SRI LANKA LAW ON PARENT AND CHILD

SAVITRI GOONESEKERE

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This book is a comprehensive and in-depth study of an important but neglected area of Sri Lankan Law. It deals with topics such as custody, maintenance, legitimacy and adoption, and critically discusses the Roman-Dutch law and customary laws as modified by English law and local statutes. It contains all the important judicial decisions on the subject from the early part of the nineteenth century, and introduces comparative material from Western Europe, Asia and Africa. The topics are dealt with not merely for setting out legal principles but also to assess the law in the context of changing social values. The book is a valuable contribution to studies on Sri Lankan law.

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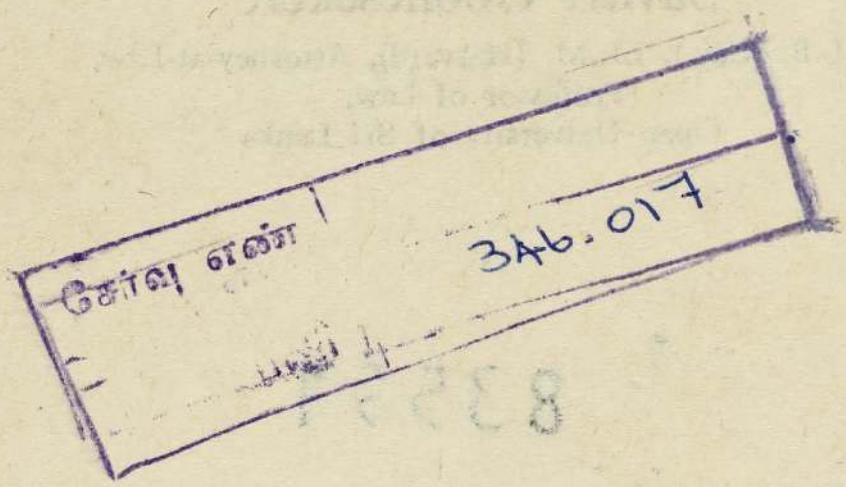

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to

the cherished memory of my father

DHANUSEKERA BANDARA ELLEPOLA

and

for my mother

GLADYS PANABOKKE ELLEPOLA

with gratitude for the inspiration of their lives,
and all the years of companionship and caring

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"Amongst few people I believe are family attachments more strong and sincere; there is little to divert or weaken them; and they are strengthened equally by their mode of life and their religion."

J. Davy:

An Account of the Interior of Ceylon (1821)

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ERRATA—TEXT

Page 16 para 2 line 9 application

Page 17 para 2 line 5 prerogative

Page 28 para 1 lines 10 to 11 Malabars

Page 31 para 2 line 17 determine

Page 51 para 1 line 1 spouses

Page 88 para 2 line 15 valid

Page 89 para 1 line 3 respect

Page 94 para 2 line 20 It has

Page 100 para 2 line 23 public

Page 100 para 2 line 25 in the event of

Page 102 para 2 line 16 adjudged

Page 187 para 3 line 4 discretion

Page 191 para 2 line 19 Registrar General's

Page 221 para 2 line 4 circumstances

Page 281 para 3 lines 6 and 7, who, enter

Page 295 para 2 line 8 considered

Page 298 para 1 line 12 enacted

Page 298 para 1 line 13 delete " or next friend" and interpolate "but can be a next friend"

Page 309 para 2 line 7 led

Page 385 para 1 line 1 certified

Page 420 para 2 line 9 plaintiff

Page 429 para 2 line 12 courts have

Page 444 para 1 line 6 District

Page 449 para 2 line 11 of

Page 451 para 1 line 14 contrary

Page 453 para 2 line 11 Hanafi

Page 458 para 1 line 5 Quazi

Page 466 last para line 2 extent

Page 483 para 2 line 13 personal law.

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Chapter I
Note 22c. Cader v. Pitchai (1916) 19 NLR 246
99a. Sivasothilingam (1978) 79 2 NLR 1
203. line. 1 Dingiria (1907) 10 NLR 371

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Note 32. (1908) 11 NLR 171
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Note 5a. 1895
46. (1972) 76 NLR 56 (C.A.)
50. line 1 (1966)
57. last line SALR 117
92. line 2, 682 per Lord Denning M.R.

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Note 43. K.M.D. Act s. 3 (i)

Chapter V
82. s. 28 (3)

Chapter VI
63. Delete s. 71 (1) (6) and insert Schedule I
70a. Ainsbury (1929) A.D. 119
78e. Olive Stone
84. line 2 S.C.C.
168b. line 2 (1908)
169. line 1 insert (1932) after Fernando *v.* Fernando

Chapter VII
Note 4. C.O.
32. Matara.
line 4 (1966) 66 NLR 215
61. line 3 insert 29 NLR 408 after (1927)
71. P.C.

Chapter VIII
Note 12. Deerasekera
43. Natchia

Chapter IX
Note 16a. Niyarupola (1937) 44 NLR 476
Note 22. obsolescence
35. line 2 s. 3 (6)
last line, add Citizenship Act No. 18 of 1948
47. Stockdale
50. s. 3 (6)
110a. (1937) 44 NLR 476

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Chapter X

Note 64 Parupathi v. Chellappa
Note 68 delete question mark and bracket and insert n.d. in bracket i.e. (n.d.)
115 (1973)
136 (1834)
138 line 3 36 NLR 273
189 Natchia
220A last line add See Chapter IX note 57
221 line 1, AER

Chapter XI

Note 8B Capitals in line 2 and 3

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PREFACE

The idea of writing a book on the Sri Lanka law of parent and child began to interest me when I lectured on the Law of Persons and Property at the Faculty of Law of the University of Sri Lanka, Colombo. The course at the Faculty focused exclusively on the Roman Dutch law based General law of Sri Lanka. The laws that applied to the relationship of parent and child were therefore considered as attributes of legal status such as legitimacy minority and parentage, all of which fell within the ancient Roman, and subsequent Roman Dutch law classification of the Law of Persons. It occurred to me that there were serious limitations in dealing with the laws governing what is an undoubtedly important legal relationship in the modern law of Sri Lanka, in this manner. I therefore decided to extract the relevant topics in the Law of Persons, shift the focus away from the concept of status, and deal with them in the context of laws governing parent and child. This inevitably led to the awareness that the General law was such an incomplete facet of the Sri Lanka law on the subject, and that no study of this area of our law would be complete without an understanding of the Customary laws that apply to the relationship of parent and child. What began as an effort to give my students a different perspective of their traditional course on the Law of Persons, turned out to be, for me, an absorbing research project. This book presents the results of my study—a study of what I considered the most important facets of the General and Customary law on parent and child in Sri Lanka.

The law of Sri Lanka itself affords a wealth of fascinating source material of comparative interest, derived as it is from Roman-Dutch law, English law, Islamic law, and two indigenous systems, the Kandyan law and Tesawalamai. Family law has been the subject of constant review and reform in many legal systems, and I found that comparative developments and trends helped me to see in better perspective both the existing law and the issues involved in future reform. I have introduced the comparative material, adopting an eclectic attitude to these sources, and selecting what I considered to be of interest to us in Sri Lanka. I have also devoted some attention to the historical background of legislation in Sri Lanka where I thought this might help to elucidate important features of the existing law.

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This part of my work was a pleasant and stimulating experience for me because I was fortunate to meet with foreign scholars on Family law, and have access to libraries in London and the Public and Commonwealth Records Office there, in 1972-1973, and on subsequent visits. I was able to spend some time in London, due to the assistance received from the Commonwealth Universities Commission which awarded me a fellowship to spend one year's sabbatical leave from the University of Sri Lanka, Colombo, at the School of Oriental and African Studies. The arrangements made for me with the kind assistance of Miss James, who was responsible for the Commission's programme at this time, enabled me to meet and become acquainted with the work of Professors J. D. M. Derrett and A. Allott—two well known authorities on Indian and African law. Professor Allott very kindly arranged for me to attend the advanced legal seminars for faculty members at the School of Oriental and African Studies, and the seminars on Family Law conducted by Dr. Olive Stone at the London School of Economics. This exposed me to stimulating discussions of current trends in English, African and Asian Family law. I wish also to acknowledge the assistance I received from the staff of the Institute of Advanced Legal Studies in London, during this time, and on later private visits. Access to the Kennedy library at Ahmadu Bello University, whose Faculty of Law I joined in 1977, helped me to complete the work on this book.

A short while after I submitted the manuscript to the press, the Judicature Act was modified by an amendment which came into force in November, 1981. The jurisdiction of Family Courts under the Judicature Act is now exercised by the District Courts. Distinct Family Courts, no longer exist in Sri Lanka. Magistrates Courts have reacquired jurisdiction in maintenance proceedings. Family counselling is a procedure which is optional for litigants in Family Court proceedings. These amendments reflect the failure of the short experiment with establishing distinct and to some extent non-adversarial legal proceedings to deal with these matters.

When she saw me assemble the final manuscript together, our small daughter remarked that she would never write a book when she grew up because it takes so much time and cellotape! To her and to our older children I owe much for creating an atmosphere in our home for both work and relaxation. My parents and

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mother-in-law shared and assumed the responsibility of looking after our children during my absence, with abundant affection and generosity. To them I owe a deep debt of gratitude. It is with special appreciation that I record my indebtedness to my husband for his help and encouragement. At a time when there were no books on the Sri Lanka law on the subject, his well researched lectures on the Law of Persons and Property at the University provided me and other Sri Lankans with the foundation for our later studies. His insight, and his study of the law of marriage in Sri Lanka stimulated me to research in the area of Customary law that was quite unfamiliar to me.

When Sri Lankan folk poetry recorded that to a child, 'father is like the Tal Kitul tree on his threshold, and mother, the flower on that tree', it was reflecting in a local idiom and image the relevance of the distinct parenting roles of a man and a woman, and a harmonious relationship between them, for the emotional security of a young child. An enlightened legal system must admittedly take account of the reality of broken and single parent families, and the pressures placed on traditional values in regard to family relationships through social and economic change. Nevertheless it cannot lose sight of the need to strengthen the concept of caring and responsible family relationships. The fact that the legal system and the law inevitably has to make rules in respect of the malfunctioning unit does not necessarily require us to reassess our vision of the satisfactory relationship. If this book is able to focus on an area of Sri Lankan law that has hitherto received little attention and stimulate inquiry, it would have achieved something besides the satisfaction I have derived from working on it.

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ABBREVIATIONS

LAW REPORTS

Sri Lanka

Austin—N. J. Austin's Reports of Cases (1833—1859)

A.C.R.—Appeal Court Reports (1903—1910)

Bala. Rep.—K. Balasingham's Reports of Cases (1904—1910)

Bala. Notes.—K. Balasingham's Notes of Cases (1911—1916)

Beven & Siebel—E. Beven and E. L. Siebel (ed.) Reports of Cases (1877)

Br.—K. G. D. Browne's Report of Cases (1904—1910)

C.L. Rec.—Ceylon Law Recorder (1919—1948)

C.L. Rep.—Ceylon Law Reports (1889—1897)

C.L.R.—Ceylon Law Review (1899—1910)

C.L.W.—Ceylon Law Weekly (1931—1972)

C.W.R.—Ceylon Weekly Reports (1915—1920)

Grenier—S. Grenier's Reports of Cases (1872—1873)

Leader—Leader Law Reports (1907—1912)

Lor.—C. A. Lorenz's Appeal Reports (1860—1871)

Matara—O. L. de Kretser (ed.) Matara Cases (1906—1914)

Morg. Dig.—O. Morgan (ed.) Digest of decisions of the Supreme Court of Ceylon (1833—1842)

M.M.D.L.R.—Muslim Marriage and Divorce Law Reports (1962—)

N.L.R.—New Law Reports (1895—)

Rama.—Sir P. Ramanathan's Reports of Cases (1820—1877)

S.C.C.—Supreme Court Circular (1878—1891)

S.C.R.—Supreme Court Reports (1891—1894)

Sri L.R.—Sri Lanka Law Reports (1978—)

T.L.R.—Times of Ceylon Law Reports (1922—1942)

Vanderstraaten—J. W. Vanderstraaten's Reports of Supreme Court decisions (1869—1871)

Wendt—H. L. Wendt's Reports of Cases (1882—1883)

Weer./S.C.D.—E. D. Weerakoon's Reports of Supreme Court decisions (1908—1912)

Foreign

A.C.—English Law Reports (Appeal Cases) (1891—)

A.D.—Reports of the Appellate Division of the Supreme Court of South Africa (1910—1946)

A.E.R.—All England Reports (1936—)

A.I.R.—All India Reporter

C.P.D.—Cases decided in the Cape Provincial Division of the Supreme Court of South Africa (1910—1946)

Ch.—English Law Reports (Chancery Division) (1876—)

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Cowp.—Cowper's English Law Reports (1774—1778)

E.D.L.—Cases decided in the Eastern Districts Local Division of the Supreme Court of South Africa (1910—1946)

I.L.R.—Indian Law Reports

L.J. Ch.—English Law Reports, Law Journal, (Chancery Division)

M.I.A.—Moore's Indian Appeals (1836—1872)

N.R.N.L.R.—Northern Region Nigeria Law Reports —(1956—)

O.P.D.—Reports of the Orange Free State Provincial Division of South Africa (1910—1946)

P.—English Law Reports (Probate Division) (1875—)

Q.B.—English Law Reports (Queen's Bench Division)(1891—)

S.A.L.R.—South African Law Reports (1947—)

S.C.—Supreme Court Reports (Cape of Good Hope) (1880—1910)

Sim. & St.—English Law Reports, Simons and Stuart (1905)

T.L.R.—The Times Law Reports England (1884—1952)

T.P.D.—Cases decided in the Transvaal Provincial Division of the Supreme Court of South Africa (1910—1946)

T.S.—Cases decided in the Transvaal Supreme Court (1902—1910)

Turn. L.R.—English Law Reports, Turner and Russell (1832)

W.L.D.—Reports of the Witwatersrand Local Division of the Supreme Court of South Africa (1910—1946)

W.L.R.—Weekly Law Reports, England (1953—)

Journals

C.L.J.—Cambridge Law Journal

Cey. J.H.S.S.—Ceylon Journal of Historical and Social Studies

Col. L. Rev—Colombo Law Review Sri Lanka

I.C.L.Q.—International and Comparative Law Quarterly

J. Cey. L.—Journal of Ceylon Law

L.Q.R.—Law Quarterly Review

M.L.R.—Modern Law Review

N.Z.L.J.—New Zealand Law Journal

S.A.L.J.—South African Law Journal

U.C.R.—University of Ceylon Review

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CHAPTER I

THE APPLICATION OF THE LAWS ON FAMILY RELATIONS

An Historical Introduction

Colonized successively by the Portuguese, the Dutch and the British, Sri Lanka has derived her law not merely from indigenous sources, but from western laws introduced during the years of foreign rule. This has special significance for the law on family relations in this country, from which the law on parent and child is derived. Western concepts and legal rules have been used to govern relations between people in an area that could be anticipated as being most impervious to alien values.

Western writers on developments and reforms in family law in Asian countries now emphasize that the law must not be too far removed from the accepted social norms.[1] Probably due to the accident of its political history, Sri Lanka received the laws of a western colonial elite, and family relations have for over a century been governed by legal concepts and principles derived from the west. These concepts and principles themselves have been subject to radical change in the legal systems from which Sri Lanka inherited them. English family law for instance has been transformed by reforms that have introduced many principles familiar to the indigenous legal systems of this country. The concept of breakdown of the marriage as the foundation for divorce, family provisions for dependants, and a humane attitude to illegitimacy, which form the basis of these reforms were accepted legal values in the traditional law. Nevertheless in many areas of the modern law of Sri Lanka the old western legal values continue to prevail. The admonition of western observers of family law in Asian countries against the introduction of western oriented "over radical and modern" reforms in family law[2] has therefore little relevance for Sri Lanka. If these reforms were to inspire changes in the family law of this country, the development would only entail discarding some legal values received from the west, and re-instating "home-grown" concepts and principles.

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The scope and application of the indigenous and the received law has been profoundly influenced by one period in Sri Lanka's history—the British period of colonial government. It was an accepted canon of English constitutional law and colonial policy to introduce minimal changes in the existing legal establishments of a colonized territory, particularly in the sensitive area of family law. However, the history of British government in this country reveals that the colonial rulers were responsible for enlarging the place of the western laws, and restricting the area in which the indigenous laws applied.

The application of the varied systems of law that are found in Sri Lanka has been determined by the different policies with regard to administration of justice in the Maritime and Central Provinces, during the British period. The manner in which family relations are determined for the different inhabitants of this country can therefore be described only in the context of the laws that applied in the two regions that fell into British hands, at different times in the country's history.

1. The Law applied by the British in the Maritime Provinces of Ceylon

It is a fundamental concept of English law that the laws of a conquered or ceded territory remain in force unless and until they are altered by the sovereign. English law was only carried by British settlers into territories that were unoccupied, or occupied by people whose form of government was too primitive as to warrant recognition by international standards.[3] The Dutch had left a legacy of a civil administration in the Maritime Provinces, the region that initially came under British rule. Thus, British settlers were treated as immigrants in these territories, subject to the existing laws which were retained by a Proclamation of 23rd September 1799. This document stated that the administration of justice was to be "according to the laws and institutions that subsisted under the ancient Government of the United Provinces", subject to any later alterations or deviations.[4] The Proclamation thus ensured the continuity of the Dutch laws, and any indigenous law applicable to the native inhabitants. The actual extent to which the Dutch introduced their laws, particularly in respect of family relations, has been the subject of much

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academic controversy and debate.[5] Nevertheless the Proclamation of 1799 itself paved the way for the application of the Roman Dutch law during the British period, thus entrenching in the area of family relations, a western body of law derived from the Protestant Christian values of a western European culture, and from the ancient laws of Rome.

If the content and the scope of the application of the Dutch laws was not clear, the British were faced with an even greater problem in ascertaining the sources of the Customary law. The search for a record of these laws resulted in the promulgation of the Mohammedan Code of 1806, and the Tesawalamai Regulation of the same year. The former was described as a Code of the law concerning "Maurs or Mohammedans" observed by "the Moors in the Province of Colombo;" the latter a collection of the customs of the "Malabar Inhabitants of the Province of Jaffna."[6] Both Codes were based on compilations of Customary law made during the Dutch regime.[7] The customs and usages dealing with particular Tamil communities such as the Mukkuvars were also recorded and applied in the courts, though the first compilation of Mukkuvar law can be traced to the Dutch period.[8] By contrast the efforts at ascertaining the indigenous laws of the Sinhalese was not successful. In 1832, Sir Alexander Johnstone, who took a special interest in the compilation of Customary law was constrained to comment that "the ancient laws of these (Maritime) Provinces.....(are) the same as those which prevailed in the Candian Country.....they have however been completely obliterated, and but few of them are still to be traced in their original form".[9]

Queyroz's account of the law of marriage in the Maritime Provinces during the Portuguese period, supports the view of Sir Alexander Johnstone that the indigenous law on family relations in the Maritime Provinces was no different to the Kandyan law.[10] Even if the years of foreign domination had eroded customary institutions, it appears unlikely that the Sinhalese were governed by the Dutch law on family relations. The memoirs of de Coste, the Dissave of Colombo eight or nine years before the British acquired the Maritime Provinces, suggests the contrary, merely indicating that the Dutch were concerned with local customs and native marriages of "heathens and Mohammedans" when they

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had a bearing on their economic policy and the practice of maintaining records.[11] Even the Commander of Jaffna, Pavilioen, whose statement indicates that Dutch law was applied to the native population, recognised that it was essentially a residual law in relation to the local Customary law.[11A] Thus the assumption in the early British period that the Customary law of the Sinhalese of the Maritime region had fallen into desuetude, and that the vacuum had been filled by Dutch law appears to have been dictated by the difficulty in ascertaining the indigenous law, and also the convenience of applying the Roman Dutch law. The turbulent political history of British relations with the Kandyan regions, and the hostility to the "barbarous" laws of the Kandyans that were "in high conflict with all the marriage laws of the civilised world"[12], was hardly conducive to the application of traditional Kandyan law to the Sinhalese population of the Maritime Provinces. Consequently the Sinhalese people in these Provinces came to be governed by a western system of family law, based on different values with regard to family relationships.[13]

Once the Roman Dutch law was accepted as the source of the law on family relations governing the Sinhalese who constituted the greater part of the population in the Maritime regions, it was inevitable that it should become the major source of the law, applicable even to persons recognised as being subject to the Customary law. A common system of courts in which the Customary law and the Roman Dutch law applied, enabled the judges to extend the latter to fill the gaps, or to find solutions for the *casus omissus* in the recorded Customary law. When the local Codes, which were a haphazard collection of customs, inevitably failed to provide a legal principle to determine a dispute, the courts were (as pointed out in cases involving Muslim parties) "obliged to discover and apply some law to a new situation which would otherwise be left undetermined."[14] From the earliest times the judiciary recognised their right to supplement the inadequate provisions in the Codes on Customary law with principles derived from what was considered "the only complete system of jurisprudence now in force in the island"–the Roman Dutch law.[15] The fact that this "foreign" system was considered the General law of the land and indigenous to the island, rather than an alien law introduced by the British, may have contributed to the courts

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adopting this practice, even in the absence of a general enactment or a statutory provision comparable to the "justice, equity and good conscience" provision that enabled the introduction of English law into the African colonies and India.[16]

The Customary laws of the different Tamil communities gradually became obsolete. The Mukkuvar law on intestate succession suffered the same fate since it was not retained when legislation on the topic of matrimonial rights and inheritance was enacted.[17] With the migration of Tamils to regions outside the Jaffna Province, the Tesawalamai crystallised into a law governing a few aspects of the law on family relations for Ceylon Tamils who could establish that they had a permanant home in the Northern Province. The Tesawalamai was also applied as a Code that contained some customs applicable to all lands in this province, but it was more important as a source of law on the topic of family relations.[18] In time, many provisions in the Tesawalamai came to be considered obsolete.[18A] Roman Dutch law was used by the courts ostensibly to fill the gaps and inadequacies, but in fact to introduce entirely new concepts and principles. Thus Roman Dutch law, rather than Hindu law became the residuary law, applicable to supplement the provisions in the Tesawalamai.[18B]

The same process of erosion of the Customary rules and the expansion of the Roman Dutch law can be observed in the early developments pertaining to the applications of the Mohammedan Code. This was probably derived from a compilation made by the Dutch and brought from Batavia, on the rationale that the Ceylon Muslim community appeared to be unfamiliar with their laws and customs. The Code was extended by the British, to the whole island, in 1852, and accepted by the communities leaders as in accordance with the customary usages of the Ceylon Muslims. The original promulgation of the Code as the laws of the "Maurs or Mohammedans" meant that the basis of its application was adherence to the Islamic faith, irrespective of race or nationality. This was further clarified when the code was extended in 1852 to "Muhammedans" throughout the island.[18C] Islamic law itself contains specific rules and principles on the subject of family relations, but the early courts emphasised that the general principles of Islamic law were not enforced in Ceylon because the Moham-

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medan law applicable in this country was limited to the customary principles ennuciated in the Code.[19] The hostility to using Islamic law to fill the gaps in the Code is reflected in the judicial dictum that "Mohammedan Law stands devoid of any sanction here because Muhammed had no right to impose his laws on the inhabitants of any British territory. Mohammedan Law in Ceylon derives its sanction from the graciousness of the British Sovereign in recognising it as a customary law of a portion of the population of this country."[20] The principles of Roman Dutch law were therefore utilised when there was no provision in the Mohammedan Code, which could be applied to decide a case.[21]

The Mohammedan Code contained provisions that were not endorsed in Islamic law, and it was clearly viewed at this time as a collection of local customs applicable to some Muslims in Ceylon.[21A] Since the Proclamation of 1799 had guaranteed continuity for the Customary law of the Muslims, the repeal of the Charter of Justice (1801), which had also guaranteed the application of this Customary law, could not prevent the use of the Code. However it is doubtful whether there was a legal basis for introducing Islamic law as a residuary law.[21B] Yet Islamic law was in fact available as an accessible and developed legal system which could be referred to with equal facility as the Roman Dutch law, and with greater relevance for a Muslim community. It was only a matter of time before the courts began to view Islamic law as the system applicable when there was a gap in the provisions of the Code. While the Tesawalamai applied to Christians as well as Hindus, the Mohammedan Code applied to persons of one religion. Thus though Hindu law which was also a religious law was never contemplated as a residual law in relation to Tesawalamai, that could compete with the Roman Dutch law, the application of the latter system was arrested in cases governing Muslims by the introduction of the principles of their religious law.[21C]

Islamic law was sometimes applied on the argument that the concepts and rules of Roman Dutch law were out of harmony with principles in the Mohammedan Code on the subject of marriage and inheritance among Muslims. It was accasionally seen as the most appropriate source for obtaining legal principles that could

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elucidate obscure and uncertain provisions in the Code.[21D] However some cases referred to the Islamic law directly as a source of the law governing Muslims.[22] Though the direct application of the Islamic law was sometimes justified on the basis that its provisions with regard to donations had been accepted by the Muslims of Ceylon,[22A] the courts also widened the scope of reference, and this is reflected in the dictum that "Mohammedan law as such is applicable to the Mohammedan of Ceylon".[22B] These developments and the accessibility of the sources on Islamic jurisprudence, eventually resulted in the application of the principles of Islamic law, according to the sect to which a Muslim belonged, and particularly the law of the Shafi school to which most Muslims adhered.[22C] It was not surprising that when the Mohammedan Code was repealed in stages, the new legislation on the matters originally covered by the Code permitted the application of the Islamic law of the particular sect to which the Muslim parties belonged.[23] The Customary law governing Muslims, or the Muslim law as it is known in Sri Lanka, therefore came to be identified with Islamic law.

The Charter of Justice of 1801 authorised the direct application of the English law in testamentary and matrimonial cases in suits involving British and European residents, the latter being persons known in India by that description.[24] However the jurisdiction of the Supreme Court, with regard to the application of these principles was confined by the specific terms of the Charter, and this created uncertainty as to the scope and the content of the applicable principles of English law. The confusion is apparent in the contradictory statements made by Sir Richard Otley C.J. in the evidence he gave before the Commissioners of Eastern Inquiry, on the law regarding inheritance and matrimonial property that applied to British inhabitants of the Maritime Provinces.[25] In any event when the Charter of 1801 was repealed by the Charter of 1833, no comparable provision was introduced, while a later Ordinance re-enacted the provisions in the Proclamation of 1799.[26] In **LeMesurier** *v.* **LeMesurier**[27] the Privy Council held that when the Charter of Justice was repealed, "the Proclamation of 1799 was restored to its original force," and the matrimonial law applicable to British and European residents again became the Roman Dutch law. English

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law, therefore, could operate as a source of the law on family relations only when its principles and concepts were introduced by local statutes, or by judges in the process of "judicial law making".

The Roman Dutch law itself was modified later by legislation and judicial decisions, and particulary in the law governing family relations. It will be observed from the law on parent and child that many of these modifications were based on concepts and principles derived from English law, the system that was familiar to both judges and legislators during the British period of colonial rule.

Customary laws were conceded an important place in the law on family relations in British India and the African colonies that came under British rule. Their scope was usually restricted by the requirement of proof of local customs, and the clause in legislative enactments that permitted courts to declare Customary law repugnant or to introduce English law on the basis of "justice, equity and good conscience". There was also a fundamental dualism in the legal system with the indigenous inhabitants being governed by the non-western native laws.[28] The absence of similar legislation in the Maritime Provinces of Ceylon, permitting the courts to use the concept of "justice, equity and good conscience", as well as a dual legal structure in respect of foreigners and the local population, may be traced to the fact that Customary law occupied a narrow place in this country. It has been pointed out by a leading authority on the traditional Sinhala law that "administration of justice must have been largely empirical often taking the form of an equitable settlement" and so "it is probable that the necessity for laying down definite causes hardly arose"[29] Compilation and codification in the early years was inevitably difficult, and when successful, we have observed that the very process of recording custom served to highlight the inadequacies and revealed the vacuum with regard to applicable principles[30]. The Roman Dutch law was comparatively accessible and already considered an established legal system in the region. These factors encouraged the narrowing down of Customary law in the British period, and the corresponding reception of Roman Dutch law as the major source of the law, particularly on the subject of family relations.

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The task of applying a foreign law was made simpler because of the docility with which the alien system was accepted by the Sinhala and Tamil population. The British were able to adopt what now seem to be radical measures without protest. There is evidence that at least some sections of the Sinhalese population in the Maritime regions in fact regarded their family relationships as being governed by norms that were fundamental to the indigenous law. Recent sociological research indicates that people in a particular area of rural Sri Lanka still hold that a daughter who marries out of the village should have no rights of succession in land, a concept of the traditional Sinhala law that is in complete conflict with the Roman Dutch law oriented law of inheritance that applies in this region.[31] Polyandry seems to have been practiced even in the Maritime Provinces as a lawful form of marital relationship, despite the insistance on the concept of the monogamous union in the formal law applicable to marriage.[32] Berwick D.J. appears to have made a pertinent observation of general interest, in his report on the application of a marriage statute in the Kandyan Provinces, when he described the legislators' problems of coping with the "passive bearing of the people". He said that the local population were adept at combining "a nominal acquiescence and a complete submission to (foreign) laws" with "a simple and silent non-acceptance of them in fact," so that they "merely with all docility take the law as a form of words without objection but disregard it in their actions!"[33] It is possible that the formal laws on family relations in the Maritime regions were observed rather in the breach, in the early years. However the extremely rare incidence of polygamy as an accepted form of marriage in modern Sri Lanka, and the general familiarity with the western concept of marriage and divorce, even among the rural population of the maritime regions[34] indicates that the gap between law and the norms of society is not as great as it must have been in the British period.

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2. The Law applied by the British in the Kandyan Provinces of Ceylon

The application of the Kandyan law today, continues to be a controversial question mostly due to the uncertainty with regard to the manner in which it was applied in the British period. It is therefore necessary to examine the history of Kandyan law during this period in some detail.

Judicial Decisions

When the case of **Kershaw** *v.* **Nicoll** was decided in 1862, Sir Edward Creasy held that a Scotsman who lived in the Kandyan Provinces had acquired a Kandyan domicile. On the basis that the matrimonial domicile of the spouses was in the Kandyan country, he decided that the Scotsman's wife acquired the personal status of a wife governed by Kandyan law.[35] It is implicit in the judgment that the Kandyan law applied to all persons who could establish that they were domiciled in the Kandyan Provinces, the latter being considered one area within Ceylon where a distinct regional law applied. This decision would certainly have surprised the members of a sub-committee of the Legislative Council that had, only eighteen years earlier, denounced Kandyan law and suggested that it was not good enough even for the Kandyans! "The native Kandyans" they said "cannot reasonably complain of being compelled to exchange their present barbarous usages in respect of polyandrism and their mischievous facilities of divorce, for the long. . . . and civilised law which govern the natives of the neighbouring provinces, who speak the same language and profess the same religion."[36] The incongruity of applying a law that was so alien to Europeans seems to have influenced a Full Bench of the Supreme Court in their decision to overrule **Kershaw** *v.* **Nicoll,** in the subsequent case of **Williams** *v.* **Robertson.**[37] The Court held that a European did not acquire a domicile in the Kandyan Provinces so as to enable his wife to claim the personal status of a Kandyan wife.

Williams *v.* **Robertson** has been criticised unanimously by academic writers, on the argument that it was based on convenience rather than the accurate legal position with regard to the application of Kandyan law. These writers have attacked the judgment for its refusal to concede that a separate domicile can be acquired in a non-sovereign region within a country. The decision has

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also been criticised for its suggestion that Kandyan law was not territorial in its application but a personal law applicable to the Kandyan Sinhalese inhabitants at the time when the British acquired these Provinces.[38] Though the first criticisan is valid, the second is disputable, for **Williams** *v.* **Robertson** is a decision that accords with the legal position on the character of Kandyan law, in the British period.

When Sir Edward Creasy decided that Kandyan law was applicable as a territorial law within the region, he emphasised that an Ordinance had been enacted in 1852 to confine the application of Kandyan law. He considered this statute "a legislative declaration that before it was passed, the Kandyan law extended to all persons in the Kandyan territory."[39] This view is incontrovertible according to the provisions of the Ordinance he referred to, as well as the background to its promulgation. The Ordinance No. 5 of 1852 was enacted "to introduce into the colony the law of England in certain cases and to restrict the operation of the Kandyan law."[40] It implemented some of the recommendations of the Judges of the Supreme Court who had expressed an opinion to the government that the law of the Kandyan Provinces should be assimilated to those of the Maritime Provinces in regard to the person and property of all persons other than Kandyans.[41] The memorandum on the Ordinance that was submitted by the Queen's Advocate also confirms these views on the territoriality of Kandyan law. This document states that certain clauses in the Ordinance were introduced "with a view of protecting the heirs of Europeans, dying intestate within the Kandyan Provinces against the operation of the law of a country only partially civilised, and which law is in some respects, inapplicable to the more advanced state of European society."[42] The Kandyan law was certainly considered to be territorial in its application when the Ordinance of 1852 was introduced. The correctness of this assumption however can be queried in the light of the legal history of administration of justice in the Kandyan Provinces, after they came under British rule.

Sir Edward Creasy in his analysis of the early legislative enactments relevant to the Kandyan Provinces, conceded that the Kandyan Convention of 2 March 1815, perserved the Kandyan laws and customs for the indigenous inhabitants of the Kandyan

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Provinces. However he thought that a subsequent Proclamation of 31 May 1816 had ennunciated that the ancient laws of Kandy were to be applied to native and European subjects alike, until provisions for administration of justice were introduced by the Crown. In the absence of any later provision in this regard, he concluded that Kandyan law continued to be applicable, to foreigners as well as the indigenous inhabitants.[43] This construction has been endorsed by academic writers,[44] but there is evidence in the official records of the colonial government of this period to support the argument that his lordship misconstrued the implication of the Proclamation of 1816.

Legislation relevant to the Administration of Justice in the Kandyan Provinces 1815—1844

The Kandyan Provinces came under the British in 1815, many years after they acquired control over the Maritime Provinces. Sir Ivor Jennings has described the provinces as conquered and ceded territory.[45] The correspondence between the British Governor of the time, Brownrigg, and the Secretary of State for the Colonies, Bathurst, however stresses the aspect of cession. It is emphasised that the Kandyan Provinces were deemed to be territory ceded to the British by the voluntary act of the reperesentatives of the Kandyan people who signed the Convention of 1815.[46] Such an informal act indicating the wishes of the people is recognised as a valid cession in English law, though an act of annexation in considered advisable as a manifestation of the intention of the Crown to accept the cession.[47] In any case, conquest and acceptance of cession being prerogative acts having the same constitutional consequences,[48] the laws in force in the Kandyan territory would have, like those in the Maritime Provinces, continued to apply within the territory, unless their scope was limited, or they were altered by the sovereign. **Campbell** *v.* **Hall,**[49] had declared that no exception could be made with regard to laws of "pagans". Thus, even if at a later date "barbarous" laws, that were repugnant to the fundamental principles of English law, might have been treated as " *ipso facto* abrogated "[50], in 1815, the accepted view was that all laws in the ceded territory applied to even British settlers. This is why Governor Brownrigg introduced into the Kandyan Convention of 1815 a specific Article (No. 9) regarding the administration of "civil and criminal justice" over

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"all other persons, civil or military not being Kandyans residing in or resorting to" the new territory.[50A] As he himself explained in justifying the need for the clause, "without some provision made on His Majesty's behalf, the local laws of the Kandyan Provinces would attach to all persons resorting there, and in all cases civil as well as criminal (as part of) a doctrine universally admitted in theory and practically instanced in most of His Majesty's conquests."[50B]

These provisions in the Convention on the administration of justice in the Kandyan Provinces are of fundamental importance in determining the application of the Kandyan law. Article 4 preserved to all classes "their civil rights and immunities according to the laws, institutions and customs established and in force amongst them." Article 8 was more explicit, declaring that the administration of "civil and criminal justice . . . over the Kandyan inhabitants of these provinces is to be exercised according to the established forms and by the ordinary authorities," with a reservation regarding the inherent right of the Government to introduce reforms. Article 9 is most important, for it excluded "all other persons civil or military not being Kandyans" and "residing in or resorting to these provinces," from the method detailed in Article 8, while setting out the provisional arrangement with regard to administration of civil and criminal justice in respect of such persons.

Articles 4 and 8 were according to Brownrigg introduced as "confirmation to the Kandyans of their own laws civil as well as criminal".[50C] The fact that article 9 was intended to prevent the application of Kandyan law as well as the jurisdiction of the native courts in respect of both civil and criminal matters, is obvious from Brownrigg's statement quoted earlier. It is also implicit in his statement that article 9 was "directed to the sole purpose of exempting certain classes of persons and certain descriptions of cases both civil and criminal, from the operation of the Kandyan law".[51] The provisional arrangements were clearly not comprehensive. They dealt specifically only with the civil and criminal liability of military personnel. In respect of others, arricle 9 merely provided that they should be subject to the "Magistracy of the accredited agents of the British Government in all cases", except for murder, for which special provision

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was made. Nevertheless, these provisions were aimed as coping with what the Governor envisaged as immediate problems regarding the administration of civil and criminal justice in respect of military personnel and civilians likely to enter the new territory. They were not intended at the time to be anything more than temporary, but they were to achieve the important purpose of preventing the application of the laws and courts of Kandy to non-Kandyans, under the familiar and well known principles of the English law on colonies. Article 9 was therefore intended to exclude from the Kandyan law and tribunals not merely Europeans, but also the local population that could migrate to the new territory.[51A]

It is not so clear whether the term Kandyan was used to describe only the Sinhalese inhabitants of these provinces at the date of the Convention. Muslim natives were referred to as "Moors" in British Proclamations.[52] A regulation of 1816 also prohibited "persons commonly called Malabars" who were resident in the Kandyan territory within a specified period before the promulgation of the Convention, "from resorting to or continuing in the island."[53] These facts certainly support the judicial view expressed much later that only the Sinhalese population was meant to be governed by the Kandyan Customary law, when the Convention was enacted.[54]

The view that Articles 8 and 9 sought to apply the Kandyan law and judicial establishments to Kandyan inhabitants, while providing "make-shift" arrangements for others who were excluded from the system operating in these provinces, is clarified further in the dispute that arose in regard to these provisions between the Governor, the Advocate's Fiscal, and the Chief Justice. The latter officials objected to these articles in the Convention on the basis that they contravened the Charter of Justice of 1801. The Charter had declared that the Supreme Court would have civil jurisdiction over all persons including British nationals, resident in any of the settlements which may be in His Majesty's possessions in Ceylon even at some future date.[55] Harding Giffard the Advocate's Fiscal at the time, objected to all three Articles in the Convention as being in conflict with this provision.[55A] The Chief Justice, however, analysed the background to the Charter and concluded that it did not prevent the application of Article 8,

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though it was in conflict with Article 9. He was of the view that the Charter could not be construed as extending to Kandyan inhabitants who were not within British rule, at the time, British laws that were totally unfamiliar. The Chief Justice expressed the opinion that the Charter guaranteed the right of being governed in civil and criminal matters according to the laws in the British possessions to one class of persons. He referred to the latter as persons "who were at the date of the Charter, British subjects." He thought that the Charter was intended to conserve their right even "when they reside in any territories in the island which might become British territories after the date of the Charter.[56]"

It is very clear from the controversy regarding the validity of these Articles in the Convention that they dealt with the fundamental question of the application of the substantive Kandyan law in criminal as well as in civil matters in the new territories. The provisional arrangements in Article 9 may have in themselves dealt with limited matters. Nevertheless Articles 4 and 8 were fundamental provisions regarding the application of Kandyan law, while Article 9 enunciated the equally fundamental premise that the Kandyan legal system was to have limited application.

It is in the light of the controversy over the validity of these Articles, that an opinion was sought from the Law Officers of the Crown in England, on the legality of the provisions in the Convention and particulary the articles on administration of justice in the Kandyan Provinces.[56A] The Law Officers' opinion formed the foundation for the subsequent proclamation of 1816,[56B] that is now used to justify the territorial status accorded at one time to Kandyan law. Even though the Articles in the Convention themselves clearly indicate that the Kandyan law and judicial establishments were reserved for the Kandyan inhabitants, there is a provision in this proclamation of 31st May 1816 that "the ancient law of Kandy are to be administered till His Majesty's pleasure be known as to their adoption in toto as to all persons within those provinces or their partial adoption as to the natives and the substitution of new laws and tribunals for the trial and punishment of His Majestys' European subjects for offences committed therein."[56C]

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This clause in the Proclamation of 1816 is taken verbatim from the opinion expressed by the Law Officers of the Crown.[56D] It may be interpreted (as it was in **Kershaw** *v.* **Nicoll**) to suggest that the Kandyan laws were to apply to all persons until and unless they were restricted. However such an interpretation would conflict completely with Articles 8 and 9 of the Convention that we have discussed above, which were modified in a few respects, but not abrogated by the Proclamation of 1816.[57] It is submitted that this clause in the Proclamation of 1816 does not conflict with the provisions in the Convention if it is interpreted in the context in which it was made. The Law Officers of the Crown made the statement subsequently used in the Proclamation, having approved of the provisions in the Convention that sought to apply the Kandyan laws and judicial establishments to Kandyans whilst making provisional arrangements for others. This statement therefore can be interpreted as meaning the reverse of what it would seem to suggest. In other words, that the laws and establishments of Kandy should apply only to the Kandyan inhabitants, and would govern others if the sovereign indicated a willingness to accept them in toto for all persons or to accept them in a limited fashion, substituting new laws, such as criminal laws for all Europeans. This interpretation is borne out by the background to the controversial articles in the Convention, and their confirmation (subject to slight modifications), when approval was sought from the Laws Officers of the Crown.

The Law Officers expressed the view that the Governor was justified in maintaining provisional arrangements for the administration of Justice until the Kandyan Provinces were annexed and made dependencies of His Majesty's settlements in Ceylon, at which point the Charter of Justice of 1801 would apply. They appear to have approved Article 8 when they made the statement regarding the continuation of the ancient laws of Kandy. In accepting Article 9 subject to some modifications, they also endorsed Brownrigg's efforts to confine the applicatinn of Kandyan law. When they approved of the application of martial law to military personnel in the Kandyan Provinces, they said that "till the pre-existing laws and courts are accepted or new ones established, we do not think that a form of the King's Civil Judicature can be said to be in force, and therefore till that time. . . . the article may

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be legally enforced". They concluded that when the Sovereign had given laws to the country or had adopted the pre-existing laws of the country, military personnel would be subject to the same system, for such laws and constitutions would then "have the form and force of His Majesty's Civil judicature". When "such approbation or adoption takes place" they said that soldiers too would be liable to the civil courts.[57A]

Despite the fact that according to the principle in **Campbell** *v.* **Hall**, the existing laws of a ceded colony are retained, we have observed that the sovereign has a right to alter their application. The Law Officers therefore seem to have considered the act of approbation or adoption of the existing laws, as a prerdgative right which can be exercised to limit the application of native laws. The phrase "civil judicature" does not refer to the law applicable to soldiers in regard to crimes. It is a phrase that has been used to mean an established civilian legal system. While conceding that the Kandyan laws and the judicial establishment may be applied to Kandyans, the Law Officers suggested that unless the existing system was accepted by the sovereign it would not be treated as the civilian legal system applicable to all persons in the territory. Thus military personnel would be exempt, and continue subject to martial law.

Brownrigg was instructed by the Secretary of State Bathurst to act on the Law Officers' opinion.[58] The provisional arrangement in the Convention was approved, subject to the suggested alteration. In order to clarify the validity of the application of martial law to military personnel, Bathurst informed Brownrigg that the sovereign had "declined adopting the pre-existing laws and constitutions of Kandy as forms of the King's Civil Judicature".[59] This statement, which is contained in the preamble to the Proclamation of 1816, provides the legal basis for the arrangements made in the Kandyan Convention regarding non-Kandyans. It is clear that the provisional arrangements were considered legal because the pre-existing laws and courts had not been adopted in respect of "non-Kandyan" migrants. The pressure put on Brownrigg by the Secretary of State to obtain details regarding the legal system in the Kandyan Provinces[59A] also suggests that the information was required in order to determine whether it should be adopted for all persons. What emerges from the Proclamation of 1816 is that

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(*a*) The Kandyan laws and courts were not adopted for all persons;

(*b*) The Kandyan law and judicial establishments were to have legal force regarding Kandyan inhabitants until the sovereign decided to adopt them for all persons in toto or partially;

(*c*) The provisional arrangements set out in the Covention were to continue subject to the modification contained in the Proclamation of 1816;

(*d*) The Supreme Court was not to exercise any jurisdiction until the Kandyan Provinces were annexed.

On the basis of the records discussed above, it is submitted that legally the Customary law of the Kandyan Kingdom ceased to to be a regional law, applicable within the Kandyan Provinces, after the British gained control over them in 1815. In terms of the Convention of that year, and the subsequent Proclamation of 1816 it became a personal law applicable to the inhabitants of the Provinces at the date of the Convention, and their descendants. It has been pointed out that the British probably referred to the Sinhalese population when they used the term "Kandyan" in the Convention, and in the later Proclamation of 1818. However persons of other races obviously migrated into the Kandyan Provinces both before and after the British obtained control of them. It seems likely that migrants became "Kandyanised" and were governed by the principles of Kandyan law during the time of the Kandyan Kings, for that was the law of the region.[59B] In any case the Convention of 1815 guaranteed to all persons within the Kandyan provinces the application of their laws and customs. Thus if persons of other races had retained their own Customary law during the time of the Kandyan kings, they and their descendants, too could claim the benefit of those laws, according to the principles of the Kandyan law. If on the other hand Kandyan Customary law had applied to them, they could claim to be "Kandyan inhabitants' within the meaning of the Convention. In any event Kandyan law applied after 1815 to this limited category of persons in the Kandyan Provinces. Legally, it ceased to apply to the migrant population from the Maritime Provinces that were already under British rule.

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The next enactment of importance that pertains to the application of Kandyan law is the Proclamation of 21 November 1818, promulgated after the rebellion of that year. When Brownrigg entered into the Convention of 1815, he viewed the agreement entered into with the Kandyan chiefs as an act of political necessity, rather than one of mere expediency in the process of obtaining control over the region. Soon after it was signed he justified the concessions given to the Kandyans in the Convention "on the ground that it was just and necessary in their present condition to do so, but on a full understanding and conviction that it was an unavoidable condition of their voluntary acceptance of the British Dominion". He concluded "in which I must consider this government as bound by such consent—subject to the unquestioned power of. . . .(the Crown) to reject that along with those advantages to which it was inseperably annexed".[60] The Proclamation of 1816 indicates that the Kandyan Provinces had not yet been annexed to or made dependancies of His Majesty's settle ments.[60A] The Proclamation of 1818 by contrast contained a clear declaration of British supremacy.

The colonial government was now declared as being the source of all powers within the Kandyan Provinces. The Proclamation also contained a clause that "every Kandyan" would be subject to the laws to be administered "according to the ancient and established usages of the country. . . .in such manner and by such authorities and persons" as would be declared, and in the name of the Crown[61] Thus, if the Convention of 1815 may be disputed as a formal act of annexure, the Proclamation of 1818 can hardly be described as anything else. The administration of the Kandyan Provinces came directly under the British; this was "annexure" or "dependency" within the meaning given to that term in the Law Officers' opinion as well as in Brownrigg's Proclamation of 1816.[61A] The Proclamation of 1818 therefore provided the legal basis for the application of the provisions in the Charter of Justice of 1801 to "non-Kandyans", for whom temporary arrangements had been made in the earlier enactments.

Despite this, succeeding British Governors continued to exercise direct control over the administration of justice in the Kandyan Provinces. Brownrigg had advised the Secretary of State that "it was decidedly adverse to the consolidation of the British

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Dominion over these districts to introduce a judicial establishment . . . . which stands in competition with the executive". . . . "which does not in a direct and ostensible manner emanate from the executive Government."[62] The Secretary of State accepted this advice,[63] and this policy was continued. The hostility and antagonism between the governors and the judges of the Supreme Court over a period of time,[64] prevented an objective assessment with regard to the legality of the provisions for administration of justice in the Kandyan Provinces after 1818. When the Commissioners of Eastern Inquiry (1829-1830) commenced their investigation, the conflict had not yet been resolved. Thus, Harding Giffard in his evidence to the Commission declared that for twelve years (after the proclamation of 1818) "a large civil establishment, a large military force, and a tribunal of whose constitution I am very little informed have administered the affairs of these provinces".[64A] Sir Richard Otley C.J. too expressed the opinion that the Governor was exercising control in defiance of the Charter of 1801.[65] The control that the governor exercised in the Kandyan Provinces in testamentary matters was a special source of disagreement. In 1825 Giffard and Otley, who were both judges of the Supreme Court at the time, submitted a memorandum to the Governor on this subject, emphasizing the legality of the testamentary jurisdiction of the Supreme Court, "over the whole island."[66]

The administration of justice in the Kandyan Provinces during this period was therefore based on arrangements made by the Governor, and there was no further clarification with regard to the laws applicable to persons excluded from the Kandyan law. In this situation there was obviously no clearly established forms and procedures for the guidance of the agents of the government responsible for the administration of justice in the region. Each official appears to have conducted proceedings as he thought fit, and the confusion and uncertainty is revealed in the contrary statements made by these officials in their evidence to the Commissioners of Eastern Inquiry (1829-1830). For instance the Agent for Matale stated that he had jurisdiction in respect of all persons with the exceptions contained in the Convention of 1815, as modified by the Proclamation of 1816.[67] When the Commissioners posed a question regarding the application of Kandyan

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law to persons who were "not Kandyan" but who were "settled there", many witnesses referred to the application of customs regarding the performance of services' when lands were acquired in the territory.[68] The Agent for Lower Ouva, said that he had jurisdiction over all claims within the District, though persons from the Maritime Provinces were exempt.[69] Another witness however claimed that he exercised jurisdiction in respect of all persons within the provinces, equally.[70]

There is no doubt that the administration of justice in the Kandyan Provinces in the early period lent itself to subjective approaches with regard to the application and scope of Kandyan law. We have observed that with the transference of power to the British, migrants from the Maritime Provinces and European settlers were clearly excluded from the operation of this law, which had become, legally, a personal law applicable to a particular class of inhabitants within the Kandyan Provinces, rather than a regional law. Legally it could apply only to the Sinhalese population and other races who were deemed inhabitants of the Kandyan Provinces at the date of the Convention, and their descendants. However if migrants into the Kandyan territory could become "Kandyanised" in the time of the Sinhalese Kings, it is unlikely that this process would have been considered irregular in the early British period, merely because the formal law was different. Fine points regarding the conflict between law and practice would hardly have been raised in the kind of forums responsible for the administration of justice in the Kandyan Provinces. It is obvious from the evidence placed before the Commissioners of Eastern Inquiry that some tribunals assumed jurisdiction over all sections of the native population, irrespective of whether they were "native Kandyan" within the meaning of the British enactments.

The position of any Europeans who ventured within the region could not have been different under Kandyan law, in the time of the Sinhalese kings.[70A] In any event, the legislative enactments regarding them, after the British gained control, seem to have been equally unfamiliar to the officials appointed by the British to dispense justice in the Kandyan Provinces. However there is some evidence that Kandyan Customary law was not known to be applicable to European settlers in the Kandyan Provinces. For

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instance the report of the Sub Committee on a Bill presented in the Legislative Council in 1844 for establishing a uniform marriage law, referred to the repugnancy of Kandyan marriage to the British concept of the institution. Besides the report described the law of the Maritime Provinces as the law under which "the majority of resident Europeans at present live" and stated that there was no hardship in extending it to "those Europeans who live in the Central Provinces especially as in most essentials it differs so very slightly from the law of England."[71] This statement creates the inference that British settlers in the Kandyan Provinces were deemed to be governed by English law and probably reflects the actual practice during the period.

It is possible that European settlers were deemed to be governed by the Roman Dutch law with regard to the devolution of their immovable property during this period. Such a conjecture is supported by the background to the Wills Ordinance No. 21 of 1844. A suggestion had been made by the Governor in 1840 to introduce the English law of descent and testamentary inheritance in regard to the lands of British settlers, many of whom were acquiring immovable property in the island.[72] Objections were raised to this policy, and instead, the Wills Ordinance was enacted to "relieve British landowners from the necessity of conforming to the Dutch law. . . . of intestate succession which is untouched by the ordinance".[73] The statute was one of general application in the whole country, and there is no suggestion that it was introduced to enable British settlers to avoid the application of Kandyan law or any other Customary law. The provision in this Ordinance which introduced the law of the "matrimonial domicile" with regard to determination of the proprietory right of spouses during and after dissolution of marriage (subject to certain exceptions)[74] was also probably calculated to avoid what had been described by Harding Giffard in his evidence to the Commissioners of Eastern Inquiry as a "source of difficulty" i.e., the Roman Dutch law concept of community of property between spouses.[75] As Bertram C.J. has pointed out, the Wills Ordinance intended to introduce the alternative of English law or a foreign law for British colonists who acquired property in the island, on the basis that their matrimonial domicile was in England or some place outside the island. When the phrase "matrimonial domicile" was used, it appears to have been intended to distinguish

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a domicile in Ceylon from a domicile abroad. There was no question of the Ordinance permitting the application of the Kandyan law or any other system within the country to determine the matrimonial rights in immovable property belonging to Europeans. In the words of Bertram C.J., "it was never intended to suggest that there might be several matrimonial domiciles in Ceylon, and to regulate the rights of parties within one of such matrimonial domiciles with reference to immovable property acquired in another".[75A]

Thus, when **Williams** *v.* **Robertson** decided that Kandyan law was not applicable as a regional law to all persons who permanently resided in the Kandyan Provinces, it was probably not reflecting the actual position taken in the courts with regard to native inhabitants, in the early period of administration of justice in the Kandyan Provinces. However the decision seems to accord with the accepted position with regard to European settlers. In any event the case clearly set out the legal position accurately. The early legislation in the Kandyan Provinces and the background to it indicates that Kandyan law was retained as a personal law of the natives of this region at the date of the Convention. With regard to others excluded from these laws there is substance in the position taken by Otley C.J. that the system envisaged by the Charter of Justice 1801 applied. Thus with the annexation of the Kandyan Provinces in 1818, the provisional arrangements in the Proclamation of 1816 ceased to be applicable. On that argument, with the repeal of the Charter in 1833, the source of the law governing these persons too, whether native or European, would be the Proclamation of 1799. If this analysis of the legal position after 1818 is not adopted, the most that can be said is that the position set out in the Convention and the Proclamation of 1816 continued with regard to "non-Kandyan" migrants into the Kandyan Provinces who had been excluded from the Kandyan law. Certainly this position was taken by succeeding Governors with the express approval of at least one Secretary of State,[76] even if it was disputed by the judges. If this latter view is accepted as the correct legal position, it is clear that the provisional arrangements would have ceased to be valid after 1833 with the introduction of a uniform system of courts.[77] In the absence of any clarification with regard to the substantive law applicable

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to these persons their position would be as uncertain as it had been between 1815 and 1833, unless the introduction of a uniform system of courts to replace the temporary arrangements in the Kandyan Provinces is interpreted as justifying the application of the law of the Maritime Provinces, to those who were not governed by Kandyan law.

Judicial and Legislative Trends in the Application of Kandyan Law after 1844

We have observed that the Ordinance of 1852 was promulgated, in a context where the Kandyan law was thought to be territorial in its application. However, this was not correct, and the legal position prior to the Ordinance was that 'non-Kandyan' migrants whether native or European were governed by the law of the Maritime Province, or that no provision had been made with regard to the substantive law applicable to them. The fact that the courts occasionally applied Kandyan law to non Kandyans[78] does not detract from the proposition that legally Kandyan law had ceased to be a regional law after 1815. The practice of the early tribunals and isolated decisions in the courts established after 1833, even if they reflected the process of 'Kandyanisation' of the migrant population that continued to take place, cannot be given the legal significance of a judicial trend established in the appeal courts. The misunderstanding with regard to the legal character of Kandyan law, when the judges of the Supreme Court reported to the Governor[78A] in 1851, may have been due to the fact that there were no legislative enactments or judicial decision on record, clarifying the law governing non-Kandyans beyond the rudimentary provisions in the enactments of 1815 and 1816. We have observed that the language used in the Proclamation of 1816 itself was interpreted to mean the very reverse of what it was meant to suggest.

In his memorandum on the Ordinance of 1852, the Queen's Advocate stated that the Supreme Court had held that Moors residing in the Kandyan Provinces were governed by their own laws[79]. The application of Muslim Customary law to Muslims who had been resident in the Kandyan Provinces at the date of the Convention and to their descendants, could have been justified on the basis that Kandyan law itself recognized the law of the

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Muslims in some respects. Muslims migrating from the Maritime Provinces after 1815 however were not under the Kandyan law, for they were in the category of persons excluded by British enactments from this system. Thus when the Ordinance of 1852 declared that the Mohammedan Code was to apply throughout the country,[80] it must be considered as confirming the existing legal position in the Kandyan provinces with regard to migrant Muslims, or alternatively as filling the lacuna left by the Convention and the Proclamation of 1816. In respect of Muslims who had been inhabitants of the Kandyan Provinces or their descendants however, the statute introduced an important change. It clarified that they ceased to be governed by Kandyan law, in any respect.

The provisions in the Ordinance of 1852 that declared the law of the Maritime Provinces applicable to Europeans and Burghers in respect of marriage and intestate succession to property in the Kandyan provinces,[81] must also be viewed as either declaratory of an existing situation, or filling the lacuna in the early enactments regarding the substantive law applicable to them. In explaining the article introducing the law of the Maritime Provinces, the Queen's Advocate emphasised that "the object is to prevent the fact of the living together of two persons, who had no intention of being regarded as husband and wife, being set up as a valid marriage, and also to secure proper evidence of the marriages referred to", i.e., marriages between Europeans and Burghers, or between them and any Asiatic in the Kandyan Provinces.[82] The article on inheritance was introduced on the basis that the Kandyan law was a territorial law applicable to immovables, and could also be applied to movables on the principle of the law of the matrimonial domicile. This provision was explained as protecting the "heirs of Europeans dying intestate within the Kandyan Provinces"[83]. The article on marriage was obviously enacted with a similar rationale, to ensure that informal unions with local women would not lead to disputes regarding inheritance to property on the basis that the parties were "married under Kandyan law".

There was in fact no legal foundation for the assumptions on which this statute was drafted. Apart from the fact that Europeans were excluded from the Kandyan law by the early enactments, we have observed the position taken by the sub-committee reviewing reforms in the law of marriage in 1844. Even the first legislative

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reforms on the Kandyan law of marriage in 1859 were introduced in a context where the British considered "the present Kandyan law . . . in high conflict with all the marriage laws in the civilized world".[84] These developments can only be explained in a context where the Kandyan law regarding marriage and inheritance was not applicable to Europeans and Burghers.

The law applicable to other persons in the Kandyan Provinces was not stated in the Ordinance of 1852, though it introduced English law in regard to some matters, and declared that the law of the Maritime Provinces would apply when Kandyan law was silent, and there was no other provision in the Ordinance.[84A] The phrase "law of the Maritime Provinces" may, by implication be considered to include reference to the Roman Dutch law. We have observed that the law governing all migrants whether Europeans, Muslims or any other settlers in the Kandyan Provinces in matters not dealt with in the Ordinance could not have been Kandyan law. Since the Ordinance of 1852 had been introduced to "restrict the operation of the Kandyan law"[85] and also due to the uncertainty regarding the legal position in the early period, there are reported decisions after 1852 in which the courts applied Kandyan law to natives of the country who had migrated to the Kandyan Provinces and retained their identity as Low-Country Sinhalese or Tamils.[86] When the Matrimonial Rights and Inheritance Ordinance No. 15 of 1876 was enacted, it is clear from the proceedings in the Legislative Council, and a report of the Queen's Advocate, that this judicial view was assumed to reflect the correct legal position.[86A] Nevertheless after the Full Bench decision in **Williams** *v.* **Robertson,** the Supreme Court, consistenty followed the view that Kandyan law was not a territorial law, and could not apply to migrants from the Maritime Provinces after 1815. The Roman Dutch law of the Maritime Provinces was deemed to be applicable to such persons.[87]

These judicial decisions set out the correct legal position. In any event, even if the interpretation that the law of the Maritime Provinces was legally applicable to migrants from the Maritime Provinces who were excluded from the operation of the Kandyan law is not accepted, the trend in the appeal courts can be taken as having filled a lacuna regarding the substantive law applicable to these persons. The extension of the Roman Dutch law in the

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event of a *casus omissus* has always been accepted as a lawful procedure in our courts, even without specific legislation conferring such a jurisdiction. Though English law was originally applied on occasion in the Kandyan areas, as a residuary law, because 'rules of natural equity' must be applied when Kandyan law was silent,[87A] the accepted residuary law has always been the Roman Dutch law. The Ordinance of 1852 also endorses by implication, this approach, when it authorises reference to the law of the Maritime Provinces. Even if the judicial decisions after **William's** case are confined to the particular disputes that have been litigated, on the argument that they do not establish a general principle,[88] Kandyan law cannot be the source of the law governing such people, for it ceased to be a territorial law after 1815. It is also not possible to accept that there is a lacuna with regard to persons whose status has not yet been determined by the Supreme Court. The existing authorities would rather support the extension of the law of the Maritime Provinces to them. At any rate, even as early as 1876 the subject of matrimonial rights and inheritance of persons other than Kandyans, Muslims and persons governed by Tesawalamai came under the provisions in the Matrimonial Rights and Inheritance Ordinance. The debates and the official reports on the statute and its provisions, leave no room for doubt that it was meant to introduce a uniform general law on the subject, applicable to all persons other than those specifically excluded, like the Kandyan inhabitants of the country.[88A]

By the early part of the twentieth century, the legal position was that Kandyan law applied only to persons who could be described as the indigenous or native inhabitants of the Kandyan Provinces. If the native population that migrated to these provinces retained their identity as "non-Kandyans", by failing to become "Kandyanised" as part of the Sinhalese population in these regions, they could not in the event of a dispute claim that they were governed by Kandyan law.[89] The legal position was that Kandyan law had ceased to be a regional law after 1815. It could not apply to foreign or native migrants from the Maritime Provinces.

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After the Ordinance of 1852 the Kandyan law regarding family relations ceased to be applicable to persons of the Muslim community, irrespective of whether they were descendants of inhabitants in the territories at the date of the Convention, or later immigrants. In respect of others who were of the local population however, and had not been "Kandyanised", it may have been possible to claim the application of Kandyan law on the basis that they were descendants of persons who had been inhabitants of these Provinces at the date of the Convenation. Thus, persons who could trace their descent to the Mesbars of the Kandyan Court in the time of the Sinhala Kings[90] may have been able to claim that they were governed by Kandyan law. However judicial decisions in the Supreme Court have interpreted the reference in the early British proclamations to "Kandyans" as a reference to the Sinhala people.[90A] Kandyan law thus came to be considered a personal law applicable to the original Sinhalese population of the region and their descendants. Sinhala migrants from the Maritime Provinces who had become "Kandyanised", or so absorbed into the population of these provinces as to be indistinguishable from the indigenous Kandyans, would obviously have been subject to Kandyan law. Sinhalese who retained their identity as "Low Country Sinhalese" did not fall into this category.[90B]

At this point the Kandyan Succession Ordinance No. 23 of 1917 created an important change in the legal position. This legislation was enacted to clarify whether Kandyan law applied to the issue of marriages between Kandyans and non-Kandyans, since the courts had refused to treat such offspring as Kandyan Sinhalese.[90C] Whether such mixed marriages could have been legally solemnized as Kandyan marriages is not clear. The Kandyan Marriages Ordinance No. 3 of 1870 had enacted that a marriage could be celebrated under the statutes between "residents of the Kandyan Provinces," excluding marriages under the Ordinance in force in the Maritime Provinces, as well as marriages of Europeans and Burghers or between Muslims excluded by the Ordinance of 1852.[91] The Supreme Court had interpreted the Kandyan marriage statutes as being applicable only to Kandyans. Unregistered marriages of Low Country Sinhalese or Tamils in the Kandyan Provinces were therefore held to be valid even though failure

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to register made a Kandyan marriage void.[92] An early case also decided that the validity of an unregistered union between a non-Kandyan and a Kandyan should be determined by the General law concept of a valid marriage by co-habitation and repute.[92A] This opinion that the General law of marriage applied to the union of a Kandyan and a non-Kandyan appears to be correct, because the Kandyan marriage statutes were enacted to reform the "uncivilized laws" of the Kandyans.[92B] It is also supported by the Matrimonial Rights and Inheritance Ordinance (1876) which envisaged that a woman subject to Kandyan law who married a non-Kandyan governed by the Ordinance would be subject to the General law regarding inheritance.[93] If the marriage could have been celebrated under Kandyan law, the matrimonial regime of the spouses and the question of inheritance would have been governed by Kandyan law, and there would have been no necessity for declaring a rule to deal with a conflict in personal laws.

In actual fact however, unions between Kandyans and non-Kandyans appear to have taken place under Kandyan law, and also treated as Kandyan marriages in these Provinces. Many of the witnesses who appeared before the Inquiry into Kandyan Marriages (1917) referred to the fact that such marriages were common, though only one witness stated that such a marriage had been solemnized under the Kandyan Marriage Ordinance of 1870.[94] The British had great difficulty in enforcing the Kandyan Marriage statutes,[95] and it is not unlikely that "mixed marriages", like so many other unions, were in fact contracted outside the Ordinance.

The Commission of Inquiry into Kandyan marriages, on whose report the Kandyan Succession Ordinance was based, did not discuss under what law mixed marriages had been celebrated in the past. However they stated that a system of registration similar to that in the Ordinance of 1870 should be introduced for the solemnistion of the type of mixed unions under Kandyan law that appear to have been common, and which the new legislation contemplated.[96] The Legislature responded with an enactment that made it possible for certain mixed marriages to be celebrated under the Kandyan Marriage Ordinance (1870). Marriages between Europeans and Burghers and Kandyans had been specifically excluded from the Kandyan Marriage law, in 1852. The new

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Ordinance enabled the solemnisation of marriages between other non-Kandyans and Kandyans under Kandyan law, if the male party was subject to Kandyan law, (married in the "diga" form of marriage,)[96A] and was domiciled in the Kandyan Provinces. A Kandyan marriage was also possible when the female party was a Kandyan, married in the "binna" form of marriage and was domiciled in these Provinces. The issue of these marriages were also deemed to be Kandyans. The Ordinance was to have retrospective effect in order to validate "mixed marriages" of this type which may have been solemnized under Kandyan law in the past. That protection was considered necessary in view of the doubts whether such marriages could have been registered under the 1870 Ordinance.[97]

The Kandyan law of marriage thus became applicable to some non-Kandyans, so that a non-Kandyan could claim to be governed by the Kandyan law with regard to matrimonial rights and inheritance.[97A] In addition the issue of the mixed unions contemplated in the Kandyan Succession Ordinance also came to be treated as Kandyans. With the introduction of the Ordinance of 1852, and the role exercised by the judiciary in extending the law of the Maritime Provinces to fill the gaps in the Kandyan law, the principles of the law of that region also became relevant, chiefly in the area of family relations. By permitting non-Kandyans to contract marriages with Kandyans under Kandyan law, the Kandyan Succession Ordinance effectively extended the application of this law in the only areas in which it was significant, to those who did not fall within the traditional definition of persons subject to Kandyan law.

3. The Modern Law on Family Relations in Sri Lanka

1. General Law and Tesawalamai

The Roman Dutch law, subject to modifications introduced by legislation and the courts, is the major source of the law on family relations in Sri Lanka applicable to all persons not governed by the Customary laws. The original principles of the Roman Dutch law have been so greatly altered that it is now described as the General law of the country that applies to the majority of its inhabitants.[98] We have observed how the Roman Dutch law was introduced as a residuary law in respect of persons governed

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by Kandyan law, and how the courts used it to fill the vacuum in the Customary laws that applied to other sections in the community. There are situations in which the concept of *casus omissus* is used in the courts to introduce the Roman Dutch law on the theory of an absence of legal principles, even when the silence of the Customary law on that point is due to the fact that it has refused to recognise an analogous principle.[98A] In this way principles of the General law have been sometimes introduced into the Customary law, despite the fact that they conflict with its fundamental concepts. However, this development has been one way of achieving uniformity in some areas of the law on family relations.

The Tesawalamai law on family relations which has been modified by later legislation influenced greatly by Roman Dutch law values,[99] continues to apply to Sri Lanka Tamils who are deemed "inhabitants of the Jaffna Province". The provisions in the Tesawalamai Code are very rudimentary, and today, the Roman Dutch law modifications seem more significant than the Customary law principles, even in the area of matrimonial rights and inheritance. The status of the Roman Dutch law as residuary law has been ensured by legislation and judicial decisions.[99A] The fact that a Tamil must have a "Ceylon domicile and Jaffna inhabitancy" in order to be governed by Tesawalamai,[100] means that he must be a person who has settled permanently in the country with the intention of making his permanent home in the Northern Province. The courts have reiterated that whether a person is an inhabitant of this Province is a question of fact. They express the view that "inhabitancy" need not be interpreted according to rules used to deeermine domicile. Nevertheless inhabitancy has a closer meaning to domicile than to residence.[101] The emphasis on proof of inhabitancy results in a fluctuation in the population that is governed by Tesawalamai. It is possible to cease being governed by Tesawalamai or to become subject to it by acquiring inhabitancy in the Northern Provinces.

Thus when Tesawalamai applies, the General law governs most aspects of the law on family relations. There are very few principles that pertain to the topic of parent and child. However the Kandyan law and the law governing Sri Lanka Muslims, (Muslim law) deal with marriage as well as inheritance, and some

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principles regarding the law of parent and child emerge from these laws which prevent the creation of a uniform law on the subject of parent and child. There is more scope for uniformity in regard to persons subject to Kandyan law, since the application of this law has been confined further in the modern law by the courts using Roman Dutch law as a residuary law. There are fewer areas in which the Kandyan Customary law derogates from the General law. The position with regard to Muslim law is somewhat different due to important developments that have taken place in this century. The scope and application of the Kandyan law and the Muslim law today pose some problems which deserve special attention.

2. Kandyan Law

When Kandyan law became applicable to the population that could claim descent from the original inhabitants of the Kandyan Provinces at the date of the Convention, we have observed that it became a personal rather than a regional law. In the light of the long trend in our courts to consider the Kandyan law as applicable to persons of the Sinhala race who fall into this category,[102] it is unlikely that it will apply today to a Tamil on the basis of descent from an original inhabitant of the Kandyan Provinces. However even a migrant from the Maritime regions who has not retained his identity as a Low Country Sinhalese, may be able to claim that he is a Kandyan Sinhalese. Since the Kandyan Marriage and Divorce Act, No. 44 of 1952, which applies today, merely requires proof of residence in the Kandyan Provinces, it is possible for any Sinhalese to register his marriage under Kandyan law on the basis that he is a person subject to this law.[103] In that event it will not be possible to challenge the validity of the marriage under Kandyan law since registration is deemed the best evidence of it.[104] The matrimonial rights of the spouses will then be governed by Kandyan law. There will also be no basis for disputing the 'Kandyan' status of the issue, even though we shall observe that it is now doubtful whether a child of a mixed union between Kandyan and non-Kandyan falls within the definition of a person subject to Kandyan law.

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We have stated that with the introduction of the Kandyan Succession's Ordinance, there was an expansion of the category of persons governed by Kandyan law. It is submitted that this trend has been arrested with the introduction of the Kandyan Marriage and Divorce Act (1952), resulting in a narrowing of the application of Kandyan law. This Act repealed the Kandyan Marriages Ordinance (1870) and declared that only a marriage between Kandyans, could be celebrated as a Kandyan marriage under the statute.[105] The provision in the Kandyan Succession Ordinance that enabled the solemnization of a mixed union, between Kandyan and non-Kandyan under Kandyan law was now declared as qualified by this rule.[106] Thus a non-Kandyan may no longer contract a marriage with a Kandyan under the Kandyan law, and the General law regarding a valid marriage by co-habitation and repute will apply to an unregistered union between a Kandyan and a non-Kandyan.[106A] Besides it is no longer clear that the issue of a mixed marriage, between Kandyan and non-Kandyan acquires the status of a "Kandyan" according to the Kandyan Succession Ordinance.

When the Kandyan Succession Ordinance authorised the solemnization of a mixed marriage of the type described in the statute, between Kandyans and non-Kandyans (other than European and Burghers) according to Kandyan law, there was no difficulty in applying the provisions in that statute, which declared the issue to be Kandyans. The Succession Ordinance had also provided that the earlier statute, the Kandyan Marriages (Removal of Doubts) Ordinance, No. 14 of 1909 which authorised the solemnization of a marriage between Kandyans under General law, while retaining the Kandyan law regarding rights of inheritance[106B] had contemplated the case of a mixed marriage.[107] This meant that a mixed union could be celebrated under the General law even in the form contemplated by the Succession Ordinance so as to render the issue "Kandyan". It is not so clear that this type of mixed marriage confers the status of Kandyan on the issue, in the modern law.

When a mixed marriage was solemnized under the General law in the form stated in the Kandyan Succession Ordinance, the rights of the spouses as well as the rights of persons claiming from or through them to succeed to property under the Kandyan

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law were deemed not to be affected.[108] Thus the spouses had rights of succession under the Kandyan law, interse, even though the marriage was not celebrated under that law. It is not clear that the principle in the Matrimonial Rights and Inheritance Ordinance applicable to a conflict in personal laws, enabled the introduction of the Kandyan law on these subjects when a Kandyan man married a non-Kandyan woman. Yet, according to this Ordinance, the matrimonial and inheritance rights in a marriage between a Kandyan woman and a non-Kandyan man would seem to be governed by the provisions in this statute rather than the Kandyan law.[108 A] The rule regarding the preservation of Kandyan law in the Kandyan Succession Ordinance could not produce anomalies if it was interpreted to mean only that the Kandyan spouses right to inherit property from Kandyans was to be determined under Kandyan law, while heirs could claim to inherit such property through them under Kandyan law. Even without a legislative declaration, this would have been the legal position, for a marriage under the General law could not have operated to disinherit the Kandyan spouse or affect the rights of persons claiming through them. However in regard to rights of spouses *interse* the provision in the Succession Ordinance created obvious contradictions with the General law statutory provisions on the law governing matrimonial rights and inheritance in the case of a mixed union.

It is clear from the preamble and the whole background to the Kandyan Succession Ordinance that the issue of a mixed union was deemed to be a Kandyan because these marriages were looked upon as basically Kandyan Marriages. The use of the Kandyan law concept of binna marriage in respect of such mixed marriages, clarifies further that this was so. When the Kandyan Succession Ordinance declared that a marriage between a Kandyan and a non-Kandyan could be celebrated under the General law with the same protection regarding inheritance as in the case of a marriage between Kandyans solemnized under the General law, it reflected this same approach. The Kandyan Marriages (Removal of Doubts) Ordinance had been enacted to enable Christian Kandyans to avoid marrying under the Kandyan law, which was based on ideas that were alien to the concept of Christian marriage[109]. Hence the specific clause preserving the Kandyan

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law on inheritance. In adopting the same principle regarding a "mixed marriage" between Kandyan and non-Kandyan, the legislators intended to ensure that parties to such unions should have the same option of contracting a General law marriage that was available where both parties were Kandyans. In that sense a mixed marriage under the General law was deemed to be no different to a marriage between Kandyans under the General law.

A marriage between Kandyan and non-Kandyan under the General law was therefore identified by the Succession Ordinance as a marriage that was Kandyan in form. The statute could thus be interpreted as authorising the admission of outside evidence to prove that, though solemnized under the General law, the marriage conformed to the binna form of Kandyan marriage.[110] The child of a mixed union between Kandyan and non-Kandyan solemnized under General law could thus be classified as a "Kandyan" within the meaning of the Ordinance. When the Kandyan Marriage and Divorce Act now declares that such a marriage cannot be solemnized under the Kandyan law however, it becomes difficult to apply this provision in the Kandyan Succession Ordinance. When a mixed union must be solemnized under the General law because the parties are prohibited from marrying under Kandyan law, it is difficult to see how outside evidence can be led to establish that the marriage was in fact a binna or diga marriage as known to Kandyan law. The right of contracting a mixed marriage under the General law was originally recognised on the basis that the parties should have the same option to contract a General law marriage that was available to Kandyan parties who did not wish to contract a marriage under Kandyan law. When persons contracting a mixed marriage have been deprived of the option, there is no basis for introducing the concept of the diga and the binna marriage.[110A]

It is submitted that in confining the Kandyan law of marriage to Kandyans, and in prohibiting the solemnization of a marriage between Kandyan and non-Kandyan under Kandyan law, the Kandyan Marriage and Divorce Act of 1952 has introduced an important change. It prevents the application of Kandyan law to non-Kandyans as well as the issue of mixed unions. We have

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observed that the Kandyan Succession Ordinance extended the application of the principle in the Kandyan Marriages (Removal of Doubts) Ordinance to the case of mixed marriages without appreciating the contradictions created by that extension in regard to the law on matrimonial rights and succession. The Kandyan Marriage and Divorce Act repealed the Removal of Doubts Ordinance and also made it impossible to apply the provisions in the Kandyan Succession Ordinance. It declares that a marriage *between Kandyans* may be celebrated under General law, without affecting the rights of the parties or person claiming through or from them to succeed to property under Kandyan law.[111] While a mixed marriage must be celebrated under General law, there is no comparable statutory provision preserving the Kandyan spouses rights under Kandyan law, or the right of persons claiming from and through him or her.

Marriages *between Kandyans and non-Kandyans* under the General law, were considered valid even before the Kandyan Succession Ordinance made the provisions in the Kandyan Marriages (Removal of Doubts) Ordinance applicable to such marriages.[112] In the modern law, as in the past, such a marriage does not affect the rights of the Kandyan spouse to inherit property under the Kandyan law or the right of heirs to inherit such property through them. This is because a marriage under General law cannot operate to disinherit the person contracting a General law marriage. It could have been argued in the past that the Kandyan spouses property *devolved* under the Kandyan law, despite the General law of marriage, since the right to succeed from him or her was to be determined under Kandyan law. That argument may now be countered with the submission that the repeal of the earlier protection in respect of mixed marriages indicates that the Kandyan spouses property devolves under the General law, according to which the marriage was contracted. For even though the right of succession to Kandyan relatives or the right of persons to claim that property through the Kandyan spouse under Kandyan law subsist even without legislation, the devolution of the spouses own property can be affected by the form of the marriage. If a marriage between a Kandyan and a non-Kandyan *must* be celebrated under the General law, and there is no specific protection, as in the past, regarding the

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retention of rights of inheritance under Kandyan law, it is not unreasonable to assume that the legislature took the whole question of mixed unions out of the area of Kandyan law and within the General law of the land. Such an interpretation also harmonizes with the rule set out in the General law statutes on matrimonial rights and inheritance. Under these enactments this topic is governed by the statutory provisions, whenever a Kandyan woman contracts a marriage with a man governed by them.[112A]

The commonly held view that the Kandyan Succession Ordinance defines the status of a mixed union as a Kandyan even in the modern law[113] fails to take account of the fundamental changes introduced by the Kandyan Marriage and Divorce Act. In the context of this Act which prohibits the solemnization of mixed marriages under Kandyan law, as well as the present law on proof of marriage, past judicial decisions cannot be used to support the admission of outside evidence to establish that a General law marriage between Kandyan and non-Kandyan was the type of union that conformed to the diga or binna models.[114] It is a violation of the provision in the Kandyan Marriage and Divorce Act to permit a marriage between a Kandyan and a non-Kandyan that cannot be solemnized under Kandyan law to be deemed the type of marriage contemplated in the Succession Ordinance that made the issue "Kandyans". The issue of a mixed marriage will be deemed Kandyan only if a marriage of the type contemplated in the Succession Ordinance was contracted under Kandyan law or the General law at a time when the Kandyan Marriage Ordinance of 1870 was in force. The changes introduced by the present Kandyan Marriage and Divorce Act do not permit the application of the provision in the Kandyan Succession Ordinance, to mixed marriages that are contracted today.

3. Muslim Law

We have observed how the Mohammedan Code of 1806 itself was considered a collection of local customs governing the adherents of Islam in the country. In the modern law the Code has been repealed, and the law on family relations that governs Muslims in this country is derived from the general principles of Islamic law. Special tribunals consisting of Muslim judges (Quazis) deal with questions involving marriage and divorce among Muslims.

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The Muslim Marriage and Divorce Registration Ordinance, No. 27 of 1929, introduced for the first time special Muslim courts (Quazi Courts) for hearing matrimonial actions.[115] The practice of Muslim women obtaining a divorce outside the Code, and informally through a priest, strengthened the communities' resolve to obtain judicial tribunals distinct from the matrimonial courts of the country. The Ordinance repealed the sections of the Mohammedan Code on marriage and divorce, but stated that the "Muslim law of marriage and divorce was not to be affected"—thus implying that the Islamic law on this aspect was part of the law governing Muslims in Sri Lanka. This statute was to apply to persons "professing Islam," and enacted into legislation the concept that the Mohammedan law applicable in this country was a religious law governing persons who were adherents of Islam. This new policy on the application of Islamic law as the source of the law on marriage was a reflection of a change in values. The Muslim law in Sri Lanka was no longer viewed as a collection of customs and usages in force among the indigenous Muslim inhabitants of the country. We have observed the trend in the judicial decisions recognising the relevance of the Islamic law of the Shafi school. Influential Muslims too viewed the law governing family relations as essentially a religious law, and did not wish to accept the limitations imposed by the Mohammedan Code.[116]

The Muslim Intestate Succession Ordinance, No. 10 of 1931 repealed the title of the Mohammedan Code on inheritance, and introduced for the first time, the law applicable to the particular sect to which a Muslim belonged as the source of the law on this subject, as well as on donations not involving fidei commissa, usufructs or trusts. Sri Lanka Muslims had adopted the practice of making gifts subject to restrictions, in the forms familiar to the General law. The Ordinance therefore recognised their legality, and excluded them from the purview of Muslim law.[117] The Islamic law on inheritance limits testamentary dispositions to one third of the deceased's assets; yet Muslims continued to exercise a right to freedom of testation under the General law statute on wills.[117A] Nevertheless, the courts were influenced by the changes in the law on succession and interpeted the provision in the Ordinance of 1929 as authorising the application of the

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law of the sect to which a Muslim belonged, even with regard to marriage and matters connected with it.[118] Thus when the Muslim Marriage and Divorce Act, No. 13 of 1951 was enacted, it endorsed a view that had already been expressed in the Supreme Court.

This Act completed the process of entrenching Islamic law, as the source of the law governing marriage and divorce among Muslims. The statute applies to Muslim inhabitants in Sri Lanka, "in all mattres relating to Marriage and Divorce and matters connected therewith." In questions that are pertinent to marriage and divorce, the status and mutual rights and obligations of the parties is to be determined by the law governing the persons sect. The Act preserves the Islamic law of marriage and divorce, for registration or non-registration of a marriage under the Act does not prevent the application of the principles of Islamic law, with regard to the validity of the union.[119]

Since the majority of Sri Lanka Muslims belong to the Sunni sect that follow the law of the Shafi school,[120] it is Shafi law that is often applied as the source of the Islamic law governing marriage, divorce and inheritance among Sri Lanka Muslims. However there are several reported decisions in which the courts have applied the Hanafi law.[121] When reform of the law governing Muslims was contemplated, there was obvious pressure to introduce Islamic law, even though what had been originally preserved for the Muslims as for others was their indigenous Customary law. Now that its relevance has been recognized by legislation, the further question that arises is whether Islamic law can be the source of the law governing Muslims in all areas of the law that have a bearing on marriage, divorce and inheritance.

At the time the Mohammedan Code applied, it was considered a rough codification that enabled the introduction of Islamic law on matters not strictly referred to in the Code. Thus the Islamic law on donations of immovable property was considered applicable to Ceylon Muslims, before the Ordinance of 1931 introduced the law of a person's sect with regard to pure donations, not involving fidei commissa usufruct or trusts.[122] Principles of Islamic law on the custody of minors were also applied by the courts,[123] even before the Muslim Marriage and

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Divorce Act introduced the law of a person's sect regarding matters connected with marriage and divorce. Judicial decisions have even accepted that the question of minority is governed by Islamic law, and the relevance of these principles has not been explained in terms of their connection with the subject of marriage[124]. In fact in the case of **Narayanen** *v.* **Saree Umma** the court considered the principles of Islamic law to be relevant on the basis that the topic of minority was outside the scope of marriage, divorce, and inheritance, the topics that were specifically covered in the Code.[125] With the introduction of the law of the sect in matters connected with marriage and divorce, it seems clear that the Islamic law regarding the relationship of parent and child is applicable in Sri Lanka.

The Supreme Court has in recent times revealed a tendency to restrict the scope of the Islamic law in this country by interpreting the legislation defining its application restrictively. It has been decided for instance, that the status of the illegitimate child of unmarried Muslim parents is outside the scope of Muslim law, since the Muslim Marriage and Divorce Act introduces the Islamic law with regard to marriage and divorce.[126] Principles of Islamic law have been rejected on the basis that rules derived from the law governing a group of persons within the country, or a personal law, that derogates from the General law of the land, cannot be applied in respect of matters that are outside the scope of the topics specified by legislation.[127] It is sometimes said that there is no local custom or *cursus curiae* in support of the application of Islamic law in Sri Lanka.[128] However, this restrictive approach leads to unsatisfactory solutions, for the introduction of the principles of Islamic law may be essential to give coherence to the law on the topics that have been declared by statute as governed by this system.[129] Besides, one transaction may encompass matters on which the personal law as well as the General law apply, and it will be arbitrary to determine all aspects of the question according to the General law.[130] The Privy Council drew attention to this fact when they commented in as far back as 1953 that "the authorities as to the extent to which and the form in which the general Muslim law has been received into Ceylon seems very conflicting, and they would venture to hope that the question of resolving by legislation the doubts which this conflict

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of authority must create may receive early attention".[131] This clarification has not been forthcoming, and there has been no legislative effort to restrict the scope of the Islamic law, which has now come to be considered the customary or traditional law of the Muslims in Sri Lanka.

The confusion and uncertainty surrounding the application of Islamic law in Sri Lanka was highlighted in very concrete terms in the judicial decisions on the subject of maintenance for the illegitimate child of Muslim parents.[132] However the legislature, for from clarifying the legal position, introduced an ad hoc amendment that caused, as we shall see, further confusion on the subject. The response of the legislature in solving this particular problem however reveals the reluctance to narrow down the application of Islamic law and the jurisdiction of the Quazi Courts.

Since the application of the law is based on adherence to a faith, an apostate from Islam will cease to be governed by Muslim, law.[132A] Equally a convert to Islam may claim that Muslim law applies to him. An early Sri Lanka case emphasised the importance of a convert "(announcing) himself as professing the Mohammedan religion."[132B] In the leading case of **Attorney-General** *v.* **Reid**[133] the Privy Council held that a non-Muslim who had become a convert and professed Islam was governed by the law applicable to Muslims. The impact of such conversion on legal rights and responsibilities acquired prior to the conversion will be discussed in dealing with questions of conflict of personal laws. At this point it is only necessary to comment that the basis of the application of Muslim law in Sri Lanka being adherence to a religious faith, an apostate will cease to be, and a convert will become governed by this law in the area of family relations.

The difficulty of challenging a conversion to Islam on the basis that it was motivated purely by a desire to change the law governing family relations, is demonstrated in **Attorney-General** *v.* **Reid.** It was established that the conversion of the parties had taken place in June 1959, and that a marriage between them was contracted under Muslim law a month later. Basnayaka C.J. stated in the Supreme Court that these facts raised a suspicion that the conversion was purely for the purpose of acquiring the right to contract a polygamous marriage under the Muslim law

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in Sri Lanka. Nevertheless the conversion was not challenged as colourable, in the face of the evidence of a Muslim priest that he had converted the parties to Islam.[134] The appeal to the Privy Council was therefore argued on the premise that the conversion was sincere and genuine.[135] Though writers on Islamic law, state that courts will not allow a colourable or pretended conversion to affect the rights and liabilities of the convert,[135A] the Sri Lanka courts do not seem prepared to question the genuineness of the conversion, if the person has gone through the appropriate form prescribed for conversion to Islam.[136]

The same difficulty arises with regard to apostacy. In the absence of a formal declaration rejecting Islam, apostacy will have to be established by conduct. Thus conversion to another faith may be deemed an act of apostacy.[136A] If proof that the conversion was genuine is unnecessary to prove apostacy,[136B] the Court may also find it difficult to go behind a person's declaration that his conversion to another faith was purely formal, and without the intention of renouncing Islam.[136C]

4. Interpersonal Conflict of Laws

The above account indicates that there are several systems of law in Sri Lanka that apply as personal laws to particular classes of the inhabitants, in derogation of the General law of the land. In attempting to describe the plurality of legal systems that this entails, the Privy Council in **Attorney General** *v.* **Reid** commented that "in a country like Ceylon. . . . there must be an inherent right to the inhabitants to change their religion and personal laws."[137] This comment is not however accurate, for it only reflects the position with regard to Muslim law, the one system of personal law that can be acquired or dispensed with by any inhabitant of Sri Lanka. We have seen that there is a very restricted right to change the other personal laws to be found in the country. For this very reason the application of these laws often entails problems of conflict of personal laws.

In countries with different systems of law applicable concurrently to the subject of family relations, within the same geographical unit, problems of internal conflict of personal laws may require adaptation of the external conflict of law rules that

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are applied to cases involving a foreign element. When the courts are faced with the problem of determining which personal law applies to the parties or to a particular transaction, and whether the General law of the country applies, it may not be appropriate to adopt the solutions accepted in cases involving external conflict of laws. The term "interpersonal conflicts" or "internal conflict of laws" is therefore used by writers on plural legal systems, to distinguish this branch of law from the law relating to external conflicts.[138] The statutory provisions regulating the choice of the applicable laws, and the principles of "justice, equity and good conscience" have been considered important sources of law in determining the rules governing questions of interpersonal conflict of laws in Africa and in India. The approach in these countries is empirical, and the principles of external conflicts are considered only of persuasive authority, and as providing guidelines for arriving at meaningful solutions to internal conflict of law problems.[139]

According to the Roman Dutch law that applies in Sri Lanka on the topic of external conflict of laws, the concept of domicile can be used to determine the legal system by which important questions on family law are decided. A person's domicile is acquired at birth, and this will be the domicile of the father or the mother, depending on whether the child is legitimate or illegitimate. Thus a legitimate child's domicile of origin is the father's domicile at the time of birth, while an illegitimate child's domicile of origin is that of the mother, at the time of his birth. The domicile of origin can be changed by the acquisition of a domicile of choice. However a minor cannot acquire such a domicile. Thus, during minority the legitimate child's domicile follows the changes in the father's domicile, and the illegitimate's the changes in the mothers domicile. A married woman acquires the husband's domicile. She becomes incapable of changing this during the subsistence of the marriage, and retains the husband's domicile even after dissolution of the union, until she acquires a fresh domicile. She does not automatically revert to the domicile she had before she was married. In the case of a voidable marriage, the wife retains the husband's domicile unless the marriage is dissolved.[140]

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Some of the important concepts and principles of external conflict of laws have been used in Sri Lanka, both in legislation and in judicial decisions, to provide solutions to problems involving an internal conflict of laws. The concept of domicile and its relevance in determining the law applicable to devolution of movable property, as well as the principle that immovable property is governed by the *lex situs*,[140A] are principles that were first applied in the external conflicts situation. Thus the Wills Ordinance was enacted to change the principle that the *lex situs* governed immovable property, introducing the concept of "matrimonial domicile" to ascertain the law applicable in determining the matrimonial rights of spouses and the devolution of their property after dissolution of the marriage. We have observed that the phrase was not intended to be used in the context of the application of different personal laws within one country. Nevertheless this phrase was subsequently interpreted in that way in the Ordinance of 1852, which was promulgated on the assumption that the Kandyan law was a regional law.[141] When the Matrimonial Rights and Inheritance Ordinance was enacted in 1876, this interpretation of the Wills Ordinance was assumed to be correct, and the legislation viewed as essential to cope with the resulting problems of conflict in personal laws.[142] The Matrimonial Rights and Inheritance Ordinance itself was based on the concept that there was only a Ceylon domicile, and it views the Customary laws on family relations as essentially personal laws applicable to particular persons within the country, rather than regional legal systems.[143] By contrast the Kandyan Succession Ordinance refers to a "domicile" in the Kandyan Provinces, despite the fact that this system was known even at that time, as a personal law applicable to a particular category of inhabitants in those provinces.[143A]

The Courts too have sometimes used the external conflicts concepts of "domicile" and "*lex situs*" in determining the scope of the application of the Customary laws, when there has been a conflict with the General law.[144] However they have come to recognise that the Customary laws on family relations even if sometimes applicable because of a regional connection, are fundamentally personal laws, applicable to certain sectors of the population. There is therefore judicial awareness that the concepts

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of "domicile" and "*lex situs*" in external conflict of laws cannot be applied automatically in an internal conflicts situation. The courts now use these concepts only in reference to the General law of the country, for the application of the Customary laws can no longer be dependent on those concepts.[145] Besides proof of a Sri Lanka domicile, when relevant, is only one ofthe requirements for the application of the personal laws.[146]

(*a*) *Marriage between individuals governed by different personal laws*

The concept of unity of domicile between husband and wife has influenced the legislative provisions enacted in this country to determine the effect of marriage on the application of conflicting personal laws. With regard to a married woman, the Matrimonial Rights and Inheritance Ordinance declares that if she marries a man "of a different race or nationality from her own, (she) shall be taken to be of the same race or nationality as her husband for all the purposes of the Ordinance, so long as the marriage subsists and until she marries again" and that, "save as aforesaid," the Ordinance shall not apply to Kandyans, Muslims or persons who are or may become subject to the Tesawalamai. This provision is also found in the Married Womens Property Ordinance, No. 18 of 1923, and both statutes contain the General law on the subject of matrimonial rights and inheritance.[147] The Jaffna Matrimonial Rights and Inheritance Ordinance, No. 1 of 1911 states that a woman becomes or ceases to be governed by Tesawalamai during the subsistence of her marriage, depending on whether her husband was or was not subject to this system at the time of marriage.[148]

Despite the legislative recognition of the concept that husband and wife should be governed by the husbands' personal law during the marriage, the courts have interpreted these provisions narrowly, and endorsed a situation where husband and wife continue to retain their own personal laws even after marriage. Thus the phrase "different race or nationality" in the Matrimonial Rights and Inheritance Ordinance has been interpreted to mean that the statutory provision on unity of personal law does not apply in the case of marriages between Low Country and Kandyan Sinhalese, or between Sri Lanka Tamils, even though they may be governed at the time of marriage by different personal laws.[149]

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The courts have also not drawn on the concept of unity of domicile in external conflict of laws to provide a solution to the ensuing problem of a conflict in the personal laws governing husband and wife. In the course of his judgment in **Fernando** *v.* **Proctor** Woodrenton J said "it may be that apart from the Ordinance No. 15 of 1876, the matrimonial domicile of spouses would in such a case be that of the husband," but expressed no opinion on the point.[150]

The present trend is unfortunate, for the courts can adopt an empirical approach to solve the anomalies created by an inter personal conflict of laws. If two different systems of personal law govern husband and wife, it will be difficult to determine the rights of the parties inter se with regard to matrimonial rights. It is also unsatisfactory that the property of husband and wife should devolve according to different systems. An effort should therefore be made to derive principles from the existing statutes, and the concepts in external conflicts, to prevent a conflict in personal laws during the subsistence of a marriage.

