself with women's rights and the feminist movement has been a fashionable pastime of many. But how well have we examined and given thought to relevant issues? Do we live by what we profess to believe in? Sometimes one realizes with a deep sense of shock that some of the worst harassers are trusted and professedly liberal 'emancipated' men who are even too insensitive to realize the pain caused to the victim because they are so convinced of their goodness and moral righteousness. Often women are blamed for being too 'sensitive' or for `not being emancipated enough' if they do not give into unpalatable sexual demands.

As we move further and further away from traditional gender roles, and hence traditional social dynamics, we are bound to encounter various social problems. The challenge is to find ways out of them.

NOTES

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1. Weerasinghe, Rohini, "Women Workers in the Katunayake Investment Promotion Zone (KIPZ) in Sri Lanka: Some Observations" in WOMEN IN DEVELOPMENT IN SOUTH ASIA (v. Kanesalingam,ed.,1989); DABINDU, 1985 (October/November), 1987 (November/December), 1990 (March); KANTHA MAGA, 1985 (May), 1989 (March). A recent report compiled by COPSITU on sexual harassment in the workplace in Sri Lanka had not been released at the time this article was written.

2. Mckinnon, Catherine A., FEMINISM UNMODIFIED:DISCOURSES ON LIFE AND LAW 103–116 (1987).

3. Report as excerpted in VOICE OF WOMEN, 1985 (#3).

4. MANUSHI, 1988 (#45), pp.20–21.

5. There were about forty students present of whom the majority was women. Most were from an urban–educated English speaking background.

6. Reported in the NEW YORK TIMES as reproduced in the ISLAND of 29/10/91.

7. See Weerasinghe, at note 1.

8. See, e.g., AND SHE SAID NO!: HUMAN RIGHTS, WOMEN'S IDENTITIES AND STRUGGLES (Liberato Bautista and Elizabeth Rifareal, eds., 1990). Countless reports by Amnesty International and Human Rights Watch on violations of human rights in countries with ongoing armed conflicts provide ample evidence of sexual violence perpetrated by armed groups.

9. Barnes v. Costle (D.C.Cir. 1977).

10. Bundy v. Jackson (D.C.Cir. 1981).

11. See for a survey of U.S. legislation and case law, Mackinnon, supra at note 2; Hill–Kay, Herma, CASES AND MATERIALS ON SEX–BASED DISCRIMINATION (1981 with 1986 supplement); Thomas, Claire Sherman, SEX DISCRIMINATION IN A NUTSHELL (1982).

12. Strathclyde Regional Council v. Porcelli [1986] IRLR 134 (excerpted in NEW LAW JOURNAL, December 8, 1989, p.1676)

13. Case law compiled by Women's Legal Defence Fund, London.

PAKISTAN'S SHARI'AH BILL

The following is the text of the Shari'ah Bill as passed by Pakistan's National Assembly

Whereas sovereignty over the entire universe belongs to Almighty Allah alone, and the authority to be exercised by the people of Pakistan through their chosen representatives within the limits prescribed by Him is a sacred trust.

And Whereas Islam has been declared to be the State religion of Pakistan and thus it has become obligatory for all Muslims to follow the injunctions of the Holy Quran and Sunnah to regulate and order their lives in complete submission to the Divine law;

And Whereas the objectives resolution has been incorporated in the Constitution of the Islamic Republic of Pakistan as a substantive part thereof;

And Whereas it is one of the fundamental obligations of the Islamic state to protect the honour, life, liberty, property and fundamental rights of citizens and to ensure peace and provide inexpensive and speedy justice to all manner of people through an independent Islamic system of justice;

And whereas Islam enjoins establishment of social order based on the Islamic values of bidding what is right and forbidding what is wrong amr bil Ma'roof wa nahi'anil Munkar;

And whereas in order to achieve the aforesaid objectives and goals, it is necessary to give to these measures constitutional and legal backing;

It is hereby enacted as follows:

1. Short title, extent and commencement.

1) This Act may be called the enforcement of Shari'ah Act, 1991.

2) It extends to the whole of Pakistan.

3) It shall come into force at once.

4) Nothing contained in this Act shall affect the personal laws, religious freedom, traditions, customs and ways of life of non-Muslims.

2. Definition.

In this Act "Shariah" means the injunctions of Islam as laid down in the Holy Quran and Sunnah.

Explanation:- While interpreting and explaining the Shari'ah the recognised principles of interpretation and explanation of the Holy Quran and Sunnah shall be followed and the expositions and opinions of recognised jurists of Islam belonging to present Islamic schools of jurisprudence may be taken into consideration:

As envisaged in Article 227 of the Constitution, interpreting the Shari'ah with respect to the personal law of any Muslim sect the expression Quran and Sunnah shall mean the Quran and Sunnah as interpreted by that sect.

3. **Supremacy of Shari'ah**

The Shari'ah, that is to say, the injunctions of Islam as laid down in the Holy Quran and Sunnah, shall be the supreme law of Pakistan. Provided that the political system and present form of government shall not be affected.

4. **Law to be interpreted in the light of Shari'ah. For the purpose of this Act.**

a) While interpreting the statute-law, if more than one interpretation is possible, the one consistent with the Islamic principles and jurisprudence shall be adopted by the Court; and

b) Where two or more interpretations are equally possible, the interpretation which advances the Principles of Policy and Islamic provisions in the Constitution shall be adopted by the court.

5. **Observance of Shari'ah by Muslim Citizens.**

All Muslim citizens of Pakistan shall observe Shari'ah and act accordingly.

6. **Teaching of, and training in, Shari'ah etc.**

The state shall make effective arrangements:

a) for the teaching of, and training in the Shari'ah, Islamic jurisprudence and all other branches of Islamic law at appropriate levels of education and professional training;

b) to include courses on the Shari'ah in the syllabi of the law colleges;

c) for the teaching of the Arabic language; and

d) to avail the services of persons duly qualified in Shari'ah, Islamic jurisprudence and ifta in judicial system.

7. **Islamisation of education.**

(1) The State shall take necessary steps to ensure that the educational system of Pakistan is based on Islamic values of learning, teaching and character building.

(2) The Federal Government shall, within thirty days from the commencement of this Act, appoint a Commission consisting of educationists, jurists, experts, ulema and elected representatives as it may deem fit and appoint one of them to be its Chairman.

(3) The functions of the Commission shall be to examine the educational system of Pakistan to achieve the objectives referred to in sub-section (1) and make recommendations in this behalf.

(4) A report containing the recommendations of the Commission shall be submitted to the Federal Government which shall cause it to be placed before both the Houses of Majlis-e-Shoora (Parliament).

(5) The Commission shall have the power to conduct its proceedings and regulate its procedure in all respects as it may deem fit.

(6) All executive authorities, institutions and local authorities shall act in aid of the Commission.

