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THRESHOLDS OF A VALID LEGAL SYSTEM: THE CRITERION OF INTERNAL MORALITY

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Introduction

"The inner morality of law, it should now be clear, presents all of these aspects. It too embraces a morality of duty and a morality of' aspiration. It too confronts us with the problem of knowing where to draw the boundary below which men will be condemned for failure, but can expect no praise for success, and above which they will be admired for success and at worst pitied for the lack of it"[1]

From the times of Plato and Aristotle the arguments for and against the connection between law and morality has been in abundance. Natural theory of law is not a single theory of law, it is the application of ethical or political theories to the question of how legal orders can acquire or have legitimacy.[2] While adheres of the Natural law school always tries to embrace the connectivity between the law and morality, adheres of other legal schools and especially the positivist argues for a sharp distinction between the two. Belonging to the second or modern set of advocates of the Natural Law, Lon Luvois Fuller argued against a sharp separation of law and morality, but the position he defended under the rubric of "Natural Law Theory" was quite different from the traditional natural law theories of Cicero, Suarez and Aquinas.[3] This Second category of natural law theories including that of Fuller includes theories especially about law, theories that hold that moral evaluation of some sort is required in describing law in general or particular legal system or in determining the legal validity of individual laws. Fuller offered, in place of legal positivism's analysis of law base on power, orders, and obedience; an analysis based on the internal morality of law.[4] According to the theory postulated by Fuller, the concepts of law or a legal system has certain moral dimensions, on this view a body of rules might be said to count as a legal system only if (for example) it is aimed at the common good or enforcement of justice.

The starting point for Fuller's theory is the suggestion that formal characterizations of human institutions independently of their purpose must be illusory and inadequate.[5] In Fuller's own account, the legal mind generally exhausts itself in thinking about law and is content to leave unexamined the thing to which law is being related and confront which it is being distinguished.[6] Like traditional natural law theorists,

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[1] Fuller, L. (1969). *The Morality of law*. 2nd ed. Yale: Yale University Press.

[2] Penner, J., Schiff, D., Nobles, R. and Barron, A. (2005). *Introduction to Jurisprudence and Legal Theory*. 1st ed. London: Oxford University Press.

[3] Bix, B. (2006). *Jurisprudence themes and Concepts*. 4th ed. London: Sweet and Maxwell.

[4] See 3 above

[5] Simmonds, N. (2002). *Central Issues in Jurisprudence*. 2nd ed. London: Sweet & Maxwell Ltd.

[6] See 1 above

Fuller wrote of there being a threshold that must be met (or to change the metaphor, a test that must be passed) before something could be properly (or in the fullest sense) called "law". Unlike traditional natural law theorists, however the test Fuller applies is one of function and procedure rather than one primarily of moral content.[7] Fuller's initial premise was that a legal system is the purposive human enterprise of subjecting human conduct to the governance of rules. According to Fuller a legal system had other purposes as well. Whatever its substantive purpose, certain procedural purposes had to be acknowledged as goals if the system went on to qualify as a system of law, rather than a set of institutions using arbitrary force.[8]

The Internal Morality of Law

The internal morality of law consists of a series of requirements, which Fuller asserted that a system of rules must meet- or at least substantially meet- if that system was to be called "law".[9] Therefore in answering the more formal attacks made against the natural law theory, and especially the attacks postulated by H.L.A Hart in his main thesis "The Concept of Law", Fuller went on a venture to formally give an adequate account on how to find a threshold that needs to be passed based on moralistic values for something to be labeled as "law". In doing this he formulated what is now known as the internal morality of law. He has described the internal morality of law as being chiefly a morality of aspiration, rather than of duty. The difference between moralities of aspiration and of duty is largely one of formulation, we might employ a rule "do not kill" but this can be equally expressed as voicing respect for human life. The former gives us the ability to judge individual acts individually whereas the latter allows us to give a judgment of degree.[10] The morality of aspiration alerts us to the possibilities of human achievement: the morality of duty takes us to the base.

A person is usually condemned for violating morality of duty but not praised for observing it.[11] I will be condemned if I commit theft but will not be praised because I did not steal. In contrast, a person is usually praised for displaying morality of aspiration but not condemned for the lack of it. I will be praised for plunging into the raging torrents to save my neighbor's cat, but will not be condemned if I thought better of it.[12] Though this morality may be viewed as made up of separate demands or "desiderata"-[Fuller] has discerned eight - these do not lend themselves to anything like separate and categorical statement." All of them are means toward a single end, and under varying circumstances the optimum marshaling of these means may change.[13]

In speaking of the relation of the two moralities, [Fuller] suggested the figure of an ascending scale, starting at the bottom

[7] See 3 above

[8] Freeman, P. (2001). *Lloyd's introduction to jurisprudence*. 7th ed. London: Sweet & Maxwell.