It has been pointed out in a case decided in the Supreme Court that the phrase "different race or nationality" in the Matrimonial Rights and Inheritance Ordinance (to be referred to as the M.R.I. Ordinance) must be interpreted according to the literal meaning of the words, and that it is not possible to speculate on the intention of the legislature and distort the actual words used in the statute.[151] However the Supreme Court has often drawn on the background to statutes to interpret provisions in an enactment in conformity with the intention of the legislation,[152] and this approach is essential for a meaningful interpretation of the M.R.I. Ordinance. The history behind this statute indicates that it was meant to conserve the Customary law on matrimonial rights and inheritance in the case of Kandyans, the Muslims, and the Tamils of the North who were governed by Tesawalamai, except in the case of a marriage between such persons and others governed by the General law as contained in the M.R.I. Ordinance. In that event the ensuing conflict of personal laws which was a focal point of the legislation, was to be resolved by the application of the principle that the woman's personal law should be deemed to be the same as that of the husband governed by the General law during marriage. This would achieve the result that matrimonial rights and

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inheritance of the spouses would be governed by the Ordinance, without affecting the principle that persons governed by the Customary laws were excluded from the Ordinance.[153] The declaration that the woman was to be deemed of the "same race or nationality" as the husband, was intended to mean that she *lost her personal* law and became governed by the Ordinance. This explains why Section 2 of the M.R.I. Ordinance declares that "save as aforesaid this Ordinance shall not apply to Kandyans....."

The interpretation that the case of the mixed marriage between a woman governed by the personal law and a man governed by the General law was to form an exception to the rule that the Customary laws were not to be touched by the Ordinance, is clearly indicated in the remarks of the Queen's Advocate in a report on the M.R.I. Ordinance that was submitted to the Colonial Office. Section 2 of the M.R.I. Ordinance, he said, contained the "important provision that a woman by marriage shall be taken so far as relates to the provisions of the ordinance to have adopted the race or nationality of her husband (and) also excludes from the operation of the Ordinance Kandyans, Mohommedans and Tamils of the Northern Province. The necessity for the exclusion as being prejudicial to the symmetry and uniformity of the law is to be regretted. But the Mohammedan law (cannot) ..... be materially altered, the Kandyan law ..... it was not thought advisable to touch so far as concerned the native population of these provinces..... the Tamils of the Northern Province made a special request that the Tesawalamai might not be interfered with, and to this request the government and the Legislative Council acceded".[154] The expression "different race" in the M.R.I. Ordinance was therefore clearly intended to denote members of the different communities who were governed by the various personal laws. Though ethnically of the same stock, it is not unlikely that when the M.R.I. Ordinance was enacted, Kandyan Sinhalese and Tamils of the North were considered as belonging to distinct groups in the Sinhala and Tamil population, and therefore deemed to be, in common parlance, persons of a different race from Low Country Sinhalese and other Tamils.[155]

If section 2 of the M.R.I. Ordinance and the corresponding provision in the Married Women's Property Ordinance is to be interpreted in a manner that is consistant with the phrase "save

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as aforesaid.....", the words "different race" cannot be construed literally, but only in the context in which they were used when the M.R.I. Ordinance was enacted. If this interpretation is not adopted there is a conflict of personal laws in the event of a marriage by Sinhalese or Tamil women with men of their own race who are subject to the General law, when the women are governed by distinct personal laws, prior to marriage. Such a situation appears to be the very reverse of what the statutes intended, for there is no logical basis for conceding that Kandyan women or women subject to Tesawalamai were permitted to retain their personal laws when they married men of their own race who were governed by the General law. In any case an interpretation that excludes marriages by Tamil men governed by the General law with Tamil women subject to Tesawalamai from the statutory provisions stating the General law on matrimonial rights and inheritance, is no longer that significant in view of the subsequent provisions in the Jaffna Matrimonial Rights and Inheritance Ordinance (henceforth referred to as the Jaffna M.R.I. Ordinance). This statute does not indicate whether a woman whom it declares as ceasing to be governed by Tesawalamai when she marries a man who is not subject to it, becomes governed by the law of the husband. Nevertheless such a woman can be subject to General law. It is an accepted principle in Sri Lanka that when a citizen is not governed by a personal law, the General law applies to determine legal rights and liabilities.[155A] Thus when the woman ceases to be subject to Tesawalamai through the duration of her marriage, both spouses will be governed by the General law regarding matrimonial rights and inheritance.

Despite the clarification introduced in the Jaffna M.R.I. Ordinance, there is still a difference in the legal position, if marriages between Tamils can be brought under the conflicts rule set out in the General law statutes. Under these statutes the woman who was originally subject to Tesawalamai does not revert to her personal law after the marriage is dissolved.[156] She continues to be governed by the General law (i. e., she retains the husband's law regarding the devolution of all property) even after dissolution of the marriage until she re-marries. If the conflicts rules in the

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General law statutes are excluded and only the provisions in the Jaffna M.R.I Ordinance apply, the woman reverts to her personal law after the marriage is dissolved, for she ceases to be governed by Tesawalamai only during the subsistence of her marriage to a man governed by the General law.

Since the Kandyan Marriage and Divorce Act now indicates that a Kandyan cannot marry a non-Kandyan under that law, it appears self evident that the matrimonial regime of the spouses in a marriage between Kandyan and non-Kandyan should be governed by the General law. Thus, despite the judicial authorities to the contrary, [157] there is even greater reason for adopting the interpretation that a Kandyan woman who marries a Low-Country Sinhalese becomes governed by the General law on matrimonial rights and inheritance. If the statutory provisions in the General law apply, she will continue to be governed by this law (i. e., she retains her husband's law regarding the devolution of all property) even after dissolution of the marriage until she re-marries. She does not reacquire her personal law. There is no corresponding statutory principle regarding the case of a Kandyan man who marries a non-Kandyan woman, unless the first part of the M.R.I. Ordinance and the Married Womens Property Ordinance is interpreted as setting out a general principle. The difficulty with adopting such a construction is that the statutory rule that the wife follows the husband's law is said to apply "for the purposes of the Ordinance", and the enactments themselves deal with the General law regarding matrimonial rights and inheritance.[158]

In the absence of a statutory principle it is difficult to ascertain the rules that apply to prevent a conflict of personal laws. If a Kandyan marries a woman subject to Tesawalamai, does the Jaffna M.R.I. Ordinance create an inference that loss of her personal law coincides with the acquisition of the personal law of her husband?[159] Even if that construction of the statutory provision is not possible, can the external conflicts concept of unity of domicile be used by the courts to prevent a conflict of personal law and ensure that the woman becomes governed by the Kandyan law? An answer to these questions can elucidate the position with regard to the application of Kandyan law when a non-Kandyan woman marries a man governed by this system.

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Since the Jaffna M.R.I. Ordinance leaves the matter vague, it is not possible to state that the woman who was subject to Tesawalamai automatically becomes governed by the Kandyan law. Nevertheless the external conflicts concept of unity of domicile is certainly relevent if it can be used to ensure that one law governs the matrimonial regime of the spouses. Though this concept has been attacked as "the last barbarous relic of a wife's servitude"[160] it has been changed by recent reforms even in a country like England only in so far as the wife is free to acquire an independent domicile after marriage. It is still recognised that the marriage should be governed by one law, and the reforms have only sought to alleviate the injustices that could arise from a wife being compelled to take the husband's domicile even after separation.[161] The concept of "unity of domicile", based upon the idea that the parties intended the marriage to be governed by the husband's personal law can be used to support the argument that the Kandyan law applies to the marriage with a non-Kandyan woman.

There is however an important obstacle to the courts adopting this view—a point that is relevant even if both the M.R.I. Ordinance and the Jaffna M.R.I. Ordinance are interpreted as setting out a general principle that the wife follows the personal law of the husband. When the Kandyan Marriage and Divorce Act (1952) was promulgated, Kandyans ceased to be able to contract marriages with non-Kandyans under Kandyan law. While the previous marriage statutes permitted Kandyans to marry non-Kandyans under Kandyan law or the General law, the Kandyan law of inheritance was specifically preserved even when the marriage was solemnized under the General law. The present Act however has repealed those provisions, and preserves the Kandyan law of inheritance only in the case of marriages between Kandyans solemnized under the General law.[162] This legislative change makes it very clear that the law regarding matrimonial rights and inheritance in all marriages between Kandyan and non-Kandyan must be determined according to the General law. It is therefore difficult to interpret the existing statutory provisions on the subject of inter-personal conflict of laws, or the external conflicts concept

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to support a principle that the Kandyan law applies to the Spouses On the basis that the spouses cease to be governed by the Kandyan law, for the duration of the marriage, there is no difficulty in applying the provisions in the General law statutes, even though they do not normally apply to Kandyans.[163]

If this interpretation is not adopted there is an insoluble conflict between the provisions of the General law statutes on matrimonial rights and inheritance and the most recent Kandyan Marriage and Divorce Act. In other words the parties in a mixed marriage are prohibited from contracting a Kandyan law marriage and are required to solemnize their marriage under the General law, and yet they retain the Kandyan law on matrimonial rights and inheritance ! It is true that Tamils governed by the Tesawalamai, and Kandyan spouses who solemnize their marriages under the General law, are governed by their personal law with regard to the aspect of matrimonial rights and inheritance. But this is because there are no separate principles regarding solemnization of the marriage in the former case, and the Kandyan law has been specifically preserved by legislation in the latter case.[164] When there is a Customary law regarding Kandyan marriages and also principles on succession and inheritance, it is difficult to argue that people who are prevented by statute from marrying under that law and whose right to be governed by the law of succession has not been expressly conceded, may nevertheless claim to be governed by the Kandyan law on matrimonial rights and inheritance.

It is submitted that the General law should govern matrimonial rights and inheritance for the duration of these marriages. On dissolution, the parties may be considered as reverting to the law that applied prior to marriage. The Kandyan man as well as a non-Kandyan woman will therefore be able to reassert a right to be governed by their personal laws. If plurality of laws is to be avoided legislative intervention is justified to prevent persons reverting from the General law back to their personal laws. In the present context, legislation ensures that a woman who marries a man governed by the General law retains it till she remarries. That same provision should be extended by legislation to cover all persons who become subject to General law during marriage.[164A]

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The external conflicts concept that a married woman retains the husband's diomcile after dissolution of the marriage appears to have influenced the rule set out in the M.R.I. Ordinance. While the principle that the woman retains her husband's law till she remarries may have some justification when it ensures that the woman continues to be governed by the General law, it ensures plurality when applied in the context where the man is governed by the Customary law. The woman will continue to be governed by the Customary law even after dissolution of the marriage. Such a result is unreasonable and is prevented by the Jaffna M.R.I. Ordinance in the case of women marrying men governed by Tesawalamai. We have observed that the General law statutes should not be interpreted as stating a general principle. If they are so construed, apart from the other anomalies, a non-Kandyan woman will continue to be governed by Kandyan law, even after the dissolution of the marriage until she remarries.

Inter-marriage between Muslims and non-Muslims do not create the same problems of a conflict of laws, even though the M.R.I. Ordinance specifically provided that the law of the husband should prevail, when a marriage is contracted between a Muslim woman, and a man governed by the statute. Muslim law in Sri Lanka is a religious law, and its application depends on adherence to the Islamic faith. It has its own principles with regard to marriages with persons who do not profess the Islamic religion. According to these, a Muslim woman is prohibited from contracting a marriage with a non-Muslim.[165] She will thus not have any status as a married woman under that law, unless the man converts to Islam. If he converts, he will cease to be subject to his personal law, and will become governed by Muslim law. There is of course nothing to prevent a Muslim contracting a registered or unregistered customary marriage with a non-Muslim under the General law.[165A] If a Muslim woman's marriage to a non-Muslim is not recognised in the Muslim law, it is clear that this law cannot apply, and her status as a married woman must be determined according to the General law or any other system which applies to her on marriage. Her conduct in marrying a non-Muslim may even be interpreted as an act of apostacy or a renunciation of her faith.

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It follows that even apart from the provisions in the General law statutes on matrimonial rights and inheritance, the Muslim woman who marries a non-Muslim will be governed by the General law during the subsistence of the marriage. However it is difficult to apply the statutory principle that she continues to be governed by the General law even after the dissolution of the marriage. It is true that in Islamic law marriage to a non-Muslim man was so taboo that it probably entailed the death penalty. But writers on the application of Islamic law, in non-Muslim states, agree that renunciation of the Muslim religious and personal law is not viewed as severely as in a Muslim state.[165B] The obstacle to the application of Muslim law being the marriage, once it is dissolved, cannot a woman claim that as an adherent of the Islamic faith, unembarrassed by status of a non-Muslim wife, she becomes subject to Muslim law? The provision in the Jaffna M.R.I. enables the exercise of such a right, for a woman becomes subject to Tesawalamai only for the duration of the marriage. The legal position in a marriage to a Kandyan will be the same as that of any other woman, and there is nothing to prevent a woman claiming to be governed by Muslim law on the dissolution of her marriage to a Kandyan.

A non-Muslim woman who converts to Islam, and marries a Muslim, will cease to be governed by her personal law. There will then be no occasion for a conflict of personal laws. The marriage of a Muslim and a non-Muslim woman who does not convert to Islam is also the kind of union which does not produce a conflict of personal laws that is within the jurisdiction of the ordinary courts. Islamic law itself refuses to recognize such marriages as valid, unless the woman is a Kitabiyya or one who adheres to a faith that is revealed in holy scriptures. Even writers who dispute the view that there is an absolute prohibition on such a marriage to a woman who is not a Kitabiyya, only concede that it is an irregular union as opposed to a void marriage.[166] Since a Muslim may contract a valid marriage with a non-Muslim under the General law, there is every reason to consider such a marriage as being subject only to the law under which it was solemnized. Even if the General law statutes on matrimonial rights and inheritance are deemed to set out a basic principle, or the courts adopt the concept of unity of personal law, the spouses who have

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married under General law cannot be considered validly married under Muslim law. In this context the marriage and its consequences in respect of matrimonial rights and inheritance should be subject to the General law, according to which the marriage was solemnized. Since the Muslim party to such a marriage cannot be subject to the Muslim law on marriage and he may even be deemed to have committed an act of apostacy when he contracted a marriage that is not recognised in Muslim law,[167] there is no difficulty in applying the provisions in the General law statutes which normally exclude Muslims.

A marriage between a Muslim man and a non-Muslim Kitabiyya is considered valid in Muslim law.[168] It may not be possible to register such a marriage under the Muslim Marriage and Divorce Act which applies to Muslims. However the Act ensures that this will not affect the validity of a marriage under Muslim law.[169] Since the Muslim law permits the Kitabiyya to retain her religion and personal law[170], she cannot become subject to Muslim law, even if the General law statutes were interpreted as setting out a basic principle on the wife following the husband's personal law. The conflict of laws that arises must be determined according to the principles of Islamic law.[171]

Since a Muslim may contract a marriage with a non-Muslim under the General law, it appears to be recognized that a Muslim male may opt to solemnize his marriage with a Kitabiyya under the General law.[172] The provision in the General law statutes, even if they are deemed to set out a general principle, cannot apply to make the woman subject to Muslim law, when that law permits her to retain her personal law. The concept of unity of personal laws should not be used by the courts to produce that result. On the other hand, since the parties had the option of contracting the marriage under Muslim law, and chose to use the General law, there is good reason for concluding that they intended the General law to apply to all aspects of the marriage.[173] On dissolution, both parties will revert to their own laws. The real problem of conflict of laws arises in respect of Muslim marriages when there is a conversion to Islam or a Muslim commits an act of apostacy.

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(*b*) *Conversion to Islam and the conflict of personal laws*

If a convert becomes governed by Muslim law from the date of the conversion, what impact does this have on a marriage contracted prior to the conversion? Islamic law postulates certain principles which are clearly relevant in a Muslim state, where there could be no problems of a conflict between different systems of law having equal force and validity. Thus, the conversion need have no effect on a marriage contracted with a Kitabiyya, for Islamic law recognized the validity of such a union. On the other hand, if the first wife was a woman from a non-scriptural faith, Islam was offered to her, and if she refused, a decree dissolving the marriage could be obtained.[174] Unilateral conversion to Islam could not create problems, for there was no question but that the right of the spouses under the previous system were subordinate to Islamic law. However, unilateral conversion, if permitted in a non-Muslim state creates a clear conflict between the law governing the first wife and the converted husband.

In India, which is a non-Muslim state, writers on Islamic law resolve the problem of conflict in personal laws by adopting a strict attitude to unilateral conversion. It seems to be well recognized that in a non-Muslim state a man cannot obtain a dissolution of a marriage contracted prior to his conversion. The judicial authorities on this point are also cited in support of the opinion that a unilateral conversion is inadequate to satisfy the requirement of a genuine conversion to Islam, when it is followed by a polygamous marriage under Muslim law. According to this view, a conversion that enables a married man to contract a polygamous marriage can only take place if both spouses to the first marriage embrace Islam. [175] The Indian Law Commission has also pointed out that when a problem of internal conflict of personal laws arises on conversion, the external conflicts concept that the law governing capacity should be determined by the law of each party before marriage has no relevance. Applying the concept of "justice, equity and good conscience," they state that the convert's personal law should not be decisive. They express the view that a unilateral conversion to Islam does not give the convert in India a right to contract polygamous marriages.

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It is in accordance with "justice, equity and good conscience" that his legal rights under Islam are qualified by the first wife's right under the monogamous marriage to "exclude all others from the consortium so long as the marriage subsists."[175A]

In the Sri Lanka appeal of **Attorney-General** *v.* **Reid,** the Privy Council decided that a unilateral conversion enabled the husband to contract a valid polygamous marriage. The court perhaps found it difficult to decide the case on the colourability of the conversion, because the appeal was argued on the basis that this was genuine.[176] Nevertheless, according to the facts of the case, the first wife was a Roman Catholic whose religion did not permit divorce, and the second marriage was contracted a month after the conversion to Islam. It is submitted that the court could have held that in a non-Muslim state like Sri Lanka, the test for conversion was an objective one, and that the husband's conduct did not conform to the standard required for a genuine conversion. They could have decided that when conversion is followed immediately by a polygamous marriage, the inference of colourability that is raised from the conduct cannot be displaced by subjective evidence with regard to the sincerity of belief. Being a foreign-based court, their lordships were probably reluctant to rest their decision on the genuineness of the conversion. A Sri Lanka court today should not feel inhibited in the same way, and can apply an objective test when the conversion is followed by a second marriage that is prohibited under the law applicable prior to the conversion, and permissible under the Muslim law in Sri Lanka on polygamous marriage.

In emphasising the right of a person to change his personal law by a unilateral act, the Privy Council seems to have been influenced by the theory that the inhabitants of Sri Lanka have an inherent right to change their religion and personal law.[177] This view, we have observed, is not correct with regard to the other personal laws that apply in Sri Lanka. Besides, the concept of the monogamous marriage, in the non-Muslim law on family relations in this country, indicates that there is no absolute right to convert to Islam and change one's personal law.

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Bigamy was included as an offence under the Penal Code in Sri Lanka, because a second marriage in the lifetime of a spouse was deemed void, except in the case of persons governed by Muslim law.[178] In **Reid's** case, the Attorney-General argued that a marriage under the General Marriages Ordinance created a status of monogamy which could not be changed legally, unless the marriage was dissolved or annulled. The Privy Council rejected this argument stating that "whatever may be the situation in a purely Christian country ..... in a country like Ceylon ..... a monogamous marriage (does not) prohibit for all time during the subsistance of that marriage, a change of faith and personal law."[179] The Privy Council, we have observed, was unaware of the fact that there are strict limitations on the application of the other personal laws. In rejecting the Attorney-General's argument, the court refused to appreciate that even the right of conversion to Islam and of becoming subject to Muslim law could be qualified in a non-Muslim state, where the monogamous marriage was the norm in the law on family relations.

When the offence of bigamy was introduced in 1895 by an amendment to the Penal Code amidst strong protests from the Muslims, the Attorney-General, Mr. C. P. Layard, explained that the provision only applied to persons to whom polygamy was prohibited. In the debate on the amendment, he said that the "object was that a man who was married and who by his legal status could not take a second wife, should not, for the sake of marrying again, adopt the Mohammedan religion ..... thus leading her to the belief that she was his legal wife, when owing to his status she was not. It was only in that class of cases that this (i. e. the offence) would apply."[180] When this amendment to the Penal Code declared that the offence of bigamy was committed whenever a person "having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife,"[181] it was clearly meant to exclude a valid polygamous marriage contracted by Muslims. But the amendment was also based on the assumption that the second marriage of a man, during the subsistence of a valid monogamous marriage, even after conversion to Islam, was void. It is this view of the General law concept of marriage that is reflected in the exhortation that a Registrar of Marriages

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is required to make to parties who marry under the Marriage Registration (General Marriages) Ordinance No. 19 of 1907. He is required to tell them that the marriage can only be dissolved by a valid judgment of divorce, or death, and that a marriage prior to dissolution amounts to bigamy.[182]

This provision on the Registrar's directive is therefore not based on a misconception of the law, as the Privy Council suggested.[183] It is an articulation of the concept that the status of marriage acquired under the General Marriages Ordinance prevents a spouse from contracting a valid second marriage. In as much as a subsequent marriage under the Ordinance is declared void when a prior marriage has not been legally dissolved,[183A] the statute contemplates the creation of a monogamous marital status.

When the General Marriages Ordinance is not interpreted in this way, the rights and obligations created by that statute have to be reconciled with the right of a person to become subject to Muslim law, by a unilateral conversion to Islam. Such a reconciliation is impossible because the Islamic law has its own principles with regard to the impact of conversion on the first marriage, the rules being enunciated in a context where this law was the supreme law of the state. In **Attorney-General** *v.* **Reid,** the Privy Council did not focus on the conflict between the Islamic law and the General law in this context. The court was content to assert the validity of the convert's polygamous marriage as well as the equivalent right of the first wife to her status under the General law. Yet the external conflict of law concept that the capacity to contract a valid marriage depends on the law of each party,[183B] at the time of marriage, cannot provide a meaningful solution to a problem of internal conflict of laws, for it entails a host of contradictions.

If the conversion to Islam enables a man to contract a valid second marriage under Muslim law in Sri Lanka, it is clear that the first wife's status is that of a Muslim wife. This was obviously accepted as the correct legal position by the Registrar of Muslim Marriages, in **Reid's** own case. The first wife being a Roman Catholic and Kitabiyya, the prior marriage was valid according to the ordinary principles of Islamic law. The convert was therefore required to conform to the procedure set out in the Muslim

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Marriage and Divorce Act, when a Muslim wishes to contract a second marriage. That procedure included giving notice to the Quazi in whose area the first wife resided.[184] This notice would have been unnecessary, unless she was considered the first wife of the convert under the Muslim law. The Privy Council failed to note this, and observed in an obiter dictum that the first wife retained her marital status under the General law.[185] Consequently, the legal position that emerges from the Privy Council decision in **Attorney-General** *v.* **Reid** is full of contradictions. The first wife is one of the convert's wives under the Muslim law on polygamous marriages in Sri Lanka, to whom, the husband has always owed, in this country, duties of equal maintenance and support.[186] She is at the same time a non-Muslim wife whose status under the General law entitles her to sue the convert for divorce, on the ground of adultery or desertion. Even if recognition of the remedies of the first wife under the law governing the first marriage would be one way of resolving a conflict of laws between foreign systems,[187] it cannot be an appropriate solution where the different legal systems apply within the same country, on a non-regional basis.

The recognition of the wife's status under the General Marriages Ordinance is clearly inconsistent with the principles of Muslim law in Sri Lanka, and there cannot be such an unresolved conflict between systems applicable in the same country. The General Marriages Ordinance considers sexual intercourse outside marriage as adultery, and categorises a second marriage as bigamy. The Privy Council declared that the second marriage by the converted husband was not bigamous, but was willing to treat it as adultery. It declared that a man had a right to convert to Islam and acquire a second wife, and yet considered his conduct adulterous, and a violation of his marital obligations to the first wife.

An approach that leads to such a conflict of laws could have been avoided if the Privy Council paid sufficient attention to the restrictions on the right of unilateral conversion, in a country where Muslim law operates as one of several equally important systems. By recognizing an unrestricted right of conversion entailing a change of personal law, **Attorney-General** *v.* **Reid** has created a situation in which the first wife's status as a married woman

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under the General law is seriously undermined. A General law marriage is indissoluble except on limited grounds. The wife therefore has a legal right to refuse to divorce her husband, for she can condone his matrimonial fault. To concede that the first wife can sue for divorce, when the husband contracts a polygamous marriage, is hardly an assertion that her marital status is protected. On the contrary the conversion compels her to grant him the release that she was unwilling to give him. It is because she relied on her legal rights, that the man contracted a polygamous marriage under Muslim law. The effect of his change of personal law is to erode her status as a married woman. Since a convert's property devolves according to Islamic law,[187A] her rights of succession will also be effected. As for the convert he must be deemed to be committing adultery with a woman recognized by another legal system in the same country as his lawful wife. Besides, he acquires a privilege that is available to no other Muslim. If the first wife does not become a Muslim wife, it follows that he may contract four marriages under Muslim Law, making up a total of five !

The "public policy doctrine" is used in the external conflict of laws, in determining the choice of law regarding the validity of a marriage. Thus, a court may hold a particular marriage invalid, even where it would be valid by the normal choice of law rules, on grounds of public policy.[187B] This concept could have been used in **Attorney-General** *v.* **Reid** to arrive at a decision which did not violate the monogamous character of the first marriage. The opinion of the Privy Council in **Attorney-General** *v.* **Reid,** seems to have been greatly influenced by what their Lordships considered an inherent right to change religion and personal law. It is submitted that this right is qualified in a country like Sri Lanka, which recognizes the obligation of monogamy as an important aspect of the law as family relations.[187C] An unrestricted right of unilateral conversion cannot be conceded in a non-Muslim state with several personal laws which are equally important as the Muslim law. Unless the Sri Lanka courts challenge the authority of this decision or legislation expressly declares the restriction on a convert's polygamous marriage,[188] the ruling in **Attorney-General** *v* **Reid** will continue to provide solace for persons seeking to avoid the rigours of the General law on divorce.[188A]

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(c) *Apostacy from Islam and the conflict of personal laws*

In Islamic law, apostacy entailed severe punishments, but they are irrelevant in non-Muslim states.[189] Thus, a Muslim can renounce Islam, though such an act of apostacy is deemed to dissolve a marriage contracted according to Islamic law. In Hanafi law, the same consequences follow as on the pronouncement of Talak. According to other schools the person apostatising is considered to have died.[189A] In non-Muslim countries, it seems to be accepted that even in the absence of legislative controls,[189B] the right to have the marriage dissolved is available only to the Muslim spouse.[190] Thus, if there is no dissolution of the first marriage, even a person who has apostatised and ceases to be governed by Muslim law, lacks capacity to contract a second marriage.[191]

(d) *The law governing a child in a conflict of personal laws*

The external conflicts concept of dependent domicile has not been recognised by the Sri Lanka courts as relevant in determining the personal law applicable to a child.[192] An empirical approach has been adopted by the courts, depending on the type of personal law involved.

We have observed that the principles of internal conflicts applicable with regard to mixed marriages generally ensures that there is unity of personal law between husband and wife. Children will therefore be invariably governed by the law applicable to the parents, for the duration of their marriage. The Kandyan Succession Ordinance which purported to follow customs, and defined the personal law applicable to the child of a marriage between Kandyan and non-Kandyan on the basis of "dependence" on the father's or mother's personal law,[193] is no longer relevant. We have observed that the parents are now prohibited from contracting a Kandyan marriage, and that after the Kandyan Marriage and Divorce Act was introduced, this provision in the Succession Ordinance ceased to apply,[194] in the modern law. The children will thus be subject to the General law, which governs their parents with regard to marriage, matrimonial rights and inheritance.

While a Kandyan may claim to be governed by the personal law applicable to him at birth, the legal position is different with regard to a child of marriages governed by Tesawalamai or Muslim law.

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The mere fact of birth or descent is inadequate to make a person subject to Tesawalamai. During minority the child's "inhabitancy" in the Province of Jaffna for the purpose of the application of this law may be established on the basis of dependence upon his parents. However, when he becomes an adult, while birth and descent are relevant, proof will be required that he has remained an inhabitant of the Northern Province.[195]

A person born to Muslim parents may not be able to change the sect to which he belongs during minority, and probably cannot apostatise from Islam.[196] However, as an adult, the application of Muslim law will depend on his adherence to the faith. The child of a marriage between a Muslim male and a Kitabiyya under Muslim law, will be considered a Muslim in that law, as the Sharia indicates that a person is a Muslim if one parent adheres to the faith.[197] When a Muslim contracts a marriage under General law however,[198] the child may be deemed a non-Muslim, on the basis that the parents did not intend the Muslim law to apply to the marriage or the issue.

In **Ran Banda**. *v* **Kawamma**[199] the Supreme Court refused to decide what personal law applied to the illegitimate child of a union between a Kandyan woman and a non-Kandyan. Since the legal relationship of the father to the child is not recognized in the General law of Sri Lanka, the law applicable to the illegitimate child of a man subject to the General law can only be the personal law of the mother. The child must be deemed to be the child of one parent for the purpose of ascertaining his legal status. The problem is more complex in the case of the child of a Kandyan father, as the personal law recognizes a limited relationship between him and the child.[200] In the absence of a lawful family unit, the courts can adopt an empirical approach and decide that the illegitimate is governed at birth by the law of the parent who assumes responsibility for him.

In the Muslim law an illegitimate is generally deemed to be a *filius nullius*, so that he has no legal relationship to either parent. Hanafi law however recognises a minimal relationship. According to Islamic law, the parents being Muslims, the child wll be deemed a Muslim, subject to the personal law of the parents, unless he

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commits an act of apostacy.[201] However, in Sri Lanka, it maybe argued that the General law applies, where there is no legal relationship to both the Muslim parents, unless there is evidence that the illegitimate has been brought up as an adherent of the faith.

(*e*) *The choice of law in the event of a conflict between the personal laws and the General law.*

We have observed that the personal laws apply only with regard to some areas of the law on family relations. It is an inherent aspect of the indigenous systems that there are no formal rules governing all aspects of the legal relations they apply to. In this context we have observed that the Roman Dutch law based General law has always been used to fill the gaps in these laws. Inevitably the courts are required to apply principles and concepts derived from different systems to a transaction between individuals governed by the personal laws. They generally adopt an empirical approach to these questions.

Some judges have introduced the General law principles on a literal interpretation of the concept of a gap in the personal laws The principles of the Roman Dutch law have therefore found their way into the personal laws, when these systems do not contain specific principles, despite the fact that they conflict with the fundamental concepts of the personal laws.[202] Other judges have been more sensitive to the need to view the transaction as a whole. and to avoid introducing principles from the Roman Dutch law that, cannot be reconciled with the principles of the personal laws.[203] In any event, the process of introducing the Roman Dutch law has helped to increase the areas of uniformity in the law on family relations. It will be observed that this development is of less significance in the case of Muslims, due to the current trend towards introducing the general principles of Islamic law.

The British period of colonial rule had a profound impact on the law on family relations, creating and entrenching, as we have observed, a plurality of systems. Even theough diversity existed in the laws of the multi-racial people who settled in this country, it was the colonial powers' concern with recording and compiling indigenous law and giving it legislative recognition that entrenched the concept of plurality in family law.[204] The multiplicity of laws

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continues as an important feature of the law on family relations even today. However the very development that resulted in the alien Roman Dutch law being considered the law governing the family relations of Sinhala inhabitants in the Maritime Provinces of Sri Lanka, paved the way for a General law pertaining to this subject, which could be applied to all sections of the population. The law on parent and child demonstrates the manner in which the multiplicity of personal laws interact with the General law, when administered (except in the case of Muslims) in a common system of courts, to produce some principles of general application within the country. The judicial extension of the Roman Dutch law and legislative activism in the promulgation of uniformly applicable statutes, combined to produce a substratum of uniform law. This is often a curious blend of Roman Dutch law values and local policies articulated in piecemeal legislation pertaining to family relations. In no sense is there a uniform or coherent law on parent and child in Sri Lanka. However in the course of time, many of the areas of difference in the plural systems have been ironed out, creating an atmosphere in which radical changes may not be required to evolve a uniform law on the subject.

NOTES

1. Family Law and Customary Law in Asia, a Contemporary Legal Perspective. Ed. David C. Buxbaum (1968) p. XV; J. D. M. Derrett, A Critique of Modern Hindu Law (1970) p. 293, 400.

2. Kahn Freund (1969) 5 East African Law Journal p. 54; The authorities in note 1 supra.

3. Campbell *v.* Hall (1774) 1 Cowp. 204, followed in Abeysekera *v.* Jayatileke 1932 A. C. 260. *See* Sir K. Roberts-Wray, Commonwealth and Colonial Law (1966) p. 540-541, Appendix III p. 929; V. Samaraweera (1971) Vol. 1, No. 2 C.J.H.S.S. (N.S.) 123, 127.
4. Legislative Acts of Ceylon (1841) p. 7.

5. *See* T. Nadaraja, The Legal System of Ceylon in its Historical Setting (1972) p. 14-17; L. J. M. Cooray. Legal Systems of Ceylon, (1972) p. 59 note 7, and note 11 infra, A. St. V. Jayawardene, Roman Dutch Law in Ceylon (1901).

6. The Mohammedan Code, Regulation No. 14 of 1806, Legislative Acts of Ceylon (1841) p. 25; Tesawalamai Regulation No. 18 of 1806.

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7. The Tesawalamai Regulation, Clause 6; T. E. Gooneratne, Marriage and Divorce Laws applicable to Muslims in Ceylon, Marriage and Divorce Commission Report, Sessional Paper XVI (1959), Appendix B, p. 183-184; H. M. Z. Farouque, The Introduction of Muslim Law in Ceylon, Souvenir of the Moors Islamic Cultural Home (1966) p. 3.

8. Sir I. Jennings and H. W. Tambiah, The British Commonwealth, The Development of its Laws and Constitution, Vol. 7. Ceylon (1952) p. 276; C. Britto, Mukkuva Law (1876), Nadaraja op. cit. 14, 183 note 44.

9. C. O. 54/124 p. 1, the Johnstone papers on the Native Laws and Customs of Ceylon; the same view was expressed by Charles Marshall, J. in a report on the courts and their laws (1830), C.O. 416/17 p. 245.

10. Father Fernaode de Queyroz, Conquest of Ceylon, tr. S. G. Perera (1930) p. 87-91.

11. C.O. 54/124 p. 13; *See* also L. J. M. Cooray, Legal Systems of Ceylon, op. cit. p. 59, note 7, T. E. Gooneratne, Marriage and Divorce Commission Report op. cit. Appendix A, p. 169.

11A. The statement of A. Pavilioen, Commander of Jaffna (1665), quoted in Nadaraja, Legal Systems op. cit. p. 10 states that "the natives are governed by the customs of the country, where they are clear and reasonable, otherwise according to our laws."

12. C.O. 54/343 p. 124, memo. of the Queens Advocate, with regard to proposed legislation on Kandyan Marriage (1859) C.O. 57/12, report of the Sub-Committee on a Bill to amend the marriage laws of the country, included in the minutes of the Legislative Council, 24 Sept. 1844.

13. Max Rheinstein, Marriage Stability, Divorce and the Law (1972), traces the impact of the Protestant ethic on the law of marriage and divorce in Western Europe.

14. Umma *v.* Pathumma (1913) 16 NLR 378 per de Sampayo A.J. at p. 380.

15. Sultan *v.* Pieris (1933) 35 NLR 57 per Garvin S.P.J. at p. 81

16. *See* Sultan *v.* Pieris per Mac Donnell C. J. at p. 68, Garvin S.P.J. at p. 81, Abdul Rahman *v.* Ussan Umma (1916) 19 NLR 175, Ibrahim Saiybu *v.* Muhammadu (1898) 3 NLR 116. The principle of extending the General law in the event of a casus omissus was obviously considered a lawful canon of judicial interpretation, when the early courts were faced with a problem regarding the choice of law. But they may also have been following a practice attributed to the Dutch, who were thought to apply their law in the event of a vacuum in the indigenous laws. *See* note 11A supra; c.f. A Allott, New Essays in African Law (1970) p. 11-13, p. 121, Essays in the African Law (1960) p. 8-9; J. D. M. Derrett (1961) 4 Comparative Studies in Society and History p, 44; Alan Gledhill, The British Commonwealth, the Development of its Laws and Constitutions, Vol. 6 India (1964) p. 212.

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17. Jennings and Tambiah, op. cit. p. 280; The Matrimonial Rights and Inheritance (M.R.I.) Ordinance No. 15 of 1876, appears to have repealed Mukkuva law. Nadaraja op. cit. 187.

18. H. W. Tambiah Laws and Customs of the Tamils of Jaffna (1950) p. 473, Fernando *v.* Proctor (1909) 12 NLR 309; Wellapulle *v.* Sitambelam 1872-76 Rama 114; Velupillai *v.* Sivakamipillai (1910) 13 NLR 74; Spenser *v.* Rajaratnam (1931) 16 NLR 321; Seelatchy *v.* Visuvanathen Chetty (1922) 23 NLR 97 (F.B.); Soundranayagam v. Sonundranayagam (1917) 20 NLR 274. Nadaraja op. cit. 187.

18A. Kander *v.* Sinnachipillai (1934) 36 NLR 362; Jennings and Tambiah op. cit. p. 265-266.

18B. Tambiah Laws and Customs of the Tamils, op. cit. p. 74, Chellappa *v.* Kumaraswamy (1915) 18 NLR 435 at 437. Puthatamby *v.* Mailvakanam (1897) 3 NLR 42; Chanmugam *v.* Kandiah (1921) 23 NLR 221; Seelatchy *v.* Visuvanathen Chetty per Bertram C. J. obiter at p. 111; Tiagaraja *v.* Paranchotipillai (1908) 11 NLR 345. J. D. M. Derrett (1961) 19 UCR p. 106-115, and also S. Katiresu, Handbook of the Tesawalamai (1907) p. 7, suggest that Hindu Law is applicable to supplement the provisions in the Tesawalamai. In Mangaleswari *v.* Selvadurai (1961) 63 NLR 88 (P.C.), a decision used by Prof. Derrett to support this view, the court was referring to the possibility of deriving principles from Roman Dutch law or Muslim law. The case does not support a general proposition that other sources, and the Hindu law in particular, can be used as a residual law. It does not therefore detract from the significance of Sabapathipillai *v.* Sinnatamby (1948) 50 NLR 367, an earlier case that applied Roman Dutch law. The statement of Pavilioen (note 11A supra), supports the view expressed in this case, for the Dutch appear to have intended Tesawalamai to apply to Christian Tamils. *See* Tambiah, Laws and Customs of the Tamils, op. cit. p. 24. Introduction of the Hindu law as a residuary law would have been quite anomalous, in this context.

18C. Khan *v.* Maricar (1913) 16 NLR 425. Farouque op. cit. 2; Ord. No. 5. of 1852 s. 10.

19. *See* e.g. Abdul Rahman *v.* Ussan Umma per Schneider J. at 184, per Ennis J. at 178; Bandirala *v.* Mairuma Natchia (1912) 16 NLR 235; Cassim *v.* Peria Tamby (1896) 2 NLR 200.

20. Abdul Rahman *v.* Ussan Umma per Schneider J. at p. 184.

21. e.g. Ibraham Sayibu *v.* Muhammed, Sultan *v.* Pieris, especially per Garvin S.P.J. at p. 81, Abdul Rahman *v.* Ussan Umma.

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21A. Cassim *v.* Peria Tamby, Abdul Rahman *v.* Ussan Umma per Ennis J. at p. 178, Schneider J. at 184; T. E. Gooneratne, Marriage and Divorce Commission Report, op. cit. p. 184; Article 101 of the Mohammedan Code permits concubinage, though only slave concubinage was recognised in Islamic law, *See* J. N. D. Anderson ed. Family Law in Asia and Africa (1968) 222-223. *See* A. A. A. Fyzee, Outlines of Muhammadan Law (1964 ed) p. 106, 184. In Mammadu Natchia *v.* Mammatu Cassim (1908) 11 NLR 297 the court applied this provision of the Code.

21B. Sultan *v.* Pieris; *See* also Proclamation of 1799 supra, Charter of Justice 1801 s. 32, C.O. 54/68 p. 199; *See* also Cassim *v.* Periatamby, Marikkar *v.* Marikkar (1915) 18 NLR 481 per de Sampayo J. at p. 484.

21C. e.g. Khan *v.* Maricar per de Sampayo A. J. at p. 427.

21D. Tillekeratne *v.* Samsedeen (1900) 4 NLR 65; Umma *v.* Pathumma; Rabia Umma *v.* Saibu (1914) 17 NLR 338; Abdul Rahman *v.* Ussan Umma per Schneider J. Sultan *v.* Pieris per MacDonnell C. J.

22. Marikkar *v.* Marikkar (1915), Marikar *v.* Natchia (1915) 18 NLR 446, Ahamat *v.* Sharifa Umma (1931) 33 NLR 8 P. C. Weerasekera *v.* Pieris (1932)34 NLR 281 P. C. Affefudeen *v.* Periyatamby(1911) 14 NLR 295.

22A. Abdul Rahman *v.* Ussan Umma per Schneider J.

22B. Narayanen *v.* Saree Umma (1920) 21 NLR 439, per de Sampayo J. at p. 440; *See* also Marikar *v.* Natchia, Re Nona Sooja (1930) 32 NLR 63 Junaid *v.* Mohideen (1932) 34 NLR 141.

22C. Marikkar *v.* Marikkar (1915), Cader *v.* Pitchai (1916) 9 NLR 246, Re Nona Sooja.

23. *See* the application of Muslim law in the modern law of Sri Lanka, infra.

24. Charter of Justice 1801 ss. 52, 53.

25. C.O. 416/16 p. 419, 420, 448-449, 453 and at p. 457, 458, 625-626.

26. Ordinance No. 5 of 1835. (described as Adoption of Roman Dutch Law, Ordinance) in Vol. I Ch. 12, Leg. Enact. (1956).

27. (1895) I NLR 160 P.C., followed in Wright *v.* Wright (1903) 9 NLR 31.

28. *See* the authorities on African and Indian Law, cited in note 16 supra; *See* also Roberts-Wray, op. cit. Appendix I, p. 702.

29. F. A. Hayley, A Treatise on the Laws and Customs of the Sinhalese (1923) p. 351; G. Obeyesekere, Land Tenure in Village Ceylon (1967); V. Samaraweera note 3 supra, 141.

30. *See* e.g. the judicial comment in Sultan *v.* Peiris per Garvin, J. pt. p. 81, and the cases cited in notes 18B and 21 supra.

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31. S. P. F. Senaratna, ,"Status, Power and Resources—the Study of a Sinhalese Village, unpublished Ph.D. Thesis (London) (1971) p. 28.

32. *See* Punchinona *v.* Charles (1931) 35 NLR 227; c.f. Unga *v.* Menika (1914) 18 NLR 182, Hettuwa *v.* Gotia (1900) 4 NLR 93; Siyatuhamy *v.* Mudalihamy (1912) 6 Lead 54.

33. Extract from paper No. 26, by T. Berwick, D. J. Kandy (1868) C.O. 54/446 p. 190, in a Despatch of 16 Sept. 1869 containing papers on the working of the Kandyan Marriage Ordinance.

34. K. *v.* Perumal (1911) 14 NLR 496. E. R. Leach, in Kinship (ed J. Goody) (1971) p. 157; S. J. Tambiah, in "Caste and Kin in India, Nepal and Ceylon," (ed.) Furer Haimendorf (1966), p. 264; *See* also G. Obeyesekere op. cit. p. 140-141.

35. Kershaw *v.* Nicoll 1860-62 Rama p. 157; The Wills Ordinance No. 21 of 1844 s. 6. Ceylon Ordinances (1841-1851) p. 175, had declared that the matrimonial rights of spouses in respect of immovable property was to be determined according to the law of the "matrimonial domicile."

36. Report of the Sub-Committee on a Bill to amend the law of marriage presented by the Queens Advocate, at a meeting of the Legislative Council 24 Sept. 1844, C.O. 57/12.

37. (1886) 8 S.C.C. 36.

38. *See* Williams *v.* Robertson per Bertram C.J. at p. 37-38, *See* also Dias J. p. 44-45; c.f. Hayley op. cit. p. 31-33, Jennings and Tambiah op. cit. p. 246-247, H. W. Tambiah, Sinhala Laws and Customs (1968) P. 82-83.

39. Kershaw *v.* Nicoll op. cit. p. 165.

40. Minutes of the Legislative Council, 18th Aug. 1852 C.O. 57/18.

41. The opinion of the Judges of the Supreme Court, in a letter to the Governor 3 June 1851, C.O. 54/291 p. 230 para 5.

42. C.O. 54/291, p. 232 at p. 233.

43. Kershaw *v.* Nicholl at p. 162-166.

44. Jennings and Tambiah op. cit. p. 55-56; H. W. Tambiah, Principles of Ceylon Law (1972) p. 152-153, Sinhala Laws, op. cit. p. 80-82; Hayley, op. cit. p. 25-31.

45. *See* Jennings and Tambiah op. cit. p. 53; c.f. Abeysekere *v.* Jayatileke at p. 264.

46. Legislative Acts of Ceylon (1841) p. 61; the correspondence is contained in C.O. 54/55, Despatch of Brownrigg to Bathurst 15, May 1815, 17th March 1815. p. 118, 161-163.

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47. Sammut *v.* Strickland 1938 A.C. 678; Roberts-Wray op. cit. p. 104.

48. Roberts-Wray op. cit. p. 105.

49. (1774) note 3 supra, and Roberts-Wray op. cit. Appendix III p. 929

50. Roberts-Wray op. cit. p. 541.

50A. Kandyan Convention, Art. 9.

50B. Minute by Brownrigg on the Convention, C.O. 54/57 p. 76, in reply to objections raised by the Chief Justice regarding the validity of Art. 9.

50C. C.O. 54/55 p. 168, a letter of 16 March 1815 from Brownrigg to the Advocate's Fiscal, Harding Giffard.

51. C.O. 54/57 p. 78.

51A. *See* Brownrigg's comment quoted above at note 50 B; Brownrigg's letter to Harding Giffard, note 50C supra.

52. e.g. Mohammedan Code 1806.

53. Regulation No. 6 of 1816; This term is also used in a question framed by the Commissioners of Eastern Inquiry (1829) on the laws in the Kandyan Provinces. C.O. 416/19 p. 267 Q. No. 15.

54. Kapuruhamy *v.* Appuhamy (1910) 13 NLR 321.

55. Charter of Justice 1801, Art. 30.

55A. C.O. 54/55 p. 172, 173, in a letter to Brownrigg on the legal position regarding the controversial articles 8 and 9; Brownrigg's comments, on this matter in, C.O. 54/55 p. 160 etc., 168-169.

56. Minute of the Chief Justice on his objections to the Convention at meeting of the Council, on 13 May 1815, C.O. 54/57 p. 53 to 66 especially at p. 55 to 56; C.O. 54/55 p. 193 p. 199, a minute by Brownrigg with regard to the opinion expressed by the Chief Justice at the Proceedings in Council on the reading of the Convention, 1 April 1815.

56A. Despatch No. 37 from Bathurst to Brownrigg C. O. 55/63 P. 99

56B. Despatch No. 50 from Bathurst C.O. 55/63 p. 126, instructing Brownrigg to adhere to the opinion of the Law Officers of the Crown; Proclamation, of 31 May 1816, C.O. 54/60 p. 11, and Legislative Acts of Ceylon (1841) p. 71.

56C. Proclamation of 31 May 1816 Art. 2.

56D. Opinion of the Law Officers of the Crown, 14 Sept. 1815, contained in C.O. 416/19 p. 135 at p. 139.

57. Proclamation of 31 May 1816. Art. 1 and 3.

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57A. C.O. 416/19 p. 135, 139.

58. Despatch No. 50 supra, Despatch No. 37 supra; this position is also clarified in Despatch No. 61 C.O. 55/63. p. 159.

59. Despatch No. 37 supra.

59A. Despatches No. 50 and 61 supra.

59B. In 1828 two cases were heard in the Judicial Commissioner's Court in Kandy that involved claims in respect of parental property by Sinhalese women who had married Moors (Muslims). The opinion of the assessors, as well as the assembly of Kandyan Chiefs who were consulted, on this matter was that the women had forfeited their rights of inheritance, having married non-Sinhalese who were ranked as belonging to a lower caste. C.O. 416/20 p. 369. 380. The application of the Kandyan law to all persons in the territory is reflected in Mongee *v.* Siarpaye (1820) cited in Hayley. op. cit. p. 25, and Gooneratne, Marriage and Divorce Commission Report, op. cit. Appendix A. p. 174, c.f. (1851) Austin 147, (daughter of a Tamil in the King's Court, considered a Kandyan).

60. C.O. 54/55 p. 168, letter to Harding Giffard, 16 March 1815.

60A. Proclamation of 1816. Art. 3.

61. Proclamation of 21 Nov. 1818 Art. 7. Legislative Acts of Ceylon (1841) p. 99.

61A. note 56C supra; Proclamation of 1816. Art. 3; *See* also Jennings and Tambiah op. cit. p. 55.

62. C.O. 54/55. p. 122, (Despatch to Bathurst 15 May 1815).

63. C.O. 55/63. p. 126, (Despatch No. 50, 6 Aug. 1816), C.O. 55/63, p. 324, (Letter from Bathurst to Harding Giffard).

64. C.O. 416/16. p. 378, evidence of Sir Richard Otley to the Commissioners of Eastern Inquiry; evidence of Harding Giffard, C.O. 416/14 p. 29.

64A. C.O. 416/14 p. 24, observations on the administration of justice in Ceylon, submitted to the Commissioners of Eastern Inquiry (Ceylon) 1829-1830.

65. C.O. 416/16 p. 378, evidence of Sir Richard Otley, C.J. to the Commissioners of Eastern Inquiry.

66. Memo. of 8 Jan. 1825, C.O. 54/88 p. 118, in Despatch No. 57 March 4 1825. In the administration of the estate of a Mr. Moons, who died intestate with property in the Kandyan Provinces, the Board of Commissioners exercised jurisdiction, with the Governor's approval, despite the objection of the Judges of the Supreme Court. (C.O. 416/21 p. 332.)

67. C.O. 416/19 p. 361.

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68. C.O. 416/19, p. 145, at p. 157 (evidence of Judicial Commissioner J. Downing), evidence of Agents of Government, at p. 269, 286 and 299.

69. C.O. 416/19 p. 402.

70. C.O. 416/19 p. 310.

70A. Witnesses who gave evidence before the Inquiry into Kandyan Marriages (1917), referred to the village of Wahakotte in Matale, where Portuguese settlers mingled with the local population and became 'Kandyanised'. (Sessional Paper I of 1917).

71. Report by a Sub-Committee on the bill presented in 1844 regarding a uniform law of marriage C.O. 57/12.

72. Correspondence on the Wills Ordinance, No. 21 of 1844, contained in despatch No. 15 from Governor Campbell to the Secretary of State, Lord Stanley C.O. 54/216, p. 112 at p. 122.

73. C.O. 54/216 p. 113.

74. Wills Ord. s. 6 Ceylon Ordinances 1841-51, p. 175.

75. C.O. 416/14 p. 20.

75A. Seelatchy *v.* Visuvanathan Chetty, per Bertram, C.J. at p. 113.

76. In a despatch No. 29 of 31 Aug. 1819, C.O. 55/63 p. 324, Bathurst communicated to Giffard, approval for restricting the Supreme Court's, jurisdiction to the Maritime Provinces of Ceylon.

77. Charter of Justice 1833 Legislative Acts of Ceylon (1841) p. 193 especially Art. 4.

78. e. g. 1849 Austin 99 (Muslims).

78A. *See* note 41 supra.

79. C.O. 54/291 p. 232 at p. 234; *See* also Saibo Tamby *v.* Ahemat (1851) 2 Ram. Rep. 163.

80. Ordinance No. 5 of 1852 s. 10 Legislative Acts (Ceylon) Vol. III, 1852-1861 p. 4 at p. 5.

81. ss. 8 and 9.

82. C.O. 54/291. p. 232 at p. 234. s. 9.

83. C.O. 54/291 p. 232 at p. 233. c.f. s. 8.

84. C.O. 54/343 p. 119 at p. 124. (Memo. by Queen's Avdocate on the Kandyan Marriage Ordinance, No. 13 of 1859).

84A. s. 5.

85. The title to the Ordinance states that it was enacted "to introduce into (this) colony the law of England in certain cases and to restrict the operation of the Kandyan law".

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86. Welayden *v.* Arunasalam (1881) 4 S.C.C. 37 (Tamils) Silva *v.* Carolinahamy (1856) 1 Lor. 189, Silva *v.* Christina Appuhamy (1864) Rama 131 (Low Country Sinhalese), though the court refrained from deciding this point in Re Juanis Gomez (1862) Beven and Siebel 33. The tendency to consider Kandyan law applicable to non-Kandyans is also reflected in a case reported in (1863) 2 Thom. 527 (H. B. Thomson Institutes of the Laws of Ceylon (1866) Vol. II) regarding Moors living in the Kandyan Provinces.

86A. Speech of the Queen's Advocate Richard Cayley, on Ordinance No. 15 of 1876 (M.R.I.), debates of the Ceylon Legislative Council, Sessions 1876-1877, p. 44-46, the Governor's address, in proceedings of 13th Sept. 1876, p. 2-3; report of the Queen's Advocate on this Ordinance 2 Feb., 1877, C.O. 54/506. p. 708 at 711.

87. Narayanee *v.* Muttuswamy (1894) 3 SCR 125; Wijesinghe *v.* Wijesinghe (1891) 9 SCC 199; Kapuruhamy *v.* Appuhamy, Mudianse *v.* Appuhamy (1913) 16 NLR 117.

87A. Nadaraja op. cit. 184.

88. N. Chandrahasan (1972) Col. L Rev. p. 56, interprets the cases in this way, on the assumption that the Kandyan law applied as a territorial law after 1815.

88A. *See* the authorities in note 86A supra, and M.R.I. Ord. s. 2.

89. *See* Wijesinghe *v.* Wijesinghe, Kapuruhamy *v.* Appuhamy, and the later decision of a Full Bench of the Supreme Court in Sophia Hamine *v.* Appuhamy (1922) 23 NLR 353 (F.B.).

90. (1851) Austin 147.

90A. Wijesinghe *v.* Wijesinghe, Kapuruhamy *v.* Appuhamy, Mudianse *v.* Appuhamy. *See* also text, at notes 52 and 53, supra.

90B. Cases in note 90A supra.

90C. Mudianse *v.* Appuhamy, Punchihamy *v.* Punchihamy (1915) 18 NLR 294.

91. Kandyan Marriage Ord. No. 3 of 1870, s. 4, substantially similar to the Kandyan Marriage Ord. No. 13 of 1859 s. 1; Ord. No. 5 of 1852 s. 9. Now *See* Ord. No. 3 of 1870 s. 37 (Leg. Enact. 1938 ed).

92. Narayanee *v.* Muttuswamy, approved later by de Sampayo J. in Sophia Hamine *v.* Appuhamy, at p. 359-361; *See* also Punchihamy *v.* Punchihamy.

92A. Tisselhamy *v.* Nonnohamy (1897) 2 NLR 352.

92B. Sophia Hamine *v.* Appuhamy; C.O. 57/12, (report of the Sub-Committee on a proposed uniform marriage law), C.O. 54/343 p. 117, (memo of Queen's Advocate on the Kandyan Marriage Ord. 13 of 1859.)

93. M.R.I. Ord. s. 2.

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94. Sessional paper I of 1917; *See* also Punchihamy *v.* Punchihamy and the discussion on this point in Natchiappa Chetty *v.* Pesonahamy (1937) 39 NLR 377 at 381. In Menikhamy *v.* Appuhamy (1913) 5 Bala Notes 38, the court held that a Kandyan woman had not married a Tamil man in the diga form of marriage.

95. *See* Ch. II Legitimacy, infra.

96. Para 9 of their report, Sessional paper 1 of 1917.

96A. *See* Kandyan Marriage Ord. 3 of 1870 s. 36, presumption as to diga marriage. *See* also note 193 infra.

97. Kandyan Succession Ordinance No. 23 of 1917. s. 2 s. 4 (2); *See* also the discussion of the Ordinancre in Natchiappa Chetty *v.* Pesonahamy at p. 381 etc. per Fernando A. J.

97A. There appears to be a conflict with the M.R.I. Ord. in the case of a Kandyan woman who marries a non-Kandyan man in binna, under Kandyan law, for according to s. 2 of this statute, the woman may be subject to the General law regarding matrimonial rights and inheritance; *See* the section on interpersonal conflict of laws, infra.

98. Kodeeswaran *v.* Attorney-General (1969) 72 NLR 337 P.C. at 342; Jennings and Tambiah op. cit. p. 183; R. W. Lee, An Introduction to Roman Dutch Law (1953) 20.

98A. In regard to Tesawalamai and matrimonial rights, Kandyan law and breach of promise of marriage, *See* authorities in note 18B supra, and Boange *v.* Udalagama (1955) 57 NLR 385.

99. The Jaffna Matrimonial Rights and Inheritance (J.M.R.I.) Ordinance No. 1 of 1911 as amended by Ordinance No. 58 of 1947; *See* also Marriage Registration (General Marriages) Ordinance, No. 19 of 1907 (G.M.O.) and King *v.* Perumal (1911) per Middleton, J. at 508.

99A. *See* notes 18B and 99 supra, and Manuvetpillai *v.* Sivasothilingam (1979) 2 NLR 1 per Wimalaratna, J. at 3.

100. Tharmalingam Chetty *v.* Arunasalam Chetty (1944) 45 NLR 414, p. 417 per Soertsz J. *See* also Nagaratnam *v.* Suppiah (1967) 74 NLR 54.

101. Tharmalingam Chetty *v.* Arunasalam Chetty; Somasunderampillai *v.* Charavanamuttu (1942) 44 NLR 1; Kandiah *v.* Saraswathy (1951) 54 NLR 137; Chetty *v.* Chetty (1935) 37 NLR 253. *See* also Spencer *v.* Rajaratnam.

102. *See* the cases cited in note 90A supra; *See* also Manikkam *v.* Peter (1899) 4 NLR 243; Natchiappa Chetty *v.* Pesonahamy (1937) Sophia Hamine *v.* Appuhamy (1922) Punchihamy *v.* Punchihamy (1915) Bandaranayaka *v.* Bandaranayake (1922) 24 NLR 245. (cases that assume the term 'Kandyan' refers to a person of the Sinhala race).

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103. Kandyan Marriage and Divorce Act No. 44 of 1952 (K.M.D. Act) ss. 16-21, s. 66.

104. K.M.D. Act s. 28 (1).

105. s. 3 (1) (a) s. 66.

106. s. 70.

106A. c.f. Tisselhamy *v.* Nonnohamy, and *See* Ch. II on Legitimacy, infra.

106B. Kandyan Marriages (Removal of Doubts) Ordinance No. 14 of 1909, s. 2.

107. Kandyan Succession Ord. s. 4 (2); *See* also Natchiappa Chetty *v.* Pesonahamy.

108. Ord. No. 14 of 1909 s. 2; Kandyan Succession Ord. s. 4 (2).

108A. *See* note 97 A; M.R.I. Ord. s. 2 discussed in the section on interpersonal conflict of laws infra.

109. Hayley, op. cit. p. 191.

110. Kandyan Succession Ord. s. 2; Natchiappa *v.* Pesonahamy; *See* also Perera *v.* Aslin Nona (1958)60 NLR 73, where Basnayake, C.J. followed the same analysis though he decided that there was no proof that the marriage celebrated under the General law was in the 'binna' form, known to Kandyan law. The entry in the marriage register is described in the General Marriages Ordinance as "the best evidence of the marriage." The phrase has been judicially interpreted to mean that other evidence can be led with regard to the form of the marriage, though the registration entry prevails in the event of a conflict. *See* K. *v.* Peter Nonis (1947) 49 NLR 16 interpreting G.M.O. Ord. s. 38 (1) (now s. 41 (1)) c.f. Mampitiya *v.* Wegodapola (1922) 24 NLR 129 and Seneviratne *v.* Halangoda (1921) 22 NLR 472.

110A. Even when a mixed marriage could be celebrated either under Kandyan law of the General law, Basnayake, C.J. thought that solemnization under the latter, indicated that the parties were not contemplating a marriage in the Kandyan form of diga or binna. (Perera *v.* Aslin Nona at p. 74 etc.) Since the Kandyan Marriage and Divorce Act (1952) does not permit a marriage under Kandyan law unless both parties are Kandyans, the decision in K. *v.* Peter Nonis can no longer be used to support an argument that evidence of the Kandyan form of a General law marriage can be led, even when registration is described in the G.M.O. Ord. (s. 41 (1)) as the "best evidence" of the marriage. *See* also the interpretation given to this phrase in Mampitiya *v.* Wegodapola and Seneviratne *v.* Halangoda.

111. K.M.D. Act s. 3 (1) (a), s. 3. (2) s. 68.

112. Karunaratna *v.* Andarawewa (1883) Wendt 285 (F.B.)

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112A. *See* the section on instrpersonal conflict of laws infra, and M.R.I. Ord. s. 2; Married Women's Property (M.W.P.) Ordinance No. 18 Of 1923 s. 3.

113. Tambiah, Sinhala Laws op. cit. 84-85; Nadaraja op. cit. p. 201 note 82; L. J. M. Cooray, Legal Systems of Ceylon, op. cit. p. 115-116; N. Chandrahasan op. cit. p. 63.

114. *See* note 110 supra; Tambiah, Sinhala Laws op. cit. p. 128 and 132-133 suggests that Natchiappa Chetty *v.* Pesonahamy can be applied in the modern law, but does not consider the impact of the Kandyan Marriage and Divorce Act on the Kandyan Succession Ordinance (1917).

115. Farouque, in article cited in note 7 supra, at p. 6 and note 35; Gooneratne Marriage and Divorce Commission Report, op. cit. Appendix B. p. 187. *See* also K. *v.* Miskin Umma 26 NLR 330, Farouque op. cit. 4-6, Khan *v.* Marikar.

116. e.g. Mr. Justice M. T. Akbar, (1919) 1 C.L. Rec. p. 19. The Ordinance was based on the recommendations of a committee chaired by him. The report of the committee, Sessional paper XX of 1928 is discussed in Farouque op. cit. p. 5. The same emphasis on the need to introduce the Islamic law is reflected in the debates of the Ceylon Legislative Council, in as far back as 1871, at p. 32-33. When an amendment to the Penal Code introducing the offence of bigamy was discussed in the legislative council in 1895, a section of the Muslim community protested at the intrusion on their right to practice polygamy. They described the law as an interference with "their religious practices". Times of Ceylon 7th Nov. 1895. *See* also K. M. de Silva (1974) Vol. IV No. 1-2, C.J. H. S. S. (N.S.) 98.

117. Ordinance No. 10 of 1931. s. 2. ss. 3, 4. introducing Roman Dutch, English law.

117A. Abdul Rahman *v.* Ussan Umma, Kadija Umma *v.* Lebbe (1903) 7 NLR 23; Abuthahir *v.* Mohamed (1942) 43 NLR 193, Wills Ord. s. 2.

118. Abdul Cader *v.* Razik (1950) 52 NLR 156 (S.C.) *See* also Faiz Mohomad *v.* Elsie Fathooma (1942) 44 NLR 574.

119. Muslim Marriage and Divorce Act, No. 13 of 1951 (M.M.D. Act) s. 2. 16, 98 (1) (2) and the title to the Act.

120. Marikkar *v.* Marikkar (1915); Rabia Umma *v.* Saibu; Abdul Cader *v.* Razik (1952) 54 NLR 201 (P.C.).

121. Faiz Mohamad *v.* Elsie Fathooma, Abdul Cader *v.* Razik 1950, (S.C.) 1952 (P.C.)

122. Khan *v.* Marikar; Sultan *v.* Pieris; Weerasekera *v.* Pieris; Abuthahir *v.* Mohommed (1942) 43 NLR 193; M.M.D. Act s. 3.

123. *See* on Parental Power Ch. VI infra.

124. *See* Narayanen *v.* Saree Umma; Majeeda *v.* Paramanaiyagam (1933) 36 NLR 196; Shorter and Co. *v.* Mohomed (1937) 39 NLR 113; Kalenderlevvai *v.* Avummah (1947) 48 NLR 508.

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125. Per de Sampayo J. at p. 440.

126. *See* Jiffry *v.* Nona Binthan (1960) 62 NLR 255; and the discussion of this point, in Duty of Support and Muslims, Ch. X infra.

127. Mohideen *v.* Sulaiman (1957) 59 NLR 227 (sale of land between Muslims). *See* also the following cases on acceptance of a gift, Haseena Umma *v.* Jamaldeen (1965) 68 NLR 300, Pakir Muhayadeen *v.* Assia Umma (1956) 57 NLR 449, Idroos Sathak *v.* Sittie Leyaudeen (1950) 51 NLR 509; c.f. the approach of the Privy Council in Noorul Muheetha *v.* Sittie Leyaudeen (1953) 54 NLR 270.

128. Muttalibu *v.* Hameed (1950) 52 NLR 97; Idroos Sathak *v.* Sittie Leyaudeen.

129. On this aspect *See* the judgement of Bonser C.J. in Tillekeratne *v.* Samedeen and de Sampayo J. in Umma *v.* Pathuma refusing to apply Roman Dutch law principles in the context of Muslim marriage.

130. *See* the judgement of the Privy Council in Noorul Muheetha *v.* Sittie Leyaudeen, and the judgement of Pulle J. in the Supreme Court (1950) 51 NLR 509; c.f. the contrary approach adopted in Haseena Umma *v.* Jamaldeen.

131. Noorul Muheetha *v.* Sittie Leyaudeen (1953) at 274.

132. *See* Duty of Support and Muslims, Ch. X infra.

132A. Khan *v.* Marikar; c.f. Katchi Mohomed *v.* Benedict (1961) 63 NLR 505 where the court accepted the Muslim party's assertion that though baptised as a Christian, he did not intend to give up his faith.

132B. *See* Q. v. Obeyesekere (1889) 9 SCC 11 at 12.

133. (1964) 67 NLR 25 (P.C.) following Datta *v.* Sen 1939 I.L.R. 2 (Cal) 12 a succession case in which the Court held, that under Muslim law, a convert acquired the right to contract a second polygamous marriage. *See* also Fyzee op. cit. (1974) ed. p. 178-179.

134. (1963) 65 NLR 97 at 99. The test of a conversion lies in "the conformity of the acts, to an external standard", *See* F. B. Tyabji's Muslim Law (1968) p. 7.

135. (1964) at p. 27.

135A. Tyabji op. cit. p. 8 citing Skinner *v.* Orde 1871 14 M.I.A. 309, Re Ram Kumari 1891 18. (Cal) 264.

136. In Malaysia legislation has been introduced, prescribing a special procedure for conversions, presumably with the intention of preventing colourable convertions. *See* Ahmed Ibrahim, Islamic Law in Malaya (1965) p. 350.

136A. Fyzee op. cit. (1974 ed.) p. 179. Adoption of Christianity may be deemed an act of apostacy. *See* Tyabji op. cit. p. 190 note 2.

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136B. Fyzee op. cit. (1974 ed.) p. 179.

136C. *See* e.g. Katchi Mohomed *v.* Benedict.

137. p. 32.

138. Allott, New Essays in African Law op. cit. p. 5 (Introduction), Essays op. cit. p. 154; J. D. M. Derrett (1962) Bombay Law Reporter Journal p. 128.

139. *See* the authorities in note 138 supra; T.O. Elias, British Colonial Law (1962) p. 200, 217.

140. Lee, Roman Dutch Law op. cit. p. 63 and Appendix L; Morris *v.* Morris (1938) 40 NLR 246, Navaratnam *v.* Navaratnam (1945) 46 NLR 361 (married women); H. R. Hahlo and E. Kahn, The Union of South Africa (1960) p. 732, E. Spiro, Law of Parent and Child (1959) p. 91 Thevagnanasekeram *v.* Kuppamal (1934) 36 NLR 337 at 346, (children). The English Common law was the same with regard to wives and children, but the Domicile and Matrimonial Proceedings Act (1973) enables a married woman to have an independent domicile. The position of, legitimate minors has also been altered, as there are exceptional instances where they may acquire a domicile independent of the father. Olive M. Stone, Family Law (1977) p. 64, P. M. Bromley, Family Law (1976 ed.) 8-13.

140A. R. H. Graveson, Conflict of Laws (1974) p. 520; J. H. C. Morris, The Conflict of Laws (1971) p. 300.

141. *See* the text at notes 74 to 75A.; Ordinance No. 5 of 1852 s. 8, and the text at note 83.

142. Report of the Queen's Advocate on the M.R.I. Ord. and the speeches of the Queen's Advocate and the Governor on the Ordinance, in the Legislative Council, note 86A supra; for cases which reflect the same approach *See* Velupillai *v.* Sivakamipillai (Tesawalamai) Kershaw *v.* Nicoll (Kandyan law).

143. M.R.I. Ord. s. 5 s. 21(2), s. 2; so much of the conflicts rule in the Wills Ordinance (s. 6) that was inconsistent with the M.R.I. Ord. was repealed. The rules regarding determination of matrimonial rights themselves were repealed by the M.W.P. Ord. s. 3 regarding marriages contracted after this Ordinance came into force.

143A. s. 2, and the cases cited in note 87 supra.

144. Kershaw *v.* Nicoll; Khan *v.* Maricar per de Sampayo A.J. at p. 427; Velupillai *v.* Sivakamipillai; c.f. Fernando *v.* Proctor per Woodrenton J. at p. 312.

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145. *See* Williams *v.* Robertson, Wijesinghe *v.* Wijesinghe, Kapuruhamy *v.* Appuhamy, Mudianse *v.* Appuhamy, Khan *v.* Maricar per Woodrenton A.C.J. at 426, Spenser *v.* Rajaratnam, Seelatchy *v.* Visuvanathen Chetty, Somesunderam Pillai *v.* Charavanamuttu. *See* also Idroos Sathak *v.* Sittie Leyaudeen, per Pulle J. at p. 511.

146. *See* cases cited in note 100 supra, (Tesawalamai applicable to Tamils with a "Ceylon" domicile). The Muslim Marriage and Divorce Act applies to "inhabitants" of Ceylon who are Muslims (M.M.D. Act s. 2). It is not clear that this refers to domicile, but it could be so interpreted on the analogy of the Tesawalamai.

147. M.R.I. Ord. s. 2; M.W.P. Ord. s. 3.

148. J.M.R.I. Ord. s. 3. The section creates the inference that the time of marriage is crucial for the determination of whether Tesawalamai applies or not, so that a change of inhabitancy on the part of the husband or the spouses cannot affect the application of this law. *See* Somesunderampillai *v.* Charavanamuttu. In Velupillai *v.* Sivakamipillai (1910), decided prior to the Ordinance, the court adopted the same view, basing itself on the Wills Ordinance s. 8 (previously s. 6). The court thought that this provision applied in respect of Tamils subject to Tesawalamai, since it was not inconsistent with the M.R.I. Ord. (1876).

149. With regard to Sinhalese, *See* Manikkam *v.* Peter, followed in Bandaranayaka *v.* Bandaranayaka, where the court expressed an opinion on this point, even though it did not base its decision on it. *See* also Mudianse *v.* Appuhamy per Perera, J. obiter, 118-119, approving of the interpretation adopted in Manikkam *v.* Peter. The same approach with regard to Tamils is reflected in Fernando *v.* Proctor, per Woodrenton J. and Mudianse *v.* Appuhamy per Perera J. obiter.

150. (1909) 12 NLR 309 at 312.

151. Mudianse *v.* Appuhamy per Perera J. p. 118-119.

152. e.g. Kuma *v.* Banda (1920) 21 NLR 294 (F.B.), Natchiappa Chetty *v.* Pesonahamy, Seelatchy *v.* Visuvanathen Chetty.

153. Report of the Queen's Advocate on the M.R.I. Ord. C.O. 54/506 p. 711.

154. C.O. 54/506 op. cit. p. 723.

155. c.f. the Ceylon Census of 1972, categorising the Kandyan Sinhalese as a distinct racial group. Census of Population, 1971, Preliminary release No. 1 Dept. of Census and Statistics (1972).

155A. Mudianse *v.* Appuhamy, Punchihamy *v.* Punchihamy per de Sampayo A.J. at p. 300.

156. s. 2 M.R.I. Ord. *See* also Fernando *v.* Proctor, per Woodrenton J. supra.

157. *See* cases cited in note 149 supra.

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158. c.f. Bandaranayaka *v* Bandaranayaka per Ennis, J. (obiter) at p. 247, that the phrase "purposes" in s. 2 refers to the "status of the wife".

159. *See* J.M.R.I. Ord. s. 3.

160. Morris op. cit. p. 30 citing Gray *v.* Formosa (1963) P. 259 267.

161. Bromley op. cit. (1976 ed.) p. 12 discussing the Domicile and Matrimonial Proceedings Act, 1973 s. 1 (1) which permits a married woman to acquire and retain an independent domicile.

162. *See* the text at notes 106 B to 108 supra, and the K.M.D. Act s. 3 (2) s. 70.

163 *See* M.R.I. Ord. s. 2 M.W.P. Ord. s. 3.

164. K.M.D. Act s. 3 (2); Chapter II Legitimacy infra, and the J.M.R.I. Ord.

164A. An exception may be justified in the case of Muslims since Muslim law is a religious law.

165. Fyzee, op. cit. (1964 ed.) p. 58-59, 95, (1974 ed.) p. 98-99; Tyabji op. cit. 85-86; Ahmed Ibrahim op. cit. p. 195. The prohibition was absolute, the Koranic punishment being stoning to death. *See* Tyabji op. cit. p. 43 on the punishment for "Zina" or unlawful intercourse.

165A. The preamble to the G.M.O. Ord. and s. 64, indicate only that a marriage between persons professing Islam, cannot be solemnized under it. An unregistered union between a Muslim and a non-Muslim may also become a valid marriage according to the General law concept of marriage by cohabitation and repute. *See* Tisselhamy *v.* Nonnohamy, and Ch. II Legitimacy, infra.

165B. *See* Fyzee op. cit. (1974 ed.) p. 184.

166. *See* the authorities cited in note 165 supra.

167. Fyzee op. cit. (1974 ed.) p. 96.

168. Ahmed Ibrahim op. cit. p. 195; Fyzee op. cit. (1974 ed.) p. 160.

169. M.M.D. Act s. 16 and the discussion of the requirement of registration of a Muslim marriage in Ch. II Legitimacy, infra.

170. Fyzee op. cit. (1974 ed.) p. 99.

171. Fyzee op. cit. (1974 ed.) p. 99.

172. Fyzee op. cit. (1974 ed.) p. 99 states that a marriage with a kitabiyya can be contracted in India either under Muslim law or under the Special Marriages Act (1954) which permits civil marriages between persons regardless of their religion. In Malaysia there is no provision for contracting such a marriage under Muslim law, but it may be solemnized under the Christian Marriages Ordinance 1956 (Ahmed Ibrahim op. cit. p. 195.)

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173. c.f. Perera *v.* Aslin Nona, per Basnayaka, C.J. obiter at p. 74 etc.

174. *See* Fyzee op. cit. (1964 ed.) p. 180; Mulla, Principles of Mohomedan Law (1972) p. 18-19.

175. Fyzee op. cit. (1964 ed.) p. 180-181, approving the dicta in Skinner *v.* Orde (1871); Mulla op. cit. p. 18-19, particularly the Indian cases cited in p. 18 note K; Tyabji op. cit. p. 18; Eighteenth Report of the Indian Law Commission (the dissolution of a convert's marriage) (1961) para 4 to 6. *See* also Bartholomew (1952) 1 I.C.I.Q. 325.

175A. Indian Law Commission report, op cit. para 6.

176. Attorney-General *v.* Reid (1964) p. 27.

177. p. 32.

178. *See* Ch. II Legitimacy, infra.

179. p. 32.

180. The Proposed Amendment of the Ceylon Penal Code as affecting Mohammedan Marriages (Ceylon Independent Press) n.d. p. 5-6.

181. s. 362 B. introduced by Ordinance No. 11 of 1895 amending the Penal Code, No. 2 of 1883.

182. G.M.O. Ord. s. 35 (2).

183. Attorney-General *v.* Reid p. 32.

183A. s. 18; *See* also Katchi Mohomed *v.* Benedict.

183B. Morris op. cit. p. 87, 120.

184. *See* Attorney-General *v.* Reid (1963), M.M.D. Act s. 24. Similar provisions which aim at ensuring that polygamy is not practiced to the prejudicc of the wives, have been advocated in several countries where Islamie law applies. N. J. Coulson Changing Law in Developing Countries (ed. J.N.D. Anderson) (1963) at p. 245. and 248 discusess such restrictions in Pakistan's Muslim Family Laws Ordinance (1961); The Kenya Marriage and Divorce Commission Report (Nairobi, 1968) Recommendation 15, suggests similar limitations on the right of polygamy, in the wive's interests.

185. p. 27.

186. Pathumma *v.* Seeni Mohomadu (1921) 23 NLR 277. The Koranic verse on polygamy is the foundation of Art. 100 in the Mohammedan Code (1806) which declares that Muslims "who have abilities enough to acquit themselves of their duty, and who are possessed of wealth enough to maintain the same properly" may marry upto 4 wives. Restirctions on polygamy that have been introduced in recent times in many Muslim countries as part of reforms in family law, are based on the Koranic, verse, and the obligation to support the wives equally. Changing Law in Developing Countries op. cit. (N. J. Coulson) p. 244-245, (J. N. D. Anderson) p. 182.

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187. In Drammeh *v.* Drammeh reported in (1970) 78 C.L.W. 55 the Privy Council followed the dicta in Attorney-General *v* Reid in a Gambian appeal. They held that a man who had contracted a monogamous marriage in England, and a subsequent polygamous marriage in Gambia under Muslim law, could be divorced by the first wife on the ground of adultery.

187A. Mulla op. cit. p. 19; Tyabji op. cit. p. 8.

187B. A. J. E. Jaffey (1978) 41 Mod. L. Rev. 39 at 49. It has been suggested that Attorney-General *v.* Reid would not be followed by the English courts, in an external conflicts situation. *See* T. C. Hartley, (1967) 16 ICLQ 680, 693-694.

187C. G.M.O. Ord. s. 18; K.M.D. Act. s. 6.

188. L. C. Green (1970) 12 Malaya Law Review 38—40, notes that West Malaysia has such legislation. The Kenya Marriage and Divorce Commission in their report, op. cit. (Recc. 10 and 12) also suggested that form of a marriage, should not be capable of alteration by a unilateral act of one of the spouses.

188A. The same problem, does not arise in the case of Kandyan marriages, since divorce is freely available. K.M.D. Act s. 32.

189. c.f. Fernando *v.* Fernando (1932) 34 NLR 204

189A. Fyzee op. cit. (1974 ed.) p. 178-179, 184-185; Tyabji op. cit. p. 10 ,191, Mulla op. cit. p. 305.

189B. The Indian Law Commission Report op. cit. refers to the Dissolution of Muslim Marriage Act (1939) in India, which prevents dissolution of a marriage on the husband's apostacy, while permitting the wife to sue for dissolution on the ground of change of religion.

190. Fyzee op. cit. (1964 ed.) p. 184-185. Indian Law Commission Report op. cit. para 6.

191. In Katchi Mohomed *v.* Benedict, a Muslim was convicted of bigamy, when he contracted a second marriage under the General law. This was because the second marriage was void, as the man being married, lacked the capacity to enter into a General law marriage. Even if apostacy had been proved, the decision would not have been different, since the first marriage under Muslim law is not automatically dissolved. *See* G.M.O. Ord. s. 18, Penal Code s. 362 B.

192. Spencer *v.* Rajaratnam per Woodrenton, A.C.J. at 326-328, Ennis, J. at p. 332; Soundranayagam *v.* Soundranayagam, Somesunderampillai *v.* Charavanamuttu, Kandiah *v.* Saraswathy (Tesawalamai); Mudianse *v.* Appuhamy at p. 118-119, Punchihamy *v.* Punchihamy (Kandyan law).

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193. s. 2. The Ordinance was based on evidence that in the traditional law, there was a fairly well established rule that the child of a man contracting a diga marriage with a non Kandyan was deemed a Kandyan. There was greater controversy as to whether the child of a Kandyan woman married in binna was also a Kandyan. *See* Punchihamy *v.* Punchihamy, the Report of the Inquiry into Kandyan Marriages (1917) op. cit. para 4 and 5.

194. *See* the discussion on application of the Kandyan law in the modern, law of Sri Lanka, and on interpersonal conflict of laws, supra.

195. *See* cases on Tesawalamai cited in note 192, supra.

196. *See* Abdul Cader *v.* Razik (1952) at 202 where the Privy Council refused to comment on this point, because it was raised for the first time in appeal.

197. *See* Fyzee op. cit. (1964 ed.) p. 58-59. 95.

198. *See* interpersonal conflict of laws, supra.

199. (1924) 6 C.L. Rec. 40. The court decided the case on the basis that the Kandyan Succession Ordinance does not apply to the issue of irregular unions.

200. *See* Ch. II Legitimacy, infra.

201. *See* Ch. II Legitimacy, infra.

202. *See* Kalu *v.* T. H. Silva (1947) 48 NLR 216 (discussed under custody of minors Ch. VI infra); Idroos Sathak *v.* Sittie Leyaudeen (1950) per Pulle J. at 511, (discussed in parental rights on the administration of a Muslim minor's property Ch. VII infra); Haseena Umma *v.* Jamaldeen.

203. Muthiah Chetty *v.* Dingiria reflects this approach, though the validity of the decision itself may be questioned—*See* Termination of parental power, Ch. VIII infra; *See* also Tillekeratna *v.* Samsedeen per Bonser C.J., Umma *v.* Pathumma especially per de Sampayo A.J.p. 379-380 and the judgement of the Privy Council in Noorul Muheetha *v.* Sittie Leyaudeen (1953).

204. *See* generally V. Samaraweera, The Evolution of a plural Society, in K. M. de Silva (ed.) Sri Lanka: A Survey (1977) 86-88.

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CHAPTER II

LEGITIMACY

The Roman Dutch law concept of *nasciturus* may be used to support an argument that even an unborn child has the capacity to acquire legal rights enforceable after birth.[1] However it is birth[1A] that generally creates the legal relationship between parent and child.[1B] The biological fact of parentage does not always coincide with the legal relationship to a child, because the law on family relations in Sri Lanka draws an important distinction between children born of a lawful marriage, and those born outside this institution.

In many legal systems with a foundation of English Common law or Civil law, the biological relationship between parent and child does not necessarily create a recognised legal relationship between them. The legal relationship depends rather, on whether the child was born during a valid marriage as opposed to a non-legal union. The law may impose duties on the biological or natural parent of a child born of a non-legal union. Thus the natural parent may be legally obliged to support such a child. The rationale for that duty of support may however lie in a legal value that has nothing to do with the relationship of parent and child.[2]

Both the English Common law, and the Roman Dutch law are western systems of jurisprudence that reveal in their laws on marriage and children, the impact of the Canon law concept that marriage, is a sacred union between one man and one woman for life.[2A] These legal systems inevitably provided supports for the institution of monogamous marriage, through incentives for conforming to the lawful union, and deterrents to the creation of irregular unions between men and women. While the law considered the sexual relationship between parties to an illicit union as no marriage, it proceeded to stigmatise their children as 'illegitimate'. The legal status of the child was therefore determined entirely according to the legality or otherwise of the relationship between the parents.

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Thus in the English Common law, the child born to parents who had not contracted a valid lawful marriage was tainted with the illegality of its parents' union. He was denied the status of 'legitimacy' conferred on the issue of a valid marriage, and was also deemed "a son of nobody or *filius nullius*, with no legal relationship to his parents.[3] While there was a presumption of legitimacy in favour of a child born to married parents, paternity being established on the basis that "*pater est quem nuptiae demonstrant*", an illegitimate was a child without a father. Besides even though the mother could be identified from the fact of birth, and the law conceded that "*mater semper certa est*", she was originally denied a right of custody and had no legal obligation to support the child.[4] The Roman Dutch law, was somewhat more liberal. While it presumed that the child of a valid marriage was legitimate, and denied the illegitimate's relationship to its father, it accepted that "the mother makes no bastard". Consequently the Roman Dutch law maintained that there was a legal relationship between the illegitimate and his mother.[5]

The view that the issue of irregular unions should be denied status in the legal system, appears to have been jettisoned even in the Common law, in the course of time. This was partly due to an awareness that the child, who was innocent of the guilt of his parents, should not be victimised for their violation of the legal norms. Thus Blackstone, writing of the Common law in the early years, refers to the disabilities that an illegitimate suffers in the law on inheritance, and comments that "any other distinctions, but that of not inheriting, which civil policy renders necessary, would with regard to the innocent offspring of his parent's crimes be odious, unjust and cruel to the last degree".[6]

More recent reforms on family law in developed countries administering both the Civil law and the Common law also show a clear trend towards recognising the status of an illegitimate as an individual capable of asserting legal rights. With industrialisation and the break up of the formal family unit, the structure of the nuclear family in these countries has changed considerably. Permissiveness in sexual relationships has replaced the earlier rigid codes, and inevitably, premarital relationships and illegitimacy are social problems which these legal systems have had to cope with.[6A] Researches in psychiatric medicine and personality

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development, as well as the value placed on the individual's right to happiness in personal relationships, has eroded the concept that individuals who do not conform to the accepted legal norms, be deemed "*persona non grata*". The permissive attitude with regard to irregular unions has lead to a liberalisation of the law on the status of the issue.

Developments in family law in both England and Scotland for instance,[7] reveal a conscious effort to remove the legal disabilities that an illegitimate suffers in the law, by assimilating his status as far as possible to that of legitimate child. In England, words of relationship such as "child", in a disposition, are no longer presumed (as in the Common law), to refer to a legitimate child. The need to recognise the natural bond between the illegitimate and his parents has also been accepted in a series of reforms. Thus, the Legitimacy Act (1959) premitted the putative father to make an application to court for the legal custody of an illegitimate, supplementing the earlier developments in the Common law that conferred a right of custody on the mother. The Children's Act (1975) confers parental rights and duties on the mother of an illegitimate, while the Guardianship of Minor's Act (1971) now deals with the right of both parents to claim custody. The illegitimate has been conferred the same right of succession as a legitimate child in respect of both parents, by the Law Reform Act (1969). This Act also conferred on the illegitimate, a right to be treated as a dependant for the purpose of family provision or maintenance from the estate of the deceased parent. Legislation enacted in Scotland in 1968 widened the scope of legitimation by subsequent marriage, and conceded that an illegitimate could have full rights of succession in regard to the estate of both parents.

Since the basic premise that the law has an interest in governing family relations has not changed, and because lawful marriage continues to be viewed as the basis of the legal family, there is a hard core of resistance in England and Scotland to abolishing the concept of legitimacy altogether. While it seems to be accepted that it is more appropriate to describe the illegitimate child as the legitimate offspring of an illegitimate union, who should not be prejudiced, the basic conceptual distinction between the legal and the extra legal family has not been changed. Consequently, while the status of the illegitimate has been improved, the law continues

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to categorise children as legitimate or illegitimate depending on whether or not their parents were lawfully married. However, the introduction of the concept of "breakdown of marriage" as the basis for divorce in England[7A] paves the way for legitimation of illegitimate children by subsequent marriage, and provides an incentive for procreation of children within lawful marriage. Some other countries in the Common law world have gone much further. Thus a statute introduced in 1969 in New Zealand abolished the concept of legitimacy and declared that "for all the purposes of the law of New Zealand the relationship between every person and his father and mother shall be determined irrespective of whether the father and mother are or have been married to each other". The Act does away with the legal relevance of the traditional concept of legitimacy, and replaces it with that of biological parentage.[8] This radical reform introduces into a Common law country, a concept that is said to have always been recognised by the Maori people.[8A]

Developments in the law on family relations in countries administering the Civil law and the Common law, thus reveal a distinct trend of improvement in the status of the illegitimate child. Academic writing has focused on the fact that in many jurisdictions, "the slur of bastardy, once almost indelible seems to be fading away in the face of social and economic changes experienced by modern societies."[9] While there has been rethinking on the law with regard to legitimacy in these countries, and recognition of the illegitimate's rights has been considered an aspect of human rights,[9A] the law of Sri Lanka continues to adhere to many of the legal values that have been rejected in the very systems from which they were inspired. And yet we shall see that legal values which are now considered appropriate for developed societies in the west, were the foundation of some of the traditional legal values that were discarded in the quest for modernization of this country.

Legitimacy in the General Law

In the Portuguese and Dutch period of colonial rule, only the maritime regions of the country came under foreign domination. There is historical evidence in support of the fact that the marriage laws and customs of the Sinhala inhabitants were similar to those in the Kandyan Provinces, and that Tamils also retained their

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own laws, during the Portuguese regime.[9B] There is nothing to suggest that the Portuguese prohibited these local laws with regard to marriage,[9C] and the Dutch do not seem to have followed a different policy, even though there is some evidence that they frowned on the native marriage laws and customs which came into conflict with their rigidly puritan protestant values and their laws.[10]

The British who succeeded the Dutch, issued a Proclamation in 1799 guaranteeing to continue in the Maritime Provinces, the laws and institutions that had existed under the Dutch regime.[10A] It was hardly clear that the Customary law had not survived, or that the Dutch went so far as to impose their own marriage laws on the natives of the Maritime Provinces.[11] Nevertheless the courts in the British period were prepared to accept that the Dutch laws of marriage had governed the Sinhala inhabitants, even if that colonial administration had retained the Customary laws of the Muslims and the Tamils.[12] Consequently, western principles and legal values with regard to marriage and legitimacy found their way into the law governing the local inhabitants of the Maritime Provinces, first as principles of Roman Dutch law, and later as statutory reforms introduced by the British. By a historical accident, the basis of the law of marriage and legitimacy of the majority of the people of the country was thus derived from western systems. In the course of time, these legal values permeated some of the indigenous local laws that continued to be applied, even during the period of British rule.