(7) The Ministry of Education in the Government of Pakistan shall be responsible for the administrative matters relating to the Commission.

8. Islamisation of economy.

(1) The State shall take steps to ensure that the economic system of Pakistan is constructed on the basis of Islamic economic objectives, principles and priorities.

(2) The Federal Government shall, within thirty days from the commencement of this Act, appoint a commission consisting of economists, bankers, jurists, ulema, elected representatives and such other persons as it may deem fit and appoint one of them to be its Chairman.

(3) The functions of the Commission shall be –

(a) to recommend measures and steps including suitable alternatives, by which the economic system enunciated by Islam could be established;

(b) to recommend the ways, means and strategy for such changes in the economic system of Pakistan so as to achieve the social and economic well being of the people as envisaged by Article 38 of the Constitution;

(c) to undertake the examination of any fiscal law or law relating to the levy and collection of taxes and fees or banking or insurance law or practice and procedure to determine whether or not these are repugnant to the Shari'ah and to make recommendations to bring such laws, practices and procedure in conformity with the Shari'ah; and

(d) to monitor progress in respect of the Islamization of the economy, identifying lapses and bottlenecks if any and suggest alternatives to remove any difficulty.

(4) The Commission shall oversee the process of elimination of riba from every sphere of economic activity in the shortest possible time and also recommend such measures to the Government as would ensure the total elimination of riba from the economy.

(5) The Commission shall submit its reports on a regular basis and at suitable intervals to the Federal Government which shall place the same before both the House of Majlis-e-Shoora (Parliament) and shall also respond to any queries sent to it by the Federal Government in respect of establishment of the Islamic economic order.

(6) The Commission shall have the power to conduct its proceedings and regulate its procedure in all respects as it may deem fit.

(7) All executive authorities, institutions and local authorities shall act in aid of the Commission.

9. Mass media to promote Islamic values.

(1) The State shall take steps to promote Islamic values through the mass media.

(2) The publication and promotion of programmes against or in derogation to the Shariah, including obscene material shall be forbidden.

10. Protection of life, liberty, property, etc.

In order to protect the life, honour, liberty, property and the rights of the citizens, the State shall take legislative and administrative measures to –

a) introduce administrative and police reforms;

b) prevent the possession and display of illicit arms.

11. Elimination of bribery and corruption.

The State shall take legislative and administrative measures, to eliminate bribery, corruption and malpractices and provide for exemplary punishment for such offences.

12. Eradication of obscenity, vulgarity etc.

Effective legal and administrative measures shall be taken by the State to eradicate obscenity, vulgarity and other moral vices.

13. Eradication of social evils.

The State shall take effective measures for enactment of law eradicating social evils and promoting Islamic virtues on the principles of amr bil Ma'roof wa nahi'anil Munkar as laid down in the Holy Quran.

14. Nizam-i-adl.

The State shall take adequate measures for the Islamization of the judicial system by eliminating law delays, multiplicity of proceedings in different courts, litigation expenses and ensuring the quest for truth by the Court.

15. Bait-ul-Mal (Welfare fund).

The State shall take steps to set up al Bail-ul-Mal for providing assistance to the poor, needy, helpless, handicapped, invalids, widows, orphans and the destitute.

16. Protection of the Ideology of Pakistan, etc.

The State shall enact laws to protect the ideology, solidarity and integrity of Pakistan as an Islamic State.

17. Safeguard against false imputations, etc.

The State shall take legislative and administrative measures to protect the honour and reputation of the citizens against false imputations, character assassination and violation of privacy.

18. International financial obligations, etc.

Notwithstanding anything contained in this Act or any decision of any Court, till an alternative economic system is introduced, financial obligations incurred and contracts made between a National Institution and a Foreign Agency shall continue to remain, and be, valid, binding and operative.

Explanation:- In this section, the expression "National Institution" shall include the Federal Government or a Provincial Government, a statutory corporation, company, institution, body, enterprise or any person in Pakistan and the expression "Foreign Agency" shall include a foreign government, a foreign financial institution, foreign capital market, including a bank and any foreign lending agency, including an individual and supplier of goods and services.

19. Fulfillment of existing obligations.

Nothing contained in this Act or any decision made thereunder shall effect the validity of any financial obligations incurred, including under any instruments, whether contractual or otherwise, promise to pay, or any other financial commitments made by or on behalf of the Federal Government or a Provincial Government or a financial or statutory corporation or other institution to make payments envisaged therein, and all such obligations, promises and commitments shall be valid, binding and operative till an alternative economic system is evolved.

20. Rights of women not be affected.

Notwithstanding anything contained in this Act, the rights of women as guaranteed by the Constitution shall not be affected.

21. Right of Parliament to make laws not affected.

Notwithstanding anything contained in this Act the Parliament, and the Provincial Assemblies shall have the exclusive right to make laws on their respective subjects under the Constitution.

22. Rules.

The Federal Government may, by notification in the official gazette, make rules for carrying out the purpose of this Act.

STATEMENT OF OBJECTS AND REASONS

Having regard to the will of the people of Pakistan to make the country a truly Islamic State wherein, amongst other things,

(a) a just social order shall be established ensuring equality between citizens, a society free from exploitation, protection of the life, liberty, property and rights of the citizens and availability of inexpensive and speedy justice to all manner of people through an independent Islamic system of justice;

(b) adequate provisions are made according to Shari'ah to eliminate bribery, corruption and malpractices; and

(c) obscenity, immorality and other social evils are eradicated;

This bill declares that the Shari'ah, that is to say, the injunctions of Islam as laid down in the Holy Quran and Sunnah, shall be the supreme law of Pakistan, requires all Muslim citizens of Pakistan, to faithfully observe the Shari'ah and casts upon the State the duty to –

(a) make effective arrangements for the teaching of and training in, the Shari'ah and Islamic jurisprudence;

(b) take adequate measures to ensure an Islamic system of justice and to save the people from the necessity of resorting to several courts;

(c) bring about police reforms to ensure that the life, honour, liberty, property and rights of the citizens are protected;

(d) make effective provisions by law to combat the offences of corruption of all sorts;

(e) take steps to set up al Bait–ul–Mal for providing assistance to the poor, needy, widows, orphans and the destitute;

(f) take effective legal and administrative measures to eradicate obscenity, vulgarity and other moral vices;

(g) enact laws to protect the ideology, solidarity and integrity of Pakistan;

(h) Undertake legal measures to prevent the possession and display of illicit arms;

(i) take steps to ensure that the economic system of Pakistan is constructed on the basis of Islamic economic principles, values and priorities and appoint a Commission consisting of economists, bankers, jurists, ulema and elected representatives with the duty to recommend measures and steps, including suitable alternatives, by which the Islamic system could be established and to monitor progress in respect of the Islamisation of the economy

and oversee the whole process of elimination of riba from every sphere of economic activity within a shortest possible time.