[9] See 8 above

[10] Paling, D. and Templeman, S. (1997). *Jurisprudence: the philosophy of law*. 1st ed. London: Old Bailey Press.

[11] See 1 above

[12] Ratnapala, S. (2009). *Jurisprudence*. 1st ed. Cambridge: CUP.

[13] See 12 above

with the conditions obviously essential to social life and ending at the top with the loftiest striving toward human excellence.[14] According to Fuller, law can only be said to be binding if people believe or act as if it is. Some people certainly don't feel that law is binding upon them. They may disregard the rules, fail to observe them and may evade punishment for breaking them. If it can be said that the laws of a particular system are binding, that is an appraisal of the success or adherence to the rule. Fuller's contention is that when a person seeks to describe a legal system as it is, he is actually evaluating the degree of success it has achieved in pursuing its purpose.[15] In Chapter 2 of *The Morality of law,* 'The morality that makes law possible', Fuller provides a narrative of an inept king who makes law in various ways, each with disastrous effect. The moral of the story is that a lawmaker must abide by certain procedural 'excellence': each instance when he does not do so damages the effectiveness of law. Law making is an interactional process, and failure of the lawmaker to achieve procedural morality will result in the system ceasing to operate according to the precepts of legality.[16]

The Morality That Makes Law Possible

The major part of Fuller's argument concerns the essential requirements for the making of recognizably 'legal' norms within the context of a 'morality of duty'. He commences this analysis by considering the reign of a hypothetical king called Rex. Rex is a hereditary monarch succeeding to a well-established dynasty with, unfortunately a lamentable record in matters legal. The attempts of the well-intentioned but incompetent Rex to improve matters are then used as a hypothetical model of the ways in which the enterprise of law making might be rendered ineffectual or indeed vitiated altogether.[17] Fuller finds several reasons for this shortcoming and asserts that the eight principles of 'inner morality' of the law will help to cure the defects so encountered by Rex. The eight principles comprises of the following[18],

1. A legal system must be based on or reveal some kind of regular trends. As such law should be founded on generalizations of conduct such as rules, rather than simply allowing arbitrary adjudication.
2. Laws must be published so that subjects know how they are supposed to behave.
3. Rules will not have desired effect if it is likely that your present actions will not be judged by them in future. As such, retrospective legislation should not be abused.
4. Laws should be comprehensible, even if it is only lawyers who understand them.
5. Laws should not be contradictory.
6. Law should not expect the subject to perform the impossible.
7. Law should not change too frequently that the subject cannot orient his action to it.

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[14] See 12 above

[15] See 10 above

[16] Morrison, W. (1997). *Jurisprudence: From the Greeks to Post-Modernity.* 1st ed. London: Routledge.

[17] Penner, J. (2012). *McCoubrey & White's textbook on jurisprudence*. 5th ed. Oxford: Oxford University Press.

[18] See 10 above

8. There should not be a significant difference between the actual administration of the law and what the written rule says.

These eight principles for carrying out the purposive activity of subjecting human conduct to rules are designated by the author as "The inner morality of law"; his other names for them include "the morality that makes law possible," "the special morality of law," "procedural natural law," and "the principles of legality".[19] However, Fuller does not claim to get these eight interlocking principles from some secure point of reference, but rather states they are derived from established judicial practice, or explicit provisions contained in conventional sources of law.[20] These criteria are in the form of the moral rules of duty. Fuller expresses them as principles or goals. In Fullers own account he expresses the view that 'though these natural laws touch one of the most vital of human activities they obviously do not exhaust the whole of man's moral life. They have nothing to say on such topics as polygamy, the study of Marx, the worship of God, the progressive income tax, or the subjugation of women. If the question be raised whether any of these subjects, or others like them, should be taken as objects of legislation, that question relates to what I have called the external morality of law'.[21] Fuller's second set of moralities contains what he calls the "external morality of law" and the "internal morality of law." The "internal morality of law" is essentially concerned with the procedure of making law. It is the technique used by the lawmaker in deciding which rule of substantive law should be applied to the particular case, which he has been called upon to decide.

The "external morality of law" refers to the content of the substantive rules of law, which are actually applied by the arbiter in arriving at his decision. Just as at times it is difficult to clearly distinguish between adjective and substantive law, so too one may find Fuller's distinction between "external morality" and "internal morality" lacking the kind of specificity that might be desirable. Fuller admits the absence of such precision, finding it to be unavoidable due to the structure of our legal system.[22] Fuller also comments that what he has called 'the internal morality of law is in this sense a procedural version of natural law, though to avoid misunderstanding the word "procedural" should be assigned a special and expanded sense so that it would include, for example, a substantive accord between official action and enacted law. The term "procedural" is, however, broadly appropriate as indicating that we are concerned, not with the substantive aims of legal rules but with the ways in which a system of rules for governing human conduct must he constructed and administered if it is to be efficacious and at the same time remain what it purports to be.[23]

[19] Hart, H. and Fuller, L. (1965). The Morality of Law. *Harvard Law Review*, 78(6).