It is clear that the early British administrators considered that the Roman Dutch law of marriage prevailed throughout most of the island, and that from the time of the cession, it was the source of the principles governing a valid marriage among the Sinhalese and Tamil inhabitants of the Maritime Provinces.[13] Consequently, in 1845 when the British decided to enact legislation that would declare a uniform law on marriage and divorce applicable to all the inhabitants of the island, it was proposed that the Roman Dutch law should be the foundation of the statute. The Roman Dutch law with regard to specific aspects of the law on marriage and divorce was to be enacted as statutory provisions of "universal application".[14]

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When the legislation eventually emerged as Ordinance No. 6 of 1847, it stated the requirements of a valid marriage and contained a provision denying validity to a second marriage contracted prior to the dissolution or annulment of the first marriage.[15] The Roman Dutch law principle of legitimation of illegitimate children procreated prior to a marriage, was also stated in this Ordinance.[16] This Ordinance was proclaimed in respect of Christians, initially in 1849, and was not enforced in its entirety in respect of other persons.[17] It was also the basis of subsequent legislation in regard to marriages of Christians as well as non-Christians in the Maritime Provinces.[18] Provisions similar to those in the 1847 Ordinance may be found in the General Marriages Ordinance (1907)[19] that has set out the requirements of a valid marriage under the General law of Sri Lanka, since the early part of this century.

The distinction between valid monogamous marriage in conformity with the statute law, and unlawful co-habitation, and the categorisation of issue as legitimate, thus became fundamental legal values in the General law of Sri Lanka. Besides, both English law and Roman Dutch law had departed from the original Canon law concept of a formless marriage contracted merely by consent of parties. Both systems emphasised the importance of a public ceremony of marriage.[19A] Since it was part of British policy to "secure the claims of legitimate filliation and (to) regulate the devolution of family property,"[20] it was also considered vitally important to have a record of the marriages that had been celebrated. Consequently, an early Regulation No. 9 of 1822, which was applicable to marriage among the local inhabitants of the Maritime Provinces, made registration an essential attribute of a vaild marriage. Non-conformity with this requirement jeopordised the legitimacy of the issue. Children born to parents who had not registered their marriage but had only celebrated it according to local custom, were considered illegitimate.[21] The law only recognised registered monogamous marriages.

We shall observe later that solemnization of marriage according to a prescribed ritual or ceremony was not necessary to constitute a lawful marriage in Sinhala law. The statutory requirement of registration appears to have been ignored by the local inhabitants of the maritime regions. They continued to contract

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marriages according to custom, unconcerned that the legal system designated their offspring as illegitimate. When the Ordinance of 1847 was proclaimed in resepct of Christians, the legislation, having repealed the earlier Regulation of 1822 in respect of these persons, went so far to introduce penalties for non-registration. It retained the requirement of registration, though it validated unregistered marriages that had taken place.[22] By 1863, however, the British were forced to concede that the law on registration of marriage, had no impact on the local inhabitants. Besides, when reforms with regard to the law of marriage were under discussion at this time, representatives of the Church objected to the concept that Christian marriage could be solemnized by an administrative official, purely as a civil contract. The strongly divergent views on this matter, as well as the failure to effectively implement the law on registration, lead to a complete reversal of policy.[23] The Regulation on registration of marriage, and the penal provisions governing non-registration in the 1847 Ordinance were repealed. Thus Ordinance No. 13 of 1863 was introduced as a marriage law applicable to both Christians and non-Christians in the Maritime Provinces. The statute set out the requirements of a valid marriage, but by eliminating the compulsory requirement of registration conceded that it was not essential and that children of these non-registered marriages were legitimate under the law.[24] Lack of parental consent to the marriage of a minor could also not be led in proceedings affecting validity, if the marriage had been solemnized under the statute.[24A] Issue of such marriages were therefore legitimate.

An abortive attempt was made to reintroduce the compulsory requirement of registration. Thus the policy reflected in the 1863 Ordinance was not changed, and may be seen today, in the General Marriages Ordinance. A marriage may now be solemnized and registered by a civil registrar of marriages, or by a Christian minister, in a registered place of worship. The provision recognising the latter facility was introduced into the marriage statutes in the British era due to pressure from an influential section of Christians, who objected to solemnization of marriage outside the Church. It was retained in the General Marriage Ordinance, and makes for an important difference, between Christians and non-Christians, for the latter persons

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do not have the right to solemnize their marriages under the statute according to religious rites.[24B] This is not however a provision which is discriminatory, since solemnization and registration under the statute is not longer compulsory, and a marriage may be solemnized outside the Ordinance, according to custom or religious rites. In **Babina** *v.* **Dingi Baba** Cayley C. J. thought that the history of the marriage statutes revealed clearly "the intention of the legislature that registration should no longer be requisite for the validity of the marriage," and this view has prevailed in a long trend of judicial decisions in our courts.[24C] Persons governed by the General law of marriage may therefore follow the statutory procedure and solemnize their union or solemnize it only according to customary or religious rites. The children of a marriage which has not been registered but only solemnized according to custom, will be deemed legitimate, provided the other statutory requirements regarding a valid marriage are satisfied. Thus the emphasis on monogamy remains. A public ceremony of marriage is considered by our courts to be an essential requirement in proving an unregistered customary marriage. The presumption of marriage by co-habitation and repute is applied, on the basis that the parties have lived together as husband and wife after a public ceremony of marriage If parties cohabit without solemnizing their marriage according to such a ceremony, they may be deemed to have lived in concubinage, the issue being considered illegitimate.[25] It is only if both parties are dead, and the marriage contracted at a very early date, that proof of a ceremony may not be required.[25A]

In traditional Sinhalese society, ceremonies of marriage appear to have been associated with the life style of merely the elite. If this continues to be true of contemporary Sri Lanka, the law having recognised the unregistered marriage as valid, will, because of the absence of a ceremony, proceed to designate an otherwise lawful union which in the eyes of the parties and their kinsmen is a marriage, as concubinage.[26] The focus on a public ceremony, thus leads to the arbitrary classification of unregistered unions as concubinage, even when the only impediment to lawful marriage is the mode of solemnization. Since the more accessible areas of rural Sri Lanka are to be found in the Maritime Provinces, it may

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be that the requirement of registration is now so familiar that it is popularly considered an essential attribute of a valid marriage.[27] In that case, there will not be the same danger of children of an unregistered customary union being designated illegitimate.

The General Marriages Ordinance which contains the modern law on the requirements of a valid marriage, follows earlier statutes, and does not treat lack of parental consent as a ground for attacking the validity of a marriage, or challenging the legitimacy of children.[27A] There is judicial controversy as to whether the same attitude can be taken regarding want of parental consent in a marriage celebrated according to custom.[27B] Since the law with regard to capacity that applies to marriages celebrated according to custom is determined according to the statute,[27C] it does not seem correct to deny a customary marriage validity for lack of parental consent. Children of such a marriage should therefore be considered legitimate.

The desire to protect the legitimacy of children is reflected in the legislation on Kandyan marriages, by provisions that confer validity on a marriage that would normally be void, when contracted during non-age of the parties. In the absence of similar provisions in the General law, Sri Lanka courts adhere strictly to the prohibition on contracting a marriage when a party is under the age of capacity. Co-habitation after reaching puberty does not confer validity on such a marriage; it is void and the children are illegitimate.[27D]

The harshness of the rule that defects regarding capacity or lack of the parties' consent render a marriage void and the children illegitimate, may be ameliorated by the Roman Dutch law principle of putative marriage.[27E] The children of a putative marriage are considered legitimate issue, even though the parents' marriage is void. The concept of putative marriage however does not apply to a marriage that can be annulled at the option of the parties, on the ground that it is a voidable marriage.

When the Administration of Justice (Amendment) Law (1975) stated that a decree of nullity could be obtained only on the grounds set out in the Marriage Registration Ordinance, the Roman-Dutch law on nullity appeared to have been repealed. For the

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courts had applied the Roman Dutch law on the basis that the Civil Procedure Code permitted a decree of nullity to be made by them on **any** ground recognised by "the law applicable in Ceylon."[27F] The Civil Procedure Code dealt with aspects of substantive law, in regard to matrimonial actions, and it may be reasonably assumed that the Administration of Justice (Amendment) Law, which repealed and replaced it, also dealt with the substantive law and procedure in matrimonial actions.[28] With the repeal of these provisions and the re-instatement of the Civil Procedure Code, a marriage may now be annulled on Roman-Dutch law grounds such as duress, incurable impotency, or pregnancy by another man, at the time of marriage which is unknown to the husband (ante-nuptial stuprum).[28A] The latter circumstance would render the children illegitimate, since the presumption of legitimacy can also be rebutted. But a decree of nullity on the ground that a marriage is voidable under Roman-Dutch law in any case operates retrospectively and affects the legitimacy of the children of such a marriage. If the concept of a voidable marriage is recognised in our law, as a basis for nullity, it is important that the status of the children should be protected, just as it is when the doctrine of putative marriages is applied to a void marriage. It is unfair that the status of the children as legitimate issue should be destroyed by the annulment of their parents' marriage. Family law reforms in some countries have ensured that the children of voidable marriages remain legitimate.[28B]

The status of the illegitimate

The Roman Dutch law, emphasising as it did the institution of lawful marriage, did not tolerate the non legal union, which it considered concubinage. It recognised the legal relationship between the mother and illegitimates on the basis that "the mother makes no bastard", but categorised illegitimates as "simple bastards" (speelkinderen) and "adulterine or incestuous bastards". (over wonne kinderen).[28C] While the subject of parental rights was treated differently in the case of illegitimate children, since, the law recognised their legal relationship only to the mother,[29] the Roman Dutch law also subjected illegitimates to significant disabilities in the matter of inheritance. No illegitimate could inherit from the putative or natural father if the latter died intestate.

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He could succeed to the mother's property if she died intestate, but some jurists denied adulterine and incestuous illegitimates even that privilege. Subject to the fixed minimum of the legitimate portion in favour of the issue of a valid marriage, an ordinary illegitimate could inherit under the will of either parent. Generally adulterine and incestuous children were prohibited from receiving anything by will, except for necessary maintenance. Prima facie, or in the event of doubt, the word "children", when used in a bequest, was interpreted as a reference to legitimate issue.[30]

Prior to statutory reforms in the law on succession and inheritance, these principles applied to persons subject to the General law. Thus in the early case of **Karonchihamy** *v.* **Angohamy**[31] the Supreme Court held that an illegitimate could not inherit from the father. However the Sri Lanka courts adopted a somewhat liberal view with regard to adulterine illegitimate issue, when confronted with the prospect of appyling the values of the traditional Roman Dutch law, in a context where the legal system adopted a different attitude to the matrimonial offence of adultery. This was not a crime in Sri Lanka, nor was it a bar to a valid marriage. In view of these changes, the courts refused to exclude adulterine illegitimates from their mother's inheritance, or to impose the other disabilities recognised in Roman Dutch law. They considered it anomalous to victimise the issue, when the Sri Lanka legal system condoned the conduct of their parents[32].

The Wills Ordinance (1844) superceded the Roman Dutch law, and introduced the concept of freedom of testation. Thus illegitimates became entitled to inherit under the will of either parent. This Ordinance permitted any person who was "not legally incapacitated" to inherit under a testator's will.[33] Even though incest, unlike adultery is a criminal offence in the law of Sri Lanka, the statutory recognition of the testator's right to dispose of his property as he wishes, prevents the presentation of an argument that incestuous illegitimates are subject to the disabilities of the Roman Dutch law. Besides the Matrimonial Rights and Inheritance (M.R.I.) Ordinance (1876) that governs the subject of intestate succession in the General law, does not distinguish between incestuous and other illegitimates. It suggests that all illegitimates may succeed to the intestate estate of the mother, or the relatives of their mother, though they may not

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inherit from the father if he dies intestate.[34] The Legitimacy Act No. 3 of 1970 removed the only remaining special disability with regard to adulterine illegitimates, when it declared that they may be legitimated by the subsequent marriage of their parents.[35]

The illegitimate is thus viewed as a child with one lawful parent. He suffers important disabilities with regard to succession whether he is born of an incestuous or adulterous union or simply outside marriage, since he has no right to share as an heir in the intestate estate of the father. It is also likely that despite the liberalisation of the law, the word "children" will in case of doubt be interpreted by a court construing a bequest, as a reference to legitimate children.[35A] The exclusion of illegitimates as heirs is thus a relic of the Roman Dutch law, that was reluctant to recognise their natural relationship to the father. Recognition of an illegitimate's rights does not come within the scope of the protection afforded to fundamental rights in our constitution. Though the General law of Sri Lanka on family relations has also chosen to maintain the distinction between the concept of legal marriage and the irregular union, the earlier rationale of victimising the issue of the non-legal union in order to strengthen the institution of marriage, has been replaced in at least some aspects of the law, by a humanitarian concern that these children should not be victimised merely because the parents violated the legal norms. I thas been pointed out in our courts that the Sri Lanka law permits a man to provide for his mistress and illegitimate children by will, to the exclusion of his lawful wife and legitimate children, "even to the extent of leaving (them) penniless and dependant on charity".[35B] It is not clear why his relationship to illegitimates should be denied when he has complete freedom to provide for them in his will, even to the prejudice of legitimate issue. If the improved legal status of illegitimates is not viewed as undermining the concept of lawful marriage, there is no justification for treating illegitimates as children with one lawful parent. The General law of Sri Lanka should also permit illegitimates to inherit, on the putative father's death intestate, provided that paternity has been established, or is not disputed. If such a reform is introduced, there will be no place for the Roman Dutch law rule of interpretation that prima facie, the word "children" in a bequest, refers to legitimate issue.

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Legitimacy in the Customary Law

1. Kandyan Law

(a) The traditional law

An early English work on the Kandyan law refers to the "vagueness of ideas with regard to the inception, maintenance and dissolution of matrimonial alliances".[36] No importance was attached to solemnization of a marriage according to rituals or ceremonies, and this aspect was not crucial to the lawfulness of the marriage relationship. . However though polygamy was practiced, it is conceded that there was a concept of lawful marriage, in the Kandyan Law. Robert Knox in his account of family life in the Kandyan Provinces refers to "marriages which made the bed lawful."[37] Digests on the Kandyan law set out the norms with regard to a valid union, indicating that if these were not fulfilled, the relationship between a man and a woman was not considered a valid marriage, and the children were deemed illegitimate.[38] Cohabitation between parties in circumstances where these norms were statisfied, "made marriage and created rights of succession in favour of issue without any formal ceremony."[38A] The rules of succession in the traditional laws, also reveal that a distinction was made between legitimates and illegitimate children. Nevertheless a society that practised polygamy, permitted divorce due to breakdown of the marriage and had a permissive attitude to sexual relations, inevitably adopted a somewhat liberal attitude to the claims of illegitimates. Thus it is clear that the issue of certain types of unions that did not conform to the legally accepted norms for a valid marriage, had a recognised status in the law on family relations. Children who were issue of even adulterous unions, but not born from incestuous or unauthorised intercourse, were considered children of irregular marriages or "non-customary co-habitation and concubinage". These children were able to inherit from both parents, though they held an inferior status to fully legitimate children. The illegitimate child of a binna married woman, could not succeed to her ancestral (paraveni) property, but generally, illegitimates had an equal right to succeed to the property of their mother. Besides they shared even the fathers' acquired property equally with legitimates and could take the

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entire acquired property if there were no legitimates. They were however only remote heirs to the father's ancestral or paraveni property, and were excluded by legitimates and other relatives.[39] In traditional Kandyan law therefore an illegitimate was not a *filius nullius*, but rather, a child whose natural relationship to both parents was recognised.

The rights of succession of illegitimate children were recognised in judicial decisions in the Sri Lanka courts, pronounced during the early period of British rule in the Kandyan Provinces.[40] In the course of time, as the definition of lawful marriage changed, the concept of legitimacy in Kandyan law became different to what it meant in the traditional law.

(b) History of the changes introduced by legislation

When the Kandyan Convention was signed in 1815, the British guaranteed that they would apply the traditional laws to the people of the Kandyan Provinces.[41] Nevertheless the colonial rulers found it difficult to administer a law that was quite alien to their own values with regard to the marriage relationship. An early judicial decision rejected the taboo on inter caste marriage, and recognised the legal validity of such a union.[42] When the first declaratory statute on the law of marriage in the colony was under discussion in 1845, it was even suggested that it should be promulgated as a uniform law applicable to Kandyans.[43] This proposal appears to have been shelved, and thirteen years later, Governor Ward, writing to the Secretary of State for the Colonies expressed the reasons for the official reluctance to initiate such reform. However "repugnant to English habits and feelings" the Kandyan laws were, he said, "the British government had no power to interfere with them unless invited to do so by the Kandyans themselves".[44] He was obviously referring to the political and legal wisdom of not violating the Kandyan Convention.

The "popular" demand for reform, came soon enough, in the form of a petition by a deputation of influential chiefs. In the words of the British Governor, who communicated their request

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for reform of the law on marriage, they wished to remove "what they felt to be a stigma upon the race and character by limiting marriage . . . . to one husband and one wife . . . . to make marriage dependant on registration, and to limit the rights of inheritance to children born of such marriages".

The chiefs were quite frank in conceding that their request was motivated, not by a change in moral values, but because of property. They obviously felt that these modifications in the law was a remedy for endless litigation and even blood feuds over competing claims to property. Such considerations could not but find a sympathetic ear among the rulers who were undoubtedly also interested in ensuring clear title to property in the Kandyan Provinces, which became the heart of the plantation economy in the colony. When the petition of the chiefs was augmented with a further 8,000 signatures, the local administration triumphantly concluded that "what it would have been imprudent to originate, it would have been unpardonable not to support".[45]

The colonial office appears to have been somewhat sceptical of the petition being an indication of popular sentiment. However the desire to make Kandyan marriage conform to the concept of that institution in Europe, clouded any misgivings on this score. In order to ensure that the changes in the law were effected before the petitioners changed their mind, legislation was rushed through, and an Ordinance enacted which fundamentally altered the Kandyan concept of marriage and legitimacy.[46]

The Kandyan Marriage Ordinance No. 13 of 1859 set out the requirements of a valid marriage. No future marriage could be valid unless the statutory requirements were fulfilled, and it was registered in the manner provided in the statute. The practice of polygamy was made illegal, and a lawful marriage had to be monogamous. A marriage during the lifetime of the husband or the wife was declared illegal and void, unless the marriage had been dissolved by divorce or the marriage was declared void by a competent court. The lawful age of marriage was specified, and a marriage during nonage was declared void. Suits for divorce, could in the future be based only on the ground of malicious desertion or adultery.[47]

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The statute thus introduced very fundamental changes. The monogamous registered marriage became the only form of valid marriage in Kandyan law, and the issue of unions that did not conform with those requirements became illegitimate. A wholly new definition of legitimacy had been introduced.[48] The legal rationale for these departures from the traditional law was articulated in the preamble to the statute, in terms of the right of the British sovereign to redress abuses.[48A]

Reviewing the working of the Ordinance in 1869, Governor Robinson wrote that the "effect of (our) premature and faulty legislation on this delicate subject has simply been to bastardise the great majority of the children born during the last nine years".[49] Administrative officials working all over the country, reported that the statute had no impact whatsoever on what one of them described as the "matrimonial inconsistency, which forms a marked feature of the Kandyan idiosyncracy"![50] The District Judges were of the same view. Berwick D.J. commented that the attempt to "thrust a social revolution by mere legislation" was unsuccessful, not because of "active opposition but by that sort of passive bearing much more difficult to deal with, which . . . . to complaisant submission to our laws, join a simple and silent non-acceptance of them in fact". According to him, the Kandyans took the new law "with all docility . . . . .as a form of words", and simply ignored it![51] They did not understand the official concern with placing domestic events on record, and did not obtain official sanction for either their marriages or divorces. Consequently Governor Robinson was constrained to point out that "it is probably within the mark to assume that 2/3 of the existing unions are illegal, and that 4/5 of the rising generations are illegitimate".[52]

The laxness of the marriage tie in the Kandyan Provinces was a cause for so much concern, not merely because it violated the British codes on sexual morality, but because of the interest in avoiding disputes with regard to inheritance, and ensuring clear title to property in this region.[53] Consequently unlike in the Maritime Provinces, the lack of success in enforcing the earlier Ordinance did not motivate a complete change in policy with regard to the requirement of registration and monogamy. The Kandyan Marriage Ordinance (1870) introduced some changes.

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An effort was made to validate marriages celebrated after 1859, which were invalid due to non-registration. The divorce law was liberalised so as to conform to the basic concepts of traditional law, which permitted dissolution of marriage by mutual consent. However, there was fresh determination to impose the new law on marriage and legitimacy. Polygamy was prohibited, and registration was to be, in the future too, an essential requirement for a valid marriage.[54] Any hardship to the people was rationalised upon the basis that the Kandyan marriage law was "barbaric," and civilisation could not be achieved without paying some price in human misery.[55] The validation of marriage contracted during non-age was made possible where the parties co-habited as husband and wife for one year after reaching the age of capacity, or where a child was born during non-age. In addition, a more liberal attitude was adopted to lack of parental consent, so that, as in the General law, it did not affect the validity of the marriage.[55A] Even though polygamy and failure to register marriage were not treated sympathetically, some concern for the legitimacy of children is reflected in the provisions on validation of marriages during non-age, and regarding parental consent.

It is not clear whether the statutory requirements of the Kandyan marriage law became familiar to the rural population in the more remote regions of the Kandyan Provinces, during the years when the Ordinance was implemented.[56] The Kandyan Law Commission that was appointed in 1927 to codify the law on inheritance, certainly conceded that even after half a century had elapsed, the "ignorant classes" were unaware of the requirement of registration. The impression that the new values with regard to marriage and illegitimacy had permeated the upper strata of Kandyan society, is suggested by the attitudes reflected in the report of this Commission.[57] The Kandyan Law Ordinance No. 39 of 1938 which incorporated their recommendations, defined legitimacy for the purpose of intestate succession exclusively in terms of the legal and registered marriage.[57A]

The Kandyan Marriage and Divorce Act (1952) was introduced in the post-independence period, to repeal the Ordinance of 1870, and declare new law. The monogamous marriage had apparently become the accepted legal norm, and there was also no reappraisal of the policy with regard to registration. In the modern law

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a valid Kandyan marriage must be monogamous, and an unregistered union is void, while the issue will be illegitimate.[58] The provision with regard to validation of marriage contracted during nonage that was introduced in the 1870 Ordinance also found a place in the new Act.[58A] Lack of parental consent was treated in the same liberal manner, so that it is not a ground for attacking the validity of the marriage or the legitimacy of the children, even in the modern law.[58B]

The definition of legitimacy in Kandyan law is therefore different to what it was in the traditional law. It differs also from the General law in that an unregistered *customary* marriage is void. The presumption of a valid marriage by cohabitation and repute cannot be drawn even when the parties have lived together after solemnizing their marriage according to custom. The children of an unregistered customary union will thus be deemed illegitimate. The practical importance of this difference is brought out dramatically in **Sophia Hamine** *v.* **Appuhamy,**[58C] where Low Country Sinhalese resident in the Kandyan Provinces were able to establish a valid customary marriage only because they were considered as not governed by the Kandyan law of marriage. While the illegality of polygamy, and the legal values regarding monogamy appear to be now familiar to villagers in even the most remote regions of the Kandyan Provinces,[59] sociologists have expressed the view that registration is not popularly known to be a requirement of a valid marriage in the rural areas of this region.[60] If this view is correct today there is a clear need to re-examine the policy with regard to registration. A system of registration helps to avoid uncertainity regarding proof of marriage. There is a rationale for making registration compulsory even in the General law today. But an effort must be made to see that the dublic is aware of the requirement, and to introduce sanctions, without touching the validity of the marriage or the status of issue n the event of irregularities in solemnization.

There is no procedure in the Kandyan Marriage and Divorce Act for annulling a Kandyan Marriage. There is evidence, that in the early years of British rule in the Kandyan Provinces,

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the ordinary courts of law tried cases that concerned the validity of a marriage.[61] The Kandyan Marriage Ordinances too conceded the possibility of obtaining a judicial decree declaring a marriage void.[62] The present Act provides a non-judicial informal procedure for dissolution of marriages by divorce. It is not clear however what forum is available to Kandyans for obtaining a decree of nullity, for though the Act recognises that a Kandyan marriage can be declared void it makes no reference to a decree of court.[63] It may be argued that an ordinary civil action can be brought in the District Court, for the purpose of obtaining such a decree.[63A] The decree will be purely declaratory of the status of the children, since a Kandyan marriage is void for non-conformity with the statutory requirements, and the issue are in any event, illegitimate in the eyes of the law. The concept of putative marriages has no place in Kandyan law, and the issue of a void Kandyan marriage cannot become legitimate on that basis, unless the concept is introduced by an extention of the General law.[63B]

(*c*) *The status of the illegitimate*

Despite the fact that the concept of legal marriage had been altered by the early statutes, and a new definition of legitimacy introduced, the Supreme Court continued to recognise the traditional rights of succession of ordinary as well as adulterine illegitimate children.[64] The Kandyan Law Commission however disapproved of the legal recognition given to the claims of illegitimate children. In order to prevent children of irregular unions asserting a right to succeed on the basis that they fell into a special category of "semi-legitimate" issue, they recommended that a declaratory provision should be introduced in the statute on succession, stating that legitimate issue were children of unions that satisfied the statutory requirements for a valid marriage. Referring to the judicial trend recognising the rights of succession of illegitimates, the Commission was in favour of applying "the full rigour" of the General law, and denying illegitimates any rights of succession in the father's property. As a concession to the "ignorants" who were unaware of the requirement of registration of marriage, they were prepared to concede a right of succession in respect of the father's acquired property, in the

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absence of legitimate children and their issue, and subject to the widow's life interest. The comparative liberalism with which they viewed the illegitimates' rights of succession to the mother, reveals the impact of the Roman Dutch law concept that "the mother makes no bastard".[65] The report of the Commission provides a pointer to the manner in which Western values regarding marriage and the family, had permeated the elitist sections of the Kandyan community.[65A]

These recommendations of the Commission, regarding intestate succession became, with some modification, enacted law. Apart from defining legitimacy for the purpose of intestate succession, in terms of a valid and registered marriage, the Kandyan Law Ordinance (1938) denied the right of inheriting as a legitimate to adulterine illegitimates legitimated by the subsequent marriage of their parents.[66] It also placed significant limitations on the illegitimate's right to inherit from the putative father. Though the illegitimate child of a woman married in binna cannot succeed to her paraveni property, the Ordinance concedes that in general, an illegitimate may share the mother's estate equally with a legitimate child. However the illegitimate can acquire rights of succession in the intestate estate of the putative father in limited circumstances. If a man has registered himself as father at the registration of the child's birth, or he has been adgudged the father in his lifetime, by a competent court[66,A] the illegitimate child is entitled to share the acquired property equally with legitimates. In any other case an illegitimate has only a remote right of succession in respect of the father's acquired property. His right of succession is postponed to the rights of legitimate issue, and their children. He has no rights at all in respect of paraveni property.[67] These limitations themselves may be used to put forward the view that the Roman Dutch law rule of interpretation applies to prevent illegitimates claiming as "children" under a bequest.[67A] There is judicial authority in the modern law to support the proposition that an illegitimate may claim rights of succession in respect of his maternal grandfather's property.[67B] The general approach is still in favour of recognising an illegitimate's rights of succession in the Kandyan law. This seems to justify rejecting that view, and construing the term "issue" in a bequest, as including illegitimate children.

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Since the Wills Ordinance was enacted as a statute of general application, illegitimates governed by Kandyan law, have been entitled to inherit property under the will of either parent. The traditional Kandyan law does not justify the view that the illegitimate has no legal relationship to his father. There is no reason why the modern law should not be liberalised, so as to remove the existing distinctions between legitimates and illegitimates. Such a reform will enable illegitimate children to inherit the father's property without the present limitations, if paternity can be established. It will also prevent any argument that the Roman Dutch law rule of interpretation should apply to prejudice the claims of illegitimates who seek to benefit from a bequest to children.

The General law principles on parental power usually determine parental rights in respect of illegitimates,[67C] though the putative father's relationship to such children is given some significance even in the Kandyan law on inheritance that applies today.

2. Tesawalamai

In the early years of British rule, the Tesawalami was applied as the code of customary law applicable to the Tamil inhabitants of the Jaffna Province, because the British had committed themselves to administer the laws that existed in the Maritime Provinces during the Dutch regime.[68] Since this code did not contain any important principles on the law of marriage, it was assumed by the British that the Roman Dutch law principles applied to even Tamils subject to Tesawalamai. That system was therefore administered in the early years as the source of the law on marriage.[69]

The practice of polygamy appears to have been prevalent among the Hindus of the North, during the Dutch period. The Tesawalamai Code declares that "Pagans consider as their lawful wife or wives, those around whose neck they have bound the taly with the usual pagan ceremonies" and that "if the wives although they should be three or four in number should all and each of them have a child or children, such children inherit share and share alike the father's property". The concept of legitimacy appears to have had a place within the institution of polygamous marriage, for children of informal pagan unions according to the

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Tesawalamai did not inherit the father's property in this way, their mother being considered a concubine.[70] It is clear however that polygamous customary marriages of even non-Christians, were not considered valid in the British period, for the practice of polygamy was permitted only to Mohammedans.[71] Besides, polygamous marriage could not be valid according to the Roman-Dutch law. Legitimacy was therefore definable even in respect of persons subject to Tesawalamai according to the principles of the General law, and was essentially the status of issue born within a monogamous marriage. The prohibition on polygamy was viewed strictly, for even when unregistered marriages were subsequently validated by statute, this legislation refused to regularise bigamous marriages that had not been registered.[72] Children born of polygamous customary marriages would necessarily have been illegitimate.

Registration had been introduced by the Regulation of 1822 as a uniform requirement for a valid marriage among natives. However Hindus Tamils of the North appear to have been, in fact, exempted from the requirement up to 1863, on the basis that it was contrary to their customs to permit females to appear in public.[73] When registration became unnecessary to the validity of a General law marriage, Tamils subject to Tesawalamai were permitted to contract an unregistered customary marriage.[74] The issue of these marriages are therefore legitimate, in the modern law.

Tamils subject to Tesawalamai are governed by the General law of marriage.[75] It was inevitable that when the Tesawalamai Code was amended, the principles of the General law would find a place in the new reforms on inheritance. The Jaffna Matrimonial Rights and Inheritance (Jaffna M.R.I.) Ordinance 1911, reaffirmed the principle familiar to the customary law, namely that an illegitimate could not inherit from his father, by stating that in the event of the parent's intestacy, an illegitimate could only inherit from the mother. However the Roman Dutch law concept that the "mother makes no bastard", rather than the customary law, appears to have provided the inspiration for the statute. A provision in the Ordinance comparable to that in the Matrimonial Rights and Inheritance Ordinance of the General law, provides that if an illegitimate dies intestate without leaving a spouse or descendants, the property passes to his mother and her heirs.[76]

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The Supreme Court of Sri Lanka has conceded that the concept that "the mother makes no bastard" must determine the relationship between an illegitimate and his mother and collaterals, but has sometimes derived general principles on inheritance from the Tesawalamai Code, in determining disputed claims.[77] However, the Jaffna M.R.I. Ordinance clarifies that when the statute is silent, reference must be made to the Matrimonial Rights and Inheritance Ordinance, and any laws that apply to the Tamils of the Western Province.[78] It is therefore not clear whether the courts are justified in stating that if a general principle can be derived from the Tesawalamai, there is no *casus omissus* or a need to refer to the General law.

An illegitimate, may claim to inherit property under the will of either parent. The Wills Ordinance that introduces the concept of freedom of testation, has been held as superseding the customary law, which denies an illegitimate the right to inherit from his father.[79]

If the General law regarding the disability of illegitimates in regard to succession is reformed, there is every reason why the same changes should be introduced in the Tesawalamai law on inheritance. Persons subject to this system are governed by the General law of marriage and parental power.[79A] It seems only logical that any reforms on the status of children born of an irregular union, should be reflected in the law on inheritance.

3. Muslim Law

The Mohammedan Code of 1806 recognised that a man could contract valid polygamous marriages—but restricted this right by permitting him to marry a maximum of four wives. He was also permitted to keep as many concubines as he could maintain. However the children born outside lawful marriage were prohibited from inheriting any property belonging to the parents.[80]

This Code reflects some of the principles of Islamic jurisprudence with regard to marriage and legitimacy. Polygamy is permitted, but children born outside lawful marriage are denied any legal status in family relations. Except in Hanafi law which recognises an illegitimate's relationship with his mother for certain purposes, such a child is deemed *filius nullius*—or the son of neither parent.[81]

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When the Mohammedan Code was repealed by later legislation, the Muslim Intestate Succession Ordinance No. 10 of 1931 introduced the law of the sect, in matters pertaining to intestate succession and donations.[82] The marriage law applicable to Muslims must now be ascertained be reference to the Muslim Marriage and Divorce Act, (1951), which applies with regard to the marriages and divorces of Muslim and matters connected with these subjects.[82A] This Act declares that the status and mutual rights and obligations of the parties to a marriage are to be determined by the Islamic law governing the sect of the parties.[83] There are other provisions which indicate that the Islamic law on marriage and divorce is applicable as a source of law, independent of the statute.[83A]

The Supreme Court has drawn attention to the fact that the Muslim Marriage and Divorce Act applies only to the subject of marriage and divorce and matters connected with it. On this basis it has decided that the Quazi Court, (the customary courts of the Muslims) exercise jurisdiction under the Act, only in respect of claims between parents and illegitimate children, when the children are illegitimate because the marriage of the parents is void. The Supreme Court has held that the statute does not apply to the relationship between unmarried Muslim parents and their illegitimate issue.[84] Does this mean that the status of the illegitimate child of unmarried Muslim parents must be determined by the General law?

Illegitimacy is a status that is definable in terms of a valid marriage. Since a marriage between Muslims cannot be contracted under the General law, and the Muslim Marriage and Divorce Act declares the Islamic law as the source of the law governing marriage and divorce and the validity of a marriage between Muslims,[85] it is submitted that there is no basis for refusing to accept the jurisdiction of the Quazi courts in respect of the illegitimate issue of unmarried Muslim parents. Clearly the Muslim Marriage and Divorce Act envisaged that the principles of Islamic law should apply to unions which do not qualify to be considered legal marriage. It does not therefore seem reasonable to consider that the status of the issue of unmarried Muslim parents should be governed by an entirely different legal system. When an illegitimate is denied any status, except in Hanafi law,

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it would be anomalous to consider the General law concept of illegitimacy applicable to the children of unmarried Muslim parents. Legislation has in fact been introduced to counter the effect of the interpretation in the Supreme Court, and to clarify that claims regarding maintenance for illegitimate issue when both parents are Muslims, are within the exclusive jurisdiction of the Quazi courts.[85A] Even if legitimacy is considered exclusively an aspect of the law of parent and child, there is support for the introduction of the Islamic law, since the principles of that law determine the scope of parental power over Muslim children.[85B] There appears to be substantial ground therefore, for accepting that the source of the law on the status of the illegitimate child of unmarried Muslim parents, is also the Islamic law.

Children of polygamous unions will be legitimate according to Muslim law in Sri Lanka, since a Muslim male may contract a polygamous marriage.[86] Registration is not an essential requirement for validity.[87] Though the Regulation of 1822 applied to Muslims, by 1866, registration was merely treated as best evidence of the marriage. It was not a compulsory requirement for a valid marriage.[88] The Muslim Marriage and Divorce Act makes registration compulsory, and imposes a duty on specified persons to cause the marriage to be registered. However a marriage which is valid according to the principles of Islamic law, does not become void because of non-registration.[89] The children of an unregistered valid Muslim marriage will therefore be legitimate.

In Islamic law, adultery is considered illicit intercourse or zina. It is an offence, and an adulterous relationship cannot be converted into a lawful union by subsequent marriage. Adultery is not defined as an offence under the Muslim Marriage and Divorce Act, but this statute declares that the definition of offences, will not make valid a marriage which would not be valid in Muslim law.[90] Adultery therefore continues to be a bar to a valid marriage and the children born of such a union will be illegitimate. Only slave concubinage being permissible, sexual relations between a man and an unmarried female who is not a slave is also described as zina in Islamic law. Though the union may be legalised by subsequent marriage, the issue remain illegitimate.[90A] Since the Mohammedan Code permitted a man

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to keep concubines, the Supreme Court of Sri Lanka decided many years ago, that the practice was lawful. However the recognition of concubinage in the Customary law of Sri Lanka Muslims appears to have been controversial even at the time of this decision, because the topic was the focus of a petition, presented while the matter was *sub judice*.[91] It may be argued that with the introduction of the principles of Islamic law regarding marriage, concubinage is illegal in the modern law.[91A] Yet the definition of offences in the statute which excludes reference to adultery and sexual relations between a man and an unmarried woman unless within the prohibited degrees,[92] justifies the view taken by the Supreme Court.

Whether a marriage is void, is a matter to be determined according to the law of the sect to which the parties belong. The Quazi courts have exclusive jurisdiction in respect of applications for nullity, and the issue of a void marriage will be deemed illegitimate.[92A] Islamic law also recognises that some unions are irregular rather than void marriages. The children of these irregular unions are deemed legitimate.[93]

Though Hanafi law permits an illegitimate to inherit from the mother, being a *filius nullius*, such a child has no relationship to the parents, and cannot generally inherit from either parent.[93A] Despite the fact that the Wills Ordinance only permits a person "not legally incapacitated" from inheriting under the testators will, it can be argued that this statute of general application in the country introduces the concept of feedom of testation.[94] Consequently an illegitimate Muslim may be able to inherit under the will of either parent.

The validity of retaining the traditional values regarding illegitimacy in the law that applies to Muslims in Sri Lanka today, is open to question. If concubinage is legal, there is already a basis for introducing reforms in regard to the status of the issue of informal unions, so as to recognise a legal relationship between the parents and the children. Perhaps due to an accident of history, the Muslim law in Sri Lanka also imposes a duty of support on a putative father, which is completely alien to Islamic law.[95] This development too justifies a liberalisation of the Muslim law regarding illegitimates.

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1. The unborn child may acquire legal rights that are to his advantage, (e.g. rights of inheritance and possibly support from his parents) if he is born alive. H. Grotius, Jurisprudence of Holland transl. R. W. Lee (1936) 1.3.4; Johannes Voet, Commentaries transl. P. Gane (1955) 1.5.5. The extension of the concept to permit a delictual action by a child for pre-natal injuries is supported by T. B. Smith, the British Commonwealth, the Development of its Laws and Constitutions, Vol. II Scotland (1962) p. 246, and H. R. Hahlo and E. Kahn, The Union of South Africa (1960) p. 347-348; In Pinchin *v* Santam Insurance Co. Ltd. 1963 (2) SALR 254, Hiemstra J. adopted this view, and recognised a delictual claim for pre-natal injuries, but the point was not discussed by the Appellate Division in South Africa in the subsequent appeal, 1963 (4) SALR 66 (A.D.) *See* also C.C. Turpin 1963 Camb C.LJ 196. Legislation has now been enacted in England conferring a right of action for damages on a child born disabled because of the wrongful infliction of pre-natal injuries i.e. Congenital Disabilities (Civil Liability) Act (1976) discussed by Olive M. Stone, Family Law op. cit. p. 69. *See* also P.T.O. Neil and I. Watson (1975) 38 MLR 174, P.J. Pace (1977) 40 MLR 141.

1A. *See* the definition adopted in the Births and Deaths Registration Act, No. 17 of 1951 s. 70.

1B. O'Neil and Watson op. cit. at p. 177, argue that a father may have a right to the custody of his unborn child that will enable him to prevent the mother having an abortion. Apart from the Sri Lanka legislation, the Roman Dutch law concept of nasciturus which recognises the "status" of an unborn child only for limited purposes, would not support such an argument.

2. *See* Duty of Support, Ch. X infra.

2A. *See* Max Rheinstein, Marriage Stability, Divorce and the Law op. cit, p. 124; c.f. Olive Stone, Family Law op. cit. p. 8-9. The author argues that the influence of the Church regarding the monogamous nature of marriage in Western Europe is exaggerated.

3. T. E. James, Child Law (1962) p. 95; Olive Stone, Family Law op. cit. p. 14; D. Lasok (1961) 10 ICLQ 123 at 127.

4. *See* O. M. Stone (1966) 15 ICLQ 505, at 508, 510, Olive Stone, Family Law op. cit. p. 223-224.

5. Spiro, Parent and Child, op. cit. (1959) p. 3.

6. Sir W. Blackstone, Commentaries on the Laws of England (1771) U.S.A. ed. Bk. I, p. 454-459.

6A. The statistics regarding illegitimate births in the U.K. are given in Olive Stone, Family Law, op. cit. at p. 15-16.

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7. Law Reform (Miscellaneous Provisions) Scotland Act (1968) and Legitimation (Scotland) Act (1968) discussed in (1968) Scottish Current Law Year Book (1969) 4421, 4529; I. D. Wilcock on Scottish Law, Parental Custody and Matrimonial Maintenance, British Institute of International and Comparative Law, Comparative Law Series 13, (1966). For the English law, *See* James, Child Law, op. cit. 35-36; O. M. Stone (1966) 15 ICLQ 505, (1967) 30 MLR 552, Family Law op. cit. 219-224; Bromley, Family law, op. cit. (1976 ed.) p. 308. *See* also family provision, discussed under Duty of Support Ch. X infra.

7A. Matrimonial Causes Act (1973) s. 1 (1).

8. Status of Children Act 18 of 1969 s. 3 (1), discussed in the Annual Survey of Commonwealth Law (1970) p. 275.

8A. *See* B. J. Cameron, (1969) NZLJ 621. Changes in European countries are discussed by Harry D. Kraus, Illegitimacy, Law and Social Policy (1971) ch. 6.

9. D. Lasok, (1961) 10 ICLQ 123.

9A. Kraus, op. cit. p. 174, cites a statement adopted in 1967 by a sub commission of the United Nations Commission on Human Rights.

9B. Queyroz, Conquest of Ceylon op. cit. p. 87-91.

9C. *See* T. E. Gooneratne, Marriage and Divorce Commission Report op. cit. Appendix A. p. 167-168.

10. Memoirs of De Coste, included in Sir Alexander Johnstone's papers, on Ceylon Native Laws and Customs, C.O. 54/124 p. 13; *See* also T. E. Goonaratne, note 9c supra p. 168-169.

10A. Proclamation of 23rd Sept. 1799.

11. *See* Ch. I supra, notes 5 and 11.

12. *See* Karonchihamy *v.* Angohamy (1904) 8 NLR 1 per Moncrieff A.C.J. L. J. M. Cooray op. cit. p. 60, 64.

13. C.O. 54/216 p. 168, C.O. 54/386 p. 465; C.O. 54/376 p. 134.

14. C.O. 54/216 p. 168, 171.

15. Ord. No. 6 of 1847, s. 28, Legislative Acts of Ceylon 1833-1851 Vol. II p. 308.

16. Ord. No. 6 of 1847 s. 31.

17. C.O. 54/376 op. cit. p. 138.

18. Ord. No. 13 of 1863; C.O. 54/386 op. cit. p. 460.

19. G.M.O. Ord. ss. 18-21.

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19A. Olive Stone, Family Law. op. cit. p. 28; Lee, Roman-Dutch Law op. cit. 60-62.

20. C.O. 54/376 op. cit. p. 141.

21. Art 3.

22. C.O. 57/12, report on a bill to amend the marriage laws, (1844); *See* also Ord. 6 of 1847 s. 52. s. 6 and Babina *v.* Dingi Baba (1882) 5 SCC 9 at 10 per Cayley C. J.

23. C.O. 54/376 op. cit. C.O. 54/405, report on the Marriage Ordinance 8 of 1865 by Richard Morgan; c.f. Ord. No. 6 of 1847 s. 3 and Ord. No. 13 of 1863 s. 4 validating past marriages that had not been registered.

24. *See* Valliammai *v.* Annammai (1900) 4 NLR 8 at p. 11; Babina *v.* Dingi Baba, Vairamuttu *v.* Seethampulle (1885) 7 SCC 56, though contra Fleming ACJ; Narayanee *v.* Muthuswamy (1894) 3 SCR 125; note 23 supra. c.f. Aronegari *v.* Vaigali (1881) 2 NLR 322 P.C. (customary marriage *before* registration was compulsory.)

24A. Ord. No. 13 of 1863. s. 27.

24B. *See* s. 33 and note 23 supra. *See* also Sophia Hamine *v.* Appuhamy (1922) 23 NLR 353 F.B. at 357

24C. (1882) 5 SCC 9 at 10; Tisselhamy *v.* Nonnohamy (1897) Valliamma *v.* Annammai, Vairamuttu *v.* Seethampulle, and cases cited in note 25 infra. *See* also G.M.O. ss. 42 and 46.

25. Gunaratna *v.* Punchihamy (1912) 15 NLR 501; Tiagaraja *v.* Kurukkel (1923) 25 NLR 89; Sophia Hamine *v.* Appuhamy (1922) 23 NLR 353 F.B.; Punchinona *v.* Charles (1931) 33 NLR 2270; Kandiah *v.* Tangamany (1953) 55 NLR 568; Punchihamy *v.* Punchihamy (1915) 18 NLR 294.

25A. c.f. Sediris *v.* Rosalin (1977) 78 NLR. 547.

26. *See* Hayley, op. cit. p. 174-175; T. Berwick, I Br. Appendix A. *See* also Leach, Kinship op. cit. p. 157-159; c.f. the facts of Kandiah *v* Tangamany with the early case of Tisselhamy *v.* Nonnohamy, where the court applied the presumption of marriage, on the facts, even though there was no evidence of a ceremony of marriage.

27. Obeyesekere, Land Tenure op. cit. p. 140-141.

27A. G.M.O. Ord. ss. 42, 46; Selvaratnam *v.* Anandavelu (1941) 42 NLR 487 497; Dayawathie *v.* Gunaratna (1966) 70 NLR 260.

27B. Selvaratnam *v.* Anandavelu per de Kretser J.; c.f. the judgement of Wijewardene J. in the same case, and Ratnammah *v.* Rasiah (1947) 48 NLR 475 per Dias J.

27C. Tiagaraja *v.* Kurukkel at p. 91; Punchinona *v.* Charles.

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27D. Tiagaraja *v.* Kurukkel; G.M.O. Ord. s. 15; c.f. notes 47, 55A 58A infra.

27E. *See* Ch. IV Sec. (3) infra. G.M.O. s. 35 (1); the position was the same in Roman-Dutch Law, *See* Lee, op. cit. p. 93.

27F. Administration of Justice (Amendment) Law No. 25 of 1975 (A.J. (Am) L.) s. 626 (1), Ch. IV Sec. (3) and Ch. V Sec. (2) infra. Sivakolonthu *v.* Rasamma (1922) 24 NLR 89, Perumal *v.* K arumegam (1969) 74 NLR 334. Gunathileke *v.* Mille Nona (1937) 38 NLR 291, Civil Procedure Code s. 607 (2).

28. contra Pieris *v.* Pieris (1978-1979) 2 Sri LR 55.

28A. Civil Courts Procedure (Special Provisions) Law No. 19 of 1977, ss. 2 and 4; Pieris *v.* Pieris (1978-1979).

28B. Matrimonial Causes Act (1973) s. 15 in England, *See* Bromley op. cit. (1976 ed.) p. 291.

28C. Grotius 1 12. 4, 2. 18. 7. Voet 38. 17. 19.

29. *See* parental power over illegitimates, Ch. VI and VII infra.

30. Grotius 2. 18. 7, 2. 27. 28, 2. 18. 18, 2. 16. 6; Voet 28. 2. 13, 28. 2. 14, 38. 17. 19, 36. 1. 13; Hahlo and Kahn, op. cit. p. 356, 625-626.

31. (1896-1897) 2 NLR 276 at 279, 285.

32. *See* Jayashamy *v.* Abeysuriya (1912) 15 NLR 348 per de Sampayo A. J. at 349-350; *See* also Wickramanayaka *v.* Perera (1908) 11 NLR 71; Perera *v.* Davith Appuhamy (1909) 3 Leader 55; Karonchihamy *v.* Angohamy (1904); Rabot *v.* Silva (1905) 8 NLR 82, (1907) 10 NLR 40, (1909) 12 NLR 81 P.C.; Jane Young *v.* Loku Nona (1911) 14 NLR 202.

33. Wills Ord. s. 2.

34. M.R.I. Ord. s. 33. *See* also Hahlo and Kahn, op. cit. at p. 356 for the view that the punitive policy of the traditional law becomes superfluous with the introduction of freedom of testation.

35. Legitimacy Act No. 3 of 1970 s. 4 repealing G.M.O. Ord. s. 21. *See* also legitimation by subsequent marriage, Ch. IV infra.

35A. c.f. Kiriya *v.* Ukku (1914) 17 NLR 361 p. 362 where de Sampayo A.J. in construing a Kandyan deed of gift, thought that the Roman Dutch Law principle that the expression "children", prima facie refers to legitimate issue, was applicable. *See* also T. Nadaraja Roman Dutch Law of Fideicommissa (1949) p. 65 note 22.

35B. *See* Karonchihamy *v.* Angohamy (1896) per Bonser C.J. at p. 281, c.f. also Constitution (1978) Chap. III.

36. Hayley op. cit. p. 174.

37. Robert Knox, An Historical Relation of Ceylon. (Tisara Prakasakayo ed. 1966) p. 175.

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38. Nitinighanduwe, trans. by C. J. R. Lemesurier and T. B. Panabokke, (1880), p. 13-14; John Armour, Grammar of the Kandyan Law, Perera's ed. (1861) p. 6, 8; Hayley, op. cit. p. 174, 175, 200; 1848 Austin 235.

38A. *See* Berwick op. cit. note 26 supra.

39. Nitinighanduwe op. cit. 13-14; Perera's Armour, op. cit. 6-8, 34, 37; S. Sawers, Digest of the Kandyan Law, (1860) p. 36; report of the Kandyan Law Commission, Sessional paper XXIV (1935) p. 26; Hayley op. cit. p. 20, 201, 391-392. *See* Mahatmaya *v.* Banda (1893) 2 SCR 142.

40. Silva *v.* Carolinahamy (1856); (1851) Austin 147; Hayley op. cit. p. 391-392;

41. Kandyan Convention (1815) Art 8.

42. 1848 Austin 255.

43. C.O. 54/216, Governors Despatch Jan. 1845.

44. C.O. 54/338 p. 349, Despatch of 9. 12. 1858.

45. C.O. 54/338 op. cit. p. 349, 405.

46. C.O. 54/338 op. cit. 369, 371, 373; C.O. 54/446 p. 192.

47. ss. 2, 3, 6, 7, 31.

48. *See* Kuma *v.* Banda (1902) 21 NLR 294 F.B.

48 A. Preamble to Ord. No. 13 of 1859.

49. C.O. 54/446 p. 190, Despatch of 16. 9. 1869.

50. Report of the Agent from Ratnapura, C.O. 54/446 op. cit.

51. Berwick D. J. in his report in C.O. 54/446 op. cit. paper No. 26 p. 16.

52. C.O. 54/446 op. cit. p. 209.

53. C.O. 54/446 op. cit. p. 209; report of Berwick D. J. op. cit. p. 16.

54. ss. 11, 23, 25, 26; cohabitation without registration therefore rendered the issue illegitimate. *See* Menika *v.* Menika (1923) 25 NLR 6.

55. Berwick D. J. op. cit. p. 16; C.O. 57/12 op. cit. minutes of the Legislative Council 24. 9. 1844, considering a Bill to introduce a uniform law of marriage: C.O. 54/343 p. 117, Memo of the Queen's Advocate on Ord. No. 13 of 1859.

55A. Ord. No. 3 of 1870 ss. 12, 13.

56. Obeyesekere, Land Tenure (1967) op. cit. p. 140 suggests that the requirement of registration is not familiar to villagers in remote regions of the Kandyan Provinces.

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57. Kandyan Law Commission report op. cit. p. 27; status of the illegitimate, infra.

57A. Kandyan Law (Declaration and Amendment) Ordinance No. 39 of 1938. s. 14.

58. ss. 3 (1), s. 6. *See* also Mallawa *v.* Gunasekera (1957) 59 NLR 157 at 159.

58A. Kandyan Marriage and Divorce (K.M.D.) Act No. 44 of 1952, ss. 4 (2) (3), and *See* s. 4. (1).

58B. K.M.D. Act ss. 29 (2) b; 16 (6) b, 16 (7) d, Parts I, II and III.

58C. (1922) F.B. *See* also Punchihamy *v* Punchihamy (1915) per de Sampayo J. at p. 300, and Tisselhamy *v.* Nonnohamy where the issue of an unregistered union was deemed legitimate because the General law applied.

59. S. J. Tambiah, "Polyandry in Ceylon", in Caste and Kin, Nepal India and Ceylon, op. cit. p. 264 at 296.

60. Obeyesekere, Land Tenure op. cit. p. 140; S. J. Tambiah op. cit. at p. 265-266;

61. *See* 1848 Austin 235.

62. Ord. No. 13 of 1859 s. 6; Ord. No. 3 of 1870 s. 26.

63. K.M.D. Act s. 6, and Part IV.

63A. The special procedure governing matrimonial actions is inapplicable to Kandyan marriages. A.J. (Am) L. s. 631. Now *See* Civil Proc. Code s. 627 introduced by Civil Proc. (Amend) Law No. 20 of 1977 s. 104, which repealed the principal enactment's s. 627. *See* also Judicature Act No. 2. of 1978 ss. 24 (1) proviso and s. 24 (2) clarifying that the Family Court has no jurisdiction.

63B. *See* Ch. IV (3) infra.

64. Appuhamy *v.* Lapaya (1905) 8 NLR 328; Rankiri *v.* Ukku (1907) 10 NLR 129 though contra Punchimahatmaya *v.* Charlis (1908) 3 A.C.R. 89; Punchirala *v.* Perera (1919) 21 NLR 145; Menika *v.* Menika (1923); Kiri Menika *v.* Mutumenika (1899) 3 NLR 376; Ranhami *v.* Menik Etena (1907) 10 NLR 153; *See* also Bandulahamy *v.* Ranmenika (1902) 6 NLR 90 which held that illegitimates, though only remote heirs to the father's paraveni property, always had a right of maintenance out of it. For a contrary approach *see* Mahatmaya *v.* Banda and c.f. also Kiriya *v.* Ukku per de Sampayo A.J. at p. 362, cited in note 35A supra.

65. Kandyan Law Commission report op. cit. p. 27, 34-35, 42.

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65A. *See* also their remarks regarding the preference of male heirs in the law on inheritance, revealing the impact of English legal values which were unfamiliar to the traditional Kandyan law (Kandyan Law Commission report op. cit. p. 16); c.f. E. R. Leach, Pul-Eliya A Village in Ceylon (1961) p. 135-136, Hayley op. cit. 331, 336-343, 384; Olive Stone, Family Law op. cit. p. 7.

66. Kandyan law Ord. s. 14. See legitimation in Kandyan law, infra.

66A. It is not clear whether this refers only to a decree in an action for declaration of status, or includes a finding on parentage in other proceedings. *See* judicial determination of parentage, Ch. V infra. *See* also the same chapter on registration of births and rectification proceedings. The statute probably intended to refer to even incidental findings on paternity in judicial proceedings.

67. as. 15, 18.

67A. *See* de Sampayo A. J. in Kiriya *v.* Ukku, decided prior to the Ordinance, at p. 362. The decision of both judiges to reject the claim of the illegitimates can however be explained on the basis of the donor's declared intention to refer to legitimate issue; c.f. also Ranhami *v.* Menika Etena per Hutchinson C. J. at p. 157.

67B. Asirvatham *v.* Gunaratna (1950) 52 NLR 53.

67C. *See* parental power over illegitimates, Ch. VI infra.

68. Tesawalamai Regulation (1806), ss. 2, 3; L. J. M. Cooray op. cit. p. 140.

69. Memo. of Queen's Advocate on marriage laws, C.O. 54/386 p. 460, 465; Despatch of the Governor, C.O. 54/376 p. 134, C.O. 54/386 op. cit. p. 443.

70. s. 18; *See* also H. W. Tambiah, Conference on Tamil Studies Kuala-Lampur (1966) p. 352 at 355, Tamil Culture (1959) Vol. VIII, No. 2. p. 1. at p. 10-11.

71. Despatch of the Governor, 18. 1. 1845, submitting a uniform law of marriage, C.O. 54/216 p. 175; C.O. 54/386 op. cit. p. 460; *See* also K *v.* Perumal (1911) 14 NLR 496 at 509 Per Grenier J.

72. Ord. No. 6 of 1847 s. 3; Ord. No. 13 of 1863 s. 4.

73. C.O. 54/386 op. cit. p. 450-452 p. 469; report of the Queen's Advocate on Marriage Ordinance of 1865, C.O. 54/405, p. 169; Governor's Despatch, C.O. 54/386 op. cit. 443.

74. Chellappa *v.* Kumaraswamy (1915) 18 NLR 435, distinguishing Vairamuttu *v.* Seetampulle (1885) 7 S.C.C. 56; Tiagaraja *v.* Kurukkel (1923) Ratnamma *v.* Rasiah (1947) Tiagaraja *v.* Karthigesu (1966) NLR 73.

75. Tiagaraja *v.* Kurukkel, Ratnamma *v.* Rasiah.

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76. J.M.R.I. Ord. ss. 34, 35, c.f. M.R.I. Ord. s. 33.

77. Chanmugam *v* Kandiah (1921) 23 NLR 221.

78. J.M.R.I. Ord. s. 36.

79. *See* Visuvanathar *v.* Tiyagaraja (1904) 8 NLR 174.

79A. *See* Ch. I supra.

80. Mohammedan Code (1806) ss. 100, 101; the first title to the Code on inheritance, makes no reference to illegitimates.

81. Fyzee op. cit. (1964 ed.) p. 19 206; Tyabji op. cit. p. 203, 819; Mulla op. cit. p. 338 states that the custody of an illegitimate belongs to the mother, but this is considered inaccurate—*See* parental power over an illegitimate, Ch. VI and VII infra.

82. ss. 2 and 3.

82A. Muslim Marriage and Divorce (M.M.D.) Act No. 13 of 1951 s. 2; this Act (s. 98) (1) repealed the Muslim Marriage and Divorce Ordinance No. 27 of 1929 which had already repealed the title on marriage in the Mohammedan Code.

83. M.M.D. Act. s. 98 (2)

83A. ss. 16, 98 (1).

84. *See* Jiffry *v.* Nona Binthan (1960) 62 NLR 255; Ismail *v.* Latiff (1962) 64 NLR 172.

85. M.M.D. Act ss. 16, 98 (1); c.f. G.M.O. Ord. s. 64, and the preamble to this statute.

85A. *See* Act No. 1 of 1965 s. 6 amending the M.M.D. Act s. 47 (1) (c), discussed under Duty of Support in respect of Muslim children Ch. X infra.

85B. *See* parental power, Chs. VI and VII infra.

86. Attorney-General *v.* Reid. (1964) P.C.

87. M.M.D. Act s. 16.

88. Mohammedan Marriage and Divorce Registration Ordinance No. 8 of 1866 s. 17.

89. M.M.D. Act ss. 16, 98; c.f. s. 17 (1) (2).

90. M.M.D. Act s. 80; c.f· Fyzee op. cit. (1964) ed. p. 182, 184.

90A. *See* Legitimation in Muslim law, Ch. IV infra; Fyzee op. cit. (1964 ed.) p. 106, 184; note 91A infra.

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91. *See* Mammadu Natchia *v.* Mammatu Cassim (1908) especially at p. 299. Mohammedan Code s. 101.

91A. Islamic law only permitted slave concubinage, and when slavery is prohibited, concubinage ceases to have legal implications. *See* J. N. D. Anderson Family Law in Asia and Africa, (1968) p. 221, at p. 222-223 Fyzee op. cit. (1964 ed.) p. 106, 184.

92. *See* M.M.D. Act s. 80.

92A. M.M.D. Act ss. 98 (2), 16, 47 (1) (i), 48.

93. Fyzee op. cit. (1974 ed.) p. 113-114. *See* also Presumption of Legitimacy, Ch. III infra note 15.

93A. Fyzee op. cit. (1974 ed.) p. 396. *See* also parental power, Chs. VI, VII, infra.

94. Ahamat *v.* Shariffa Umma (1931) P.C.; c.f. Visuvanathar *v.* Tiyagaraja (1904). *See* also Farouque op. cit. p. 8, Abdul Rahman *v.* Ussan Umma (1916) per Schneider J.

95. *See* duty of support' Ch. X infra.

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CHAPTER III

THE PRESUMPTION OF LEGITIMACY

Since the Roman Dutch law[1], attached special significance to lawful marriage and the legitimacy of issue born within marriage, it created a principle which would help to protect the status of children born to married parents. Thus the husband of a married woman is deemed to be the father of children born to her during the marriage—*pater est quem nuptiae demonstrant.* There is a presumption that the children are legitimate issue of the marriage. The presumption of legitimacy can however be rebutted by evidence which establishes that the husband is not in fact the father of the married woman's child.

In order to protect the legal status of posthumous children, the Roman law prohibited a widow from marrying within a certain time after her husband's death. This concept of the widow's *annus luctus* was accepted in Holland, but it is considered obsolete in the modern Roman Dutch law, which does not prohibit a widow's marriage, but ensures the same result by applying the presumption of legitimacy. If therefore a widow remarries within a prescribed period and gives birth to a child, he is presumed to be the issue of her second marriage.

The traditional Sinhala Customary law, did not have any comparable principle—since the attitude to sexual relations between men and women was completely different to the Protestant Christian values reflected in the Roman Dutch law. There is some evidence however that adulterine children were deemed to be the husband's, unless he discarded the wife and disowned them.[2] An early decision in the Supreme Court reveals that the Roman-Dutch law presumption of legitimacy was applied even with regard to a Kandyan marriage.[3]

The Mohammedan Code of 1806 did not contain a specific principle on this subject, but provisions regarding the husband's duty to maintain his pregnant wife and her infant child,[4] suggest that he was deemed the father of children born during the marriage. These provisions appear to reflect the values of Islamic law, for according to this system, there are several presumptions

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regarding the legitimacy of a child born to a married woman. These presumptions appear to be considered important in Islamic law as methods of preventing disavowal of children, in a context where the law on illegitimacy is particularly harsh.[5]

When the rules of evidence applicable to litigation in Sri Lanka were codified, the presumption of legitimacy was set out as a provision in the Evidence Ordinance, No. 14 of 1895.[5A] This development, resulted in the Roman Dutch law being replaced with a statutory rule which could be applied uniformly to all marriages, whether contracted according to the General law, or the special Customary laws.

The statutory presumption of legitimacy now applies in respect of children born to parents who have contracted a valid Kandyan marriage.[6] Since registration of a Kandyan marriage is essential to its validity, the presumption cannot be utilised to confer the status of legitimacy on children of marriages celebrated according to custom, and not registered.[7] This is in contrast to the position under the General law, where registration not being essential, the presumption of legitimacy may apply in favour of children born of a marriage celebrated merely according to custom.[8]

The appeal courts of Sri Lanka have decided that the statutory presumption is equally applicable to Muslim marriages.[9] When the Quazi Courts were given exclusive jurisdiction in respect of maintenance and matrimonial proceedings,[10] disputes regarding legitimacy became justiciable in these Courts. Thus even before the Muslim Marriage and Divorce Act introduced the Islamic law of the individual Muslim's sect on matters relevant to marriage, the Quazi Courts were of the view that the rules of Islamic law regarding the presumption of legitimacy could be applied.[11] However, recent decisions conform to the view taken in the Supreme Court that the Evidence Ordinance contains the governing provision on the presumption of legitimacy in respect of Muslim marriages.[12]

Since the Evidence Ordinance is a statute of general application, it is clear that the evidentiary rule on the presumption of legitimacy has superseded the Muslim law on the subject. The Indian Courts have also taken this view in regard to Muslim marriages in that country.[13] Nevertheless the statutory presumption of legitimacy

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which is based on birth within a lawful marriage cannot apply in favour of a child born of a Muslim marriage that is irregular. For instance a Muslim marriage is irregular if it is contracted during iddat—or the period during which a widow is prohibited from contracting a second marriage. Since the concept of iddat which is similar to the Roman law concept of *annus luctus*, is specifically referred to in the Muslim Marriage and Divorce Act,[14] it is not possible to argue that it has been superseded by the statute law on the presumption. Consequently the law as set out in the Evidence Ordinance must be considered qualified by the Muslim law principles. Thus a child born to a married woman who has violated the iddat prohibition will nevertheless be deemed the legitimate issue of the second marriage.[15]

The Application of the Presumption of Legitimacy

Principles of the English Common law on evidence, modified slightly to suit what were considered the special needs of the local situation, were introduced into British India by the Evidence Act (1872) prepared by Sir James Fitz James Stephen. The Sri Lanka Evidence Ordinance was also a colonial statute, and a close copy of the Indian Act. Thus the statutory provision on the presumption of legitimacy and its rebuttal by proof of no access, is drafted in identical language. The law on the subject in both England and India, has necessarily had an impact on the interpretation of the presumption in Sri Lanka.

According to Section 112 of the Evidence Ordinance, the fact of birth during lawful marriage or within 280 days after dissolution, the mother remaining unmarried, is conclusive proof of legitimacy. However, birth in these circumstances is deemed to merely raise a strong presumption of legitimacy, since the Ordinance provides that it will not be conclusive proof of legitimacy, if the husband had "no access" to the mother at a time when the child could have been begotten. The Sri Lanka statute, unlike the Indian Act, contains an additional basis for displacing the presumption, and the inference of legitimacy is also rebutted by proof of the husband's impotence.[16] Though relevant as an evidentiary rule, the presumption of legitimacy has special significance for the relationship of persons as parent and child. It affects not merely the status of legitimacy, but the equally important status of paternity.

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(a) The legal basis of the presumption

The statutory presumption of legitimacy in Sri Lanka and India, that was inspired by the Common law, incorporates the maxim *pater est quem nuptiae demonstrant*, and is clearly an indication of the law's concern that the status of legitimacy should be protected. The maxim was not developed as an absolute one in the Common law, and the decisions which span the years between the early 19th century opinion expressed in the **Banbury Peerage Case,**[17] and a more recent decision in the House of Lords,[18] clearly reflects the concern of the Common law that the obligation of paternity should not be placed on the wrong man.

In legal systems where the distinction between legitimacy and illegitimacy is not so clearly demonstrated, or is absent, the law is concerned with the status of biological paternity and the relationship of parent and child flowing from it.[19] The Common law and the Indian Evidence Act that was based upon it, conceded as a matter of policy the important distinction between the status of legitimacy and illegitimacy. However the English judicial decisions on the manner in which the fiction of legitimacy could be destroyed, and on the meaning of "no access," as well as the more recent utilization of scientific serological evidence in paternity disputes, clearly indicates that the aspect of biological paternity was not ignored. The Common law was not merely concerned with deciding the status of legitimacy according to a legal fiction, but attempted to achieve a balance between the conflicting interests, of the child and the husband. The Indian Evidence Act introduced that same philosophy, for there was clear provision for the rebuttal of the "conclusive" statutory presumption of legitimacy.[20]

(b) Judicial interpretation of the presumption in Sri Lanka

The interpretation of the phrase "no access" in section 112, was the subject of some controversy in the law of Sri Lanka. The legal battle over the nuances of meaning in this phrase continued for over half a century, until the Privy Council decided to place an authoritiative interpretation, on the somewhat elusive language in the section.

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1. The early trends: the impact of the English Common law

It was recognised in an early decision that while the policy of the law is to protect the status of legitimacy, the provision for rebuttal of the presumption indicates that the law does not choose to impose the responsibility of paternity on a husband, for a child who is in fact not a child of the marriage.[21] Thus some early cases demonstrate a tendency to follow the Common law. However others reflect the view that the statutory presumption in the Evidence Ordinance is not identical with Common law, and give a narrow interpretation to "no access", confining it to physical impossibility of access of the husband to the wife during the relevant period.[22] Later developments indicate approval for a more liberal interpretation of the phrase. A Divisional Bench of the Supreme Court of Sri Lanka for instance held that the presumption of legitimacy could be rebutted by proof that there was no opportunity for sexual intercourse.[23] In **Jane Nona** *v* **Leo** a Full Bench of this court, approved of the local decisions that followed the Common law, and decided that "no access" must be liberally interpreted to mean absence of sexual intercourse at the relevant time. The Court concluded that absence of sexual intercourse being a question of fact, proof of no access had to be determined by evidence in the ordinary way, without any artificial restrictions.[24]

2. The impact of the Indian law

The authority of **Jane Nona** *v* **Leo**, was queried, in later decisions in Sri Lanka[25] when the Privy Council in the Indian appeal of **Karpaya Servai** *v* **Mayandi**[26] interpreted the phrase "no access" in the Indian Act as referring to "absence of opportunities for intercourse". The authority of the local Full Bench decision was accepted however in several other decisions in the Supreme Court,[27] and this approach appears to have been approved by the Privy Council in the local appeal of **Alles** *v* **Alles.**[28]

In this state of the authorities the Privy Council in **Kanapathi-pillai** *v* **Parpathy,**[29] delivered a judgment which explored the meaning of the phrase, and departing from the views expressed in the Indian appeal, interpreted "no access" in a more liberal sense than even **Jane Nona** *v* **Leo.** Expressing the opinion that section 112 of the Evidence Ordinance reflected the influence of

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the English legal outlook on the subject, the Privy Council followed the interpretation of "no access" adopted by Lord Eldon in **Head** *v* **Head.**[30] In that case, Lord Eldon, in explaining the opinion of the judges in the **Banbury Peerage Case,** said that "no access" would be established by proof that there was no sexual intercourse at the relevant time. He conceded however, that if there was personal access between husband and wife under circumstances where there could have been sexual intercourse, this raised a presumption of intercourse, which applied unless it were rebutted by proof that there was in fact no intercourse between the spouses at that time.

In **Kanapathipillai** *v* **Parpathy** therefore, the Privy Council rejected a strict interpretation of "no access," suggesting that a test which considers the "bare geographical possibility of the parties reaching each other during the relevant period, must be rejected completely because such a test could hardly ever exempt a husband from the onus of paternity and could work real injustice in many cases."[31] Commenting on the interpretation of "no access" adopted by the Privy Council in the Indian appeal of **Karpaya Servai** *v* **Mayandi,** Lord Tucker who delivered the judgment said that the remarks of the Board in that case must be considered as obiter dicta. He added that in any case, they did not indicate that "no opportunity for intercourse" meant proof of absence of geographical proximity, and that the actual decision in **Karpaya Servai** *v* **Mayandi** could itself be explained on the basis of the interpretation adopted, in the present appeal.[32] Lord Tucker approved of the comments of the Privy Council in the Ceylon appeal of **Alles** *v* **Alles** that "the issue remains whether on the whole of the evidence made available, it can safely be concluded that there was no access at a time when the child could have been conceived."[33]

The scope of the decision in **Kanapathipillai** *v* **Parpathy** can be confined by arguing that on the facts, the Privy Council merely decided that where there is estrangement between the parties or aversion to each other indicative of moral impossibility of intercourse, there is proof of "no access," even though husband and wife are in physical or geographical proximity to each other. Since the Privy Council decided that on the facts before them, there was no personal access of husband to wife, it may be argued

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that the comments of Lord Tucker indicating that "no access" could be further proved by rebutting the presumption of intercourse arising from personal access, were merely obiter dicta.

An attempt to confine the decision in this way seems indefensible, in view of the fact that the judgment of the Board, the highest judicial authority in Sri Lanka at that time, was delivered in the context of the problems of interpretation posed by the Indian appeal, and the prolonged controversy in the Supreme Court on the meaning of "no access". The Privy Council in fact explicitly referred to this aspect before proceeding to give their interpretation of "no access". They emphasised that "no access" could not be limited to proof of absence of geographical or physical proximity. They said that even if proximity in this sense was established, if there was no personal access between husband and wife as would create the inference that intercourse had taken place—there would be proof of "no access". Besides they distinguished the decision in the Indian appeal, and interpreted access as 'sexual intercourse,' clarifying that even the presumption or inference of intercourse created by personal access, could be rebutted by factual proof of absence of intercourse at the relevant time. Consequently, even if the views of the Privy Council on this latter aspect are treated as obiter dicta, and the interpretation of the Board truncated in this way, it is surely dicta which cannot be ignored.

It is clear from the liberal interpretation given to the phrase "no access" in **Kanapathipillai** *v* **Parpathy** that following the Common law, an issue of legitimacy in Sri Lanka involves as much a question of the child's status, as ascertaining that the obligation of paternity is not placed on the wrong man. This latter aspect seems to have been ignored in India, where the courts adopt a more limited interpretation of "no access". It would appear that the Indian courts interpreting s. 112 of the Indian Evidence Act have viewed the statutory presumption of legitimacy exclusively in the light of **Karpaya Servai** *v* **Mayandi.**[34] This has meant that even in situations where there is evidence of moral impossibility of access due to estrangement, the fact of physical proximity between spouses as in **Kanapathipillai** *v* **Parpathy,** is considered adequate proof of 'access'.[35]

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Academic comment in India has focused attention on the undesirability of limiting proof of 'no access' to 'absence of opportunity of access.' The argument has been made that in accordance with principle and English judicial authority, access should be interpreted as sexual intercourse, and that access in this sense can only be presumed or inferred from opportunity. It has been pointed out that "the status of illegitimacy should not be imposed on a person without clear justification, but it is equally important that nobody should be compelled to own a child that is clearly not his."[36]

The reliance of Asian countries on western legal models has been strongly criticised,[37] and this argument for a liberal approach to the presumption of legitimacy may be viewed as another painful attempt to transplant western reforms into the Asian context. However, indigenous systems in both India and Sri Lanka had a much more liberal attitude to illegitimacy than the Common law,[38] while the Christian ethic left its impact on the legal systems and the values of these societies. If the English law on legitimacy has developed along satisfactory lines and shed its puritanism, it seems logical that as long as colonial legislation remains unrepealed, courts in the Commonwealth derive assistance from English law in interpreting those statutes. If this attitude is not adopted the courts of law will bear the burden of an imposed and also stultified legal heritage, until the legislature decides to place a new law before them.

The decision of the Privy Council in **Kanapathipillai** *v* **Parpathy** was undoubtedly influenced by the Common law on the interpretation of "no access." While it is true that the Sri Lanka Evidence Ordinance contains, unlike its Indian counterpart, a *casus omissus* clause permitting reference to English law, it is clear that the Board did not derive inspiration from that section, for the interpretation it placed on the phrase "no access." The Privy Council referred to English cases because the phrase "no access" was a familiar Common law concept with a technical meaning, and could only be understood in that context. It is submitted that in **Kanapathipillai** *v* **Parpathy** the Privy Council was called upon to confront the inadequacy of the "absence of opportunity for intercourse" test they had expounded in the Indian appeal. They delivered a judgment which rejected the approach in **Karpaya**

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Servai *v* **Mayandi,** and effected a balance between the conflicting interests of the husband and the child.

3. The current judicial view in Sri Lanka

Kanapathipillai *v* **Parpathy** has been considered authoritative in the modern law.[38A] In **Samarapala** *v* **Mary,**[39] Alles J. referring to **Karpaya Servai** *v* **Mayandi** said that it had been authoritatively decided by the Privy Council that the word access in section 112, meant not actual intercourse but "opportunity of intercourse." However this comment can be considered obiter dicta which is not authoritative, since it is in conflict with the judgment which in fact followed the interpretation adopted by the Privy Council in **Kanapathipillai** *v* **Parpathy.** In **Andris Fonseka** *v* **Alice Perera**[40] reported just prior to **Kanapathipillai** *v* **Parpathy,** Sansoni J. interpreted 'no access' as referring to absence of opportunity for intercourse, following the Privy Council decision in **Karpaya Servai** *v* **Mayandi.** Though Alles J. In **Samarapala** *v* **Mary** referred to Sansoni J's interpretation with approval, this view as submitted earlier, is in conflict with the opinion expressed in **Kanapathipillai** *v* **Parpathy** which his Lordship purported to follow.

The Privy Council interpretation of "no access" in **Kanapathipillai** *v* **Parpathy** has therefore been followed by the Supreme Court of Sri Lanka so that in this country it is no longer possible to contend that the opinion in **Karapaya Sarvai** *v* **Mayandi** is authoritative on the interpretation of "no access." The opinion expressed by the Supreme Court in **Samarapala** *v* **Mary,** also indicates that the dicta of the Privy Council in **Kanapathipillai** *v* **Parpathy** is considered authoritative. Consequently if parties are living in physical or geographical proximity to each other, or where there is no clear evidence of separation, it will no longer be possible to argue that there is access, due to the existence of the opportunity for intercourse. If there is evidence of estrangement, between husband and wife there will be proof of absence of personal access and consequently proof of no access.[41] **Andiris Fonseka** *v* **Alice Perera** which purported to follow **Karpaya Servai** *v* **Mayandi** is therefore overruled, unless it is distinguished by arguing that there was no clear evidence of estrangement between the parties in that case, even though husband and wife were living apart, and the wife was intimate with another man.

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4. The quantum of proof

The history of the interpretation of section 112 of the Evidence Ordinance in Sri Lanka reveals that over emphasis is not placed on the need to protect the legitimacy of the child. It is submitted that this attitude is also reflected in the highest judicial authorities on the standard of proof required to rebut the presumption of legitimacy.

Certain decisions in the Supreme Court of Sri Lanka, have held that the presumption of legitimacy must be rebutted, as in a criminal case, by proof "beyond reasonable doubt,"[42] while others have referred to a "cogent" or "heavy" onus.[43] The Privy Council favoured the latter interpretation, in the leading cases of **Alles** *v* **Alles** and **Kanapathipillai** *v* **Parpathy.**[44]

The linguistic difference in the phrases used in the Sri Lanka courts is significant, in that the phrase "cogent evidence" is suggestive of something more than the ordinary civil standard of proof, and something less than the criminal standard of proof.[45] The phrase indicates that there should be clear and strong proof to rebut the presumption of legitimacy. The point of using language different from that associated with the criminal standard of proof, is to indicate that the standard for rebutting the presumption need not approximate with that degree of proof. This "in betweens standard" is not unfamiliar in the area of proof. Recent decisions in Sri Lanka for instance concede that the standard of proof required to establish adultery in a matrimonial action may be of a higher degree than the usual civil standard, though proof beyond reasonable doubt is not required.[46]

In **Samarapala** *v* **Mary,** Alles J followed the Privy Council's interpretation and stated that "cogent evidence" was required to rebut the presumption of intercourse from personal success, but he identified the phrase "cogent evidence" with proof beyond reasonable doubt.[47] It is respectfully submitted that in this case, his lordship felt compelled to decide the issue of paternity against the husband, because he required this very high standard of proof. He did not adequately appreciate the trend of judicial opinion in Sri Lanka which culminated in **Kanapathipillai** *v* **Parpathy,** when he said: "I appreciate that such a finding may sometimes cause hardship to an innocent husband, but in my view the greater

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interests of the child should prevail, and every assumption should be made in favour of the legitimacy of the child."[48] It is surprising too that the learned judge did not consider that the concept of the "interests of the child," in this context could well be a myth, given the strong possibility that the child would be imposed on a father who was sure it was not his, and would obviously appreciate neither the legal fiction, nor the burden of proof evolved to protect the child.

The use of the word "conclusive" to describe the presumption enunciated in section 112, is no justification for introducing the criminal standard of proof, for the presumption is conclusive in Sri Lanka only in the absence of proof of "no access" or "impotency." The definition of "conclusive proof" in section 4 of the Evidence Ordinance is consequently qualified by the very language of section 112.[49] The concern of the law for the status of the child, cannot be over-emphasised where the statute accepts that a child's legitimacy can be queried in the circumstances envisaged. The very liberalisation in the judicial interpretation of "no access", and the explanation of the phrase in terms of "absence of sexual intercourse," is surely a reflection that the law, in its formative stages was concerned that justice to the husband should be done on the basis of fact, rather than that injustice be done, and strict liability for paternity imposed on the basis of fiction.[50] It seems therefore unreal, and an over-exaggeration of one aspect of the policy of the statute, to suggest that the presumption of legitimacy must be rebutted by proof beyond reasonable doubt.

The validity of accepting the criminal standard of proof has been queried in England, and it has been conceded that this standard is too high for rebuttal of the presumption of legitimacy.[51] The Supreme Court of Sri Lanka has asserted the need to prove adultery beyond reasonable doubt,[51A] but in **Alarmalammal** *v* **Nadaraja,**[52] the Court of Appeal, in an obiter dictum, doubted whether adherence to that standard was justified. It is submitted that the Sri Lanka courts are still free to adopt a more liberal approach, and that they can review the standard of proof in a context where adultery is no longer a criminal offence. Consequently the assertion of this high standard of proof in relation to adultery is no justification for requiring a similar standard for

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rebuttal of the presumption of legitimacy. When an issue of legitimacy arises, a Sri Lanka court must follow the approach of the Privy Council in the leading local cases and place its priorities in the correct perspective. While the presumption of legitimacy in this country is a statutory one, a court must give due significance to the comment of the Privy Council in **Kanapathipillai** *v.* **Parpathy,** that section 112 of the Evidence Ordinance reflected the English legal outlook on the subject. It follows that it cannot afford to ignore the interpretation of the presumption in the English legal system where the law is considered as reflecting not merely a concern with the status of the children born during a valid marriage, but a corresponding interest in not placing the onus of paternity on the wrong man.[53] If this approach is adopted, there are no policy reasons for adhering to the criminal standard of proof and for equating "proof by cogent evidence"—the expression used by the Privy Council in the Sri Lanka appeals—with proof beyond reasonable doubt.

5. Nature of evidence admissible to rebut the presumption

The judgment of Lord Tucker in **Kanapathipillai** *v* **Parpathy,** considered binding and authoritative on the subject in the recent case of **Samarapala** *v* **Mary,** clarifies that "no access" can be proved not merely by proof of absence of geographical proximity, or even personal access of husband to wife, but even by other evidence that will rebut the presumption of intercourse that arises on proof of personal access. Establishing "no access" by evidence of the latter description will often be difficult. The Sri Lanka courts have not accepted the principle of the English law that husband and wife are not competent to give evidence of "access" or "non access",[54] but even though the evidence of spouses can be accepted, a court will scrutinize a denial of intercourse very carefully. Since the status of a child born during a valid marriage should not be questioned irresponsibly, a court will be suspicious of possible collusion between husband and wife in order to obtain maintenance from an innocent third party. While there is therefore authority for the proposition that sworn testimony of the husband or the parties denying intercourse will be adequate, this must be corroborated by cogent evidence.[55] Evidence of the resemblance of the child to the father too, is not a fact which in itself will be given weightage,[56] though it may be

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argued that evidence of strong ethnographic features not present in the mother or the husband is adequate corroborative evidence of a denial of intercourse between them, at the time when the child could have been conceived. In this way physical resemblance may be relevant in rebutting the presumption of legitimacy.[57] The difficulty with admitting this type of evidence however, is that its cogency may be disputed on the argument that ethnographic differences cannot be identified in countries like Sri Lanka where many ethnic groups have mingled.[58]

The admission of serological evidence

Serological evidence is considered in many jurisdictions to be of high probative value in solving paternity disputes,[59] and the value of blood tests, as distinguished from the traditional type of evidence cannot be ignored in Sri Lanka, in the face of current medical knowledge. Blood tests of the husband, wife and child are said to indicate with scientific accuracy that the man cannot be the father of the child, where he is in fact, not its father. While an ordinary blood grouping (genotyping) is considered 60% sufficient to exclude a man who is not in fact the father, the hapto-globin test is accepted as almost infallible in its conclusions.[60] In developed countries like Britain and the United States, even more sophisticated tests appear to have been developed and are used to determine paternity.[60A] It is medically recognised that blood has different constituents and that a child must have derived these from either parent. The possibility that the child's grouping is different to the husband's as a result of mutations is considered to be too remote to be of practical significance. If a child's blood has some constituent that is absent from the blood of both husband and wife, the result of the conventional blood typing tests is to exclude the husband, while raising an inference that the child derived this constituent from some other man who was its father. Consequently where two men concede that either of them could be the father, and both submit to the test, there is a 90% chance of obtaining an exclusion result.[61] But even if only the blood groupings of the wife child and husband are obtained, there is said to be a 70% chance of showing that the husband is not the father if he is in fact not the father.[62] While medical research may at some point be able to indicate methods of obtaining a positive result, even if serological evidence

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may not afford 100% certainty, according to current medical knowledge, it helps to negative paternity and is of strong probative value. This type of evidence can exclude a person who is in fact not the father of the child, and may in any case be much more reliable than evidence obtained from traditional sources.[63] Besides it may be possible to draw certain important inferences from the blood groupings of the husband and child.[64]

In both India and Sri Lanka, the presumption of legitimacy is a statutory rule of evidence. Can it be legitimately argued that admission of serological admission in paternity disputes must await the dictates of a legislature, burdened with other pressing problems, and not always responsive to the need for systematic law reform? It has been suggested that if the hapto-globin test comes to be widely used in India, and accepted as reliable, a significant amendment to section 112 of the Evidence Act will be necessary to make the presumption of legitimacy rebuttable by serological evidence.[65]

There are no reported decisions, on the admission of blood test evidence in Sri Lanka, though the possibility of submitting to the test out of court and producing it as evidence voluntarily, does not seem unfamiliar to practitioners in the trial courts.[66] This is perhaps why, in as far back as 1945 eminent counsel in the clebrated appeal of **Alles** *v* **Alles** referred in argument before the Supreme Court to the fact that a blood test "is a recognised method of testing illegitimacy."[67] However, an application that the child be submitted to a blood test, in the course of the trial appears to have been refused in that case, and the point was not canvassed in appeal.

It is submitted that the interpretation placed on "no access" by the Privy Council in **Kanapathipillai** *v* **Parpathy** permits the admission of serological evidence to rebut the statutory presumption of legitimacy, as it is enunciated in both India and Sri Lanka. The Privy Council recognised, in dicta that was part of the interpretation of section 112, that "no access" could be established even where there was proof of personal access between husband and wife. The Board interpreted "no access" to mean absence of sexual intercourse at the relevant time, or the time when conception could have taken place. This dicta has been considered

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authoritative, and a binding interpretation of 'no access' in the recent decision of **Samarapala** *v* **Mary** in the Supreme Court, and it is clear that unless the Privy Council judgment is truncated, "no access" must refer to absence of sexual intercourse at the time of conception. Serological evidence which excludes the husband is therefore admissible as proof of 'no access'; it is possible to prove by blood tests that a husband who had 'personal access' to his wife, had in fact 'no access' because he did not have intercourse at the time the child was conceived.

Where reliance is not placed on personal access of husband to wife at the relevant time, but rather on evidence of actual intercourse between them, "no access" can still be proved by serological evidence.[68] In **Kanapathipillai** *v* **Parpathy** Lord Tucker, who based the interpretation of "no access" on Lord Eldon's explanation of the Banbury Peerage case, cited with approval Lord Eldon's statement that where sexual intercourse had taken place, "the child must be taken to be the child of the husband unless on the contrary it be proved that it cannot be the child of that person."[69] Since the fundamental premise accepted in **Kanapathipillai** *v* **Parpathy** is that 'no access' in the statute, means absence of intercourse at the time of conception, it follows that Lord Eldon's comment is pertinent. It emphasises, as the statute does, the importance of the time of conception, for the law is concerned with proof that the child was not begotten through intercourse (access) between husband and wife. Medical evidence will therefore clearly be admissible to rebut the statutory presumption of legitimacy, even where there is evidence of actual intercourse.

It is for this reason that if the child is born long after or before the period of gestation medically recognised as that necessary for the birth of a normal child, the presumption is rebutted. In **Alles** *v* **Alles** for instance Lord Radcliffe reviewed the medical evidence and said that the husband had sustained the onus of "proving affirmatively that the only date when he had access to the first Respondent (the wife) was not a date when the child could have been begotten."[70] Evidence that reliable contraceptives were used may also be cogent evidence that the child was not conceived through any union with the husband. Evidence of the use of contraceptives, has been considered inadequate to satisfy the standard of proof beyond reasonable doubt, the standard some-

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times suggested as necessary to rebut the presumption.[71] Serological evidence may be open to the same objection, but as already suggested, the Privy Council has emphasised the need for rebuttal by cogent evidence. Medical evidence as to the reliability of contraceptives, and blood test evidence, may inevitably indicate that even if husband and wife had intercourse, the husband could not, according to the law of nature, be the father of the child.[72]

On this analysis, blood test evidence is admissible to rebut the presumption of legitimacy, when there is proof of personal access, and the husband nevertheless disclaims paternity.[73] It is also admissible where there is evidence of sexual intercourse at a time claimed to be relevant to conception, for serological evidence can indicate that the husband cannot be the father. It is true that in Sri Lanka where the husband admits intercourse, the presumption of legitimacy cannot be rebutted merely by proof that other men were also intimate with the wife, since the *exceptio plurimam concubentium* is not a defence[74]. The rationale for this premise is that if several men, other than the husband have had intercourse with the wife, the court cannot assess the probabilities of the husband or any one of the men being in fact the father of the child.[75] The fact that the *exceptio* is no defence, does not however mean that the presumption can never be rebutted by evidence which would carry with it the inevitable inference that the wife had intercourse with another man. Evidence of intimacy with other men will be inadequate by itself to rebut the presumption, but other evidence which would cogently exclude the husband as the father will be admissible.[75A] Medical evidence that the child could not have been conceived through union with the husband will demonstrate that according to the laws of nature, he cannot be the father of the child. Since the areas of scientific knowledge have expanded, a court will not be called upon to assess the probabilities of one of several men being the father, and will have before it, evidence which will cogently exclude the husband.[76]

In the Sri Lanka appeal of **Alles** *v* **Alles** Lord Radcliffe stated that birth during the period prescribed in section 112 raised a conclusive presumption of legitimacy "unless whoever denies paternity can prove, not that the child was not conceived of any union with the ostensible father, but that person had no access

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to the mother at the time when the child could have been begotten or was impotent."[77] It is submitted that this in no way conflicts with the interpretation of 'no access' in **Kanapathipillai** *v* **Parpathy.** Access in **Alles** *v* **Alles** was interpreted by the Privy Council as sexual intercourse,[78] and the Board admitted medical evidence disproving paternity, despite the fact that the husband had admitted intercourse with his wife.[79]

Consequently Lord Radcliffe's statement cannot be interpreted to mean that if the husband admits intercourse, the presumption excludes evidence that the child was not conceived of any union with the ostensible father. It is submitted that in the context of the interpretation given to 'access' in **Alles** *v.* **Alles,** Lord Radcliffe could only have meant that it was unnecessary for a husband denying paternity to go so far as to prove that the child was not begotten of intercourse with him. He suggested that instead, the presumption could even be rebutted by proof of absence of access, or sexual intercourse at a time when the child could have been begotten, or on proof of the husband's impotence. This aspect is clearly emphasised in the following passage from Lord Radcliffe's judgment which appears immediately after the statement quoted above. He said: "It is obvious that in many cases, the onus of disproving access[80] at a time when the child could have been begotten must be a heavy one. But that being conceded, a Court that is furnished, as was the trial court in this case, with an abundance of expert testimony bearing on this very issue. . . . is faced with an issue of fact that is not incapable of being resolved, though it must properly require to be well satisfied by the evidence if it is to conclude that such access as did take place, did not take place at any time when conception was possible".[81]

The admission of evidence, serological evidence in particular, to prevent the imposition of paternity on the wrong man is in harmony with the policy of section 112. There is no reason why the courts should reject the current developments in scientific research on this subject, and show intense commitment to what has been conceded as a rebuttable fiction in our statute, as well as the English legal system from which it was derived. The flexible attitude to the presumption in the English law is surely relevant, when as Lord Tucker said, "the language of this section, though not purporting or intended to reproduce exactly the English

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law on the subject, was clearly influenced by the English legal outlook on the subject matter as disclosed in the authorities in the course of years in which the word access so frequently occurs."[82]

If evidence of blood tests can be received under section 112 of the Evidence Ordinance to rebut the presumption of legitimacy, this will be admissible as circumstantial evidence. In some jurisdictions where serological evidence is deemed admissible to rebut the presumption, it has nevertheless been rejected for other reasons. When husband, wife and child have submitted to the test, the wife consenting on behalf of the child[83] before parties come to court, or voluntarily, expert evidence of a serologist has been accepted on the issue of paternity and adultery.[84] When the issue of admission of serological evidence has arisen in the course of proceedings however, the question of the court's right to order a test, or to permit one, has been challenged. The privilege against self incrimination, and the invasion of a right of privacy have been suggested as basis for querying the right of a court to order a blood test on a non consenting adult.[85] It has been pointed out however that the privilege against self incrimination is not absolute,[86] and that an order for a blood test is in no way diferent from an order which a court could make that a claimant in a matter involving a bodily condition, submit to a medical examination.[87] The English courts have been wary in this matter, and reluctant to concede to the courts an inherent right to order a test on a non consenting adult. It has been judicially suggested however that a court is entitled to draw an adverse inference from the unreasonable refusal by an adult to submit to a test.[88] The Family Law Reform Act 1969 now permits the courts to order blood tests, though persons cannot be compelled to submit to the tests. However a court may draw certain inferences from the unreasonable refusal of party to submit to a test.[89]

The admission of serological evidence in solving paternity disputes has been difficult in England due to the traditional jurisdiction of the courts as institutions acting in the protection of a minor's interests. Courts which are required to consider the welfare of a child of paramount importance, have been disinclined to order blood tests on a child, the results of which may bastardize him. The Official Solicitor whom the court must appoint as guardian

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ad litem to watch the child's interests, can object to a direction for a test in a paternity dispute, on the ground of prejudice to the child, even where the parents consent to the test.[90] In a petition for divorce on the ground of adultery, an order for a blood test on a child could be objected to on the argument that it is not in the child's interest to query its status, merely in order to determine an issue of adultery between husband and wife.[91] The English courts however appear to have accepted the force of the argument that it is in the child's interest to decide an issue of paternity on all the evidence rather than half of it. In the context of the reliability and scientific accuracy of blood test evidence, they have had to concede that "though it is a sad thing to bastardize a child, there are graver wrongs. . . . There is nothing more shocking than that injustice should be done on the basis of legal presumption when justice can be done on the basis of fact."[92]

The Family Law Reform Act 1969 empowered a court to give directions for the use of blood tests, but did not contain principles of guidance as to how the jurisdiction should be exercised. The House of Lords therefore decided that the lower courts must follow precedents in the higher courts in exercising the discretion that the statute gave.[93] Though the statute had changed the Common law concept of the presumption and introduced a standard of proof for rebuttal that was lower than the criminal standard,[94] the views expressed in the House of Lords on the value of serological evidence in paternity disputes do not appear in the main to have been influenced merely by this statutory change.[95] Consequently the views reflected in the House of Lords are relevant in the interpretation of the Common law.[95A] The House of Lords appears to have accepted that while in custody disputes the interest of the child is the sole criterion,[96] in other matters, a court should not refuse to order a blood test on a child merely because it could bastardise him or cast a doubt as to his paternity. The opinion of the Law Lords indicates that in paternity disputes, in general the interest that the law has in ensuring that justice is done to the husband, does not conflict with the jurisdiction of the courts as institutions committed to safeguarding the interests of the child, for the reason that the wider interests of the child demand that he should not be foisted on a resentful father, or have a false illusion of legitimacy based on suppressed evidence.[97] The House of

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Lords appears to have accepted that generally "truth should prevail in the administration of justice,"[98] and there is some suggestion that in the event of a conflict between the interest of the child and the interests of justice, it is important that material evidence should not be suppressed. A court's right to refuse a test in the child's interests, appears to be conceded and strictly defined in terms of prejudice to health,[99] or due to evidence of ulterior or fishy motives.[100]

In Sri Lanka the presumption of legitimacy may be directly applied by a party to the action, as where a right of succession depends as the legitimacy of the claimant.[101] It may also be utilised in divorce proceedings where alimony is claimed in respect of a child and the husband denies paternity.[102] While it can be relevant in proceedings, for rectifying a birth registration,[103] it is in actions for maintenance that the presumption is most frequently invoked as a defence. Since the presumption in Sri Lanka is statutory, it is submitted that if serological evidence is admissible on the issue of "no access" in any of these proceedings, a court cannot reject it if it has been obtained out of court, or voluntarily. When an unmarried woman claims maintenance the burden of proving paternity is the same as in other civil proceedings, and is expressed in terms of a balance of probabilities. But when a married woman brings such a claim against a person who is not her husband, undoubtedly the policy of the law will require a higher standard for rebutting the presumption of legitimacy, but as already pointed out, it need not be, as high as proof beyond reasonable doubt. Consequently, when serological evidence is submitted to court, it should be adequate to rebut the presumption of legitimacy.