(j) take steps to promote Islamic values through the mass media;

(k) take steps to ensure that the educational system of Pakistan is based on Islamic values of learning, teaching and character building and to appoint a Commission consisting of educationists, jurists, experts, ulema and elected representatives to make recommendations for the purpose;

(l) take effective measures for enactment of laws eradicating social evils and promoting Islamic values on the principles of amr bil Ma'roof wa nahi'anil Munkar as laid down in the Holy Quran.

In order to prevent the disruption of the economic system of Pakistan and to honour sanctity of agreements, the Bill seeks to protect the validity of the financial obligations and contracts between a National Institution and a Foreign Agency until an alternative economic system is evolved.

THE OPEN-ENDED SHARIAT BILL

by

Asma Jahangir
(AGHS Law Associates, Pakistan)

The present form of Shariat Bill appears harmless, compared to the draft presented by Sami-ul-haq, or the two Shariat Ordinances promulgated earlier. The general impression being that the government has struck a compromise and pleased both, the ulema and the progressive lobby. These appearances are misleading.

The present Bill is an unholy alliance, between the politicians and the fundamentalists within the ruling party. It does not accommodate the point of view of the progressive elements. The leadership of the ruling party has knocked down those portions of the Sami-ul-Haq Bill which proposed to take away their own powers. They had to ensure that their own power does not slip into the hands of the mullahocracy, realizing that the fundamentalist forces may very well turn against them when politics so demands. The Bill, however, has far reaching implications on the rights of ordinary citizens, particularly women.

The softening of the Bill has served only one purpose; delaying the power of the ulema over the body politic of Pakistan. It has provided a foothold for the fundamentalists, who given the right opportunity, will manoeuvre a coup. It has at the same time neither pleased the fundamentalists nor the liberal element. At best it has postponed the inevitable clash between the two lobbies. The escapist section of society is relieved and happy to muddle through a confused pseudo-democratic theocratic system. The ordinary person is, of course, unconcerned about the system of government or the 'isms' introduced by them, as none provides for his basic needs.

The mullah had hoped for an instant kill through a single Bill. Now, they feel let down, since, they will have to worm their way gradually. On the one hand, the liberals realize that it is far easier for an ostensibly watered down version of a Shariat Bill to sail through the Parliament, rather than the tough and patently extremist version presented earlier. The vagueness of the Bill is
uncomfortable. The present Bill strengthens the fundamentalists and theocracy, but its impact cannot be judged in isolation. Much will depend upon the political pressure of various lobbies, the rules framed under the law, the policies and political will of the government in power, and the mood of the judiciary.

The Shariat Bill of Nawaz Sharif, ostensibly seems tame. It appears to be a resolution or a document of intent. Nevertheless, seen closely it can change a number of laws and create a political situation where the fundamentalists will eventually gain ground. So far earlier beneficial provisions in the purview of family law have been introduced through codification like the Muslim Family Laws Ordinance 1961, The Dissolution of Muslim Marriage Act, 1939, The Child Marriage Restraint 1929, The Guardian & Wards Act, 1890 and others. The objective of codification was to protect family laws from being interpreted rigidly to the detriment of the contemporary social order. The passage of the Shariat Bill is likely to take away the advantages ensuing from these codifications.

Presently, there is no consensus amongst the superior judiciary for altering the present legislation on family laws. There are clearly two schools of thought. One which advocates liberal interpretation of personal law and the other which has applied a conservative or orthodox religious interpretation on family matters. The codification has provided a justification for the liberal elements in the judiciary for withstanding the pressure of the orthodoxy. Once the Shariat Bill becomes law, the orthodox school of thought will gain strength. Registration of marriages and divorces will become unnecessary. Orphan grandchildren will not be able to inherit the share of their predeceased parents, on the death of the grandparents. Welfare of the children will not be the predominant factor, in awarding custody of children. There will be no bar on child marriages. Hilala will become mandatory in case a woman wishes to marry her former husband. There will be no restriction whatsoever on polygamy.

The Shariat Bill prescribes that if there are two possible interpretations on a matter, the one closer to principles of policy or Islamic provisions will prevail. In other words, fundamental rights will take a back seat, while interpreting statute law. This would automatically pave the way towards a conservative form of interpretation. The bill lays down that Quran and Sunnah (Shariah) shall be the supreme law of Pakistan. There are sharp differences of opinion on Sunnah. These have led to bitter sectarian riots. The ulema are themselves not clear in their conception of an Islamic State. According to the report of the Court of Inquiry of 1954, "The ulema were divided in their opinions when they were asked to cite some precedent of an Islamic State in Muslim history. Thus, though Hafiz Kifayat Husain, the Shia divine, held out as his ideal the form of Government during the Holy Prophet's time, Maulana Daud Ghaznavi also included in his precedent the days of the Islamic Republic, of Umar bin Abdul Aziz, Salah-ud-Din Ayyubi of Damascus, Sultan Mahmud of Ghazni, Mohammad Tughlaq and Aurangzeb and the present regime in Saudi Arabia. Most of them, however, relied on the form of Government during the Islamic Republic from 632 to 661 A.D, a period of less than thirty years, though some of them also added the very short period of Umar bin Abdul Aziz. Maulana Abdul Haamid Badayuni stated that the details of the ideal State would be worked out by the ulama while Master Taj-ud-Din Ansari's confused notion of an Islamic State may be gathered from the following portion of his interrogation:-

Q. Were you also in the Khilafat movement?
A. Yes.

Q. When did the Khilafat movement stop in India?
A. In 1923. This was after the Turks had declared their country to be a secular State.

Q. If you are told that the Khilafat movement continued long after the Turks had abolished Khilafat, will that be correct?
A. As far as I remember, the Khilafat movement finished with the abolition of the Khilafat by the Turks.

Q. You are reported to have been a member of the Khilafat movement right up to 1928 and having made speeches. Is it correct?
A. It could not be correct.

Q. Was the Congress interested in Khilafat?
A. Yes.

Q. Was Khilafat with you a matter of religious conviction or just a political movement?
A. It was purely a religious movement.

Q. Did the Khilafat movement have the support of Mr. Gandhi?
A. Yes.

Q. What was the object of the Khilafat movement?
A. The Britisher was injuring the Khilafat institution in Turkey and the Musalman was aggrieved by this attitude of the Britisher.