[20] See 16 above

[21] See 1 above

[22] Tucker, E. (1965). The Morality of Law, by Lon L. Fuller. *Indiana Law Journal*, 1(1).

[23] See 1 above

Fuller's Internal Morality: Does the Legal System Becomes More Morale with It?

The Sri Lankan Experience with a comparative analysis

The very notion of 'a legal system' implies that a legal order is in some significant sense a unity, even if it is a complex unity. Clearly, the degree to which the norms of a legal order are traceable to a modicum of hierarchical arrangement may assist us to think of it as unity, and even moderate success in such arrangements promotes coherence in further legal development.[24] In a Sri Lankan context many different systems of laws have affected the development of the law. These are Sinhalese law (today more commonly referred to as Kandyan law), Buddhist law, Hindu law, *Tesawalamai* law, Islamic law, Mukkuvar law, Roman Dutch law and English law. An individual may in respect of different transactions or legal relations, be governed by different systems of law. Problems have arisen as a consequence of the overlap of the different systems.[25]

The Constitutional Structure

As a country, which has a written constitution, it is incumbent to first look at our constitution to find out how it has accorded with the principles of internal morality and its degree of compliance. The 1978 constitution being a sui generis one articulates for a unitary and a sovereign state.[26] The law making power is mainly granted to the legislature which is called the Parliament. In some particular instances the President is also granted with some powers to enact legislation with certain limitations. As for the enactment of laws, the constitution vests the authority to do so with the parliament. Under Article 75, the parliament is empowered to make laws, including laws having retrospective effect and repealing or amending any provision of the Constitution. However Article 13(6) enacts that no person is to be guilty of an offence, if the offence was not, at the time when it was committed deemed as such. However the proviso to that same section does allow penalizing a person for an offence which was not deemed as punishable if it was criminal according to the general principles of law recognized by the community of nations. In *Ekanayake v. The Attorney General*, [1987], the court had to decide the retrospective implementation of a penal statute 'Offences against Aircraft Act No, 24 of 1982'. Here the dependent was charged with hijacking an airplane, which was at the time not considered as an offence. However, when the above Act was promulgated it was to have effect from 1978 and therefore, the dependent could be held responsible as the Act was committed in 1982. Deciding that this was good law the Court of Appeal held that the act, which the accused is alleged to have committed, has now been recognized as an offence under the Act.

According to the precepts postulated by Fuller this would be contradictory, however apart from being retrospective in effect; all the other precepts postulated by Fuller would have been fulfilled in this occasion and hence could be given the proper label of 'law'. Then perhaps the most fundamental reason why retroactive

[24] Stone, J. (1964). *Legal system and lawyers' reasoning's*. 1st ed. Delhi: Universal Law.

[25] Cooray, L.J.M. (2003). *An introduction to the legal system of Sri Lanka*. 2nd ed. Pannipitiya, Sri Lanka: Stamford Lake.

[26] 1978 Constitution of the Democratic Socialist Republic of Sri Lanka

legislation is suspect stems from the principle that a person should be able to plan his conduct with reasonable certainty of the legal consequence.[27] On a comparative basis with regard to South Africa, Section 35(3) of the **South African Bill of Rights** prohibits ex post facto criminal laws, except that acts which violated international law at the time they were committed may be prosecuted even if they were not illegal under national law at the time. In India, without using the expression "Ex post facto law", the underlying principle has been adopted in the Article 20 (1) of the Constitution of India where it enacts that 'No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence.'

Fuller asserts that the evil of the retrospective law arises because men may have acted upon the previous state of the law and the actions thus taken may be frustrated or made unexpectedly burdensome by backward looking alteration in their legal effect.[28] On a general account we can say that with regard to the constitutions, there is a general reluctance in allowing for retrospective implementation of legislation. So on Fuller's own accord, the precept of law not being of retrospective effect has been duly recognized in many of the constitutions even if it is subject to some limitations. With regards to the promulgation of the laws, Article 78 enacts that bills which are to become law must be published in the Gazette at least fourteen days prior to it been placed on the Order Paper of Parliament. This gives the citizen the opportunity to look at the contents of the bill and to seek out the inconsistencies with the constitution. Furthermore, by virtue of Article 121 every citizen has the right before seven days has been lapsed from the date when the bill was put in to the Order Paper of Parliament to invoke the exclusive jurisdiction of the Supreme Court with regard to the consistency of such a bill with the provisions of the constitution. Here the Supreme Court is given a maximum of three weeks to determine the matter.