If an issue of the admission of serological evidence arises in the course of proceedings, the objections voiced in other jurisdictions against the recognition of an inherent right in the courts to order a non-consenting adult to submit to a test, are likely to succeed. The courts in Sri Lanka are traditionally conservative, and would probably seek specific statutory authorization before they would adopt this procedure. It is possible however that the objection to ordering a test on a child may be viewed somewhat differently.

It is true that there is some existing machinery which may be used to prevent the issue of an order for a blood test of a child.

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The law on Civil Procedure makes provision for the appointment of a next friend or a guardian ad litem who will safeguard the interests of the child, when an action is brought by or against a minor. The Public Trustee (at one time) or an officer of court, today, may be appointed guardian ad litem when there is no suitable person willing to act in that capacity, and he is invested with special functions in safeguarding a minor's interests.[104] The Sri Lanka Courts can also exercise the jurisdiction based on the Roman Dutch law concept of Upper Guardianship over minors. They have utilised this jurisdiction in the past to ensure independant representation of the minor in legal proceedings that affect his interest.[105] However the power of the court to order representation on behalf of a minor seems to be qualified by the statutory provisions on joinder of parties and causes of action.

It is not the practice in Sri Lanka to join the minor as a party to legal proceedings in which a question regarding his status arises incidentally.[106] The decided cases take the view that in applications for rectification of birth registers and in matrimonial litigation, the issue of legitimacy even if relevant to paternity, matrimonial misconduct, or maintenance, is purely incidental, and that a finding does not bind the child.[107] There is also authority for the proposition that a decree of nullity on the ground of ante-nuptial stuprum is not effective to query legitimacy since it is not binding on a child who is not a party to the action.[108] Consequently an order rectifying an entry in a birth register, or a decision in matrimonial proceedings on the issue of legitimacy, can be considered not to affect the status of the child, and it would not bind him within the meaning of the Ceylon Evidence Ordinance.[109] The same approach is adopted to an order in maintenance proceedings.[110] The child is therefore not joined as a party; his interests are not independently represented in matrimonial or in maintenance proceedings in which legitimacy is queried.

In the context of the existing procedure, it seems possible to argue that an order for a blood test on a child will not be prejudicial to his interests, whether the request is made in a maintenance action, or in matrimonial litigation in order to prove adultery, or support a denial of an obligation to pay maintenance.[111] The standard required for proof of adultery as well as the possible suspicion of collusion may make a court disinclined to act on the request of a

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husband and wife who agree to be tested, and want the child also to submit to the test merely in order to establish adultery. However in a matrimonial action where the husband denies paternity, or in maintenance proceedings where there may be a real injustice to the husband in being prevented from proving 'no access' with the aid of serological evidence,[112] it would be difficult to justify objections to an order for a blood test on a child. While oral evidence of husband and wife as to access may be looked upon with suspicion, there can be no similar qualm about permitting the admission of scientifically accurate serological evidence in a paternity dispute.

It is also part of the procedure in a divorce action under the General law, that unless specifically exempted, the alleged adulterer is made a co-defendant in the action.[113] This will be a practical safeguard that subsequent maintenance proceedings[114] will be brought against the co-respondent, should the husband be able to rebut the presumption by serological evidence. Besides if in a later action for maintenance, the result of these tests are produced, proof of paternity on a balance of probabilities will not be difficult. In an action against a third party for maintenance in Sri Lanka, rebuttal of the presumption is in itself considered proof on a balance of probabilities, of his liability to maintain.[115] Consequently, admission of serological evidence which will exclude the husband will not carry with it the necessary consequence that the child's father is unidentified.

If the law is amended so that the child is made a party to legal proceedings in which the issue of his legitimacy arises,[116] it is possible that the guardian ad litem who represents him may challenge the admission of serological evidence as adverse to the interests of the child. In that event the courts can always refer to the policy of the Evidence Ordinance which has been clearly interpreted in the case law, as the justification for ordering a blood test on the child. As we have seen it has been accepted that the statute reveals not merely concern for the protection of the child's status, but a concern for ensuring that the onus of paternity is not foisted on the wrong man. Consequently even if the Sri Lanka courts cannot accept as the English Courts appear to have done, that the interests of justice are inseparable from the interests

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of the child, there is no reason why they should be committed to the sole criterion of the paramount interest of the child.

A liberal interpretation of the presumption, along the lines of the developments in the English law does no violence to the language of section 112 of the Evidence Ordinance. The justification for such an interpretation lies, not in the need to follow western models, but rather in the social realities of Asian society. The status of parentage and its obligations are valued highly in Sri Lanka, where family ties are considered important. If the English law in the course of years of development concedes the importance of that status even within the framework of the traditional law on the presumption of legitimacy, it is difficult to appreciate why this insight should be ignored in the countries with an English legal heritage.

There has been rethinking in many jurisdictions, on both the nature of the presumption of legitimacy, and the standard of proof required to rebut it. It is one of the directive principles of state policy in the Constitution, that the "state shall promote with special care the interests of children."[117] However the pressure on the legislature in developing countries is so great, that law reform in the area of family law, does not necessarily rank high in the scale of priorities. Consequently, when colonial legislation is interpreted narrowly, the legislature cannot always be relied on to remedy the problems surfaced in decided cases. A survey of the judicial interpretation of the presumption in Sri Lanka indicates that there has been an appreciation of the balance between conflicting interests which the statute attempted to maintain. The law has therefore developed in the right direction, and even in the absence of legislation, the advances of modern science need not be ignored in deciding paternity disputes.

NOTES

1. *See* Lee Roman Dutch Law op. cit. p. 29, 31.
2. Perera's Armour, op. cit. p. 34; Hayley op. cit. p. 200-202.
3. Ukku Etena *v.* Punchirala (1897) 3 NLR 10.
4. ss. 96-98.

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5. Fyzee op. cit. (1964 ed.) p. 181-182.

5A. Evidence Ordinance No. 14 of 1985, s. 112.

6. Sanchi *v.* Allisa (1926) 28 NLR 199.

7. *See* Ukku Etena *v.* Punchirala at p. 11, c.f. Kandyan Law Ord. (1938) s. 14.

8. *See* Tisselhamy *v.* Nonnohamy (1897) and Legitimacy in the Generàl law, Ch. II supra.

9. Amina Umma *v.* Nuhu Lebbe (1926) 30 NLR 220; in Ajax Umma *v.* Hamidu (1929) 7 TLR 35, s. 112 of the Evidence Ordinance was applied, though Akbar J pronounced an obiter dictum, that the Muslim law was also relevant, and could modify the statutory presumption.

10. Now *See* M.M.D. Act. s. 48.

11. Lebbe *v.* Mariana Kandu (1938) 11 MMDLR 64; Rahimany Umma *v.* Pitchai (1938) 11 MMDLR 86.

12. Balkees *v.* Dole (1952) 4 MMDLR 36; Nagoorumma *v.* Lebbe (1954) 4 MMDLR 59, Asia Umma *v.* Cassim (1953) 4 MMDLR 42; Sheriff *v.* Sowdoona Umma (1956) 4 MMDLR 111.

13. Fyzee op. cit. p. 182; Tyabji op. cit. p. 204.

14. M.M.D. A t ss. 47 (i) (d) 80; Fyzee op. cit. p. 102-107, 108.

15. Fyzee op. cit. p. 102-107, 108 182 *See* also the obiter dictum of Akbar J. in Ajax Umma V. Hamidu, note 9 supra.

16. E. R. S. R. Coomaraswamy, Law of Evidence in Ceylon (1955)15; R. K. W. Goonesekere in Tambiah, Principles op. cit. at 439; Indian Evidence Act (1872) s. 112, AIR Manual, Civil and Criminal (2nd ed.) Vol. VII, p. 29, Sri Lanka Evidence Ord. (1895) s. 112. *See* also Sri Lanka Evidence Ord. s. 4 (3) and Indian Evidence Act s. 4 defining "conclusive proof."

17. (1811) 1 Sim and St. 153.

18. S *v.* S and W *v.* Offcial Solicitor (1970) 3 WLR 366 H.L.

19. c.f. reforms in New Zealand abolishing the concept of illegitimacy, which introduce into a Common law jurisdiction the practice of esta blishing paternity by acknowledgement of a child born out of wedlock, following a practice known to the civil law countries (New Zealand, Status of Children Act, No. 18 of 1969, discussed in the Annual Survey of Commonwealth Law (1970) p. 275).

20. *See* note 16 supra.

21. Ajax Umma *v.* Hamidu, per Akbar J.

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22. Perera *v.* Podisingho (1901) 5 NLR 243 at 246, Sopinona *v.* Marsiyan (1903) 6 NLR 379 (D.B.), though contra Pavistina *v.* Aron (1897) 3 NLR 13, Podina *v.* Sada (1900) 4 NLR 109, which had held, following the English law, that the presumption could be rebutted although the husband had opportunities of access to his wife.

23. Rabot *v.* Silva (1907) *See* also Kalo Nona *v.* Silva (1912) 15 NLR 508; Rosalinahamy *v.* Suwaris (1921) 23 NLR 168.

24. (1923) 25 NLR 241 (F.B.) especially at p. 247.

25. Ranasinghe *v.* Sirimanne (1946) 31 CLW111, Selliah *v.* Sinnammah (1947) 48 NLR 261, Andris Fonseka *v.* Alice Perera (1956) 57 NLR 498.

26. AIR 1934 P.C. 49.

27. Pesona *v.* Babonchi Baas (1948) 49 NLR 442, Kiribanda *v.* Hemasinghe (1950) 52 NLR 69; Alles *v.* Alles (1945) 46 NLR 217.

28. Alles *v.* Alles (1950) 51 NLR 416. P.C.

29. (1956) 57 NLR 553.

30. 1823 Turn LR 140.

31. *See* Kanapathipillai *v.* Parpathy, supra at p. 556 per Lord Tucker.

32. *See* at p. 556.

33. Supra at p. 418.

34. e.g. *See* Nadar *v.* Nadar 1971 AIR S.C. 2352. Borammah *v.* Dharmappa AIR 1969 Mys. 17 and B. S. Murthy, (1965) Vol. 1 Madras Law Journal p. 3. *See* also J. D. M. Derrett Introduction to Modern Hindo Law (1963) p. 36.

35. Murthy op. cit. p. 9; the cases cited in note 34 supra.

36. Murthy op. cit. p. 10.

37. J. D. M. Derrett, a Critique of Modern Hindu Law op. cit. 30-31, 400, Religon, Law and the State in India, (1968) 361; M. Friedman, Family Law in Asia and Africa (ed. J. N. D. Anderson) (1968) p. 52.

38. Hayley op. cit. 200-202; J. D. M. Derrett, Journal of the American Oriental Society, Vol. 81 No. 3. (1961) p. 252.

38A. *See* Samarapala *v.* Mary, (1969) 74 NLR 203, and Edwin Singho *v.* Baby 1961) 60 CLW 103, where the judge assumes that statements in a house-holders list on the identity of the putative father, are relevant on the issue of 'no access'.

39. note 38 A supra.

40. Note 25 supra.

41. *See* Kanapathipillai *v.* Parpathy

42. Pesona *v.* Babonchi Baas at 445; Fonseka *v.* Perera (1957) 59 NLR 364 at 370.

43. Sopi Nona *v.* Marsiyan; Menchihamy *v.* Hendappu (1861) Rama (1860-62) 90.

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44. Alles *v.* Alles (1950) at P. 418, Kanapathipillai *v* Parpathy at p. 556.

45. Coomaraswamy op. cit. 370.

46. Weeramantry J in Gunasekera *v.* Gunasekera (1970) 79 CLW 71, Fernando P. in Alarmalammal *v.* Nadaraja (1972) 70 NLR 56 (CA); c.f. Tolstoy, on Divorce, (1971 ed.) p. 52, Dharmasena *v.* Navaratnam, note 51 A infra.

47. *See* at p. 206-207.

48. See at p. 207.

49. Coomaraswamy op. cit. at 369, 370.

50. Holmes *v.* Holmes (1956) 1 WLR at 187 at 188 per Ormrod L.J. c.f. Kanapathipillai *v.* Parpathy at p. 556, Rabot *v.* Silva, (1907) at 144-145, Jane Nona *v.* Leo.

51. Rupert Cross, Evidence (1967) 112; The Family Law Reform Act (1969) s. 26 enables the presumption to be rebutted on a balance of probabilities; *See* also Tolstoy, op. cit. 4-03. note 25.

51A. Dharmasena *v.* Navaratnam (1967) 72 NLR 419; c.f. Gunasekera *v.* Gunasekera (1970). Civil Proc. Code (Amend.) Law 20 of 1977 repealing, and introducing new s. 602 into principal enactment uses similar language.

52. Note 46 supra.

53. Cross op. cit. at 111.; c.f. Mary Hays, (1971) 87 LQR 86, 87.

54. Rabot *v.* Silva (1907) supra at p. 150. Jane Nona *v.* Leo at p. 248 Kanapathipillai *v.* Parpathy, Samarapala *v.* Mary; Lucihamy *v.* Fonseka (1890) 9 SCC 96 and Podina *v.* Sada which express a contrary view can be considered overruled. The English law rule on this point has been criticised as preventing proof of true paternity. *See* Fcote Levy and Sander, Cases and Materials on Family Law (1966) p. 39.

55. *See* Alles J. in Samarapala *v.* Mary; Edwin Singho *v.* Baby; in Kanapathi-Pillai *v.* Parpathy the wife denied intercouse with the husband at the relevant time, but this was considered as evidence bearing on the absence of personal access between husband and wife.

56 Saram Appuhamy *v.* Ranni (1946) 47 NLC 71; c.f. Mountforsd *v.* Makumudzi 1969 (2) SALR 56 C *v.* C (1972) 3 AER 577, where this type of evidence was admitted.

57. It has been suggested that where a man identified by the mother of an illegitimate child as its father admits intercouse, evidence of strong racial features can be admitted to rebut the presumption of paternity. *See* H. R. Hahlo (1962) Annual Survey of South African Law p. 78; *See* also Cross op. cit. at p. 111-112; Bromley Family Law op. cit. (1976 ed.) p. 286; W *v.* W (1970) 1 WLR 682 C.A.; R. *v.* Pie 1948 (3). SALR 1117.

58. Bernard Shaw, on a visit to Sri Lanka is reputed to have commented that the country was surely "the cradle of the human race, for in it every face is an original".

59. J. R. Forbes (1971) 45 Australian Law Journal 247; B. Bradley (1939) 12 Australian Law Journal 413; Alf Ross (71) Harvard Law Review

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466; G. W. Bartholemew, (1961) 24 MLR 313; F *v.* F (1968) 2 WLR 190; Stocker *v.* Stocker (1966) 1 WLR 190, 193; S *v.* S and W *v.* Official Solicitor; Mary Hayes (1971) 87 LQR op. cit; Cross, Evidence op. cit. at p. 42; R *v.* Pie; Ranjit *v.* Shiela 1965 (3) SALR 103, also noted by Darroll in (1965) SALJ 317 as the first case in South Africa in which blood test evidence was led to exclude the paternity of a husband alleged to be the father of child born during the marriage; *See* also H. R. Hahlo, 1954 Annual Survey of South African Law p. 55, and (1965) Annual Survey of South African Law p. 66 at 68.

60. S. *v.* S and W *v.* Official Solicitor at 370-376. *See* also F *v.* F supra; In re L (1967) 3 WLR 1645 C.A.

60A. *See* Olive Stone Family Law op. cit. p. 219. Medical research in the United States suggests that a tissue typing test, instead of conventional blood typing can establish paternity with 95% reliability, and not merely by exclusion. The test was used on one occasion to establish that two different men had fathered non-identical twins. Newsweek Magazine Oct. 2 1978 p. 55.

61. In re L (1967)

62. S. *v.* S. and W *v.* Official Solicitor per Lord Reid.

63. Bartholomew op. cit. p. 317; Ross op. cit. p. 481.

64. *See* S *v.* S per Lord Reid; Hayes op. cit.

65. Murthy op. cit. at 11.

66. Lawyers working in the trial courts have indicated to the writer that blood test evience is used in paternity disputes.

67. The late Mr. H. V. Perera K. C. in Alles *v.* Alles. (1945) at p. 221.

68. It is clear from the judgment of the Privy Council, in Kanapathipillai *v.* Parpathy that personal access cannot be assimilated with sexual intercourse as it was, by K. D. de Silva J. in Fonseka *v.* Perera (1957) at 370; the distinction is clearly evident in Alles *v.* Alles, and Samarapala *v.* Mary.

69. Kanapathipillai *v.* Parpathy at p. 555.

70. Alles *v.* Alles ,(1950) at p. 425; In Amina Umma *v.* Nuhu Lebbe, 217 days was accepted as a possible period of gestation but, in Alles *v.* Alles supra, Lord Radcliffe coomented that uncertainty still attends much scientific knowledge about the inception and progress of pregnancy, and the Board decided, after hearing expert testimony, that a period of 229 days could not produce, a fully developed child. Where birth occurs two months after marriage the presumption applies, but can be rebutted by evidence that the child could not have been conceived during the marriage. *See* Visvaverni *v.* Murugiah (1955) 60 NLR 541 at p. 543 though contra Mary *v.* Joseph (1935) 4 CLW 46.

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71. Watson *v.* Watson (1953) 3 WLR 708, cited in South Africa in R. *v.* Swarnepoel 1954 (4) SALR 31; *See* also Macdonald *v.* Stander (1935) AD 325 at p. 330; c.f. State *v.* Jeggels 1962 (3) SALR 704 emphasising that use of contraceptives may be insufficient when the particular method is unreliable.

72. State *v.* Jeggels; Cross op. cit. at 110; R *v.* Swarnepoel, Rex *v.* Pie, in which blood test evidence is discussed in a situation where the disclaimer of paternity was by an unmarried man; *See* also Darrol op. cit. p. 318.

73. In Samarapala *v.* Mary admission of serological evidence could have solved the dilemma of the learned judge who felt called upon to reject oral evidence of absence of intercourse, even though conscious of the possible injustice to the husband in imposing the responsibility of paternity on him. *See* Alles J. at p. 207.

74. Menchihamy *v.* Hendappu; Fonseka *v.* Perera (1957); Alles *v.* Alles (1945) p. 231; c.f. R. *v.* Swarnepoel, S *v.* Jeggels, S *v.* Sambo 1962 (4) SALR 93; S *v.* Swart 1965 (3) SALR 454.

75. Hahlo, (1965) Annual Survey op. cit. Alles *v.* Alles (1945) at p. 213 citing Cope *v.* Cope 1933 (1) Moody and Robinson 269, where it was said that "the law will not under such circumstances allow a balance of the evidence as to who is most likely to have been the father."

75A. Foote, Levy and Sander op. cit. p. 51, support this argument.

76. *See* S. *v.* Swart; Hahlo (1965) Annual Survey op. cit. at p. 68.

77. (1950) at p. 418.

78. p. 418-419.

79. p. 425.

80. Referred to as intercourse at p. 419 of the report.

81. P. 418.

82. Kanapathipillai *v.* Parpathy at p. 555.

83. Holmes *v.* Holmes; In Re L (1967) 3 WLR 1149 at 1159 per Ormrod J; F *v.* F recognising her right to do so.

84. Stocker *v.* Stocker; In Re L (1967) 3 WLR 1149 at 1166; Ranjit *v.* Shiela

85. *See* W *v.* W 1964 p. 67 C.A; Hahlo, (1965) Annual Survey op. cit.; Daroll. op. cit. S *v.* S and W *v.* Official Solicitor per Lords Reid, Hodson and Guest; Family Law Reform Act 1969, Part III s. 20 (1) gives the English courts the power to make directions for the use of blood tests.

86. Darroll op. cit.; Bartholemew op cit.

87. *See* Lord Mac Darnott in S *v.* S and W *v.* Official Solicitor; c.f. Darroll op. cit.; Bartholemew op. cit.

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88. In Re L (1967) 3 WLR 1645, C.A. per Lord Denning M.R. at 1653. B *v.* B and E (1969) I WLR 1800 C.A.

89. ss. 20 (1) 21, 23, Hayes op. cit. 91-93.

90. S *v.* Mc and M (1970) 1 WLR 672 C.A. W *v.* W.(1970) 1 WLR 682 C.A.

91. M (D) *v.* M (S) and G (1969) 2 AER 243, 245 C.A.

92. Holmes *v.* Holmes at p. 188 per Ormrod L.J; *See* also W. *v.* W (1970) 1 WLR 632 per Lord Deaning M.R.; In Re L (1967) 3 WLR 1645 C.A. per Davies L.J. at 1664.

93. S *v.* S and W *v.* Official Solicitor at p. 370-376 386-388.

94. s. 26.

95. Only Lord Reid appears to have been obviously influenced by the change in the standard of proof (*See* S *v.* S and W *v.* Official Solicitor at p. 370-376).

95A. Bromley op. cit. (1976 ed.) p. 287 states that S *v.* S settled the Common law position with regard to blood testing.

96. See also In Re L (1967) 3 WLR 1645 C.A.

97. *See* S *v.* S and W *v.* Official Solicitor; for a similar opinion *See* Lord Denning M.R. in S *v.* Mc. and M.

98. Russel *v.* Russel 1924 A.C. 687 at 748, cited with approval in a dispute involving paternity by Lord Denning M. R. in W *v.* W (1970) 1 WLR 682.

99. Lord Hodson in S *v.* S and W *v.* Official Solicitor.

100. Lord MacDermott in the same case; c.f. B *v.* B and E.

101. Rabot *v.* Silva (1907) Fonseka *v.* Perera (1957).

102. Alles *v.* Alles.

103. Cornelis *v.* Lorenzia (1912) 16 NLR 229; Cabraal *v.* White (1905) 1 SCD 53;Births and Deaths Registration Act No. 17 of 1951 ss. 28 (1) (b) (c). repealed, and replaced by s. 27A introduced by Births Deaths and Marriages (Amendment) Law No. 41 of 1975. Proceedings are now before the Family Court or in appeal to the Court of Appeal, *See* Judicature Act (1978) ss 24 (1) (2), modifying s. 27A above.

104. A.J. (Am) L. S. 604 (3) 611 (4); Now *See* Civil Procedure Code No. 2 of 1889 Ch. 35. *See* also parental power over administration of minor's property, Chap. VII infra, Adoption of Children Ordinance No. 24 of 1941 s. 13 (4), requiring the court hearing an application for an adoption order to appoint some person to act as guardian ad litem "with the duty of safeguarding the interests of the child before court;" Judicature Act s. 25.

105. Cassaly *v.* Buhari (1956) 58 NLR 78 at p. 80, and parental power over administration of a minor's property, ch. VII infra.

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106. *See* judicial determination of parentage Ch. V (2) infra.

107. *See* Alles *v.* Alles (1950) at p. 417, Perumal *v.* Karumegam (1969) at 336 (matrimonial litigation) Cabral *v.* White, Perera *v.* Balasuriya (1929) 30 NLR 415 (rectification of birth registers). *See* generally, declaration of legitimacy in matrimonial proceedings, Ch. V (2) infra.

108. Perumal *v.* Karumegam

109. Evidence Ordinance s. 41; Coomaraswamy op. cit. p. 151.

110. Orders for maintenance under the Maintenance Ordinance No. 19 of 1889 will not in any event fall within section 41 of the Evidence Ordinance; c.f. Miwonis *v.* Menika (1915) 4 Bala. Notes 48, where the issue whether a decision on paternity in a maintenance order binds the child was raised, but not decided. *See* judicial determination of parentage (maintenance proceedings) Ch. V (2) infra.

111. In Ranjit *v.* Shiela, serological evidence was obtained before the parties came to court, and was accepted on the issue of adultery and paternity. In the local case of Alles *v.* Alles adultery had been proved, and the issue of legitimacy arose because the husband denied paternity. However the Privy Council appears to have approved of the District Judge's view that this issue was relevant to matrimonial misconduct, *See* Alles *v.* Alles (1950) at p. 417 per Lord Radcliffe.

112. e.g. Samarapala *v.* Mary.

113. Civil Procedure Code (1889) s. 598.

114. Under the Maintenance Ordinance (1889).

115. e. g. Kanapathipillai *v.* Parpathy.

116. *See* judicial determination of parentage Ch. V (2) infra.

117. Constitution (1978) s. 27 (13)

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CHAPTER IV

CHANGE OF THE ILLEGITIMATE'S STATUS

An illegitimate's legal relationship to his natural parents may be altered, and he may acquire the legal status of a legitimate child in several ways. Even if the law with regard to the status of the illegitimate child is liberalised, as long as the law of Sri Lanka distinguishes between the concept of lawful marriage and the non-legal union, importance must be attached to methods by which a child born illegitimate can claim the status of legitimacy. If that law is not liberalised, it is specially important to consider those legal principles that will ameliorate the disabilities that an illegitimate suffers.

1. LEGITIMATION

Legitimation of an illegitimate child is effective to confer the status of legitimacy upon him. This concept was alien to the Common law which as we have seen, was more strict in its attitude to illegitimacy than the Roman Dutch law. Though an illegitimate could only be legitimated by Act of Parliament in English law, and a liberal law on legitimation was introduced as recently as 1926, the Roman Dutch law[1] accepted that an illegitimate could acquire the status of legitimacy, particularly by the subsequent marriage of the parents. In this respect it revealed the impact of the Roman law, though the Canon law too recognised the principle of legitimation from the twelfth century.[1A]

General Law

There is some evidence that the principle of legitimation by subsequent marriage, applied in respect of the marriages of the local inhabitants of the Maritime Provinces, during the Dutch regime. De Coste, who was a Dutch Dissave of Colombo, eight or nine years before the cession of these provinces to the British, refers to a Resolution of 1747 enunciating the rule that an illegitimate should belong to the caste of the parents when they are of the same caste, and legitimate their children afterwards by marriage.[2] Whether the source of this principle was local custom, or Dutch law, the inspiration for a similar provision in the first marriage statute introduced by the British, appears to have come from Roman Dutch law. Since the concept of legitimation by

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subsequent marriage was unknown to the Common law, it found its way into the Marriage Ordinance (1847)[3] because the British considered Roman Dutch law the source of the law regarding the marriages of the natives in the Maritime Provinces.

Legitimation by Subsequent Marriages

Though Roman Dutch law permitted the legitimation of illegitimates upon the subsequent marriage of the parents, it denied this facility to children born in adultery or incest. Adulterous and incestuous unions being "prohibitus concubitus" in Roman Dutch law, there could be no question of a subsequent marriage between the parents of adulterine or incestuous illegitimates.[4] The Sri Lanka Marriage Ordinance (1847) in defining the relationships which could not form the basis of a valid marriage, clarified that an incestuous union was prohibited. It did not include an adulterous union as a prohibited relationship. Yet the provision on legitimation stated that a legal marriage would render legitimate children procreated before the marriage except if they were procreated in adultery.[5]

One view expressed in the Sri Lanka courts was that, the Ordinance of 1847 was not conclusive on the subject of validity, so that the Roman Dutch law prohibition on marriage between persons who had committed adultery was part of the marriage law in the Maritime Provinces, even after the Ordinance.[6] However a series of decisions rejected that opinion and refused to treat an adulterous union as "*prohibitus concubitus.*"[7] There was some uncertainty as to whether the Dutch had prohibited adulterous unions between the natives, but the support for these decisions came from the fact that adultery was not an offence according to the Criminal law of the country, during the British regime.[8] Once the union was considered permissible, the courts adopted a liberal attitude to the status of adulterine illegitimates, rejecting the Roman Dutch law principles on the argument that it would be a "curious result . . . . to punish as it were the victims of persons whose misconduct the law condones."[9] The same view is reflected in the report of the Marriage and Divorce Commission (1959) which recommended liberalisation of the law.[9A] Nevertheless the statutory prohibition on legitimation of adulterine illegitimates, was not the subject of reform and remained a part of the General

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law of marriage until as recently as 1970, when the General Marriages Ordinance was amended in this respect, by the Legitimacy Act of that year. Adulterine children may now be legitimated by the subsequent marriages of their parents. This facility has been conceded retrospectively to children procreated in adultery.[10]

A subequent legal marriage for the purpose of legitimation is a marriage that satisfies the requirements for validity, and is either registered according to the statute, or is unregistered and celebrated according to custom.[11] While the General law recognises that a marriage may be presumed to have taken place, when there is proof that the parties co-habited together as husband and wife and were treated as such by relatives and friends, it draws this inference on the basis that the parties lived together after a public and customary ceremony of marriage. The presumption of marriage from "co-habitation and repute" is not therefore a device to eliminate the legal distinction between lawful marriage and concubinage. If there is evidence that the unregistered union of the parents of an illegitimate child was not solemnized according to custom, evidence of co-habitation and repute will not be adequate to prove legitimation by subsequent marriage.[11A]

The General Marriages Ordinance contains a specific provision enabling a Christian minister to solemnize death-bed marriages of persons who are Christians.[12] This practice was permitted in the early marriage legislation due to pressure from the Catholic church which claimed that it would facilitate the giving of the last sacrament.[13] It creates a special privilege for Christians, who can regularise an informal union, even at the point of death, thus conferring the status of legitimacy on the children.

Legitimation by Act of the Sovereign

In the Roman Dutch law, like in many other Civil law systems influenced by Roman law,[13A] an illegitimate could acquire the status of legitimacy by an act of the sovereign. Though some writers express the view that this method of legitimation is obsolete in the modern Roman Dutch law,[14] it has been argued that the principle is applicable even today, and that there has merely been a failure to maintain the proper machinery for making an application to the executive.[15] Since legitimation by subsequent marriage

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may not always be possible, it is desirable that there should be alternative methods by which a child can acquire the status of legitimacy.

An early twentieth century work on the law of Sri Lanka refers to this method as one way in which an illegitimate can be legitimated.[16] Whether the method can be utilised today by an act of the executive is related to the issue whether the statutory provisions on legitimation by subsequent marriage have superseded the Roman Dutch law.

Since legitimacy is a topic which falls within the law of marriage, can it be argued that the only method of legitimation available is that referred to in the legislation on marriage? The Marriage Ordinance of 1847 which purported to declare the law of marriage for the first time, contained a provision that the statute did not "profess to treat or declare the whole law of marriage," and also stated that the law of marriage would be the same as it was before the Ordinance, except in the event of a conflict with the statute.[17] This provision was interpreted by some judges in the Supreme Court, as permitting reference to the Roman Dutch law of marriage.[18] According to another opinion expressed by de Sampayo A. J., the Ordinance was intended to set out a uniform law of marriage, and this *casus omissus* clause was introduced for the purpose of conserving the special laws applicable to Kandyan and Mohammedans.[19]

We have seen that the first declaratory legislation on marriage was drafted in a context where the British assumed that the Roman-Dutch law governed the marriages of the native inhabitants of the Maritime Provinces. The report of the Sub Committee of the Legislative Council which examined the Ordinance of 1847, confirms that the controversial '*casus omissus*' clause referred only to the principles of Roman Dutch law. While the legislators intended to introduce a uniform law, there was a distinct hostility to Kandyan law, and the uniform statute on marriage was viewed as one way in which the Kandyan could be given a "civilised" marriage law.[20] Though de Sampayo J. doubted the necessity for enacting a vague "*casus omissus*" clause when it would have been quite simple to specifically refer to the applicability of Roman-Dutch law, it appears that the provision was drafted in this language

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because the legislators thought that the marriage law of the Maritime Provinces was "well defined and understood" as the Roman Dutch law of marriage. The report of the Sub Committee also indicates that they were unwilling and unable to declare the whole Roman-Dutch law on marriage, and thus utilised the *casus omissus* clause to permit easy reference to that body of legal principles.[21]

Legitimation by subsequent marriage was therefore not the only method available in the law of Sri Lanka when the Ordinance of 1847 applied. However this statute was of limited application, and a similar *casus omissus* clause was not retained in the Ordinance of 1863 that replaced it. This fact supports the view of de Sampayo A. J. that the Roman Dutch law of marriage ceased to be applicable after 1863.[22] Nevertheless the courts of Sri Lanka have for many years acted on the premise that "the effect of the legislation in regard to marriage . . . has been to repeal all those portions of the Roman Dutch law on the subject in regard to matters which are expressly dealt with by legislation."[23] There are many areas in which the Roman Dutch law of marriage continues to apply. For instance, the Roman Dutch law with regard to the grounds on which a marriage is voidable has been considered part of the General law of marriage, despite the fact that the marriage legislation also deals with the circumstances in which a decree for nullity could be obtained in the case of a void marriage.[24] On the same premise it may be argued that the statutory provision on legitimation by subsequent marriage, does not prevent legitimation by an application to the executive authority, if the exercise of such a power by the executive does not conflict with the Constitution of Sri Lanka.[24A] Legitimation could also be viewed as a subject that is part of the Roman Dutch law on parent and child. It can be argued that a provision on legitimation in the marriage statute does not preclude the possibility of utilising other methods available according to the Roman Dutch law of parent and child.

Legitimation by an Act of Parliament is always possible in the modern law even without reference to the Roman Dutch law.[25]

The Effect of Legitimation

The Roman Dutch jurists seem to agree that children legitimated by subsequent marriage do not differ from legitimate children,

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and this would suggest that the status of legitimacy was conferred on them with retrospective effect.[26] Not all countries which have been influenced by the Roman law, accept this view.[27] The Legitimacy Act of Sri Lanka, recognises that legitimation by subsequent marriage places the illegitimate in the same legal position as a legitimate, for a specific proviso declares that children procreated in adultery prior to the Act do not acquire rights by legitimation which will displace the rights of others that have already vested.[28] Since the reform of the law appears to have been inspired by the recommendation of the Marriage and Divorce Commission, it would seem that the statute was intended to reflect their view, that the status of legitimacy should accrue as from the date of birth.[28A] It can be argued that if legitimation does take place on an application to the Executive, it should be effective only from the date when the status of legitimacy is conferred. There is nothing to prevent the Legislature conferring the status of legitimacy on individuals retrospectively.

Customary Law

1. Kandyan Law

The early commentaries by English writers on Kandyan law do not refer to a concept of legitimation, but Hayley, in his treatise on the subject, expresses the view that legitimation by subsequent marriage was permitted in the traditional law of the Kandyans.[29] It is difficult to understand the need for this concept in a context where formalities were not generally associated with marriage, and the attitude to the non-legal union itself was liberal. The criterion of legitimacy in Kandyan law appears to have been birth within a union which conformed to certain accepted norms with regard to a legal union. When co-habitation could have commenced without formalities,[30] it is not clear how the event of marriage could have had any special significance for the legitimacy of the issue.

The principle of legitimation by subsequent marriage received statutory recognition in the first Kandyan Marriages Ordinance of 1859.[31] It became a legal rule of vital importance when this legislation introduced the concept of formal solemnization of a Kandyan Marriage by registration. The British were concerned with certainity of title to property, and viewed the marriage

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legislation as a method of placing "domestic events on record and of putting them beyond dispute."[32] When the statutory formality of registration became essential to the validity of a Kandyan marriage, it was official policy that "cohabitation upon other terms than registration will be concubinage, not marriage."[33] Legitimation by subsequent marriage was therefore a necessary device to prevent the bastardization of issue procreated in unions entered into before the statute came into force.[34]

The Ordinance of 1859 denied the benefit of legitimation to children born in adultery.[35] This prohibition again echoes the values of the Roman Dutch law, for a system which permitted polygamy and informal liaisons, and recognised the right of succession of adulterine illegitimates could hardly have accepted such a principle.[35A] The prohibition on legitimation of adulterine children in the Kandyan marriage statute seems to have been inspired by a desire to assimilate the Kandyan law to the law of the Maritime Provinces. The Ordinance did introduce the Roman Dutch law with regard to divorce,[36] and the comments of Governor Ward, when recommending the statute to the colonial office confirms this official policy. "The present Kandyan law," he said "is in high conflict with all the marriage laws of the civilised world; the present bill destroys the conflict of laws."[37]

We have seen that the British changed this policy drastically, when it was discovered that the Ordinance of 1859 was "premature and faulty legal action on a delicate subject."[38] Just as the divorce law was liberalised by the subsequent Ordinance of 1870 so as to conform to the traditional Kandyan law,[39] incentives were provided for legitimation of children and regularisation of unions which were adulterous due to the failure to abide by the statute of 1859. This liberal policy was considered the only way to remedy the havoc likely to be caused by a generation of illegimates, to the very property titles the policy-makers wished to settle.[40] The Ordinance of 1870 therefore did not contain a prohibition on legitimation of adulterine children, and the disability was clearly repealed.[41]

A judicial dictum in the Supreme Court has referred to the fact that the Ordinance of 1870 indicates the liberal attitude of the Kandyan law to adultery; the present Kandyan Marriage and

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Divorce Act, reflects the same values.[42] There are no restrictions on the legitimation of Kandyan illegitimates by the subsequent marriage of their parents. The subsequent marriage contemplated in Kandyan law, has always been a registered marriage, since that requirement has been essential for validity since the very first marriage statute was enacted. An unregistered marriage solemnized merely according to custom does not confer the status of legitimacy on illegitimate children, and this can limit the scope of legitimation in Kandyan law.

A marriage between persons subject to Kandyan law may also be solemnized and registered under the General law. Consequently, until the General law on legitimation was amended recently, Kandyans who registered their marriages under that law were governed by the prohibition on legitimation of adulterine children in the General law.[43] The facility of contracting a marriage under the General law was given to Kandyans, especially to accommodate Christian Kandyans, since the Kandyan law of marriage conflicts with the Christian values regarding marriage.[44] With the repeal of the prohibition in the General law, Kandyans who choose to contract a marriage under that law may also legitimate adulterine children, even though the other provisions that govern their marriages continue to reflect concepts that are quite different to those in the Kandyan law.

The Supreme Court has held that subsequent registration makes an unregistered union valid retrospectively, thus suggesting that children of the union will be deemed legitimate apart from any principle of legitimation.[45] In any event the fact that there is a statutory provision on legitimation ensures that illegitimate children acquire the status of legitimacy with retrospective effect. The Kandyan Marriage Ordinance (1870) as well as the present Kandyan Marriage and Divorce Act recognise that a legitimated child is entitled to the same rights as if procreated subsequent to the marriage.[46] Some confusion with regard to the legal status of adulterine children has been created by a disability introduced by the Kandyan Law Ordinance (1938). We have observed that the Kandyan Law Commission adopted a very strict attitude to the rights of illegitimates, and their views are reflected in this Ordinance.[46A] According to a provision in this statute, which governs the subject of intestate succession, subsequent marriage

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is deemed to confer the status of legitimacy on children procreated prior to the marriage, only if they have not been procreated in adultery. Thus, despite the repeal of the prohibition on legitimation of adulterine issue in both the Kandyan law and the General law, adulterine Kandyans who are legitimated by the subsequent marriage of their parents cannot always claim to succeed in the same manner as legitimate issue.[47]

The conflict between the provision on legitimation in the Marriage Ordinance (1870) and the Kandyan Law Ordinance appears to have passed unnoticed when the former statute was repealed by the Kandyan Marriage and Divorce Act. Since the provision on legitimation in this Act is drafted in the language contained in the 1870 statute, it is difficult to suggest that this provision was meant to supersede the conflicting provision in the Kandyan Law Ordinance. Though recent accounts on the Kandyan law emphasize that the facility of legitimation is available to adulterine children, they have not discussed the conflicting provision in the Kandyan Law Ordinance.[48] The Legitimacy Act which confers the status of legitimacy on adulterine children with retrospective effect, cannot be interpreted as having repealed the provision in the Kandyan Law Ordinance, at least with regard to marriages under Kandyan law, since these are specifically excluded from the purview of the Act.[49] However, Kandyans who marry under the General law and are nevertheless governed by the Kandyan law of succession,[50] may be able to argue that the restrictive provision in the Kandyan Law Ordinance with regard to succession does not apply, in view of the provisions in the Legitimacy Act.

Unless a court is prepared to hold that the provision on legitimation in the Kandyan Marriage and Divorce Act has tacitly repealed the conflicting section in the Kandyan Law Ordinance, adulterine children of parents married subsequently under Kandyan law, will be denied the rights of succession available to legitimates. The provision in the Kandyan Law Ordinance was enacted by an oversight, and it is one that should be repealed by a specific amendment to the statute.

Legitimation by an Act of Parliament will be possible as in the General law. If legitimation by an act of the executive is part

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of that law, this method too may be extended to Kandyans on the principle of *casus omissus*. However, since the Kandyan law Ordinance refers only to legitimation by subsequent marriage in its definition of legitimacy for the purpose of intestate succession,[50A] it may be argued that the rights of succession of legitimate issue cannot be claimed by children legitimated by other methods, and that this is an indication that the General law is in conflict with the principles of Kandyan law. This contradiction can only be resolved by an amendment of the relevant provision in the Kandyan Law Ordinance.

2. Tesawalamai

Since the General law of marriage applies to Tamils governed by the Tesawalamai, illegitimate children may be legitimated in the same manner as under the General law. They may thus acquire the status of legitimacy even if their parents' subsequent marriage was unregistered, provided it was solemnized according to the Tamil customs associated with the marriage ceremony.[51]

3. Muslim Law

Islamic law, which as we have seen adopts a very severe attitude to illegitimacy, does not enable the status of legitimacy to be conferred on an illegitimate child. It does not therefore recognise the concept of legitimation, and the subsequent marriage of the parents has no effect on the legal status of the illegitimate child. We have observed that adultery is a bar to marriage, and that the children born of such a union are illegitimate. Though an informal union between unmarried persons may be legalised by marriage, the issue remain illegitimate.[52]

These principles appear to apply with regard to illegitimate Muslim children in Sri Lanka. The Marriage Ordinance of 1847 which contained a provision on legitimation by subsequent marriage was intended to apply to Mohammedans,[53] but it was never promulgated in respect of this community. Subsequent legislation on the marriage law of the Maritime Provinces did not and does not govern Muslims.[54] An adulterous relationship cannot be converted into a valid marriage,[54A] and the Legitimacy Act declares that its provisions do not apply to persons professing Islam.[55] This clear legislative trend indicates that Muslims are

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governed by their personal law, and not by the General law on legitimation.

The application of the personal law of the Muslims in this area is not surprising. Legitimation is a topic that can be considered "connected with marriage", and thus attracting the principles of Islamic law, introduced by the Muslim Marriage and Divorce Act.[56] We have also observed that the principles on legitimacy in Islamic law can be applied as part of the law on parent and child.[57] When this law denies the very concept of legitimation, it can hardly be argued that there is a "casus omissus", justifying the introduction of the Roman Dutch law on this topic.

We may therefore conclude that an illegitimate Muslim in Sri Lanka cannot acquire the status of a legitimate child by the legal device of legitimation.

2. RECOGNITION

Some jurisdictions accept that an illegitimate may acquire the status of legitimacy by an act of voluntary acknowledgment on the part of the putative or natural father. Acknowledgment may be by some formal act, such as the signing of a birth register, or by receiving the child into the father's family. Thus, in several jurisdictions in the United States, there are statutes which consider acknowledgment in this sense a method of legitimation of the illegitimate child.[58]

The concept of recognition or acknowledgment of an illegitimate by the putative father is considered to be typical of Civil law systems derived from the Roman law.[58A] However, acknowledgment by the putative father was not an independent method of legitimation in Roman law, and was ineffective in the absence of an application to the sovereign authority for legitimation of an illegitimate child. It does not therefore appear to have been a separate method by which an illegitimate could acquire the status of legitimacy under Roman law.[58B] Besides, many Civil law systems, which consider an illegitimate filius nullius or a child of no-body at birth, permit the mother to recognise or acknowledge her relationship to an illegitimate child. Recognition by the father does not, even in these countries confer the status of legitimacy, but it creates an "intermediate

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status between illegitimacy and legitimation", effective to create legal rights and duties, and a legal relationship between the recognizing parent and the child.[58C]

Since the parent who acknowledges the child is vested with parental authority,[58D] recognition by the putative father prejudices the mother's legal rights, where the law concedes that there is a legal relationship between her and the illegitimate child. Consequently though unilateral aknowledgment by the father appears to have been possible in European legal systems where recognition was an accepted principle, the mother's consent is now invariably considered a necessary prerequisite. Besides, even when recognition of an illegitimate is permitted, an extra marital child cannot be aknowledged by a married person unless the other spouse consents, a principle which attempts to safeguard the lawful family unit by protecting the legal rights of spouses, and the property rights of the legitimate children of the marriage.[58E]

General Law

The legal relationship between the mother and the illegitimate at birth is accepted in the General law. It is only relevant to consider whether an act of aknowledgment by the putative father alters the legal status of the child. In the General law such an act of acknowledgment of an illegitimate is only an item of evidence in proving paternity, for the purpose of enforcing legal obligation that the law may impose on the putative father. The illegitimate does not acquire the status of legitimacy because of such an act. Recognition or acknowledgment is not even effective to create the full legal relationship of parent and child between the illegitimate and the father, for the legal relationship to his mother remains unaffected.

Under the Births and Registration Act, No. 17 of 1951 the father of an illegitimate is under no obligation to admit paternity, and even if he wishes to aknowledge paternity, his name can be entered in the register of birth only if the mother agrees, and provided both of them sign the register.[59] Such an acknowledgement when reflected in the certificate of registration is not considered by the Sri Lanka courts to be prima facie evidence of paternity.[60] It is merely admissible under the Evidence Ordinance as evidence

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which may have some geneological value, or as evidence which will corroborate a woman's allegation that a man is the father of her child.[61]

Evidence that a man received a child, born of a non-legal union, into his family is also treated in the same way—as merely some relevant evidence on the issue of paternity.[62] Similarly, the fact that a man entered into an agreement with the mother of an illegitimate child to maintain it, is considered merely evidence that corroborates the mother's allegation of paternity, in a subsequent legal action for maintenance.[63]

Recognition or acknowledgment of paternity in any of the above situations does not confer parental rights, and has no impact at all on rights of succession. Thus the putative father has no legal right to custody. An illegitimate who has been acknowledged by his father in this manner suffers the same disabilities as any other, and can only claim to inherit the father's property under his will.[64]

Customary Law

1. Kandyan Law

Since the mother's legal relationship to the illegitimate is conceded in Kandyan law too, the only relevant question is whether acknowledgment by the putative father has any significance for the legal status of an illegitimate child. The present Kandyan law permits a limited type of recognition when it confers special rights of succession on an illegitimate, where paternity has been acknowledged by the putative father. Thus the Kandyan Law Ordinance states that an illegitimate may claim the same rights of inheritance as legitimates in respect of the acquired property belonging to the intestate estate of his putative father, if the latter's name was entered as the father, when his birth was registered.[65] While the Birth and Deaths Registration Act applies to Kandyans[66] clearly the legal effect of a statement on paternity in the certificate of registration is quite different to that in the General law. The statement in the birth certificate of the illegitimate child of a Kandyan man is deemed an act of acknowledgment, effective to create the legal relationship of father and

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child, even though for the limited purpose of creating some rights of inheritance.

Despite the fact that recognition in this sense is possible in Kandyan law today, it must be noted that the legal status of the child remains that of an illegitimate. Consequently, even though recognition by the putative father confers a special right of succession that is not available to other illegitimates, it does not operate as a method of legitimation. Besides, the father does not acquire any parental rights in respect of the child.[66A]

2. Tesawalamai

Tamils subject to Tesawalamai are governed by the General law on this subject. Consequently even a man who has acknowledged the paternity of an illegitimate child does not have any legal right, and can ensure rights of succession for him only by making a will.[67]

3. Muslim Law

Islamic law contains a legal principle of acknowledgment of paternity or iqrar.[68] However this is a totally different concept from that we have discussed, since it is not one that is effective to confer the status of legitimacy on an illegitimate child. An illegitimate who is the issue of zina or illicit intercourse cannot be acknowledged by the putative father. Acknowledgment in Muslim law is merely an admission that a child is legitimate, in circumstances where his paternity is uncertain, and only on the basis of a presumption that a valid marriage has taken place. Acknowledgment is therefore confined to situations where a lawful marriage between the parents may be presumed.

The principle of acknowledgment appears to have developed from the very need to mitigate the harshness of legal values that denied an illegitimate's natural relationship to its parents. Consequently in systems where the illegitimate child's legal relationship to the mother was accepted, but a legal relationship to the father was denied, there was clearly merit in a principle that permitted a man to voluntarily assume legal obligations and rights in respect of a child whom he had fathered. It helped at least to ameliorate the legal position of those illegitimates whose father wished to admit paternity and accept the rights and obligations of a parent.

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In the General law and the Kandyan law where a distinction is drawn between the concept of legitimacy and illegitimacy, can the concept of recognition provide a meaningful solution to some of the problems connected with the legal status of the illegitimate? When acknowledgment by the putative father is deemed to be effective as a method of legitimation, it creates the inference that it is a relationship to the male that is necessary to confer the status of legitimacy. Such a concept would be difficult to support when equality of the sexes is both a traditional and current legal value in Sri Lanka.[68A] It would also be hard to justify the logic of maintaining the distinction between the concept of the lawful (generally monogamous) marriage and the non-legal union, if either or both the unmarried parents of an illegitimate could confer the status of legitimacy by the act of acknowledging their relationship to the child. There is not the same objection to attaching importance to an act of acknowledgment by the putative father and considering it as effective to remove some of the disabilities of illegitimacy, by creating certain legal rights and duties between him and the child.[69] Recognition in this sense we have seen, can be subject to legal controls which will safeguard the interests of the mother and child, as well as the spouse and legitimate children of a married man.

If the status of illegitimates can be improved in this way it is hardly an argument that the legal system is thereby permitting the putative father to acknowledge at his whim and fancy those illegitimates on whom he wishes to confer legal rights.[69A] If the legal system discriminates against illegitimates, must it be committed to subjecting all to the same harsh rules, and preventing the assumption of voluntary responsibility by the father? Recognition can be a creative legal principle unless the need for it is obviated by more liberal laws, which as in England accept that there can be a natural as well as a legal relationship between the putative father and the illegitimate child.

There is nothing in the present law to prevent the putative father acknowledging an illegitimate, bringing him up and providing for him in his will. If the law regarding the illegitimate's status is not liberalised significantly, there is good reason to legalise the practice of voluntary assumption of responsibility for an illegitimate child. It is now recognised even in the west that

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the law should as far as possible reinforce the rights and responsibility of parents for their children, with minimum state interference, since it seems to be agreed that the state is not the best instrument to "manage except in a very gross sense, so delicate and complex a relationship as that between parent and child."[69B] The traditional laws of Sri Lanka, seem to have acted on a similar theory, in their policy with regard to the relationship between parent and child.[70] Giving legality to recognition by the putative father, can be supported by the same rationale.

3. COURT ORDER

When both parties to a duly solemnized marriage bona fide believed that the marriage was lawful, but it was void because the parties lacked legal capacity to marry, the Roman Dutch law permitted the union to be considered a "putative marriage." In proceedings to annul such a marriage, a court could therefore declare the issue legitimate. If such an order of court is purely declaratory of a status that children of a putative marriage acquire by operation of law retrospectively, it will not be a device which makes illegitimate children legitimate. However if it confers the status of legitimacy on the illegitimate children of a marriage that is not lawful, a court order will be effective to change their legal status.[70A]

Early South African cases which apply the Roman Dutch law principle on putative marriage, reflect the view that it is the court order which legitimates the child of a putative marriage.[70B] Thus an application for a declaration of legitimacy was considered essential.[71] However there are later cases which recognise that in proceedings to annul a marriage, a court may *mero motu*, declare the issue legitimate. This approach conforms with the principle that the court order is merely declaratory of a status which the children of a putative marriage are entitled to by operation of law.[72] Some authorities favour the view that the court order will not bind third parties such as legitimate issue of either parent who have not been represented in court, because they stand to be prejudiced in their right of intestate succession by the declaration on legitimacy.[73] Others do not accept the need for representation of persons with conflicting interests, thus supporting the principle that the court is merely making a declaration of a

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status that accrues to the children retrospectively.[73A] In view of the uncertainity on the point, it is not clear whether an order of court is a method by which the issue of a putative marriage acquire the status of legitimacy.[74] In England where the concept of putative marriage has been the basis for statutory reforms regarding the legal status of the children of void marriages, the issue acquire the status of legitimacy by operation of law.[74A] Once a putative marriage is established, it appears inherent in the policy of the doctrine, that the issue of the union should not be treated differently from legitimate offspring. Thus a court order should not be considered a method of legitimation, but as declaratory of a status acquired by operation of law.

General Law

It was at one time doubted whether the concept of putative marriage could be utilised to confer the rights of succession of legitimate children on the issue of a bigamous and void marriage contracted in good faith. In **Silva** *v* **Kanerishamy**[74B] the court expressed the view that since the succession rights of illegitimates were defined by the Matrimonial Rights and Inheritance Ordinance, a child of such a marriage could not claim to inherit as a legitimate child.

This decision seems to be based on the view that children of putative marriages are illegitimate. However whether a child is legitimate or not is a matter which is determined, not according to the Ordinance on inheritance, but according to the law of marriage. If according to that law, the issue of a putative marriage is deemed to be legitimate or may be legitimated by a court order, there is no question but that they would be entitled to the rights of inheritance available under the Ordinance, to legitimate children.

It has been stated earlier that the Roman Dutch law continues to be a source of law with regard to some aspects of marriage.[75] The principle of putative marriage may thus be considered applicable as part of the General law of marriage in Sri Lanka. In fact Weeramantry J. accepted that the principle applies in the case of **Fernando** *v* **Fernando.**[75A] It is not clear whether the facts of the case justify the conclusion that the marriage was a putative marriage according to Roman Dutch law principles;

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his lordship's comments may thus be merely obiter dicta. Nevertheless, this judicial opinion was based on the view that the Roman Dutch law on putative marriage is part of the General law and that children of such a marriage have a legal right to be considered legitimate. A court order will accordingly, be merely declaratory of their status, and cannot be a method of conferring legitimacy on an illegitimate child.

The concept of putative marriage protects the issue from the usual consequences of a void marriage. It is familiar to Civil law jurisdictions, and its essential justice has been accepted as a basis for the statutory reforms that have been introduced in a Common law country like England.[75B] It is clearly an aspect of the Roman Dutch law that should be retained in the modern law of Sri Lanka. A court order on the legitimacy of children should be viewed as merely declaratory of a status that the issue have acquired by operation of law.

Customary Law

1. Kandyan Law

The Kandyan Law Ordinance defines legitimacy for the purpose of intestate succession in terms of a marriage between parents "according to law."[75C] The concept of putative marriage would be contrary to the meaning of legitimacy in that statute. Besides the Kandyan Marriage and Divorce Act contains a specific provision on the validation in certain circumstances of a marriage which is void because the parties are below the prescribed age of marriage.[76] If the Roman Dutch law on putative marriage is considered applicable to Kandyan marriage, the doctrine will have to be introduced in a context where the Kandyan law has its own principles. In view of the specific provisions in the law on marriage, it appears artificial for a court to utilise the concept of "casus ommissus" to extend the application of the General law on this point. The principle of putative marriage should thus be introduced into Kandyan law through legislative reform.

2. Muslim Law

According to Islamic law the children of a void (batil) marriage are illegitimate, and the union cannot be legalised or the issue

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rendered legitimate. Children of an irregular (fasid) marriage are considered legitimate.[77] Since the Muslim Marriage and Divorce Act has introduced Islamic law on marriage and matters incidental to it, the General law concept of putative marriage cannot be extended to Muslim marriages except by special legislative reforms.

4. ADOPTION

Adoption may be effective to improve the legal status of the illegitimate, without conferring the status of legitimacy. This aspect will be discussed in the chapter on adoption.[78]

NOTES

1. Lee Roman Dutch Law op. cit. p. 32; Spiro Parent and Child, op. cit (1959 ed) 22; c.f. R.W. Leage, Roman Private Law (1961 ed.) p. 121, James, Child Law op· cit. p. 33 - 34; Kahn Freund (1960) 23 MLR 56.

1A. Olive Stone Family Law op. cit· p. 14.

2. C.O. 54/124 p. 13.

3. s. 31.

4. See authorities on the Roman Dutch Law cited in Note 1 supra;

5. ss. 27, 31.

6. See Bonser C.J. and Withers J in Karonchihamy *v* Angohamy (1896-1897) at p. 279, 285, Moncrief A.C.J. in the same case, (1904) at p. 11; Marriage Ord. 1847 s. 55.

7. See cases cited in note 32 in Chapter II supra.

8. See Karonchihamy *v* Angohamy, (1896-1897) Per Lawrie J. at p. 283, (1904), per de Sampayo A.J. at p. 19-27, and per Middleton J. at p. 13-16; Rabot *v* Silva (1905) at p. 90-91, 94.

9. Jayashamy *v* Abeysuriya (1912) per de Sampayo A.J. at p. 350; see also Wickramanayaka *v* Perera (1908) Perera *v* Davith Appuhamy (1909).

9A. See their report op. cit. p. 138-143.

10. Legitimacy Act (1970) ss. 3 and 4 repealing G.M.O. Ord. s. 21.

11. See G.M.O. Ord. ss. 21, 64; See also Chapter II supra.

11A. c.f. Aronegari *v* Vaigali (1881) 2 NLR 322; Kandiah *v* Tangamany (1953) Ratnammah *v* Rasiah (1947); Ponnamma *v.* Rajakulasingham (1948) 50 NLR 135 and Ch II supra notes 25 and 25 A.

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12. G.M.O. Ord. s. 40.

13. C.O. 54/386 p. 452.

13A. See Leage op. cit. p 121, on legitimation by imperial rescript; D. Lasok (1961) 10 ICLQ op. cit. at p. 126 states that this practice prevails in several European countries.

14. Lee Roman Dutch Law, op. cit. p. 32; Spiro op. cit. p. 22.

15. D. Pont (1959) 76 SALJp. 448 at 452.

16. Walter Perera, Laws of Ceylon (1913) p. 178.

17. Marriage Ord. (1847) s. 55.

18. Bonser C. J. and Withers J. in Karonchihamy *v* Angohamy (1896-1897).

19. Karonchihamy *v.* Angohamy (1904) at p. 29.

20. C.O. 57/12, C.O. 54/216, Governor's despatch p. 170-171.

21. C.O. 57/12 op. cit.

22. Karonchihamy *v* Angohamy (1904) at p. 28 - 29.

23. Tiagaraja *v.* Kurukkel (1923) per Schneider J. at p. 92.

24. Tambiah, Principles op. cit. p. 233 etc., and p. 246; Ch. II supra at note 27F to 28 B.

24A. The Constitution (1978), does not contain specific provisions relevant in this respect, see Ch. VII and VIII on the President and the Cabinet of Ministers.

25. c.f. R. W. Lee nd A. M. Honore, The South African Law of Property Family Relations and Succession (1954) Sec. 398; The Constitution (1978) Ch. XI especially s. 75.

26. Spiro op. cit. p. 29 - 30.

27. Legitimation by subsequent marriage does not have retrospective effect in Scotland according to the Legitimation (Scotland) Act 1968, discussed in (1968) Scottish Current Law Year Book op. cit. 4529. However legitimation has this effect in South Africa, see Spiro op. cit. p. 30.

28. Legitimacy Act s. 3 and the proviso.

28A. See their report op. cit. p. 138 - 143.

29. Hayley op. cit. p. 200.

30. Hayley op. cit. p. 174.

31. s. 32.

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32. Berwick D. J., C. O. 54/446 p. 193.

33. Governor Ward's Despatch. C. O. 54/338.

34. Kandyan Marriage Ord. (1859) s. 32.

35. s. 32.

35A. Nitinighanduwe op. cit. p. 14; Hayley op. cit. p. 170-172; F. Modder, Kandyan Law (1914) p. 390; Punchirala *v* Perera (1919) per de Sampayo J obiter at p. 146; Punchirala *v* Kandaswamy (1919) 6 CWR. 45.

36. s. 31.

37. Despatch No. 11 of 3.1.1859., C.O. 54/343 p. 124; Governor Robinson makes a similar comment in his Minute on the working of the Ordinance of 1859, C.O. 54/446, p. 192.

38. Governor Robinson. C.O. 54/446 op. cit. p. 190.

39. Kandyan Marriage Ord. (1870) s. 23.

40. Governor Robinson's Minute C.O. 54/446 op. cit. p. 192, 209; Papers No. 10, 12 on the working of the Ordinance of 1859. C.O. 54/446 op. cit.

41. s. 30; See also Punchirala *v* Kandaswamy.

42. Punchirala *v* Perera per de Sampayo J.at p. 146; K.M.D. Act s.7.

43. K. M. D. ss. 3 (1), 66; Punchirala *v* Kandaswamy, Punchirala *v* Perera.

44. K.M.D. Act s. 3 (1) ennuciates a right conferred by the Kandyan Marriage (Removal of Doubts) Ordinance (1909); See also Tambiah, Sinhala laws op. cit. p. 133.

45. Ukku *v* Kirihonda (1902) 6 NLR 104, especially per Moncrieff A.C.J at p. 107.

46. Kandyan Marriage Ord. (1870) s. 30, K.M.D. Act s. 7.

46A. See Chapter II supra.

47. Kandyan Law Ord. (1938) s. 14 proviso.

48. Tambiah, Sinhala Laws op. cit. p. 136, p. 256; report of Commission on Marriage and Divorce op. cit. sec. 135.

49. Legitimacy Act s· 2 (1) (b), 2 (2).

50. K.M.D. Act s. 3 (2).

50A. s. 14 and the proviso.

51. See the cases cited in note 11A. supra.

52. Fyzee op. cit. (1964 ed) p. 180 - 182; Tyabji op. cit. p. 207; see also Legitimacy. Ch. II supra at note 90.

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53. s. 31; c.f. s. 28

54. See Marriage Ord. (1863) s. 2; G.M.O. Ord. s. 64,

54A. See M.M.D. Act s. 80, and Legitimacy, Ch. II supra at note 90.

55. ss. 2 (1) (a), 2(2).

56. M.M.D. Act s. 2. s. 98 (1).

57. See Ch. II supra, and parental power over minors, Ch VI and VII infra

58. Foot Levy and Sander, op. cit. p. 24, 27, 33; D. Lasok (1968) 17 ICLQ 634 at p. 645.

58A. Olive Stone, Family Law op. cit. p. 19; Estate of Lund (1945) per Schauer J. cited in Foot Levy and Sander op. cit. p. 26.

58B. H. F. Jolowicz, Roman Foundations of Modern Law, (1961 ed.) p. 201; See also Leage op. cit. 120-122; W. W. Buckland, A Text Book of Roman Law, (1963 ed.) p. 128 - 130.

58C. D. Lasok, (1961) 10 I C L Q op. cit at P. 127 – 133, (1968) 17 I C L Q op. cit. at P. 646–648, and 650.

58D. See Lasok, (1961) 10 I C L Q op. cit. at p. 132.

58E. Lasok, (196I) 10 I C L Q op. cit at p. 130 – 131, (1968) 17 I C L Q op. cit at p. 648.

59. s. 21 (1), 21 (2) (a); see also Ranmenika *v* Kiri Banda (1947) and c. f. Karonchihamy *v* Registrar of Births (1964) 66 NLR 4 75.

60. Silva *v* Silva (1942)43 NLR 572; Fonseka *v* Perera (1957); Allis *v* Nandawathie (1971) 75 NLR 191; Piyasena *v* Kamalawathie (1973) 77 NLR 406; see also Births and Deaths Registration Act (1951) s. 57 introduced by amending Law No. 41 of 1975 which repealed s. 57 of the principal enacment.

61. Silva *v* Silva, Fonseka *v* Perera, Allis *v* Nandawathie; see Evidence Ord. s. 32 (5), and c.f. Wijesekere *v* Weliwitagoda (1958) 61 NLR 133.

62. Ranmenika *v* Kiri Banda at p. 218; see Walter Perera, Laws of Ceylon op. cit. p. 172; Evidence Ord. ss. 32(5), 50, and c.f. Wijesekere *v* Weliwitagoda which applied these sections.

63. Hinnihamine *v* Don Alfred (1938) 12 C.L.W. 47; Punchiappuhamy Wimalawathi (1952) 55 NLR 11; See duty of support, Ch. X infra.

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64. See custody of minors under the General Law, Ch. VI infra; c.f. In re Sithamparampillai (1919) 21 NLR 337.

65. s. 15 (c); c.f. s. 15(b).

66. See Yaso Menika *v* Biso Menika (1963) 67 NLR 71; c.f. Ukku Etena *v* Punchirala (1897) and Ranmenika *v* Kiri Banda, decided prior to the Kandyan Law Ordinance.

66A. Kalu *v* T. H. Silva (1947); Ch. VI, VII infra.

67. c.f. In re Sithamparampillai.

68. Fyzee op. cit. p. 183-187; Tyabji op. cit. p. 206-208.

68A. See Robert Percival, An account of the Island of Ceylon (1803) p. 176. Mohottiappu *v* Kiri Banda. (1923) 25 NLR 221; For recent legislative provisions reflecting this view see A. J. (Am) L (1975) ss. 628, 629, 606 (1) s. 611(1), now repealed, but re-enacted in Civil Proc. Code, ss. 614(1)(2), 615 by the Amending Law No. 20 of 1977. Maintenance (Amendment) Act No. 19 of 1972, amending Maintenance Ordinance (1889) s. 2.

69. See Lasok's articles, 1961 and 1968 ICLQ op. cit.; c.f. Olive Stone Family Law op. cit. p. 224.

69A. O. M. Stone (1966) 15 ICLQ 505 at 526, (1967) 30 MLR 552 at 558; and for a criticism of these views, Lasok (1968) ICLQ op. cit. p. 646 See also J. C. Hall 1972 (31) C.L.J. 248 at 256, that this concept of recognition is suggested as a suitable reform in England.

69B. J. Goldstein, A Freud, A. J. Solnit, Beyond the Best Interests of the Child (1973) p. 7-8.

70. See parental power, (customary laws) Ch. VI infra.

70A. Van der Keessel (V.D.K.) Theses, trans. C.A. Lorenz (1901) 64, 65; R. W. Lee (1954) Butterworth's SALR 36; P. J. Conradie (1947) 64 SALJ 382; Spiro op. cit. p. 21; Bam Bhaba 1947 (4) S.A.LR 798; c.f. Enger and Enger *v* Desai 1966(1) SALR 621.

70B. Lasok 1961 ICLQ op. cit. at p. 126 refers to a similar jurisdiction granted to the Swiss courts.

71. Lionel *v* Hepworth 1933 CPD 481; Potgieter *v*. Bellingan 1940 EDL 264.

72. Prinsloo *v* Prinsloo 1958(3) SALR 759; M *v* M 1962(2) SALR 114; c.f. Enger and Enger *v* Desai.

73. c.f. Potgieter *v* Bellingan; See Lee, note 70A supra.

73A. See Enger and Enger *v* Desai; H. R. Hahlo, Law of Husband and Wife (1969 ed.) p. 486-487; Spiro op. cit. p. 21, 29.

74. See Lee, Roman Dutch Law op. cit. and Spiro, op. cit, who do not in their books refer to a court order as a method of legitimation.

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74A. Legitimacy Act 1976, s. 1; the reform was originally introduced by the Legitimacy Act 1959, s. 2, following a recommendation that the concept of putative marriage in Scots Law should be introduced in England. See Bromley Family Law op. cit. (1976 ed.) p. 290; c.f. Olive Stone, Family Law op. cit p. 218 interpreting the statutory provision in a manner that conflicts with the concept of putative marriage.

74B. (1955) 57 NLR 567.

75. See Legitimation by act of the Sovereign, supra.

75A. (1968) 70 NLR 534 especially at p. 536.

75.B. See note 74A supra.

75C. s. 14.

76. See K.M.D. Act s. 4.

77. Fyzee op. cit. p. 106-109.

78. See Ch. IX infra and especially the legal consequences of adoption.

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CHAPTER V

PROVING THE PARENT-CHILD RELATIONSHIP

With the development of the science of serology blood tests can be used to prove parentage.[1] In the absence of sophisticated techniques or difficulties in obtaining such evidence, more traditional methods may have to be used to establish the fact that some individual is the natural parent of a child. We have seen that evidence of residence, acknowledgment, and reception into a family may be utilised to prove paternity,[1A] while the presumption of legitimacy is an extremely important principle in establishing the latter relationship.[2] The Sri Lanka law also contains statutory provisions for registration of births, while the status of persons as parent and child, may be decided by a court in legal proceedings. It is proposed to examine the statute law on registration of births, and to consider the extent to which these statutory provisions as well as judicial proceedings may be utilised to obtain a conclusive finding regarding the status of persons as parent and child.

1. REGISTRATION OF BIRTHS

The registers known as Thombos were used in the Dutch regime to maintain a record of the place of birth of an individual, and contained information on parentage.[3] The Regulation of 1822 which applied to marriages, appears to have been introduced by the British to remedy the defects and abuses in the system of registration which had been established by the Dutch and continued in the Maritime Provinces in the early period of British rule.[4] The Regulation provided for the registration of births of the local inhabitants of these Provinces. The next legislation on this subject was the Marriage Ordinance (1847) which did not merely deal with the law of marriage, having also been enacted to introduce a better law with regard to registration of birth. The first statute of uniform application in respect of all persons which dealt solely with the subject of registration of births and deaths was the Ordinance No. 18 of 1867. It applied throughout the country to persons governed by the General law, as well as the Customary law.[5]

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The Ordinance of 1867 while providing for registration of births made the certificate of registration or the birth certificate prima facie evidence of the birth.[6] The use of the phrase "prima facie" was clearly intended to indicate that the certificate was something more than mere evidence of the birth, even if it was not to be treated as conclusive evidence.[6A] Different views were expressed in the Supreme Court on the evidential value of the birth certificate. According to one view the birth certificate was prima facie evidence of the fact of birth, but not of the date of birth.[7] However in **Muthiah Chetty** *v* **de Silva**[8] Bonser C. J. in an obiter discussion of the point, rejected this view. He said that the fact of birth was evidenced by the existence of the person, and it was possible to conclude that the obvious intention of the legislation was to make the certificate prima facie evidence of the details of the event, such as the date of birth. The birth certificate subsequently came to be treated as prima facie evidence of the fact of birth, the date and place of birth and the identity of the person registering the birth.[9]

The present law on this subject is contained in the Births and Deaths Registration Act (1951),[10] which is a statute of general application throughout the island. The parents of a legitimate child and the mother of an illegitimate have a duty to give information of their child's birth within 42 days, to the District Registrar, who is required to register the birth and issue a certified copy of the entry. This certificate indicates among other things, the name and sex of the child, the date and place of birth, the name and race of the parents, and whether the parents were married.[11]

The latter information, revealing as it does on the face of a birth certificate that a child is illegitimate, is considered relevant because the statute attaches importance to the legal distinction between legitimate and illegitimate children. There are many provisions in the statute which reflect this policy. Thus both parents of a legitimate child are under a duty to give information of the birth to the appropriate District Registrar. It appears to be due to the presumption of legitimacy that the District Registrar is permitted by the statute to enter the name of a married man as the father of a child, upon information provided by a married woman or certain other specified persons.[12] If the Registrar has reason to doubt the legitimacy of a child whose birth has been

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or is sought to be registered, he is empowered to notice persons who may be prejudiced, to appear before him, and he may call for proof of the marriage.[13] By contrast only the mother of an illegitimate is under a duty to give information of its birth, while the District Registrar may not generally enter a man's name as father of an illegitimate child. He may do this on the order of a competent court, or at the joint request of the man and the mother, provided they both sign the register.[14] He may also make such an entry, when called upon to make an order on an application to amend a birth registration entry.[14A]

The birth certificate is referred to in the Act, as prima facie evidence of the birth,[15] and there has been no statutory clarification on the phrase that was the subject of judicial controversy even under the Births and Deaths Registration Ordinance. Recent judicial decisions have followed the earlier interpretation of the phrase.[16] Accordingly, entries with regard to the identity of the mother and the father are viewed differently from other entries, and are not considered prima facie evidence. However a declaration of parentage made in a birth certificate by a man or a woman may have a geneological value, as relevant evidence on their relationship to the child.[17]

Maternity may be proved as a fact, by evidence other than a birth certificate.[18] Nevertheless this certificate would be specially useful, if it were treated as prima facie evidence of the identity of the mother. Since the identity of the mother is as much a part of the event, as the place and date of birth, there is no reason why the birth certificate should not be considered prima facie evidence of the identity of the mother. Production of the birth certificate should therefore be accepted as prima facie evidence of the relationship between the mother and the child. Since an entry on paternity is not considered prima facie evidence, Sri Lanka courts take the view that the production of the birth certificate will not be of use in determining the relationship of father and child.[19] Thus it has been decided that the presumption of legitimacy applies despite the fact that there is an entry in a birth certificate indicating that a person other than the husband is the father of a married woman's child.[20] Even if the husband has not taken steps to rectify the birth register, he may challenge it in other proceedings by simply invoking the presumption of legitimacy.[21]

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It has also been decided that the presumption of legitimacy rather than an entry in a birth certificate raises the inference that a husband of a married woman is the father of her child.[22]

The statutory procedure for registration of births appears to have been introduced in order to maintain an accurate record of births, and the Sri Lanka courts have considered this the primary purpose of the legislation. Since the identity of the father is not revealed by the fact of birth, there is some justification for exercising caution in accepting the entries on paternity as prima facie evidence of the relationship between a man and a child. However there are adequate safeguards in the Act for ensuring that the name of the putative father cannot be entered in the birth certificate of an illegitimate child, against his will. Consequently there is no reason why an acknowledgment of paternity in a birth certificate by a man should not be considered prima facie evidence of the relationship between himself and the child. Such an acknowledgment of paternity should also be available as evidence of no access between husband and wife, which can be used to rebut the presumption of legitimacy. Particularly where the spouses are dead, it seems artificial to follow the view expressed in **Fonseka** *v* **Perera** [23] that an acknowledgment of paternity by a third party in a birth certificate, cannot rebut the presumption that the husband is the father of a married woman's child. The courts in England have taken the view that recognition by the putative father after the birth, is strong evidence that the husband could not have been the father. An acknowledgment of paternity in a birth certificate by a man who is not married to the mother of a child, is also considered prima facie evidence of paternity. [23A]

If an entry on the paternity of an illegitimate child is made by the Registrar on the order of a competent court,[23B] the entry should be conclusive evidence of paternity. A recent amendment to the Births and Deaths Registration Act limits the significance of judicial proceedings under the Act, as a device for rectification of entries on paternity in a birth certificate. Court proceedings are now relevant, mainly when an appeal is lodged to the courts against an order of the Registrar General, on an application to amend a birth registration entry. The order of a competent court will therefore refer to an order on paternity in a duly constituted action to determine that issue.[24] Clearly such a court

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order will be preceded by a judicial inquiry on paternity. In these circumstances, the entry made by the Registrar should be treated as something more than just *prima facie* evidence of paternity.

The birth certificate is a document which is required for many purposes. Under the present law, it reveals whether the parents of an individual were married or not, and thus surfaces his illegitimacy even though his legal status is not conclusively determined by the information on parentage in the certificate. This situation can be avoided by introducing the device of the shortened birth certificate, familiar to English law.[24A] The Registrar should be able to issue a birth certificate that does not contain details regarding parentage, so that there will be no disclosure of the apparant status of illegitimacy, in this document.

2. JUDICIAL DETERMINATION OF PARENTAGE

The legal status of persons as parent and child and especially the question of paternity may arise for determination in a court of law. A finding by the court on the issue of paternity will bind the parties to a legal proceeding, as it falls within the scope of the Sri Lanka law on *res judicata.* However, it is only if a judicial determination of paternity is deemed a judgment *in rem* which binds all persons, that it will be considered a conclusive declaration on the status of persons as parent and child.[25]

(*a*) *The Action for Declaration of Status*

The General Law

The Civil Procedure Code No. 2 of 1889, made provision for a decree of a civil court which may, without affording any substantive relief or remedy, declare a right or status.[26] The Code recognised the device of the declaratory judgment, which though unfamiliar to the Common law as a method of obtaining a binding judicial declaration on the status of paternity,[27] is used in Civil law countries for this purpose.[28] In systems which, unlike the Common law, concern themselves with the subject of ascertaining status, the declaratory judgment is considered accepted legal machinery for determining status. The device of the declaratory judgment enables a court to make pronouncements on the legal status of paternity, though it can also be used to obtain a declaration of maternity.

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The question of status and filiation could be tried and determined by a court, according to the Roman Dutch law.[29] Nevertheless, since the Sri Lanka law on civil procedure has been influenced by the English law the courts have adopted a conservative approach to the remedy. The declaratory action has been comparatively unexplored by litigants, and not generally favoured by the courts as a method of obtaining a judicial decree on status. Thus in an early case, **Miwonis** *v.* **Menika,**[30] the Supreme Court considered whether an action for declaration of non paternity was available. The action was combined with a claim in respect of non-liability to maintain a child. Since the action for declaration of status was combined with a claim for substantive relief, the Supreme Court refused to concede that such an action could be instituted according to the current law on civil procedure. Six years later, **in re Josephine Ratnayaka,**[31] de Sampayo, J. with Schneider, J. agreeing decided that a court had no jurisdiction to grant an "extraordinary and entirely misconceived" application by a wife for a declaration that her husband was dead.

It was as recently as in 1969, that the Supreme Court, in the case of **Tiagaraja** *v* **Karthigesu** [32] reviewed the scope of the declaratory judgment and held that the provision in the Civil Procedure Code could be used to obtain a declaration in respect of a family relationship. The court decided that a decree could be obtained by a person which declared that he or she was not the spouse of another. This judgment is therefore authority for the proposition that a judicial declaration on the status of persons as parent and child can be obtained by a duly constituted civil action, a view supported by dicta in the case of **Mallawa** *v* **Gunasekera.** [33]

The declaratory action was interpreted in **Tiagaraja** *v* **Karthigesu** in the light of the interpretation of the declaratory judgment in England, and this restricts the scope of the remedy. [33A] The liberal approach adopted to it in the case of **Asiz** *v* **Thondaman** [33B] is more pertinent in the modern law of Sri Lanka. Since the practice of declaring status is familiar to the Roman Dutch law, and the local legislation specifically empowers a court to declare a status, there is no reason why the declaratory action in Sri Lanka should be subject to the restrictions recognised in the English law on the scope of the declaratory judgment. In any event the fact that a person had a right to obtain a declaration on status by

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instituting a legal action, appears to have been recognised in the Administration of justice (Amendment) Law No 25 of 1975 that repealed the Civil Procedure Code. The provision contained in this statute enabled a civil court to "declare a right or status whether existing or contingent, and whether or not any substantive relief or remedy is afforded."[34] A declaratory judgment could have therefore been used to obtain a declaration on the status of persons as parent and child, and the decree pronounced in a civil action, even where the plaintiff was claiming some substantive legal relief, or remedy.

In **Perumal** *v* **Karumegam,** Samarawickreme J. expressed the view that there is no provision in Sri Lanka for instituting an action for declaration of non paternity in a civil court.[35] His lordship's opinion appears to have been based on the view that a civil action for maintenance is not available in Sri Lanka. This is a controversial question.[36] Our law on civil procedure under the Administration of Justice (Amendment) Law in any case, clearly permitted a civil court to pronounce a decree declaratory of status in a duly constituted action, even without affording any substantive relief. An action for declaration of non-paternity could therefore be instituted independant of a civil action for maintenance. Even though the declaratory judgment is used in some countries to obtain a declaration of maternity or the paternity of an illegitimate child,[37] the Sri Lanka law on civil procedure was flexible, and enabled a court to declare that a person was not the father or mother of a child. However, since the law permitted a claim for substantive relief to be combined with an application for a declaratory decree, it seemed possible for a person seeking a declaration on non paternity in a civil action, to combine this with a claim for non-liability to fulfil the statutory obligation of support imposed on a father by the Maintenance Ordinance No. 19 of 1889.[38]

The action for declaration of status can also be used to obtain a declaration that a person is the legitimate or illegitimate child of his parents. The child of a putative marriage who is deemed legitimate, or a person who claims to be legitimated by the subsequent marriage of his parents may wish to obtain a declaration of legitimacy in a duly constituted action, even though

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legitimacy may be conferred by operation of law. A binding judicial pronouncement may be useful to him, if there has been no litigation regarding the parents' marriage.[39] A child whose legitimacy has been challenged incidentally, in legal proceedings may also find it useful to obtain a judicial pronouncement that he is the legitimate child of his parents. Actions for declaration of legitimacy may therefore be instituted in an ordinary civil action, and when the courts have been granted jurisdiction to declare a status, they have the power to pronounce a declaration of illegitimacy if they decide to dismiss the action.[40]

The recent repeal of the Administration of Justice (Amendment) Law, and the application of the original provision in the Civil Procedure Code,[40A], may now be used to interpret this remedy restrictively. The courts should avoid such an approach as the declaratory action affords important legal relief. The fact that today, the Family court is granted sole and exclusive jurisdiction in regard to "claims in respect of declaration of legitimacy and illegitimacy "[40B] justifies the adoption of a liberal approach. The jurisdiction of a civil court, to grant a declaratory judgment is limited by certain considerations. It will not be able to pronounce such a decree if there is already a judgment of a court of law, on status.[41] In order to assess the significance of the action for declaration of status as a method of ascertaining the parent-child relationship, it is necessary to examine whether there are other legal proceedings in which a binding judicial finding on the status of persons as parent and child can be obtained.

According to the Evidence Ordinance, a final judgment order or decree of a competent court, in the exercise of probate or matrimonial jurisdiction, which confers upon or takes away from a person any legal character, or which declares a person entitled to any such character, not as against any specified person but absolutely, is conclusive proof of the accrual of a legal character it conferred or declared a person to be entitled to, or the termination of any legal character.[42] Incidental findings on parentage in legal proceedings will not prevent the issue being readjudicated in a substantive action.[42A] Judgments which fall within the scope of this provision in the Evidence Ordinance however will clearly preclude an action for declaration of status.

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There is judicial authority in support of the view that the decree of a matrimonial court, (today, the Family Court) only takes away the legal status which had accrued to spouses as husband and wife, and that it does not confer a legal character.[43] Consequently the decree of the court, exercising matrimonial jurisdiction is conclusive and binding on all persons in so far as it is a determination that the spouses have ceased to be husband and wife.[44] If the court dismisses an action for divorce or nullity, it is not possible therefore to argue that there is a final judgment order or decree that confirms the existence of a valid marriage and thus confers, the status of marriage,[45] It follows that a judicial finding on the existence of a parent-child relationship in such a matrimonial action, though binding on the parties, will be treated as an incidental finding which is not a conclusive determination of parentage. It will have no binding effect on persons who are not parties to the action. Since there appears to be no procedure for making a child a party to a matrimonial action,[46] a determination in the course of a matrimonial action, that a child is not the child of the husband, will not bind the child or be conclusive as to his status.[47]

The only way in which the finding on parentage can be effective as a determination on status under the present procedure, is if an action for declaration of legitimacy can be combined with an action for dissolution or annulment of marriage. If such a combined action were possible, it could be argued that at least the final decree or order of the matrimonial court which declares that the child is not legitimate, takes away the legal status of legitimacy and paternity, and is thus a judgment *in rem* on this issue, according to the current interpretation of the provision in the Evidence Ordinance. The combining of such an action with the matrimonial action will enable the child to be joined as a party, and ensure representation of his interests in court. Representation of a minor is required in the law of Sri Lanka in respect of civil actions or applications in court by or against minors. When the minor is represented in a legal action, the court order will bind him.[48]

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The Sri Lanka law on civil procedure enables a matrimonial court to make orders on the custody, maintenance and education of minor children.[49] However there is no specific provision requiring independent representation on their behalf. Nor is there any provision indicating that such orders must be preceded by an order on the legitimacy of a child, where paternity is disputed. Consequently the courts have expressed divergent views on the need for an order on legitimacy. It was suggested in one case that a declaration of legitimacy may be necessary to decide which of the spouses is entitled to the custody of the child.[50] A contrary opinion is expressed in another decision where the judge was of the view that a court can make an order on custody in a matrimonial action, only in respect of legitimate children.[52] The statutory provisions on orders for custody and maintenance in matrimonial actions indicate that it is not imperative for the court to make such orders. It is therefore difficult to interpret these provisions as requiring a prior order on the legitimacy of a minor child. Reported decisions in fact reveal that a matrimonial court does not always make an order regarding the custody of children.[51] This appears to be a matter entirely within the court's discretion so that the issue of legal custody can be even settled by the spouses out of court. It is doubtful whether the establishment of a special Family Court to handle these matters will stimulate a fresh approach, when the substantive law has not been changed. The Sri Lanka law on civil procedure too does not seem to provide for joining a minor as a party to a matrimonial action when the issue of custody, maintenance or education arises. Besides, the introduction of a statutory provision enabling a third party to be added as co-defendant in an action for divorce on the ground of adultery,[53] suggests that in the absence of specific provision in the law on civil procedure, a child cannot be joined as a party in a matrimonial action between spouses. As a judicial finding on the parent-child relationship binds only the parties, the judgment in the matrimonial action in the present law will not prevent the child from instituting a civil action for declaration of status. The parents will not be able to bring such an action as they are bound by the judgment in the matrimonial action.

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Testamentary Proceedings

The probate jurisdiction of a court is considered to include testamentary jurisdiction.[54] The Sri Lanka courts reveal an, unwillingness to treat an incidental declaration or finding on parentage in testamentary proceedings a conclusive judgment order or decree on status within the meaning of the Evidence Ordinance. The judgment of a court in a testamentary action is considered a judgment, *in rem*, only in so far as it confers the legal character of executor or administrator.[55] A declaration on parentage will therefore bind only the parties to the testamentary proceedings. A finding on parentage or legitimacy in these, proceedings should not therefore prevent a civil court exercising its jurisdiction to grant a declaratory decree, provided the parent or child instituting the action for declaration of status has not been a party to the testamentary action.

Maintenance Proceedings

Since the availability of a civil action for maintenance is a controversial point, the action for support of a minor under the Maintenance Ordinance[56] is the proceeding in which a court will be generally required to determine the existence of a parent-child relationship. A Magistrate's court that exercised summary jurisdiction under the Maintenance Ordinance in the past, or the recently established Family Court is required to determine and enforce the father's statutory obligation of support, speedily . The purpose of maintenance proceedings is to determine the natural filiation of the father to his legitimate or illegitimate children, for the sole purpose of enforcing his duty of support. Maintenance, proceedings therefore involve a determination of the status of paternity, though the order of court is not considered a judgment *in rem* that is binding on all persons.

Under the Administration of Justice Law a finding on paternity in a maintenance action clearly did not bind even the parties to it in any subsequent legal proceeding, if the magistrates court lacked concurrent jurisdiction to try the later proceedings.[57] Thus, while such a finding could bind the parties in any later action under the Maintenance Ordinance,[58] it could not have that effect, in a subsequent matrimonial action.[59] Though the binding quality of a maintenance order was raised but not decided in

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Miwonis *v* **Menika,** the more recent decision of **Perumal** *v* **Karumegam,** accepted that the finding on paternity in maintenance proceedings did not prevent the issue being readjudicated in a subsequent matrimonial action. The latter case revealed that a man who had been ordered to pay maintenance as the father of a legitimate child, in proceedings before a Magistrate, could obtain a subsequent decree of nullity on the ground of ante-nuptial stuprum.[59A] And yet, such a ground affects the paternity of the child, for it is based upon the premise that, unknown to the husband, the wife was pregnant by another man, at the time of marriage.

The opinion in **Perumal** *v.* **Karumegam** was consistent with the law on *res judicata* as set out above. Yet at the time the case was decided the concurrent jurisdiction of both courts was not an accepted requirement for the application of the Civil Procedure Code provisions on *res judicata.*[59B] The latter provisions have been re-instated with the repeal of the Administration of Justice (Amendment) Law provisions on *res judicata.* This affords a basis for questioning the approach taken in **Perumal's** case. The issue appears to have been resolved in any case with the sole and exclusive jurisdiction granted to Family Courts. both in regard to maintenance cases and matrimonial disputes.[59C]

The Maintenance Ordinance confers the right of maintenance on the minor child himself. Thus while the application for maintenance is usually made by the mother or a relative, the minor is the real party to these proceedings. Maintenance proceedings under the Ordinance however do not attract the provisions on representation of the minor's interests.[60] Besides the presumption of legitimacy may be rebutted in these proceedings even in circumstances where either the husband of a married woman, or the putative father, are not parties to the proceeding. As in the case of adult parties, the order of the Magistrate on paternity also did not bind the child in subsequent legal proceedings in which the Magistrate's Court had no jurisdiction. The legal position appears to be different now because the Family Court has sole and exclusive jurisdiction in matrimonial and maintenance proceedings, and in a wide range of other matters where the issue of paternity will surface. Yet if the child is not a party to maintenance proceedings, the order of the Family Court in these proceedings cannot bind him in later proceedings, even if it binds the parties themselves, in subsequent legal proceedings.

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Maintenance proceedings under the Ordinance are viewed in the present law merely as a speedy device for enforcing the father's obligation of support. Thus, even if the presumption of legitimacy is rebutted in these proceedings, the finding of illegitimacy may not as we have seen bind the husband, or the putative father or the child in subsequent legal proceedings in a civil court. It follows that they may even institute an action on declaration of status, despite the fact that an order on paternity has been made in the maintenance proceedings.

The declaratory judgment thus provides the legal machinery for obtaining a judicial determination of the parent-child relationship. However, it would appear that a declaratory decree will not operate as a judgment *in rem*, within the meaning of the language used in the Evidence Ordinance. While the question of parentage can be adjudicated in different types of legal proceedings without resulting in a binding order, the declaratory judgment itself when obtained, appears to bind only the parties to the action.[61]

The declaratory judgment is used in countries where it is an accepted type of legal procedure, as a device for obtaining a judgment in rem regarding the important subject of legal status.[62] There is every reason why our law should be amended to give the judgment this legal effect. Liberalisation of the law with regard to the status of illegitimacy, lends special meaning to the action for declaration of status as a method of conclusively determining the relationship between parents and an illegitimate child. However even the existing procedure for obtaining declarations on non paternity and illegitimacy justifies an amendment that will enable parties to obtain a judicial finding that conclusively declares their status.