Q. Was not the object of the movement to resuscitate the Khilafat among the Musalmans?
A. No.

Q. Is Khilafat with you a necessary part of Muslim form of Government?
A. Yes.

Q. Are you, therefore, in favour of having a Khilafat in Pakistan?
A. Yes.

Q. Can there be more than one Khalifa of the Muslims?
A. No.

Q. Will the Khalifa of Pakistan be the Khalifa of all the Muslims of the world?
A. He should be but cannot be.

The Bill declares that the State shall take "legislative" and "administrative" measures to protect the honour or reputation of the citizens against false imputations, character assassination and violation of privacy. Administrative measures suggests, that the executive will be strengthened to take anyone to task, who may, even in good faith, or for public interest publish a scandalous story. The press can be intimidated. It would give the executive a cover to violate the privacy or anyone they wish to persecute.

The Bill has made it mandatory for all citizens, individually and collectively to order their lives according to the Shariah. This opens the flood gates for witch hunting. Any religious sect can be taken to court for not ordering their lives, collectively, to the wishes of the majority sect. Certain practices of the Dawoodi Bohra community were challenged in the Federal Shariat Court. Even the use of "jamooriat" was challenged as un-Islamic. The petitions were dismissed owing to lack of jurisdiction. Similarly in the past few years several petitions were made in the Federal Shariat Court to curtail the freedom of women. The petitions failed for lack of jurisdiction. The passage of the Shariat Bill will change the situation drastically. In 1983 a Shariat petition was made asking that non-observance of purdah by women be declared un-Islamic and Co-education be banned. In another petition an injunction was sought against a government circular allowing females of Fiqa-afria to proceed on haj without a Mahram.

How far will the courts resist the constant pounding of the fundamentalists? The Shariat Bill has left many issues open-ended. This void will be gradually filled in through a series of legislation. Each law will promote the point of view of the fundamentalist, rather than the progressive point of view. While the progressive lobby in Pakistan is confused in their approach and strategy, the fundamentalists have a clear objective. They want power, at any cost. The game of "appeasement" has always been badly played by the progressive forces. It has not fooled anyone; in fact in the long term it has put the liberals on the defensive. The ulema have taken advantage of this defensive attitude. They have used every opportunity to take over the reins of power unobtrusively.

In 1949, the Objectives Resolution was issued as a statement of intent. It reiterated the need to build an Islamic State without laying down any specific guidelines or laws for implementing the spirit of the Resolution. The proposer of the Resolution emphatically declared that the Resolution did not imply a theocracy. It was believed that the Resolution had outmanoeuvered the fundamentalists. In years to follow, the outcome was the reverse. Initially, the Resolution was placed in the Preamble of the 1956 Constitution. It remained in the Preamble of 1962 Constitution. In 1973, the Resolution was tampered with. Words like "should" were replaced by "shall".

In 1985 the Resolution was added to the substantive part of the Constitution. The part allowing "for the minorities freely to profess or practice their religion", was amended, by deleting the word "freely". An attempt is being made to use the objectives Resolution as the supreme source of law. It is being selectively used for introducing orthodox religious notions into the legal system.

The Shariat Bill has a similarity to the Objectives Resolution. It seems innocuous; being drawn up as a compromise; the Prime Minister while introducing the Bill emphatically declared, that he was not a fundamentalist.

It is often argued that, opposition to any form of Shariat Bill is unwise in Pakistan. It is, on the other hand, totally unwise to let any such Bill be passed without being openly criticized and opposed. Silence will be construed as support. It is this very silence which has strengthened the hands of the fundamentalists. This uncomfortable silence is a form of disinformation which hinders the formation of public opinion. The schizophrenia of a concept of an Islamic democratic system has to end. Democracy cannot flourish under any theocratic ideology.

'PARADISE LOST'

EXTRACTS FROM A REVIEW OF A VIDEO DOCUMENTARY

by

Sepalika Fernando and H.L. Hemachandra

(of the People's Bank)

Directors: Dharmasiri Bandaranayake and Swarna Mallawarachchi
Produced by the Law & Society Trust

Historically, prostitution has occurred with a greater or lesser degrees of social acceptance for many centuries and in many cultures. Certain types of prostitution are now seen as a serious social problem, particularly in developing countries like Sri Lanka, which tourists are said to consider a safe haven for "Sex holidays" involving prostitution.

'Paradise Lost' is a 45 minute documentary film produced by the Law and Society Trust on this subject. It is directed by Dharmasiri Bandaranayake, one of our best-known film directors, in collaboration with Swarna Mallawarachchi, more famous as an award winning actress than as a director.

Two main categories of persons are interviewed in the film. One group consists of male and female children and women who engage or have engaged in prostitution, and the other group consists of well-informed professionals sympathetically concerned with their problems. They include researchers, university teachers, doctors, legal experts, social workers, government and NGO officials. The narration of the first-hand experiences of the pimps and prostitutes themselves alternates with the views of the relevant experts to give the viewer a greate[illegible]t into the problem of prostitution. Any comforting illusions that prostitution does not exist are dispelled [illegible]lm. The pain and bewilderment of the child prostitutes and the despair of the women incontestably cle[illegible]he increasing seriousness of the overall problem of prostitution and of child tution in particular is [illegible]orsed by Padma Ranasinghe, Commissioner of Probation and Child Care.

The film examines the various types of prostitution existing in Sri Lanka. As activist Sunila Abeysekera explains, women prostitutes may be street walkers, work in brothels, or at more expensive levels as call girls in 5 star hotels. Lal Fernando, OIC Police Dehiwela says that many personnel working at massage clinics also engage in prostitution. Apart from these groups there are Sri Lankan women working abroad as prostitutes. Although the film confines itself to the Sri Lankans engaging in prostitution, reports in the local press have highlighted foreigners, particularly Thai teenage girls, operating here.

The film reveals that the centres of prostitution are the big towns, particularly those frequented by tourists. Carlyle Dias, S.P. Crime Branch says that in the case of child prostitution, the centres are in the South West coastal belt.

The organisation of prostitution as a trade in Sri Lanka today is clear in the film. A.J. Weeramunde, a Senior Lecturer at Colombo University, calls it a highly organized capitalist enterprise, selling human beings. It has other characteristics of an organized trade, with promotion costs such as publicity, including publicity abroad, support services and brokers. According to Lal Fernando some brothels even operate legally, naming themselves massage clinics and holding appropriate licenses. Gamini Jayakuru, Director, Anti-VD Campaign claims that Sri Lanka has been advertised as a "gay" paradise in some foreign magazines, and is famous abroad for its boy prostitutes.

As in the case of the internationally organized drug traffic, many developing countries export children and young women for sexual services to developed countries. Prostitutes are one of the most exploited groups in developing countries, and the film shows how they are exploited to maximize profits. The interviews reveal how much they earn, and that actual payments made to them range from about 15% to 35% of these earnings. The greater part of their earnings go to profit their handlers, brokers, taxi drivers, room owners etc., who promote the industry as it is a money spinner for them. The prostitutes operating at the lowest levels earn little, and their health and appearance is constantly deteriorating. They have no channel of protest, and are socially discriminated against. Simon Nawagaththegama, Director Jana Udawa, says "poorer people, under capitalism, lack sanitation, education and knowledge, and their situation deteriorates. The same thing happens to prostitutes."