These provisions accords well with the precepts advanced by Fuller. Here the citizens are entitled to know the contents of the law before it is enacted and to have a say in it as well. Here the problem faced by the hypothetical Rex has been to some extent solved. However, the sweeping provision contained in Article 122 of the constitution regarding emergency bills takes much of the light shone by the Article 121. If a bill is endorse to the effect that it is an urgent bill with the other requirements being fulfilled, such bills will not be published in the Gazette and the Supreme Court is only given twenty four hours to determine the bill's constitutional consistency. This is like the Rex promulgating laws in secrecy, which does not accord to the precepts set forth by Fuller. It is also noteworthy to point out the irony of the 18th Amendment made to our constitution. The bill was deemed urgent in the national interest in order to expedite its progress through the legislature. Yet, there were no compelling reasons why the 18th Amendment was urgent or in the national interest. The Supreme Court as a superior court with special responsibilities as the custodian of

[27] Hochman, 1960

[28] See 1 above

the Constitution took little note of the shortcomings in neither the process nor the substance of the 18th Amendment.[29] This clearly shows the abuse of procedures and the lack of the precepts of Internal Morality advocated by Fuller remedying them. It is a clear-cut scenario where the substance is violated while the procedures have been protected.

In relation to the *Thirteenth Amendment to the Constitution and the Provincial Councils Bill*, [1987] Wanasundera J, made the remark that even in their ordinary day to day work, in cases of no great importance, we are accustomed to take five to six weeks after the conclusion of the hearings to deliver our judgment. In a case of this magnitude and importance, the time allotted seems therefore totally inadequate to attend to it, as we would wish. Since the case concerned about the whole structure of the constitution it seems clear that the issue was decided more on political pressure than on the merits of law and on Fuller's account the internal morality of the law could not have prevented such an atrocity. Here the constitutionality of the act could have been accorded with Fuller's precepts of internal morality as fuller's precepts accord more with procedure than substance but on a note of constitutionalism which is of substantive value belonging to the external morality as for it would have been a total failure. However, the Indian counterpart in *Kesavananda Bharati v. State of Kerala*, [1973] it was held that there are certain principles within the framework of Indian Constitution that are inviolable and hence cannot be amended by the Parliament. These principles were commonly termed as *Basic Structure*. Here the Supreme Court as the fundamental protector of the constitution, properly evaluated the whole structure of the constitution and found its virtues and values embodied in its preamble. This decision has been deemed as the savior of Indian Constitutional Democracy.

According to Article 80(3) once a bill becomes law by the certification either by the president or the speaker, the validity of such law cannot be questioned by any Court for any reason whatsoever. According to the Fuller's Precepts this would help to keep the law stable, as he states 'of the principles that make up the internal morality of the law, which demands that laws should not be changed too frequently seems least suited to formalization in a constitutional restriction'. If the laws validity is to be questioned at any time whatsoever, then the people will not be able to conduct their affairs in a proper manner. However, the Courts have on instances through its interpretative capabilities has done what the constitution has specifically told not to. In *H.C.Anuradhapura Case*[30] regarding the mandatory sentencing of 10 years for offenders found guilty on an account of statutory rape, the court held that "the minimum mandatory sentence in Section 362 (2)(e) is in conflict with Article 4(c), 11 and 12(1) of the Constitution and that the High Court is not inhibited from imposing a sentence that it deems appropriate in the exercise of its judicial discretion notwithstanding the minimum mandatory sentence." It is also noteworthy to regard the Fundamental jurisprudence of the Supreme Court as well. Most critiques

[29] Edirisinghe, 2011

[30] H.C.Anuradhapura Case[30] No.333/2004, [2008]

argue that the Sri Lankan Constitution does not grant many of the rights granted by other countries, such as the right to education granted under Article 21A of the Indian Constitution. However to overcome this atrocity, the Supreme Court has used its interpretive powers with regards to Article 12 which relates to the equal protection of law. In a remarkable piece of reasoning in *Watte Gedera Wijebanda v. Conservator General of Forests and Others*, [2009] the court held that even if environmental rights are not specifically alluded to under the fundamental rights chapter of the Constitution, the right to clean environment and the principles of equity with respect to the protection and preservation of the environment are inherent in a meaningful reading of Article 12(1) of the Constitution. In this regard it can be seen that though the Supreme Court has parted from a positivistic to a more natural law based interpretative approach, it can be hardly said that the precepts of Fuller's Internal Morality could have helped them to reach such decisions.