Under the present procedure in Sri Lanka, casual bastardisation occurs in legal proceedings which are basically ineffective to challenge the legal status of a child. Thus the presumption of legitimacy may be rebutted in maintenance proceedings or in a matrimonial action, and the social status of the child will be destroyed. Besides, when the presumption is rebutted in these proceedings, the minor child will lose his legal right to maintenance as the legitimate offspring of a man who is still deemed to be his father for every other purpose, the status of legitimacy

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itself remaining unchanged. For this very reason an important aspect of the minor's legal status is clearly connected with a matrimonial or maintenance action. Yet there is no provision for independent representation of his interests. Since a judicial finding on non-paternity is not binding on a child who is not a party to matrimonial proceedings there is even room for a further anomaly. It is possible that a husband will be required to continue to pay maintenance for a minor under an order obtained in maintenance proceedings prior to a matrimonial action.[63] By contrast, if the order on paternity in the matrimonial action is binding on the child, a man may refer to it and obtain a cancellation of a previous order of support in the maintenance proceedings, or claim that there has been a change of status which automatically relieves him from the liability to maintain the child.[63A]

If the present law is amended so as to permit a court to pronounce a declaratory judgment regarding the status of persons as parent and child in matrimonial and maintenance proceedings, there will be no room for casual bastardisation. The presumption of legitimacy will be rebutted in circumstances where the spouses, the putative father and the child are necessary parties who are independently represented. The decision of the court will clearly bind these parties but the usefulness of a decree will be enhanced if it is also considered a judgment *in rem*. Provision for obtaining such a judgment, will prevent the present duplication of proceedings, and there will be no room for conflicting orders on legitimacy in different legal forums. If the declaratory decree obtained in an ordinary civil action is also considered a judgment *in rem*, it will provide the legal machinery for obtaining conclusive orders on the relationship between parent and child, in circumstances where there has been no matrimonial dispute between the parent, or a support action.

Several European countries with Civil law systems enable the court deciding the maintenance action to make a declaration on the status of the putative father and the illegitimate, that will bind all persons as a judgment *in rem*.[64] Since the present law of Sri Lanka recognises, unlike the English law, the device of the declaratory judgment, a similar reform should be introduced into maintenance proceedings. The practice in the magistrate's courts, did not permit such a procedure, because the action

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under the Maintenance Ordinance was derived from the English legal values of that time.[64A] However in even the modern English law, an order on paternity in affiliation proceedings is deemed prima facie and rebuttable evidence of paternity in subsequent civil proceedings.[64B] The desirability of combining an action for declaration of status with the matrimonial action has also been raised in other jurisdiction.[65] Apart from the usefulness of this action in preventing casual bastardisation of children in divorce proceedings, it has a special value in proceedings for nullity in respect of a putative marriage. Children of a putative marriage are deemed legitimate by operation of law, and a declaration is not relevant to the issue of custody which is decided solely on the basis of the child's interests. A declaration will however obviate the possibility that the status of the children will be challenged in subsequent legal proceedings.

If a declaratory judgment on status can be obtained in maintenance proceedings, a minor can also be brought in as a party, and will be represented in court by a guardian-ad-litem. An amendment to the present law which will enable a child to be joined as a party to a matrimonial action, will equally ensure independent representation of a minor's interests. We have seen that under the law on civil procedure there is provision for representation of a minor who is a plaintiff or defendant in any civil action.[66] The Adoption of Children Ordinance No. 24 of 1941 provides for the appointment of a guardian ad litem to watch over the interests of a minor in adoption proceedings.[67] However there is in general no other statutory provision for independent representation of a minor whose interests may be in issue, and who is not a party to a legal action. The Sri Lanka courts are deemed to be Upper Guardian of minors, and they have exercised the inherent jurisdiction to protect their interests, by requiring that minors be made respondents to applications for curatorship, or for court consent to an alienation of their property.[68] However the exercise of the court's jurisdiction as Upper Guardian appears to be subject to the rules of procedure with regard to joinder of parties and causes of action. Consequently in the present law, a court may not be able to bring a minor in as a party to proceedings bearing on his legal status, if the exercise of the inherent jurisdiction to protect the minors welfare is inhibited by the procedural rules with regard to joinder.[68A]

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The Judicature Act (1978) now gives the Court of Appeal the power to transfer proceedings filed in different Family Courts to one such court, while a Family Court in which the same matter or a matter between the same parties is being litigated in several proceedings, can consolidate them into one proceeding.[68B] It is not clear to what extent these provisions can be used to combine declaratory actions with maintenance or matrimonial proceedings.

Customary Law

The action for declaration of status being an aspect of the law on civil procedure that applies to all persons, it is available to persons governed by the Customary laws. However, it must be emphasised that matrimonial proceedings in respect of persons married under Kandyan law and Muslim law are completely different from the equivalent proceedings under the General law. Besides maintenance proceedings in respect of Muslims are instituted in the Quazi courts. Consequently, the legal position under the Customary law of the Kandyans and Muslims deserves special consideration.

1. Kandyan Law

The action for dissolution of a Kandyan marriage is not instituted in a court of law. An application for divorce is made to an administrative official known as the District Registrar, and this official may, at his discreation, order the husband to pay maintenance for his children.[69] The District Registrar's order, once it is issued, becomes and has the effect of an order of a competent court, and can be enforced just like an order on maintenance issued by a District Court in a matrimonial action.[70]

The view that the District Registrar can make an order on maintenance only in respect of a child whose paternity has been admitted by the husband, has been expressed in the Supreme Court.[71] A provision requiring the official recording the dissolution of marriage to state that the parties had "according to their representation children from the marriage" which was used to support this view,[72] is not found in the present Kandyan Marriage and Divorce Act. However the very non-judicial nature of the proceedings before the District Registrar, indicates that the legislature could not have intended him to resolve a dispute on paternity.

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The Kandyan Marriage and Divorce Act, now confers jurisdiction on a District Court, in respect of maintenance orders issued by the District Registrar, which is comparable to that exercised by the District Court in matrimonial actions under the General law. The District Court may discharge, modify, or subsequently revive a District Registrar's order on maintainance.[73] It would thus appear that the husband may subsequently challenge the legitimacy of a child in respect of whom he has been ordered to pay maintenance. The District Court, will then be required to determine paternity, and may have an opportunity to pronounce a declaratory judgment. Since the procedure for Kandyan divorce is informal, it may be argued that the District Court, when it exercises the jurisdiction conferred by the Kandyan Marriage and Divorce Act, has the power to make the child a party to the proceedings, without being limited by the statutory provisions on joinder of causes of action or parties that apply to matrimonial actions under the General law. If the child is a party to the proceedings in the District Court, he must be reperesented. The declaratory order of the District Court on paternity and legitimacy will then bind both the spouses and the child. It may even be possible to argue that the District Court order on non paternity or illegitimacy is a judgment in rem, within the meaning of the existing provisions in the Evidence Ordinance on judgments *in rem.* If this analysis is adopted, the present procedure regarding Kandyan divorce enables the District Court to make an order that is a conclusive determination on the question of paternity.

As there is no special provision for the annulment of a Kandyan marriage in the Kandyan Marriage and Divorce Act, it seems possible to initiate proceedings for nullity by an ordinary action in the District Court. Though the special statutory provisions governing the procedure in a matrimonial action in the Civil Procedure Code will not apply to an action for annulment of a Kandyan Marriage,[74] the provisions on joinder that apply to civil actions will continue to be relevent. Since the basis of a decree for annulment of a Kandyan marriage will be that the marriage is void, and the doctrine of putative marriage is inapplicable, the court will not in any case be usually required to make a declaration of legitimacy.

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Maintenance and testamentary proceedings in respect of Kandyans are no different to those that govern persons subject to the General law.

2. Muslim Law

Under the present law it is the Quazi Court that has exclusive jurisdiction regarding claims for maintenance in respect of legitimate and illegitimate issue of Muslim parents.[75] Before the introduction of the Quazi Courts, the ordinary courts had jurisdication to administer Muslim law.[76] Consequently the District Court had the power to consider applications for matrimonial relief even by Muslims, under the rules of procedure in the Civil Procedure Code.[77] In the present law, the Quazi Court has exclusive jurisdiction in respect of proceedings for divorce or nullity.[78] The ordinary courts of law will not therefore have an opportunity to determine the issue of paternity or legitimacy in matrimonial or maintenance proceedings.

The procedure in the Quazi Courts is governed by regulations to be made by the appropriate Minister, or by the provisions of the Muslim Marriage and Divorce Act.[79] In cases involving proof of paternity, it would appear that the Quazi Courts consider the principles of the General law merely as rules of guidance.[80] While these courts are required to make the same vital decisions with regard to status, no provisions exist for representation on behalf of minors or protection of their interests. It is not clear whether the findings on these important issues by the Quazi Courts, are considered binding in civil proceedings instituted in the ordinary courts of law. Since the Quazi Court is a recognised judicial tribunal in our court system, in principle, these findings should fall within the ordinary rules on the binding nature of judgments in civil proceedings.

(*b*) *Proceedings for Rectification of Birth Registers*

Until the Births and Deaths Registration Act was amended recently, an application could be made to the District Court for the purpose of rectifying an entry made with regard to paternity, at the registration of a birth.[81] The District Court was required to hold an inquiry before making its order. It was also required to notice interested persons, though the court had a discretion in deciding who these persons were, and was free to make any order that "the justice of the case required."[82]

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The proceedings in the District Court, were not considered by the legislature to be a device for obtaining a conclusive finding on paternity. The birth certificate, as we have seen, is deemed to be only prima facie evidence of the birth, while an entry regarding paternity is denied even that significance. However the summary procedure involved in the judicial inquiry in the District Court, as well as the wide discretion of the court, casts some doubt on the judicial view expressed obiter in a case interpreting an earlier Ordinance, No 1 of 1895, and more recently in **Ratnayaka** *v* **Ratnawathie.**[83] These cases indicate that the District Court proceedings for rectification can be utilised, only where the paternity of a child has been established by an order of another court, or it has been admitted, or not disputed.

If the function of the District Court in rectification proceedings was to merely act as a conduit for giving effect to the order of another court, or to authorise rectification when paternity was not disputed, it would have been unnecessary to require this Court to have a due inquiry, or to give it jurisdiction to notice the officials who registered the births and other interested persons. Nor would it have been necessary to permit the court to make an order "in terms of the application or otherwise, as the justice of the case requires." The determination on paternity by a Magistrate in a maintenance action, though described in **Ratnayaka** *v.* **Ratnawathie** as a finding on paternity by "a competent court" within the meaning of the Act, was not even *res judicata* between the parties, in later proceedings before the District Court.[84] Rectification proceedings under the Births and Deaths Registration Act were basically no different, for they were not effective to, challenge the legal status of a child.[84A] When therefore the Act permitted a Registrar to enter the name of a person as the father of an illegitimate child, upon the order of a "competent court", it would seem to have been referring not merely to incidental orders on paternity in other legal proceedings, but to a situation where the Registrar would have to give effect to the order of the District Court made in rectification proceedings under the statute.[85]

The District Court proceedings envisaged by the Act, did not, as pointed out in **Ratnayaka** *v* **Ratnawathie,** provide adequate safeguards for the determination of an important issue such as paternity.[86] This is precisely why the order of the District Court

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was not considered a conclusive legal finding on paternity, and it was unnecessary for the child to be represented.[87] Even though the issue of paternity was not resolved as in a properly constituted action, the District Court nevertheless engaged in a legal inquiry into this question, in the rectification proceedings. Thus while these proceedings have been utilised where there has been an admission of paternity[88] or where a denial of paternity was not disputed,[89] it has been possible in the past to rebut the important presumption of legitimacy in rectification proceedings.[90] There was some doubt whether after the rebuttal of the presumption, the name of the third party who appeared to be the father of the child on the evidence before the District Court, could be inserted in the register on the order of the court.[91] Since the District Court had a wide discretion in rectification proceedings, and could reject applications for rectification on grounds such as the fact that the insertion of a married man's name as father of an illegitimate may prejudice legitimates,[92] the jurisdiction to order a rectification of a birth register so as to enter the name of a third party as the father of a married woman's child, appears to have been conceded.

The recent amendments to the Act, take away the original jurisdiction of the District Court in proceedings for rectification of entries regarding the name, rank or profession of the father. The District Court is conferred with merely an appellate jurisdiction, which is now exercised exclusively by the Family Court. The original jurisdiction of the District Court (now the Family Court) is confined to rectification of entries regarding the race of the father. Applications for rectification of other entries may be initiated only before the Registrar-General.[93] It may be argued that as an administrative official he cannot order rectification where there is a dispute with regard to paternity,[94] though he may alter or amend an original entry to conform with the status of legitimacy acquired by an illegitimate, when his parents contracted a marriage after his birth.[95] Under the earlier law, while the legal status of a legitimate could not be destroyed in rectification proceedings, a birth register could be rectified on the orders of the court, so as to reveal that he was not the child of a lawful union between his parents. This unsatisfactory situation has now been changed, for it seems clear that the Registerar-General's power to rectify the register does not extend to an inquiry into the legal

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issue of legitimacy. The provision in the Act which enables the official registering the birth to enter the name of the father of an illegitimate on the "order of a competent court"—can now be interpreted to refer only to an order on parternity in a duly constituted action to determine that issue. An incidental finding on paternity in judicial procceedings could have been considered an "order of a competent court" for the purposes of the Act, when rectification proceedings could be initiated in the District Court.[96] If the order on paternity in rectification proceedings could be considered an "order of a competent court", there was no reason why an incidental finding on paternity by another court should be denied this significance. With the abolition of the wide original jurisdiction of the courts in rectification proceedings in regard to paternity under the Act, it is possible to give the phrase "order of a competent court" its logical meaning, and consider it as referring to a conclusive adjudication on paternity.

NOTES

1. See presumption of legitimacy, Chapter III supra; Peterson *v* Kruger 1975 (4) SALR 171 where tests were used to establish the identity of parents who had been given the wrong child by hospital authorities.

1A. See note 62. Chapter IV, supra; providing information regarding the birth of an illegitimate, was considered an act of aknowledgment, that was adequate proof of paternity, in Ranmenika *v* Kiri Banda (1947). But see Yaso Menika *v* Biso Menika (1963) where the court took a different view, since the Kandyan Law Ordinance made certain rights of succession dependant on the intestate being registered as the father of the illegitimate.

2. See Chapter III supra.

3. See T.E. Gooneratne, Marriage and Divorce Commission Rep. op. cit. App. A. p. 168.

4. The preamble to Regulation No. 9 of 1822.

5. Ukku Etena *v* Punchirala (1897); the Ordinance was followed by the Births and Deaths Registration Ord. No. 1 of 1895, which also applied to all persons in the country, see Cader Lebbe *v* Don Issan (1900) 4 NLR 98, Ranmenika *v* Kiri Banda Supra.

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6. s.27

6A. The distinction is clearly brought out in the English case of Jackson *v* Jackson and Pavan 1964 P. 25 which interprets a statutory provision on the evidential value of a birth certificate.

7. Letchiman Chetty *v* Perera (1881) 4 SCC 80.

8. (1895) 1 NLR 358; See also Ratwatte *v* Hewavitarane 3 Bala Rep. 26; Silva *v* Weiman (1894) 3 SCR 82.

9. See Silva *v* Silva (1942) 43 NLR 572.

10. No. 17 as amended by the Births Deaths and Marriages (Amendment) Law No. 41 of 1975. The Act was preceded by the Births and Deaths Registration Ord. (1895), note 5 supra.

11. See Forms A and D in the Schedule to the Act; see also ss. 10 (1) 15, 21 (1) (2), 23, 24.

12. ss. 15, 21, 22.

13. s. 22.

14. s. 15 ss. 21 (1) (2) (b) 21 (3) 21 (2) (a); Ranmenika *v* Kiri Banda Supra.

14A. s. 27 A (1) (a) (b) 27 (3) 27 (8), introduced by Amending Law No 41 of 1975.

15. s. 56 and also s. 57, introduced by amendng Law No. 41 of 1975, which repealed s. 57 of the principal enactment.

16. Fonseka *v* Perera (1957); Allis *v* Nandawathie (1971); Piyasena *v* Kamalawathie (1973).

17. Evidence Ordinance s. 32 (5); Fonseka *v* Perera; Allis *v* Nandawathie.

18. See Piyasena *v* Kamalawathie; c. f. Allis *v* Nandawathie.

19. See Piysena *v* Kamalawathie; c. f. Allis *v* Nandawathie, for the opinion that the evidence in a birth certificate with regard to paternity, can have a geneological value.

20. Fonseka *v* Perera at p. 370.

21. Fonseka *v* Perera; Births and Deaths Registration Act, s. 55.

22. Edwin Singho *v* Baby (1961).

23. See note 16 supra.

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23A. Hawes *v* Draeger (1833) 23 Ch. 173 and other cases cited in Bromley Family Law, op. cit. (1976 ed.) p. 285 notes 7 — 10; Jackson *v* Jackson and Pavan.

23B. s. 21 (2) (b)

24. See on the proceedings for rectification of Birth Registers infra; In England a man's name may be entered as the father of a child at the registration of a birth at the mother's request, if she produces a certified copy of an affiliation order which names him as the putative father, Bromley op. cit. p. 339.

24A. See James Child Law op. cit. p. 35; A Century of Family Law (1857—1957) ed. R. H. Graveson and F. R. Crane p. 45.

25. A. J. (Am) L. S. 490—493, now see Civil Proc. Code. ss. 34, 207, 406; Kantaiya *v* Ramu (1909) 13 NLR 161; E. B. Wikranmanayake Civil Procedure in Ceylon (1959) 20—27; E.R.S.R. Coomaraswamy, The Law of Evidence in Ceylon, op. cit. 143—154· G. L. Pieris, The Law of Evidence in Sri Lanka, (1974) p. 239.

26. Civil Procedure Code. s. 217 (G).

27. In the English Law, there is in general no provision for obtaining a conclusive and binding judicial declaration of paternity. An incidental finding on this aspect may be obtained in legal proceedings, such as affiliation proceedings, or in proceedings for divorce where the presumption of legitimacy is rebutted in the process of establishing the wife's adultery. However there is no analogous procedure to the declaratory action where the paternity of an illegitimate is directly in issue, (S. M. Cretney Principles of Family Law (1974) p. 321). A declaration of legitimacy may be obtained in defined circumstances in terms of special statutory provisions, (s 45 of the Matrimonial Causes Act 1973), or in terms of the Legitimacy Act 1959 which renders children of a putative marriage legitimate, Hawkins *v* Attorney General (1966) 1 AER 392. It appears to be accepted that even in these circumstances a court has no power to make a declaration of illegitimacy, B *v* Attorney General (1966) 2 AER 145, Bromley op. cit. p. 296, though a contrary view was taken in Starkowski *v* Attorney General (1952) 1 AER 495.

28. In regard to such combined claims in other jurisdictions, see D. Lasok Polish Family Law (1968) p. 143 —145, 159—166, (1968) 17 ICLQ op. cit. p. 634—637.

29. William Burge Commentaries on Colonial and Foreign Laws (1838), Vol. I p. 90; Walter Perera, Laws of Ceylon op. cit p. 172.

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30. (1915)

31. (1921) 23 NLR 191;

32. (1969) 69 NLR 73; c.f. the ealier case of University of Ceylon *v* Fernando (1956)58 NLR 265 where the Supreme Court granted a declaration that the finding of a committee of inquiry and the decision of a Universitiy Board suspending a student from a University examination, was null and void.

33. (1957) at 159.

33A. Tiagaraja *v* Karthigesu per H. N. G. Fernando S. P. J., A. Pulle in a note on the case, (1969) Col. L. Rev. p 113; T. Nadaraja Legal System of Ceylon, op. cit. p. 165 note 182 suggests that the judgment lacks enforceability.

33B. (1959) 61 NLR 217.

34. A. J. (Am) L. s. 465 (3).

35. (1969) at p. 335—336.

36. See Duty of Support Ch. X infra.

37. Lasok, op. cit. note. 28, supra.

38. A husband who wishes to disclaim liability to support a child born to his wife who was without his knowledge pregnant by another man at the time of marriage, may be able to take this course. See the facts of Perumal *v* Karumegam, and c. f. Miwonis *v* Menika, under the old law.

39. Starkowski *v* Attorney General; Hawkins *v* Attorney General.

40. c. f. Starkowsky *v* Attorney General, note 27 Supra.

40A. See Civil Courts Procedure (Special Provisions) Law No. 19 of 1977 s. 4

40B. Judicature Act No. 2. of 1978 s. 24 (1).

41. Tiagaraja *v* Karthigesu at p. 77—78; T. Nadaraja, Legal System of Ceylon op. cit. p. 165; Pulle, op. cit. especially at p. 118—121.

42. ss. 41 (2) (a), (b) and (c); see also the discussion of this provision in Coomaraswamy op. cit. p. 151—154.

42A. See e.g. Kantaiyar *v* Ramu.

43. Punchirala *v* Kiri Banda (1921) 23 NLR 228 F. B. at p. 232; Judicature Act s. 24 (1).

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44. Christina *v* Cecilin Fernando (1962) 65 NLR 274 at p. 277; c. f. Sivakolonthu *v* Kamalambal (1953) 56 NLR 52; Perumal *v* Karumegam, at p. 336.

45. Contra Perumal *v* Karumegam per Samarawickreme J, at p. 336, in a dictum which conflicts with other comments in the same judgment that endorse the position taken in earlier cases.

46. Civil Procedure Code Ch. 42; the position was the same under A. J. (Am) L. s. 625–631.

47. See Alles *v* Alles (1950) P. C. at p. 417, Perumal *v* Karumegam at p. 336, and Sivakolonthu *v* Kamalambal, though contra Pesona *v* Babonchi Baas (1948) per Basnayaka C. J. obiter at p. 446.

48. See A. J. (Am) L. s. 604 (1), ss. 604 (2), 604 (3) ss. 605, 606 (5) and 611 (4); now see Civil Procedure Code Ch. 35, ss 476, 477, 479 480, 494.

49. Civil Procedure Code ss. 619–622; A. J. (Am) L. s. 630 (2).

50. Blok *v* Blok (1940) 42 NLR 70.

51. Ismail *v* Latiff (1962) 64 NLR 172 per Sinnetamby J. obiter at P. 175.

52. See e. g. Algin *v* Kamalawathie (1969) 72 NLR 429.

53. A. J. (Am). L. s. 625 (2), now see Civil Procedure Code s. 598 and s. 599A, introduced by amending law No. 20 of 1977.

54. Punchirala *v* Kiribanda.

55. Punchirala *v* Kiribanda, especially at p. 232; Velupillai *v* Muthupillai (1923) 25 NLR 261; c. f. Mendis *v* Goonewardene (1916) 3 CWR 275.

56. See Duty of Support Ch. X infra.

57. See A. J· (Am) L. s. 493 (1) (c), stating that the court which pronounced the former decision should have concurrent jurisdiction with the court trying the subsequent action.

58. See the cases cited in note 83A, Duty of Support Ch. X infra.

59. Administration of Justice Law No. 44 of 1973 (A. J. L.) ss. 26, 30; A. J. (Am.) L. s. 493 (1), (c)

59A. See per Samarawickreme J. at 335–336, and Ch. II notes 27 F and 28 A.

59B. See Dingiri Menika *v* Punchimahatmaya (1910) 13 NLR 59, especially Middleton ACJ at 61.

59C. Judicature Act, s. 24 (1) (2).

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60. See Duty of Support Ch. X infra; Tenne *v* Ekanayaka, (1962) 63 NLR 544 and Weeraratna *v* Perera, note 68A infra.

61. See Coomaraswamy op. cit. 154, Civil Procedure Code s. 207.

62. Lasok, Polish Family Law, op. cit. Chapter II, (1968) 17 ICLQ op. cit. p. 634–637; Kraus, Illegitimacy op. cit p. 110, 149.

63. See Perumal *v* Karumegam; c. f. Meniki v Siyatuwa (1940) 42 NLR 53, Mihirigamage *v* Bulathsinghala (1962) 65 NLR 134.

63A. See Duty of Support Ch. X infra.

64. See Lasok (1968) 17 ICLQ op. cit. p. 644, (1961) 10 ICLQ op. cit. p. 138 etc; Kraus, Illegitimacy op. cit. p. 149, 226, refers to the pratice of obtaining a declaratory judgment on status in a support action as prevalent in some American States, and also in Germany.

64A. See Duty of Support Ch. X infra.

64B. Civil Evidence Act (1968) s. 12, cited in Bromley op. cit. p. 593.

65. e. g. Jamieson *v* Jamieson O. H. 1969 S. L. T. (Notes) 11; c. f. also Lasok (1968) 17 ICLQ op. cit. p. 635—637 on the need for legal proceedings that permit a judicial declaration of paternity.

66. See note 48 supra.

67. s. 13 (4).

68. See Parental Power over the administration of a minor's property Ch. VII infra, c.f. Weeraratna *v* Perera, note 68 A infra, Vythialingam J; see also Fernando *v* Fernando (1914) 18 NLR 24 where the court emphasised the importance of securing representation for minors in legal proceedings where their legitimacy is in issue.

68A. c. f. Weeraratna *v* Perera (1977) 79 NLR 445 per Wijesundera J. at 445, that a magistrate could appoint a next friend for an insane party under Ch. 35 of the Civil Procedure Code. Vythialingam J. held that this was not possible, but that a court could make such an order in regard to representation to ensure that justice was done.

68B. Judicature Act supra. s. 28 (1) (2).

69. K. M. D. Act s. 33 (7) (iii); Judicature Act s. 24 (1) proviso.

70. K. M. D. Act s. 35 (1).

71. Sanchi *v* Allissa (1926) per Jayawardene A. J. at p. 202.

72. Kandyan Marriage Ordinance (1870) s. 23 (as amended by Ordinance No. 1 of 1919); see also Sanchi *v* Allissa per Jayawardene A. J. at p. 201.

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73. K. M. D. Act. s. 35 (1); Judicature Act s. 24 (1) proviso, excluding the jurisdiction of the Family Court.

74. See the Kandyan Law on Legitimacy, Ch. II supra at note 61—63 B. Civil Procedure Code s. 627 introduced by amending Law No. 20 of 1977.

75. See Duty of Support Ch. X infra.

76. King *v* Miskin Umma (1925) 26 NLR 330 per Bertram C. J. at p. 335.

77. King *v* Miskin Umma per Jayawardene A. J. at p. 342; Mowlana *v* Shariffa (1953) 4. M. M. D. L. R. 48; c.f. Abdul Rahiman Lebbe *v* Pathumma Natchia (1918) 5 C. W. R. 145 where the question whether the District Court had jurisdiction to hear nullity application was left open.

78. M. M. D. Act s. 47 (1) (h) (i), s. 48; Civil Procedure Code s. 627, Judicature Act s. 24 (1) proviso.

79. M. M. D. Act s. 94 (1) (a); Civil Procedure Code s. 627.

80. See Presumption of Legitimacy Ch. III supra.

81. s. 28 (1) (b) s. 28 (1) (c) prior to amendments introduced by the Births Deaths and Marriages (Amendment) Law (1975).

82. See. 28 (3) prior to amendment.

83. (1970) 73 NLR 419 also reported (1970) 79 CLW 6; See also Samynathan *v* Registrar General (1936) 37 NLR 289 at 291 per Dalton S. P. J. obiter, interpreting a similar provision in the Births and Deaths Registration Ord. 1895 s. 22.

84. See 79 CLW at p. 8; c.f. discussion on maintenance proceedings supra.

84A. See cases cited in note 87 infra.

85. See ss. 21 (2) (b) 21 (3) 28 (4) 28 (5) and 28 (6) of principal enactment, prior to amendment.

86. See also Samynathan *v* Registrar General, at p. 291.

87. Perera *v* Balasuriya (1929) per Akbar J. obiter at p. 416, Cabraal *v* White (1905), interpreting the Births and Deaths Registration Ord. 1895.

88. Perera *v* Balasuriya, Karonchihamy *v* Registrar of Births (1964).

89. Cornelis *v* Lorensia (1912) Cabraal *v* White, interpreting the Births and Deaths Registration Ord. 1895.

90. Cornelis *v* Lorensia, Cabraal *v* White interpreting a similar provision on rectification proceedings in the Births and Deaths Registration Ord. (1895) s. 22; See also Perera *v* Balasuriya.

91. See Cornelis *v* Lorensia; c.f. Cabraal *v* White.

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92. See Karonchihamy *v* Registrar of Births; failure to acknowledge paternity at the time of registration was considered by Abeysundere J to justify rejection of an application for rectification. However this view cannot be reconciled with the legal provision that the father of an illegitimate is not under a duty to provide information of its birth. See note 14 supra.

93. s. 27 A (1) (a) (b) s. 27A (5) s. 28 (1) introduced by the amending Law (1975); Judicature Act s. 24 (1) 24 (2) and Third Schedule.

94. c. f. Sanchi *v* Allissa per Jayawardene A. J. at p. 201.

95. Sec. 27 (A) (1) (e) introduced by the amending Law (1975).

96. Ratnayake *v* Ratnawathie per Samarawickreme J obiter.

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CHAPTER VI

PARENTAL POWER I

THE CONCEPT, AND PARENTAL CUSTODY OF MINORS

Family ties are considered important in Sri Lanka [1] and the relationship of parent and child dominates in the sphere of personal relationships that are valued highly.[2] Traditionally, emphasis is placed on the parent's rights, and the duty of filial obedience. A concern for the welfare of the child is not absent, but the child's interests are conceded within the framework of a strong concept of parental rights.[3] These values have influenced developments in the law on parental rights over children.

In the traditional societies of both the Sinhala and Tamil people, parents exercised certain privileges even in respect of adult children.[4] In the modern law of Sri Lanka, with the exception of persons governed by Muslim law, parental power subsists and confers special rights only in respect of minor children.

Minority is determined by reference to the age at which a child acquires majority under the legal system. In the traditional Sinhala law, this was considered to be sixteen for both males and females. However degrees of majority were conceded, so that a person could claim a limited minority and exemption from certain liabilities, even after this age.[5] In the Islamic law, the age at which a legitimate minor acquires personal emancipation or majority is assessed according to the age of puberty, which may differ in the case of males and females.[5A] In the absence of evidence to the contrary, it has been decided by the Sri Lanka courts that the age of puberty is presumed to be fifteen for both Muslim males and females.[6] The Age of Majority Ordinance No. 7 of 1865 was enacted as a statute of general application, and the age of majority in respect of all persons has been, since that date, twenty-one. Acceleration of majority continues to be possible, by operation of law.[7]

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I. THE CONCEPT OF PARENTAL POWER

Customary Law

1. Kandyan Law and Tesawalamai

The importance of the parental role in traditional Sinhala and Tamil society is reflected in certain aspects of the ancient Customary laws. The Government officials who gave evidence before the Commissioners of Eastern Inquiry (1829) on the laws and judicial establishments in the Kandyan Provinces, repeatedly refer to the parents' authority over their children, despite the lack of specific legal principles regarding parental rights.[8] The extent of the parental power was such that children appear to have been treated as the personal belongings of their parents. Robert Knox refers to the fact that "it is lawful and customary for a man in necessity to sell or pawn his children,"[9] and this statement is confirmed by early British accounts of Kandyan Sinhalese society.[10] Children could thus be sold or surrendered under Sinhala law, if parents could not afford to maintain them, or in the discharge of their liabilities.[11] The Tesawalamai code contained originally, a specific reference to the sale of children.[11A] Consent of parents was also a requirement for the valid marriage of even an adult, according to the customary laws of both Sinhalese and Tamils.[12] Child marriages were not uncommon among the Tamils of Jaffna,[13] but even though the age of capacity was defined in the first Kandyan Marriage statute as twelve for females, there is no particular reference in Sinhala law to a concept of marriages or betrothals in infancy.[14] We have seen that in the traditional Sinhala law, a person could plead a limited minority after arriving at the age of majority. The Tesawalamai code states that sons are bound to bring into the common estate all that they have acquired while unmarried.[15]

The general picture that emerges, indicates the dominance of the parent, and the importance attached to a parent's supreme authority over children. It is equally clear however that the concept of caring and nurturing a minor, was not an alien value. The Buddhist texts record that "caring for mother and father, and the cherishing of wife and children" are some of the most

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important obligations of the layman.[16] Those values appear to have had their impact on family relationships. Thus, Davy, writing of Sinhala society in 1821, comments that "as fathers and mothers, as sons and daughters, the Sinhalese appear in a more amiable light" and that family attachments are very strong among them.[17] According to the Tesawalamai, if both parents die without contracting a second marriage, the relatives assemble to decide to whose care the infant should be entrusted.[18] The traditional Sinhala law recognised a concept of guardianship, and senior members of the family became lawful guardians in the event of parents failing to appoint a legal guardian.[19]

It has been suggested that the Tesawalamai recognised the father as the natural guardian of a minor, and that on his death, the mother succeeded him, but had to hand over the child and its property to the maternal grandparents if she contracted a second marriage. The view has also been expressed that under Kandyan law the father is by "nature and nurture" the guardian of a minor, and has a paramount claim to the guardianship and custody of his child.[20]

The only clear provision in the Tesawalamai on this matter merely says that "if a father wishes to marry a second time, the mother-in-law or nearest relation generally takes the child or children (if they are still young), in order to bring them up." There is also the general provision referred to earlier, reflecting concern for the orphaned child.[21] It is because the provisions of the Code are so sparse on this subject, that the Sri Lanka courts have been inclined to consider them as merely setting out a convenient arrangement, rather than a legal right to custody.[22]

Two major sources on Kandyan law, do not detail any principles with regard to an order of guardians.[23] One of them, an early digest on the Kandyan law by Simon Sawers, merely mentions in the section on guardianship, that minor orphans who have not been placed specially under guardianship are under the guardianship of certain relatives, maternal grandparents being conceded the most important in this respect. The other work by John Armour states certain principles with regard to the custody of children on dissolution of marriage. The only treatise that deals expansively with this subject is the Niti Nighanduwa, which

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may not always be treated as authoritative on controversial matters of Kandyan law.[24] This is the work cited in the compilations on the laws of the Sinhalese, in support of the broad general propositions on custody and guardianship.[25]

The provisions in the Niti Nighanduwa itself are clear, but sometimes contradictory. It is stated that the surviving mother if she is of good character, has a right of guardianship, even against paternal relatives who may claim to be responsible for the child, because it will inherit ancestral lands. Contrary to Sawers, the Niti Nighanduwa prefers paternal relatives as guardians of an orphan. In the special type of binna marriage, where the husband contracts to live in the wife's family residence, it seems clear from other sources that he has no right to custody on a dissolution of the marriage by divorce, and maternal relatives are preferred as guardians, on the death of a husband and wife married in binna. However the Niti Nighanduwa states that on the death of a binna married woman, the father should take charge of it. This work also concedes that a child of sufficient understanding may leave a guardian, and "commit himself to the guardianship of another relation."[26]

In view of the contradictions in the sources on this subject, it is not clear that the Niti Nighanduwa can be accepted as authoritative. The very uncertainty of the customary sources with regard to custody and guardianship, make it plausible to speculate that some of the propositions set out in the Niti Nighanduwa reveal the impact of Roman and Roman Dutch law influence that could have entered the text of the treatise at the stage of editing and rearrangement for publication.[27]

The fact that both in the Tesawalamai and the Kandyan law the provisions on guardianship are obscure, but indicate some attention to the subject in the event of dissolution of marriage, lends support to the view that "the topic was not likely to be the subject of litigation so long as the patrilineal joint family looked with equal affection and efficiency upon the infant's needs."[28] The traditional legal systems probably recognised the importance of not having formal legal rules which would inhibit decision making in this complex area of family relations, even when a dispute regarding guardianship came before the courts. Adminis-

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tration of justice in the Kandyan Provinces has been described as "largely empirical" so that it would have been contrary to the process of dispute settlement, to lay down clear rules.[28A]

2. Muslim Law

The relevance of the principles of Islamic jurisprudence on the subject of parental rights over legitimates, has been conceded in many decisions on minority,[28B] and in applications for custody, initiated in the ordinary courts of law[29] even before recent legislation permitted the application of the law of a person's sect in determining the status and mutual rights and obligations of the parties to a Muslim marriage. There is thus substantial ground for concluding that the Islamic law determines the relationship between parent and legitimate child, in the absence of statutory provisions to the contrary.

Islamic law considers parental power over legitimates an aspect of guardianship (wilaya), which is classified into three categories. as guardianship of person, property, or in marriage. Sometimes the parental power regarding marriage can be exercised even in respect of an adult female. The father alone is deemed the natural guardian. He has a right of access and is entitled to supervise the upbringing of a child, until the age of personal emancipation or majority, even when the mother has the right to physical custody of the child (hidana). The mother is completely excluded from guardianship of property, and she occupies a very low place in the order of guardians who are entitled to succeed the father as guardians for marriage.[30]

Some decisions in the Supreme Court tend to confine the application of Islamic law to the areas demarcated by statute.[31] It may therefore be argued that an illegitimate child of unmarried parents should be governed by the General law and not the Islamic law, according to which, except under the Hanafi principles, he is considered *filius nullius* or as a child of neither parent.[32] The difficulty with accepting this interpretation as we have seen, is that the concept of illegitimacy is an aspect of the law of marriage. It would also seem anomalous to introduce the General law, as a residuary law applicable to Muslims, when the Islamic law itself contains specific legal principles that deny any status to the issue

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of a union that cannot be classified as marriage. Besides we have observed that in the absence of statutory provisions to the contrary, the Islamic law on minority has been considered by the courts to be a source of the personal law governing Muslims, not merely in regard to marriage, but generally.[32A] This development, together with the recent statutory amendment bringing applications for maintenance of illegitimates within the jurisdiction of the Quazi Courts,[32B] supports the application of the principles of Islamic law in regard to the relationship between parents and illegitimate children.

General Law

The Roman Dutch law is the source of the General law, regarding parental power.[32C]

The Roman Dutch law did not recognise the *patria potestas* of the Roman law, or the concept of adoption. Nevertheless both parents of a legitimate minor child acquired what has been referred to as the parental power. The mother of an illegitimate child was considered to have a similar power, and on the premise that "the mother makes no bastard", the natural father was completely excluded from the parental power over illegitimate children.[33]

The parental power ceased with the death of either the parent or the child, or when the child married or attained the status of majority. The methods by which parental power could be terminated were therefore clearly defined. The Roman Dutch law, though derived from Roman law, did not recognise adoption as a means of creating a legal relationship between children and persons who were not the natural parents. Therefore, delivery of a child to a third party or abandonment or surrender of the child could not effect a transfer of parental power.[34]

In Roman Dutch law, the parental power though shared by both parents of a legitimate minor child, was referred to as the "paternal power". This in itself endorses the view of those text-writers who suggest that the mother's rights in respect of the child are not on par with those of the father.[35] Consequently, the modern law as developed in South Africa confirmed the superior rights of the father, by the concept that in his lifetime, he is

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the natural guardian of minor children to the exclusion of the mother.[36] On the father's death, the mother is deemed to succeed him as natural guardian; if the father has not appointed a guardian, she acquires the parental power in every respect.[37] The mother is, by contrast, deemed to be the sole natural guardian of her illegitimate minor child. Domicile and citizenship depend on natural guardianship.[37A]

Since the "natural guardian" was the repository of the major incidents of the "parental power", these terms are invariably used synonymously. Natural guardianship is therefore described as "the legal manifestation of the parental power".[37B] Even if some of the incidents of natural guardianship are curtailed, the residue of rights associated with it, remains unaffected.

The Roman Dutch law thus recognised the concept of parental power and gave a parent significant rights over a minor child. However it conceded to the Princeps, and later the courts, the overriding responsibility and authority to act as the "*parens patriae*" or Upper Guardian of all minors. The Roman Dutch law, has therefore always accepted that the courts may deprive a parent of any or all of the incidents of parental power, in the exercise of their special jurisdiction to protect the welfare of children.[38] In that sense, it showed a concern for the welfare of minors that was not displayed in the early English law. The extent to which Common law and Equity permitted judicial interference with parental rights, is still a matter of academic speculation; it has even been suggested that early English law showed a "brutal indifference to the child's fate", which has been rectified through years of legislative reform.[38A] It is only these reforms that have introduced the concept that a child can be a "ward of court."

Persons subject to the Customary laws in Sri Lanka are also governed by the General law on parental power. As guardianship by parents was not a topic on which developed rules could be ascertained from the non Muslim Customary laws, the Roman Dutch law was introduced as a residuary law. The principles of that law regarding parental power thus apply to all persons, unless there are specific statutory or Customary law provisions governing such matters.[39] Consequently certain aspects of the Customary law on parent and child may be considered obsolete.

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Thus the right of Kandyan parents to sell or pawn their children may be considered to have been displaced by the Roman Dutch law restrictions on parental power, even before specific legislation was introduced[40] to protect children from abuse. The role of the General law in relation to Muslim children, is by contrast less significant. This is because Islamic law is considered a source of law on the subject of parental rights. Nevertheless the Roman Dutch law is applied to fill the gaps in the Muslim law in Sri Lanka, while its influence can be sometimes seen even in the actual application of the substantive principles of Muslim law.[41] Besides, in the modern law applicable to Muslims, parental power, as in other systems, is of importance only in respect of minor children[41A]

With the passing of the Courts Ordinance, No. 1 of 1889 the District Court became a symbol of the State's involvement and concern in the welfare of minor children. This Court was granted a special jurisdiction over the persons and estates of minors. The jurisdiction could be exercised in proceedings for the appointment of curators or guardians over property, and in matrimonial proceedings. Nevertheless the court's jurisdiction has been interpreted as merely a reflection of the general jurisdiction that the courts of Sri Lanka exercise as Upper Guardian of minors, according to the basic concepts in the Roman Dutch law on parent and child.[42] We have observed that in this law, the courts were repositories in fact, of a responsibility assumed by the State. Inevitably they became an independent agency, entrusted with a special responsibility for the welfare of minors.[42A] The Sri Lanka courts are empowered to enact a similar role, while statutes have conferred on other courts besides the District Court, jurisdiction to determine matters involving minors, and a duty to protect their welfare.[43] We shall observe how the courts have used this jurisdiction to protect the property interests of minors. The existing law in fact enables a court to safeguard a minor's interests in *all* matters that concern him. Even a third party can move court to prevent an abuse of any right that falls within the concept of parental power.

After recent reforms in the structure and powers of the courts, the District Courts retained their special jurisdiction in respect of the persons and estates of minors.[44] However, certain inroads were made in that jurisdiction, in the process of investing

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a government official, the Public Trustee with special supervisory powers and control over the property of minors. The task of protecting the welfare of the minor was shared by two agencies the courts, specifically the District Court, and the Public Trustee. Sole and exclusive jurisdiction in regard to applications for custody and in "disputes between spouses, parents and children as to matrimonial property, custody of minor children..... guardianship and curatorship matters" where there is no conflict with the provisions of the Kandyan and Muslim marriage statutes, and a general jurisdiction regarding the care of the person and property of minors, has now been conferred on the Family Courts by the Judicature Act (1978). Proceedings in this court must be conducted expeditiously, and generally by the summary procedure set out for civil proceedings. Applications for custody must be given precedence over all other matters in this court.[44A]

II. THE PARENTAL RIGHT TO CUSTODY

The Procedural Aspect

The jurisdiction and responsibility of the District Courts in respect of the guardianship and custody of a minor has been recognised in statutes,[45] but this aspect of the court's functions has been judicially described as a general capacity to act as the traditional Upper Guardian of minors.[46]

The District Court was until recently also the matrimonial court in Sri Lanka, and it had a specific jurisdiction to make orders for custody in matrimonial actions under the General law, for divorce, judicial separation and nullity.[47] Matrimonial disputes involving certain persons governed by the Customary law are however decided by the authorities empowered to do so by special legislation. There is no specific provision for determining an issue on custody in these matrimonial proceedings, but there is also no indication that the general jurisdiction of the courts to make orders regarding minors is excluded. The jurisdiction of the Family Courts as we have seen, is excluded in some respects, altogether. But despite these restrictions, the Family Court have now replaced the District Court as the major forum entrusted with responsibility for children.[48]

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When an application for custody was originally made in curatorship proceedings in the District Court, the court appeared to have a wide discretion to award custody.[48A] The ambiguity in regard to the significance of parental rights in these proceedings remains, even though the Family Court has now a general jurisdiction in custody and curatorship matters. In any case, despite the statutory recognition originally given to the District Court as the authority concerned with appointing guardians over the person of a minor, and safeguarding his interests, it is the Supreme Court that has been the major forum concerned with adjudicating claims regarding the legal custody of minor children. Legal custody is claimed usually by making an application for a writ of habeas corpus to issue on the person with the physical custody of the child. These applications have been presented in the Supreme Court since 1860, when it was decided that the District Court had no jurisdiction to order a writ of habeas corpus to issue on a person with *de facto* custody of a child.[49] The remedy of the writ of habeas corpus was considered to be available only in the Supreme Court, and a person who sought the legal custody of a child, generally used writ proceedings and made his application in that court. The power to issue writs of habeas corpus now lies with the Court of Appeal. Legal custody is still claimed by bringing an application for such a writ in this court.[49A] This, despite the sole and exclusive jurisdiction in guardianship and custody matters now conferred on the Family Courts, and the specific powers conferred on the Family Courts in this regard, to ensure speedy court proceedings.

In the past curatorship and matrimonial proceedings were rarely used to determine custody issues in the District Court; generally the Supreme Court rather than the District Court determined the issue of legal custody. Though the Administration of Justice Law later gave the Public Trustee the power to appoint a guardian, in curatorship proceedings,[49B] the experience of the past suggested that he could not have acted under this provision where the Supreme Court had made a prior order with regard to custody. It would also appear that a guardian appointed by the Public Trustee could have been deprived of custody by the Supreme Court exercising its jurisdiction to determine custody disputes.

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The frequency of applications in the Supreme Court had an important impact on the law of custody, since the writ of habeas corpus in Sri Lanka is based on the English law. It was asserted at one time that the principles which should guide a Sri Lanka court in applications for custody should be the same as those which applied in the issue of the writ of habeas corpus in custody application in England. English cases and English law principles on the custody of minors were cited with frequency in the Supreme Court.[50] It is the more recent decisions that reveal a clear trend of declaring that the substantive law on custody in Sri Lanka is derived from either the General law of Sri Lanka on parental power, or from the personal Customary law of the parties.[51]

The justification for excluding the English law on custody was the statutory provision in Sri Lanka which permitted the issue of the writ of habeas corpus in the event of illegal and improper detention, and also provided that it could be issued "to bring up the body of any person to be dealt with according to law."[52] Consequently, though direct reference to the Customary law and the Roman Dutch law on custody was made rather cautiously at one time, in the later law of Sri Lanka these sources were deemed relevant on the question of the issue of the writ, and also in deciding how the minor who was the subject of the application, was to be dealt with according to law.[53] Since the Courts Ordinance which originally contained the relevant statutory provision gave a wide power to the Supreme Court to issue the writ, the controversy as to whether illegal or improper detention must be proved, and whether the writ was available against a person with the legal right to custody, receded into the background.[54] However the impact of the English law continued to be felt in significant areas of the Sri Lanka law on custody.

A striking feature in the present law is the availability of different forums to determine custody matters. Habeas corpus proceedings are available, while the issue of appointment of custodians can surface in curatorship claims in the Family Courts, and in matrimonial actions in these courts. A children's magistrate may also exercise jurisdiction in proceedings under the Children and Young Persons Ordinance.[54A]

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The Substantive Law

General Law

The Roman Dutch law being the source of the General law, the concept of the parental right to custody and the presumption in favour of it is well documented in the case law of the country. The commitment to that concept has however been paralleled by a desire to infuse a liberalism into the law, and consequently the principle of the "welfare of the child" has sometimes engulfed and obscured the concept of parental rights. An analysis of the reported decisions reveals contradictions in the case law on the subject, and the confusion has not been resolved because habeas corpus applications were invariably heard before one judge of the Supreme Court, who was not bound to follow a precedent created by a decision in a previous application.[55]

Parental rights over minor children were clearly important in the Roman Dutch law, and the right to custody was an important incident of the parental power. As such, custody was not synonymous with parental power or natural guardianship, but was merely one aspect of it.[56] Since the right to administer and manage a minor's property was considered an independant aspect of the parental power that vested in the natural guardian,[57] the right to custody does not appear to refer to control over the minor's property. It refers rather to control over the person, and the day to day life, upbringing and education of the minor child.[58] In some countries, such a sweeping concept of parental custody, may be viewed in the modern law, as in conflict with the constitutional guarantees on the right to freedom of conscience and political beliefs.[58A] In any case, the right to control education in the Roman Dutch law does not seem to include religious upbringing, since the right to determine the religious education of the child is distinguished from custody, and considered another aspect of natural guardianship.[59] Custody in the General law therefore refers essentially to the care and control over the person and education of the minor (guardianship of the person) as distinguished from curatorship (control and management of the minor's property).[60] The award of legal custody cannot therefore affect the exercise of other parental rights reposed in the natural guardian.

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The right of custody includes a bundle of related rights. A person who interferes with the parent's custody by keeping the child away from him may be guilty of the criminal offence of kidnapping.[60A] But apart from such criminal sanctions, the parent with the legal custody of the child may under Roman Dutch law be able to obtain an interdict restraining a third party associating with the minor who is in his care and control.[61] A parent may also be entitled to recover from the wrongdoer, medical and other expenses incurred by him in connection with personal injuries caused to a minor.[61A] However it is doubtful whether a parent has an action in damages for the seduction of a daughter,[61B] or the infliction of an injuria upon a child.[62]

The right to moderate chastisement is included within the concept of care and control over a minor's person. Excesses by the parent may result in loss of the legal right to custody, and can be punished under the Penal Code No. 2 of 1883.[62A] Statutory provisions on the prevention of cruelty to children also create criminal liability, and confer a special jurisdiction on a court to remove a child from the custody of a parent who has abused his authority in this respect.[63] A parent may even be liable for such excesses under the General law on delict as there is no rule in the Roman Dutch law, which is also the source of that law, precluding a delictual action between a parent and a minor child. A custodian parent may therefore incur a civil liability in delict[64] to a child who is the victim of wrongful personal injuries, while a criminal liability is imposed by the Penal Code and the Children and Young Person's Ordinance No. 48 of 1939. There is thus a legal framework aimed at preventing an abuse of this aspect of parental rights. The child's access to these protections however will depend on the intervention of an adult third party, who can either institute proceedings for deprivation of parental custody, or institute legal proceedings on behalf of the child.[65]

The custodian parent is not, simply by virtue of his legal status in that respect, liable for the minor's delicts. A parent is not liable for a minor child's delicts, unless the latter acted as his servant or agent, or the parent has been personally negligent.[66]

Legal custody entails the right to express or refuse consent to medical treatment. This right may be qualified in the case of a minor over seven years who is deemed to have a limited legal

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capacity when he reaches years of discretion. The consent of such a child may therefore be required for medical treatment.[67] Unreasonable conduct on the part of the parent, in regard to medical treatment for a minor can of course be prevented by the exercise of the courts jurisdiction to deny parental custody in the child's interests. It is doubtful whether a court can overrule the parent's wishes in this respect while permitting him to retain custody.[67A]

The natural guardian with whom a minor lived had a legal right to his services under the Roman Dutch law.[68] The custodian parents' rights in this respect are qualified in the modern law by statutory provisions on the employment of minors. Notably, a parent cannot obstruct or disrupt the minor's education.[69]

Custody disputes between married parents who are not lawfully separated.

Due to the fact that the parental power of the mother of a legitimate child was not considered "*par potestas*" with the father, the modern Roman Dutch law has recognised that the father as natural guardian has a preferential right to custody.[69A] This means that he has a superior right to determine any matter relevant to the person, upbringing and education of the child, during the marriage. The recognition of this right has also had the important consequence of conceding to the father the right of custody, in the event of a separation that is not lawful, or a de facto separation between husband and wife. In the words of Tindall A.J. in the leading South African case of **Calitz** *v* **Calitz**, generally "the court has no jurisdiction where no divorce or separation authorising the separate home has been granted, to deprive the father of his custody."[70]

In **Calitz** *v* **Calitz** the *de facto* separation between the parties was due to the wife's fault, but the decision that the father's preferential right continued was not based on that fact. It was founded on the premise that in the Roman Dutch law the rights of both parents over minor children of the marriage were not on a par, and the law showed a preference for the father as the natural guardian of his children. This preferential right is in that sense a reflection of the father's dominant role in the family, and **Calitz** *v* **Calitz** conceded its importance when the court had not authorised a separate home.

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The view that the preferential right should continue despite a *de facto* separation is consistent with a system such as the Roman-Dutch law, which did not recognise the concept of breakdown of the marriage. The scope of matrimonial relief was clearly defined in the Roman Dutch law, and decrees for divorce and judicial separation could be obtained only after judicial proceedings, on the ground of matrimonial fault.[70A] Consequently no legal recognition could be given to the *de facto* situation between spouses who were living apart, unless either of them petitioned for the matrimonial relief that was available to them according to the Roman Dutch law. If such relief was sought, the issue of custody would itself become justiciable in the matrimonial litigation in which, the court would be called upon to authorise a separate home.[71] When a separate home was authorised in these proceedings, the dominant role of the father ceased to have the same legal significance. The court would then assert its jurisdiction to protect the child's welfare, without conceding a presumption in favour of the father's right to custody.[72] Since the Roman Dutch system did not countenance the theory of breakdown of the marriage, the preferential right of the father to custody was given significance even in the event of a dispute between parents during *a de facto* separation, but denied that importance in matrimonial litigation authorising a separate home. This distinction in the Roman Dutch law has now been abolished by a statute in South Africa, that makes the welfare of the child the sole criterion in all custody proceedings.[73]

While the Roman Dutch law recognised the aspect of parental rights we have observed that it conceded to the State, the overriding responsibility and authority to act as Upper Guardian of all minors.[74] It has therefore, always been accepted that a court can deprive a parent of his or her legal right to custody, in the exercise of this special jurisdiction. **Calitz** *v* **Calitz** postulated for the modern Roman Dutch law, the criterion for interference with the father's right to custody, when a separate home has not been authorised. In that case Tindall A.J. said that a court could interfere on special grounds such as "danger to life, health and morals."[75] That phrase is now utilised in all types of custody litigation to describe the basis for interference with parental

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rights,[76] but it has been frequently pointed out that it merely reflects the principle that a court can interfere with parental custody so as to ensure the general welfare of the child.[77]

In litigation between married parents during a *de facto* separation that is not lawful,[77A] Sri Lanka courts have followed the developments in the modern Roman Dutch law as reflected in the South African case of **Calitz** *v* **Calitz.** Judicial decisions make constant reference to the concept of natural guardianship, and the preferential right of the father to custody, which flows from it.[78] Statute law in the country too refers to the father's preferential right to the custody of minor children.[78A]

In some early cases, the jurisdiction of the Supreme Court as Upper Guardian of minors was asserted to deprive the father of this right, on proof of his unsuitability to be legal custodian, because of possible prejudice to the child's "life, health and morals."[78B] These decisions however gave legal significance to the initial presumption in favour of the father's right to custody. In **Ivaldy** *v* **Ivaldy** for instance, H. N. G. Fernando J. as he then was, emphasised the need to construe the concept of the welfare of the child within the scheme of the preferential right, when he said that the court will not merely promote the interest and welfare of the child, but "will recognise the father's prima facie right except when the element of danger or detriment is positively established."[78C] The phrase " danger to life, health and morals " has in the course of time been equated with the wider concept of the welfare of the child [78D] and a liberal interpretation given to the jurisdiction of the court to deprive the father of his right to custody.

The inspiration for expanding the concept of the welfare of the child appears to have come from the English law. The English law, before the Guardianship of Minor's Act (1925) made the child's interest the paramount consideration, was a combination of principles derived from Common law and Equity. Thus the concept of the child's interests had a limited impact, and was subordinate to the concept of parental rights. The father's preferential right was an important principle in the early English law on custody. In fact until very recent legislative reforms were enacted, the rights of the father under Common law, were superior

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to those of the mother.[78E] Some decisions in the Sri Lanka courts have overlooked this, and emphasised that in the English law the welfare of the child is the paramount consideration in custody matters. It has also been pointed out that the Roman Dutch law concept of Upper Guardianship indicates a similar concern that the welfare of the child should be the only relevant concern of the courts.[78F]

Apart from the fact that some of these recent decisions seek to introduce a change that was made by legislation in England and in South Africa, they have interpreted the concept of the welfare of the child so as to create a preferential right to custody in the mother of young children. These decisions emphasise that permanent damage to the child would be caused by separation from the mother, and they do not require proof that the father is unsuitable to have the custody of the child.[79]

Since the General law on custody in Sri Lanka is the Roman Dutch law, the concept of the welfare of the child can be developed by the judiciary within the concept of parental rights in that system. Fundamental changes in the law, such as the introduction of a principle that the welfare of the child is the only valid consideration in custody matters, or that the custody of young children should always be awarded to the mother, can be introduced only by legislation. This is why in other countries, (notably England and South Africa) where the preferential right of the father was recognised in the Common law and the Roman Dutch law respectively, legislation was necessary to abolish the presumption in favour of the father's custody, and to establish the welfare of the child as the only valid criterion in all custody matters.[79A] In India too legislation altered the existing law with regard to the right of the father, and gave a right of custody in young children to the mother.[79B]

An analysis of the case law in Sri Lanka indicates that there is clear authority in support of the presumption in favour of the preferential right of the father to the custody of his minor children. The judgments which seek to erode that concept are in conflict with more recent decisions which do place the onus of displacing the father's right on the person who seeks to deny it.[79C] There is dicta in favour of the preferential right of the father in recent

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custody litigation arising out of divorce actions, and claims by third parties.[79D] This dicta may be justifiably taken as indicating that the presumption in favour of the father's right is still an important aspect of the law of custody in Sri Lanka. It is very clear that the consistent approach adopted by the courts is that "the rights of the father will prevail if they are not displaced by considerations relating to the welfare of the child, for a petitioner who seeks to displace those rights must make out his or her case."[79E] The view that the Roman Dutch law has fused with the English law in Sri Lanka to formulate a principle that the court can deprive a father of his right to custody when the mother is fit to be legal custodian,[80] is in conflict with those numerous authorities that recognise the father's preferential right; besides it obscures a fundamental premise in the Sri Lanka law on custody.

In emphasising the importance of a continuing relationship with the mother, reference has been made to **Fernando** *v* **Fernando** where H. N. G. Fernando J. as he then was, said that "so long as the mother is shown to be fit to care for the child it is a natural right of the child that she should enjoy the advantage of her mother's care."[80A] However that statement was made in a judgment that clearly emphasised the preferential right of the father, and went on to decide that he should be deprived of custody because "it would be detrimental to the life, health and even of the morals of such a young child if that child were forcefully separated from the mother and compelled to live, not even in her father's custody but under the care of a elderly relative."[80B]

The approach in **Fernando** *v* **Fernando** was followed in later cases where custody was awarded to the mother only on proof that in the particular circumstances it was essential to deprive the father of his rights in the child's interest.[81] It is that same approach which guided the court more recently in the case of **Madulawathi** *v* **Wilpus**[82] when it refused to grant custody to the mother, on proof that the father was able to support the child, and had relatives to care for it when he was away at work.

The judicial decisions that focus attention on the right of the mother to custody, introduce a fundamental change which is not in harmony with the legal principles that apply in the determination of her parental rights. In Roman Dutch law, a wife shared the

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parental power with her husband and could thus assert a right to custody against a third party, even in the lifetime of the husband.[83] However it is clear that her rights were subordinate to the husband's right, and she only succeeded him as natural guardian and sole repository of parental power on his death. This principle has been recognised by the courts in Sri Lanka.[84] Consequently on the father's death it has been decided that the mother requires no appointment by court to assert her status as natural guardian.[85] There are however judicial decisions, which have held that she requires such an appointment when she claims the right to deal with the minor's property, or to accept money from the debtor of a minor child.[86] Though the right to nominate a guardian by will or deed was shared by both parents in the Roman Dutch law, the father as natural guardian could limit the mother's right by making an appointment himself. This could seriously prejudice the surviving mother's parental rights, for such an appointment could deprive her of the right to represent the child in legal proceedings, and take charge of his property, even if her right to custody and control of his person could not be excluded.[87] It was the father's consent that was required for the tacit emancipation of a minor, the mother's consent sufficing only when she succeeded him as natural guardian.[87A] The consent of both parents was required for a minor's marriage but in the event of a difference of opinion, the father's view prevailed.[88] Statutory provision in Sri Lanka reflect the superior position of the father, both with regard to the appointment of guardians, and the expression of consent to a minor's marriage.[89]

The preferential right of the father to legal custody of the child, and the less significant rights of the mother therefore, reflect the general policy of a legal system that does not concede equal rights to both parents of a legitimate child. While it is possible to state that the interests of the child are a paramount consideration, this only means that the concept must be interpreted in the context of the recognition accorded to a scheme of parental rights. In considering the court's right to exercise its jurisdiction as Upper Guardian in a custody dispute involving Muslim parties, T. S. Fernando J. said, that the "court is called upon to adjudicate in the best interests of the child, but the adjudication must be reached within the framework of the law governing the parties."[90] It

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is submitted that this dictum reperesents the valid approach that should be followed by a court, required to apply the General law on custody in Sri Lanka.

The individual decisions that erode the father's preferential right, and emphasise that the mother has a right to the custody of minor children do not question the policy of a law that accords a superior status to the male parent, and thus discriminates between the sexes. They reflect, rather, the view that a continuing relationship with the mother is essential for the well-being of the child. In that sense they accord with the views of the British psychiatrist John Bowlby, whose theory that "maternal deprivation" or lack of maternal care causes irreversible and permanent damage to a small child,[90A] has had a profound impact in the field of child care. Sri Lanka's judges have sometimes stated that separation from the mother must inevitaby be prejudicial to the welfare of the child. There is judicial dicta which stresses that "there is a rule commended by law and ordinary human experience that the custody of very young children ought ordinarily be given to the mother."[91] In another local case it was suggested that as long as the mother of a young child is not an unsuitable person to have the custody of the child, the father can be deprived of his right to custody.[92]

Western theories of child psychology are not necessarily apt for all societies. What has been characterised as a disturbing neurosis or deviance which would motivate a parent in a developed country to rush for psychiatric help may not be seen as calamitous in a developing country where the average family must cope with the harsh realities of daily living. If lying and inability on the child's part to feel affection are the kind of irreparable damage that can result from "maternal deprivation", as some writers have held, how disturbing can this be considered in a part of the world which is still familiar with the gamut of human misfortunes? The theory of "maternal deprivation" may therefore deserve to be viewed with as much scepticism, as the concept that unmarried mothers produce babies out of revenge and jealousy for their own mothers, or that freedom fighters are motivated by masochism and guilt feeling for their hated fathers ![92A] In any event the impact of maternal deprivation and its permanent damaging effects have been reviewed in later

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research.[92B] It has been suggested that the "blood tie" to the biological parent is not important to a small child, and that what the child needs for its psychological wellbeing is a relationship with an adult providing security and continuous loving care. Studies in some societies indicate that a maternal substitute can provide this, and that separation from the natural mother is not necessarily harmful or traumatic for the child.[93]

In countries like Sri Lanka where ties with the wider family are close and meaningful, it cannot be assumed that a small child will suffer the deprivation that would result from a break up of the nuclear family, or separation from its mother.[93A] The child may receive love and care from a female relative who is not its mother. Situations can be envisaged where the child will receive greater care and security from the father and his relatives than from a mother who is not able to shoulder the responsibility of the child on her own. Consequently, when the present law concedes a preferential right of custody to the father, prejudice to the child by separation from the mother should not be assumed because of the biological relationship. It should be substantiated by evidence that separation from the mother will be contrary to the child's interests, and thus prejudicial to its welfare.

It has been pointed out that if a dispute as to custody arises during a *de facto* separation, the position of the parents in the Roman Dutch law is substantially different to the situation where matrimonial litigation has been initiated. We have observed that the marriage and the common household are deemed to continue, until and unless the spouses seek the matrimonial relief that may be available to them. During a *de facto* separation the father's preferential right is therefore unimpaired, and his blameworthiness in bringing about the separation will only be relevant in determining whether he is unfit to have the care of the child. When a decree for divorce or judicial separation was granted in the General law of Sri Lanka on the ground of matrimonial fault rather than breakdown of the marriage, there was a legal rationale for the Roman Duth law principle that the *de facto* separation did not by itself affect the father's preferential right to custody. A limited concept of marriage breakdown has now been recognised in recent reforms which give the matrimonial court a discretion to grant a divorce on proof of separation for seven years.[93B]

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Nevertheless the significance of court proceedings, even in this context, make it difficult for the courts to justify a departure from the accepted legal position in regard to *de facto* separation.

A separation by mutual consent, consequent to a binding agreement to live apart is recognised as a legal separation in Sri Lanka.[93c] The father may not be able to assert his preferential right to custody in these ciycumstances, even though there is no decree for judicial separation. The notarial document that contains the terms of the agreement for separation may specify the arrangements regarding the custody of minor children. In the event of a dispute however, the issue of custody will come before the courts through the usual procedure of an application for a writ of habeas corpus. Since the agreement of the spouses to live apart is deemed lawful and binding, there is a basis for arguing that the husband cannot claim his preferential right to custody in these proceedings.

It is the husband who has the legal right to decide the location of the matrimonial home.[94] It must be pointed out that this, coupled with his preferential right, does mean that he can take the children to reside with him.[95] Unreasonable conduct on his part would be relevant in deciding whether he should be deprived of the custody of the child.

Custody when a court authorises a separate home

Matrimonial proceedings in Sir Lanka may take the form of actions for nullity, for divorce or for judicial separation. The issue of the legal custody of children, is the aspect of the parental power that is affected in matrimonial proceedings for divorce and judicial separation, since the other incidents are not generally interfered with by the courts. The District Court had jurisdiction to make interim orders for custody pending the determination of the matrimonial dispute, but it could make an order for custody in its decree or even after decree has been entered. Today this jurisdiction is exercised by the Family Courts.[96]

It is not mandatory for the court to make an order on custody, and the issue of who is to have the custody of a minor child can be settled by mutual agreement. Thus an agreement between the parties regarding custody may be submitted for inclusion in

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the order of court.[97] Probably due to this, there are only a few reported decisions on claims to custody in matrimonial disputes. These cases emphasise the preferential right of the father,[98] even though it is clear that in the Roman Dutch law the aspect of parental rights ceases to be important in the determination of claims to custody, when the common home is dissolved.

The jurisdiction that was available to a court acting as Upper Guardian in the Roman Dutch law to vary an order for custody made in a matrimonial action, if it no longer satisfied the interests of the child [99] is exercised in Sri Lanka by the Family Court, that determines the matrimonial dispute between spouses.[100] The criterion for making the variation should also be the welfare of the child,[101] and the jurisdiction of the court is not exhausted by a single exercise of the power to vary the order.[102] It has sometimes been suggested in other jurisdictions that variation of custody orders should not be permitted for the reason that discontinuity in the care and custody of a child is prejudicial to his welfare.[102A] In Sri Lanka however, the issue of custody is even re-opened in a completely different court from that which determined the matrimonial action. There is authority in support of the proposition that applications for custody in habeas corpus proceedings should be rejected by the Court of Appeal when they are made subsequent to a Family Court order on custody. The English law has been cited to justify this view, on the argument that the writ of habeas corpus must not be granted to question the decision of an inferior court, acting within its jurisdictions.[103] Nevertheless, where the issue of custody has not been disputed in the matrimonial action, and the court has not made an order for custody, it has been decided that habeas corpus proceedings can be initiated by the father, asserting his preferential right to custody.[104]

The preferential right has no significance in the Roman Dutch law, when the common home has been lawfully terminated. In matrimonial litigation, a court is called upon to decide the issue of custody solely in the interests of the child. The father cannot rely on his preferential right, nor is the matrimonial court required to attach any importance to it. If the matrimonial court has made no order on custody in its decree, this issue should be raised again, only in the same court, and on the same basis. When the

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jurisdiction of the matrimonial court to make orders on custody continues even after the decree has been entered, it is surely incorrect procedure to permit applications for custody, based on the father's preferential right in the Court of Appeal The award of custody, and the grant of the writ of habeas corpus by that court, operates to stultify the jurisdiction of the matrimonial courts that have been empowered to determine the issue of the minor children's custody, when the common home has been dissolved. Since the function of the courts in custody disputes in Sri Lanka differs, depending on whether the marriage subsists or not, the habeas corpus jurisdiction of the Court of Appeal should also not be exercised in custody litigation, when a matrimonial action is pending. There is thus reason to query the decision in **Fernando** *v* **Fernando** where Weeramantry J. in the Supreme Court assumed jurisdiction to hear a habeas corpus application due to a possibility of delay in the trial of the action for nullity in the District Court.[104A]

We have seen that the Sri Lanka law on civil procedure provides the machinery for moving the matrimonial court to obtain an interim order on custody. This procedure should be streamlined to permit the convenient obtaining of such an order, for it is appropriate that an interim order should be made by the same court that will make the final order on custody in the matrimonial action. The existence of an order for custody made in a habeas corpus application may precipitate an alteration in the legal custody of the child within a short space of time, since the court decidng the issue of custody where there is a *de facto* separation between husband and wife, must concede the significance of the preferential right of the father, while the jurisdiction of the matrimonial court deciding the issue of custody in a matrimonial dispute is not restricted in this way. Such disruption will obviously be harmful to a young child. It is submitted that since the Family court is conferred with exclusive jurisdiction in matrimonial and custody matters, and is provided with the appropriate procedure to cope with this situation, the jurisdiction of the Court of Appeal is not relevant for determining a dispute on custody pending a matrimonial action in the trial court. It is the Family court that should have exclusive power to make and alter custody orders, always being guided by the ultimate criterion of the child's welfare. The

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provisions in regard to transfer of cases from one Family court to another and consolidation of proceedings into a single proceeding[104B] reflect the concern that one forum should decide these issues.

The confusion regarding the forum which has jurisdiction to decide the issue of custody when a matrimonial dispute is pending or has been concluded has arisen because the importance of the jurisdiction of the matrimonial court in this context has not been fully appreciated. It is in the child's interest that one forum should have jurisdiction on the issue of custody. This value appears to have been recognised by the Judicature Act, when it conferred sole and exclusive jurisdiction on the Family Courts, and also provided for consolidation of proceedings. The present practice of permitting spouses to settle this vital question by mutual agreement appears to have resulted in the matrimonial courts ignoring their special role as guardian of the child's welfare. The practice itself should not be discouraged, for conciliation in these matters imposes less conflict on the child, and it is proper that state interference should be minimal. However, it is important for a court to exercise supervisory control over any arrangement between spouses regarding custody, when the common home is terminated. Parents should be required to submit their agreement regarding custody to court for inclusion in the final order.

Litigation between parents concerning the custody of an illegitimate child

The mother has a right to the custody of an illegitimate child. She is recognised as the natural guardian with the exclusive right to exercise the parental power. However it is also conceded that the court can exercise its jurisdiction as Upper Guardian of minors and deprive her of this right in the child's interests.[105] In depriving the mother of her right, the court may well award custody to the putative father, who is otherwise, completely excluded from the parental power. We have observed that the putative father of an illegitimate is not recognised as a parent who can exercise any rights in respect of the child.[106]

The children of a marriage that is invalid but is regarded as a putative marriage in the Roman Dutch law,[107] may be declared

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legitimate by court, on an application, or *mero motu*.[108] Since there is some doubt whether a court order is necessary according to Roman Dutch law or is purely declaratory of the legitimate status of such a child, it has sometimes been suggested that the mother is entitled to their custody, as in the case of illegitimate, children.[108A] A contrary opinion considers them legitimate and recognises a preferential right in the father.[109] In Sri Lanka there is judicial authority in support of the view that the children of a putative marriage are deemed legitimate.[110] The preferential right however has no significance if the common home has been dissolved by order of a court, annulling the parent's marriage.

Litigation between parents and third parties

When missionary and other voluntary organisations assume an important role in child care, disputes can arise between parents, and the type of institution that considers itself better equipped to assume responsibility for a minor child.[110A] Similarly, in a society where the practice of adoption is a familiar customary institution,[111] and where family relationships can extend beyond the immediate unit of parents and children, third parties sometimes accept responsibility for the care and upbringing of a child. The traditional Sinhala law, does not indicate whether these arrangements were the source of conflicts between the adults. It was perhaps understood that the transfer of the child was subject to the right of the parents' to change their minds. The modern law of Sri Lanka however reveals that disputes between parents and third parties whether individuals or institutions, has been a fertile source of litigation. The courts have been swift to decide such disputes in favour of the natural parents. It has been judicially stated that the natural right of parents can be terminated only "under circumstances which are well recognised and clearly defined."[112] A dictum in a reported decision emphasises that the rights of natural parents go very deep in the fabric of Sri Lanka society so that "one starts with the assumption that the natural parent has a natural right."[113] However the case law reveals that the law does not always take account of the natural ties that are in fact recognised in the society, but concedes a presumption in favour of the natural right of the parent with the legal right to

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custody in the Roman Dutch law.[114] The possibility of displacing the presumption, and of depriving the parent of custody has been conceded on proof of prejudice to the welfare of the child.[115]

It is doubtful whether a father, can exclude the surviving mother from the custody of her children, by appointing a guardian. It has been decided that such a guardian may not claim a right to custody even against a foster parent, if there is evidence of prejudice to the child's interests.[116] If a lawfully appointed guardian claims a right to exclude the mother, the Court of Appeal can always assert its jurisdiction as Upper Guardian and confer legal custody on the mother.[116A]

Foster Parents

The attitude of the courts indicates that the welfare of the child is determined, not only from the point of view of what is of individual interest to the minor, but rather according to what is appropriate for him as a member of the natural family. Thus, parental custody is almost viewed as inherently essential to the child's welfare. It has been emphasised that mere delivery of a child by its natural parents to a third party does not invest the transaction with any legal consequences, and that prima facie the best place for a child is with its parents in its natural family.[117] The possibility of emotional disturbance to the child who is transferred suddenly from foster parents to natural parents, has been often ignored or in any event underrated.[118] Consequently sudden separation from foster parents has not been considered necessarily prejudicial to the welfare of the child. The reported cases show that there is a heavy burden of proof on anyone who seeks to displace the parental rights, and foster parents have found it very difficult to convince the courts of the necessity of interfering with parental custody in the child's interests.[119]

Consistent with the Roman Dutch law principles on parental power, foster parents cannot, in the absence of a statutory adoption order,[120] claim that they have any legal rights in respect of the child. It has been said, in one case, that such persons have "only themselves to blame for the sorrow they have . . . . brought on themselves by not taking the steps the law provides for the adoption of children."[121] That comment also focuses attention on

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the reluctance of the courts to accept that because the natural parent has permitted an informal adoption, they should deny parental rights and legalise the *de facto* custody, in the child's interests. There are other decisions which appear to suggest that the idea of surrender and abandonment of a child has been received from English law and grafted upon the Roman Dutch law as it applies to Sri Lanka, and that a third party with the *de facto* custody of a child can claim legal custody, leaving it to the parent to prove why the status *quo* should be disturbed.[122]

The view that even after surrender of a child, the parent can assert the legal right to custody in a dispute with a third party, is consistent with the legal principles on parental power under the General law. There is clear authority for the proposition that in the Roman Dutch law, parental power terminates on the happening of certain events, and that it cannot be alienated by a surrender or abandonment of a minor. In the absence of a valid adoption order, parental rights can be terminated by a court order and on evidence that their exercise is detrimental to the welfare of the child.[123] A court may interfere with the parent's right either in deciding a dispute with a third party or even where there is no competing claim to custody.[124] The judicial authorities on the aspect of surrender and abandonment are not indicative of a clear trend which supports the introduction of principles alien to the Roman Dutch law.[125] Besides it is not clear that they have set out the English law on the subject with accuracy.

In English law, an agreement purporting to surrender parental rights was considered void and contrary to public policy. It is true that if a child has been abandoned or allowed to be brought up by another person at the expense of any person, school or institution, the burden shifted to the parent to prove that the natural right should be restored. But the basis of that principle was the custody of Childrens Act 1891 which introduced a statutory exception to the general principle in equity that the presumption was in favour of parental custody.[126] The principles developed in the Common law and in Equity were no different to the Roman-Dutch Law, in this latter respect. Besides even the English statute referred to, does not appear to cover the type of factual situation that arose in the local case of **Samarasinghe** *v* **Simon,** which suggested that the burden of proof shifted to the parent to prove

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that the natural right should be restored. The case of **Re. Mathieson** [127] which is cited in the reported decisions in Sri Lanka, on the topic of surrender and abandonment in the English law, in fact reflects the approach in Equity which was identical with the Roman Dutch law.

A careful perusal of the judgment in **Samarasinghe** *v* **Simon** reveals a strong commitment to the view that the natural right of a parent should be asserted unless there is proof that recognising, it would be prejudicial to the welfare of the child. The dicta on the onus of proof cannot therefore be given special significance. The case law in Sri Lanka does not support the proposition that a principle of surrender and abandonment that is effective to terminate parental rights has been introduced into the General law. The fact that a parent has surrendered or abandoned a child, can only be treated as items of evidence upon which a court may decide that it is in the child's interest to deprive the parent of custody.[128]

The hostility of the courts to informal adoptions and the claims to custody by foster parents has been strengthened by statutory provisions which govern the transfer of parental rights to third parties. Under the Children and Young Person's Ordinance (1939) a court can deprive a natural parent of the legal custody of a child under 16 who is neglected or abandoned, and transfer that right to a "fit person" who is willing to care for the child.[128A] The Adoption of Children Ordinance (1941) which is a statute of general application, permits the legal transfer of parental power through a valid adoption order. Besides a separate part of this Ordinance contains provisions for the registration of *de facto* custody of children under 14, making it an offence for persons other than lawful guardians or adoptors to fail to register as custodian. Defined categories of people and institutions are exempted from this requirement of registration. A person who is a close relative or lawful guardian of the child, and a person in whose care or supervision a child is placed by an order of court under the provisions of any other written law, (such as the Children and Young Persons Ordinance) need not register themselves as custodians. Similarly, persons in charge of certain schools and institutions referred to in the statute are exempted, as well as those belonging to a class exempted from the provisions of the statute

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under regulations made by the Minister. Minors under 14 in the custody of registered custodians, are referred to as "protected persons", and the statute provides for home visits and inspections by officials.[129]

These provisions, the title of the statute and the debates in the legislature on the Adoption of Children Ordinance, clarify that it was viewed essentially as a piece of child welfare legislation. That part of the Ordinance which deals with registration of the *de facto* custody of children was introduced to prevent cruelty and ill treatment of children, since the social evil of exploitation of destitute children was thought to require some legislative interference. The Ordinance was not meant to obstruct a practice that was familiar to the culture, namely the practice of nurturing and bringing up a child as a son or daughter of the family.[130]

The fact that these legislative provisions on registration of *de facto* custody were not intended to affect the principles on legal custody, or to drastically restrict the scope of the court's jurisdiction as Upper Guardian of minors, is also evident in many provisions in the statute. Thus registration of some person as custodian in no way affects the right of the natural parent or the legal guardian to remove the child from the care of the custodian. A relative or guardian or person who has care of a child on an order of court under the Children and Young Persons Ordinance, is not required to register their custody. The legislation was introduced in order to prevent minors under 14 being exploited. This is why persons who had not assumed parental responsibilities either as adoptive parents or legal guardians were generally prohibited from having the *de facto* custody of such children unless they registered as custodians who could be supervised by the appropriate authorities under the statute. Though non-registration is an offence, there is nothing in the Ordinance which prevents the regularisation of the situation by the *de facto* custodian acquiring legal rights as adopter or lawful guardian.

Nevertheless these provision on non-registration of custody in the Ordinance have been interpreted in the case of **Abeyawardene *v* Jananayaka,** as preventing a court awarding legal custody to a person who has failed to register as custodian. The judgment suggests that the court must refuse to award legal

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custody to such a person even if it is detrimental to the child for the court to interfere with the existing situation.[131] The decision seriously restricts the scope of the jurisdiction of a court to protect the welfare of minors, but it has not been followed in later cases,[132] and it is submitted, with good reason.

The interpretation in **Abeyawardene** *v* **Jananayaka** cannot be supported by the argument that a court has no jurisdiction to condone the failure to conform to the statutory requirement of obtaining an adoption order. The opinion of the learned judge in the case was based on the failure to register custody, and not the failure to obtain a valid adoption order.[132A] In any event, non-registration of custody, though an offence under the Adoption of Children Ordinance, does not prevent the court granting legal custody by the entirely different process of a court order which would in the future exempt the recipient from the obligation of registration.[133] Adoption or assumption of legal guardianship by a third person could both be essential for the minor's welfare, and it would be ironical if the statutory requirements on registration of custody, introduced to protect minors, should inhibit the capacity of the courts to safeguard a child's interest.

Grand parents, Step Parents and Guardians

A grandparent has been referred to in Sri Lanka, as a natural guardian of a minor.[134] There is judicial authority in support of the view that the maternal grandparent succeeds the mother as natural guardian of an illegitimate child.[134A] However, though grand parents had a duty to support minor children, in the Roman Dutch law, they were not deemed to be natural guardians who had a legal right to custody. They had to make out a case for the award of custody like any other third party.[135] Though the Customary laws of Sri Lanka sometimes concede a special status to grand parents in connection with a minor's custody, the courts have not departed from the Roman Dutch law so as to confer any inherent right of custody upon them.[136] Similarly, the relationship of step child and step parent is not deemed to confer parental rights unless step parents are appointed as legal guardians. They may make an application for custody, like any other third party.[137]

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The Administration of Justice (Amendment) Law permitted the Public Trustee to appoint a relative or friend of a minor or any fit individual as guardian of the person of a minor, when issuing a certificate of curatorship in respect of the property of that minor. These provisions of the statute applied generally to all persons. It is clear however that such an appointment could only be made when the custody of the child was not with a natural or testamentary guardian.[137A] When a relative or friend was appointed, such a person had a legal right to custody, subject to the supervision of the Public Trustee, and the District Court.[137B] With the repeal of the above law, and the reinstatement of the Civil Procedure Code, the legal position is the same, but for the fact that supervisory jurisdiction is now vested exclusively in the Family Court.[137C]

Reimbursement of third party

The question of the payment of the cost of maintenance to a third party when a child is recovered by a parent has not been considered in Sri Lanka. In **Samarasinghe** *v* **Simon,**[138] Nihill J., held that where the father had never contributed to maintenance of the child, no order for costs of the action would be made, since the father should be "under a deep debt of gratitude to the respondent for having maintained his daughter for so many years without expense to himself." If arrangements of this nature, are made voluntarily, the obligation of maintenance can surely be considered to have been undertaken willingly. There are local decisions in support of the proposition that a third party who refuses to return a child to the parent with the lawful right of custody, is not entitled to claim maintenance for it in a legal action.[139]

The basis of judicial interference with the parental right of custody

The phrase "danger to life health and morals" has often been used to describe the basis upon which a court generally interferes with parental rights in custody proceedings; but, as pointed out earlier it is not interpreted literarily, and is merely a convenient expression, used to denote prejudice to the minor's welfare. The jurisdiction of the courts to deprive a parent of custody in the child's interests is generally exercised in habeas corpus proceedings or in the matrimonial actions discussed above. In their capacity

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as Upper Guardian, the courts can award custody to a third party who does not claim it. They can even dismiss repeated applications for change of custody, on the ground that a continuing relationship with one person is in the child's interests.[139A]

The manner in which the concept of the welfare of the child has been used to evolve a right to custody in the mother of young children has already been discussed. While the Sri Lanka courts have been swift to admit the possibility that a young child may find the experience of separation from its mother traumatic, they appear to be more reluctant to take that view in the case of separation from foster parents. There are several decisions in which the courts have emphasised the rights of the natural parents to custody and refused to award legal custody to foster parents, even on proof of emotional stress to the child on being uprooted from a familiar environment.[140] The natural parent's right of custody is identified as an inherent aspect of what is in the best interests of the child. These decisions reflect a strong inclination to preserve the natural family unit, and the relationships that flow from it; this has influenced the judicial interpretaton of the concept of the child's welfare.

It has been decided that poverty of the parent *per se* will not justify the courts interference.[141] However the comparative affluence of one party has been considered relevant, where there was evidence of previous neglect by the other, due to financial inability to maintain the child.[142] A flexibility in the interpretation of "danger to life, health and morals" is reflected in decisions which take the view that the fact that a parent has been or is living with a paramour will not justify the courts inteference, where there is evidence of clear concern for the welfare of the child, and the ability to provide for it.[143]

The parental right of custody may be taken away in special proceedings under the provisions of the Children and Young Persons Ordinance. If a parent is considered unfit to exercise, or as not exercising proper care and guardianship of a minor under 16, and the minor is either falling into bad company or is exposed to moral danger or beyond control, he is considered "in need of care or protection." Such a minor can be brought before the Magistrate, (sitting as a Juvenile or Children's Court) by the person

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or authorities specified in the statute. This court can then decide to deprive the parent of custody, entrusting the care of the child to an approved institution or a "fit person" willing to take care of him. The Ordinance also declares that a parent who commits one of the offences under the Penal Code enumerated in the statute, against a minor under 16, or who commits an offence created by the Ordinance, such as ill-treatment, wilful assault, neglect or abandonment, can be deprived of custody by the court before whom he is convicted. If this court does not consider that it has sufficient material to exercise the powers normally exercised by a Juvenile court, it can order the child to be brought before the Juvenile court with a view to that court making an order regarding the child's custody.[143A] An order conferring custody on a "fit person", remains in force, only upto the age of 16, and the statute spells out the duty of the court to regard the welfare of the minor.[144] The sole and exclusive jurisdiction conferred on the Family Courts in regard to custody matters does not appear to affect this jurisdiction, since the Children and Young Persons Ordinance has not been included in the schedule of statutes modified in regard to court proceedings, because of the creation of Family Courts.[144A] If the modification is made by an amendment to the Judicature Act, the Family Courts will be authorised to determine cases under the Ordinance.

The relevance of the "age of discretion"

The wishes of a child will clearly be relevant in deciding whether an order on custody will be in his interests. If a child is at an age when it is reasonable to take his wishes into consideration, the courts in Sri Lanka will consult him, and may decide to deprive the parent of legal custody on the basis of those wishes. The child is not joined as a party to custody proceedings, and he is not reperesented in court. However when an application for his custody is made in habeas corpus proceedings in the Court of Appeal, the judge may interview the child in chambers to ascertain his wishes.[144B] The Family Court deciding a matrimonial dispute may follow the same practice, in its capacity as Upper Guardian of minors. Besides, the procedure of family counselling, built into the proceedings. of the Family Courts,[144C] can ensure that the child's wishes are consulted before an order on custody is made by that court.

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Habeas corpus proceedings cannot be brought in the English law by a parent to compel a child to return, after he has arrived at "the age of discretion". This is determined as 14 for boys and 16 for girls, no significance being attached to the individual maturity of the child. If however a child is under the age of discretion but old enough to indicate his wishes, the court can consider them in ascertaining what is in the best interests of the child. These principles can be traced back to the old English case of **Re Agar Ellis.**[145]

In Roman Dutch law by contrast, no special significance is attached to an age that falls short of the accepted age of majority. There is some slender authority for the conclusive significance of "the age of discretion" in the South African case of **Grant** *v* **Dunbar and Others** [146] where the court held that the interdict *de libris exhibendis* to have a child produced could not lie where the child was at an age of discretion, and stayed of his own free will. Since in the modern Roman Dutch law that is applied in South Africa an ordinary interdict is considered the appropriate remedy, subject to the guiding criterion of the welfare of the child, it may be argued that the decision in **Grant** *v* **Dunbar** does not justify the general proposition that the age of discretion terminates parental power, particularly when the methods of termination in that system are so clearly defined.[147]

The Sri Lanka courts refer to "the age of discretion" and have sometimes suggested that at this age, the child's wishes are conclusive on the issue of custody.[148] The judicial decisions that give this significance to the age of discretion have purported to follow two early decisions, considering them binding on the point. However both those cases are not authoritative on the matter, and deserve to be examined critically. In **Queen** *v* **Jayakodi** [149] Clarence J. in a judgment of four lines decided that the child being a girl under 16 was not at "the age of discretion", and must be returned to the father's custody irrespective of her own wishes. In argument, counsel had cited in **Re Agar Ellis** [150] on the English law with regard to the age of discretion, and it is clear that Clarence J. agreed with his submission that the court should adopt the English law on the subject. Subsequently, in the case of **Gooneratnayaka** *v* **Clayton** [151] a girl of 17 wished to stay on in a boarding school at which she had been placed by her parents for her education.

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Fisher C.J. approved of the local cases of **Queen** *v* **Jayakodi** and **Re Mastan** [152] and held that **Re Agar Ellis** should be followed, and the girl's wishes accepted as conclusive on the issue of legal custody.

The judgment in **Re Mastan** is capable of the interpretation that the court was considering the wishes of a child who was mature enough to express an opinion, as part of the wider issue whether the order on custody would be beneficial to him. In **Gooneratnayaka** *v* **Clayton** too Fisher C.J. appears to have viewed the age of the child as relevant in deciding whether her wishes should be taken into account for the purpose of making a custody order that was in her best interests. The sources on the English law that his lordship cited, are indicative of that same approach to the age of discretion. Despite the reference to **Re Agar Ellis** and **Queen** *v* **Jayakodi** therefore, and his decision that the girl's wishes were conclusive, the judgement of Fisher C.J. is capable of the interpretation that the age of discretion is only one relevant factor in determining the issue of legal custody. The judgment of Drieberg J. who delivered the other opinion in **Gooneratnayaka** *v* **Clayton,** certainly reflects that view. His lordship referred to the power of the court in the Roman Dutch law to consider and give effect to the minor's wishes, in the process of making an order on custody that would be most beneficial to him.

Queen *v* **Jayakodi** and **Gooneratnayaka** *v* **Clayton** have thus been erroneously accepted as binding decisions on the conclusive significance of the age of discretion. In treating attainment of this age as the decisive factor on the issue of who should be awarded legal custody, the courts have introduced a principle that has a wider impact than even the English law contemplated. English law merely recognises that habeas corpus proceedings cannot be brought by a parent to compel a child who has reached the age of discretion, to return. In drawing upon that principle to formulate a general rule regarding the award of legal custody, the courts have adopted a view that is neither consistent with the maturity of Sri Lanka children, nor with the Roman Dutch law— the source of the General law on custody.

Even though the ages of 16 and 14 have been treated as relevant in regard to the criminal offence of kidnapping from lawful guardianship,[153] it may well be argued that it is arbitrary to suggest

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that girls mature at a later date than boys. What relevance can the age of maturity in England, have for Sri Lanka children, growing up under totally different conditions? In any case parental power in Roman Dutch law could be interfered with only in certain situations. To give conclusive effect to the wishes of a child of 16 or 14 would result in interference with parental rights in circumstances not warranted under the Roman Dutch law, and restrict the role of the courts in custody matters. Even in England, the present law ensures that a child who wishes to leave his parents, may be made a ward of court, and thus bound by its orders.[153A] It is clearly contrary to a Sri Lanka court's jurisdiction as Upper Guardian to determine what is most conducive to a minor's welfare, to give conclusive significance to a child's wishes, because he has attained an arbitrarily defined "age of discretion".

Of course the wishes of a child, by reason of his age and maturity must be considered in determining whether the parental right to custody should be interfered with, in his interests. As Lord Denning M.R. said in an English case, the parental right of custody is a "dwindling right", its significance decreasing as the child grows older.[153B] If an adolescent minor wishes to leave his parents, the courts can respect his wishes and deny parental custody in the minor's interests.[154] However they must award the child's custody to some one, even if that party does not claim custody, as a respondent to the application.[154A] The very concept of minority implies that an adult must be responsible for a child.

The right of access of the non custodian parent

We have observed that a court can, in the Roman Dutch law, deprive a parent of all the incidents of parental power in the child's interests. However the parental power is considered so fundamental that it is deemed to continue even when a court order denies some aspects of it. Consequently, unless a court order terminates the whole parental power, there is a presumption that the residue of rights remain unaffected when some incidents have been taken away. Thus even if a custody order does not make provision for it, the non custodian parent may claim a right of reasonable access to his or her child.

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If the mother is awarded legal custody, the father may claim the right of access, as the child's natural guardian. A non custodian mother may also claim access, either in the capacity of the child's natural guardian, or on the basis that she shares the parental power with the father, in his lifetime. These parental rights of access can always be asserted unless the court has, in awarding legal custody, decided to deprive the non custodian parent of the right of access because contact with the child will not be in the latter's interests. This aspect may be especially relevant when a third party has been awarded the custody of a small child, and contact with the non custodian parent may become a grave source of disruption that is prejudicial to the wellbeing of the child.[155] In a situation where the parent claiming custody lives overseas, an order for custody may in some circumstances have the effect of denying the non custodian parent his right to reasonable access. The possibility of that situation affecting the welfare of the child may influence the court in its final decision on the award of custody.[156]

Where custody has been awarded to one parent, during a *de facto* separation, the courts of Sri Lanka have recognised the right of the non custodian parent to reasonable access.[157] In the case of matrimonial disputes too, this right has been conceded, and irrespective of the fact that the non custodian parent has been guilty of a matrimonial offence. It has been pointed out that "natural ties ought not to be completely disregarded and denied unless the interests of the children are likely to be substantially prejudiced."[158] The decisions of the Sri Lanka courts that have considered the wishes of a child above the age of discretion conclusive and effective to terminate the parent child relationship,[159] are therefore in conflict with the legal principles on the right of access. They may however be distinguished on the facts, on the argument that the courts decided to deprive the parent of the right of access and all the other incidents of the parental power in the child's interests.