Savithri Goonesekere, Professor of Law at the Open University regards adult prostitution merely as the exploitation of human bodies for economic gains. The worst form of exploitation is that of the child prostitute, where profits are not made only by organizations serving the needs of clients but by parents who see a child as an economic resource. She says that with the increase in tourism, the demand for both adult and child prostitutes has increased in recent years.

The film shows how vulnerable prostitutes are to drug usage, and how many end up as seriously addicted. Carlyle Dias explains that boy prostitutes, who lose their attractiveness to clients in about 5 years, have by that time dropped out of schools and have got used to an affluent life style. From that point it is only a short step to a life of delinquency and crime, particularly as the psychological shocks undergone by them as child prostitutes unfit them for normal social life, unless they are provided with proper psychological treatment. The film stresses the importance of finding out why children or adults became prostitutes.

The most important cause shown in the film is poverty. Parents, husbands or family who consent directly or indirectly to women or children becoming prostitutes see it as the easiest if not the only way they can survive. An excessive urge for consumerism is to blame in the case of some prostitutes but economic pressures are the main reason. Often female children placed as domestic servants in middle-class homes are sexually exploited, and later become prostitutes. Diyanath Samarasinghe speaks of the psychological problems of children separated from their parents either because they work as domestic servants or because the mother has gone to the Middle East as a servant. Such children or those who are ill treated by step-parents or alcoholic fathers may accept sexual relations as the only occasion on which they are shown human warmth, touched or noticed, and get some sort of psychological comfort.

Rehabilitation of prostitutes is an urgent necessity. M.W. Premawardhena, Deputy Director, Social Services Department, points to the serious drawbacks of present rehabilitation programmes. Some women whom social workers try to rehabilitate are not psychologically ready for normal life and some run away from the legitimate employment found for them by the authorities. As Desmond Fernando of the BASL explains, there has been

a failure to tailor the rehabilitation programmes to meet the needs of the prostitutes. His opinion is that the present-day law is ineffective and outdated. As a first step to an effective rehabilitation programme, he suggests that when prostitutes are brought before court, social workers should tell the court why they became prostitutes. Diyanath Samarasinghe feels that information on the psychological background of child prostitutes is particularly important to their rehabilitation.

As the tourist industry contributes to the problem of prostitution, it is essential that the necessary laws be introduced to minimis sex tourism as much as possible. A report tabled at an international conference on Child Prostitution places Sri Lanka third, after the Philippines and Thailand, in terms of its number of boy prostitutes.

One debatable issue raised by the films is whether adult prostitution should be legalised or not.

The film provides information on many hidden areas and controversial aspects of the problem. Although it confines itself to the Sri Lankan scene, its analysis of the causes, incidence and control of prostitution could apply to most third world countries in the region. The Law and Society Trust is to be congratulated on the service rendered in producing this film.

THE CORE GROUP ON LAW AND THE ECONOMY: A REPORT

by

Jennifer Thambayah

This report comprises a review of Core-Group activities from April 3rd 1991 to September 30th 1991. During this period the Core-Group organized several public lectures, workshops and seminars, as a part of its public awareness programme on issues of Business Law and the Economy.

The Core-Group also offered internships with placements being made in public and private sector business organizations.

Public Lectures;

This has always been an extremely successful part of the Core-Groups activities, and we have also had a series of lectures on a particular subject or issue. The most important of these was the series on "Privatization of Public Enterprises" which included lectures by Mr. Shelton Wanasinghe, Chairman of the Presidential Commission on Privatization. The Hon. Anil Moonesinghe who spoke on the Transport Industry & Privatization and Professor Kotelawela who spoke on the Privatization of the Tyre Corporation.

During the period under review the Core-Group invited Mr. Adrian Corera of John Keells Financial Services Ltd. to address the subject "Stockbroking Aspects of Privatization". Mr. Corera dealt with the manner in which an issue of a recently privatized company is offered to the public and the problems stock brokers encounter in doing so, with particular relevance to the Ceylon Oxygen issue and the forthcoming Pugoda issue.

The public response to this lecture was good, with many persons wishing to ask questions. This resulted in the normal two hour period devoted to such lectures being considerably extended. There was much debate on the actual handling of the issue and the restrictions placed on certain categories of persons who wished to subscribe to such share issues.

The next lecture was delivered by Mr. Venkateswaran, Advocate of the High Court of Madras who is an expert on international trade issues. His lecture was entitled "Perspectives of the Third World with regard to International Trade". He urged the importance of Third World Nations being aware of their twin goals of Development and Free Trade in this area and said that this perspective should be recognized by developed countries. He talked about the recognition of such goals by bodies like GATT, UNICITRAL, UNIDO and of course through instruments governing intellectual property like the Paris Convention. He also pointed out the importance of teaching international trade law in law schools.

The lecture was attended by a large group of people from the Ministry of Trade & Commerce, and Minister Munsoor was also present.

Seminars and Workshops:

Due to the growing interest in Privatization or Peoplization as it is known here and the interested response we had received from members of the public with regard to our public lecture series on "Privatization of Public Enterprises", a half-day workshop or seminar on "Privatization in the Development Process of Sri Lanka" was organized.

Three speakers were invited to make presentations lasting for about 20 - 25 minutes to be followed by a discussion. The workshop commenced with a presentation being made by Mr. Stanley Jayawardena, a member of the Presidential Commission on Privatization and the man behind the advertising and marketing campaign for privatization. His presentation covered the reasons put forward by the Commission which advocated privatization and he also talked about the need to market the idea as people were still not receptive to it and were not well- informed about the strategies involved in doing so.

Mr. Shelton Wanasinghe, the second speaker was concerned with "Equity Issues in Privatization". He said that this was an important concern which should be taken note of in every aspect of privatization from formulating a national policy on privatization to implementing a particular modality of privatization. He also remarked that this was a neglected issue in many developing Asian economies which had decided to privatize their public enterprises.

The final presentation was made by Dr. Saman Kelegama, Reserach Fellow of the Institute of Policy Studies, Sri Lanka and a member of the Core-Group. Dr. Kelegama's comprehensive presentation consisted of a brief introduction to the privatization programme in Sri Lanka followed by an analysis of the problems of privatization and a discussion on the possible policy options with regard to these problems. Dr. Kelegama's paper on "Privatization in Sri Lanka : Problems and Prospects" is to be published shortly by the Core-Group of the Law & Society Trust.

The interest in securities, the stock market, and in the buying and selling of shares prompted the Core-Group into organizing a seminar on "The Securities Industry and the Stock Market". The public response to the workshop was unprecedented and many of them had to be turned away. Several members of the public wished to be invited if a workshop on the same theme was held again.