Fuller asserts with regard to the United States where 'A continuing debate in this country relates to the question whether in interpreting the Constitution the courts should be influenced by considerations drawn from "natural law".[31] Fuller cites *Perez v. Sharp*, [1948] where a statute preventing the marriage of a white person to any Negro, Mulatto, Mongolian or member of the Malay race was held unconstitutional on the basis that the constitution needs clarity. The court observed that marriage is a fundamental right in a free society; the state may not restrict this right with respect to restrictions based upon the race of the parties. However, in *Pace v. Alabama* [1883], court decided that the criminalization of interracial sex did not violate the equal protection clause of the Fourteenth Amendment because whites and non-whites were punished in equal measure for the offense of engaging in interracial sex. It thus seems clear that the precepts advocated by Fuller have generally being adopted by many of the Constitutions in various degrees. While on the procedural aspects the theory advanced by Fuller has been there on the Constitutional document the application of the law has not always accorded with what is written in the black letter of it.

However, it seems that Fuller knew of this defect from the outset, in his earlier writings Fuller has asserted to the fact that 'classical natural law theory cannot convince us that law can actually be pure reason; it cannot supplement the need for authority for a deciding power. But equally importantly, positivism cannot convincingly portray law as pure fiat, because the legal outcomes of judicial decisions cannot be understood except in light of reasons for the decision.'[32] In the above analysis we can also point out that the precepts advocated by Fuller do not give a clear understanding as to the substance of the decision, which from the beginning seems to be the problem.

[31] See 1 above

[32] Cotterrell, R. (1989). *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy*. 1st ed. London: Butterworths.

Fullers Precepts under General Application of Law in Various Fields: A Comparative Analysis.

Now on the final analysis it would be necessary to find out how the Fuller's precepts can have value on the fields such as Family, Tort, Contract, Trust and Contract law. Could any moralistic life be shown in to those fields by the internal morality of law? In the realm of Family law, one great issue face by the Sri Lankan Jurisprudence is with the grounds for divorce. Under the Marriage Registration Ordinance No 19 of 1907, it lists out three grounds for dissolution of a marriage under section 19(2) which is based on fault of either of the parties. On the other hand the Civil Procedure Code enacts that a decree of judicial separation may be converted to a decree of divorce after the lapse of two years under section 608 (2) (a) and that a mere separation (*a mensa et thoro)* for a period of seven years is sufficient to institute an action for divorce under section 608 (2) (b). It is interesting to note that the Sri Lankan divorce laws, as set out in Civil Procedure Code, are an innovation which does not resemble either the South African or the English law Position.

Both the Divorce Act No 70 of 1979 of South Africa under section 4 and the Matrimonial Causes Act of 1973 under sections 1(1); (2) require proof if irretrievable break down of the marriage as a prerequisite for the award of a decree for divorce.[33] Under this confusing state of affairs it would be relevant to see how the courts reacted to this shift from a fault based divorced to a one that was based on something similar to a irretrievable breakdown of a marriage as postulated in the Civil Procedure Code. So in *Tennekoon v. Somawathie Perera Alias Tennekoon* [1986], it was held that the words -either spouse in section 608 (2) of the Civil Procedure Code must be understood as referring only to the innocent spouse for the purpose of the relief of divorce under section 608(2) (a) or section 608(2) (b) of the Civil Procedure Code. It was further held that, it is incumbent on a spouse seeking a divorce under section 608(2) of the Civil Procedure Code on the ground of separation for a period of seven years to establish matrimonial fault. Only a procedural change enabling summary procedure to be used instead of a regular action was effected by section 608(2) of the Civil Procedure Code.

Here on an analysis of Fuller the law enacted in the statute and its application is of two totally different natures. Fuller asserts that the most complex of all the desiderata that make up the internal morality of the law [is the] congruence between official action and the law. This congruence may be destroyed or impaired in a great variety of ways: mistaken interpretation, inaccessibility of the law, lack of insight into what is required to maintain the integrity of a legal system, bribery, prejudice, indifference, stupidity, and the drive toward personal power.[34] However, on a different footing we can't always argue that the congruence between official action and the law will always give moralistic results. In *Smit v. Smit* [1982] the court granted the divorce for a husband under the section 4 of the Divorce Act No 70 of 1979 which relates to the

[33] Ponnambalam, 2003

[34] See 1 above

irretrievable breakdown of a marriage in South Africa. Here the wife was in institution for infirm persons for a period of five years and there was no hope of her getting back on with her life. In *Kruger v. Kruger* [1980] where the husband was living in adultery for a period of 27 years while being married to his wife for 40 years, the husband filed for divorce but the wife was unwilling to give the divorce because of her religious beliefs and was quite willing to settle back with the husband. Nonetheless court granted the divorce on the ground of irretrievable breakdown of the marriage.