Since the Roman Dutch law does not recognise the father of an illegitimate as capable of exercising the parental power, access cannot be claimed by him as of right. However the wide jurisdiction to act as Upper Guardian of minors, empowers a court to grant the putative father access to an illegitimate child, even if custody is awarded to the mother who asserts her natural right.[159A]

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Customary Law

Persons governed by the Customary laws, may sometimes be subject to special principles regarding the award of legal custody. The provisions of the Adoption of Children Ordinance, and some of the provisions in the Civil Procedure Code that have a bearing on this subject however apply equally to persons governed by these laws. Thus applications for appointing guardians with legal custody could be made, in the past to the District Court, in curatorship proceedings.[159B] The Children and Young Persons Ordinance is also a statute of general application. Disputes between parents regarding children subject to the special laws have been decided in habeas corpus proceedings both prior to and after dissolution of marriage, as no provision has been made for determining disputed claims to custody in matrimonial proceedings involving Kandyans and Muslims.[160] The creation of Family courts, now appears to give these courts custody jurisdiction since there is no conflict with specific provisions in the Kandyan and Muslim marriage statutes.[160A]

1. Kandyan Law and Tesawalamai

The Sri Lanka courts have expressed the view that when there is no evidence to the contrary, the principles in the General law on custody apply even to persons governed by the Customary law.[161] Consequently, in the absence of a developed system of rules with regard to the custody of minors in the Tesawalamai and Kandyan law, the General law principles regarding the legal right to custody have been extended to persons governed by these systems. Some decisions on the custody of minors subject to Tesawalamai refer to the inherent preferential right of the father.[162] The father of legitimate children governed by the Tesawalamai will be able to assert his right to custody, even when he remarries. However, in the case of the binna form of Kandyan marriage it way be argued that the husband cannot claim a preferential right to custody, in the lifetime of the mother.[162A]

The traditional Sinhala law adopted a very liberal attitude to illegitimate children, and we have observed that the modern Kandyan law attaches some legal significance to the acknowledgment of a child born out of lawful wedlock. The extension of

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the General law of custody to persons governed by the Kandyan law has however prevented the natural father of an illegitimate child from asserting a right to custody.[163]

Since the Kandyan law of marriage is different from the General law, the application of the principles on custody in the latter system to persons subject to Kandyan law has created some anomalies. It is doubtful whether the difference in the principles on custody when there is a *de facto* separation between parents, and when there is matrimonial litigation, can have any relevance in the Kandyan law which, unlike the General law recognises the concept of breakdown of the marriage and permits divorce by mutual consent.[164] Besides, in the Kandyan law there is nothing comparable to matrimonial litigation, since a marriage is dissolved in non adversary proceedings before an administrative official. The concept of the welfare of the child should therefore be the only criterion whether an application for custody is made in the Court of Appeal or the Family court before or after the dissolution of a Kandyan marriage.

The application of the General law on custody does not produce this type of anomaly in the case of Tamils governed by the Tesawalamai, since the General law of marriage applies to them.

2. Muslim Law

As Islamic law contains specific principles on this subject, it has been accepted by a trend of decisions in the Supreme Court that the principles of this law determine the parental rights of Muslims to the custody of their minor children.[165] The Age of Majority Ordinance confers majority at the age of twenty-one. If that status has not been accelerated by the legal processes accepted in the General law, or the Muslim law, a child is emancipated from parental power at twenty-one. The parental right of custody in Islamic law can therefore be asserted in Sri Lanka, only in respect of minor children.

The Sri Lanka courts have recognised that a Muslim mother has a preferential right to the custody of a girl. They have also held that under Shafi law, generally custody remains with her, not merely until the girl attains puberty, but until she is married.[166] These decisions must be interpreted as referring to a Shafi girl

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under twenty-one, since she becomes a major at that date. In respect of other sects, the mother's right of hidana or custody is limited in Islamic law to the time when the girl attains puberty.[166A] If the age of puberty continues to be treated as relevant in the modern law that governs Sri Lanka Muslims,[166B] legal custody can be claimed upto that age rather than twenty-one, the general age of majority in Sri Lanka.

There is judicial authority that failing the mother, the right of custody of a female is transferred to the maternal grandmother,[167] so that the father does not succeed the mother as custodian of the child. In the case of both Shafis and Hanafis our courts have accepted the general principle of Islamic law that the mother's right to the custody of a male child is terminated at the end of the seventh year. After this he may choose his own custodian, until he reaches the age of puberty or of personal emancipation.[167A] There is authority in Muslim law that the mother loses her right of hidana or custody if she marries a man other than one who is a relative within the prohibited degrees.[168] The above principles will apply with regard to the custody of legitimate children in disputes between parents as well as parents and third parties. The Islamic law does not recognise parental rights in respect of the custody of an illegitimate, since he is considered a *filius nullius* or the child of no one. Though the mother has been referred to sometimes as the custodian of illegitimates,[168A] the law merely concedes that "for securing its due nourishment and support" it should be left in the mother's charge till the age of seven. Beyond that age, only a legally appointed guardian can claim custody.[168B]

Since the customary Quazi courts had not been conferred with specific and exclusive jurisdiction in custody matters,[168C] applications for the custody of even Muslim children were made in the usual way in the past, by utilising the writ of habeas corpus and curatorship proceedings in the ordinary courts, and they emphasised from the very earliest times, their right to determine a dispute in accordance with the child's interests.[169] The jurisdiction of the Family courts in custody and guardianship matters today appears to be relevant even for Muslims, as there is no conflict with any provision in the Muslim marriage statute. The fact that

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the Quazi court may exercise jurisdiction,[169A] and habeas corpus and Family court proceedings may also be utilised, does mean that custody applications will be considered in different courts.

The concept of the child's interests must be given special importance when the ordinary courts assume jurisdiction. A person with the right to legal custody according to the Islamic law may therefore be deprived of it, if such a step is essential for safeguarding the welfare of the child. Equally a person without the legal right to custody may obtain it by moving the court to assert its jurisdiction as Upper Guardian of minors.[169B] A parent may obtain a court order granting legal custody of an illegitimate in respect of whom there is no parental right, or in respect of a boy over seven who is permitted to choose his own guardian. The Sri Lanka courts concede that the concept of the child's welfare must always be interpreted within the framework of the personal law governing the parties.[170] The scheme of parental rights in respect of the custody of a Muslim child will therefore affect the burden of proof, and the person who seeks to deny those rights will be required to establish the need for the court to intefere with them, in the child's interest. It is on this basis that the courts may take the minor's wishes into consideration, and deprive the mother of her right to the custody of a female child.[170A] It is not clear whether legal significance must be given to the concept of the child's interests, when the Quazi courts exercise jurisdiction in a custody dispute.

The varying powers of the courts applying the General law, depending on whether or not the spouses are lawfully separated, can have no relevance for Muslims, since they are governed by the principles of Islamic law on custody.

Islamic law which considers the father the natural guardian concedes a right of access to him, even when the mother has the legal custody of a child.[171] A parent's right of access can also be recognised by a court asserting its jurisdiction as the Upper Guardian of minors, committed to safeguarding their welfare.

The influence of the General law can be observed in those decisions that refer to the child's arrival at the 'age of discretion', when his wishes are conclusive regarding custody.[172] The impact of the view that the welfare of the child should be the only con-

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sideration even when the Customary laws apply, is seen in a recent decision in a custody dispute involving Muslims, where the learned judge commented that "under any system of law, a paramount and indeed a valid consideration.....is the interest of the child, any other consideration being subordinate to it".[172A]

Overview of the law

This account of the law of custody indicates that the source of the law in Sri Lanka is the modern Roman Dutch law on parental power, the Muslim law, and statutes of general application. The concept of the welfare of the child has inspired the courts to interfere with the scheme of parental rights recognised in the General law, as well as the Customary law on custody. The impact of the English law on the interpretation of this concept, as well as with regard to abandonment and surrender of children, and the age of discretion, is also evidenced in the case law. Judicial opinions on parental custody sometimes reveal not merely the impact of two Western systems, the Roman Dutch and the English law, but the influence of Western ideas and research on the subject of child care and the parental role. At a time when Western observers of family law in the developing countries emphasise the irrelevance of the Western legal experience in those countries,[173] Sri Lanka judges have derived inspiration from it, and assumed that it is an important part of their legal heritage. While legislation in England has in the course of time displaced the father from his superior role, and made the child's interests paramount, in Sri Lanka the judiciary has on occasion eroded the concept of parental rights, and focused attention on the child's interests.

If we examine the General law on custody we find that conceding a creative role to the judiciary in the administration of justice, the decided cases do not reveal a strong and consistent judicial trend that is effective to establish a deviation from the principles of the Roman Dutch law, which is the aknowledged foundation upon which the Sri Lanka law on custody is based. However these decided cases draw attention to important issues regarding parental power, and the respective rights of parents to the custody of their minor children.

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Western legal systems which originally emphasised the importance of recognising the biological parent's right to custody, have over a period of time, moved away from that concept. There has been a marked erosion of parental rights, and reforms in the law have increasingly stressed the need to determine custody matters according to the best interests of the child. Even so, recent medico-legal studies in these countries claim that the existing laws are not "child oriented" enough, and that biological ties should not be deemed relevant, when they come in conflict with the child's need to maintain a continuing relationship with the "psychological parent" who has been the source of love and security.[173A] More recently with the movement for equality of the sexes reaching a crescendo of public concern, legal reforms have recognised that both parents occupy an equal status in relation to a minor child.[173B] Though Sri Lanka judges do not overtly question the fundamental emphasis placed by the existing law on parental rights, or the subordinate status of the mother in this respect, they have sometimes drawn attention to the need to ensure that a child does not suffer from maternal deprivaion. In this process they have articulated in the law on custody, a principle that is strongly feminist, and also one that erodes the preferential right of the father to the custody of a legitimate child.

The Sri Lanka law on custody nevertheless, generally accords a special place to the concept of parental rights over minor children, and the superior rights of the father of legitimate children. The importance attached to parental rights in the existing law may be viewed as in harmony with values regarding the parent child relationship that are generally accepted in the country. Besides, the Roman Dutch law on parental power reflects concepts that are not alien to the indigenous systems of law. Neither the courts nor the legislature have therefore reviewed the need for a complete departure from the concept of parental power over minor children, and the presumption in favour of the natural parent's legal right to custody.

Some Western authorities on the subject, now criticise the acceptance of the welfare of the child as a sole criterion in custody disputes, when it is applied in isolation from the interests of the parents and the other members of the family.[173C] This criticism appears specially valid in an Asian country like Sri Lanka,

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where family obligations and responsibilities are viewed somewhat differently from the West. A balance between parental rights and the welfare of the child, a balance which the existing law seeks to achieve, may therefore have a relevance which Western medico legal research has suggested that it should not have in disputes on custody. In a developing country, the demands on state finances are also such that reforms in the law on custody must be based on a realistic assessment of the facilities the State will be in a position to provide. In the West, many supporting services are deemed necessary for determining the right placement for a child whose custody is in question. Will the state in Sri Lanka be in an immediate position to finance the setting up of such services?

It appears unrealistic at present, to introduce reforms in the law on custody based on the assumption that a major responsibility for minor children lies, as in some Western countries, upon the State.[174] In fact there is positive reason for minimising State inteference while strengthening and giving more support for the traditional value of parental responsibility for minor children. The concept of parental power may be viewed as an additional motivation for parental responsibilities. In England, where the modern law on children gives a child access to State protection against the parent, "baby battering" by parents is a recognised social problem. There is even a movement for a "children's charter" of rights, against parents.[174A] It is doubtful whether children in Sri Lanka generally need the protection of the law, in the same sense. Lack of parental responsibility may often be traced to factors such as ignorance and dire poverty. The State should then provide supportive services which assist parents to fulfill their obligations adequately. In any event, the jurisdiction of the courts to protect children and interfere with parental rights, that was built into the Roman Dutch law, and was equally unfamiliar to early English law, provides a safeguard against abuse of the parental power. If a parent, for instance unreasonably refuses medical treatment for a child as reported in an American case,[174B] the principles of the present law on custody can be used by even an interested third party to deprive the parent of the physical control of the child. It may also be possible to institute proceedings under the Children and Young Persons Ordinance. The controls with regard to other aspects of parental rights will

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be evident in the discussion that will follow in subsequent chapters. There is thus an existing machinery to ensure that the recognition of parental rights will not prejudice the welfare of the child.

The father's status as natural guardian of legitimate minor children, which gives him more significant rights in relation to the children is an aspect of the modern Roman Dutch law, that has come in question in some local cases. The father's preferential right to custody accords with the role that the Sri Lanka law assigns to him, as head of the family. The superior parental rights that he enjoys in the General law accords with his legal status in the family; it may even accord with his hitherto socially accepted role in it.[174C] Yet it may be viewed as in conflict with the concept of equal legal rights for women, and thus reflecting unfair discrimination against women.

As long as breakdown of the marriage is not considered the basis for matrimonial relief that results in the dissolution of the legal family, there is a rationale for conceding that the father's preferential right to custody under Roman Dutch law continues even when there is a *de facto* separation between spouses. Interference with that right will be the responsibility of the courts, which can deprive the father of custody, in the child's interests. This in fact is the basis on which custody has been awarded to the mother during a *de facto* separation.[174D] When a child does not have to depend solely on its own parents for its care and upbringing, it would be incorrect to over estimate the prejudice to the child through separation from the mother. The concept of inevitable "maternal deprivation" from conceding the father's preferential right to custody does not therefore in itself justify rejection of his preferential right to custody. The more pertinent objection to the preferential right is that it flows from the concept of the father's natural guardianship, which enshrines an attitude of discrimination against the female spouse. It may be argued that the present policy of the law should be changed to reflect the concept that both parents can be joint guardians of the child.

Equal opportunities for men and women has been an accepted social and legal value in Sri Lanka, despite a family structure and a law that accords a superior status to the father in family relations. It may thus be suggested that discarding the concept of the father's

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superior rights, and his natural guardianship, does not necessarily have the same ideological significance for "women's emancipation" that it may have in countries which have experienced the need for an aggressive campaign for equal opportunities; and that a radical change in the law, requires evidence that the structure of family relationships warrants a reform that concedes an equal status to both parents in regard to the guardianship of their minor legitimate children.

If breakdown of the marriage rather than fault becomes the fundamental ground of divorce in the General law, there will be no rationale for recognising the father's preferential right to custody when the common home has ceased to exist. Such a development will also enable a court determining a custody dispute between parents during a *de facto* separation to adopt the same attitude that it adopts in matrimonial litigation where the father's superior right of custody is not conceded. In other respects however it is not clear that the concept of the father's natural guardianship, if it continues to be recognised, should cease to have significance with the dissolution of the common home.

The present law that emphasises parental rights need not result in disruption and trauma for a child who has been cared for by foster parents. If the need for a continuing relationship with the "psychological parents" is considered essential for the child's well-being, evidence of this fact can be led before a court which has the power to make a determination on custody in the foster parents favour. If emotional stress to the child by separation from the person with *de facto* custody has been minimised in local cases, this may be due to the reason that its significance has not been adequately brought to the notice of courts.

The concept of parental rights, the superior rights of the father, when the spouses are living together, and his continuing natural guardianship even after dissolution of the common home, are important features of the General law, and future reforms must focus on whether they have a relevance in Sri Lanka or whether modification is necessary. An appreciation of the balance that the law seeks to maintain between parental rights and the welfare of the child is also important. The introduction of the concept of the child's interests as the sole criterion in custody

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matters will destroy that balance, and not necessarily create a better law; particularly in a situation where the State is unable to assume a major responsibility for children and provide the supportive infrastructure necessary to determine what is in the best interests of a child.

There is a need to examine whether the concept of the father's superior rights as natural guardian should be recognised and inhibit the mother's rights after his death. The right of a surviving mother to the custody of legitimate minor children should be clearly conceded, and a guardian appointed by the father should be unable to exclude her from this right. The law should also confer the parental power upon the natural father who has acknowledged an illegitimate, thus enabling him to claim the right of custody and other parental rights. In the present law it may be possible for the natural father of an illegitimate to obtain a certificate of guardianship from the Family Court that is effective to confer legal custody. However, such a certificate may only be obtained in circumstances where the child has property, and custody is not with the mother as natural guardian. [174E] The existing procedure enables the father to obtain custody in limited circumstances, when the full parental status of the natural father should be conceded in all situations where he has recognised the child. The strictures on the natural father acquiring parental rights by recognition of the illegitimate are particularly anomalous in the Kandyan law, which permits an illegitimate who has been acknowleged by the putative father to acquire rights of inheritance.

We have observed that the scheme of parental rights regarding custody in the Muslim law is different to the General law, enabling a boy to choose his own guardian after the age of seven, and conferring a preferential right of custody, in respect of all females, upon the mother. Even though these rights may be considered fundamental to the Muslim law on family relations in this country, it is difficult to support the judicial opinions that continue to treat the age of puberty as relevant, in determining the age at which the Muslim minor is released from parental custody. It may be argued that attainment of this age can no longer terminate the parental right of custody, when twenty-one

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has been substituted as the age of majority for all persons. [174F] Besides, the Muslim law regarding the position of illegitimates should be reviewed, since they are still deemed *filius nullius* or children without parents. Under the present procedure, an application for the custody of such a child may be made in the manner prescribed under General law. The courts can then award custody to any person that they are satisfied will safeguard the child's welfare. The Family Court may also appoint a guardian to take charge of a Muslim illegitimate, in the unlikely event of curatorship proceedings being initiated with regard to the property of such a child.[174G] The fact that custody applications are heard in the ordinary courts, can thus provide salutory protection of the child's interests. The Quazi courts may also award custody to a person who has been appointed legal guardian. However in the substantive law, the Muslim illegitimate remains a child in respect of whom neither parent has a right of custody, and this concept in itself reflects a severe attitude to the status of illegitimacy.

The anomaly in the existing system which is striking is the introduction of the General law distinction between custody on *de facto* separation and custody after a matrimonial dispute, to persons governed by the Kandyan law. While the concept of parental rights was familiar to the traditional Kandyan law, the principles applicable to divorce indicate that the concept of breakdown of the marriage was recognised. Consequently it becomes difficult to rationalise the father's preferential right to custody during a *de facto* separation between Kandyan spouses. If legislative reform of the General law leads to a divorce law based on the indigenous theory of breakdown of the marriage, the distinction between custody disputes during *de facto* and legal separation will have no place. As long as it remains part of the General law however, the extension of these principles to persons governed by the Kandyan law of marriage creates an anomaly.

The concept of the age of discretion, borrowed from the English law and introduced in the local cases, is arbitrary and without relevance in Sri Lanka. The law on custody gives a court the discretion to take a mature minor's preference into account when determining who should be awarded custody. This prevents the assertion of parental rights against the wishes of the child. A child may even be permitted to leave his parents if the court is

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satisfied that it would be prejudicial to his interests to permit the parents to enforce their custodial rights. The concept of the age of discretion thus serves no purpose, and can be dispensed with.

The practice of the judge interviewing the child in chambers aims at providing the court with an opportunity to ascertain the child's wishes. The child may in fact find this experience intimidating, and it may inhibit his capacity to express himself freely. In this situation a "guardian ad litem", who represents the child, may be in a better position to provide the court with information on the child's preference. Where legal custody is strongly contested by the adult parties, and there is conflicting medical or psychiatric evidence, independant testimony introduced by the guardian ad litem, may also help the court to arrive at an objective assessment of the minor's interests.[175] It may be argued that as in applications for alienation of a minor's property, the court should exercise its inherent jurisdiction as Upper Guardian of minors, to make a minor respondent to an application for custody in habeas corpus proceedings.[175A] Hitherto our courts have revealed greater concern for protecting a minor's proprietory interests, even though custody disputes and other matters are equally, if not more important. However, in matrimonial actions, even this jurisdiction may be inhibited by the provisions on joinder. On principle, it is important that the court deciding a custody dispute should be able to obtain any assistance that is required to determine the issue of legal custody. The court of its own motion should require independent representation of the minor in custody applications, by a guardian ad litem.[175B] Specific statutory provisions already exist regarding the appointment of such a guardian ad litem to watch the interests of the minor, where his "civil rights are affected,[175C] and in adoption proceedings.[175D]

The question whether an informal procedure should be utilised, and the adversary procedure approach in judicial proceedings dispensed with, has been the subject of discussion in other countries.[176] These questions have not surfaced in Sri Lanka, but perhaps accidentally, the procedure at one time combined the purely administrative and the judicial. Several courts and the Public Trustee could make orders on the custody of minors. Custody claims could also surface in different proceedings. The recent

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establishment of the Family courts has placed special emphasis on the expeditious disposal of custody matters. There is also provision for efforts at resolving a dispute through conciliation, using the services of family counsellors before trial. The original mandatory provision in regard to use of family counsellors, was subsequently amended due to the difficulty of appointing qualified persons to act in that capacity in the Family courts. The procedure adopted in the Family courts today continues to be adversary in its approach, even though the Judicature Act (1978) specifies that custody matters should take precedence over all others proceedings in the Family court, and enables consolidation of different poceedings or actions in the same court, between the same parties or in regard to the same matter, into one single proceeding. This provision coupled with the court's jurisdiction can prevent the issue of custody being determined incidentally in curatorship proceedings or in a matrimonial dispute, or in separate habeas corpus proceedings. Yet we have observed that habeas corpus proceedings in the Court of Appeal continue to be used in respect of custody applications, despite the important jurisdiction conferred on the Family court as the appropriate forum to deal with custody cases.[176A]

Since custody disputes are litigated in the courts when family efforts at conciliation have failed, and there is irascible disagreement, it is unlikely that family counsellors will be able to resolve this conflict. However the special Family court can at least provide a single forum for determining a custody issue with minimum prejudice to the child, and some effort to safeguard his interests. Custody proceedings were initiated in the Supreme Court only because Sri Lanka continued to follow the ancient English law practice of enabling claims for legal custody to be made through applications for a writ of habeas corpus. Since District proceedings were likely to involve delay, habeas corpus proceedings have been favoured as a device for obtaining a speedy determination of a disputed claim for custody. Yet the District Court was specifically charged with the care and custody of minors, and this jurisdiction has now been conferred on the Family court. The Magistrate's court sitting as a Juvenile court also has jurisdiction in adoption proceedings, and in applications under the Children and Young Persons' Ordinance.

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It is also the Magistrate's court that is required to make investigations and submit a report to the Court of Appeal when it determines the issue of custody in habeas corpus proceedings.

It is in the child's interests that there should be a co-ordinated uniform policy regarding the forums and the procedures for determining custody. The present variable procedures for deciding the issue can, as we have seen, even lead to conflicting orders. Any reform in the substantive law should therefore be accompanied by a review of the position regarding the forums and the procedures for determining custody.

NOTES

1. N. Yalman Under the Bo Tree (1971) p. 119; J. Davy, An Account of the Interior of Ceylon, (1821) p. 216; Ralph Pieris, Sinhalese Social Organisation (1956) p. 195; Tambiah, Principles op. cit. p. 172, 212—213.

2. Bryce Ryan, Sinhalese Village (1958) p. 41—45; Tambiah principles op. cit. p. 247; Davy op. cit. p. 215.

3. Robert Knox, op. cit. (1958 ed.) p. 193. Davy, op. cit. p. 137, 211—213; Ryan, op. cit. p. 44; Pieris, op. cit. p. 226; c.f. Tesawalamai s. 12; Baldeus, Ceylon, transl. by R. L. Brohier, (1960) p. 366.

4. Hayley, op. cit. p. 185; Baldeus op. cit. p. 366.

5. Hayley, op. cit. p. 209—210. J. D. M. Derrett (1956) 14 U.C.R. 105 at 123.

5A. Fyzee op. cit. (1974 ed.) p. 208, 209; Tyabji op. cit. p. 212, 248—249.

6. Marikkar *v* Marikkar (1915); Narayanen *v* Saree Umma (1920), followed with approval by the Privy Council, in Abdul Cader *v* Razik (1952). This view accords with Islamic law, see Fyzee, note 5A supra; the suggestion in Haniffa *v* Razack (1958) 60 NLR 287 that the concept of the "age of discretion" as it is known in the General Law on custody is relevant for determining the age of puberty of Muslims, conflicts with these authorities.

7. Age of Majority Ordinance No. 7 of 1865. ss. 2, 3. See also termination of parental power, Ch. VIII infra.

8. C.O. 416/19 p. 270, 337, 405 in answer to a question on the authority of parents.

9. op. cit. p. 193.

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10. Davy, op. cit. p. 137.

11. Davy, op. cit. p. 137; Hayley, op. cit. p. 137. Sawers Digest, op. cit. p. 32.

11A. See Tesawalamai, part VII, the titles on Purchase and Sales, which refer to the sale of children. The provisions on sale of children were excluded when the Revised Legislative enactments were published in 1938.

12. Sawers Digest op. cit. p. 34; Hayley, op. cit. p. 185. H. W. Tambiah, Tamil Culture (1959) Vol. VIII No. 2. p. 8. Davy, op. cit. p. 213. Baldeus, op. cit. p. 366.

13. Baldeus, op. cit. p. 366, 368, 370.

14. Queyroz, Conquest of Ceylon, op. cit. p. 88 refers to the practice of child marriages during the Portuguese period, but this could be a description of the custom among the Tamils; see Kandyan Marriage Ordinance (1859), s. 3, and the discussion in the Marriage and Divorce Commission report op. cit. p. 32.

15. Tesawalamai, s. 7, s. 1; Kander *v.* Sinnatchipillai (1934) Nalliah *v* Ponnamma (1920) 22 NLR 198 at 204.

16. The Mahā Mangala Sutta, stanza 5.

17. Davy, op. cit. p. 215—216.

18. Tesawalamai, ss. 11, 12.

19. Hayley, op. cit. p. 213.

20. Tambiah, Sinhala Laws op. cit. p. 152, Principles op. cit. p. 157, 213, Tamil Culture, (1959) Vol. VIII op. cit. p. 16.

21. Tesawalamai, ss. 11. 12.

22. Ambalavanar *v* Ponnamma (1941) 42 NLR 289, Theivanapillai *v* Ponniah (1914) 17 NLR 437, though a different view was expressed in Kanapathipillai *v* Sivakolonthu (1911) 14 NLR 484; c.f. also Annapillai *v* Saravanamuttu (1938) 40 NLR 1 per de Kretser J. at p. 6; Katiresu, A Handbook of the Tesawalamai op. cit. p. 28—29 refers to some decisions between 1843—1860 which have treated the provision in the Tesawalamai as setting out a legal principle regarding guardianship; see also Tambiah, Principles op. cit. p. 213.

23. Sawers, op. cit. 20; Armour Grammar, op. cit. p. 15.

24. Tambiah, Sinhala Laws, op. cit. p. 38—42.

25. Hayley, op. cit. p. 211; Tambiah Sinhala Laws op. cit. p. 152.

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26. Niti-Nighanduwe op. cit. p. 44, 46, 25; c. f. Sawers op. cit. p. 20, Armour op. cit. p. 15.

27. Hayley, op. cit. p. 17.

28. Derrett, (1956) 14 U.C.R. op. cit. p. 123.

28A. Hayley op. cit. p. 351, and see Ch. I supra, note 29.

28B. Marikkar *v* Marikkar, Narayanen *v* Saree Umma; Shorter and Co. *v.* Mohomed (1937) Kalenderlevvai *v* Arummah (1947) Assenar *v* Hamid (1948) 50 NLR 102, Majeeda *v* Paramanayagam (1933) Abdul Cader *v* Razik (1952) P.C., and also the view of the Privy Council expressed obiter in Noorul Muheetha *v* Sittie Leyaudeen (1953).

29. Cassim *v* Cassee Lebbe (1927) 29 NLR 136; In re Lebbe Ahamado Lebbe Marikkar (1890) 9 S.C.C. 42 (F.B) Re Nona Sooja (1930) Junaid v Mohideen (1932); Faiz Mohomad *v* Elsie Fathooma; c.f. M.M.D. Act s. 2, s. 98(2); Now see Hameen *v* Maliha Baby (1967) 70 NLR 405; Subair *v* Isthika (1974) 77 NLR 397.

30. Fyzee op. cit. (1964 ed.) p. 188—201 (1974 ed.) p. 197—202; for further discussion see administration of a minor's property and parental consent to marriage under Muslim Law, Ch. VII infra; see also custody of Muslim minors infra; termination of minority, Ch. VII infra.

31. Haseena Umma *v* Jamaldeen, (1965), Pakir Muhayadeen *v* Assia Umma (1956) Jiffry *v* Nona Binthan (1960); Mohideen *v* Sulaiman (1957) at 231—232; c.f. Pemawathie *v* Kudalugoda Aratchi (1970) 75 NLR 398 per Weeramantry J. at 401.

32. Fyzee op. cit. (1964 ed.) p. 192, 206.

32A. Marikkar *v* Marikkar, Narayanen *v* Saree Umma, Shorter and Co. *v* Mohomed, Kalenderlevvai *v* Avummah, Assenar *v* Hamid; the Privy Council in Abdul Cader *v* Razik (1952) obiter, and their judgment in Noorul Muheetha *v* Sithie Leyaudeen.

32B. See duty of Support, Muslims, Ch. X infra.

32C. See cases cited in notes 39 and 51 infra.

33. Voet op. cit. 1. 6. 3., 1. 7. 7.; Grotius op. cit. 1. 6. 1., 1. 6. 3.; J. Van de Linden [V.D.L.] Institutes of the Laws of Holland transl. H. Juta (1906) 1. 4. 1. and 1. 4. 2; Hahlo and Kahn op. cit. p 354; see also Dhanabakiam *v* Subramaniam (1943) A.D. 160 at p. 162.

34. Grotius 1. 6. 1.; Voet 1. 7. 7. V.D.L. 1. 4. 2; Spiro Parent and Child op. cit. (1959 ed.) p. 4, 158.

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35. Grotius 1. 6. 1; Voet 26.1.1., 23.2.13.; see also Spiro op. cit. (1971 ed.) p 3, citing Voet 1.6.3 and V.D.L. 1.4.1., both of whom, in discussing parental power, refer to the "paternal power". In the old Dutch law the surviving parent was not automatically the guardian in all respects, and even the father had no right to take charge, of the minor children's property after his wife's death. But he had a prior claim to be appointed guardian, see Lee, Roman Dutch Law, op. cit. p 36.

36. Spiro op. cit. (1971 ed.) p 30—31, Hahlo and Kahn op. cit. p 367; Van Rooyen *v* Werner (1892) 9 S.C. 425, 428; Calitz *v* Calitz (1939) A.D. 56 at 61—63.

37. Grotius 1.7.8; Voet 1.6.3; V.D.L. 1.4.I.; Lee Roman Dutch Law op. cit. p 37, 38; Van Rooyen *v* Werner at 430.

37A. See note 33 supra. See Citizenship Act (1948) ss. 4, 9. (citizenship by descent) and P. 43 supra.

37B. Hahlo and Kahn op. cit. p 367

38. Grotius 1.7.10; Voet 27.2.1.; Spiro op. cit. (1959 ed.) p 163, 166; Hahlo and Kahn op. cit. p 364

38A. See J. C. Hall (1972) 31 C.L.J. 248, and at p 265; see also authorities cited at note 78 E infra.

39. In re Lebbe Ahamado Lebbe Marikkar, Idroos Sathak *v* Sittie Leyaudeen (1950), Kalu *v* T. H. Silva (1947); cases cited in note 22 supra and note 51 infra; Mangaleswari *v* Selvedurai (1961) P.C. at p 93.

40. Children and Young Persons Ordinance No. 48 of 1939, Adoption of Children Ord.

41. See custody of Muslim minors infra.

41A. See Ch. VII, Ch. VIII infra.

42. Courts Ordinance No. 1 of 1889, s. 62; see Cassaly *v* Buhari per Gratiaen J. at 80; Fernando *v* Fernando (1968) 72 NLR 174 at 178.

42A. Spiro op. cit. (1959 ed.) p. 166.

43. See the jurisdiction of the Supreme Court, the Court of Appeal, and the Family Court, in applications for custody infra, and the jurisdiction conferred on the courts under the Children and Young Persons Ord.

44. A.J.L s. 26; See the rights of parents regarding administration of a minor's property, Ch. VII infra.

44A. See ss. 24(1) (2)(3) and Third Schedule, s. 29 and s. 25 Judicature Act as amended by Judicature (Amendment) Act No. 37 of 1979.

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45. Courts Ord. ss. 55, 62, 69, AJ.L. s. 26; Civil Procedure Code Ch. 40; c.f Children and Young Persons Ord. s. 21.

46. Cassaly *v* Buhari per Gratiaen J. at 80, Fernando *v* Fernando, (1968) 72 NLR 174, Keppetipola Kumarihamy *v* Rambukpotha (1928) 30 NLR 273; Ambalavanar *v* Ponnamma, K *v* de Croos (1911) 14 NLR 249.

47. Civil Procedure Code, s. 619—622 and c.f. A.J. (Am.) L.s. 630(2), A.J.L s. 26.

48. K.M.D. Act ss. 33, 34, 35, M.M.D. Act Parts III and V and s. 47; see also Judicature Act s. 24(1) proviso, ss. 24(2), 24(3), 25, 29, and ss. 19 and 20 (District Court).

48A. See the right to appoint guardians Ch. VII infra.

49. Re Shaw (1860—62) Rama 116; Kamalawathie *v* de Silva (1961) 64 NLR 253 per Tambiah J; Courts Ord. s. 45 and see A.J.L. s. 12(2)

49A. See Constitution (1978) s. 141, and Karunawathie *v* Wijesuriya (1980) 2 Sri. LR 14.

49B. A.J (Am.) L. s. 614(3); see also Re Lesley Mark Antony, note 116 infra

50. Goonaratnayaka *v* Clayton (1929) 31 NLR 132 per Fisher C.J.; see also Queen *v* Jayakodi (1890) 9 S.C.C 148; Samarasinghe *v* Simon (1941) 43 NLR 129; Ranmenika *v* Paynter (1932) 34 NLR 127; Abeywardene *v* Jananayaka (1953) 55 NLR 54 at p 55; c.f. Kamalawathie *v* de Silva per Tambiah J. at p. 259.

51. Ivaldy *v* Ivaldy (1956) 57 NLR 568; Fernando *v* Fernando (1956) 58 NLR 262; Kamalawathie *v* de Silva at p. 253; Fernando *v* Fernando (1968) 70 NLR 534; Boteju *v* Jayawardene (1968) 75 C.L.W 55; Madulawathie *v* Wilpus (1967) 70 NLR 90; Endoris *v* Kiripetta (1968) 73 NLR 20; Frugtneit *v* Fernando (1969) 74 NLR 448; Pemawathie *v* Kudalugoda Aratchi .

52. Courts Ord. s. 45(a) and (b); see A.J.L. s. 12(2) (a) (b).

53. See H. N. G. Fernando J. in Ivaldy *v* Ivaldy at p. 568, 570; c.f. Re Andrew Greig (1859) 3 Lorenz 149 at p. 153, Weragoda *v* Weragoda (1961) 66 NLR 83 per Sansoni J. at p. 86.

54. See Weragoda *v* Weragoda; c.f. Goonaratnayaka *v* Clayton, per Fisher C.J.

54A. See text at note 143 A infra.

55. Tambiah, Principles op. cit. p. 90.

56. Calitz *v* Calitz (1939) A.D. 56; Spiro op. cit. (1971 ed.) 30,37, 80.

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57. See, parental rights over the property of minors, Ch. VII infra.

58. See Calitz *v* Calitz at p. 63; Spiro op. cit. (1971 ed.) 81. Hahlo and Kahn. op. cit. p. 370.

58A. In the case of Dahiru Cherance *v* Alkali Cheranci (1960) N.R.N.L.R 24 a Nigerian Court held that a statutory prohibition that prevented a child aged 15 and under from participating in political activities is not coutrary to the constitutionally guaranteed right of freedom of conscience, but did encroach on the right to freedom of expression. See Sri Lanka Constitution (1978) s. 10 guaranteeing the protection of freedom of thought conscience and religion as a fundamental right. For the English Law see J. M. Eekelaar (1973) 89 LQR 210 at 219—223.

59. Hill *v* Hill (1969) (3) S.A.L.R. 544 R.A.D.; see also Spiro op. cit. (1971 ed.) 122, 276—277.

60. See for the statutory expression of this difference A.J. (Am.) L. s. 614(3) (4) (5) (9), s. 630(2) and now see Civil Procedure Code s. 582, 585, 587, and 594.

60A. Nalliah *v* Herath (1951) 54 NLR 473, Vaithialingam *v* Gnanapathipillai (1944) 46 NLR 235.

61. Meyer *v* Van Niekerk 1976 (1) S.A.L.R. 252, Coetzee *v* Meintjies 1976 (1) S.AL.R. 257. In the former case the court thought the right restricted to the case of a totally immature young child. However in the later case, the court stated that the grant of an interdict would depend on the degree to which the parent had retained authority. The interdict was refused on the basis that the parent had not retained authority. The right to determine who the child associates with seems inherant in the concept of care and control of the child's person.

61A. Safena Umma *v* Siddick (1934) 37 NLR 25; Rodrigo *v* Perera (1942) 43 NLR 217; See also R. G. Mckerron, The Law of Delict (1965) p 80, 146.

61B. In Nonno *v* de Silva 1883 5 S.C.C 214 such a right was recognised on the basis of the English law. However, according to the Roman Dutch Law, which is the source of the Sri Lanka law, it is not clear whether such an action is available today. See C. F. Amerasinghe, Defamation and other Injuries (1968) p. 384.

62. The Roman Law recognised the concept of mediate injuries, so that a delictual action for wrongful interference with interests of personality could be brought by a person connected to the injured person in a close relationship, like that of parent and child. This doctrine is of limited application in the modern Roman Dutch law and is probably confined to the case of a husband or wife suing mediately because of an injuria primarily suffered by the other; see Mckerron, The Law of Delict, op.

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cit. p 52—53, Sudu Banda *v* Punchirala (1951) 52 NLR 512, and the dicta at p 515; see also Appuhamy *v* Kirihamy (1895) (1) NLR 83 where the Supreme Court held that a father had no cause of action for an injuria when an insulting statement was made about his adult daughter. For a different view see C. F. Amerasinghe Aspects of the Actio Injuriarum in Roman Dutch Law, (1966) p. 203, 206—207 and p 209.

62A. See judicial interference with parental custody infra, and Penal Code s. 343.

63. Children and Young Persons Ord. s. 71 (1) (6), s. 88, s. 34 (1) (b) (1) s.35 (1), s. 36.

64. Hahlo and Kahn op. cit. p 375, and Pinchin *v* Santam Insurance Co. Ltd. 1963(2) SALR 254 per Hiemstra J. obiter at p. 260; see also Ch. II note 1 supra on the child's right to sue for pre-natal injuries. The Congenital Disabilities (Civil Liability) Act (1976) now permits such claims to be made under English law; see P.J. Pace (1977) 40 MLR 141 at p. 152—155 discussing the statutory liability of parents for physical and mental disabilities caused to their children by pre-natal injuries and pre-conception fault. But is the recognition of such claims disruptive of family harmony?

65. See judicial interference with custody infra, and parental right of representation Ch. VII infra.

66. Mckerron op. cit. p 80; de Beer *v* Sergeant 1976(1) SALR 246; de Silva *v* Gunawardene (1963) 66 NLR 385; as an extension of the concept, a parent may be liable for a delict committed by a minor child who drives a vehicle belonging to him. See de Silva *v* Hapuaratchi (1970) 74 NLR 121, de Silva *v* Gunawardene Supra.

67. Voet 26.8.2; see Roman Dutch Law op. cit. p 44, 46; Hahlo and Kahn op. cit 375; see also Eekelaar op. cit. p. 224.

67A. c.f. Re D (1976) I.A.E.R 326 where an English Court overruled the parent's consent to an operation for sterilisation of a handicapped child of seven, after making her a ward of court.

68. See the parent's rights in respect of a minor's property, Ch. VII infra.

69. Children and Young Persons Ord. s. 59, 62, 63 now repealed and replaced by Employment of Women, Young Persons and Children Act No. 47 of 1956, see ss. 13(1) 14, 17 and 33(2).

69A. Calitz *a* Calitz at p. 61, 65.

70. At p. 63.

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70A. See Quadrata, (1971) 88 S.A.L.J. 105—106; Hahlo Kahn op. cit. p. 425, 437; Voet 24.2.5; 24.2.7.; Grotius 1.5.20; Van Vuuren *v* Van Vuuren (1959) 3 S.A.L.R. 765 ; Ainsbury *v* Ainsbury 1929 A.D. 109; Buchling *v* Buchling 1909 T.S. 713 at 714.

71. See Calitz *v* Calitz at p. 61 to 65.

72. Voet 25.3.20; Calitz *v* Calitz at p. 63; Fletcher *v* Fletcher 1948 (1) S.A.LR. 130 A.D.; Shawzin *v* Laufer (1968) 4 S.A.L.R. 657 A.D.; H. R. Hahlo, Law of Husband and Wife (1963 ed.) p. 454.

73. The Matrimonial Affairs Act 1953 s. 5.

74. Grotius 1.7.10;. Voet 27.2.1.; Lee Roman Dutch Law, op. cit., p. 99; Spiro op. cit. (1971 ed.) p. 4, 239.

75. supra p. 63.

76. See the other types of custody disputes discussed infra.

77. See Bam *v* Bhaba at p. 806 per Centlivres J. A.; Short *v* Naisby 1955 (3) S.A.L.R. 572 at p. 575; Kaiser *v* Chambers 1969 (4) S.A.L.R. 224; September *v* Kariem 1959 (3) S.A.L.R. 687; Spiro op. cit. (1959 ed.) p. 167. Peterson *v* Kruger 1975 (4) S.A.L.R. 171.

77A. See notes 93B, 93C infra.

78. Re Andrew Greig; Ivaldy *v* Ivaldy; Fernando *v* Fernando (1956) Weragoda *v* Weragoda, Rajaluxumi *v* Iyer (1972) 76 NLR 572, Karunawthie *v* Wijesuriya, Madulawathie *v* Wilpus, Boteju *v* Jayawardene; In Kamalawathie *v* de Silva and Fernando *v* Fernando (1968) 70 NLR 534 the premise of the preferential right is conceded though the judicial views expressed by Weeramantry J. cannot always be reconciled with it. Judicial dicta in other cases refer to the preferential right of the father recognised in the General Law. See Algin *v* Kamalawathie (1969), Frugtneit *v* Fernando, Endoris *v* Kiripetta; Cassim *v* Cassie Lebbe at p. 137; Ambalavanar *v* Ponnamma, Fernando *v* Fernando (1965) 69 NLR 429; Rajaratne *v* Rajaratne (1970) 80 CLW 69; Goonaratnayaka *v* Clayton at p. 135.

78A. Children and Young Persons Ord. s. 79 which must be interpreted as referring only to legitimate children.

78B. See Fernando *v* Fernando, (1956), Ivaldy *v* Ivaldy.

78C. See Ivaldy *v* Ivaldy at p. 571.

78D. Kamalawathie *v* de Silva, Boteju *v* Jayawardene, Fernando *v* Fernando (1968) 70 N.L.R. 534, Weragoda *v* Weragoda, Madulawathi *v* Wilpus; Rajaratne *v* Rajaratne; Karunawathie *v* Wijesuriya.

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78E. Bromley, Family Law, op. cit. (1966 ed.) p. 310 etc; J. C. Hall (1972) 31 C.L.J. op. cit; the Guardianship of Infants Act (1925) s. 1 replaced by the Guardianship of Minor's Act (1971) s. 1. The most recent statute, the Guardianship Act 1973 s. 1(1) for the first time enacts that in relation to the custody or upbringing of a minor or the administration of his property, the rights and authority of both parents shall be equal. Up to this time, the father's rights were superior regarding any matter to which the statutes of 1925 and 1971 did not apply. See Oliver Stone, Family Law, op. cit. p. 72.

78F. Sansoni J in Weragoda *v* Weragoda, Tambiah J in Kamalawathie *v* de Silva and Weeramantry J in Fernando *v* Fernando (1968) 70 NLR 534; see also M. Sornaraja (1973) 90 S.A.L.J. 131.

79. See Tambiah J in Kamalawathie *v* de Silva supra, and Weeramantry J in Fernando *v* Fernando (1968) 70 NLR 534.

79A. See Bromley Family Law op. cit. (1976 ed.) p 298 — 303; Spiro op. cit. (1959 ed.) p 397; Olive Stone, Family Law op. cit. p 71—72; Parental Custody and Matrimonial Maintenance op. cit. p. 4 where this trend is described in a comparative survey on the law on custody.

79B. Hindu Minority and Guardianship Act 1956, discussed in S. V. Gupta, Hindu Law of Adoption, Maintenance, Minority and Guardianship, (1970) p. 389—390.

79C. See Madulawathie *v* Wilpus, Boteju *v* Jayawardene. Rajaluxmi *v* Iyer at p. 575, and Karunawathie *v* Wijesuriya.

79D. Algin *v* Kamalawathie, Frugtneit *v* Fernando, Endoris *v* Kiripetta.

79E. Weragoda *v* Weragoda per Sansoni J. at p. 86; Karunawathie *v* Wijesuriya at 18; see also the cases cited in note 78.

80. Kamalawathie *v* de Silva per Tambiah J; see also Fernando *v* Fernando (1968) 70 NLR 534 per Weeramantry J.

80A. (1956) 58 NLR 262 at p. 264.

80B. See at p. 263—264.

81. Weragoda *v* Weragoda, Boteju *v* Jayawardene, Rajaratne *v* Rajaratne, Rajaluxumi *v* Iyer per Deheragoda J. at p. 575.

82. (1967) 70 NLR 90; see also, for the same approach, Karunawathie *v* Wijesuriya.,

83. In Frugtneit *v* Fernando Samarawickreme J. at p. 449 suggested that she could do so, if the father failed to accept responsibility for the child or neglected it. In the Roman Dutch Law the mother shares the parental power with the father, and her rights, being subordinate only to his rights, are not restricted in this way. See the authorities cited in note 33 supra.

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84. Croos *v* Vincent (1920) 22 NLR 151; Ex parte Assen Natchia (1885) 7 s.c.c. 22; Ramalingam Chettiar *v* Mohomad Adjwad (1938) 41 NLR 49; Arunasalam Chettiar *v* Murugappa Chettiar (1954) 57 NLR 21, 23; Manickam Chettiar *v* Murugappa Chettiar (1957) 60 NLR 385, 388; Kandiah *v* Saraswathy (1951) at 139. c.f. also Lebbe *v* Christie (1915) 18 NLR 353 (F.B.). For statutory recognition of the father's role as natural guardian, see G.M.O. Ord. s. 22(1)(c) requiring the father's consent to the marriage of a minor, and on his death, the consent of the mother. The cases on acceptance of a gift on behalf of minors, which refer to the mother of a legitimate child as natural guardian, do not detract from these principles. See the discussion in Ch. VII infra at note 84.

85. See Ex parte Assen Natchia (1885) 7 S.C.C. 22 per Laurie J at p. 23, (though the woman had applied to be appointed); Croos *v* Vincent; In re Evelyn Warnakulasuriya (1955) 56 NLR 525, recognising the surviving mother's right to custody.

86. Croos *v* Vincent ,Lebbe *v* Christie, Gunasekera Hamini *v* Don Baron (1902) 5NLR 273 at 279; Arunasalam Chettiar *v* Murugappa Chettiar; Manickam Chettiar *v* Murugappa Chettiar; c.f. A.J. (Am) L. s. 613(1) and ss. 614(1), 614(3) and now see Civil Procedure Code Ch. XL for the governing provisions in the modern law on the issue of a certificate of curatorship; see also parental rights regarding the administration of a minor's property Ch. VII infra, for a detailed discussion of this subject.

87. See K. Balasingham Laws of Ceylon (1933) Vol 11 p. 728—733; Ch. VII note 135 infra, though some jurists indicate that the mother could appoint a guardian, (Grotius, 1.7.9; S. Van Leeuwen (V.L.) Censura Forensis, 1.16.3). Since she could not prejudice the husband's superior rights as natural guardian, she could make an effective appointment only if he had predeceased her without appointing a guardian who limited her rights. See Lee, Roman Dutch Law op. cit. p. 34, 37—38, 99, and note 37 supra; the Civil Procedure Code s. 585 and the Administration of Justice (Am.) Law s. 614(3) reflect this view—see note 89 infra; L. Lazar, Parental Custody and Matrimonial Maintenance, op. cit. p. 70, writing on South African Law, expresses the same view; see also the discussion on parental rights regarding administration of a minor's property, the appointment of guardians and representation, Ch. VII infra, and note 85 supra.

87A. See Tacit Emancipation, Ch. VIII infra

88. Hahlo and Kahn op. cit. p. 399.

89. See Civil Procedure Code s. 585(3); c.f. A.J. (Am.) L. ss. 613(1), 614(1)(3) which gave the Publc Trustee issuing a certificate of curatorship the power to appoint a person to be guardian of the minor's person, when he was not under the custody of a natural guardian or where the father

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had not appointed a guardian. While the father is considered to have a superior right to appoint a guardian for the minor, it is not clear from these provisions whether such an appointment can exclude the mother's right as surviving parent to custody. See the discussion on the parental right to appoint a guardian, Ch. VII infra; See also G.M.O. Ord. ss. 22 (1) (c), K.M.D. Act s. 8 (2) (c), for statutory provisions reflecting the father's superior right to appoint a guardian; his superior rights with regard to the minor's marriage and religious upbringing are discussed in Ch. VII infra.

90. Mafthootha *v* Thassim (1963) 65 NLR 547 at 548. See also Junaid *v* Mohideen per Drieberg J.

90A. John Bowlby, Maternal Care and Mental Health, W.H.O. (1951) Child Care and the Growth of Love (1965).

91. Fernando *v* Fernando (1968) 70 NLR 534 per Weeramantry J. at p. 538.

92. Kamalawathie *v* de Silva per Tambiah J.

92A. L. Young, Out of Wedlock (1954) as cited in R. J. Isaac, Adopting a Child Today (1965), p. 131; c.f. Bowlby op. cit. note 90 A.

92B. Foote Levy and Sander, op. cit. .p. 149; Deprivation of Maternal Care, A Reassessment of its Effects, W.H.O. (1962), discussing the theroy of maternal deprivation put forward by John Bowlby.

93. Goldstein Freud and Solnit, Beyond the Best Interests of the Child op. cit. Ch. 1 and 2; M.E. Spiro, Children of the Kibbutz (1965) M. Rutter Maternal Deprivation Reassessed (1972).

93A. See Yalman op. cit. p. 119; in Sri Lanka in the rural Sinhalese family the elder sister often assumes the role of mother to the younger children in the family. See Ryan op. cit. p. 41.

93B. G.M.O. Ord. s. 19(2), though a divorce may also be obtained on the ground of incurable impotency at the time of marriage; c.f. also A. J. (Am.) L. s. 627(1)(2) and now see Civil Procedure Code ss. 608(1) and 608 (2) (b) introduced by amendment of 1977.

93C. Soysa *v* Soysa (1914) 17 NLR 385, (1916) 19 NLR 146 (P.C.) Silva *v* Silva (1914) 18 NLR 26.

94. Voet. 23.4.20. Webber *v* Webber (1915) AD 239 246—247.

95. Contra Weeramantry J in Fernando *v* Fernando (1968) 70 NLR 534; c.f. Spiro op.cit. (1959 ed.) p. 51 201

96. See note 47 supra, and Judicature Act s. 24(1)(2) and Third Schedule; In re B. S. Liyanaaratchi (1958) 60 NLR 529; Basnayaka C. J. appears to have blurred the distinction between the situation where a court makes an order in the decree, and orders a variation of it. c.f. Jeeris Appuhamy *v* Kodituwakku (1947) 49 NLR 10 at 11.

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97. de Silva *v* de Silva (1947) 49 NLR 73; Civil Procedure Code ss. 619—622.

98. Silva *v* Silva (1943) 44 NLR 494, 497: Algin *v* Kamalawathie; But see Muthukumaraswamy *v* Parameshwary (1976) 78 NLR 488 which emphasised only the child's interests, and Sederis Singho *v* Somawathy (1978) 1978—1979 2 Sri L R 140.

99. Horseford *v* de Jager (1959) 2 S.A.L.R. 152; Short *v* Naisby at 575; Hahlo op. cit. (1963 ed) p. 463—464, Spiro op. cit. (1959 ed.) p. 179 note 38.

100. de Silva *v* de Silva; (1947) Judicature Act s. 24(1) 24(2) and Third Schedule.

101. Civil Procedure Code ss. 619, 621. Re B. S. Liyanaaratchi at 531; cf. Hameen *v* Malihababy (1967) at 406.

102. Jeeris Appuhamy *v* Kodituwakku.

102A. Goldstein Freud and Solnit op. cit., p. 37—39.

103. Re B. S. Liyanaaratchi per Basnayaka C.J. at p. 53, referring to comparable proceedings in the District and Supreme Court.

104. See Algin *v* Kamalawathie; c.f. Hameen *v* Maliha Baby, Fernando *v* Fernando (1932) 34 NLR 204, for the practice of raising a custody issue in habeas corpus applications even after a Muslim divorce.

104A. Fernando *v* Fernando (1968) 70 NLR 534 at 538; see also Rajaratna *v* Rajaratna.

104B. See Judicature Act. s. 28.

105. Ranmenika *v* Paynter, Deutrom *v* Jinadasa (1970) 78 C.L.W. 17; Pemawathie *v* Kudalugoda Aratchi; see also Jane Nona *v* Van Twest (1929) 30 NLR 449 at 453, and see Francisco *v* Don Sabastian 1964 (69) NLR 440.

106. A right of access has been recognised in South Africa (Mathews *v* Haswari 1937 WLD 110). In Meenachi *v* Supramaniam Chetty (1898) 3 NLR 181 at 182 the Supreme Court of Sri Lanka assumed without discussion that the putative father has a better right to custody than the maternal grand mother; but contra Kalu *v* T. H. Silva, and Francisco *v* Don Sabastian.

107 The doctrine of putative marriages has been recognised in Sri Lanka, Fernando *v* Fernando (1968) 70 NLR 534 per Weeramantry J, though contra Gratiaen J. in Silva *v* Kainerishamy (1955). See Ch. IV(3) supra.

108. See Spiro op. cit. (1959 ed.) p. 21; see also effect of court orders on the status of an illegitimate, Ch. IV (3) supra.

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108A. See Hahlo and Kahn op. cit. p. 369;

109. Lee and Honore op. cit. (1954) p. 400; Hahlo and Kahn op. cit. p. 369 note 8; Enger *v* Desai; Hahlo op. cit. (1963 ed.) p. 480; see also on court orders, Ch. IV(3) supra.

110. Fernando *v* Fernando (1968) 70 NLR 534 per Weeramantry J.; see also Ch. IV supra.

110A. See e.g. Ranmenika *v* Paynter, and c.f. In re Evelyn Warnakulasuriya.

111. Ceylon Law of Adoption, Sessional Paper 11 of 1935 p. 34—35; Tambiah Principles op. cit. p. 157, 213; Ch. IX infra.

112. Abeywardena *v* Jananayaka per Nagalingam J. at p. 55.

113. Samarasinghe *v* Simon per Nihill J. at p. 133.

114. See Kalu *v* T. H. Silva, deciding that the natural father had no right of custody which could be asserted against the maternal grandmother of an illegitimate child. But see Hayley, op. cit. 200—202, 20—25; c.f. Ambalavanar *v* Ponnamma, and Samarasinghe *v* Simon at p. 134; see also Ranmenika *v* Paynter, Deutrom *v* Jinadasa, In re Evelyn Warnakulasuriya, Pemawathie *v* Kudalugoda Aratchi.

115. Fernando *v* Fernando (1965), Ranmenika *v* Paynter, Endoris *v* Kiripetta, Deutrom *v* Jinadasa, Pemawathie *v* Kudalugoda Aratchi; Frugtneit *v* Fernando, per Samarawickrema J. at p. 451, Re Justina (1862), Re Manhamy (1862) cited in Walter Perera, Laws of Ceylon, op. cit. p. 115.

116. See Re Lesley Mark Antony (1947) 34 CLW 71.

116A. A guardian appointed by the Family Court under the Civil Procedure Code s. 585(3) may therefore be deprived of legal custody.

117. Abeywardene *v* Jananayaka, Endoris *v* Kiripetta, Samarasinghe *v* Simon, Frugtneit *v* Fernando; see also Pemawathie *v* Kudalugoda Aratchi where a provisional order was made in favour of a third party, which could be reviewed in three years on the mother's application; for a similar view, expressed in a South African case, see Peterson *v* Kruger.

118. See Samarasinghe *v* Simon, Endoris *v* Kiripetta, Abeywardene *v* Jananayaka, Fernando *v* Fernando (1965); c.f. Pemawathie *v* Kudalugoda Aratchi where this aspect was considered relevant on clear proof of parental neglect and indifference.

119. See Fernando *v* Fernando (1965), Endoris *v* Kiripetta, Samarasinghe *v* Simon, Abeywardene *v* Jananayaka.

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120. i.e. under the Adoption of Children Ord.

121. Endoris *v* Kiripetta per de Kretser J. at p. 23; Pemawathie *v* Kudalugoda Aratchi which attaches significance to informal adoption where there is clear evidence of parental indifference, may be distinguished.

122. Abeywardene *v* Jananayaka, Samarasinghe *v* Simon; see also the dicta in Fernando *v* Fernando (1965) 69 NLR 429 at p. 430 referring to the "renunciation of parental power," and Frugtneit *v* Fernando per Samarawickreme J. at p. 451.

123. See termination of parental power, Ch. VIII, infra; cases cited in notes 115 and 117 supra; Spiro op. cit. (1959 ed) p. 54, 166.

124. In re Evelyn Warnakulasuriya; c.f. Children and Young Persons Ord. ss. 34, 35, giving a special statutory power to a court to interfere with parental rights, and Navaratna *v* Karunaratna (1957) 61 NLR 82.

125. Cooray, Legal Systems, op. cit. p. 168.

126. Bromley, op. cit. (1966 ed.) p. 326; H. K. Bevan, Law Relating to Children (1973) p. 265; Clarke, Hall and Morrison on Children (1972 ed.) p. 1017.

127. (1918) 87 L.J. Ch. 445 C.A.

128. In Abeywardene *v* Jananayaka Nagalingam A.C.J. interprets in this way, the local cases that recognise the concept of surrender and abandonment; see also Pemawathie *v* Kudalugoda Aratchi.

128A. See notes 143A, 144 infra.

129. Part II of the Ordinance, ss. 18, 19, 27, 30, s. 29(1) and (2), 25, 23.

130. Debates in the State Council of Ceylon, Hansard (1941) Vol. 1, p. 44. See also Sessional Paper 11 of 1935 and Adoption, Ch.IX infra.

131. Abeywardene *v* Jananayaka at p. 56; c.f. Endoris *v* Kiripetta, and Fernando *v* Fernando (1965), where the third party was a relative exempted from the provisions of the Ordinance.

132. See Frugtneit *v* Fernando, Pemawathie *v* Kudalugoda Aratchi, In re Evelyn Warnakulasuriya. In the latter case the judge distingushed the facts from Abeywardene *v* Jananayake and considered the failure to register irrelevant because the Mother Superior of a Convent, the third party, was not making a competing claim to custody. What he in fact decided was that a court could deprive a surviving parent of custody in favour of a third party, even though the latter had committed a statutory offence in failing to register as custodian.

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132A. c.f. Pemawathie *v* Kudalugoda Aratchi where Weeramantry J. overlooked the distinction. M.S. (1972) 1972 Col. L.Rev. p. 117, 118, reflects the same oversight in a note on this case.

133. See for example, in re Evelyn Warnakulasuriya.

134. Silva *v* Silva (1908) 11 NLR 161; Nagalingam *v* Thanabalasingham (1952) 54 NLR 121 P.C.; Nagaratnam *v* John (1958) 60 NLR 113; Chelliah *v* Sivasamboo (1971) 75 NLR 193 at 206.

134A. See Kalu *v* T. H. Silva where the court appears to have conceded a right in the maternal grandmother merely on the basis that in the Roman Dutch Law, the natural father had no right to custody; for a contrary view see Meenachi *v* Supramaniam Chetty, at 182.

135. See Spiro op. cit. (1959 ed.) p. 261; Kaiser *v* Chambers.

136. See the section on the Customary law, supra; see also Meenachi *v* Supramaniam Chetty, Ambalavanar *v* Ponnamma, Annapillai *v* Saravanamuttu. In Kalu *v* T. H. Silva the court recognised the grandmother's right to custody but no authority was cited to support the decision.

137. See Spiro op. cit. (1959 ed.) p. 42; Chelliah *v* Sivasamboo. The English law confers only a limited right to claim custody (Children's Act (1975) s. 33(3)).

137A. A.J. (Am.) L. ss. 613 (2), 614 (2) (3), 614 (4).

137B. A.J. (Am.) L. s. 614 (4) (5) (9)

137C. Civil Procedure Code s. 585 (3) 587 s. 594 and Ch. XL generally; Judicature Act. ss. 24 (1) 24 (2) and Third Schedule.

138. (1941) at p. 141.

139. Fernando *v* Fernando (1937) 9 C.L.W. 97; Annapillai *v* Saravanamuttu.

139A. See In re Evelyn Warnakulasuriya, and cases cited in note 78D supra.

140. See cases cited in note 118 supra.

141. Ranmenika *v* Paynter, Weragoda *v* Weragoda at p. 87; c.f. also Endoris *v* Kiripetta, Pemawathie *v* Kudalugoda Aratchi at 405.

142. Frugtneit *v* Fernando. The learned judge's comments at 450—51 that the child would be looked after better by the third party who would provide her with the "necessary comforts," must be viewed in this context; c.f. also Deutrom *v* Jinadasa at p. 21, Pemawathie *v* Kudalugoda Aratchi at p. 405. Rajaluxumi *v* Iyar at p. 576.

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143. Ranmenika *v* Paynter, Frugtneit *v* Fernando; c.f. Deutrom *v* Jinadasa Rajaluxumi *v* Iyer.

143A. See Children and Young Persons Ord. ss. 34, 35, 36, 46, 88.

144. ss. 21., 46 (3).

144A. See Judicature Act ss. 24 (1) (2) and Third Schedule.

144B. Judicature Act s. 26, as amended by Act of 1979, which inserted into the principal enactment s. 26 (5).

144C. See Fernando *v* Fernando (1965) Ivaldy *v* Ivaldy, Samarasinghe *v* Simon

145. Re Agar Ellis (1883) 24 Ch. 317 C.A; see also J.C. Hall (1972) 31 C.L.J. op. cit.

146. 1917 W.L.D. 17.

147. Spiro op. cit. (1959 ed.) p. 56, 158 etc; c.f. also cases cited in note 61 supra.

148. Re Mastan (1862), cited in Walter Perera op. cit. p. 115; Queen *v* Jayakodi, Goonaratnayaka *v* Clayton, Haniffa *v* Razack, Fernando *v* Fernando (1965), In re Evelyn Warnakulasuriya, Weragoda *v* Weragoda, Samarasinghe *v* Simon; see also Vaithialingam *v* Gnanapathipillai.

149. (1890).

150. (1853) 24 Ch. 317.

151. (1929)

152. note 148 supra.

153. See R. K. W. Goonesekere, Criminal Law, in Tambiah Principles op. cit. at p. 453.

153A. J. C. Hall (1972) 31 C.L.J. op. cit. at p. 255.

153B. Hewer *v* Bryant 1970 1 Q.B. 357, 369.

154. See in re Evelyn Warnakulasuriya, where the Mother Superior of the convent in which the child wished to stay did not claim custody.

154A. In re Evelyn Warnakulasuriya; the dictum to the contrary in Vaithialingam *v* Gnanapathiplliai is based on the view that there can be no rights with regard to the control of the person of a child after the age of discretion is attained.

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155. Spiro, op. cit. (1959 ed.) p. 174, 197, 193, 204. Hahlo and Kahn op. cit. p. 369; Goldstein Freud and Solnit op. cit. p. 37—38; S. Maidment (1974) 40 MLR 293 discusses the problems connected with recognition of the parental right of access.

156. c.f. Ivaldy *v* Ivaldy; Re Andrew Greig.

157. Kamalawathie *v* de Silva, Fernando *v* Fernando (1956); Madulawathie *v* Wilpus, Rajaluxumi *v* Iyer.

158. Blanche Anley *v* Herbert Bois (1945) 46 NLR 466—467; see also Silva *v* Silva (1943), Algin *v* Kamalawathie and Muthukumarswamy *v* Parameshwary. The English courts also tend to favour this approach despite the controversy with regard to recognition of the right of access. [Re T. (1973) 3 Family Law 138 discussed in Annual Survey of Commonwealth Law (1974) p. 227].

159. Goonaratnayaka *v* Clayton, In re Evelyn Warnakulasuriya.

159A. c.f. Mathews *v* Haswari 1937 WLD 110, where a South African court recognised a right of access.

159B. See Ex parte Assen Natchia (1885) 7 SCC 22.

160. c.f. A.J. (Am.) L. s. 631 and see Civil Procedure Code s. 627; M.M. D. Act, s. 27, s. 47 (1)(i), K. M. D. Act s. 33 and note 48 supra; see also Hameen *v* Maliha Baby, and Subair *v* Isthika; the custody of children may be settled by mutual agreement during the proceedings for dissolution of a Kandyan marriage [See Pinchi Amma *v* Mudiyanse, (1920) 21 NLR 477].

160A. See at note 44 A. and Judicature Act ss. 244 (1), the proviso, and s. 24 (3).

161. In re Lebbe Ahamado Lebbe Marikkar, Idroos Sathak *v* Sittie Leyaudeen, and note 39 supra.

162. See cases cited in note 22 supra; Mangaleswari *v* Selvadurai (1961) P.C., Kalu *v* T. H. Silva.

162A. See Hayley op. cit. p. 198, 211, 289.

163. See Kalu *v* T. H. Silva, and Legitimacy in Kandyan Law Ch. II supra.

164. Tambiah, Sinhala Laws, op. cit. p. 138, etc.

165. Mohideen *v* Sittie Katheeja (1957) 59 NLR 570; Re Nona Sooja, Junaid *v* Mohideen, Faiz Mohomed *v* Elsie Fathooma; c.f. Re Assen Natchia, where no reference was made to Muslim law principles.

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166. In re Wappu Marikkar (1911) 14 NLR 225; Re Nona Sooja; Hassen *v* Marikkar (1953) 55 NLR 190, a view supported by Tyabji op. cit. p. 216, and Mulla op. cit. p. 333 citing Indian cases in support.

166A. J. Schacht, Introduction to Islamic Law (1964) p. 167; Fyzee op. cit. 1964 ed. p. 208; Tyabji op. cit. p. 249.

166B See Termination of minority under Muslim Law, Ch. VIII infra; c.f. the cases cited in note 167A. infra.

167. Re Nona Sooja; Junaid *v* Mohideen; Hassen *v* Marikkar

167A. In re Wappu Marikkar; Hassen *v* Marikkar; Faiz Mohomad *v* Elsie Fathooma; Hameen *v* Maliha Baby; Subair *v* Isthika; Schacht op. cit. p. 167.

168. Schacht op. cit. p. 167.

168A. Mulla op. cit. p. 338.

168B. Fyzee op. cit. (1974 ed.) p. 201, 209; see also Legitimacy in Muslim law, Ch. II Supra., c.f. Fernando *v* Cassim (1974) II NLR 329 applying General Law principles in respect of the illegitimate child of a non-muslim woman and a muslim.

168C. See MMD Act s. 47 and s. 48.

169. Re Aysa Natchia 1862 Rama. 130; see also Fernando *v* Fernando per Jayawardene A. J. at p. 209 , Ex parte Assen Natchia, per Lawrie J.

169A. See M. M. D. Act ss. 47(1) and 98. c.f. Judicature Act ss. 24 (1) and proviso and 24 (3).

169B. In Fernando *v* Fernando (1932) the court refused to consider apostacy as a disqualification in the father, who was seeking custody.

170. Re Aysa Natchia; Cassim *v* Cassie Lebbe; Junid *v* Mohideen; Fernando *v* Fernando (1932); Faiz Mohomad *v* Elsie Fathooma; Ambalavanar *v* Ponnamma; Mafthootha *v* Thassim; Pemawathie *v* Kudalugoda Aratchi.

170A. c.f. Haniffa *v* Razack.

171. See note 30 supra.

172. Haniffa *v* Razack; c.f. Re Noor Jehan (1954) 56 NLR 29.

172A. Hameen *v* Maliha Baby, per Manickavasagar J. at p. 406. See also, Subair *v* Isthika, at p. 402

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173. J. D. M. Derrett, A Critique of Modern Hindu Law op. p cit. p. 30—31, 40. Family Law and Customary Law in Asia, op. cit. XV; M. Friedman, in Family Law in Asia and Africa, op. cit. p. 52.

173A. Goldstein Freud and Solnit, op. cit.

173B. The Guardianship Act 1973 s. 1 (i); see also note 78E supra.

174. The position in England is discussed in Olive Stone, Family Law op. cit. Ch. VIII and X.

174A. See J. C. Hall (1972) 31 C.L.J. op. cit.; Olive Stone, Family Law op. cit. p. 18.

174B. The News Week Magazine (April 17 (1968) p.34) discusses a controversial legal dispute in America between doctors treating a small child and his parents, who refused life-saving drugs for Leukemia.

174C. Ryan, op. cit. p. 41; see also notes 78, 78A and 84 to 89 supra.

174D. Boteju *v* Jayawardene, Rajaluxumi *v* Iyer.

174E. A.J. (Am.) L. s. 613 (1) (2), 614 (2) (3); now see Civil Procedure Code s. 585.

174F. See Termination of Parental Power Ch. VIII infra.

174G A.J. (Am.) L. s. 614(3)(4); see further, termination of parental power, Ch. VIII infra, and Civil Procedure Code s. 585.

175. Samarasinghe *v* Simon is a case where there was a conflict of medical opinion; the Denning Committee in England drew attention to the need for independant representation of a child in custody matters. See Parental Custody and Matrimonial Maintenance op. cit. p. 20—21; Goldstein, Freud and Solnit op. cit. draw attention to this aspect in Ch. V.

175A. See parental power over administration of a minor's property, Ch. VII infra, and c.f. Peter *v* Carolis (1953) 55 NLR 406.

175B. c.f. A.J. (Am.) L. s. 604(2), 611(4), and see Civil Procedure Code ss. 479, 480, 494, and Ch. VII infra. Bromley op. cit. (1976 ed.) p. 314 refers to a similar power exercised by some English Courts that determine custody disputes.

175C. Peter *v* Carolis

175D. Adoption of Children Ord. s. 13(4).

176. Parental Custody and Matrimonial Maintenance op. cit. p. 3—4.

176A. Judicature Act ss. 24(1) 24(3), 26, 28, and s.29 as amended by Act No. 37 of 1979.

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CHAPTER VII

PARENTAL POWER II

ADMINISTRATION OF THE MINOR CHILD'S PROPERTY AND MISCELLANEOUS PARENTAL RIGHTS

All females under the age of majority acquire testamentary capacity at 18, and can dispose of their property by will, without the consent of parents.[1] In other respects however, parents who occupy the role of natural guardians and are repositaries of the parental power, have been conferred with important rights over the disposition, administration, and management, of their minor children's property. These rights vary considerably in the General law, and the Customary laws, and will be discussed, before dealing with the residue of parental rights.

1. Parental Rights in the Administration of a Minor's Property

The concern over the need to provide special safeguards regarding the administration of the property of minors has a long history in Sri Lanka. In the Dutch period, a special board known as the Weesakamer or Orphan Chamber functioned for the purpose of managing the property of minors, while the equivalent native board was the Boedelkamer. According to a report submitted to the Commissioners of Eastern Inquiry (1829-1830) on the powers of the boards during Dutch times, their jurisdiction was not confined to the management of the property of orphans. The Weesmasters had the authority to permit the property of minors to remain in the hands of parents or guardians who provided security, until minors came of age.[2] This opinion accords with the view that the "orphan chamber" was the court, generally in charge of the administration of the estates of minors.[3] According to Sir Richard Otley, these institutions were not maintained in the Maritime Provinces during the very early British period, and there was no authority which exercised similar powers. Consequently the estates of orphans and minors were administered by their guardians, who do not appear to have been subject to any special controls.[4]

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When the Charter of Justice of 1801 established the Supreme Court, the jurisdiction to appoint guardians and "keepers" for infants and their estates, in the Maritime Provinces was entrusted to this court.[5] This jurisdiction appears to have been exercised consistently, special vigilance being shown with regard to the appointment of guardians, and the supervision of their conduct in relation to the property of minors.[6] The principle that the guardian should give security appears to have been accepted, and a minor was considered to have a tacit hypothec or lien over the property of the guardian for the sums reserved for the minor's use. Even at this time, the parents, and especially the father, was considered to have a preferential right to be the guardian of minor children.[7]

Administration of justice in the Kandyan Provinces after they came under British colonial rule was the responsibility of the Board of Commissioners and a hierarchy of officials.[8] During this period there was no specific court which handled questions involving the estate of minors, and such issues appear to have been treated as matters to be sorted out privately, without official interference.[9]

In 1833 the Charter of Justice established a uniform system of courts in the island, and District Courts were created with jurisdiction in civil and testamentary matters. Though no special powers were conferred on the District Court in this respect, it was deemed to have jurisdiction regarding the estates of minors.[10] The Courts Ordinance (1889) eventually conferred specific jurisdiction in respect of minors upon this court, which became the court especially entrusted with the responsibility of safeguarding their interests.[11]

The Civil Procedure Code (1889) introduced provisions regarding the appointment and control of curators,[12] i.e. guardians of the property of minors.[13] The District Court was empowered to issue certificates of curatorship to these guardians, which brought them within certain controls regarding the administration of a minor's property. Any person who claimed a right to control and manage a minor's property, on the basis of a will or deed or natural guardianship, or kinship tie, could apply for such a certificate.[13A] A natural guardian could be excluded, only if the right to obtain a certificate had been prejudiced by the appoinment

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of a curator by deed or will.[13B] A natural guardian was not compelled to obtain such a certificate,[14] but there were indirect incentives to obtain an appointment. Thus, even a natural guardian claiming to be in charge of the minor's estate was generally required to obtain a certificate of curatorship from the District Court, if he wished to institute or defend an action connected with the estate, though the court had a discretion to exempt him from this requirement.[14A] Besides, when a certificate of curatorship had not been granted in respect of a minor's property, any relative or friend of a minor could petition the court to appoint a fit person to take charge of the property of the minor. The District Court also had a limited power to act on its own initiative and appoint a curator. There was thus an indirect compulsion for a natural guardian to obtain a certificate, which would bring him under the direct control of the court.[15] The absence of mandatory provisions was a clear concession to the concept of parental rights in the administration of a minor's property, under the Roman Dutch law and the Customary laws. The natural guardian was clearly deemed to be someone who should be entrusted with, and could be expected to look after, the minor's estate.

The statutory provisions regarding administration of a minor's estate were later set out in the Administration of Justice Laws, which repealed the provisions in the Courts Ordinance and the Civil Procedure Code. Under the earlier law, the District Court, though limited by the specific legal provisions in the Civil Procedure Code, had the full power to appoint guardians and curators over the person and property of minors. The courts were directly placed in a position of "supervisory" authority over a guardian or curator.[16] In the later law the function of appointing curators or guardians over the property of minors was entrusted to a government official (the Public Trustee). The general jurisdiction of the District Court in respect of the person and estates of minors was conceded, but the provision in the Civil Procedure Code giving that court the power to appoint guardians was repealed, while applications for certificates of curatorship had to be made to the Public Trustee. When a certificate was issued, the Public Trustee became entitled to exercise supervisory powers and functions over a curator, and he was conferred with a special status and responsibility regarding the protection of

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a minor's interests.[17] The supervisory jurisdiction of the District Court could therefore be exercised only in circumstances where there was no conflict with the statutory powers of the Public Trustee. The change appears to have been inspired by the concern with avoiding the delays and technicalities of court procedure in civil litigaton. The statutory reforms attempted to introduce the simpler device of proceedings before the Public Trustee to dispose of non-contentious matters involving the property interests of minors. These reforms were controversial even at the time, but their legal validity was challenged unsuccessfully in the Constitutional court, and they came into force as enacted law.[17A]

The Administration of Justice (Amendment) Law avoided the Civil Procedure Code's phrase "in trust for a minor", by stating that a natural guardian who claims to have charge, control or management of the property of a minor under the substantive law may apply to the Public Trustee for a certificate of curatorship. An applicant for such a ccrtificate was required to notice the Public Trustee of persons who were likely to object, and the minor was required to attend the inquiry into the application, unless excused by the Public Trustee on specific grounds. When a claim was made by virtue of a natural guardians' right to administer a minor's property, the Public Trustee did not have a discretion to refuse to issue a certificate, unless this right had been displaced by a guardian who claimed rights of administration under a will or deed, or under a court order.[18] Obtaining such a certificate was no longer imperative for a natural guardian even for the purpose of instituting or defending an action concerning the property of a minor that was in his charge. However, as in the previous law if the parent who was the natural guardian with a right to administer the minor's property, did not obtain a certificate of curatorship, there was provision for any relative or friend to apply to the Public Trustee to appoint a fit person to take charge, control and management of the property. The Public Trustee could also on his own initiative appoint a relative or a fit person as curator. While the statute recognised the special status of a natural guardian and permitted him to exercise rights of administration conferred by the Roman Dutch law, or the Customary laws, this provision indirectly compelled him to obtain a certificate of curatorship. It is clear that if the natural guardian was unwilling to be appointed

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as curator, the Public Trustee could on his own initiative or on an application made by a relative or friend of the minor, appoint a person other than the natural guardian to take charge of the minor's property.[19] Thus, in the event of a dispute regarding administration, the natural guardian with a parental right to administer the minor's property, would have done well to obtain a certificate of curatorship. In the absence of a dispute the statute did not alter the policy that accepted the natural guardian as a person who could be entrusted with the responsibility of safeguarding the minor's interests.

When the Administration of Justice Laws were subsequently repealed in 1977 the legal position reverted to that established by the Civil Procedure Code.[19A] The chief significance of the repeal is that the more specific provisions on statutory controls regarding the appointment of curators and control over the administration of a minor's property have been replaced by the earlier general provisions of the Code. Besides, the Public Trustee's status is no longer recognised, and the Family Courts established a year later under the Judicature Act (1978) have replaced the District Courts[19B] as the judicial tribunal entrusted with the responsibilities originally shouldered by the Public Trustee in regard to curatorship and guardianship matters. The legal position in regard to the right to make applications for certificates of curatorship has not changed fundamentally from that outlined above. However the provision in regard to notice to interested persons likely to object, and providing for the minor to be present, reflective of the non-adversary quality of proceedings before the Public Trustee, have not been re-introduced into the new law.[19C]

General Law

The statutory provisions on the administration of a minor's property have never been considered as displacing entirely the principles of the Roman Dutch law that applied in the Maritime Provinces prior to legislative reform. The powers of natural guardian in respect of a minor's property thus continue to be determined by that law,[20] even though these powers of administration may be qualified by the statutory provisions when a certificate of curatorship has been obtained. We have observed that the statutory provisions reflect the same policy as the Roman Dutch law, in conceding a special status to natural guardians.

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One of the consequences of the parental power, as envisaged in Roman Dutch law, is that the father as natural guardian has the right to the custody of his legitimate minor children, and a right to manage their property. Because administration and management of property is considered an aspect of his parental rights and responsibilities, the father's powers are wider in scope than those of other guardians. Though he does not have a life interest in the minor's property, he has full powers of management, can receive and invest money, control the assets, and use the income from property for the minor's maintenance and education. If the minor lives with the father and is maintained by him the father has a right to acquire earnings made while working for him, on the basis that he has a right to the minor's services. Civil and military earnings are however exempt from this rule. The earnings payable to the father can be used for maintenance and education of the minor.[21] Though the Dutch jurist Voet suggests that a surviving parent's rights are limited in this respect, a leading authority on the modern Roman Dutch law recognises that the father is entitled to receive and retain money due to a minor,[22] and that he is the proper person to whom payment can be made.

Due to the father's special status as parent and natural guardian, he is not subject in Roman Dutch law to the limitation and controls considered relevant in the case of ordinary guardians. Since the law assumes his competence and suitability to manage the estate of his minor children to their advantage, the father is not required to obtain a certificate of curatorship, find security or cause an inventory of the minor's property to be made.[23] However, he is expected to exercise care in handling the estate, and it has been suggested that a minor can claim damages from him for loss due to maladministration.[24] In any event the Roman Dutch law recognises special protections in respect of immovable property, and movables of value belonging to a minor. A natural guardian cannot make a donation of such property on the minor's behalf, such a transaction being deemed prejudicial to the minor's interest.[25] Alienations or mortgages of immovable property on behalf of a minor are prohibited without court consent. While alienations of movable property are exempt from this requirement, there is authority in support of the view

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that alienation of valuable movables and use of capital for maintenance, requires court permission. Valuable movables appear to have been considered immovable property in the Roman Dutch law.[26]

The father's rights regarding administration and management can of course be excluded by a donor from whom the minor received property, for administration and management could always be entrusted to someone specially appointed for the purpose. More important, a court acting as Upper Guardian of minors can deprive a father of his rights of administration, on the basis that there is prejudice to the child's interests.[27] In these circumstances he would be unable to administer the minor's property. The concept of parental rights and responsibilities is therefore balanced by the right of the courts to interfere with them, in the child's interests.

In Sri Lanka, the statutory requirements with regard to appointment of guardians have in the past, sometimes had their impact on the principles of Roman Dutch law that determine the rights of parents regarding the property of minor children, when the statutory provisions do not apply. There is dicta in judicial decisions suggesting that the father is not entitled to receive any money on behalf of a minor without obtaining a certificate of curatorship from court.[28] Since neither the statutory provisions on administration of a minor's property in the past, nor the present compel a natural guardian to obtain such a certificate for this purpose, it appears inconsistent wih the father's accepted role in regard to the administration of a minor's property, to require him to take this step.[29] Yet in today's context, the law should provide for some control over large sums of money received by even the natural guardian.

In the modern law, money earned by the minor while being self employed or working for others, cannot be acquired by the father.[30] This principle harmonizes with the Roman Dutch law, which, as we have observed, recognised limitations, on the father's right to the minor child's services.[31] The traditional Roman Dutch law envisaged circumstances in which the father received money on behalf of the minor. In that situation, protection of the minor's interests lay elsewhere than in the

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practice of obtaining a certificate of curatorship. There is clear authority in the Roman Dutch law that valuable movables were treated like immovable property, and their alienation required court consent. In the modern law this concept can be used to support a principle that use of large sums of cash earned by a minor requires, like utilisation of capital for maintenance, specific authorisation by court.[32] The natural guardian can also be liable in damages, for maladministration of the minor's property.[32A] The General law thus contains principles that can be used to ensure that cash or the earnings of self employed minors like child artists will not be exploited and squandered by irresponsible parents.[33]

Though an alienation of movables, is not considered to require court permission,[34] a minor, who can establish that an alienation of movable property (other than a donation) validly entered into with only the guardian's assistance is prejudicial to his interests, can according to Roman Dutch law, have it set aside by obtaining the remedy of *restitutio in integrum.*[35] This remedy can be utilised by a minor to challenge the validity of a transaction entered into by the father, or his guardian. Following the fundamental principles of the Roman Dutch law, Sri Lanka courts have accepted that the prohibition on alienation or mortgage of immovable property belonging to a minor without court consent, is an "inflexible rule".[36] These restrictions that emphasise the need for protecting the minor's interests, qualify the right of the father or any other guardian to administer the minor's property.

The strict approach of the Sri Lanka courts to transactions with immovable property, reflects the view that "the plain policy of the law is that guardians should not (sell) the property of their wards without the leave of court."[37] The prohibition applies to any act which affects a real right. Sale, donation, mortgage and lease of immovables that must be notarially executed, cannot therefore be created without court permission.[38] A donation is deemed to be void,[39] while other transactions are voidable and can be set aside by court for want of prior consent. The minor may obtain the remedy of *restitutio in integrum* in respect of such transactions.[40]

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The District Court was in the past, the judicial forum from which consent to these transactions had to be obtained. There were no express provisions conferring this jurisdiction on the court. However it was established by several cases in the Supreme Court that the District Court could authorise transactions of immovable property in the exercise of an inherant jurisdiction conferred by the Roman Dutch law, to act as Upper Guardian of minors.[41] The court's sanction had to be obtained after full disclosure of the facts. If this requirement was not satisfied the authorisation had no legal significance.[42] The actual alienation had also to be within the strict terms of the permission, so that if the court authorised a lease to one individual, the property could not be leased to another.[43] However obtaining court permission did not mean that alienation of the property could be compelled.[44]

Prior to the enactment of the Civil Procedure Code, an application for consent could be made directly to the District Court.[45] When the Code was enacted, it became the practice for a natural guardian, who was generally required to obtain a certificate of curatorship to institute or defend an action regarding the property of a minor, to combine an application for permission to alienate a minor's property, with an application for curatorship.[46]

We have seen that the Civil Procedure Code required independant representation of the minor's interests only in actions by or against minors. An application for curatorship and for alienation of a minor's property could hardly be described as such an action.[47] The Sri Lanka courts however have always required representation on behalf of the minor in these proceedings. Even before the Civil Procedure Code was enacted, representation of the minor's interests was required in an application for court permission to alienate the property of a minor.[48] The inspiration for requiring independant representation of minors, came from the concept that the District Court had an inherent jurisdiction as Upper Guardian to protect a minor's interests. Thus it has been judicially stated that just as the court has the jurisdiction to authorise an alienation, it has an obligation to ensure that the minors interests are represented when an application is made regarding his property.[49] It has also been said that naming a respondent to an application for curatorship is a useful device to protect the interests of the minor.[50] The minor has therefore

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been considered a respondent to applications for curatorship, and or applications for court permission for alienation of property, his interests being represented by a guardian ad litem.[51] Non representation of his interests has also been considered the type of serious irregularity that vitiates a court order, granting permission to alienate property.[52] Representation of a minor has therefore been considered an inherent aspect of an application to alienate his property.

The Administration of Justice (Amendment) Law introduced significant changes which were short-lived because of the repeal of that law. The jurisdiction of the District Court to appoint and then supervise curators was replaced by the powers vested in the Public Trustee, and it was not possible to institute proceedings fo the appointment of a curator in that court. Curatorship proceedings had to be initiated before the Public Trustee; due to the non-adversary nature of these proceedings, the minor, unless exempted, was required to attend them, but was not independently represented.[53] We have observed how the supervisory jurisdiction of the District Court in matters involving a minor's property was retained. It is thus possible to argue that these courts continued to exercise their traditional role, when a natural guardian was able to assert the right conferred by the Roman Dutch law to administer a minor's property, without obtaining a certificate of curatorship.[54] A transaction with immovable property or investment of money by such a guardian would have therefore required court permission. A transaction that did not require court consent could also be challenged in court in an application for *restitutio in integrum.*

When the natural guardian who was the father of a legitimate minor obtained a certificate of curatorship from the Public Trustee however, he came within the statutory provisions regarding the supervision and control of a minor's property, so that the jurisdiction of the District Court was excluded. This law, unlike the Civil Procedure Code, spelled out in some detail the powers and duties of a curator. Thus it stated that a natural guardian who obtained a certificate was not generally required to give security like other curators, unless the Public Trustee decided that this was essential for the protection of the estate. He was however re-required like any other curator to submit an inventory and accounts.[55] The new legislative provisions reflected the judicial

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opinions expressed in earlier cases, and required a natural guardian (like any other curator) to be appointed next friend or guardian ad litem, when he instituted or defended an action on the minor's behalf.[56] When a curator was appointed, the supervisory functions exercised previously by the courts, in respect of alienations were exercised by the Public Trustee, as the new law created the inference that a curator was under his exclusive supervision and control regarding certain transactions with the minor's property. Thus if a father was appointed curator he was required to obtain like other curators the prior written consent of the Public Trustee for the sale or mortgage of the estate, or any part of it.[57] He was permitted to lease immovable property for a period of less than three years without the Public Trustee's consent, since the statute declared that a lease of such property which exceeded that period required previous written consent. The Civil Courts Commission (1955)[58] recommended that a curator should be given the power to grant a lease of immovable property not exceeding three years without, court sanction. The new law implemented that recommendation regarding leases by a guardian who had obtained a certificate of curatorship, from the Public Trustee. A curator however was required to obtain the consent of court regarding alienations like donations, which were not specified in the statute as transactions for which the Public Trustee's consent had to be obtained.

With the repeal of this law, and the re-introduction of the Civil Procedure Code, curatorship proceedings must be initiated in the Family Courts, which replaced the District Court, and now exercise complete supervisory control over curators. The clearer provisions of the later statute in regard to appointment of curators have been replaced by the original provisions in the Civil Procedure Code. The detailed statutory controls regarding a curator's management and administration of a minor's property have also been repealed, with no clear alternative provisions to replace them. The Family Court has merely been conferred with a general jurisdiction to appoint curators, "make orders for the maintenance of minors and the proper management of their estates, to take security from curators and to call for accounts". With the reinstatement of the Civil Procedure Code, persons claiming to be curators under a will or a deed appear to be exempt from even the basic

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obligation to file an inventory and accounts, while a natural guardian does not enjoy that privilege.[58A] All transactions with a minor's estate, even a lease for a period less than three years requires court consent. A natural guardian who has obtained a certificate of curatorship may, like any other curator obtain the permission of the Family Court to resign and be discharged, on rendering an account, and on making over the property in his hands.[58B]

The emphasis placed on these courts of law in the control and supervision of curators reflects a rejection of the concept that an administrative functionary like the Public Trustee is better equipped to provide an effective and efficient procedure for monitoring the administration of a minor's property. What is unfortunate is that in rejecting that policy the law has not come up with new solutions but merely re-introduced the older enactment. The law and procedure in regard to administration of a minor's property seems to have been a casualty to the wholesale repeal of the Administration of Justice laws.

Parental rights in respect of administration of a minor's property in the General law are complemented by the Roman Dutch law principle that a minor must obtain the assistance of a guardian in order to enter into binding contracts of his own. An infant (a minor below the age of seven) lacks contractual capacity, and a guardian must act for him. A minor above that age who is old enough to understand the nature of the transaction may enter into legally binding contracts. However generally even he requires the assistance of a guardian;[58C] it is only in exceptional circumstances that the unassisted contract of a minor creates a binding legal obligation.[59] Alienations of movable and immovable property by him are also void.[60] Of course the guardian's assistance may not always ensure that a contract is valid. We have observed that court consent is necessary for the alienation of certain properties, and that even a contract which a minor is competent to enter into with the guardian's assistance, may be set aside by the courts; the remedy of *restitutio in integrum* will be granted if the minor can prove that he has been prejudiced by such contracts. Apart from donations, a contract of debt or suretyship can also be deemed inherently prejudicial to a minor. Consequently it may be argued that a guardian cannot assist a minor

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when he enters into any such transactions, and that contracts of donation, debt or suretyship by a minor even with the guardians assistance are void *ab initio*.[61] Thus, while a natural guardian has an important role to play in giving validity to a minor's contracts, it is clear that he must discharge this responsibility with care. The parent who contracts as guardian, on behalf of a minor child may become liable to the other contracting party and also be liable in damages,[61A] for any loss to the minor.

An early Sri Lanka case took the view that in Roman Dutch law, parents could not donate property to their minor children, and so put property out of the reach of creditors.[61B] However the line of decisions that gave legal recognition to such donations on the basis of a consistently followed practice in Sri Lanka, in fact reflect the position in the modern Roman Dutch law correctly.[61C] When a minor receives a gift, whether from a parent or anyone else, the limitations on his capacity to contract, confers a special status upon the natural guardian. Early cases presumed acceptance of the gift from the fact of possession by the parents on behalf of the minor, with the donor's consent.[61D] It is now emphasised that there must be clear evidence of acceptance by the minor or by the guardian on his behalf.