Four speakers were invited to make presentations. Mr.L.Namasivayam, Director General of the Securities and Exchange Commission of Sri Lanka opened the proceedings with an introduction to the new Securities Council Act which established the Securities and Exchange Commission of Sri Lanka. He outlined the objects of the Commission and dealt with its important powers, functions and duties. He also dealt with the concept of insider trading in the context of the measures set out by the Act to ensure orderly and fair trading in securities and in ensuring that the investor's interests are protected.

This was followed by a presentation by Dr. `Clive Gray, Fellow of the Harvard Institute for International Development on "Financial Markets and Competition Policy". Dr. Gray stated that the application of competition policy to financial markets has two dimensions, the encouragement of healthy competition and the regulation of financial markets so as to ensure that their impact on the economy is consistent with public policy as regards economic concentration and creation of market power. He indicated that the latter dimension was one that gave developing countries problems because they would have to balance the need for healthy

competition with the need to maintain economic concentrations in certain areas. He said perhaps the problem could be solved by introducing anti-monopoly laws gradually and cited the example of Korea.

He also said that if public policy determines that only a certain degree of concentration should be present in a particular industry then the law should ensure a certain amount of transparency of takeover moves thus giving the authorities the means to block acquisitions.

Mr. Ravi Peiris, General Manager of the Colombo Stock Exchange delivered an extremely interesting talk on "Modern Developments in the Stock Market". He gave us a brief history of the Colombo Stock Exchange and talked about the effect brisk trading in shares had wrought. He also commented on the new technological developments that had been introduced recently.

Mr. Anura Wickremasinghe, a stockbroker attached to Forbes & Walker made a short presentation on "The Stock broker-Client Relationship". He commented on the duties owed by a stockbroker to his client and vice versa and the remedies available if such duties were breached.

Internships;

Many institutions that were approached by the Core-Group with regard to the placement of interns were reluctant to accept them. The general feeling was that they would be a nuisance, since the institutions did not know how to deal with them. In the case of banking institutions, though many were open to the idea, they were reluctant to take in interns because of the problem of maintaining customer security with regard to secrecy.

We placed 3 interns at 3 institutions.

Anne-Marie Cadiramanpulle was placed at the National Development Bank and is working on 2 short papers on Factoring and on the Debt Recovery Laws.

Manuela Motha was placed at the Securities & Exchange Commission and is working on a paper on Unit Trusts.

Shanika Daluwatta was placed at the Merchant Bank of Sri Lanka and is working on a paper on Merchant Banking in Sri Lanka.

The papers are due on the 30th of November 1991. The interns will also be required to present their papers at a meeting of the Core Group members.

Other Activities of the Core Group Members:

Tamara Nanayakkara is following a course of study at the University of St. Paul in Minnesota which would enable her to obtain a Master of Business Administration degree.

Prasanna Jayawardena is presently at Georgetown University following a short term course on Loan Negotiation and Re-negotiation.

Rozain Casiechetty and Mohamed Adamaly graduated from the Faculty of Law, University of Colombo with Second Class Honours Degree in the Lower Division.

Jennifer Thambayah conducted a 5 day familiarization course on Commercial Law for lawyers and judges in the Maldives.

Book Review

LON FULLER: PHILOSOPHER, CRITIC AND REFORMER

by

Rangita de Silva

Title: **JURISTS : PROFILES IN LEGAL THEORY : LON. L. FULLER**

Author: **Robert S Summers**

Publishers: **Stanford University Press, 1984**

We cannot learn law by learning law. If it is to be anything more than just a technique it has to be so much more than itself : a part of history, a part of economics & sociology, a part of ethics and a philosophy of life.

– Lord Radcliffe –

To the average citizen, the law is as forbidding as the face of the sphinx, shrouded in mystery and obscure language. Rarely does a lawyer or jurist break through this mystique and attempt to reach the public. Though law has been termed the oldest and richest of social sciences, it is also one of the most bewildering. Professor Fuller makes it clear that it need not be so. He was known as the leading "standard–bearer" of secular natural law and founder of a whole new branch of jurisprudence devoted to the nature and limits of basic legal process. Fuller who held the Professorship of General jurisprudence in the Harvard Law School emphasized more than any other jurists the laws essential purposiveness and the "direction giving quality" of the law.

Fuller evolved an enlarged and original conception of law, one that embraced legal processes, including contractual ordering, mediation, legislation and managerial directions and is considered one of the leading "means – end" theorists in modern social thought.

Fuller strains to establish or recognize, as an inner–core of the law itself, a moral standard which must accept or reject individual rules according to objective justice.

The absence of a philosophical tradition informing legal education in common law countries has tended to instil skepticism towards theory among judges. It has been pointed out with great force by Prof Fuller that any academic discipline worthy of the name must entail "instilling in the student the capacity for critical thought". In his view, legal education needs to teach both the law and its context, social, political and theoretical.

Fuller stressed the importance of bringing law to the touchstone of sociological reality, rather than of indulging in a process of analysis and deduction from abstract precept to abstract precept by an exercise in pure logic. To this end Fuller strove in his words to take the student "outside the legal system and give him some view of it as a whole, so that he might be led to reflect on the more general aims of law and government and the conditions that conduce to the realization of these aims".

To Fuller the positivist attempt to describe the legal system in a purely formal manner neglects the element of purpose. The legal system according to Fuller should have an inherently moral purpose and moral aspiration.

Thus an understanding of what law is cannot be separated from an understanding of what law ought to be, because understanding what law is involves a comprehension of moral aspirations inherent in the law itself.

Fuller reasoned, certain purposes had to be honoured for a system to qualify as a system of law, rather than a mere set of arbitrary rules.

To set out briefly Fuller's receipe for good government, the rules must be sufficiently general, must be publicly promulgated, must be sufficiently prospective, must be clear and intelligible, must be free of contradictions, must be sufficiently constant through time so that people could order their relations accordingly, must not require the impossible, and must be administered in a way sufficiently congruent with their wording.

To Fuller if a legal regime failed to meet any of these requirements that society might have a system of government but it would not be a government through law. It would be interesting to apply this formula to the Lankan body politic.

The 8 precepts point to 8 minimum conditions for the existence of anything that would be regarded as a law or legal system. Fuller describes these principles as an "inner morality of the law". The 8 principles relate to the collective representation of a moral aspiration for the legal system. It might be correct to adduce that Fuller's 8 principles correspond to the idea of the "Rule of Law".

Professor Hart, with whom Professor Fuller conducted a Trans Atlantic debate in 1956/57 on the separation of law and morals – which debate was later published in the Harvard Law Review – critiques the fact that Fuller describes the 8 principles as the morality of Law. Hart suggests that if one were to describe certain principles for effective poisoning, would it not be absurd to describe these as an "inner morality of poisoning".