When we take the above decisions together we may find in our conscious that the Sri Lankan case has more moralistic value than the two decisions of averred in South Africa. We may put it more blatantly in saying though the two decisions of the South African Courts goes well with the Fuller's theory based Internal Morality of law while being more immoral on the face of it. Another problematic area with regard to the family law is the difference between age of marriage and the age of consent for sexual intercourse. While under section 15 of the Marriage Registration Ordinance No 19 of 1907 declares that no person who is under the age of eighteen is to get married, under section 363 (e) it enacts that it is an offence to have sexual intercourse with a girl even with her consent if she is below the age of sixteen. This according to the precepts of Fuller may be deemed as an inconsistency in the law where these two ages are not level out. According to Fuller it is rather obvious that avoiding inadvertent contradictions in the law may demand a good deal of painstaking care on the part of the legislator. What is not so obvious is that there can be difficulty in knowing when a contradiction exists, or how in abstract terms one should define a contradiction. It is generally assumed that the problem is simply one of logic. A contradiction is something that violates the law of identity by which A cannot be not A.[35]

A clear example of the above can be found in *Gunaratnam v. Register General* [2002], here the issue was the contradictory amendments made to the Marriage Registration Ordinance No 19 of 1907. An amendment made in 1995 made the age of marriage at 18 but with a subsequent amendment made in 1997 it was enacted that a person who is under the age of 18 could get married with the parental consent. Delivering the judgment in the Court of Appeal, Tilakawardane J stated that, section 22 of the Marriage Registration Ordinance has also been amended by the Marriage Registration (Amendment) Act No. 12 of 1997. It appears that the framers of the law did not consider the implications of the Marriage Registration (Amendment) Act No. 18 of 1995, when they enacted the amendment to section 22 of the Marriage Registration Ordinance. And further elaborated on the matter by stating since the prohibited age of marriages has been raised to 18 years of age, the absolute bar to marriage must necessarily override the parental authority to give consent to the marriage of a party. It was not relevant whether parents agreed or did not agree to the marriage of their children, only persons who had completed 18 years of age could enter into a valid marriage.

[35] See 1 above

Another situation where the contradictions have been exploited can be seen in *Attorney General v. Reid* [1964], here according to the Section 64 of the Marriage Registration Ordinance, it defines a marriage as any marriage except marriages contracted under the Kandyan Marriage and Divorce legislation and marriages contracted between persons professing Islam. Since in Reid's case his second marriage was held to have been a marriage contracted between persons professing Islam it did not fall within the definition of marriage in section 64 and was therefore not invalid by virtue of the section 18 which states that no marriage shall be valid where either of the parties thereto shall have contracted a prior marriage which shall not have been legally dissolved or declared void. If this line of reasoning was to be accepted as the valid law it would be very much in disfavor of all women as only men are allowed to have more than one wife and any person who had contracted a marriage under the Marriage Registration Ordinance No 19 of 1907 could by a unilateral conversion to Islam legally contract a valid second marriage. However in *Natalie Abeysundere v. Christopher Abeysundere and Another* [1998] overruling the decision in Reid, the court observed that there is no question that Reid was free to change his faith, but the true question which arose for decision was whether Reid could cast off the statutory obligations which directly arose from his previous marriage in terms of the Marriage Registration Ordinance by the simple expedient of unilateral conversion to Islam. Could he by his own act overcome the incidents of the marriage he chose to contract in terms of the Marriage Registration Ordinance? In my view, the answer is emphatically in the negative.

The Privy Council in Reid's case did not focus on the crucial question whether by a unilateral conversion to Islam subsequent to a lawful marriage in terms of the Marriage Registration Ordinance Reid could absolve himself of the statutory liabilities incurred and the statutory obligations undertaken by him. The Privy Council overlooked the fact that the "rights" of Reid were qualified and restricted by the legal rights of his wife whom he married in terms of the Marriage Registration Ordinance. Here the contradictions in law were finally cured by the intervention of the judiciary by its interpretative techniques. However it would be hard to reconcile the Internal Morality or its precepts aptly to overcome the situations envisaged above. If the law allows you to go through its holes it could not be said that one has a duty not to do so and only the morality of aspiration could help to avoid such absurdities. Nonetheless the thresholds of morality to reach that kind of standard or to expect the individual to conduct his affairs in such manner do not seem plausible.