A minor who is an infant requires the assistance of a guardian for the valid acceptance of a gift of property. A minor who has reached the age of puberty—the age considered relevant for determining his maturity and understanding—can accept the gift himself, but it is usual for the gift to be accepted on his behalf. A natural guardian plays an important role, since a gift to a minor can usually be accepted only by the natural or legal guardian.[62] Thus when the mother of a legitimate child donates property to him, the father as natural guardian may accept the gift on the minor's behalf.[63] Sri Lanka cases have also held that a father donor, may as natural guardian lawfully authorise a relative to accept a gift on the minor's behalf, so as to satisfy the requirement of acceptance by a lawful guardian. Though it was at one time suggested that authorisation should be by a "special mandate," on the face of the deed, it is recognised that mere permission is adequate.[64] There is judicial dicta to suggest that the father as natural guardian may even authorise a stranger to accept a gift on the minor's behalf.[65]

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In the Roman Dutch law, a donor parent who gifted property to his minor child, seems to have been competent to accept the gift on the minor's behalf.[66] There are judicial decisions in South Africa which concede this right to a natural guardian, provided the acceptance is "manifest by some overt act" or "an outward act of signification or communication of acceptance."[67] Consequently, transfer of the property by some formal act which indicates that the father who is the natural guardian divests himself of ownership on behalf of the minor, will satisfy the requirement that the gift should be accepted by a guardian on the minor's behalf. The South African approach has been followed in an obiter dictum by Gratiaen, J. in the Sri Lanka case of **Mohideen** *v* **Maricair**.[68] However the practice of the donor parent authorising the relative to accept a gift, appears to be based on the assumption that the parent cannot, even as natural guardian, accept his own gift on behalf of the donee.[69] There are several cases in which it has been decided that a father who donates property to a minor is not competent to accept the gift on the minor's behalf.[70] The law requires acceptance by a guardian in order to safeguard against a minor being "saddled with a burdensome property involving him or her in heavy liabilities".[71] It seems logical enough to require that if a person who is not a parent gifts property to a minor, the only person competent to accept the gift on his behalf is the lawful guardian of the minor.[72] However, if a natural guardian is deemed to be the appropriate person to decide whether acceptance of a gift would be beneficial to a minor, he should be able to accept his own gift to the minor on the minor's behalf, or authorise acceptance by anyone, on behalf of the minor.

We have observed that in the Roman Dutch law the mother is deemed the sole natural guardian of illegitimate children. She thus enjoys the same status, as the father of legitimate children. Though a married woman shares the parental power with the father of her legitimate minor children, we have observed that he enjoys superior rights in his lifetime, as their sole natural guardian. Since the right to administer the minor's property is an aspect of natural guardianship, the judicial authorisation of a separate home does not affect the father's rights, regarding the minor's property, unless a court order has specifically denied or limited them. The court may decide that it is in the child's interest to give the cus-

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todian mother the power to control and manage the minor's property. On the father's death however, the mother succeeds him as the natural guardian of legitimate children. These principles regarding the mother's rights of administration have been applied by the Sri Lanka courts, and it has been conceded that she does not require an appointment by court to assert her status as natural guardian of her children.[73]

Some decisions express the view that the mother must obtain a certificate of curatorship, in order to exercise any right to administer and manage the child's property.[74] No authority has been cited in support of this view.[75] Besides the decisions that make the obtaining of a certificate of curatorship mandatory, have been pronounced in circumstances where the mother was required to obtain permission from court for the alienation of the minor's immovable property, a factor which appears to have influenced the opinion of the court.[76] The judicial view that the mother requires a certificate of curatorship to administer the minor's property was rationalised long ago by the argument that a woman lacks business acumen.[77] It has no relevance to current conditions, since women are making increasing use of career opportunities and can hardly be said to live in the seclusion of their homes. This view is also in conflict with the principles of the Roman Dutch law and the statutory provisions on administration of a minor's property, for a woman is not treated differently from a man, when she acts in the capacity of the child's natural guardian.[78] She must therefore be considered to have full powers of management and administration, even to the extent of being entitled to receive money on behalf of the minor.[79] In the absence of a dispute, she cannot be compelled to obtain a certificate of curatorship, and can, like the father, rely on her rights under the Roman Dutch law as natural guardian of her minor children.

The mother's rights may be limited or excluded, in the same way as the father's rights.[80] Thus a person who transfers property to a minor may entrust the administration of the property to a guardian. A court acting as Upper Guardian can also deprive her of these rights as a necessary measure for safeguarding the minor's interests. The courts have also the power to appoint a guardian to act jointly with her.[81] When the power to appoint curators was taken from the courts by the Administration of Justice

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(Amendment) Law, it is doubtful whether a court could exercise its inherent jurisdiction as Upper Guardian of minors to appoint a co-guardian when the mother came to court as natural guardian, in proceedings involving the minor's property. There is an inbuilt safeguard against mismanagement of the minor's property in that the mother, like the father can be indirectly compelled to obtain a certificate of curatorship which will bring her under the supervision of the Family Court. We have observed that a third party can petition this court for the appointment of a curator to administer the minor's property, and the Family Court may then deprive the natural guardian of the rights of administration, unless he or she is willing to be appointed curator.[82]

In one respect a widow's position is vulnerable in that her husband as natural guardian may completely exclude her right to administer her children's property by appointing a guardian who is then entitled to a certificate of curatorship.[83] However the mother has been accorded a special status in accepting gifts on behalf of a minor, even when she is not the natural guardian. Since the mother of an illegitimate minor is the natural guardian, it is clear that she has a right to accept a gift on his behalf.[83A] Such a right has been recognised in favour of the mother of a legitimate minor even though she is not the natural guardian of the minor children in the father's lifetime. Sri Lanka courts have accepted that her status is identical with the father in regard to competence to accept a donation on the minor's behalf.[84] It would thus appear that she can accept a gift to him, or as donor, authorise a relative to accept her gift on the minor's behalf. The decisions that have adopted this flexible approach seem to be influenced by the need to recognise the validity of a gift which can be of benefit to the minor. They can be supported by the Roman Dutch law principles, but only in so far as they concede parental rights to the mother that do not conflict with the father's legal rights. We have observed that the mother of legitimate child shares the parental power with the father, though her rights are subordinate to his rights as natural guardian. Thus it is evident that she can accept the father's gift to minor's on their behalf, or authorise a relative to accept her gift to them, when the father is not their natural guardian. Nevertheless according to the legal principles on the subject of parental rights, the mother of a

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legitimate minor should not be able to accept her own, or anyone else's gift or authorise a stranger to accept, without the permission of the father who is in his lifetime, the minor's natural guardian.

When the Administration of Justice (Amendment) Law conferred on the Public Trustee powers of supervision and control over the property of minors, there was an administrative procedure applicable in the General law that could be utilised to safeguard the minor's interests, avoiding the necessity for litigation in respect of curatorship proceedings. The traditional supervisory functions of the courts were not displaced completely under this law. The courts were empowered to exercise their jurisdiction when a person with the legal right of administration refrained from obtaining a certificate of curatorship which brought him within the supervisory control of the Public Trustee. A judicial proceeding was therefore available as a last resort, where the issue of administration could not be resolved in a non adversary manner.

The fact that a natural guardian is not compelled to obtain a certificate of curatorship in Sri Lanka Law appears to reflect the view that parental rights of administration and management of a minor's property should be conceded in the modern law of this country. It indicates a policy of minimising State interference, on the assumption that parents, as natural guardians, can be expected to fulfil their responsibilities to minors by displaying a proper concern for safeguarding their interests. The supervisory powers of the courts under the Civil Procedure Code, and acting as Upper Guardian, are deemed adequate to protect the interests of a minor whose property is administered by a natural guardian. For instance, the provisions in the Civil Procedure Code which permit a relative or friend to apply to the Public Trustee for a certificate of curatorship, can prevent an abuse of parental powers. Thus where there is no common home, and the father's rights of administration have not been taken away in the minor's interests, a custodian mother has the ability to ensure that the father as natural guardian does not abuse his right to manage the minor children's property, to the prejudice of their interests. When an application is made for the appointment of a curator, the natural guardian must obtain a certificate of curatorship, or be excluded from his powers of administration and management of the minor's property.[85] Once he is granted such a certificate, he will come

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within the supervisory control of the courts. With the repeal of the Administration of Justice laws, the all pervasive jurisdiction of the courts has been restored, and the more detailed statutory guidelines on the control and supervision of curators removed. It is not clear that this in itself will make the task of the courts easier, or ensure greater protection of the proprietory interests of minors.

The remedy of *restitutio in integrum*, available up to three years after majority to attack prejudicial transactions, also ensures control over the activities of the parent who is in charge of the minor's property. The remedy can be obtained even in respect of an alienation of property for which court consent has been obtained.[86] However the latter transaction is *prima facie* binding on the minor and can be attacked only if prejudice can be clearly established.[87] We have already observed the existing controls with regard to alienation of property, and the investment of a minor's money.

The present law accords a superior status to the father of legitimate minors in regard to administration of their property, and even permits him to exclude the surviving mother from administration and management of their estate. The concept of a father's superior parental rights as natural guardian, and its relevance in the modern law has been considered in the earlier discussion on parental power and the right of custody. The special question that must be considered here is whether the father should be able to limit the mother's right to succeed him as the person in control of the management and administration of the minor children's property.

There is no rationale for not conferring on the surviving mother the full right to manage and administer the property, when she can be subject to the control of the courts. The right of the father to restrict the mother's powers of administration after his death was incidental to his power to appoint guardians. This power should not be recognised in the modern law so as to enable the father to exclude the rights of the surviving mother completely. She should be able to act jointly with a guardian appointed by the father except perhaps in a situation where he bequeaths his own property to the minor.[88] In these circumstances, just

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as a donor can exclude the father's rights, the latter may be able to transfer sole rights of management to a guardian appointed by him for this purpose.

The Roman Dutch law recognised certain controls on the surviving parents' rights of management in the event of their contracting a second marriage.[89] The statutory provisions in the modern law enabling a third party to request the Family Court to appoint a curator,[90] ensure that a child will not be prejudiced by the surviving parent's change of status. There is judicial authority in support of the view that in the modern law a mother's rights as natural guardian are not affected by the mere fact of her remarriage.[91]

Customary Law

Kandyan Law

We have seen that the statutory provisions on administration of a minor's property leave room for the application of principles of substantive law. The rights and powers of Kandyan parents over the property of minors may at times be determined according to Kandyan law, even though it is the principles of the General law that usually apply on the subject of parental power.

The Kandyan law on intestacy contains specific principles with regard to the right of surviving parents to manage and possess the lands inherited by a legitimate minor from a deceased parent. Thus, a diga married husband has a right to possess his deceased wife's ancestral (paraveni) property on behalf of children during their minority. The widow is deemed the head of the family, after the husband's death. She acquires a similar right to manage and possess the husband's ancestral (paraveni) property that is inherited by the children, throughout the period of their minority.[92] These principles in the law of inheritance thus confer parental rights in respect of the management of the property belonging to legitimate Kandyan minors.

On the death of the parent, it is clear that there was common enjoyment of the property, until the heirs were old enough to manage their own portions. There is some authority that the father could not alienate any portion of the property. However,

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the widow could even exercise this power. She had rights similar to an administrator in the modern law and could sell the property of the deceased for the purpose of settling his debts. The widow's rights of management could not be excluded by the father appointing a guardian for the minors.[93]

These principles of the Kandyan law become especially significant when they create legal rights regarding a minor's property, which are different to those conferred by the General law of parent and child, that also govern Kandyans. There is judicial authority in support of the view that the father's right to transact with the property is governed exclusively by the General law, and he cannot alienate without court permission.[94] When he possesses and manages property inherited by minors from their mother, there is no conflict between the General law principles and the Kandyan law. The position of the mother is somewhat different, and requires further analysis

The judicial trend in the General law has been to restrict the widow's rights to manage the minor's property by requiring her to obtain a certificate of curatorship. Even though the Kandyan widow occupies a special status in relation to the management of her legitimate minor children's property, a Sri Lanka court decided that she must be appointed curatrix in order to assert these rights.[95] However this view, which we have observed has no justification in the General law, is completely out of harmony with the principles of Kandyan law. A Kandyan widow may, like her counterpart in the General law, refrain from obtaining a certificate of curatorship, and may assert her right to manage the minor's property, even without such an appointment. Obtaining a certificate of curatorship will be essential, only in circumstances where a third party applies to the Family Court to initiate curatorship proceedings.

In some respects however, the Kandyan law, confers on the surviving mother different legal rights. Since her right to possess and manage certain property is conceded in Kandyan law, it can he argued that the husband cannot rely on the General law and exclude her from her rights in respect of such property, by appointing a guardian. Besides the courts have recognised her right to alienate immovable property inherited by minors from her

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deceased husband, in order to pay his debts.[96] She has been referred to as "a sort of administratrix."[97] She may even mortgage such property for this purpose.[98] The same right has not been conceded with regard to leases. In **Lebbe** *v* **Christie** [99] the Supreme Court decided that the right to lease the minor's property was not covered by the Kandyan law principle that permitted alienation. When she exercises the right to alienate or mortgage, it would appear that she does not require the prior permission of court.[100] It is clear however that the Kandyan widow's rights in this respect are confined to alienation for the purpose of paying the husband's debts.[101] They may also be asserted only in respect of property below the statutory limit for administration of a deceased person's intestate estate. In the law of Sri Lanka an administrator or an executor must be appointed in respect of estates over the value of Rs. 20,000.[102] With inflation in property values, the widow's rights, will continue to diminish in importance.

There is a difference of judicial opinion, as to whether an executor or an administrator can alienate property belonging to minors for the purpose of paying the debts of the deceased, without obtaining court permission.[103] If permission is not required, the rights that a Kandyan widow is permitted to exercise will not entail a departure from the principles applicable to executors and administrators under the General law. They can then be explained on the basis of the legal rights of an administrator rather than an aspect of parental rights. However, the Kandyan widow will still enjoy a right which is not available to a widow governed by the General law, for unless the latter is appointed an executor or administrator, she will have to obtain court permission to alienate the minor's property.

Testate succession in the modern sense was unknown to Kandyan law,[104] and it is clear that the widow's rights were exercised in respect of property that devolved on an intestacy. In **Lebbe** *v* **Christie** cited above, the majority appear to have assumed that the Kandyan widow who has been appointed executrix under a will could claim the same rights. However Shaw J. who specifically discussed the point clarifies that when the mother is appointed executrix her right to pay debts under Kandyan law becomes absorbed into her rights as executrix. It may thus be argued that when the widow is appointed executor or administrator, her right

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to alienate is dependant on the general right of an executor or administrator to alienate the deceased person's property, in order to pay his debts. **Lebbe** *v* **Christie** nevertheless is a case that may be cited in support of the view that the Kandyan widow may now claim to exercise the rights of alienation, in respect of paraveni property inherited by minor's under their father's will.

The recognition accorded to the widow as "head of the household" in the Kandyan law is a reminder that a restrictive approach to the rights of the surviving mother of legitimate children to manage and administer the minor's property, is out of harmony with traditional values on the widow's status in the family. They also focus on the anomaly of permitting a father to exclude her, by appointing a guardian. In conceding the power of alienation to a widow, the Kandyan law, considers her as someone with a responsibility and obligation to safeguard the minor's interests. The Sri Lanka courts appear to have accepted this rationale in respect of property that is below the administrable limit.[105] This indegenous legal value however comes into conflict with the basic assumption in the General law that the State has an interest in supervising all transactions with valuable property belonging to minors.

The traditional law sought to safeguard a minor against abuse of the parental power of management by the principle that a person would forfeit rights of guardianship for misconduct.[106] In the modern law of Sri Lanka, courts acting as Upper Guardian may deny the Kandyan mother's right to possess and manage the children's property on proof of prejudice to the child. They may also deny the rights of management that she claims according to the General law. Besides the provisions in the Civil Procedure Code referred to earlier may be utilised to ensure that even a Kandyan mother obtains a certificate of curatorship which will bring her within the control and supervision of tbe District Court. If the mother is unwilling to be appointed curator, a third party may be appointed so as to exclude her from the management of the minor's property. All these principles are however subject to the proprietory rights conferred by the Kandyan law of succession upon a widow herself when the husband dies intestate. Thus the widow may be excluded by a curator from her right to

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manage the paraveni property inherited by legitimate minors. She has merely a right to maintenance from the income to this property and that too only if the deceased husband left no acquired property or the acquired property is insufficient for her maintenance. However she cannot be excluded from the management of the deceased husband's acquired property, in respect of which she has a life interest.[107]

We have observed that the illegitimate child has a remote right of intestate succession in the acquired property of his father. If the illegitimate inherits such property in the modern law, the mother as natural guardian can claim the right to manage and administer this property. However a court, acting as Upper Guardian may deny the right, and appoint a third party, because of the widow's life's interest in respect of it.[107A]

Tesawalamai

Some early judicial authorities refer to the customary right of maternal grandparents to the care of the property of a minor, when the surviving parent remarries.[108] In the modern law it is conceded that it is the principles of the General law that are applicable in determining the individuals entitled to the care and custody of the person and the property of minors subject to Tesawalamai.

Under the special principles on intestate succession applicable to persons subject to this law, a surviving parent is entitled to a usufruct in the income from property devolving on legitimate minors through a deceased parent, during the period of their minority. The right carries with it the obligation to maintain the children during this period.[109] The legal right enjoyed by the surviving parent limits the father's capacity to appoint a guardian who will exclude the surviving mother from the management of the minor's property. If he appoints a guardian, but dies intestate, the guardian's functions will be circumscribed by the mother's rights regarding the property.

There is judicial dicta in support of the view that a curator cannot be appointed so as to take away the surviving parent's right to possess and enjoy the minor's property.[110] Since the surviving parent has a legal right to a usufruct over the property during the

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children's minority, it is justifiable to conclude that the Family Court cannot in the usual way appoint a curator so as to restrain the parent from possessing and managing the property. It would seem to follow that the courts cannot deprive or restrict the parent's proprietory rights. These rights are not an incident of parental power but rather encompass an entrenched legal right to possess and enjoy the income from the deceased parent's property even when it devolves on minors. There is a clear conflict of legal values, between the customary law, which confers proprietory rights and also entrusts the parent with the protective role, and the General law, which entrusts the Courts with the task of safeguarding the minor's proprietory interests.

The surviving parent's usufruct in the property can be considered as subject to the requirement of obtaining court consent for any alienation.[111] When the minor has a right to pre-empt property belonging to the father which the latter wishes to sell, the courts seek to protect the minor from being prejudiced by a conflict between the father's interests and his duty. It has been decided that the ordinary principle that notice to the natural guardian, is notice to the minor does not apply.[112]

Muslim Law

Islamic law considers the father the legal guardian of the property of a legitimate minor child. The mother of such a child is not considered a legal guardian, for the father may be succeeded in this capacity, by his executor and certain other male relatives. She may however be appointed by Court as guardian of the property of minor children, in the absence of any legal guardian. If she intermeddles with the minor's property, without receiving an appointment, she is treated as a *de facto* guardian who has custody of the property, but acquires no legal rights and is only subject to legal obligations.[113] The recognition that the father and not the mother is the legal guardian of property reflects the concept that he alone acquires that status by virtue of an inherent parental right to be guardian of their property.

The father as legal guardian is not given a general power to sell immovable property belonging to a minor. The exceptional circumstances in which he may sell the property however, indicates that he has wide powers. For instance he may sell the minor's

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property for the purpose of maintaining him, or where debts and legacies have to be paid, and there are no other means of satisfaction. A power of sale is also conferred in circumstances where double the value of the property can be obtained, or where the property is falling into decay or the expenses of management exceed the income. The mother who is appointed a guardian by court, may not sell or mortgage immovable property without court consent. Both the father who is legal guardian, and the mother who is appointed by court, have power to sell or charge movable property.[114]

The exclusion of the mother is in accordance with the subordinate role accorded to her in some areas of the Islamic law on family relations. She is conferred with certain rights regarding the custody of her minor children, but we have observed that she is not conferred with the status of a "legal guardian" of property, unlike the father, who may assert such rights by virtue of the parental status. She does not even have a legal right to succeed him as guardian of the economic interests of her minor children. The Courts have the discretion to appoint her as guardian only in circumstances where there is no legal guardian, and she establishes that she is competent to manage and administer the minor's property.

There are reported cases in which the Sri Lanka courts have applied Roman Dutch law principles on this aspect of parental rights, in preference to the principles of Islamic law. Roman Dutch law principles regarding the obtaining of court consent for alienation of immovable property belonging to minors, have been applied to Muslims.[115] It has also been accepted by judicial decisions that a Muslim mother can be considered a natural guardian who is competent to accept a gift to minors.[116] It has been stated that the Roman Dutch law principles on the competence of guardians to accept gifts to minors can be applied when donations of Muslims are governed by Roman Dutch law.[116A] However in **Noorul Muheetha** *v* **Sittie Leyaudeen,** [117] the Privy Council questioned this approach, suggesting that even if Roman Dutch law applied to certain gifts by Muslims, the competence of guardians should be determined by the Muslim law on parental power, rather than the Roman Dutch law.

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In this case, a Muslim mother had accepted a gift on behalf of minor donees. The donation was one that was not recognised in Muslim law, but effective to create a fideicommissum under the Roman Dutch law. The court was therefore required to consider whether there had been a valid acceptance of the gift on behalf of minors, as required by the Roman Dutch law. Pulle J, in the Supreme Court, [117A] referred to the necessity of determining the whole transaction by one legal system, and, thought that the validity of the mother's acceptance must be determined solely by the principles of Roman Dutch law. Alternatively he said that even if this issue had to be determined according to Muslim law, there was no evidence of a "*cursus curiae*", which supported the introduction of a principle of Islamic law that denied a Muslim mother her right to be considered natural guardian under the General law. On appeal, the Privy Council[118] decided that the intention of the donor to create a gift under the Roman Dutch law was not relevant to the issue of who was entitled to accept the gift on behalf of the minors. Considering that this point had to be determined by Muslim law, the Privy Council referred to the fact that in this system the mother is not the natural guardian of the property of her minor children. While commenting that in the absence of guidance from the lower court they would have hesitated to exclude this principle, the Privy Council was not prepared to dissent from Pulle J's conclusion that this principle of Islamic law had not been received into Sri Lanka.

The application of the Roman Dutch law to fideicommissa created by Muslims was clearly not the basis for the decision in **Noorul Muheetha** *v* **Sittie Leyaudeen.**[118A] It was rather the absence of evidence that the principle of Islamic law excluding the mother, was received into Sri Lanka. The recent developments both statutory and judicial, casts doubt on the correctness of a view that requires evidence of reception of principles of Islamic law in areas where that system is condidered a general source on the law governing Muslims. We have seen that the principles of Islamic law apply to the relation between parent and child. Consequently there is no justification for accepting the view that the Roman Dutch law principles apply in determining the mother's status regarding her minor children's property. The

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Privy Council itself appears to have had reservations on this point, and it is unlikely that this view regarding the application of the Roman Dutch law will prevail, if the point had to be decided today.

The Roman Dutch law concept of parental rights is quite different to the Islamic law concept, for in that system, though the mother's "natural right" to custody is recognised, she is not deemed the legal or natural guardian of her children's property. We have observed that even in the Roman Dutch law the mother is not the natural guardian in the lifetime of the father, and that her right to accept a gift on behalf of minor's is restricted. The legal position of the Muslim mother in relation to her minor children's property makes it even more anomalous to accept her parental or "natural" right to determine whether a gift to a minor should be accepted. It is only when the Roman Dutch law confers parental rights in respect of a minor's property that are not in conflict with Islamic law that they may be properly introduced on the basis of a *casus omissus*. The fact that a statute introduces the Roman Dutch law regarding gifts subject to fidei-commissa usufruct or trusts does not affect the basic argument, accepted by the Privy Council in **Noorul Muheetha** *v* **Sittie Leyaudeen**, that capacity of guardians to accept gifts should be determined by Muslim law.[118B]

The Roman Dutch law limitations on the father's right to alienate immovable property are in conflict with the enabling provisions in the Muslim law. However since a court has a special jurisdiction as Upper Guardian of all minors, it has a right to restrict the father's rights of administration in the minor's interests. The requirement of obtaining court permission for alienation of immovables may therefore be seen as a reflection of this special power. Besides if either parent obtains a certificate of curatorship, the personal law will be modified by the application of the statutory principles.[119] While the mother may not be able to apply for a certificate as natural guardian of her legitimate or illegitimate child, she may utilise the statutory provisions to obtain an appointment.[120]

Parental rights cannot be asserted in respect of the property of an illegitimate Muslim minor, but even Islamic law permits the appointment of a guardian by the courts, for the protection of

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such a minor's property.[120A] In the law of Sri Lanka the statutory provisions may be used to obtain a certificate of curatorship, which empowers the curator to administer and manage the property of such a child. A parent may apply for a certificate of curatorship on the basis that he or she is "next of kin". An application may also be made in the capacity of a relative or friend, to the Family Court for the appointment of fit person to take charge of the property belonging to a minor. The Family Court is permitted to grant a certificate to any near relative who is willing and fit to be entrusted with the responsibility.[121] This ensures that the natural parent or some relative will manage and administer any property belonging to an illegitimate child, under the supervision of the courts.

2. The Right to Represent a Minor

General Law

According to the Roman Dutch law a minor has no locus *standi in judicio*, and must therefore be represented in legal proceedings. As natural guardian, the father of legitimate children, has, during his lifetime a superior right to represent them. He can therefore represent a minor in court, and may sue, or defend an action, on his behalf. The mother can assert this right on the father's death, provided he has not excluded her by appointing a guardian. Since the mother of an illegitimate child is the natural guardian, she has the exclusive right to represent the child.[122] The right of representation, like the other incidents of parental power, is subject to the courts overriding jurisdiction as Upper Guardian, to act in the minor's interest. A parent can be denied this right if there is proof of prejudice to the child.

The requirement of representing the minor in legal proceedings was always endorsed in the Civil Procedure Code. A civil action by a minor had to be instituted in his name, by a next friend, while a court was required to appoint a guardian ad litem when he was a defendant to such an action.[123] A married woman was however denied the right to be appointed a guardian ad litem,[124] The courts were strict in their attitude to the requirement of representation, and even a curator was not allowed to act on behalf of a minor party, without an appointment as next friend or guardian

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ad litem.[124A] The subsequently introduced Administration of Justice (Amendment) Law which repealed the Civil Procedure Code, re-enacted the requirement that the minor should be represented by a guardian ad litem or a next friend,[125] but removed the prohibition on a married woman being appointed as guardian ad litem.[125A] Even prior to the statute, there are reported cases where married women were appointed, as guardian ad litem.[126] The new law, gave legality to this practice, and repealed the anachronistic provision prohibiting a married woman from being appointed in this capacity. When it was repealed, and the Code re-instated, perhaps by oversight, the old prohibition became enactd law once again. Consequently the mother may not represent a legitimate minor as guardian ad litem or next friend like any other person "of sound mind and full age" who is considered competent to represent a minor.[126A] The principles of substantive law regarding representation must also be applied by a court, when there are conflicting claims to represent the child. Consequently, she may be able to represent her minor child only in circumstances where the father or guardian appointed by him fails to successfully assert their superior right.

The Code itself ensures that a parent whose interests are adverse to the child should not represent him, and several provisions have been introduced with the object of safeguarding the minor's interest.[127] These, coupled with the overriding jurisdiction to act as Upper Guardian, will enable a court to achieve a balance between the father's or guardian's right of representation, and the minor's own interests. The status of minority thus need not operate to the disadvantage of a minor. He can have access to court even through an adult third party, who is neither a parent nor a guardian appointed by a parent, if their right of representation is denied by the courts, in the minor's interest.

In the absence of any person who was fit and willing to act as guardian ad litem, the law permitted at one time the appointment of the Public Trustee to represent the child. With the repeal of this law, *any* officer of court, who has no interest adverse to the minor may be appointed.[128] It is not clear how such an officer could be better equipped than the Public Trustee to provide representation on a minor's behalf. In any case, the fact that a minor can be represented by any other person if the parent's interests

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are adverse to his own, means that the parental right of representation cannot prevent a minor coming to court, to prevent an abuse of parental authority.

Customary Law

The statutory provisions on representation of a minor in civil proceedings apply to persons governed by the Customary law.[129] The principles of the Roman Dutch law on the parental rights of representation may also apply to persons subject to the Kandyan Law and the Tesawalamai, in the absence of specific provisions. Since Islamic law contains an order of legal guardians with respect to the property of a legitimate minor, it may be possible for the father or any other legal guardian who succeeds him to assert a superior right of representation, and a right to exclude the mother. A Muslim mother, like her counterpart in other systems, will have no right to be a guardian ad litem, but she will also be unable to claim any right of representation, on the basis that she is excluded by the father, or a legal guardian who automatically succeeds him as guardian of the minor's property. However, she too will be able to represent the child, if there is no competing claim by the father or a legal guardian, or the court decides that the appointment of the former persons will not adequately safeguard the minor's interest.[130] If Muslim parents cannot claim a right of representation under the principles of their personal law, the provisions of the Civil Procedure Code authorise the appointment of a next friend or guardian ad litem for a legitimate or illegitimate minor who has in general no *locus standi* to appear on his own.

The requirement of representation of a minor is considered so important in the law on civil procedure, that acceleration of majority is accepted for this purpose only in limited and specified circumstances. Thus while the status of majority may accrue by operation of law, the statute law specifies that "for the purposes of this Chapter, a minor be deemed to have attained majority or full age, on his attaining the age of twenty one years, or on marriage or on obtaining letters of *venia aetatis*."[131] This creates the inference that the requirement of representation must be satisfied, even if majority has been acquired by other legal methods, accepted as effective to accelerate majority. The justi-

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fication for this restrictive approach is not apparent. A minor may however claim earnings salary or wages, as if he is of full age, and without the assistance of a next friend.[132]

The removal of the disability regarding representation of a minor that was imposed on a married woman was a recognition of her role as someone capable of sharing parental rights and assuming responsibility for her minor children. The reform enabled the court to appoint her in circumstances where the father's interest was adverse to that of the child, or he was unfit to exercise these functions. It is unfortunate that the disability was (perhaps accidentally) reintroduced, when the Civil Procedure Code was brought into force again. The father's superior right to represent the child, where he is otherwise competent to do so, is consistent with his status as natural guardian. However there is no rationale for continuing to accept the Roman Dutch law principle that enables the father to exclude the surviving mother of legitimate children, by the mere act of appointing a guardian. The provisions in the Customary law do not envisage any restriction in her status as natural guardian when she survives her husband. Besides the courts are in a position to ensure that the appointment of the mother will not prejudice the minor' for as in the case of the father, they have the jurisdiction to balance parental rights with the minor's interests.

The importance of securing independant representation of the minor has not always been recognised in our legal systems.[133] The statutory provisions seem to have been introduced on the basis that the minor has no *locus standi in judicio*.[134] The safe-guards that they envisage are those that will ensure that the minor will receive assistance to be represented in civil litigation by or against him. The reform that provided for the Public Trustee to represent the minor, in the absence of any other person, reflected the policy that the state had a special concern in obtaining adequate representation. The current provision, permitting "any officer of court" to be appointed, removes that important emphasis. These changes highlight the disadvantages inherent in the, mechanical repeal of a law and the wholesale re-enactment of an earlier statute.

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3. The Right to Appoint a Guardian for a Minor

Parents are the guardians of their minor children in their lifetime, but they may wish to entrust the care of the children to another, in the event of their death or absence during the children's minority. The right to appoint a guardian is therefore an important aspect of parental rights, calculated to ensure that there will be someone to assume the parental responsibility for minor children.

General Law

In the Roman Dutch law, both parents had the right to appoint guardians over the person and property of minors either by will or act intervivos. However the status of the father as natural guardian of legitimate children in the modern law, enables him to make an appointment that restricts the mother's rights when she succeeds him in that role, as the surviving spouse. We have observed that by making such an appointment he could exclude her from control over the management of the children's property, as well as the right to represent them. It is doubtful whether he could exclude her from having charge of the person of the child by appointing a guardian. Her right as surviving parent, to appoint a guardian could be exercised only if the father had not appointed a guardian during his lifetime. The mother of an illegitimate minor as natural guardian, has the sole power to appoint a guardian for her children.[135]

These principles with regard to the appointment of guardians by the parents have not been replaced by legislation in Sri Lanka which conferred ,on the District Court, at one time on the Public Trustee, and now the Family Court the right to appoint guardians over the person of the minor child, as well as curators or guardians over his property. The local legislation[136] has concerned itself with the control and supervision of guardians who claim to administer and manage property belonging to a minor. It provides for the issue of certificates of curatorship to such persons, and incidentally for the appointment of guardians of a minor's person in curatorship proceedings. Though the Courts may have a discretion to appoint curators or guardians, where there is no person with a legal right to be curator, the legislation maintains the relevance of the Roman Dutch law in regard to the parental

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power to appoint guardians. The right to receive a certificate of curatorship which will bring a curator within the supervisory control envisaged by statutes, is still dependant on these principles. The father of a legitimate child may thus exclude the surviving mother from her right to obtain a certificate of curatorship, by appointing a guardian. Such a guardian will have a preferential claim to be appointed curator, and the mother can only replace him if he is unwilling to be appointed. Besides, the Family Court which is now responsible for appointing curators can appoint a guardian over the person of the child when granting a certificate of curatorship only in circumstances where there is no person appointed by the father as guardian with the legal custody of the child. The Civil Procedure Code, unlike the Administration of Justice (Amendment) Law, does not clarify that a guardian over the minor's person cannot be appointed when a natural guardian has custody. But the code must be reasonably construed to reflect the same legal position.[137] A guardian appointed by a parent will not be entitled to administer and manage property in respect of which the donor has appointed a different guardian.

The right to appoint guardians, is like the other incidents of the parental power, subject to the overriding authority of the courts to act as Upper Guardian, and safeguard the minor's interests. The Civil Procedure Code itself harmonizes with this approach, as it confers on the Courts the right to appoint guardians over the person and property of minors, when there is no legally appointed curator, or the appointee is unwilling, or there is no willing and fit relative who can be appointed curator.[137A] It also declares that when a guardian of the minor's person is appointed under the code in curatorship proceedings, the guardian must provide for a suitable education and also come under the supervision and control of court in this respect.[137B] The code however does not clarify the legal positoin, when a guardian has custody of the minor's person before curatorship proceedings are instituted. We have observed that custody may be obtained in Habeas Corpus proceedings. The Court of Appeal may thus deprive a lawfully appointed guardian of legal custody, when there is proof of prejudice to the child, and award it to someone suitable.[137C] The code merely states that a guardian over person cannot be appointed in curatorship proceedings when the father has appointed a

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guardian. The statutory provisions must be reasonably interpreted to prevent such an appointment in curatorship proceedings when a natural guardian or a guardian appointed by the Court of Appeal enjoy the legal right of custody. The Judicature Act now describes the Family Court jurisdiction in regard to the appointment and control of guardians and curators, in general terms.[137D]

It is not imperative for a guardian who has been appointed by a parent, to obtain a certificate of curatorship. However, as a third party can request the Family Court to appoint a person to control the property of a child in circumstances where no certificate has been issued, if such a guardian refuses to be appointed as curator, the court may appoint someone else to administer the minor's property, even though the guardian's right of custody will not be affected.[138]

There are several statutory provisions which reflect the view that the father has a superior right to appoint a guardian for a legitimate minor.[139] The statutes on marriage however clarify that the mother takes preference over such a guardian in the matter of expressing consent to marriage.[140]

Customary Law

There is authority in support of the view that under traditional Kandyan law the father had a right to appoint guardians, this right passing to the mother on his death.[141] In the modern law probably on the basis of General law principles on parental power that apply to Kandyans and persons subject to Tesawalamai, it is recognised that the father of a legitimate has a superior right to appoint a guardian.[142] The surviving mother can therefore be excluded from her right to represent the child, by a guardian appointed by the father. However we have observed that she cannot be prevented from exercising the right to possess and manage the minor's property, in circumstances where the Kandyan law or Tesawalamai recognises such a right. These rights under Customary law make it anomalous to recognise that the father can limit the surviving mother's rights as natural guardian by making an appointment. Legislation recognises that the right of a widow subject to Kandyan law or the Tesawalamai to express consent to a minor's marriage, cannot be excluded by the appointment of such a guardian.[143]

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The father of an illegitimate being excluded from the parental power, cannot claim a right to appoint a guardian. This power is reposed exclusively in the mother of the illegitimate minor.

The Muslim mother of a legitimate child does not come within the order of persons entitled to be guardian over the property of a minor. Consequently she cannot assert a right to appoint a guardian. The father has the exclusive right to appoint a guardian over the property of the children, and his executor succeeds him in this capacity, to the exclusion of other relatives. However such an appointment cannot exclude the surviving mother from her right of hidana or custody.[144]

The statutory provisions on appointment of guardians and curators apply with equal force to persons governed by the Customary laws. Thus a legal guardian under customary law may obtain a certificate of curatorship. Besides, a surviving mother of legitimates who has been excluded from management of the minor's property may be able to obtain such a certificate if the testamentary guardian refuses to be appointed in this capacity.

The provisions in the Civil Procedure Code on appointment of guardians lay special emphasis on the aspect of curatorship proceedings, where the focus is on appointment and control of guardians who administer the property of minors. The provisions on the incidental appointment of gardians over the person of minors, in these proceedings, are ambiguous. They can be confusing too because the Sri Lanka law also recognises a distinct legal procedure with regard to applications for guardianship, or control over the person of minor's (custody). The lack of rationalisation in the legal procedures with regard to curatorship and custody matters is clearly prejudicial to the interest of minor children. The differences in procedures and forums should be resolved, and a co-ordinated approach adopted to the whole issue of guardianship proceedings involving minor children. The Family Court has now been conferred with jurisdiction to consolidate into one proceeding several actions or proceedings involving the same parties or subject matter in one court. This reflects the policy of adopting a co-ordinated approach, but it is not clear how the courts can actually implement this provision in the Judicature Act. (1978).[144A]

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The present law of Sri Lanka follows the Roman Dutch law closely in recognising the father's capacity to restrict the surviving mother's rights in regard to a minor child, by appointing a guardian. The fact that the law considers the father head of the family in his lifetime, does not mean that he should use his status to limit the mother's role as his successor, after his death. The traditional Kandyan law certainly recognises no such limitation. The father's right to appoint a guardian so as to exclude the mother from managing the minor's estate should at least be restricted to situations where he bequeathes his own property to the minor. In other circumstances an appointment made by him should not prejudice or limit the rights of the surviving mother, as natural guardian of legitimate children. The Roman Dutch law itself does not appear to have denied the surviving mother's right to the custody of minor children. A clear right in this respect should not be denied to her in the modern law of Sri Lanka. What is needed now is a further expansion of the rights of the surviving mother, as natural guardian of her legitimate minor children.

4. The Right to determine the Religious Upbringing of a Minor

General Law

There is some judicial authority in South Africa in support of the view that control over religious education is a consequence of natural guardianship, and not an aspect of the right to custody. Consequently even if the mother obtains an order on custody in the father's lifetime, as natural guardian, he can assert a right to determine the religious education of a legitimate child.[145] It would appear that the mother has a right to determine the child's religious upbringing only when she succeeds the father as natural guardian. The mother of an illegitimate however, being the sole repository of the parental power, can claim a corresponding right in respect of her child, during minority.

The father's role in relation to legitimate minor children being conceded a more prominent place in the Roman Dutch law, it is not surprising that determination of religious upbringing, an obviously important aspect of the parental role in the Christian family, has been viewed as the responsibility of the father. Though English precedents have been mistakenly cited in support of the same proposition in a Sri Lanka case,[146] the Roman Dutch law

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and statute,[146A] must form the source of any principle that a non-custodian father continues to enjoy the right to determine the religious upbringing of a minor child. The proposition that the law concedes parental rights regarding religious upbringing creates the inevitable inference that the minor cannot change his religion without parental consent.

Customary Law

The principles in the General law apply to persons governed by the Kandyan law and the Tesawalamai.

Muslim Law

According to the Sharia or the Canon law of Islam, if one of the parties to a marriage is a Muslim, the child is deemed to be a Muslim.[147] Since a Muslim is generally prohibited from marrying a non Muslim, the above reference appears to be to a situation where a male Muslim validly marries a non Muslim female who is a Kitabiyya, or one who believes in a religion revealed in holy scriptures, such as Judaism or Christianity.[148] The attitude of the Muslim law to mixed marriages [149] coupled with the father's superior rights over minor children in other respects clearly raises an inference, that the father has the right to determine the religious upbringing of the child, even if he happens to be the non-custodian parent.[150] It may be argued that a legitimate minor cannot change the sect to which he belongs, or his religion without the father's consent.[151] Illegitimacy, as we have seen, generally confers no parental rights in Muslim law.

In societies where adherance to religious beliefs is valued, the right and duty to impart religious instruction may be seen as an important aspect of the parental role. However, recognition of a legal right to determine religious upbringing as an independant aspect of the parental power over minors in the General law, poses certain problems. It creates the inference that a parent has an enforceable legal right to compel a minor to conform to particular religious beliefs, when freedom of conscience is considered an important fundamental right.[151A] When the custodian parent does not belong to the same faith or conviction as the non-custodian parent with the legal right to control religious education, the child can also be the centre of conflicts and pressures that would not be inevitable in other situations where matters concerning a minor are handled by different parents.

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A court may of course exercise its jurisdiction as Upper Guardian, and take away a non-custodian parent's right to determine religious upbringing, on the basis that its recognition will be prejudicial to the minor's welfare. Nevertheless in the modern law it would seem more appropriate to consider determination of religious upbringing an aspect of the custodian parent's responsibility for the upbringing of a minor, rather than as a distinct and separate parental right. By elevating control of religious upbringing to an independant incident of the parental power, the law entrenches a legal right in the parent which is difficult to enforce, and is in embarassing conflict with the concept of freedom of conscience.

5. The Right to express consent to the Marriage of a Minor

General Law

The Roman Dutch law, while emphasising the need for consent of parties, regarded the consent of parents as an essential requisite for the marriage of a minor.[152] The requirement of parental consent appears to have been followed in regard to marriages in the Maritime Provinces in the period soon after the British occupation.[153] It was not surprising that it was included as a specific requirement for a valid marriage in the very first statute declaring the law on the subject, in this region.[154] As a restraint against hasty and ill considered marriages, the requirement of parental consent continues to find an important place in the statute governing a General law marriage;[155] inevitably it supports the concept of parental power over minor children.

The consent of parents to a marriage is no substitute for the consent of the parties, which is an essential element in a lawful marriage.[156] Parental consent is an additional requirement, founded on the policy that a minor lacks the maturity to enter into such an important contract alone, without adult assistance.[157]

In the Roman Dutch law, the father of a legitimate as natural guardian, occupied a more significant role in the exercise of this right. Thus, though the consent of both parents was required, if there was a difference of opinion between them, the father had a right to have his views prevail.[158] Statutory provisions in the

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modern General law on marriage require the consent of only one parent, but gives a superior status to the father in this respect. The General Marriages Ordinance states that the father is first in the order of persons whose consent is required for the marriage of a minor. It is only if he is dead or under a legal incapacity, or being abroad is unable to convey his views, that the mother's consent becomes adequate to fulfil the requirement of parental consent. If the parent whose consent is required unreasonably refuses to give it, the District court is empowered to give consent to the minor's marriage. This provision ensures that a parent cannot impose his subjective values as to the propriety of a union. The court is conferred with jurisdiction to assess the refusal according to objective criterions, and can prevent an abuse of the parental right in this respect.[159] The remedy for a capricious refusal on the father's part to give consent lies with the court. The mother's consent in such circumstances, is not deemed auequate parental consent to the minor's marriage. It is the court that is empowered to give relief, the statutory provision itself reflecting the special role the courts occupy as Upper Guardian of minors, entrusted with the duty of safeguarding their interests. Since a mother shares the parental power with the father, even though in a less significant manner, it seems anomalous that her role in regard to a minor's marriage is so narrowly defined. Besides, with the establishment of the Family courts it is curious that they have not been conferred with the jurisdiction hitherto exercised under the marriage statute by the District Court.[159A]

The General Marriages Ordinance is ambiguous with regard to the legal position on illegitimate minors. The reference in the relevant section on parental consent, to the right of the mother to express consent in the event of the father's "legal incapacity", was probably intended to cover an incapacity such as insanity.[160] Since the putative father could not claim legal rights in respect of an illegitimate child, who was deemed to have no father under Roman Dutch law, clearly the mother was the only parent competent to express consent to his marriage.[161] The General law of Sri Lanka reflects the same attitude to the relationship between the putative father and the illegitimate minor.[162] Thus the statutory provision on the father's "legal incapacity" must be interpreted as enabling the mother to exercise her exclusive right

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to express consent. If the putative father is permitted to acknowledge the child, by an act of recognition however, his status as parent will be conceded, and it would not be anomalous to permit him to have the superior right to express consent.

There was some controversy in the Roman-Dutch law as to whether lack of parental consent rendered a marriage void or voidable.[163] By contrast, early legislation in the General law, enabled a parent to forbid a marriage, so that it became void unless authorised by Court. However this legislation also adopted the principle that solemnization of a marriage without parental consent under the marriage statute prevented evidence being lead of lack of such consent, in any legal proceeding affecting the validity of the marriage.[164] The present General Marriages Ordinance contains a similar provision which has been interpreted by the Supreme Court to mean that the validity of a marriage solemnized under the statute cannot be attacked on the basis of want of parental consent. It has been pointed out that the Ordinance contains adequate safeguards to prevent a marriage being solemnized without parental consent, and that even if it does take place without the required consent, the irregularity is not treated so drastically as to permit an attack on the validity of the marriage or a challenge to the legitimacy of children.[165] There has been a difference of judicial opinion as to whether the legal position is the same with regard to unregistered marriages solemnized according to custom.[166] Since the law with regard to capacity that applies to customary marriages is determined according to the statute,[167] there is no rationale for denying validity to a marriage celebrated according to custom, merely because there is a lack of parental consent. If the grounds for attacking the validity of a customary marriage are interpreted only according to the statute, a provision in the customary law that prohibits a marriage without parental consent, can have no legal effect.

Since the consent of the parties is an important requirement for a valid marriage, a parent cannot enter into a marriage contract on behalf of a minor. As the practice of arranged marriages is deemed to accord with the social norms in the country however, Sri Lanka courts have recognised that a parent may become liable jointly with a minor child, on a promise of marriage, if there is clear evidence of the minor's consent to the betrothal.[168] The

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personal liability of the parent is not anomalous, since he may incur liability in respect of a minor's contracts.[168A] The emphasis on the minor's consent is a reflection of the court's desire to reconcile the consent requirement in a valid marriage, with the pragmatic fact of the parental responsibility assumed in arranging a betrothal.

This same concern can be observed in the judicial view that an agreement by which a parent agrees to give a daughter in marriage before a particular date, and in default, to pay a sum of money to the promisee is invalid and contrary to public policy. The rationale accepted by the courts is that such a clause conflicts with the concept that parties must freely consent to contract a marriage, without pressure or duress. An agreement containing this type of term has been viewed as "an embarassment upon the absolute freedom to consult the best interests of his child, which parents should possess."[169] The opposing view, that there is nothing contrary to public policy in a clause that contemplates a parent influencing the child's decision in regard to marriage,[169A] has not been followed in the Sri Lanka courts.

A minor who makes a promise of marriage with parental consent, is bound by it, even when the parent is not a contracting party, and the promise is enforceable despite minority. The existence of parental consent, like in other contracts, enables the minor to make a binding promise of marriage. The contrary view, that such a promise is unenforceable because of minority, reflected in some decisions in the Supreme Court, [169B] does not represent the correct legal position.

Customary Law

We have observed that parental consent was considered an essential element of a valid marriage in the traditional laws of the Sinhala, Tamil and Muslim people. Since the legal concept of "marriage guardianship" is important in the Muslim law, parental consent plays an important part in the law of marriage. It does not have the same significance in the modern law of marriage that applies to the Sinhalese and the Tamils, since consent of the parties is essential, and parental consent is merely required for the marriage of a minor. The requirement of parental consent in

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these systems may be considered, as in the General law, an aspect of the law of marriage that strengthens the concept of parental power over minors.

Kandyan Law

When provisions relating to the Kandyan law of marriage were enacted for the first time in legislation, the consent of the father or the mother was required only in respect of the marriage of a minor. Minority for this purpose was defined as 21 for males and 16 for females in the first Kandyan Marriage Ordinance of 1859.[170] The relevant age was reduced in the case of males to 18, and was specified as 16 in the case of females in the subsequent Marriage Ordinance of 1870. Minority was therefore defined differently from the Age of Majority Ordinance which had declared 21 to be the age of majority.[171]

The requirement of parental consent is retained in the Kandyan Marriage and Divorce Act, but minority continues to be specially defined for the purpose of marriage. Parental consent unlike in the General Law is thus required only in respect of a male under 18 and a female under 16.[171A] Since a minor's promise of marriage is valid and enforceable when made with parental consent, despite his minority, a Kandyan minor who is at an age when parental consent is not required, should be competent to make a binding promise to marry without parental assistance, even though he is under the age of majority. In becoming emancipated from parental power for that limited purpose, he clearly acquires the capacity to make such a promise of marriage.[171B]

There is no justification for retaining this special definition of minority for the purpose of obtaining parental consent today, even though it may be argued that it is an aspect of the Kandyan law of marriage that does not alter the general age for termination of minority that is specified in the Age of Majority Ordinance.[172] The Kandyan Marriage and Divorce Act retains a provision which can be traced back to the 1859 Ordinance enacted before this uniformally applicable statute on the age of majority. The Marriage and Divorce Commission has also reccommended that a uniform law of marriage should not enshrine a distinction between the age of majority and the age at which parental consent to a minor's marriage can be dispensed with.[172A]

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The persons who are competent to consent to the marriage of a Kandyan minor are defined by statute. When the early Kandyan Marriage Ordinances applied, the mother could give consent only if the father was dead. If he was mentally incapable of expressing consent, or was abroad, or unreasonably withheld his consent, it was only a court of record in the District, and later a specified administrative official, who could provide the necessary consent.[173] In the modern law, the provision on consent is drafted in the same language as in the General Marriages Ordinance, thus reflecting a harmony with the principles in the General law on the parent's capacity to express consent. The father's consent is required for the marriage of a minor, but if he is dead, or under a legal incapacity, or being abroad is unable to make known his consent, the mother's consent will suffice. Her consent is generally not a substitute for the father's consent, as the District Registrar of Kandyan Marriages continues to be empowered to give consent in the absence of the persons considered competent to give consent.[174] It is also the District Court that has a supervisory control over the exercise of the parental power of giving consent. Even though the father or the mother may, at their discretion refuse consent,[175] an appeal may be preferred to the District Court. This court is required to give the parties including the minor and their witnesses an opportunity of being heard. It has the absolute discretion to confirm the decision regarding consent, but can also set the decision aside, and give consent to the marriage, if it is satisfied that the refusal of consent was unreasonable. The decision of the District Court is final and conclusive, and if it decides to give consent where there has been a refusal, the consent of the court will be as effective as the consent of the parent whose consent is required for the marriage.[176]

The Kandyan Marriage and Divorce Act contains the same ambiguity as the General law, in regard to the parent entitled to give consent to the marriage of an illegitimate. Since the putative father is excluded from the parental power, the statute must be interpreted as giving the mother the exclusive right to express consent. However since Kandyan law permits acknowledgment for the purpose of succession, there is substantial ground for recognising the putative father's capacity to express consent, when he has aknowledged the illegitimate child.

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Though the traditional Kandyan law considered parental consent essential for validity, the Kandyan Marriage Ordinance of 1870, probably influenced by the General law marriage statute of 1863, contained a provision preventing admission of evidence regarding lack of parental consent, in any suit on the validity of a Kandyan marriage.[177] The Kandyan Marriage and Divorce Act contains a similar provision.[178] The Act does not include lack of parental consent among the circumstances that affect the validity of a Kandyan marriage. It also provides detailed safeguards to prevent the soleminization of a marriage without parental consent.[179] These features of the statute lends support to the argument that lack of parental consent does not justify an attack on the validity of a Kandyan minor's marriage.

The Kandyan law requires the consent of the parties, for a valid marriage.[180] The legal position with regard to the parent's capacity to contract a marriage on behalf of a minor will thus be the same as in the General law. The Sri Lanka courts appear to have taken for granted that the General law action for damages, arising from breach of a promise of marriage is available to Kandyans,[181] probably because the principles of the Roman Dutch law can be applied, in the event of a *casus omissus*. The action for breach of promise of marriage has been developed in Sri Lanka according to statutory provisions governing a General law marriage,[182] while the remedy itself appears to be in conflict with the Kandyan law concept of marriage.[183] There is thus room for the argument that neither a Kandyan minor nor a parent who joins a minor in making a promise, are liable in an action for breach of promise of marriage.[184]

Muslim Law

The Muslim law principles on parental consent to a child's marriage are completely different from those applicable in other systems, being founded on the concept of marriage guardianship that is an important aspect of the law of marriage. The Muslim Marriage and Divorce Act introduces the law of a persons sect in regard to matters pertaining to Muslim marriage, and thus permits the application of the principles of Islamic law.[185]

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In Islamic law, the father of a legitimate child occupies a special status as wali or marriage guardian. It would appear that the mother may also act as a wali, though she ranks very low in the order of persons who may succeed to the father's role.[186] However, there is judicial authority in Sri Lanka to support the proposition that she cannot act in this capacity, a view that accords with the principles of the Shafi sect regarding marriage guardianship.[187]

There is no minimum age of marriage in Islamic law, and despite the relevance of such a requirement in the other systems, Muslims in Sri Lanka are not subject to statutory limitations on the age of capacity to marry. This fact, coupled with special principles with regard to marriage guardianship (wilaya) gives the father, rights regarding the marriage of his legitimate children, which are more sweeping than in any of the other systems. The father, as wali, is a contracting party to the marriage of minors, who are considered lacking in capacity to enter into this contract. The father may thus impose the status of marriage on a minor child, in the exercise of the power of jabr. The consent of the bride and bridegroom appears to be required, only if they have reached the age of puberty or of personal emancipation. At this age, which is deemed, in the absence of evidence to the contrary, to be fifteen, they are released from the requirement of obtaining the walis' consent to the marriage.[188] Virginity in girls is also a basis for wilaya.

The bridegroom's consent is required for the registration of a marriage under the Muslims Marriage and Divorce Act. However, since the provisions of Islamic law govern the issue of validity, even a male under the age of puberty may be given in marriage by the father without his consent. Islamic law itself provides some relief against abuse of the parental power in this respect by conceding that the minor has the "option of repudiating the marriage", on attaining puberty.[189]

The Muslim Marriage and Divorce Act has enshrined the principle of the Shafi sect that a female of that sect of any age requires the consent of a wali for a valid marriage.[190] Besides the Act does not require a bride to express her consent at the registration of the marriage, and merely requires her to sign the declaration made prior to registration, when her wali is someone other than the father or paternal grandfather. It is the wali who com-

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municates the consent of a Shafi woman to her marriage.[191] The bride is merely entitled to receive a copy of the statement of particulars of the marriage entered in the marriage register.[191A]

These provisions in the Act regarding the bride's consent suggest that the father as wali may give his daughter in marriage without her consent.[192] However, our courts have accepted that a Hanafi girl who has reached the age of puberty is emancipated from marriage guardianship so that she does not require a wali, and may contract a marriage on her own.[193] The local decisions reflect the principles of the Hanafi sect, according to which the father as wali has no right to impose the status of marriage on a girl who has reached the age of puberty without her consent, acceptance of the marriage contract by her or her agent, being essential for a valid marriage. Even if he gives her in marriage before that age without her consent in the exercise of his power of jabr, she has the option of repudiating the marriage on attaining puberty.[194] The father's rights in respect of Hanafi females are therefore limited under the Muslim law that applies in Sri Lanka, despite the fact that the Muslim Marriage and Divorce Act does not seem to require that their consent be recorded in registering a marriage under the statute.

There is authority in Islamic law that a Shafi female's consent is required when the wali is a person other than the father or, paternal grandfather, and that an adult woman who is not a virgin cannot be given in marriage even by her father as wali, without her consent. However, it seems clear that a minor or an adult virgin can be given in marriage by the father or the paternal grandfather without their consent.[195] The concept that the consent of a virgin who has attained puberty is "desirable" is sometimes cited as justification for departing from the strict application of the Shafi law in regard to adult virgins.[195A]

These principles of the Shafi law seem to be the basis for the provision in the Muslim Marriage and Divorce Act, requiring the bride whose wali is a person other than her father or paternal grandfather, to sign the declaration that is made prior to registration of a marriage. However the absence of statutory provisions requiring a bride to record her consent to a marriage registered under the Act, does not take away the legal significance of the

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requirement of consent, when it is considered essential for the valid marriage of a Shafi female in Islamic law. Though the consent of the bride must be expressed through the wali in Shafi law,[196] there are clearly situations in which her consent is required, and expression of consent in these circumstances, is basic to the validity of the contract.[197] The provisions in the Muslim Marriage and Divorce Act must therefore be interpreted within the framework of the Islamic law regarding expression of the Shafi bride's consent.

The above account indicates that the legal rights of a Muslim father regarding the marriage of a legitimate child are completely different to those recognised in the other systems in Sri Lanka. The father has not merely the right to withhold his consent to the marriage, but a right to contract a marriage in place of the child, and impose the status of marriage upon him or her without their consent. Though the age of majority is 21 for all persons in Sri Lanka,[198] a Muslim father of the Shafi sect appears to have significant rights in respect of the marriage of adult daughters who are virgins, though they are considered released from parental power for all other purposes. Besides, our courts have conceded that generally, Muslim children are emancipated from the requirement of obtaining parental consent to marriage, at the very early age of puberty. They have applied the principles of Islamic law, on this aspect, even though 21 rather than the age of puberty is the age at which a Muslim acquires majority or "personal emancipation" from parental control. Though the definition of minority has changed in the modern law, the courts have continued to apply the principles of Islamic law regarding the age at which a child is released from marriage guardianship, treating this as a distinct period of minority that pertains exclusively to the topic of marriage.[198A]

Though the Muslim law gives the father these considerable powers, it does recognise some safeguards which are intended to prevent the abuse of the rights that the father acquires as wali or marriage guardian. There are defined situations in which he cannot impose the status of marriage on a child, without consent. Shafi law recognises limitations on the father's right of jabr in respect of a daughter, which are intended to ensure that he contracts a marriage for her benefit and not "wickedly or carelessly".[199] A

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marriage is consideed void under this law if the father gives a daughter in marriage to a man who is of inferior condition without her consent. The option of puberty referred to earlier serves a similar function. The Muslim Marriage and Divorce Act too contains some safeguards against the abuse of the father's power regarding females. Thus the Quazi may be moved to give the required consent to a marriage, if a woman has no wali, or if the *wali* unreasonably refuses his consent. The consent of the Quazi is also required for the registration of the marriage of a girl under twelve.[200] As registration is not compulsory,[201] this protection has only a limited significance, and does not in any case operate as a requirement on a minimum age of marriage.

Since some Muslim minors acquire the right to contract a marriage without parental consent at the age of puberty, the Marriage and Divorce Commission thought that minors denied this privilege in other systems, may convert to Islam, for the purpose of contracting a marriage without parental consent.[202] If a parent is able to assert a right to determine the religious upbringing of a minor governed by the Kandyan law and the General law, the validity of a conversion may possibly be challenged in the existing law. However if the law does not recognise a parental right in this respect, the necessary safeguards should be contained in the law on marriage, as long as the requirement of parental consent can be dispensed with by Muslims, at puberty. Without some effective controls, there is room for colourable conversion to Islam.

There is judicial authority in Sri Lanka that a Muslim father may validly enter into a contract by which he agrees to give a minor daughter in marriage within a specified time, or pay a penalty. In **Abdul Hameed** *v* **Peer Cando** [203] the Court pointed out that the father in entering into such a contract was merely asserting his parental power. Taking into consideration the General law premise that such a contract would be contrary to public policy, as lending itself to use of duress, the court emphasised that the prospective bride had consented to the marriage, prior to the agreement. It is clear that in circumstances where a Muslim father may impose the status of marriage on a child even without the latter's consent, the aspect of duress is irrelevant, and a contract agreeing to give such a child in marriage would be valid if it does

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not conflict with any other principle of Muslim law. However a mere betrothal or a promise to marry at some future time does not create rights in the Muslim law.[204] It is therefore arguable that the General law regarding breach of promise of marriage cannot be applied to Muslims, and that a specific obligation undertaken by the father to give a daughter in marriage before a certain date cannot create an ordinary contractual liability.

A Muslim marriage contracted without the consent of the wali or marriage guardian is void. By contrast lack of consent of the parties in circumstances where the right of jabr is legitimately exercised, does not render a Muslim marriage void.[205]

Since even the mother does not generally acquire parental rights over an illegitimate who is considered a *filius nullius*, there are no defined rules in regard to the position of illegitimate children. The Muslim law makes it imperative for a minor to have a wali for the purpose of contracting a marriage.[205A] If the concept of marriage guardianship is considered completely independant of the concept of parental rights, it may be argued that the same principles with regard to the requirement of obtaining consent to marry, applies to illegitimates. Since the Muslim law permits a Quazi or the court to act as marriage guardians, this provision can be utilised to obtain a wali for an illegitimate minor. It would appear that the courts cannot appoint a marriage guardian.[205B]

The Marriage and Divorce Commission considered whether reforms should be introduced in the Muslim law regarding the aspect of capacity to marry. They referred to the fact that Islamic law, even though a religious law, was not considered immutable in other countries that administered this system. However, due to the difficulty of obtaining unanimous agreement on the subject of reforms, the Commission suggested that Muslims be permitted at their own discretion to utilise the facilities of a uniform law.[206] Since Sri Lanka became a party to the United Nations Convention on Consent to Marriage and the Minimum Age of Marriage (1962), it has undertaken an obligation to "take appropriate measures with a view to abolish such customs, ancient laws and practices" that conflict with these concepts.[206A] There is thus a clear basis for introducing reforms even if they conflict with traditional concepts in the Muslim law in Sri Lanka.

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Statistics on registered marriages reveal that the age of marriage for all communities is rising.[207] Since registration is not compulsory among Muslims the extent of child marriage cannot be accurately ascertained. The Marriage and Divorce Commission report referred to the fact that at the time it conducted investigations, the infant and maternal mortality rates among Muslims was very high due to early pregnancies.[208] Apart from the social abuses and the physical and psychological trauma that can result from a law that permits very young children to marry, the co-relation between population control and a reasonably high age of marriage is so obvious that there is substantial reason for all laws on marriage recognising a minimum age of capacity. If the low minimum age of marriage applicable in other systems in Sri Lanka does not prevent child marriages.[208A] that are prejudicial to the physical and psychological wellbeing of minors, the Muslim law which does not specify a minimum age at all, positively encourages such unions. The Marriage and Divorce Commission reccommended that at least Muslim marriages that were registered should conform to the requirement of a minimum age of marriage.[209] The reform is particularly important in the special context of the Muslim law, for even if the Muslim Marriage and Divorce Act is amended on the lines suggested by the Commission so as to require a record of the bride's consent, to a registered marriage,[210] the right of jabr and the concept of wilaya enables the father to exercise sweeping powers in contracting marriages for minor children.

There are important differences in the General law and the Kandyan law on the one hand and in the Muslim law on the other, regarding the premises behind the legal rules governing parental control over a minor's marriage. The former systems seem to view the requirement of parental consent not so much as an important parental right, but as a device for protecting minors from their own immaturity of judgment, when entering into a responsible relationship like marriage. In Muslim law by contrast, the concept of parental rights over a child's marriage, provides the very foundation for the legal rules on expression of parental consent. Relief from abuse of these rights has to be obtained within the system, rather than in the ordinary courts of law. The introduction of the principles of Islamic law regarding release

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from the parental power over marriage at the age of puberty, operates to restrict considerably the scope of parental rights in regard to a minor's marriage. However, we have observed that this development also enables Muslim who are far below the prescribed age of majority to contract marriages on their own.

Conceding that in the existing framework of parental rights over the marriage of Muslim children, the introduction of the age of puberty as the relevant age of release from the parent's powers under Muslim law serves a purpose, it is submitted that Muslim minors should not be permitted to completely dispense with the requirement of parental consent. The age of puberty was relevant in Islamic law to relieve the child from parental controls over marriage, only because this was also the age of majority. If a uniform age of majority has replaced the concept of personal emancipation or majority in Muslim law, there is a rationale for introducing a uniform requirement of parental consent on the lines of the General law and the Kandyan law. The fact that the father is natural guardian should not however prevent both these systems acknowledging a mother's right to express consent in wider circumstances than they allow at present.

6. Parental Rights in the choice of a Minor's name

We have observed that in the Roman Dutch law, both parents of a legitimate minor child acquired the parental power, even though the father was deemed to be the natural guardian, in his lifetime. The concept of natural guardianship was based on certain legal values, and the superior rights of the father in this respect have not been interpreted in Sri Lanka as giving him a legal right to have the children carry his surname through minority[211]. The question of the child's name is determined in Sri Lanka, by custom and convention, subject to the provisions on the registration of names in the Births and Deaths Registration Act (1951).

According to Sinhalese custom, a legitimate child carries his father's family name, as part of his own name, though in a binna marriage under Kandyan law the child often carries his mother's family name.[212] Nevertheless the difference between "first name" and "surname" that is familiar to the west, is not main-

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tained by many people. For this very reason, a child may have a name without a surname. Equally, as in the case of Tamils and Sinhalese, the family name or the father's name may be carried before the name that is given to the child as his own name. Consequently, except among the westernised classes, the same significance is not attached to the child's surname or family name. It is therefore artificial to introduce the concept of legal rights regarding the name that a child should carry through minority. Besides the provisions in the Births and Deaths Registration Act do not suggest that the Sri Lanka law, recognises any special rights in the father or the mother to have a legitimate minor child carry their own name.

The parents of a legitimate child, or certain other persons may register the birth of the child and in doing so, specify the name of the child. Under the present law, it would appear that the Registrar of Brirths is not under an obligation to enter the information provided by the applicant in the Register, and these officials have been known to refuse to register a name of the parent's choice when it does not conform with their caste! The remedy available to a parent in this situation, or to a parent who wishes to alter the name of a minor as entered by the Registrar or the other parent, is to appeal to the Registrar-General or District Registrar who are also public officials. There is no appeal from their decision to the courts.[213] These provisions make it clear that a dispute between parents as to the name a child should carry, is not justiciable in the courts. However they also confer an unwarranted discretion in this respect, upon public officials.

The position is somewhat different in the case of an illegitimate. The Births and Deaths Registration Act declares that the father's name shall not be entered by the Registrar in the birth register as a parent, except with the consent of the mother, while both parents must sign the Register.[214] The mother therefore has a legal right to prevent the child carrying the father's name, even if the latter wishes to acknowledge the child. She can give the child any name she pleases, provided the Registrar agrees. Though the District Court (in the past) or the Registrar-General under the present law, may order that the putative father's name be entered in the Register, when he makes an application and establishes

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paternity, there is no provision for altering the name given to the child by the mother, without her consent.[215] These provisions reflect the attitude of the legal system to the status of the illegitimate.

Once a child attains majority, he may apply to the Registrar-General and certain other officials specified in the Act, and change the name given by his parents. In the past the written consent of the parents was required, but this is no longer necessary. An adult may even change his family name by making such an application.[216] A married woman may use her husband's family name without such an alteration. Sinhala women often choose to retain their own names and patrilineal name even after marriage.[217]

NOTES

1. Wills Ordinance (1844) s. 3.

2. Report by V. W. Vanderstraaten to the Commissioners of Eastern Inquiry, (Ceylon) (1829—1830) C.O. 416/18 F 63; c.f. Nadaraja, Legal System of Ceylon op. cit. p. 37, 38, note 152, Tambiah Principles op. cit. p. 12; Jennings and Tambiah, op. cit. p. 206 suggest that these boards administered the property of orphans.

3. Spiro op. cit. (1959 ed.) p. 61; See Re Hider (1876) 3 S.C.C. 46, though contra Lee, Roman Dutch Law op. cit. p. 100 note 7 describing the Orphan Chambers as boards charged with the supervision of children who had lost one or both parents.

4. Evidence of Sir Richard Otley C.J. to the Commissioners of Eastern Inquiry on the Laws and Courts of Justice in the Maritime Provinces, c.o. 416/16 at p. 557; See also Jennings and Tambiah, op. cit. p. 206, referring to the Proclamation of 1802 discontinuing the Boedelkamer.

5. Otley, C.J. op. cit. at 557; Marshall J in a report on the working of the courts established by the Charter, C.O. 416/17 p. 73.

6. Marshall J. op. cit. p. 73.

7. Otley, C.J. op. cit. p. 456, Answers of members of the minor judiciary (from the courts of Colombo, Mannar, Galle and Matara.) to questions posed by the Commissioners of Eastern Inquiry C.O. 416/13 p. 242, 306, 343.

8. K. M. de Silva, University of Ceylon, History of Ceylon, Vol. III (1973) 317 at p. 321.

9. C.O. 416/19, p. 265, 299, 304, Answers of the Agents of Government (Kandyan Provinces) to the questions posed by the Commissioners of Eastern Inquiry.

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10. Re Hider per Cayley C.J. at p. 47.

11. Courts Ordinance (1889) s. 62, 69(1); See also in re Olive Daisy Fernando (1896) 2 NLR 249 at 250.

12. "Curatorship", derived from "Cura", is the power of managing the estate of a minor, or insane person. See T. B. Smith, (Scotland), op. cit. p.380.

13. See Hayley op. cit. p. 217; Keppetipola Kumarihamy *v* Rambukpotha (1928), Civil Procedure Code Ch. XL.

13A. The phrase "in trust" must be given a non-technical and liberal interpretation, in the context of the enabling s. 582.

13B. See s. 585(1).

14. Civil Procedure Code, s. 582; for a contrary view see Gunasekera Hamin, *v* Don Baron (1902) at 279.

14A. Civil Procedure Code s. 582 proviso.

15. Uduma Lebbe *v* Seyadu Ali (1895) 1 NLR 1; Gunasekera *v* Abubaker (1902) 6 NLR 148; Lebbe *v* Christie (1915), Civil Procedure Code s. 582 and the proviso to the section. See also s. 583, s. 585(2) s. 586.

16. Fernando *v* Fernando (1968) 72 NLR 174 per Weeramantry J. at p. 178; See also In re Olive Daisy Fernando at p. 250; King *v* de Croos (1911) Cassaly *v* Buhari (1956) at p. 80; Courts Ordinance ss. 62, 69.

17. A.J.L. s. 26; A.J. (Am.) L. proviso to s. 614(9), s. 611(4), 613—617.

17A. See V. Samaraweera, "Administration of Justice and the Judicial System" in Sri Lanka: A Survey, op. cit. 353 at 372

18. A.J. (Am.) L. s. 613(1) 614(1); see also the text at note 27 infra regarding restriction of the natural guardian's right to administer a minor's property.

19. A.J. (Am.) L. ss. 613(2) 614(1) (2)(4).

19A. See Civil Procedure Code Ch. XL and Civil Procedure Code (Amending Laws) No. 19 of 1977 and No. 20 of 1977.

19B. Judicature Act s. 24 (1) ,(2) Third Schedule, and s. 25.

19C. See further discussion of the comparative changes that occured in the General law, infra.

20. Re Hider; Mana Perera *v* Perera Appuhamy (1895) 1 NLR 140 at 141. See also Cassaly *v* Buhari, Fernando *v* Fernando (1968) 72 NLR 174, Walter Perera, Laws of Ceylon, op. cit. p. 193.

21. Spiro op. cit. p. 59, 61, authorities cited in notes 36—38. Voet 15.1.6. 25.3.15. V.D.K. Theses 105, Grotius 1.6.1., 3.1.28; Van Rooyen *v* Werneri

22. Voet, 26.4.4.; c.f. Lee, Roman Dutch Law, op. cit. p. 37.

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23. Lee, Introduction to Roman Dutch Law op. cit. p. 37; Spiro op. cit. p. 62; Hahlo and Kahn op. cit. p. 370; But see Ex parte Joubert 1949(2) S.A.L.R. 109 that a natural guradian who wishes to utilise assets that have not come to the minor from him, must obtain court permission for this. The decison reflects the distinction drawn in Roman Dutch Law, between bona profectitia [property given to the minor by the natural guardian] and bona adventitia, [property received from other sources] the father's powers in respect of the former being considered wider. But see P.J. Conradie (1948) 65 S.A.L.J. 57 that the distinction is no longer relevant in the modern law. It does not appear to have been applied in Sri Lanka.

24. Hahlo and Kahn op. cit. p. 372, especialy note 15, and p. 375; Spiro op. cit. p. 64; see also note 61 A infra.

25. Voet op. cit. 4.4.13., Lee, Roman Dutch Law op. cit. p. 286 citing Grotius 3.2.7.

26. Spiro op. cit. p. 99, 100; Voet 27.9.1., 25.3.16. See also Grotius 1.8.5—6; V.D.K. Theses 129, 130; Ex parte Ansermino 1949(1) S.A.L.R. 357, P. J. Conradie (1949) 66 S.A.L.J. 243.

27. Lee, Roman-Dutch Law, op. cit., p. 37, Spiro op. cit. p. 62.

28. See Arunasalam Chettiar *v* Murugappa Chettiar (1954) at 23; Manickam Chettiar *v* Murugappa Chettiar (1957) at 388.

29. See at note 22 supra and Civil Procedure Code s. 582; c.f. A.J. (Am.) L. s. 613(1).

30. See A. J. (Am.) L.s. 610, and now see Civil Procedure s. 492 recognising the existence of such a right to wages and salary.

31. See note 21 supra.

32. See note 26 supra; See also In re Estate Illangakoon (1911) 15 NLR 104 at 105; Perera *v* Davith Appu (1903) 6 NLR 236 at 238, though the contrary is implicit in the decision in de Silva *v* Wijenaike (1912) 2 Mataro 118.

32A. See note 24 supra.

33. c.f. Olive Stone, Family Law op. cit. p. 98—99 regarding statutory restrictions regulating the employment of minors in the entertainment industry, that have been introduced to prevent exploitation of minors. In the English Common law a parent is entitled to the minor's services.

34. See Kandiah *v* Saraswathy (1951) at 139, 141; But quaere whether a motor car, being a valuable movable, the guaadian should not have been required to obtain court consent to the sale of it.

35. See notes 25 and 26 supra, and also the text at note 61 infra indicating that a guardian cannot assist a minor to donate property.

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36. See Malliya *v* Ariyaratne (1962) 65 NLR 145, per Basnayaka C.J. at p. 160, where the prohibition was considered applicable even to an executor.

37. See Mustapha Lebbe *v* Martinus (1903) 6 NLR 364 at 385 per Moncrieff J. at 385, in a case involving a transaction by the minor's mother; see also Layard C.J. in the same case.

38. Voet 27.9.3; (1870) Vand. 66 (mother) Re Hider (1876) (mother); Gunasekera Hamine *v* Don Baron (mother) per Wendt J. obiter at p. 280; Girigorishamy *v* Lebbe Marikkar (1928) 30 NLR 209 (father); Gunasekera *v* Albert (1959) 62 NLR 209 (father) Mahawoof *v* Marikkar (1928) 31 NLR 65 following Perera *v* Perera (1902) 3 Br. 150 (curator) Mudiyanse *v* Pemawathie (1962) 64 NLR 542 (curator); See also Lebbe *v* Christie (1915) F. B., Podihamy *v* Jan Singho (1958) 60 NLR 379 per Basnayaka C.J. obiter at p. 380, Mana Perera *v* Perera Appuhamy (1895) at 141; Cassaly *v* Buhari; Perera *v* Davith Appu (1903) per Moncrieff J at p. 238; Meydeen *v* Ghouse (1921) 23 NLR 445, though a doubt regarding court consent for leases was expressed in Mohomad Anvar *v* Arumugam Chettiar (1938) 40 NLR 382.

39. Gunasekera Hamini *v* Don Baron; Manuel Naide *v* Adrianhamy (1909) 12 NLR 259; Haturusingha *v* Ukku Amma (1944) 45 NLR 499.

40. Fernando *v* Fernando (1916) 19 NLR 193; Silva *v* Mohomadu (1916) 19 NLR 426; Velupillai *v* Elanis (1926) 7 Law Rec. 162; Thangaretnam *v* Umaru Levve (1948) 41 CLW 51; Simon Naide *v* Aslin Nona (1945) 46 NLR 337; Noris Appu *v* Neris Singho (1966) 63 NLR 215 at 216; In Cassaly *v* Buhari, Gratiaen .J suggests that a sale is void, but this view does not represent the existing law.

41. See Re Hider, decided prior to the enactment of the Civil Procedure Code; Cassaly *v* Buhari per Gratiaen J. at p. 80; Fernando *v* Fernando (1968) 72 NLR 174.

42. Piyadasa *v* Piyasena (1967 (69) NLR 332.

43. Meydeen *v* Ghouse.

44. Podihamy *v* Jan Singho.

45. See Re Hider.

46. See Podihamy *v* Jan Singho; Mana Perera *v* Perera Appuhamy; Mudiyanse *v* Pemawathie; Fernando *v* Fernando (1968) 72 NLR 174.

47. See Civil Procedure Code Ch. 35; See also Croos *v* Vincent.

48. See Re Hider.

49. Mudiyanse *v* Pemawathie per H. N. G. Fernando J. at p. 546.

50. Croos *v* Vincent per Shaw J; See also Abdul Cader *v* Razik (1950) at 160.

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51. See Fernando *v* Fernando (1968) 72 NLR 174; Abdul Cader *v* Razik (1950), Cassaly *v* Buhari.

52. Mudiyanse *v* Pemawathie.

53. A.J. (Am.) L. s. 613(4); the Public Trustee could exempt the minor from being present at these proceedings due to his tender age, or any of the reasons specified in this section

54. See A. J. (Am.) L. s. 613(1) which indicates that a natural guardian has the option not to apply for a certificate of curatorship.

55. A. J. (Am.) L. s. 614(1),(6),(7),(8), s. 616; See also A.J. (Am.) L. ss. 614(5), s. 615.

56. A.J. (Am.) L. s. 615(1), s. 604 etc. c.f. Fernando *v* Weerasinghe (1894) 3 C.L.R. 67; Ramanchetty *v* Abdul Rasac (1903) 7 NLR 345 per Moncrieff J. obiter at p. 348;

57. A.J. (Am.) L. s. 615(2).

58. Sessional paper XXIV (1955) p. 69.

58A. See Civil Procedure Code s. 588(2), Judicature Act ss. 25, 20, c.f. A.J. (Am.) L. s. 615, s. 616.

58B. See Civil Procedure Code s. 592.

58C. c.f. Nagalingam *v* Thanabalasingham (1948) 50 NLR 97, per Canekeratna J. at 98,99, Mohideen Hadjiar *v* Ganeshan (1963) 65 NLR 421.

59. See generally on this topic M. Donaldson, Minors in the Roman Dutch Law(1955); Voet, 26.8.2, 26.8.3, 26.8.9. T. Nadaraja (1953) 11 U.C.R. 65; Lee Roman Dutch Law op. cit p. 44, 46; Hahlo and Kahn, op. cit. p. 375, 379; Edelstein *v* Edelstein N.O. 1952(3) S.A.L.R. 1 A.D.; Grotius 1.8.5. V.L. Censura Forensis 1.4.43.2; See also A.J. (Am.) L. s. 610 recognising his right to sue in person without the assistance of a guardian for salary or wages.

60. See note 26 supra; c.f. Grotius 1.8.5.

61. On donations see note 25 supra, and Gunasekera Hamini *v* Don Baron, Haturusinghe *v* Ukku Amma; see generally, Silva *v* Mohomadu (1916) at 428, Nadaraja op. cit. at 85, 86; c.f. Navaratna *v* Kumarihamy (1927) discussed in section on parental consent to marriage infra at note 169B.

61A. Lee, Roman Dutch Law op. cit. p. 109—110, Maarsdorp's Institutes of South African Law Vol 1 (1968) p. 225 231—232; see also note 24 supra.

61B. Fernando *v* Cannangara (1897) 3 NLR 6.

61C. Francisco *v* Costa (1888) 8 SCC 189, followed in Wellappu *v* Mudalihamy (1903) 6 NLR 233, Fernando *v* Weerakoon (1903) 6 NLR 212, and the later cases on acceptance of a donation to minors; see also Lee, Roman Dutch Law op. cit. p· 35, and 286.

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61D. G. A. S. P. *v* Karolis (1896) 2 NLR 72, Nagaratnam *v* Kandiah (1943) 44 NLR 350, but contra Spiro op. cit. p. 59 at note 14 ; see also Fernando *v* Alwis (1935) 37 NLR 301, Kanapathipillai *v* Kasinather (1937) 39 NLR 544, where it was conceded that acceptance could be presumed even though it was not, on the facts.

62. V.D.K. theses 4.8.5., Voet 26.8.4; Edelstein *v* Edelstein per Van den Heever J. A. at 12; Lee Roman Dutch Law, op. cit. p. 286 note 6; Babaihamy *v* Marcinahamy (1908) 11 NLR 232, Nagalingam *v* Thanabalasingham (1948) at 98,99, (1952) 54 NLR 121 P.C., Mohideen Hadjiar *v* Ganeshan, though contra Wellappu *v* Mudalihamy per Layard C.J. at 235; see also Francisco. *v* Costa, Silva *v* Silva (1908) 11 NLR 161, Nagaratnam *v* John, Francisco *v* Don Sabastian, Chelliah *v* Sivasamboo.

63. See cases cited in note 62 supra, and Senanayaka *v* Dissanayaka (1908) 12 NLR 1.

64. Abeywardene *v* West (1957) 58 NLR 313 P.C. at 319; Bindua *v* Untty (1910) 13 NLR 259; Franciso *v* Costa at 192; Mohideen *v* Maricair (1952) 54 NLR 174; Kirigoris *v* Edinhamy (1965) 69 NLR 223; Chelliah *v* Sivasamboo at 214. The contrary opinion in Pakir Muhaiyadeen *v* Assia Umma (1956) may now be considered overruled, see Nagaratnam *v* John per Sansoni J. at 115.

65 Chelliah *v* Sivasamboo p. 206, 207, 210, 214.

66. Spiro op. cit. p. 97, text at note 76;

67. Ex parte Hulton 1954 (1) S.A.L.R. 460 at 466—467; Buttar *v* Ault N.O. 1950 (4) S.A.L.R. 229 at 239; Slabbers Trustee *v* Neezers Executor 1895 12 S.C. 163.

68. (1952) at 176

69. Wellappu *v* Mudalihamy per Layard C.J. and Moncrieff J. Fernando *v* Weerakoon, Abeywardene *v* West, Nagaratnam *v* John, Francisco *v* Costa, Noorul Muheetha *v* Sittie Leyaudeen (1953) P. C.

70. Wellappu *v* Mudalihamy, Fernando *v* Weerakoon at 213, Abeywardene *v* West P.C. at 319, Nagaratnam *v* John at p. 115. c.f. Noorul Muheetha *v* Sittie Leyaudeen.

71. Noorul Muheetha *v* Sittie Leyaudeen p. c. at 273.

72. Francisco *v* Don Sabastian; Tissera *v* Tissera (1908) Weer. 36, though a contrary approach was taken by Tambiah J. in Haseena Umma *v* Jamaldeen. The case may be distingusished on the facts, since the person authorised to accept was the mother, who could have been treated as competent to accept the gift. [see text at note 84 etc. infra]. Since grand parents are deemed natural guardians for the purpose of acceptance of a gift to minors, they may be outside the scope of this rule, and authorise others to accept. See Chelliah *v* Sivasamboo at p 207 and Ch. VI note 134 supra; but should this be so, when the child has a legal or natural guardian? See the discussion of the mother's right of acceptance, infra.

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73. Croos *v* Vincent; In re Evelyn Warnakulasuriya, Kandiah *v* Saraswathy per Dias S.P.J. at p. 139; c.f. Idroos Sathak *v* Sittie Leyaudeen (1950) at 511, and see Ex parte Assen Natchia (1885) at 23.

74. Lebbe *v* Christie (1915) F. B. Croos *v* Vincent, Gunasekera Hamini *v* Don Baron.

75. See e.g. Croos *v* Vincent.

76. See Lebbe *v* Christie, and Gunasekera Hamini *v* Don Baron.

77. See e.g. Mana Perera *v* Perera Appuhamy.

78. Lee, Roman Dutch Law op. cit. p. 37; Civil Procedure Code s. 582; c.f. the repealed A. J. (Am.) L. s. 613(1) which reflected the same approach.

79. But contra Arunasalam Chettiar *v* Murugappa Chettiar, followed in Manickam Chettiar *v* Murugappa Chettiar. (See discussion on the father's right to receive money, supra.)

80. See regarding exclusion of the father's rights, supra.

81. Walter Perera, op. cit. p. 195; Mana Perera *v* Perera Appuhamy. Ex parte Assen Natchia.

82. Civil Procedure Code ss. 583 586; c.f. A.J. (Am.) L. ss. 613(1),(2) 614,(2)

83. Lee, Roman Dutch Law op. cit. p. 36, 37, describing the developments in the morden law, and Van Rooyen *v* Werner at p 430; see Hahlo and Kahn op. cit. p. 368. c.f. Idroos Sathak *v* Sittie Leyaudeen (1950) at 511. The A.J. (Am.) L. s. 613(1), (614 (1) and the Civil Procedure Code ss. 582 and 585(1) confirm the right of such a guardian to obtain a certificate of curatorship. See also parental rights in regard to the appointment of guardians, infra.

83A. Francisco *v* Don Sabastian; c.f. Senanayaka *v* Dissanayaka.

84. Senanayaka *v* Disanayaka, Francisco *v* Don Sabastian, Silva *v* Silva (1908) 11 NLR 161, Noorul Muheetha *v* Sittie Leyaudeen, and the cases cited in notes 62 and 64 supra.

85. A.J. (Am.) L. s. 613(2) 614(2); Now see Civil Procedure Code s. 583 585(2).

86. Voet 4.4.15, 27.9.11. Nadaraja, note 59 supra.

87. Voet 4.4.9. Majeeda *v* Paramanayagam (1933).

88. See the parent's right to appoint guardians, infra.

89. Grotius 1.7.11; Walter Perera op. cit. p. 199

90. See Civil Procedure Code s. 584, discussed supra.

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91. Pinto *v* Fernando (1901) 5 NLR 183, where the court was considered to have an unfettered jurisdiction under the Civil Procedure Code to appoint a woman who had remarried, curatrix of her minor children.

92. Hayley op. cit. p. 351, 460; Nitinighanduwe op. cit., p. 111; Sawers, op. cit. p. 1, Kandyan Law Ordinance (1938) s. 15(a).

93. Nitinighanduwe op. cit. p. 111; Sawers op. cit. p. 17, Hayley op. cit. p. 496; Armour op. cit. p. 87, cited with approval in Hayley op. cit. p. 212.

94. Juwan Appu *v* Helenahamy (1901) 2 Br. 19.

95. Lebbe *v* Christie (1915).

96. Suppen Chetty *v* Kumarhamy (1905) Bala. 36; 1838 Morg. Dig. 252; Appuhamy *v* Kirihenaya (1896) 2 NLR 155; Bandara Menika *v* Imbuldeniya (1949) 50 NLR 478 per Gunasekera J. obiter p. 480; Punchirala *v* Banda (1948) 50 NLR 488; Babi *v* Dantuwa (1961) 63 NLR 139 per L. B. de Silva J. obiter at p. 142.

97. Bandara Menika *v* Imbuldeniya p. 480; See also Suppen Chetty *v* Kumarihamy, Babi *v* Dantuwa.

98. Bandara Menika *v* Imbuldeniya.

99. (1915).

100. Punchirala *v* Banda; the suggestion that she does not require court permission when she alienates to pay the husband's debts, is apparent in Lebbe *v* Christie; See also Appuhamy *v* Kirihenaya, Babi *v* Dantuwa, Bandaramenika *v* Imbuldeniya.

101. See cases cited in note 96 supra, and Lebbe *v* Christie.

102. Bandara Menika *v* Imbuldeniya, Punchirala *v* Banda, Babi *v* Dantuwa; See also Tambiah, Sinhala Law op. cit. p. 146; c.f. A.J.L. s. 279; now see Civil Procedure Code ss. 542, 545.

103. See Punchrala *v* Banda [in the affirmative]; See also Shaw J. in Lebbe *v* Christie but contra Malliya *v* Ariyaratna (1962); See Babi *v* Dantuwa per L. B. de Silva J. at p. 142, suggesting that the law imposes special safeguards to protect the minor in the case of an estate above the administrable limit.

104. See H. W. Tambiah, Tamil Studies (1966) p. 355 at 367.

105. See Babi *v* Dantuwa per L. B. de Sivla J. at p. 142; Punchirala *v* Banda, 490. c.f. Tambiah, Sinhala Laws, op. cit. p. 145.

106. Hayley op. cit. p. 215.

107. Kandyan Law Ordinance (1938) s. 11; Tambiah, Sinhala Laws, op. cit. p. 155; c.f. Ambalavanar *v* Ponnamma (1941) interpreting the provision in the customary law applicable to persons subject to Tesawalamai.

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107A. Kandyan Law Ordinance (1938) s. 15.

108. Kanapathipillai *v* Sivakolonthu (1911) see Kathiresu, Tesawalamai op. cit. p. 28—29.

109. Jaffna M.R.I. Ordinance (1911) s. 37, 38, c.f. Annapillai *v* Saravanamuttu (1938) at p. 6; Ambalavanar *v* Ponnamma at p. 296.

110. See Ambalavanar *v* Ponnamma.

111. Tambiah, Tamil Studies, op. cit. p. 355.

112. Mangaleswari *v* Selvadurai (1961).

113. Tyabji op. cit. p. 228; Fyzee op. cit. (1974 ed.) p. 202—204.

114. Fyzee op. cit. (1974 ed.) p. 204, 207.

115. See Girigorishamy *v* Lebbe Marikkar; c.f. Mahawoof *v* Marikkar, Meydeen *v* Ghouse, Cassaly *v* Buhari.

116. Idroos Sathak *v* Sittie Leyaudeen, Noorul Muheetha *v* Sittie Leyaudeen. In Haseena Umma *v* Jamaldeen Tambiah J. considered the mother competent to accept because she had been authorised by the donor to do so. But see comment in note 72 supra.

116A. See Pakir Muhaiyadeen *v* Assia Umma, Mohideen *v* Maricair, Haseena Umma *v* Jamaldeen.

117. (1953) 54 NLR 270.

117A. See Idroos Sathak *v* Sittie Leyaudeen (1950) especially at p. 511—513.

118. See Noorul Muheetha *v* Sittie Leyaudeen (1953).

118A. The adoption of such an analysis in Haseena Umma *v* Jamaldeen may be queried.

118B. Though contra Haseena Umma *v* Jamaldeen.

119. c.f. Mahawoof *v* Marikkar, Meydeen *v* Ghouse.

120. See Civil Procedure Code s. 583, 585(2) c.f. Ex parte Assen Natchia.

120A. Mulla op. cit. p. 339; Fyzee op. cit. (1974 ed.) p. 209.

121. c.f. A.J. (Am.) L. ss. 613(1),(2), 614(2). Now see Civil Procedure Code s. 582, 583,(2).

122. Voet , 26.7.12. Grotius 1.7.8., 1.6.1. Van Rooyen *v* Werner; Lee, Roman Dutch Law op. cit. p. 38. Kandiah *v* Saraswathy (1951).

123. See Civil Procedure Code, Ch. 35, Wickremeratna *v* Silva, (1959) 63 NLR 569;.

124. Civil Procedure Code s. 495; See also Fernando *v* Fernando (1966) 68 NLR 503.

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124A. Fernando *v* Weerasinghe (1894), Raman Chetty *v* Abdul Rasac (1903); on the effect of non representation of a minor see Muthumenika *v* Muthumenika (1915) 18 NLR 510; Vivekasivenmany *v* Ramasamy (1966) 69 NLR 433; Rupasinghe *v* Fernando (1918) 20 NLR 345; Somasunderam *v* Ukku (1943) 44 NLR 446; Siebert *v* New Asia Trading Co. (1962) 66 NLR 460.

125. See A.J. (Am.) L. s. 604—611.

125A. See A.J. (Am.) L. s. 611(1)

126. See Podihamy *v* Jan Singho (1958) Ponnampalam *v* Appukuddy (1904) 7 NLR 273 though it is not clear from the report whether the mother was a married woman or a widow.

126A. c.f. A.J. (Am.) L s. 606(1), 611(1), See generally s. 606(2), 611(5). Now see Civil Procedure Code s. 495, and see generally ss. 481(1), 493(1).

127. See A.J. (Am.) L. s. 606, 611; now see Civil Procedure Code ss. 481, 482, 493(1), 495.

128. See A.J. (Am.) L. s. 611(4); now see Civil Procedure Code s. 494.

129. A.J. (Am.) L. ss. 604—611; now see Civil Procedure Code ss. 476—500 applicable to civil proceedings by or against minors and Muthu Menika *v* Muthu Menika.

130. Civil Procedure Code ss. 481, 483, 484, 485, 495 .

131. A.J. (Am.) L. s. 612, now see Civil Procedure Code s. 502; c.f. Termination of minority, Ch. VIII infra.

132. A.J. (Am.) L. s. 610; now see Civil Procedure Code s. 492.

133. See Judicial determination of parentage and parental custody of minors, Ch. V. and VI supra.

134. The subtitle introducing the provisions, refers to "Actions by or against minors and persons under other disabilities."