The argument then arises, as arose in the Hart Fuller debate, whether retrospective legislation would amount to law.

According to Fuller the laws passed during the 3rd Reich were void ab–initio. Fuller begins on the premise that what is immoral cannot be law. Hart recognizes the laws of the Nazi regime as law and suggests the passing of retrospective legislation to invalidate them. Fuller debates that laws should have a certain moral datum, with an intrinsic norm creating, "standard setting" capacity, which commands the acquiescence of the public.

Though Hart concedes that laws should posses a "minimum moral content", he comments that Laws cannot be judged by morality alone. For morality has an open texture which changes with time, space and culture.

In Fuller's opinion, the moral obligation of German citizens to obey many of the laws under the Reich was not merely diminished but obliterated, for they contradicted the basic tenets of the Rule of Law.

According to Summer's view – Fuller was not of the view that a bad law was not a law, but that a regime may so depart from the laws "internal morality" as to pre empt the citizens obligation to obedience.

Fuller believed that it was not necessary to dwell on such moral upheavals as the Nazi regime to see how completely incapable the positivistic philosophy was of serving higher moral ideas. He states dramatically that following a bad law would be akin to the situation in Tennyson's poem, the "Charge of the Light Brigade" – where an army marched to its death, obeying a wrong command. Fuller was of the view that the question was not whether the law under the Nazi regime was bad law, but how much of a legal system could survive the general perversion of social order.

Thus Fuller stressed that fidelity to law may not be justified if enforcing the law perpetrated injustice.

THE PURPOSIVE AND VALUE LADEN NATURE OF LAW

Fuller's essential view on law was that it was purposive and teleological. Accordingly law must embody or reflect an intelligible purpose. These substantive purposes according to Fuller are notions of what "ought" to be.

To Fuller the most fundamental tenet of natural law was the value placed on the role of reason in legal Ordering – Despite the fact that the term "natural law" has about it "a rich deep odour of the Witches

Cauldron" and the mere mention of it sufficed to "unloose a torment of emotions and tears". He was of the view that enmeshed in the diverse theories of natural law was the assumption that "the process of moral discovery is a social one and that there is something akin to a collaborative articulation of shared purposes" by which men come to understand better their own ends and to discern more clearly the means for achieving them. Fuller perceived his role as Professor of Jurisprudence of Harvard "as serving as a sort of counterpoise to the excessively legalistic and conceptualistic approach of some of my colleagues".

Fuller's debate with Nagel, published in the Journal of Philosophy in 1956 and the law forms in 1958 – 59 centered on the nature of what legal theorists often term the is–ought distinction in law. Fuller insisted that forms of law cannot be understood without reference to the purpose of those who brought them into being – notions of what "ought to be", and that forms of law are in consequence necessarily value laden.

Fuller points to the distinction between the 2 standards of morality –: the morality of aspiration and the morality of duty. The morality of aspiration is the morality of excellence, the morality of the man who is not content with ordinary standards of duty but strives to reach the highest standards of excellence as a human being. The morality of duty on the other hand lays down the standards which a man must comply with to satisfy the basic requirements of living.

According to Fuller's thesis, positivism fosters formalistic methods of legal interpretation. Under the positivist tradition judges would interpret precedents in a "wooden" fashion or interpret statutes "literally". A purposive natural law oriented theory would invite a more reasoned argument over the laws ends and means.

Fuller paid special attention to the purposiveness of Constitutional law. Constitutional law had its own special distinctive purposes – namely to enact the basic organizational principles required for representative and orderly government. Democratic precepts, basic protections against the abuse of majority rule, the principles of rule of law and the requirements of due process are all examples of forms of law that encapsulate constitutional purpose.

Certain standards of conduct for instance may be what has been called the operative ideals of a particular society – a part of its accepted system of values. Lawyers and legislators do not and in fact cannot exorcise this element. It is up to the judge to articulate these values.

The exercise of discretion or the concious choice a judge makes will to some extent reflect the social and political outlook of the judge. His legal training will instil a measure of rationality into such an operation, but it can by no means obviate the personal value judgement. Since the law has to be interpreted before it can be applied, the very function of interpretation becomes creative activity.

The case of the Speluncean Explorers spun in the imagination of Fuller spells out the different decisions of the judges 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 in the mythical court of True Penny C.J.

Fuller not only rescued Natural Law from the assumption that it incorporated a religious doctrine – such as the doctrine that the ultimate aim of man was the knowledge of God. He also brought about a resurgence of interest upon the rational purposes of legal concepts and legal institutions. In contract law Fuller asserted that there was a rekindling of interest in asking what contract is for and not merely what a contract is, stressing a purposive legal philosophy.

INTERPRETATION OF STATUTES:

American legislators give the courts a blank cheque in interpreting statutes. However, in common law countries strict attention to the letter of the law is often required. H.L.A. Hart, who emphasized the "plain meaning" rule, stated that if for eg. "A legal rule forbids you to take a 'vehicle into the public park, **plainly** this forbids an automobile."

Fuller who advocated the purposive theory of interpretation – which seeks to determine the purpose of the statute – states that if "some local patriots wanted to mount on a pedestal in the park a truck used in W.W. II..... this would not offend such statutory purposes and thus would not on a purposive approach to interpretation be

contrary to the statute. On the other hand to interns of Hart's "Plain meaning" approach the truck would "plainly" qualify as a vehicle and be excluded from the park.

The meaning of a statute is not the sum of the meaning of its particular words. Rather the statute as a whole is a device to achieve a purpose. To determine the purpose of the statute it is at least necessary to consider the statutory scheme as a whole, for only as an integral whole can we see the statute as an instrumentality with some overall purposive design."

Fuller was insistent on the creative role of judges, who would be more concerned with the "spirit" of the law than the letter.

Fuller has been associated with Cardozo, Pound & Llewellyn among the great names associated with the struggle to liberate the law from the shackles of precedent.

In statutory interpretation Fuller holds that the task before the judge is not merely one of simple interpretation but one of evaluation of different alternatives. This would be a creative function. There are many situations where the words of the legislator suffer from vagueness, internal inconsistency or ambiguity. An internal search within the statute will not yield the required guidance. A whole array of leeways of choice open up which must be used more boldly.

The creative role of the judiciary in interpretation has become the primary cause of jurisprudential analysis. A judge according to Cardozo J. is essentially an artist, "Who although he knows the handbook should never trust to them for guidance, but rely on his instinctive sense where the line lies between the word and the purpose which lies behind it."

A more socially oriented multi disciplinary legal curriculum could go a long way in liberalizing law and judges alike. As Justice Cardozo has observed the great tides and currents which engulf the rest of men do not turn aside in their course and pass by the judges.