Another instance where the precepts of Fuller may be tested can be found in the law relating to the presumption of legitimacy. According to the section 112 of the Evidence Ordinance the fact that any person was born during the continuance of a valid marriage between his mother and any man or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that such person is the legitimate son of that man, unless it can be shown that that man

had no access to the mother at any time when such person could have been begotten or that he was impotent. The statutory presumption of legitimacy in Sri Lanka and India that was inspired by Common law incorporates the maxim *pater est quem nuptiae demosntrant* and is clearly an indication of the law's concern that the status of legitimacy should be protected.[36] Here the word 'access' is of utmost importance and in *Wijesundera v. Wijekoon* [1990] it was held that that the word "access" means not only actual intercourse but also personal access under circumstances that raise the presumption of actual intercourse. This would in event make the presumption more in favor of the legitimacy and the scale or the tip of the balance would be in favor of the child than that of the farther but if we are to evaluate the moral value of such a decision then the precepts provided by Fuller would not be of a much guide as it only speaks of the duty which does not encompass a moral scale in the substantive field.

In the field of Tort/Delict one of the precepts advanced by Fuller and that of law being not too burdensome/law requiring the impossible has found its place. Fuller advocates that on the face of it law commanding the impossible seems such an absurdity that one is tempted to suppose no sane lawmaker not even the most evil dictator, would have any reason to enact such a law.[37] Regarding the attribution of responsibility, Fuller states that the principle that the law should not demand the impossible of the subject may be pressed toward a quixotic extreme in which it ends by demanding the impossible of the legislator. It is sometimes assumed that no form of legal liability can be justified unless it rests either on (l) intent to do a harmful act or (2) some fault or neglect. If a man is held accountable for a condition of affairs for which he was not to blame-either because he intentionally brought it about or because it occurred through some neglect on his part-then he has ascribed to him responsibility for an occurrence that lay beyond his powers.[38]

However, with regard to the law relating to strict liability this perception changes as it is based on non-fault liability. In *Rylands v Fletcher* [1868], where it was held where a person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. This may look like a too much of a toll to bear but according to Fleming,[39] the hallmark of strict liability is therefore that it is imposed on lawful not reprehensible activities. The activities that qualify are those entailing extraordinary risk to others, either in the seriousness or frequency of the harm threatened. In any event much of the strictness of strict liability has faded with time, commenting on *Read v. Lyons* [1947], where it was held that there must be an escape of the dangerous substance from land under the control of the defendant to a place outside and since substance caused the damage within the premises where the substance was stored and there being no escape, the strict

[36] Gunasekera, S. (1987). *The Sri Lanka Law on Parent and Child*. 1st ed. Colombo: MD Gunasena

[37] See 1 above

[38] See 1 above

[39] Fleming, J. (1992). *Law of Torts*. 8th ed. Sydney: LBC.

liability was denied. Fleming asserts that the said decision prematurely stunned the development of a general theory of strict liability for ultra-hazardous activities.[40] Furthermore, the final nail in the coffin was placed with the decision in *Cambridge Water Co Ltd v Eastern Counties Leather PLC* [1994], where it was held that it was not reasonably foreseeable that the spillages would result in the closing of the borehole. The foresee ability of the type of damage is a pre-requisite of liability in actions of nuisance and claims based on the rule in *Rylands v Fletcher* in the same way as it applies to claims based on negligence. Here through the development of judicial precedents the law relating to the Strict Liability has been brought down to an extent that it does not demand the impossible to be performed by the individual. Here surprisingly so the virtues found on Fullers precepts have accomplished what it desired of that being law not demanding the impossible to be performed.

This precept is equally demonstrated in the concepts of Duty of care found in the English law and its equivalent the wrongfulness in the South African Law. These two concepts also restrict the responsibility one has on another. However they have also been expanded on some occasions as well. Under English law the development of nervous shock can be seen as an instance where this has been done so. Especially with regards to secondary victims or persons not directly involved with the act itself at the time of occurrence. In *McLoughlin v O'Brian* [1983] it was held that due to her close relationship with her family members the lapse between the accident and its aftermath felt by the victim when she saw the deceased and the wounded in the hospital several hours later from the time she heard the accident did not negate the victims ability to claim damages under nervous shock. With regard to the South African law the cornerstones relating to wrongfulness have been expanded to include claims for pure economic loss under the Aquilian Action. Burchell[41] asserts that however the protection of pure economic interest, however involves the difficult problem of imposing theoretical and practical limitations so as to keep liability within reasonable limits. However in *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* [2006], it was stated that in a case like the present where the claim for pure economic loss falls outside the ambit of any recognized category of liability, the first step is therefore to identify the considerations of policy that are of relevance. It was held that the Aquilian Action is capable of supporting a claim based on pure economic loss if the policy considerations do not contradict such a finding.