As the 21st century approaches, Fuller's view of an innovative imaginative judiciary striving to interpret the law in its context and with the broader socio-legal purpose in mind is timely. Especially in a Third World Society such as Sri Lanka the very "spirit" of the times is against interpretation of law in a vacuum. Rethinking of judicial values is necessary in the face of diverse social, economic, and ethnic differences and the many convulsions thrown up by society.

PROVINCE AND LIMITS OF ADJUDICATION:

According to Summer, Fuller's writings on the limits of adjudication are the most suggestive and thought provoking of any in the history of Anglo American jurisprudence.

To synthesize Fuller's views, in a pluralistic and democratic society, adjudication alone is insufficient to introduce new aims and to launch society in new directions. Summer's elaborating on Fuller's thesis states that in an adversarial setting the litigants represent only themselves and are in no position to represent the interests of society generally. Judges too are not in general supposed to act as political representatives and be made accountable for their decisions.

Secondly, Fuller states that when issues to be litigated are ones of deep social divisiveness, adjudication would be less appropriate especially when opposing parties have to continue to work with each other, as in the case of the husband-wife relationship. The concentration of the adversarial system on the presentation of their case by the respective parties minimizes the procedural powers of the judge. The judges role, to decide between the respective cases put before him by the parties on the evidence tendered by the parties, obscures important social perspectives and limits judicial reasoning.

Since the Adversarial Process proceeds on the fiction of an equal opportunity to present one's case it promotes the "Winner Takes All" concept rather than the more equitable distribution of justice, which is imperative in a developing society such as ours. Perhaps the time has come when the Sri Lankan judge must no longer remain content with the parties presentation of their case but strive to arrive at a right decision as in many civil law systems, where judges have access to philosophy, history, tradition, sociology and psychology which can be brought to bear on the manipulation of case materials, letting loose a greater spirit of creative choice when handling legislation.

As we move increasingly into a technocratic and science-dominated age, an increasing proportion of disputes will require a high degree of scientific knowledge – which the adversarial proceedings will not be able to furnish.

Fuller has also suggested than an adversarial court of law is not suited to draw up institutional designs for basic structures of governance, public or private. Adjudication does not provide the landscape for compromise that institution – building requires.

Fuller draws the example of a polycentric problem which would not be solved by methods of adjudication – for the adversarial system would make it exceedingly difficult – to organize a hearing so that each side could fully argue out all implications.

LAWYERS, LEGAL EDUCATION AND LEGAL THEORY:

To Fuller the task of the lawyer was to apply reason to the human relationships he confronts in his work.

Fuller, impatient with skepticism about the force of reason, believed that the basic problems of law and government could be solved by reason. He openly loathed the "black-letter mind" – the mind that was neglectful of the purposes of legal percepts and content with mechanical application of the law, incapable of analyzing problems into their constituent elements.

As far as legal education was concerned Fuller was a radical curriculum reformer.

He encouraged the use of the case law method combined with the Socratic method, which generates lively and spontaneous response from a class. What was interesting was that Fuller believed that even the simplest problem on Contract or Tort raised issues of moral justification. Thus he was of the view that the course in jurisprudence should explore the general relation between law and morals.

According to Fuller the object of these courses was to take the student outside the legal system. To Fuller, every student should have the thrill of exploring a wilderness and should want to know where he stood every foot of the way. Bar examinations in Fuller's view required only a knowledge of black-letter law, and a mechanical ability to apply it, rather than the enlarged capabilities and concept which Fuller fought for and which are not easily tested in a written examination. These thoughts are vital considerations when evolving long overdue reforms in the Sri Lankan law school curriculum.

To Fuller, communication was more than a means of staying alive, it was a way of being alive. How and when we accomplish communication with one another could expand or contract the boundaries of life itself. As he put it "The limits of my language are the limits of my world".

What then was to Fuller the central principle of Substantive
Natural Law – "open up and preserve the integrity of the channels of communication by which men convey what they perceive, feel and decide. And, if men will listen, that voice unlike that of the morality of duty, can be heard across the boundaries and through the barriers that now separate men from one another."

As law has advanced in complexity the legal profession seems to have reversed its role of bridge between law and public and begun withdrawing within itself, keeping its body of legal knowledge behind the smoke screen of ambiguity. Ironically, in an age which is witnessing the greatest communication revolution, the world is also witnessing a total breakdown of communication in the sphere of law.

One of the chief lay dissatisfactions with the law is the unintelligibility of many statutes and regulations. It is unforgivable that a layman should have to dig a path through the labyrinth of a statute and welter through the chaotic verbiage which is a statute. Officialese has added to the witches cauldron of mixed legal brew.

Each word has a penumbra of meaning which no draftsman can entirely cut away. It refuses to be used as a mathematical digit. Words being symbols cannot speak without a gloss. According to the rule of liberal interpretation one must follow the spirit rather than the letter. According to H.G. Wells every species is vague, every term goes cloudy at its edges and so in his way of thinking, "relentless logic was only another phrase for intellectual Pig headedness". Many new concepts have been stunted due to interpretation in a vacuum, producing a petrified jurisprudence rather than a "living law" alive to the "felt necessities of the time".

CONCLUSION:

Summers' book on Professor Fuller is decidedly a sympathetic account. It's a tribute to an important Jurist, and it emphasizes all that was positive in Fuller. Summers has provided a empathetic general account of Fuller's thought with little by way of criticism. Since Fuller did not always develop his views systematically and failed to gain the most theoretical mileage out of his reflections, Summers has on various topics reconstructed the views of Fuller. This failure to develop adequately his insights had lead to an inadequate appreciation of Fuller's theories. Summers has not only brought out the merits of Fuller's theories but accentuated and highlighted the value of such, at times even reconstructing when necessary the views of Prof. Fuller at points when they seem particularly blurred.

Summers has not only enumerated fully an appreciation of the Theory of Fuller, and thus a fresh appraisal of the Theory of Natural Law and its role in a changing society, but rescued the Theory from its own vices. Though Summers vividly recreates Fuller's theory sieved of its illogicalities, what is missing in Summers appreciation of Fuller is a critique of his theory. Even though the greatest merit in Fullers theory lies in the fact that he has created space within the Positivist discourse, he still works within the Positivist frame work and not outside it, as do the later Realists and Sociologists.

Philosophers such as Rawls and Dworkin have succeeded in evolving distinctively different doctrine which represent a "break away" from either Positivist or Natural Law discourses, bringing in their wake a whole new world of philosophical thought. What ever may be the shortcomings of Fuller he opens out exciting new possibilities for a Third World society such as Sri Lanka, trembling on the brink of change, where innovative legal doctrine, creative methods of adjudication and imaginative changes in Law School education can no longer be things of the future.

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To our readers.....

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