In a Sri Lankan Context in the leading case of *Prof Priyani Soyza v. Rienzie Arsecularatne* [2000], the court held that Lex Acquilia permits the grant of patrimonial damage. If loss of care and companionship as such should attract compensation it is for the legislature to make necessary provision and that the court were not authorized to alter the materials of Roman Dutch law but was only permitted to iron out it creases. In the above analysis it seems clear that the

[40] See 39 above

[41] Burchell, J. (1993). *Principles of Delict*. 1st ed. Cape Town: Juta.

standards required by the law on general have been brought to tolerable levels both by the legislature and by the judiciary. With regards to this Fuller's precept regarding the fact that the law should be bearable has been accorded its recognition. Then again when it comes to other precepts such as the clarity of law, in fields such as contract and commercial law where so many technical terms and words are used, it has even at times being difficult for lawyers to understand its terms. Furthermore the clarity has been very much lacking with regards to Banking, Bills of Exchange, Trust, Finance laws and etc. Fuller does assert that the desideratum clarity represents one of the most essential ingredients of legality.

Though this proposition is scarcely subject to challenge, Fuller is certain that it always understand what responsibilities are involved in meeting this demand.[42] Fuller also asserts that it is easy to assert that the legislator has a moral duty to make his laws clear and understandable. However these remains at best, an exhortation unless we are prepared to define the degree of clarity he must attain in order to discharge his duty.[43] However because of the complexities of the modern society and due to the huge number of statutes that are being implemented from sanitation to cybercrimes the clarity of the law has to give away to the more formal demands of justice. The more formal demands of justice require that the law should govern most of the human conduct that has arisen new. With the development of technologies, the human life has changed more than ever it seems and the precepts advanced by Fuller do seem to be outdated and inadequate to meet the present demands of the legal order. Further, to discard any thing that fails the thresholds advocated by Fuller seems at best to be very dangerous. What Fuller's theory lacks as with all the other natural law theories is the fact of evaluating the substance of the laws so enacted. Fuller's theory it seems would accord more towards a formal positivistic approach in that the precepts will enable the legal system to declare that whatever is passed in accordance with those precepts must be labeled as law and must be adhered to.

Conclusion

Hart attacks Fuller's theory in full disdain in the following manner so far so good but the author's insistence on classifying these principles of legality, as a "morality" is a source of confusion both for him and his readers. The objection that the description of these principles as "the special morality of law" is misleading because they are applicable not only to what lawyers think of as law but equally applicable to any rule guided activity such as games (or at least those games which possess rule-making and rule-applying authorities) would no doubt be rejected by the author: he would simply appeal to his wide conception of law as including the rules of games. Nevertheless the crucial objection to the designation of these principles of good legal craftsmanship as morality, in spite of the qualification "inner," is that it perpetrates confusion between two notions that it is vital to hold apart: the notions of purposive activity and morality. Poisoning is no doubt a purposive activity, and reflections on its purpose may show that it

[42] See 1 above

[43] See 41 above

has its internal principles. ("Avoid poisons however lethal if they cause the victim to vomit," or "Avoid poisons however lethal if their shape, color, or size is likely to attract notice.") However to call these principles of the poisoner's art "the morality of poisoning" would simply blur the distinction between the notion of efficiency for a purpose and those final judgments about activities and purposes with which morality in its various forms is concerned'.[44]

When critics argued that a regime could follow those principles and still enact wicked laws, Fuller stated that he could not believe that adherence to the internal requirements of law were as consistent with a bad legal system as they were with a good legal system. However there have also been regimes generally condemned as evil, which have at least at times been quite meticulous about legal procedures (South Africa before the fall of the Apartheid or East Germany before the fall of Communism may be examples). Since the principles of legality can be understood as guidelines for making the legal system more effective in guiding citizen behavior, wicked regimes would also have reasons to follow them. Thus, while following the principles of legality is it-self a moral good whilst it may indicate a government committed to morally good actions, and may hinder base actions, it is probably claiming too much for those principles to say that following them would generate a substantively just system.[45] It thus seems very clear that since Fuller's articulation of his thesis based on the Internal Morality of law being one of procedure than of substance it has failed to adequately find the moral value that is going to be inherent in a legal system. According to Morrison[46] Fuller's theory tells us that our task is not to align law to some perceived natural uniformity of humanity but rather to align it to the continual search for social betterment. However as sated earlier by Hart, Morality and Purpose are different species and the purpose of law is not always moral and it would be too much to expect that all purposes of the law must fit in to a moral dimension. All in all Fuller's Internal Morality of the law has not helped much to evaluate the degree of moral aspirations that is inherent in a legal system as the formula put forward by Fuller is incapable of achieving its goal. It is tough like we know there is a line, a threshold that lies between duty and aspiration yet we don't know where it lies and the Internal Morality of law neither guides nor tells us authoritatively where we may find it.

[44] See 19 above

[45] See 3 above

[46] See 16 above