135. See parental custody of minors, Ch. VI supra, notes 85 and 87; see also the mother's rights in respect of a minor's property, and in regard to representation of the minor in legal proceedings, supra; K. Balasingham. Laws of Ceylon (1933), Vol. II, p. 728—733, also supports the view that the appointement of a guardian by the father cannot exclude the mother from her control over the person of the child. In re Lesley Mark Antony (1947) it was decided that in a dispute between a guardian appointed by the father, and a foster parent, the appointment would be effective unless it was prejudicial to the child. The courts may therefore always assert their inherant jurisdiction and recognise the mother's status as custodian with control over the person of the child.

136. See A.J. (Am.) L. ss. 613—616; now see Civil Procedure Code Ch. 40 especially ss. 582, 585, 586, 587, ; Judicature Act s. 25,20.

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137. See A.J. (Am.) I., s. 613(1), 613(2), 614(1)—(4). Now see Civil Procedure Code ss. 582—583 s' 585(3) which seem to reflect the same principles, even though it is not as clear that a guardian over the child's person cannot be appointed if custody is with a natural guardian; ss. 586 and 587 are thus qualified by s. 585(3).

137A. Civil Procedure Code ss· 585(2)(3) 586, 587.

137B. Civil Procedure Code s. 594; c.f. A.J. (Am.); L. s. 614(9); for a similar provision c.f. Judicature Act s. 25, 20.

137C. See Re Lessley Mark Antony (1947).

137D. See ss. 20, and 25.

138. A.J. (Am.) L. ss. 613(2), 614(2),(3). Now see Civil Procedure Code ss. 583, 585(1)(2)(3).

139. G.M.O. s. 22(1), Civil Procedure Code s. 585(3), and c.f. similary A.J. (Am.) L. s.614(3).

140. G.M.O. s. 22(1), K.M.D. Act s. 8(2)(c).

141. Sawers op. cit. p. 21, Hayley op. cit. p. 212.

142. K.M.D. Act s. 8(2), G.M.O.S. 22(1) that applies to persons subject to Tesawalamai.

143. K.M.D. Act s. 8(2)(c), G.M.O.S. 22(1).

144. Fyzee , op. cit. (1974) p. 202—204. Tyabji op.cit. p. 218.

144A. See s. 28.

145. Spiro op. cit. (1971 ed.) p. 122, 276—277. Hill *v* Hill 1969(3) S.A.L.R 544; c.f. Simleit *v* Cunliffe 1940 T.P.D. 67, Dreyer *v* Lyte Mason 1948(2) S.A.L.R. 245.

146. de Silva *v* De Silva (1947) 49 NLR 73.

146A. Education Act No. 31 of 1939 s. 35(1), (4)(b)(i)(ii)

147. Fyzee op. cit. (1964 ed.) p. 58.

148. See Fyzee op. cit. (1964 ed.) p. 95.

149. See conflict of personal laws Ch. I supra.

150· Fyzee op. cit. (1964 ed.) p. 189—190 refers to to the father's right to supervise the upbringing of a child who is lawfully in the mother's custody.

151. Skinner *v* Orde 1871 14 M.I.A. 309 is an Indian case in support of the view that a child is presumed to belong to the religion on the father. In the Sri Lanka case of Abdul Cader *v* Razik (1952) the Privy Council refused to consider the point that a minor could not change her religion without the father's consent, since it had not been rasied in the lower court; c.f. Faiz Mohomed *v* Elsie Fathooma (1942), and Mohideen *v* Sittie Katheeja, (1957) which impliedly support the father's right to determine the religious upbringing of a minor.

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151A. Constitution of Sri Lanka (1978) op. cit. s. 10; it may be argued that freedom of conscionce refers to a child's freedom to follow his own religious beliefs, Dahiru Cherance *v* Alkali Cheranci, Ch. VI note 58A supra.

152. Lee, Roman Dutch Law op. cit. p. 52, 54; Spiro op. cit. (1959 ed.) 124; see also Lange *v* Lange 1945 A.D. 332, Uys *v* Uys 1953 (2) S.A.L.R. 1, on the requirement of the consent of parties; the Marriage and Divorce Commission Report, op. cit. p. 54.

153. Evidence given by the lower court judges of Colombo, Jaffna, Mannar, Galle and Matara to the Commissioners of Eastern Inquiry (Ceylon) 1929—1830. C.O. 416/13 p. 242, 260, 306, 343.

154. Marriage Ord. No. 6 of 1847, s. 18 (21 and 16 are specified as the ages at which parental consent is not required for males and females repectively who have not been married before).

155 G.M.O. Ord. s. 22(1).

156. Selvaratnam *v* Anandavelu (1941); G.M.O. Ord. s. 34(4) s.35.

157. See Marriage and Divorce Commission report op. cit. p. 40 and 154.

158. Voet 23.2.13, Grotius 1.15.15; Spiro op. cit.(1959 ed.) p. 214; Lee, Roman Dutch Law op. cit. p. 56.

159. G.M.O. Ord. s. 22(1); Gunerishamy *v* Gunathileke (1904) 7 NLR 219.

159A. The Family, Court has not been conferred with this jurisdiction, see Judicature Act s. 24(1) and 24(2).

160. See the statutory provisions in the early Kandyan law Ordinances (note 173 infra) which refer to unsoundness of mind; the Marriage Ord. (1847) s. 18 which contained the provision on parental consent in the General Law, and was retained in the subsequent Marriage Ord. 1863 makes no reference to legal incapacity. The provision in the present G.M.O. Ord. was probably derived from the Kandyan Marriage Ordinances.

161. Hahlo and Kahn op. cit. p. 355 comment that "save for his claims to maintenance, an illegitimate child has legally no father". The requirement of the consent of both parents to a minor's marriage is consequently discussed in relation to legitimate children, See p. 399—400; see also Lee, Roman Dutch Law op. cit. p. 56 —57.

162. See Legitimacy, Ch. II supra.

163. Lee, Roman Dutch Law op. cit. p. 54—60.

164. Marriage Ord. No. 13 of 1863 s. 11, s. 27.

165. See G.M.O. Ord. s. 42, 46; Selvaratnam *v* Anandavelu at 497; Dayawathie *v* Gunaratna (1966).

166. See Selvaratnam *v* Anandavelu; Ratnammah *v* Rasiah (1947).

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167. Tiagaraja *v* Kurukkel (1923); Punchinona *v* Charles (1931).

168. de Silva *v* Juan Appu (1928) 29 NLR 417; Henderick Sinno *v* Haramanis Appu (1879) 2 S.C.C. 136; Fernando *v* Fernando (1899) 4 NLR 285; c.f. Namasivayam *v* Supramaniam 1877 Rama. 362.

168A. See Parental assistance in regard to a minor's contracts, in discussion of the parent's right to administer the minor's property, supra.

169. See de Silva *v* Juan Appu per Garvin J. at p. 420, followed in Kandiah *v* Tambipillai (1943) 44 NLR 553. Bastiampillai *v* Rasalingam (1936) 38 NLR 89; see also C. Weeramantry The Law of Contracts Vol I (1967) p. 380; c.f. Abdul Hameed *v* Peer Cando (1911) 15 NLR 91.

169A. See Dalton J. dissentiate in de Silva *v* Juan Appu.

169B. See the views expressed obiter in Navaratna *v* Kumarihamy, where the court followed a similar opinion in Henderick Sinno *v* Haramanis Appu; c.f. the authorities cited earlier at notes 59 and 61, and Maarsdorp's Institutes of South African Law, op. cit. p. 11.

170. Kandyan Marriage Ord. (1859) s.4.

171. Kandyan Marriage Ord. (1870) s. 13, Age of Majority Ord. (1865) s.2

171A. K.M.D. Act s. 66.

171B. Contra Navaratna *v* Kumarihamy where the court held that a Kandyan under 21 continues to suffer from the disabilities of minority, and cannot enter into a binding promise to marry, even though he is of an age where parental consent is not required for marriage. The decision does not represent the correct legal position, see note 169 B. supra.

172. See Navaratna *v* Kumarihamy; the Marriage and Divorce Commission recommended that this provision in the Kandyan law should be altered to conform with the General Law. See their report, op. cit. p. 39—40.

172A. See the summary of recommendations in their report op. cit. at p. 154 para 11.

173. Kandyan Marriage Ordinance (1859) s. 4 (1870) s. 13.

174. K.M.D. Act ss. 8(1),(2).

175. K.M.D. Act s. 9.

176. K.M.D. Act ss. 11(1), 12(1),(2)(4), 13, 15.

177. Kandyan Marriage Ordinance (1870) s. 13.

178. K.M.D. Act s. 29(2)(b).

179. K.M.D. Act ss. 16(6)(b), 16(7)(d), 20, Parts I, II and III.

180. K.M.D. Act ss. 22(3), 23(1)(b).

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181. See Boange *v* Udalagama (1955) 57 NLR 385 [action for damages], c.f. Navaratna *v* Kumarihamy.

182. G.M.O.Ord s. 19; Udalagama *v* Boange (1959) 61 NLR 25 (P.C.); See also M. Sornaraj (1966) 9 Ceylon J.S.H.S. 177.

183. See Ralph Pieris op. cit. p. 201.

184. In Navaratna *v* Kumarihamy the court held that a promise of marriage was unenforceable, on the ground of minority.

185. M.M.D. Act s. 98(2).

186. See Fyzee op. cit. (1974 ed.) p. 209. S. Ameer Ali, Mahommedan Law Vol. II (5th ed.) p. 234.

187. Marikkar *v* Marikkar (1915) at 482, 485. M.M.D. Act s. 26(1); Ibrahim, Islamic Law in Malaya op. cit. p. 179.

188. Marikkar *v* Marikkar, Abdul Cader *v* Razik (1952) P. C. Fyzee op. cit. (1974 ed.) p. 91, 208—210, Mulla op. cit. p. 223, 233; Ameer Ali op. cit . p. 234; see also the cases cited in Ch. VI note 6.

189. M.M.D. Act s. 19(1)(a), s. 16. Fyzee op. cit. (1974 ed.) p. 94, 210. Muheidinbawa *v* Seylathumma (1937) 2 MMDLR 53 (B.Q.)

190. M.M.D. Act s. 25(1)(a); see also Marikkar *v* Marikkar, Fyzee op. cit. (1974 ed.) p. 210; Ibrahim op. cit. p. 178.

191. Marriage and Divorce Commission Report, op. cit. , p. 144—147; M. M.D. Act s. 25(1)(a)(ii), see also ss. 18, 19.

191A. M.M.D. Act s. 19A. introduced by Births Deaths and Marriages (Amendment) Law No. 41 of 1975.

192. See Marriage and Divorce Commission Report op. cit. p. 144—146.

193. Abdul Cader *v* Razik (1950), (1952) P.C.; Haniffa *v* Razack (1958); See also Fyzee op. cit. (1974 ed.) p. 210; Ibrahim op. cit. p. 180.

194. Fyzee op. cit. (1974 ed.) p. 210, p. 91; Ibrahim op. cit. p. 180, 181.

195. Ibrahim op. cit. p. 178; Fyzee op. cit. (1974 ed.) p. 208, p. 210.

195A. See Tyabji op. cit. p. 47—48.

196. Ibrahim op. cit. p. 181.

197. see note 195 supra; Fyzee op. cit. (1974 ed.) p. 91.

198. Age of Majority Ordinance s. 2.

198A. See Termination of Parental Power, Ch. VIII infra; see also Abdul Cader *v* Razik (1952) P.C. at p. 202—203 and Marikkar *v* Marikkar.

199. Ibrahim op. cit. p. 178, see also p. 179—180.

200. M.M.D. Act ss. 25(1)(b), 47(2) 47(3), 23.

201. M.M.D. Act s. 16.

202. See their report op. cit. p. 30.

203. (1911) especially at 93, 94.

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204. Fyzee op. cit. (1974) p. 91—92; c.f. Ibrahim op. cit. p. 175, describing the practice of betrothal in the Muslim Law applicable in Malaya and Singapore.

205. Fyzee op. cit. (1974) p. 209—210, M.M.D. Act s. 25(1)(a), Ameer Ali *v* Jameela Umma (1947) 3 M.M.D.L.R. 65 (BQ).

205A. Fyzee op. cit. (1974 ed.) p. 209.

205B. Mulla op. cit. p. 267; Fyzee op. cit. (1974ed.) p. 209.

206. See their report op. cit. p. 21—28.

206A. Cmnd 3616 (1968) London.

207. Statistics indicate that the mean age of marriage for women governed by General law is over 20. See C. Jayasuriya Status of Women, Sri Lanka (1979) 16, at 44, for statistics; see also H.M.Z. Farouque, Muslim Law in Ceylon, 4 MMDLR p. 13, and the Marriage and Divorce Commission Report, op. cit. 38.

208. See their report op. cit. p. 40.

208A. The minimum age of marriage in the General Law and the Kandyan Law is 12-14 for females, and 16 for males. G.M.O. Ord. s. 15, K.M.D. Act s. 66.

209. See their report op. cit. p. 41.

210. See their report op. cit. p. 144—177.

211. Olive Stone, Family Law, op. cit. p. 58, citing in re T. (1963) Ch. 238 at 241, suggests that the father may assert such a right in English Law. Bromley op. cit. (1976 ed.) p. 338 however states that this is a convention and not a right.

212. Hayley, op. cit. p. 193—194; Obeyesekere, Land Tenure, op. cit. p.44.

213. Births and Deaths Registration Act s.s. 15, 22, 27(1), 27(2)(a), as amended by Births, Deaths and Marriages (Amendment) Law (1975) and ss. 27(3) 27(6); Registrar General *v* Tikiri Banda (1961) 66 NLR 63; Registrar General *v* Geederick (1967) 71 NLR 249. See generally L. A. Wickremeratne (1975) Vol V Nos. 1 and 2 CJHSS(N.S.) 49 at 57 on representations made to the Donoughmore Commission on refusal by Registrars to register names on caste grounds; c.f. Ruwanpura *v* Registrar General (1972) 76 NLR 167.

214. s. 21(2)(a).

215. Perera Balasuriya (1929), s. 28(1) (b)(c) of the principal enactment; s. 27(A)(1)(a) introduced by (1975) amendment, note 213 supra.

216. s. 27(1), 27(2) (a) introduced by the (1975) amendment which repealed ss. 27(1) and 27(2) of the principal enactment; s. 28(1)(a) of the principal enactment permitting an application to the District Court has also been repealed; see also Ruwanpura *v* Registrar General (1972) (change of "ge" name).

217. Ryan op. cit. p. 47.

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CHAPTER VIII

TERMINATION OF PARENTAL POWER

According to the Roman Dutch law which provides the foundation for the law on this subject, the parental power over minors continues until the death of either the parent or the minor unless it has been interfered with by the courts, acting in the minor's interests.[1] In Sri Lanka the parental power may also be terminated and transferred to another by a valid adoption order.[1A] There are several other recognised methods by which a child ceases to come under the authority and control of the parent. We shall consider in this chapter, the different situations in which parental power is terminated, or restricted, excluding adoption, which is dealt with separately, when that topic is discussed in general.

1. TERMINATION OF PARENTAL POWER BY THE MINOR ATTAINING MAJORITY

We have observed that the Age of Majority Ordinance (1865) is a statute of general application, and that it defines the age of majority as twenty-one.[2] The statute also recognises that majority may be accelerated by operation of law, on the happening of an event which is effective according to the principles of the Roman Dutch law or the Customary laws, to terminate the status of minority.[3] Individual statutes in recent times appear to treat eighteen, rather than twenty-one, as the age of majority, thus casting doubt on the validity of retaining the age of twenty-one as the upper limit of minority.[3A]

ACCELERATION OF MAJORITY

The General Law

The Roman Dutch law recognised that a minor could acquire majority by the grant of *venia aetatis*, by marriage, or tacit emancipation from the parent.

venia aetatis referred to the practice by which the sovereign could confer the status of majority on a male over twenty or a female over eighteen.[4] The Wills Ordinance of 1844 reflects the Roman Dutch law concept,[5] and this method has been in use in

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Sri Lanka. In the colonial period, the grant was made by the Governor, and when the country achieved Dominion Status, this power was vested in the Governor-General as an aspect of his constitutional power.[6] This method continues to be recognised,[7] and *venia aetatis* may now be obtained by grant of the President.

In Roman Dutch law, *venia aetatis*, was considered to terminate the incapacities of minority, but unless there was express provision to the contrary, court permission for mortgage or alienation of immovable property continued to be required.[8] The form of the grant in Sri Lanka indicates that its purpose is to enable a minor "to manage, transact and administer his affairs and property as fully and effectively to all intents and purposes, as if he had attained his full age", on the basis that the minor is "capable of managing (his) affairs".[9] This would suggest that court permission for alienation of immovable property is not required.[9A]

The law on Civil Procedure expressly recognises that majority for the purpose of acquiring *locus standi in judicio*, can be obtained by a grant of *venia aetatis*.[10] However since there is a statutory requirement of parental consent to marriage until the age of twenty-one, a grant of *venia aetatis* does not appear to enable a person to contract a marriage without obtaining such consent.[11] *Venia aetatis* can only be obtained by a male over twenty or a female over eighteen. While accepting that parental consent is a salutary precaution against hasty marriage, it is difficult to appreciate why a person who has obtained such a grant and is considered a major in every other respect, should lack the capacity to contract a marriage without the approval of parents.

A valid marriage according to the Roman Dutch law, terminated the parental power over a male, and with the erosion of the concept of the husband's marital power in the modern law of Sri Lanka, a married woman under the age of majority acquires full legal capacity.[12] There are many statutes which reflect this view that minority is terminated by marriage.[13] Besides the Marriage Registration Ordinance like the prior legislation, specifically states that a widow or widower or a person whose marriage has been dissolved, is exempt from the requirement of parental consent to marriage.[13A] This is a further indication that marriage confers majority according to the principles of the General law, and that

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the status is not affected by the dissolution of the marriage prior to the attainment of the usual age of majority. In South Africa it has been decided that annulment of a voidable marriage, restores the status of minority with retrospective effect, a view that is consistent with the Roman Dutch law on nullity of marriage, and the concept that only a valid marriage is effective to terminate minority.[13B] In Sri Lanka this question was of academic interest when a nullity decree could not be obtained on the ground that the marriage was voidable.[13C] It is now a relevant and important question. On principle, annulment of the voidable marriage should restore the status of minority. Yet just as the law introduces certain measures to qualify the logical consequences of annulment, in the interests of the parties and the issue, it should concede that annulment does not affect the status of majority acquired by contracting a marriage.

Tacit emancipation was an event that was considered effective in Roman Dutch law to release the minor from parental power and thus terminate minority. It was described by Grotius as a situation in which "a child is permitted to have a home of his own and to do business."[14] Tacit emancipation from parental power could only be effected by the conduct of the minor's natural guardian.[14A] If both parents are dead, the parental power has been terminated, and the issue of tacit emancipation from parental control cannot arise at all, even though it may take place expressly by a declaration of court.[15] According to the Roman Dutch law, emancipation in this sense required the knowledge and the express or implied consent of the father, or the mother when she succeeded him as the natural guardian of the child.

It is the significance of the minor being permitted to live in a separate residence and conduct a business, that has been the subject of some controversy in the modern law. It has been pointed out that today, a minor may receive permission to work and engage in a business of his own, thus obtaining a general authority to enter into binding contracts, without the intention that he will also be emancipated from the parental power.[16] Since the incapacity of a minor at law is based on the policy that he should be protected against his own immaturity of judgement, there is a clear incentive to adopt a restrictive attitude to the concept of tacit emancipation.

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Some writers express the view that it is unnecessary in modern law to establish that the minor lived in a separate dwelling and engaged in a trade or business, and this opinion is supported by judicial decisions in Sri Lanka that stress the importance of the minor establishing economic independence from the parents, rather than the fact of his carrying on a separate trade or business.[16A] The latter fact and independence in business matters is also not the only test of emancipation,[17] and this circumstance can be inferred from permission to take salaried employment.

Despite the fact that tacit emancipation was considered in the traditional Roman Dutch law, as a method of terminating parental power, authorities in the modern law are also not in agreement that it has this effect. One view interprets it as merely the grant of general consent to undertake work or business which gives legal effect to contracts entered into by a minor in connection with that trade or business.[17A] Emancipation is thus considered "relative", conferring contractual capacity for a specified purpose, but always subject to the parents' right to revoke consent, without prejudice to third parties. This view seems to be supported by those judicial decisions that do not require that the minor lives in a separate dwelling, and which stress that economic independence is the test of emancipation. Nevertheless, according to another view, a minor acquires contractual capacity by tacit emancipation and is released irrevocably from parental power. However, even writers who subscribe to this view state that under Roman Dutch law, he continued to require parental consent to his marriage, and court approval for alienation of property.[18]

There are some old cases in Sri Lanka that support the view that tacit emancipation confers limited legal capacity on a minor.[19] The statute law on Civil Procedure does not treat emancipation as conferring *locus standi in judicio* and accelerating majority for the purpose of instituting or defending a civil action, in the same way as marriage or obtaining letters of *venia aetatis*. Legislation governing General law marriages indicates that parental consent is an essential requirement for marriage, until the attainment of the statutory age of majority, i.e. twenty-one.[20] The latter provision may be based on the rationale that even if a minor is emancipated for other purposes at a tender age, there is a

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policy of preventing early marriage without parental consent.[21] However, the principle that even a tacitly emancipated minor has no *locus standi in judicio* can have no meaning if tacit emancipation releases a minor from the parental power so that he has personal control over the management and administration of his property.[21A]

On the basis of the statutory provisions and judicial decisions it may be argued that in Sri Lanka, tacit emancipation confers a limited contractual capacity and terminates parental rights in respect of the control of the person of the minor. In that sense tacit emancipation releases a minor irrevocably only from some of the important aspects of the parental power.[22] The release from parental power is subject to the qualification that he requires court consent for alienation of property[22A] and parental consent for marriage. Since he does not have *locus standi in judicio*, he appears to lack the right to manage and administer his property, which writers who support a liberal concept of tacit emancipation concede to him. The concept of tacit emancipation releasing a minor only from some aspects of the parental power, is relevant in a context where persons below the age of majority may enjoy economic independence, but still require the protections that the ordinary law affords to minors.

The Customary Law

Since the Age of Majority Ordinance enables a minor to acquire majority by operation of law, a person who has not attained the statutory age of majority has been considered by the courts to be capable of acquiring that status on the happening of an event effective to accelerate majority under the Customary laws.[22B] Difficulties have arisen because the Customary laws do not contain provisions on acceleration of majority, and this has sometimes been interpreted as preventing the extention of the principles of the Roman Dutch law by an application of the concept of *casus omissus*

Kandyan Law

The Kandyan law with regard to the age of majority applied prior to the introduction of the Age of Majority Ordinance.[23] Even though a minor may be released from the parental power

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regarding marriage at an earlier date,[23A] the status of minority terminates at twenty-one today.

Since the General law on parent and child applies to Kandyans, the principle of tacit emancipation can be utilised to make a minor liable on his contracts. The provisions in the law on Civil Procedure on representation of minors in litigation, clarifies that obtaining letters of *venia aetatis* and marriage are methods by which minority is deemed to have terminated for all children. The Wills Ordinance, which is a statute of general application also refers to the practice of obtaining letters of *venia aetatis.*[2] It seems artificial therefore to consider these methods applicable only to persons governed by the General law. Nor is it logical to argue that these methods are recognised as terminating the minority of children governed by the Customary laws only for the purposes of representation in civil proceedings. Consequently, it is difficult to accept the authority of a series of early decisions[25] that have held that marriage is ineffective to confer the status of majority on Kandyan minors. The basis of the view that marriage does not confer majority appears to be the absence of a formulated principle to the effect that marriage accelerated majority in the Kandyan law, and the refusal of early decisions to recognise that it terminated minority. Reviewing the legal position, a Full Bench of the Supreme Court concluded that the General law, could not be introduced, according to the doctrine of *casus omissus* also stated in Ordinance No. 5 of 1852.[26]

Guardianship as we have seen, was not a topic on which Kandyan law contained a developed set of legal rules. The absence of a legal principle is therefore not a justification for assuming that marriage did not confer majority. The very nature of the institution of marriage in fact suggests the contrary. A Kandyan woman, was considered a *feme sole* when she married, and had full powers with regard to her property.[27] In this context, the Nitinighanduwa probably reflects the spirit of Kandyan law, when it states that majority is accelerated by marriage.[28] The principle that marriage confers majority on a Kandyan minor can be accepted on the basis that it conforms with the fundamental concepts of the tradtional law. The authority of the decisions to the contrary is therefore doubtful, and it is submitted that it would not be in-

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appropriate to even introduce the General law by an application of the doctrine of *casus omissus*.

There are statutory provisions in the current Kandyan law on marriage which also conflict with the view reflected in the judicial decisions. We have seen that a Kandyan minor may be released from the requirement of obtaining parental consent to marriage before attaining the age of twenty-one.[29] It seems hardly logical that a child under twenty-one who does not require parental consent to make the vital and adult decision on marriage, continues to be subject to the incapacities of minority after marriage. Besides if marriage does not confer majority, what is the status of a Kandyan widow or widower or a person whose marriage is dissolved, who is under the age at which parental consent to marriage can be dispensed with. Would they continue to require parental consent to contract a second marriage? If a person is considered competent to assume the serious responsibilities of marriage, why should he or she continue to be treated as lacking the capacity to enter into legal relations on their own?

The history of the statutory provisions on parental consent regarding the remarriage of a Kandyan widow or widower support the argument that marriage does confer majority. The earlier ordinances expressly stated that a person under the specified age, not being a widow or a widower, required parental consent to marriage; the sections on parental consent in the present Kandyan Marriage and Divorce Act do not contain the reference to a widow and widower.[30] The repeal of this aspect of the provision can hardly be explained on the basis that a widow or a widower requires parental consent. It would rather suggest that a specific statutory statement that a widow or a widower does not require consent was considered unnecessary, in view of the fact that marriage was deemed to confer majority by operation of law.

Tesawalamai

The General law applies to persons governed by Tesawalamai. There is statutory clarification that majority is accelerated by marriage, even if judicial decisions recognise marital power.[31]

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Muslim Law

The Sri Lanka cases have often referred to the Islamic law on minority, and the principle that a minor who has attained puberty and is of ripe discretion acquires personal emancipation, and is released from parental power.[32] While the relevance of this age for the purpose of releasing a minor from the requirement of obtaining parental consent to marriage has been accepted by the courts,[32A] its general applicability has been the subject of controversy. There is a conflict of judicial authority regarding the question whether this principle of Islamic law on termination of the parental power operates to accelerate the status of majority, which is defined by the Age of Majority Ordinance as twenty-one. Roman Dutch law principles on tacit emancipation have been considered applicable to determine the contractual capacity of a Muslim under twenty-one when the other party to the contract is subject to the General law.[33] However, when both parties are Muslims, the Roman Dutch law has been considered irrelevant, and the law applicable to determine acceleration of majority has been considered to be the personal law governing Muslims.[34] Nevertheless there is no unanimity as to the scope and content of that law.

A line of judicial decisions has followed the view expressed in **Narayanen** *v.* **Saree Umma,**[34A] which restricts the age of majority for Muslims to twenty-one i.e. the statutory age specified in the Age of Majority Ordinance. In this case the court expressed the opinion that the Ordinance had replaced the principles of Islamic law in regard to the age of personal emancipation, and substituted a defined age of majority. The court also decided that since marriage did not confer the status of majority on a minor who had not reached the age of personal emancipation in Islamic law,[34B] it would be anomolous to introduce the Roman Dutch law principles and confer that status on a married Muslim who had not attained the statutory age of majority. There is dicta to suggest that the Roman Dutch law principles on tacit emancipation are equally inapplicable.

This judicial view considers the age of puberty or personal emancipation in Islamic law as the age of majority, rather than as an event which accelerates majority. It emphasises that the Age

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of Majority Ordinance attempted to introduce a uniform age for terminating minority in the interests of all minors, and that this protection must not be denied to Muslim minors by introducing the Customary law principle that a minor is emancipated from parental power at puberty. de Sampayo J. placed special emphasis on this point in **Narayanen** *v.* **Saree Umma** when he said that "the General law which incapacitates a minor from entering into an obligation accords with justice and is eminently suitable to the circumstance of all the people in Ceylon . . . and the plain object of the Ordinance when it fixed the age of majority (is) to continue the legal disabilities of a person up to that age."[35]

A contrary view has been expressed by Gratiaen J. in the later case of **Assenar** *v* **Hamid,**[36] where his Lordship refused to follow **Narayanen** *v.* **Saree Umma.** Referring to the fact that the Age of Majority Ordinance permits acceleration of majority by operation of law, and that this has been judicially interpreted to include any methods recognised by the Customary law, his lordship concluded that a Muslim minor acquires majority when he attains puberty, and is therefore considered capable of managing his own affairs. When Gratiaen J. applied this principle of Islamic law to determine the contractual liability of the minor, it is clear that his lordship viewed puberty as the happening of an event, which, like marriage or *venia aetatis* in the General law, accelerated the status of majority. In adopting this analysis he expressed a concern that in a business oriented community like that of the Muslims, the Age of Majority Ordinance should not be interpreted so that the law of minority would be "made unduly attractive to young gentlemen of any race who are engaged in commerce or trade."[37] His lordships views are supported by cases which recognise the age of puberty as relevant for terminating the parent's right to custody, and to express consent to a child's marriage.[37A] This interpretation has also been accepted, without reference to the conflict of judicial authority, in two recent decisions on the subject of maintenance.[37B]

The conflict of judicial opinions on this point has been referred to in the Supreme Court, as well as in the Privy Council,[38] and it is unfortunate that it has not been settled by an authoritative decision. Despite the fact that in **Assenar** *v* **Hamid** Gratiaen J. cited

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the earlier case of **Marikkar** *v.* **Marikkar**[39] as a case which followed his interpretation, that decision was based on the application of the principles of Islamic law regarding the requirement of parental consent for marriage. We have already observed the special considerations that make the age of puberty relevant in releasing a Muslim minor from the requirement of parental consent to his marriage.[39A] The dicta in the case of **Marikkar** *v.* **Marikkar** on the period of personal emancipation in Islamic law[40] are not therefore an authoritative pronouncement that attainment of the age of puberty and discretion always accelerates the status of majority. Besides it is difficult to deny the validity of the analysis adopted in **Narayanen** *v.* **Saree Umma,** that puberty is the actual age of majority under Islamic law, rather than an event which, like marriage, accelerates majority. When the age of puberty is considered in this light, it is apparent that the Age of Majority Ordinance replaced it with a statutory age of majority; the Ordinance abolished the concept of personal emancipation from parental power at puberty, by enacting that twenty-one should be the age of majority. Parental rights of custody too must therefore be interpreted as continuing upto that age, rather than the age of puberty. Gratiaen J's views nevertheless highlight the anomaly of applying the decision in **Narayanen** *v.* **Saree Umma,** so as to permit Muslim minors to avoid liability for contracts entered into in the course of their trade or business, when a liability based on tacit emancipation can be imposed on minors subject to the General law. The solution might well lie in the extension of the law on tacit emancipation to Muslims.

We have observed that the law on Civil Procedure contains a general provision, applicable even to Muslims, indicating that marriage and obtaining letters of *venia aetatis* are deemed to confer majority for the purpose of capacity to institute or defend an action without a guardian or next friend.[41] The Wills Ordinance which also applies to Muslims refers to grants of *venia aetatis.* These provisions are an indication that at least two methods of acceleration of majority in the General law are available to Muslim minors. Since there is no limitation on the age of marriage in Islamic law, the age of puberty rather than marriage was considered the age at which a minor acquired majority.[42] When the age of puberty is no longer the relevant age for conferring majority

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on Muslim minors in Sri Lanka, it is not justifiable to follow the approach in **Narayanen** *v.* **Saree Umma,** and refer to the Islamic law concept that marriage does not terminate minority to support the view that a Muslim under the present statutory age of twenty-one cannot acquire majority by marriage. If Islamic law contains no principles by which majority can be accelerated, and if the principles it does contain on termination of parental power have been qualified by the Age of Majority Ordinance, there is no anomaly in adopting a pragmatic approach, and extending the principles of the modified Roman Dutch law regarding acceleration of majority by marriage, and the doctrine of tacit emancipation.

It is submitted that we have here, a proper situation in which to utilise the concept of *casus omissum,* so as to permit the application of the Roman Dutch law. If a Muslim minor is deemed to be old enough to marry on his own, on attaining the age of puberty, there is no reason why marriage itself should not be deemed to accelerate majority. Even if marriage is not deemed to have this effect in the special situation where a minor under the age of puberty is given in marriage by the parent, the very fact that Islamic law emancipated a child at the age of puberty, enables the introduction of the Roman Dutch law to married Muslim minor's who have attained this age. If a minimum age of marriage is introduced for Muslims too, there will be no reason why marriage should not uniformly accelerate majority.

In view of the existing conflict of judicial opinion, it is important that the principles on termination of minority among Muslims should be clarified. The reluctance of the courts to accept that marriage confers majority on Kandyan minors has also introduced some uncertainty with regard to the scope of acceleration of majority when Kandyan law applies. The solution may well be found in an amendment to the Age of Majority Ordinance that will bring this statute in line with the policy reflected in other statutes that consider *venia aetatis* and marriage, events that accelerate the status of minority uniformly. Roman Dutch law principles on parental power have been utilised even in respect of Kandyans and Muslims, in the absence of customary principles to the contrary. There is therefore a valid basis for extending the present law on tacit emancipation to contracts entered into by all minors, in respect of their trade and business.[42A]

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2. TERMINATION OF PARENTAL POWER BY COURT ORDER

A century ago, the Supreme Court, in deciding a custody dispute among Muslims, referred to the wide jurisdiction it enjoyed to safeguard the interests of all minors irrespective of parental rights recognised in the traditional Customary laws. The court, it said "decides nothing here about Moors and Sinhalese, about followers of Buddha and disciples of Islam."[43] This dictum is substantially true of the modern law, for generally the Sri Lanka courts consider that they have an unfettered jurisdiction to interfere with parental rights in the minor's interests. The Family Court has now been granted sole and exclusive original jurisdiction in regard to matrimonial disputes, in the General law, and all disputes between spouses, parents and children as to custody of minors, and in guardianship matters.[13A] We have observed that in the Roman Dutch law a court could act as Upper Guardian and either terminate some of the incidents of the parental power, or deprive the parent of all his or her rights in respect of a minor child.[43B] Can the courts in this country exercise the latter jurisdiction too ?

The jurisdiction of the courts to terminate individual parental rights can be exercised in legal proceedings involving the person or the property of the minor. The parental right to express consent to marriage is now statutory in the case of Kandyans and persons governed by the General law, but the District and Family courts have a special jurisdiction to protect minors from the parental power to refuse consent to a minor's marriage. In the case of Muslims however the special principles of the law of marriage prevent the interference of the ordinary courts. The safeguards against abuse of the parental power must be found in the legal rules applicable to Muslim Marriage.[44] If a minor wishes to live away from his parents, the judge can accede to that request, and deny the parent's right to custody when the latter makes an application for custody. However it is unlikely that the judge can refrain from awarding the minor's custody to some one.[45]

The legal position regarding denial of the whole parental power is not so clear. In the modern law of Sri Lanka the jurisdiction of the Family Court to deny the whole parental power will usually be exercised in some matrimonial proceedings. Annulment of a

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marriage may affect the legitimacy of issue, and with it the rights of the parents, irrespective of a court order on parental rights. However in an action for nullity in respect of Kandyan or General law marriages, or actions for judicial separation or divorce under the General law, parental rights may be terminated by the court order, in the child's interests. A court may therefore, deprive one parent of all his or her rights and grant them exclusively to the other, or to a third party. In the absence of such a general order, the powers of the father as natural guardian will continue even if the mother is awarded the custody of the child.

It is not clear whether it is possible to institute a civil action in the Family Court requesting the court to exercise jurisdiction under the Roman Dutch law and terminate the parental power. The wide jurisdiction of this court seems to justify bringing such an action before it. The Children and Young Persons Ordinance also confers a limited jurisdiction upon the courts and ordinary proceedings for terminating the parental power can be initiated under the Adoption of Children Ordinance only when an application is made for the adoption of a minor under the specified age. Adoption orders are now made by the Family Court, because the Judicature Act expressly declares that this court should exercise jurisdiction under the Adoption Ordinance. No such provision is made in regard to proceedings under the Children and Young Persons Ordinance, and the jurisdiction given to a Juvenile Court, under that statute must qualify the sole and exclusive jurisdiction conferred by the Judicature Act, on the Family Court.[45A]

3. TERMINATION OF PARENTAL POWER BY DEATH OF THE PARENTS

Since the Sri Lanka courts are vested with a special jurisdiction as Upper Guardian of minors, an orphaned non-Muslim minor in respect of whom the parents have not appointed a guardian, may be considered to come under the supervision and authority of court.[45B] The Family Court will therefore have the right to appoint a guardian over the person of the child, and he will be entrusted with legal custody and the right to express consent to marriage.[46] The power of appointing curators of the minor's property, was originally conferred on the Public Trustee, and

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the jurisdiction of the courts did not appear to extend over the appointment and supervision of curators in charge of the minor's property. Nevertheless if the Public Trustee appointed a guardian over the child's person in the curatorship proceedings, he was under the supervision of court in regard to the exercise of the responsibilities concerning the minor's education. The Family Court has now been conferred with the power to appoint curators and supervise their management of a minor's property.[47] The minor also requires the consent of court or the consent of a guardian appointed by court, if he or she wishes to contract a marriage.[48] The provisions on representation indicate that the court has a right to appoint a next friend or guardian *ad litem* to represent the minor in civil litigation. The principle of tacit emancipation has been extended to include emancipation from court control, so as to confer contractual capacity on an orphaned minor.[49]

These provisions may not apply to Muslims, since the parental power over an orphaned legitimate minor may be transferred to other relatives who would exercise important rights, particularly in regard to marriage.[50] However it is submitted that an illegitimate Muslim who is considered *filius nullius* may be treated as a minor who comes within the supervision and authority of court, like an orphaned minor governed by General law who has no parent or legal guardian.

NOTES

1. Grotius op. cit. 1.7.8. Hahlo and Kahn op. cit. p. 367.

1A. See Adoption, Ch. IX infra.

2. Ordinance No. 7 of 1865 s. 2; Navaratna *v* Kumarihamy (1927) at 409.

3. Age of Majority Ordinance (1865) s. 3; Muthiah Chetty *v* Dingiria (1907) F.B. at 371; Assenar *v* Hamid (1948).

3A. Land Reform Law No. 7 of 1972. s. 14(1). A person acquires the right to vote at the age of 18. The age of majority has been reduced to 18 in England, and a similar change has been adopted and is under consideration in several Commonwealth countries. Family Law Reform Act (1969), Bromley, op. cit. (1976 ed) p. 309; Quadrata (1971) 88 S.A.L.J 105,106.

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4. Grotius 1.10.3; Voet 4.4.4. Lee, Introduction to Roman Dutch Law, op. cit. p. 43; D. Zeffert (1969) 86 S.A.L.J. 407.

5. Wills Ordinance (1844) ss. 3 and 4. See also Civil Procedure Code s. 502.

6. See Wills Ordinance (1844) s. 4; Jennings and Tambiah op. cit. p. 204.

7. See Civil Procedure Code s. 502. The repealed A.J. (Am.) L. s. 612 contained the same provision.

8. Voet 4.4.5. Lee, Roman Dutch Law, op. cit. p. 43; Hahlo and Kahn, op. cit. p. 363.

9. See Lee, Roman Dutch Law, op. cit. Appendix A.

9A. c.f. Somindra *v* Padiya (1909) 3 Leader 56 where the Court expressed a contrary view in an obiter dictum.

10. Civil Procedure Code s. 502.

11. See G.M.O. s. 22(1); the Roman Dutch law, recognised a similar principle. See Hahlo and Kahn op. cit. p. 363.

12. Hahlo and Kahn, op. cit. p. 362; Dheerasekera *v* Gunasekera (1903) 1 ACR 135; Muthiah Chetty *v* Dingiria (1904) F.B. obiter at p. 373; Dissanayaka *v* Elwes (1909) 12 NLR 291 per Hutchinson C.J. obiter at 292; Haturusinghe *v* Ukku Amma (1944) per Jayawardene J. obiter at 500; Married Women's Property Ordinance No. 18 of 1923; the contrary view in Majeeda *v* Paramanayagam (1933) may be queried as an incorrect interpretation of the law.

13. See Wills Ord. s. 3; on her legal position in litigation see Civil Procedure Code s. 502; this provision was also retained in A.J. (Am.) L. s. 612; See also Jaffna M.R.I. Ord. s. 38, that applies to Tamils subject to Tesawalamai who are governd by the General law of marriage.

13A. G.M.O. s. 22(1); Marriage Ordinance (1847) s. 18 retained in Marriage Ordinance (1863) s. 2.

13B. Hahlo and Kahn op. cit. p. 363; See Ch II supra at note 27 F. and note 28A., for the General law on annulment of marriage.

13C. See A.J. (Am.) L. s. 626(1) and Ch. II supra note 27 F.

14. Grotius 1.6.4.; Voet 1.7.12. Spiro op. cit. (1959 ed.) p. 161, Hahlo and Kahn op. cit. p. 364.

14A. Hahlo and Kahn op. cit. p. 365; Grand Prix Motors Ltd. *v* Swart (1976) 3 S.A.L.R. 21

15. Hahlo and Kahn op. cit. p. 365, 367; Ex parte Van den Heever 1969(3) SALR 96; c.f. Zeffertt op. cit. p. 411—412, Silva *v* Mohamadu (1916) where the Court appears to have overlooked this proposition. See also note 49 infra.

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16. See R.W.Lee, Commentaries ad. Grotius (1936) p. 37; Hahlo and Kahn, op. cit. p. 365; Muthiah Chetty *v* de Silva (1895) per Bonser C.J. at p. 361, Browne A.J. at p. 362; Sinnethamby *v* Ibrahim (1917) 4 CWR 311.

16A. R.W. Lee Commentaries, op. cit. p. 37; See also R.W. Lee and A.M. Honore, The South African Law of Obligations (1950) s. 28; Hahlo and Kahn op. cit. p. 364; Muthiah Chetty *v* de Silva supra at 361; Welliappa Chetty *v* Pieris (1904) 3 Bala R. 4; Sinnethamby *v* Ibrahim; c.f. Narayanen *v* Saree Umma (1920) per de Sampayo J. at p. 440. For South African decisions that reflect the same view, see Dickens *v* Daly 1956 (2) SALR 11, Dama *v* Bera 1910 T.P.D. 928.

17. Dama *v* Bera; Dickens *v* Daley; Contra Pleat *v* Van Staden 1921 OPD 91,96; c.f. dicta in Assenar *v* Hamid supra at p. 107.

17A. Lee, Roman Dutch Law op· cit. p. 39; Ambaker *v* African Meat Co. 1927 C.P.D. 325; Ochberg *v* Ochbergs Estate 1941 C.P.D. 15.

18. Hahlo and Kahn op. cit. p. 365—366; Annual Survey of South African Law (1956) p. 93; H. R. Hahlo (1943) 60 S.A.L.J. 289; Donaldson, Minors op. cit. p. 76; Zeffertt op. cit. p. 410, 411. For a recent South African decision that refers to both views but failed to pronounce an opinion on the argument that the concept of total release from parental power is no longer in force, see Grand Prix Motors Ltd. *v* Swart.

19. Welliappa Chetty *v* Pieris; See also Samindra *v* Padiya.

20. See Civil Procedure Code s. 502; also found in A.J. (Am.) L. s. 612; see also G.M.O. s. 22(1).

21. Marriage and Divorce Commission Report, op. cit. p. 40.

21A. See Somindra *v* Padiya.

22. See Muthiah Chetty *v* de Silva, Sinnethamby *v* Ibrahim; see Meyer *v* Van Niekerk, Coetzeer *v* Meintjies, Ch. VI supra, note 61.

22A. Somindra *v* Padiya.

22B. Muthiah Chetty *v* Dingiria; Assenar *v* Hamid.

23. 1836 Morg. Dig. 106; c.f. Hayley op. cit. p. 209.

23A. See Navaratna *v* Kumarihamy, and parental consent to the marriage of a Kandyan minor, Ch. VII supra.

24. Civil Procedure Code s. 502 and the repealed A.J. (Am.) L. s. 612; See Muthu Menika *v* Muthu Menika (1915) Wills Ordinance (1844) s. 4.

25. 1871 Vanderstraate 251; Muthiah Chetty *v* Dingiria, Dissanayaka *v* Elwes, Haturusinghe *v* Ukku Amma, Simon Naide *v* Aslin Nona (1945) (all cases dealing with female minors).

26. See s. 7 and Muthiah Chetty *v* Dingiria.

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27. Sawers op. cit. p. 17, 32 — 34; Hayley op. cit. p. 209 — 210; See also Mohottiappu *v* Kiribanda (1923) per Jayawardene A.J. at p. 224.

28. Nitinighanduwe op. cit. p. 46.

29. K.M.D. Act supra s. 66.

30. Kandyan Marriage Ord. (1859) s. 4. (1870) s. 13; c.f. K.M.D. Act s. 8(1), s. 66.

31. Jaffna M.R.I. Ord. s. 38; c.f. Vijayaratnam *v* Rajadurai (1966) 69 NLR 145

32. Marikkar *v* Marikkar (1915) p. 485; Assenar *v* Hameed, Narayanen *v* Saree Umma; See also Abdul Cader *v* Razik (1952) P.C.

32A. See Abdul Cader *v* Razik (1952) P.C. p. 202—203, and parental consent to the marriage of a Muslim minor, Ch. VII supra.

33. Sinnatamby *v* Ibrahim, though contra Assenar *v* Hamid per Gratiaen J. obiter at p. 103; c.f. Shorter and Co. *v* Mohomed at 115, where the court concluded that the same decision could be arrived at whether Muslim law or Roman Dutch law was applied. The question of the applicability of the Roman Dutch law, regarding the contractual capacity of Muslims, was referred to a Divisional Bench, but the case appears to have been settled before the court's ruling. See Assenar *v* Hamid.

34. Nagoor Meera *v* Meera Saibo (1919) 6 C.W.R. 89; Assenar *v* Hamid per Gratiaen J. at 103, 106, 107; Narayanen *v* Saree Umma supra per de Sampayo J. at p. 440.

34A. (1920) followed in Kalenderlevvai *v* Avummah (1947) Majeeda *v* Paramanayagam, Shorter and Co. *v* Mohomad; Abdul Cader *v* Razik (1950), at 161—162, (1952) P.C. at 202—203.

34B. The female minor came under the authority of the husband if he was a "fit person", while in other situations, minors remained under the guardianship of persons considered their lawful guardians prior to marriage. See Tyabji op. cit. p. 227, p. 249, and Mulla op. cit. p. 337. See parental consent to marriage Ch. VII supra.

35. Narayanen *v* Saree Umma supra at p. 441.

36. (1948) 50 NLR 102.

37. Assenar *v* Hamid p. 107.

37A. See Ch. VI, and VII supra.

37B. Ummul Mazoona *v* Samad (1977) 79 NLR 209, Burhan *v* Ismail (1978—1979) 2 Sri L.R. 218.

38. Abdul Cader *v* Razik (1950), p. 161—162, (1952) P.C. at p. 202—203.

39. (1915) 18 NLR 481.

39A. See Ch. VII supra.

40. at p. 485.

41. See Civil Procedure Code s. 502 and the repealed A.J. (Am.) L. s. 612; Majeeda *v* Paramanayagam p. 197.

42. See parental consent to marriage in Muslim law Ch. VII supra; See also Narayanen *v* Saree Umma.

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42A. c.f. the position in India, discussed in Tyabji op. cit. p. 29. The Indian Majority Act excludes capacity regarding defined acts from the statutory provisions on majority. In regard to other aspects, though a person is clearly deemed a minor under the statute, the writer favours the application of the age of puberty in determining capacity.

43. See Re Aysa Natchiya, (1860—1862) p. 130.

43A. See Judicature Act ss. 24(1)(2); the proviso to s. 24(1) which excludes the jurisdiction of these courts in respect of Kandyans and Muslims is not relevant in regard to custody and guardianship matters.

43B. See parental power Chapter VI supra.

44. G.M.O. s. 22; K.M.D. Act ss. 11(1), 12, 13, 15; See also Judicature Act s. 24(1) proviso, s. 24(2) and Third Schedule . For Parent's rights in respect of a Muslim minors marriage, see Ch. VII supra.

45. In re Evelyn Warnakulasuriya; c.f. Gooneratnayaka *v* Clayton and see termination of parental power by the death of parents, infra.

45A. Ch. VI supra, and Ch. IX infra. See also Judicature Act s. 24(1), 24(2) and Third Schedule. Children and Young Persons Ord. ss. 34 and 35.

45B. See Silva *v* Mohomadu (1916) where the court appears to have overlooked the point that death terminates parental power; c.f. however de Sampayo J. p. 429, who referred to the tacit emancipation of an orphaned minor, from court authority, thus lending support to the proposition that an orphan who has no lawful guardian falls within the guardianship of court.

46. G.M.O. s. 22(1) (2) K.M.D. Act s. 8(2); c.f. Muslim law, Ch. VII supra; see Judicature Act s. 24(1) and proviso.

47. A.J. (Am.) L. s. 614(9) and the proviso, repealed and replaced by Civil Procedure Code Ch. XXXV; see also Ch. VII and note 46 supra.

48. G.M.O. s. 22(1) and (2); In Kandyan law, in the absence of a guardian appointed by court, the District Registrar is empowered to give consent. However, the granting of this official's consent is subject to the control of the District Court. See K.M.D. Act s. 8(2) 11(1), 12, 13. Judicature Act s. 24(1) proviso.

49. See Silva *v* Mohomadu supra, p. 427, 429; H.R. Hahlo and E. Kahn, the South African Legal System and its background (1968)p. 447 refer to the practice of emancipation by declaration of court, when the father is dead, as dating from the middle ages. It is not considered obsolete in the modern law, (Ex parte Vanden Heever supra) though, it may be redundant in view of the principle of venia aetatis, c.f. Zeffertt op. cit. at 412. Hahlo and Kahn, The Union of South Africa op. cit. p. 365 state that the concept of emancipation has been extended in South Africa to include tacit emancipation by a legal guardian in Le Grange *v* Mostert (1904) 26 S.C. 321.

50. See Ch. VI and VII supra on parental rights over a minor's person and property, under Muslim law.

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CHAPTER IX

ADOPTION

1. Introducing the Concept

The Sri Lanka law on adoption is derived from English law as well as the indigenous Customary law applicable to Kandyans. In order to understand the developments that have taken place in the adoption law of the country, it is useful to consider the meaning of that concept in English law as well as in an archaic system like Roman law. While the English law may be described as the foundation of the General law on adoption, the Roman law concept of adoption provides a useful comparative basis for elucidating the nature of this institution in the Kandyan law.

The institution of adoption was familiar to archaic legal systems as a device for creating the relationship of parent and child between persons who were not biologically connected in that way. It could be used by childless persons for the purpose of instituting an heir, and was not limited to the adoption of minor children. Thus the concept of adoption of minor children from other families was recognised in the Roman law principle of adoption, while the concept of *adrogatio* enabled the adoption of an adult for the purpose of perpetuating the family name, and ensuring succession to property.[1]

When an unemancipated child was adopted in the classical Roman law, he was removed from one *potestas*, into another, and there was also a transfer of parental rights to the adoptive parents. Even according to the principle of *adrogatio*, the adoptee was brought into the family of the adopter as the latter's unemancipated child. The Roman law concept that "*adoptio naturam imitatur*", was the source of the principle that generally the difference of age between adopter and adoptee should be such that the adopter could have been a parent. Nevertheless adoption did not involve a permanent severance from the natural family. The adoptee acquired the rights of a natural son of the adopter but retained his relationship to his natural family for some purposes. Thus the cognatic tie was not affected, and even an adopted child could claim rights of succession in his natural family in that capacity.

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Justinian introduced further limitations on the consequences of adoption in cases where there was no close kinship tie between the adopter and adoptee. In order to protect the adoptee in circumstances where the adoption could be revoked, his reform ensured that he would not pass into the *patria potestas* of the adopter, and also that he would retain his rights of succession in the natural family. These safeguards were not deemed necessary, and adoption *plena* took place when the adopter was a natural ascendant. The risk of termination of the adoption being considered minimal in such cases, the adoptee could be absorbed into the adopter's family, in the sense accepted in the classical law. Though *adrogatio* was supervised by the State and used for the purpose of succession, *adoptio* was a transfer of parental power which took place without state intervention, and it was not necessarily connected with obtaining an heir.[2] By contrast the concept of adoption for succession, and the legal transfer of parental rights by adoption was unknown to the English Common law, and has been described as obsolete in the Roman Dutch law[3]. The parental power over children could not be alienated by an act of surrender or abandonment by the parents.[4] Even if third parties acted as foster parents and looked after a child "*in loco parentis*", the Common law gave no legal recognition to the practice, and the natural parents retained their rights in respect of the child. In the Roman Dutch law too a person could assert his parental power and recover a child from any third party who tried to interfere with his parental rights.[5]

Some writers suggest that the reluctance of the Common law to permit the device of adoption was due to the fear that legalising transfer of parental rights could lead to abuse of children and such malpractices like traffic in children for commercial purposes.[6] Even in contemporary Western societies the adopted child is often an illegitimate child.[7] When the Common law attitude to illegitimacy was very harsh, could it be that there was no incentive to recognise a concept that could have ameliorated the status of a child born out of wedlock? This could also be one reason why Islamic law, with its strict attitude to illegitimates, rejected the institution. The practice of adoption was familiar to Arabian tribal custom but was abolished by Koranic law and is not therefore known to Islamic law.[8]

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When adoption was recognised in the Englsh law by the Adoption of Children Act of 1926 and accepted in other countries with a Common law heritage, it was viewed as a device for making lawful a permanent transfer of parental rights, and thus creating artificially the legal relationship of parent and child. The institution of adoption would ensure that childless persons could permanently enjoy the parental role, and in the process provide parental care for unwanted children. The new law in England was meant to legalise the hitherto unlawful practice by which foster parents assumed the role of parents. Hence the emphasis on the transfer of parental rights from the natural to the adoptive parents.[9] Inevitably the welfare of the child was an important aspect of the law, and adoption was later to become a device for conferring an improved legal status on the illegitimate who did not have a recognised relationship to its parents.[10]

While it is true that the original concept of adoption in the English law was different to the Roman law, since the Act of 1926 did not confer rights of succession upon the adopted child,[11] this aspect has been at times over-emphasised to suggest that the English law introduced a novel rationale for adoption in using it to create parental rights and responsibilities in respect of another's child.[12] We have observed that adoption for the purpose of succession could take place in Roman law, but that the device was equally familiar as a method of creating the relationship of parent and child between an adopted child and the adopter. The reforms introduced by Justinian reflect the importance attached to the welfare of the child in a situation where adoption was deemed to transfer the adopted child into the *patria potestas* of the adopter.

The Customary law of Sri Lanka too like the Roman law was familiar with adoption as a device for instituting an heir who could succeed to the family title and property. In Kandyan law, even an adult could be adopted "in order that the child may at his (the adopter's) death, inherit his name and lands."[13] The Tesawalamai contains a similar principle, and adoption of young adults (youths) appears to have been permitted.[14] A person adopted as an heir became a member of the adopted parents' family. Thus the Tesawalamai states that the adoptee ceased to have any rights of succession in the natural family and was considered to belong to

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the adoptive family.[15] The Kandyan law too recognised the transfer of parental rights by the adoption of a minor, and the need to protect such a child seems to have been the basis of the principle prohibiting the adoptive parent from exercising the natural parents' right to sell or surrender a child to satisfy an obligation.[15A]

Despite the fact that adoption was utilised in the Customary laws for the purpose of instituting an heir, there was an equally familiar practice of nurturing and providing parental care for an unwanted child. Robert Knox writing of early Kandyan society records that when a child was deemed unlucky to his parents, there was a practice of "giving it to somebody of the same degree with themselves who often will take such children and bring them up by hand with Rice and Milk, for they say the child will be unhappy to the parents but none else."[16] Later works on the principles of Kandyan law confirm this, as well as the practice of kinsmen taking over the care and guardianship of minor orphans who had no lawfully appointed guardian. A child nurtured in a family in this way however had no fixed rights of succession, although the nurturing parent or the child could claim to inherit from each other on the basis that "assistance and support" had been provided in time of need. It is clear that the parent-child relationship was created between them, even though the child was not instituted as heir to the family name and estate.[16A] The lack of fixed rights of inheritance has been stressed by writers and judges familiar with the institution of adoption for succession in Roman law, and the English law concept of foster parents acting "*in loco parentis*", and the relationship between nurturing parent and child has been distinguished from legal adoption.[17] The Tamil customary law too recognised the practice of providing parental care for unwanted children, but the written records (by westerners) draws the same distinction between "bringing up a child with the same love and tenderness as their own" and adopting him as legal heir to the adoptive parent's property.[18]

It is submitted that the relationship between the child and the nurturing parent in the indigenous laws in this country, cannot be distinguished from the concept of lawful adoption. In refusing to recognise that the former relationship conferred fixed rights

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of inheritance to the parent's estate, the Kandyan law for instance was merely highlighting the fact that all children who were brought up in the family of persons who were not their biological parents did not become heirs to the family property. The phrase "hadagat daruva" was used in Kandyan society to describe an adoptee who was instituted heir. But the phrase means literarily "a nurtured child" and was also used to describe a person who had been brought up in the family of the nurturing parent from childhood, and rendered "familial assistance" and support as a son or daughter.[18A] The indigenous law of Sri Lanka did not reflect the attitude of the Common law which refused to recognise the assumption of the parental role by persons who were not the natural parents in the absence of a permanent transfer of parental rights. Rather, like the Roman law, it recognised that adoption did not necessarily involve severance of the relationship with the natural parents, and that instituting an heir was not the sole rationale for adoption.

We have observed the lack of clear legal rules in the Customary laws regarding parental rights over minor children, though there were a few specific rules on the relationship between the orphaned child and a kinsman who asserted parental rights.[19] Besides, when even adoption for succession in Kandyan law was revocable,[19A] the transfer of parental rights and responsibilities temporarily for the duration of the time when a child was nurtured in another family, cannot be treated as crucial for determining whether or not there was legal adoption. Though the English law emphasised the need for permanent transfer of parental rights in legal adoption, other systems like the Roman law recognised the concept that adoption was revocable and that it could take place in circumstances where the adoptee retained his ties with the natural family. The failure to describe the legal relationship between the nurturing parents and the child brought up by them without being instituted as heir, should not be taken as an indication that an informal extra legal relationship was created. The lack of legal rules can be interpreted as a reflection of the Customary system's reluctance to elucidate formal rules that would govern all aspects of family relations. The practice of caring for someone else's child appears to have been familiar to the indigenous society of this country and endorsed in positive terms in the legal system. The nurtured child, who was not instituted as heir was brought

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up as a member of the adoptive parent's family, and in Kandyan law, claims to share in each other's property on intestacy, could be made by both the nurturing parent and the child.[19B] The indigenous laws therefore recognised not merely adoption for succession, but adoption based on the need for creating the parent-child relationship that was known to Roman law, and is now familiar to Western legal systems.

2. The General Law on Adoption

Adoptions were not legal during the British period of colonial rule, when the Roman Dutch law was considered the source of the law on family relations in the Maritime Provinces.

Since adoption was a familiar institution in the indigenous laws of the Sinhala and Tamil people, it would not have been surprising if the local people continued to practice it, even when it was alien to the formal legal system that applied in the Maritime Provinces of Sri Lanka. However the Thombos or official land registers maintained by the Dutch contain references to adopted children, while people were known to appear before police magistrates or at police stations to make a record of adoption during the British period.[20] The later practice may have been a continuation of a procedure familiar to the local people in the Dutch period. It supports the theory that adoption according to the Customary law was recognised in the legal system operating in the Maritime Provinces during the Dutch regime. Without such a rationale it is difficult to explain the existence of a practice that was not part of the Roman Dutch law, and was unknown to English law.

The Adoption of Children Ordinance

The concept of legal adoption was introduced into the General law more than a century after British colonial power was established in Sri Lanka, and just a few years before the country gained independence. From the point of view of the formal legal system, the Adoption of Children Ordinance of 1941 was to introduce a hitherto unknown principle into the General law of Sri Lanka. The statute was to apply to all persons in the country, even to the Muslims whose personal law did not recognise adoption.[20A] The Ordinance was meant to create an additional

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method of adoption for Kandyans and persons subject to the Tesawalamai.[21] Even though the provisions on adoption in the Tesawalamai are now considered obsolete,[22] the underlying assumption of the Ordinance is that adoption under the Tesawalamai was an existing institution.[23]

The Sri Lanka statute enacted many of the provisions in the Adoption Act of 1926, which introduced the concept into the English law. Nevertheless the inspiration for the Adoption of Children Ordinance was somewhat different to the policy behind the English Act. This Ordinance was one in a series of legislative measures aimed at preventing the exploitation of minor children, initiated in an era of social welfare legislation.[24]

We have observed that in traditional Sinhalese society there were two types of adoption—i.e.,either for the purpose of instituting an heir, or for obtaining familial assistance and providing parental care for another's children. In either case, the child was considered a member of the adopter's family. In a society that recognised a caste hierarchy, it is clear, that the adopter and the child would have to belong to "the same degree."[25] However there was also the quite distinct and separate practice of parents selling or surrendering their children, "in order to rid themselves of an encumbrance in time of dirth."[26] The latter practice of poor parents transferring their children to the affluent, continued in Sri Lanka even when it had ceased to be legal according to the formal laws of the British colonial period. The Adoption of Children Ordinance was motivated by the need to introduce some legislative controls that would prevent this practice and the attendant abuses and exploitation of minor children. Sir D. B. Jayathileke, in his speech, in the course of the debate on the Ordinance described as "quasi adoption" the system by which "persons who are destitute are prepared to transfer their children to the custody of other persons who are perhaps better off than themselves for the purpose of getting their children brought up."[27]

Children of poor parents are used even today as domestic servants or "wedakarayo" in the families in which they have been placed by their parents. They have been described as so underprivileged, that their status can be compared to the "vahalla" or slave in traditional Sinhala society.[28] When the Adoption of Children

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Ordinance was introduced, it is this type of placement that was viewed as "quasi adoption"—even though it had none of the usual connotations of acceptance into the adopter's family. Thus, it is not surprising that the device of legal adoption was considered one solution to the social evil of exploitation of children placed with persons who were not their parents.[29]

Since the practice described as quasi adoption had no relation at all to the concept of adoption that envisaged the child becoming a member of the adopter's family, statutory adoption could hardly have provided a framework for eradicating this social evil. Nor could it be an incentive to the assumption of full responsibilities in respect of the indigent children placed with persons who were not their biological parents. Nevertheless when the Adoption of Children Ordinance was enacted, statutory adoption was seen as a method of legalising "quasi adoption", of the type described in Sir D. B. Jayatileke's speech. Introduced for the wrong reasons the statute eventually provided a general method for artificially creating the legal relationship of parent and child.

The Sub Committee that recommended legislation on adoption envisaged the creation "by legal process of the relationship of parent and child, severance of the blood relationship and voluntary assumption of parental obligations."[30] However, since the Adoption of Children Ordinance was based on the Adoption Act of 1926, it incorporated some of the limitations in that statute on the inheritance rights of adopted children.[31] We have observed that adoption for succession or the concept of alienation of parental rights was unknown to the Common law. It was inevitable that a pioneering piece of legislation like the English Act of 1926 should be cautious about assimilating the adopted child's legal status with that of a natural child by conferring rights of inheritance and succession to property. In a context in which the Customary laws of the country were familiar with adoption as a method of obtaining an heir, it is curious that these restrictions in English law were introduced into the Adoption statute, and that they remain as fundamental principles in the law on adoption in Sri Lanka today.

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The Law on Statutory Adoptions

Since the Sri Lanka Adoption of Children Ordinance reveals the influence of the Adoption Act of 1926, and it introduced the English law concept of adoption, the English law on this subject will be referred to for comparative purposes in examining the provisions of the local statute. Modern adoption law in many parts of the world is statutory. The Sri Lanka Ordinance of 1941 provides an appropriate framework for a modern adoption law in this country, provided that changes are introduced to reflect necessary reforms.

Requirements of a valid Adoption Order

1. Who may be adopted

An adult cannot be adopted under the Ordinance and there is a statutory limit on the age for adoption of children. Thus only a child under the age of 14 may be adopted.[31A] The age limit for adoption is geared to the definition of "a child', in the legislative measures introduced at a particular time to prevent the exploitation of children.[32] It has no special relevance if adoption is viewed essentially as a method by which the relationship of parent and child can be created between adults and minor children. The Ordinance accepts this rationale for adoption, and it would seem appropriate that minority rather than the arbitrary age of 14 should be the upper limit for legal adoption.[33] Since there is some controversy whether marriage terminates minority, the Adoption Ordinance should also clarify that a person who is or has been married cannot be adopted.[34]

A child who was sought to be adopted had at one time to be a subject of Sri Lanka, who was resident in the country. A non national could not therefore be adopted under the Ordinance, nor a national who was abroad, at the time of the adoption. Several later amendments to this provision in the ordinance were introduced. These amended the earlier law, and emphasise that the adoptee must only be resident in Sri Lanka.[35]

2. Who may adopt

Either a man or a woman may adopt a child, provided they satisfy the other requirements of the Ordinance. Though the

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Adoption Act of 1926 did not indicate that the natural father or the mother could adopt their own child, the Act was judicially interpreted in England as permitting such adoptions.[35A]

Since the illegitimate was *filius nullius* at Common law, subject to statutory changes, neither parent had a legally recognised relationship to the child.[35B] Thus, it was possible to contemplate a transfer of parental rights in respect of such a child to the putative father or mother through the device of adoption and it was logical that adoption should be used to create a legal relationship with illegitimate issue. In Sri Lanka by contrast generally the "mother makes no bastard" and she is the parent with exclusive parental rights in the child. The putative father is completely excluded from the parental power. The legal consequences of adoption are described by the Adoption Ordinance in terms of extinction of parental rights and their transfer to the adopter.[35C] It may therefore be argued that a transfer of all parental rights in respect of an illegitimate to the mother through adoption cannot be envisaged when she is already the sole repository of parental rights in the child. This argument would be based on the premise that the statute does not permit adoption by any person who already has sole parental rights in a child. If this view is accepted, a mother cannot adopt her illegitimate child, though a putative father may claim this privilege. It is possible that the statute was drafted without taking into account the special position of the mother in Sri Lanka, in regard to illegitimates.

The Adoption of Children Ordinance was probably drafted at a time when the possibility of women adopting children was remote. Conditions may not have changed that much, and in a context where unmarried mothers may come from the poorer classes, it is unlikely that women will use adoption as a method of giving respectability to their illegitimate children. There is no reason however why the law should recognise a distinction between the rights of the putative father and mother in this regard, and the Adoption Ordinance should be amended or interpreted so as to permit the father or the mother to adopt an illegitimate child. This facility will serve an important purpose, for adoption of an illegitimate will legalise from the point of view of the formal legal system, the relationship between the parent and the child, and confer on him a status that is close to legitimacy.[35D]

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The Ordinance permits a court to grant an adoption order in favour of a sole applicant.[35E] The father or if the statute is amended, or so interpreted, the mother of an illegitimate may therefore become the sole adopter of the child. The Ordinance states that an adoption order cannot be made in circumstances where the sole applicant is a male and the child is a female. However, the court is given the discretion to waive this requirement[36] if it is satisfied that there are circumstances which justify such an order. A putative father may therefore be able to obtain an adoption order that permits him to be the sole adopter of his daughter. This prohibition regarding female adoptions is based on the possibility of sexual exploitation. It has been abolished in the modern English law as being superfluous, when the court has a discretion to waive it in the child's interests.[36A]

In regard to adoption by a sole adopter, the Ordinance does not distinguish between the unmarried parent who wishes to adopt an illegitimate child, and the married parent of an illegitimate child. Thus the Sri Lanka law on adoption, following the policy of the English law (prior to recent reforms), permits a married person to be sole adopter, if the consent of the other spouse has been obtained.[36B] The law stresses the importance of the other spouse's consent when a married person applies to adopt a child, in order that additional parental rights and liabilities are not incurred by one of the spouses unilaterally. This provision is aimed at ensuring that an illegitimate is not adopted without the consent of the other spouse. The Court is permitted to dispense with the requirement of consent if the consortium has been destroyed; for it can dispense with consent due to disappearance, or a judicial determination of unsoundness of mind, or a decree for separation.[36C]

Joint adoptions are legal in Sri Lanka only when the adopters are married to each other. The Ordinance states that an adoption order cannot be granted to more than one applicant unless they are married to each other and they jointly apply to adopt the child.[36D] The requirement that the applicants for a joint adoption should be married to each other reflects the policy against legalising the extra-legal family through the device of adoption. Under the present law joint adoption of an illegitimate by parents who are not married to each other is prohibited. On the other hand a married couple may jointly apply to adopt the illegitimate child

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of one of them. Since a child is legitimated by the subsequent marriage of his parents there cannot be a joint adoption of an illegitimate child of both parents.[37]

In English law even a legitimate may be adopted by one of his parents, acting either as sole or joint adopter.[37A]. There is nothing in the Ordinance to indicate that a legitimate child cannot be adopted by one parent, so as to extinguish the other's rights, even though this type of adoption may not have been envisaged at the time the statute was enacted. The purpose of adopting a legitimate child, is to exclude the other parent and obtain exclusive parental rights over a child. In Sri Lanka, this result may be achieved, even under the Roman Dutch law, where the court as Upper Guardian may be moved to terminate all parental rights in the child's interest. We have observed that this jurisdiction can be asserted in matrimonial actions. If such an order is final or if it is possible to obtain a termination of parental rights in an ordinary civil action, there would be inevitable duplication in the availability of a similar procedure under the Adoption of Children Ordinance. The question then will be whether termination of the whole parental power should take place only in circumstances where there is a valid statutory adoption under the special procedure created by the Ordinance, which can be more suitably geared to protecting the child's welfare.[37B]

The English law has been amended recently so as to prohibit adoption by a married person as sole adopter even with the consent of the other spouse, unless for some reason it is not possible for both spouses to make an application to adopt the child jointly, or the consortium has been broken. Adoption being viewed as a device for providing a home for a child, some legal systems disapprove of a principle that will enable one spouse to adopt without giving the child access to the common home. Such a situation is described as artificial, and is viewed as not being conducive to the welfare of the child.[38] The policy of permitting adoption by a natural parent acting as sole adopter has also been reviewed recently in England, and doubts have been expressed as to whether such an adoption will be in the child's interests. It has been pointed out that authorising such adoptions and excluding the other parent completely may expose the child to social isolation and poverty. Recent reforms, prohibit adoption orders in favour

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of the mother or the father alone, "unless the court is satisfied that the other natural parent is dead or cannot be found or that there is some reason justifying exclusion."[39] The change in policy preventing adoption by one parent, also reflects the shift in the English law towards recognising a putative father's rights in respect of an illegitimate. Adoption by the mother can lead to his complete exclusion.[40]

The Sri Lanka law on adoption, like the English law until it was amended recently, envisages a situation where the advantage of adoption can be given to a child who is not necessarily accepted in the home of a married adopter. The pattern of family relationships in Sri Lanka is such that it may be possible to provide a child with all the advantages of parental care with the support of the wider family, even if he is not brought into the home of the adopting parent. There may therefore be some reason for continuing to permit adoptions by a married person who applies to be sole adopter with the consent of the other spouse.

The law of Sri Lanka does not confer parental rights on the putative father, and indeed considers the mother of an illegitimate the sole repository of the parental power. An unmarried mother has relied on this to successfuly assert her legal right to custody, and her poverty per se has not been considered prejudicial to the child's welfare, or a reason for denying her parental rights.[41] Given the context of family relationships in Sri Lanka, it may be that an adoption order in favour of a single parent even acting as sole adopter will be conducive to the child's welfare. If the child is adopted and accepted by the parent, this may well pave the way for the child to be brought into the parent's wider family circle, and he will not be exposed to the same isolation as one who is brought up by the mother or father single handed, in the West. In the present realities of Sri Lanka society, it is likely that unwed mothers will invariably come from among the rural and urban poor. A woman from this social class would be hardly likely to seek 'respectability' for a child by the elitist device of adoption. Sole adoption by a single parent, if sought by the middle classes, is more likely to be a device utilised by men rather than women. Yet there is no doubt that such adoptions by a man or woman will be in the child's interests, for as long as the difference between

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legitimates and illegitimates is maintained, adoption by one parent will improve the legal and social position of the child. If the practice of acknowledgment or recognition by the putative father is legalised,[42] adoption by a parent as sole adopter can still enable the child to be legitimated and thus acquire a status equivalent with legitimacy.[42A] This method of formalising the relationship to the child will therefore continue to serve a purpose, even as an alternative to voluntary recognition.

The Adoption of Children Ordinance enacting a provision similar to the Act of 1926, requires the adopter to be over the age of 25. Besides, generally the adopter must be at least 21 years older than the child.[43] The latter provision reflects the policy that a significant age difference will help to simulate and maintain the parent-child relationship.[44] It has been considered important in a context where marriage between an adopter and an adoptee is not prohibited by the law.[45] Thus the requirement of the age difference can be dispensed with by court in circumstances that are specified in the Ordinance; but these exceptions cover cases where the relationship between the adopter and the adoptee falls within the prohibited degrees for marriage.[46] The twenty-one year age difference need not be maintained when the parent, or brother or sister of the adoptee seeks to obtain an order. Equally an uncle or aunt, when the adoptee is a descendant of a brother or sister, or a step parent, need not be 21 years older than the adoptee. A court can therefore dispense with the requirement of the age difference, and permit an adoption by a person within these prohibited degrees who is not 21 years older, even when the adoptee belongs to the opposite sex.

When the age of capacity to marry is as low as it is in Sri Lanka,[46A] it can hardly be argued that there should be a 21 year age difference between the adopter and the adoptee in order to simulate the relationship between parent and child. Legislation can be introduced to include the relationship of adopter and adoptee within the prohibited degrees for marriage, so that the requirement of the age difference can be dispensed with altogether. The adoption statute should continue to specify an age (albeit arbitrary) that is deemed adequate for ensuring that an adopter is mature

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enough to accept responsibility for an adopted child.[47] However the relevance of an age limit is not so clear in the case of a parent who is seeking to adopt a child[48]

Most legal systems confer the right to adopt only on persons domiciled and resident in the country.[49] The Adoption of Children Ordinance contained a similar provision, but this was amended later, permitting adoption by persons not domiciled in Sri Lanka. An adoption order could be granted to such a person when a court was satisfied that there were circumstances which justified the making of the order.[50] This liberal approach to foreigners adopting children has been controversial, and progressive restrictions have been introduced. In the modern law an applicant for adoption must as under the principal enactment, be resident and domiciled in Sri Lanka. An exception has been made only in regard to a joint application for adoption by two spouses who are not resident and domiciled in Sri Lanka. In addition to the usual protections enshrined in the Ordinance, the court making such an adoption order is required to be satisfied that there are special circumstances which justify the making of the order. It is mandatory for the court to call for and consider a report from the Commissioner of Probation and Child Care on the adoption, prior to making its order. The nature of the Commissioner's report is specified by statute. It must contain a "home-study" report on the background of the applicants from an institution in the applicant's own country, and this report must be authenticated by Sri Lanka's diplomatic representative in that country.[50A] The court is therefore conferred with the discretion to permit an adoption that will entail the child being taken out of the country. This discretion, exercised within the framework of controls contained in the principal enactment, and with the required report, has been considered adequate to prevent abuse of the practice of aliens adopting children from Sri Lanka . There are inherent risks for children in permitting such adoptions, unless the legal controls are applied and enforced meaningfully.

3. Consents

The consent of the child, over the age of 10 is essential for a valid adoption, and it cannot be dispensed with.[51] This provision is in addition to that which requires a court to give due

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consideration to the wishes of a child who is of an age and understanding when his wishes ought to be considered in ascertaining whether the adoption order will be in his interest.[52] The present law therefore gives a court the discretion to assess the significance of the wishes of a child under 10, but denies it that right when the child is over that age limit.

The English law, while requiring the court to consider the child's wishes, does not include him as a person whose consent must be obtained.[52A] However, given the lack of expert services available in England, to assist our courts in determining whether an adoption is in the child's interests, it may be justifiable to retain an age limit beyond which the consent of the child is generally essential. Nevertheless the court should be free to dispense with even this consent, when there are special reasons connected with safeguarding the child's welfare.[52B]

Adoption permanently deprives the natural parent of his rights in respect of the child,[53] so the Ordinance requires the consent of parents to the adoption of their child.[54] Since the putative father has no parental rights in Sri Lanka, it may be argued that his consent is not required for adoption of an illegitimate, and that the consent of the mother alone will suffice. However since he may be a person who has the actual or legal custody of the child, or is under a liability to support him, his consent may be required on that basis, as the Ordinance makes the consent of such persons necessary for adoption.[55] If the status of the putative father who has acknowledged a child is recognised in the law of Sri Lanka, he will come within the meaning of the word "parent" in the Ordinance, and thus be required to express consent to the adoption of his illegitimate child.

The Ordinance declares that an adoption order shall not be made except with the consent of the parent, or the guardian or the other categories of persons referred to above.[55A] The language used in the Ordinance, warrants the interpretation that any person belonging to these categories is entitled to consent to or veto an adoption [55B] The guardian is defined as a person who, for the time being has charge or control of the child.[56] Since the consent of a person with the actual custody of a child, or who is liable to contribute to the child's support is also required,[56A] the term

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"guardian" must be taken to mean a person who has legal custody of the child. As the parents are generally the legal guardians, and repositories of the parental power exercised in respect of a minor child, the consent of any other guardian will be required only in circumstances where the parents are dead, or have been deprived of their legal right to custody of the child. A man who marries a woman with a child, is described in the Ordinance as a person liable to contribute to the support of the child; his consent is thus required for an adoption of that child.[57]

When the parent expresses consent to the adoption, a court is required to ensure that he understands that the order will permanently deprive him of his parental rights.[57A] However, a proviso in the Ordinance enables a court to dispense with the parent's consent, if they cannot be found, are incapable of giving consent because they have been adjudged as insane by a competent court, or they have abandoned or deserted the child.[58] The language of the proviso suggests that parental consent can be dispensed with only on these grounds, and that a wide discretion to waive the requirement of consent has been conferred on the court in regard to persons whose consent is required because they are liable to contribute to the child's support. It is thus difficult to accept the interpretation of an English court which, construing a similar proviso in the Adoption Act of 1926, decided that the court had a wide discretion to dispense with consent, in regard to all the persons mentioned as required to express consent. The court appears to have ignored the clear language of the proviso in order to accomodate the policy of permitting the court deciding an adoption case, a wide discretion to dispense with the required consents, in the child's interests.[58A]

Later legislation in England, articulated that policy, and the Adoption of Children Act of 1958 in England recognised a wide discretion in the courts to dispense with even the parent's consent, on the ground that the refusal to consent to the child's adoption is unreasonable. With this erosion of the requirement of parental consent, a parent could be denied the right to veto a child's adoption. More recently however, there has been, even in that country, a constant debate on whether it is justifiable to assess unreasonableness solely in terms of the long term welfare of the

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child. It is sometimes suggested that a parent has a right to maintain the blood tie, and that it is arbitrary to interpret the child's welfare in isolation from the needs of other members in the family. Critics of this view argue that the relationship with the biological parent is not necessarily essential to the welfare of a small child, and that the concept of the child's interest must not be identified with the interests of the adult involved.[59] This type of debate however seems to lack meaning in the Sri Lanka legal system. Where the State places the responsibility for the welfare of children, upon the parents, and minimises the area of official interference, it is difficult to question the need to balance parental rights with the child's welfare. The Roman Dutch law, which is the major source of the law on parent and child in this country recognises the jurisdiction of the courts to terminate the parental power, on proof that its exercise will prejudice the child's welfare. A provision in the adoption law which gives the court the discretion to dispense with consent only when there is incapacity to express consent, or neglect or failiure to fulfill parental obligations, is clearly too restrictive. It should therefore be widened to include a provision that permits a court the discretion to dispense with parental consent, on the ground of prejudice to the child's welfare.[59A]

The consent of the other persons referred to above can be dispensed with in the existing law on the same basis as in the case of parents. If they are persons liable to contribute to the child's support, the court has a wider discretion, for their consent may be dispensed with not merely for neglect or failure to support the child, but if in all the circumstances their consent "ought to be dispensed with".[60]

The provisions in the Ordinance referred to above on the expression of consent to adoptions have been borrowed from the Act of 1926 in England, and retained in Sri Lanka despite the important changes introduced in the modern adoption law of that country.[60A] It is difficult to justify retaining the requirement regarding the consent of the de facto custodian, and the person with the liability to contribute to the child's support, when they have no legal rights in respect of the child. The aspect of their refusal to consent may have a bearing on whether the adoption is in the child's interests. The court has a sufficient discretion to take this into account in making

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its order, and it is unnecessary to have a specific statutory requirement regarding the expression of consent by a *de facto* guardian or a person with the liability to contribute to the child's support. It is even more anomalous to require the consent of a man who marries a woman with a child, on the basis that he is a person who is liable to maintain the child. The provision may have been introduced as an additional safeguard to ensure that a man who marries the mother of his own child consented to the adoption, in circumstances where a child born in adultery could not be legitimated by the subsequent marriage of his parents· It is unnecessary for this purpose in the present law, for we have observed that legitimation by subsequent marriage, without restriction is possible. This provision in the Adoption Ordinance is also anomalous if it refers to a stepfather, for the substantive law on maintenance does not impose a duty of support upon him.[60B] It seems unreasonable to require his consent, in circumstances where he has not assumed parental responsibility for the child, but merely because he happens to be married to the mother. The English law has long since dispensed with the requirement of consent to adoptions by persons liable to contribute to a child's support,[60C] and there is no rationale for retaining this concept in the adoption law of Sri Lanka.

The only consent, other than the parent's that is relevant in adoption proceedings, is the consent of a legal guardian of the child. It is necessary however to review the meaning of the term guardian in this context, and consider whether it should refer merely to a custodian, or even a curator who has charge of a child's property.[60D] The law should also clarify that the guardian's consent can be dispensed with in the same circumstances that apply to a parent of the child.

The status of the putative father in regard to the expression of consent to an illegitimate child's adoption has been subject to changing values in the English law.[60E] In the present law of Sri Lanka, a putative father who has obtained legal custody of the child through a court order may be deemed a parent with legal rights in respect of the child, and therefore entitled to express consent. If he is not treated as a parent, but as merely a third party who has been granted legal custody, his consent will still

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be required. It is proper that the putative father who has legal custody should be required to express consent, subject to the right of the courts to dispense with that requirement, as in the case of parents and guardians. However there is no rationale for the provision in the existing law that includes the putative father within the category of persons required to express consent merely because he happens to be liable to support the illegitimate child. His consent as a parent should be required and will be necessary even under existing provisions in the Ordinancce, if the law attaches legal significance to his voluntary aknowledgment of an illegitimate child.

Consent in the above circumstances is required in the interests of the adoptee and the adults who are concerned with him. The Ordinance also contains a provision on consent which is intended to safeguard the interests of the spouse of the adopter. The consent of the husband or wife of a married person is required when the other spouse alone wishes to adopt a child, but we have seen that the court may dispense with this requirement in certain defined situations, that are related to the destruction of the consortium.[61]

Procedure for making Adoption Orders

Applications for adoption under the principle enactment were originally made in the Court of Requests, the procedure and rules being determined by the Supreme Court.[62] The Court of Requests was abolished later, and adoption proceedings were heard in Magistrates' Courts before judges who were designated by a Ministerial Order as Childrens Magistrates.[63] Today the Family Courts have sole and exclusive original jurisdiction in regard to adoption matters. Any reference to a court in the Adoption Ordinance is taken to be a reference to the Family Court. The provisions in this Ordinance regarding the institution and conduct of adoption proceedings apply to adoption proceedings in the Family Courts.[63A]

In the early years, when applications for adoption were made in a minor court like the Court of Requests, a judge could even make orders without following the imperative requirements of the statute, thus rendering the whole adoption procedure a nullity.[63B] Such carelessness may not be possible now that a special court, like the Family Court, with a higher status, exercises

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jurisdiction in adoption matters. The present law also recognises the need for privacy in the hearing of applications for adoption. Proceedings can be held in camera, and the judge has the discretion to exclude persons not directly interested in the case.[63c]

The court making an adoption order is required to consider the welfare of the child as of primary importance.[64] It must appoint a guardian ad litem for the hearing of any application for adoption, and this person is under a duty to investigate all the circumstances of the adoption so as to safeguard the child's interests before the court[65] The Supreme Court has the power to make rules regarding adoption proceedings, and it can therefore specify the duties of the guardian ad litem.

The procedure of obtaining the assistance of a guardian ad litem is based on the practice in adoption proceedings in England. In that country, until the law was reformed recently, the Adoption Rules clarified that the guardian ad litem must ensure that the required consents had been given. He interviewed the applicant's and the child's parents, was required to ascertain the wishes of the child, investigate the background of the adopters, and the needs of the child, and had to make a confidential report to the court. Under recent legislation these duties have been placed on adoption agencies that are officially authorised to make arrangements for the adoption of children. They must conduct inquiries and report to the court. In any event the decision of the judge in making an adoption order in England is greatly influenced by the report of the guardian ad litem, or (under the new law), the adoption agency.[66]

In the absence of private organisations or local authorities in Sri Lanka that can be considered adoption agencies entrusted with the responsibility for making the preliminary arrangements for suitable placements, the guardian ad litems' functions become especially important. There is provision for a court considering an application for adoption, to appoint as guardian ad litem, a member of the governmental department of Probation and Child Care Services, or some one from a charitable institution that undertakes the care of unwanted children, who is willing to act in this capacity. Since there are no authorities that offer private

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or state sponsored adoption services in the country, it is appropriate that the court should have a complete discretion with regard to who should be appointed as guardian ad litem. It is unfortunate that courts do not sometimes attach sufficient importance to the need for ensuring independent and objective representation for a child by a person without an adverse interest. A "home study" report by Probation and Child Care officials is mandatory only in the case of foreign adoptions.[66A]

In England and other Western countries, the pre-adoption procedures are considereed an important aspect of adoption. Before the application for an adoption order is made in court, a child has invariably been placed for adoption by an agency, or privately. Adoption laws often aim to control these pre-adoption procedures, so as to ensure that the child is placed in a suitable environment and not exploited because of conflicting adult interests. Adoption laws sometimes prohibit private placement on the ground that it could lead to commercialisation of the institution, in a context where there are more adopters than children available for adoption. Besides, they tend to favour placement by adoption agencies that have the facilities to make prior investigations before placement for adoption. Private placements are discouraged on the argument that they may be made without adequate care, resulting in disruption for the child, if the placement is not deemed satisfactory.[67]

Apart from the fact that the "adoption agency" with the services for making suitable placements is not found in Sri Lanka, there are not the same reasons for disapproving of private placement. Relative adoptions (i.e. by persons connected by birth or marriage) are likely to be more common than they are in the West, and even the current English law concedes that a child can be placed for adoption with a relative, privately.[68] In relative adoptions the adoptive parents and the natural parents are known to each other, and they are likely to have a continuing association. The generally close relationships within the wider family, suggest that the child will not experience the insecurity or problem of identity that may arise in a situation where the natural parents and the adoptive parents are complete strangers to each other, and the adoption proceedings are not completed successfully.

Some controls with regard to pre-adoption procedure appear to be necessary when adoption orders are sought by persons who

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are strangers to the child, particularly when they wish to take the adoptee out of the country. If private placements are permitted, there could be the danger of the child being exploited for nefarious purposes. However in the absence of adoption agencies, should the appointment of a guardian ad litem be considered an adequate protection, that will ensure the child obtaining a satisfactory placement? Or should the adoption law prohibit private placements in this special area and require that the child be placed by some authority that is officially recognised, before the application for adoption is brought to court? These are basic questions that should be resolved in formulating any legislative policy on private placements.

The English law insists that the child should live with the applicants for a specified time, prior to the making of the adoption order. The court must also be satisfied that the adoption agency making the placement has had adequate opportunity to see the child with the applicants, or in the prospective home. This trial period is considered a necessary preliminary for ensuring a suitable placement. In order to prevent its usefulness being prejudiced by withdrawal of the parents consent before the decision of the court is pronounced, recent legislation introduces the concept of making the child "free for adoption." After a preliminary proceeding in which those entitled to express consent are heard, the court can make an order declaring the child "free for adoption." The adoption agency can then make a placement, and parental consent for adoption will be unnecessary when the application for adoption is eventually made.[69]

The Sri Lanka law does not contain similar provisions. However when the application for adoption comes before the court, and it is not satisfied that the placement is suitable, it has the right to postpone making the final order for adoption by issuing an interim order giving the custody of the child to the applicant for a "probationary period" of up to two years.[70] Child psychologists argue that the lack of security and uncertainty inherent in such a proceeding is not conducive to building a stable relationship between the adoptive parents and the child.[71] When the judge determining the issue is not satisfied that an adoption order should be granted, it is not appropriate that he should

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experiment with the case of the child, in order to obtain the evidence that he requires to make up his mind. Consequently the "interim order" may not really achieve the purpose that it envisages, namely the protection of the child's welfare. It appears preferable therefore to require a procedure that will enable investigation of the adopting couple, their home background, and the child, prior to the application for the adoption order, which should be issued only as a final order that will determine the proceedings. Our law should also insist that the child should have lived with the adoptive parents for a specified time, or that it should have been with them under a de facto adoption.[71A]

Prior to the making of an adoption order, the court hearing the application in Sri Lanka must be satisfied that the provisions with regard to consent have been followed, and that consent has been given with a full understanding of the implications of an adoption order.[72] We have observed that the present law on the requirement of consent is outdated, and that consent can be dispensed with only in limited circumstances. These provisions should be amended on the lines suggested above, and the court should be free to dispense with consent when refusal will be prejudicial to the child's interests. There should also be an appropriate procedure, specified by the statute, for recording consent. At the moment, it may be difficult to obtain evidence that the court, actually obtained the required consents. The rules made by the Supreme Court in regard to adoption procedures do not deal with this matter.[72A]

In the present law a court must also be satisfied that the applicant for adoption has not received or agreed to receive without the sanction of court, a payment or consideration for the adoption, and that no person has given or agreed to give the applicant such a payment or consideration. These provisions which are borrowed from the English Act of 1926 attempt to prevent the adopter receiving consideration for the adoption. Nevertheless they do not cover a situation where the adopter gives a consideration, a factor which should be equally relevant, in order to ensure the bona fides of the adopters and the welfare of the child.[72B]

An adoption order can be made subject to certain terms and conditions. The adopter may be required to make a permanent

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commitment regarding financial provision for the child.[73] However the final order for adoption cannot be subsequently revoked, the Ordinance reflecting the policy that it is prejudicial to the child to consider transfer of parental rights anything but permanent.[74] The court has jurisdiction to make a subsequent order in respect of an adopted child, and the adoptive parents will be deemed the parents, in any application under the Ordinance.[75]

When legitimation of adulterine illegitimates was prohibited, the parents could upon their subsequent marriage, jointly apply to adopt their illegitimate child. Now that the law has been changed and legitimation by subsequent marriage is possible, the Adoption Ordinance should be amended to enable a revocation of a prior adoption order in favour of parents who at a later date were married to each other.[76]

The legal consequences of a valid Adoption

An adoption order that does not satisfy the mandatory requirements of the Adoption Ordinance is void ab initio and has no legal effect. "It is not merely voidable, but a nullity", and without legal consequence.[76A] If the order is valid the adopted child in the present law of Sri Lanka is deemed to be for all purposes a child born "in lawful wedlock of the adopter."[77] The Adoption Ordinance also declares that an adoption order deprives a natural parent permanently of his or her parental rights.[77A] The rights, duties and obligations and liabilities of the parent or guardian in regard to future custody, maintenance and education are extinguished and transferred and vested in the adoptive parent. So also the right to appoint a guardian, or consent to marriage or give notice forbidding it. For these purposes and for the purpose of the child's reciprocal liability to maintain his parents, the adopted child is described as one who has been born in lawful wedlock to the adopter. If spouses jointly adopt a child, they are considered as the lawful father and mother of the child for the purposes specified above, and for the purpose of claims in court regarding custody maintenance and access.[78] The court is also required (unless it considers this inexpedient) to confer on the child the surname or

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family name of the adopter or the name that would, according to the custom in the adopter's community, be conferred on a legitimate child.[79]

We have observed that the English Act of 1926 did not confer rights of succession on the adopted child. This Act also specified the parental rights that would pass from the natural parent to the adopter, thus indicating that the legal relationship with the natural parents was not terminated.[79A] The Adoption of Childrens Ordinance has followed the Act of 1926 in some of its provisions, but departed from it in important respects. It contains a specific provision declaring that the adopted child will be deemed a child born in lawful wedlock of the adopter.[79B] While it has a section similar to the English Act, indicating that the adoptee retains his rights of succession in the natural family, it does not enact a corresponding provision that adoption "shall not confer. . . . any right or interest in property as a child of the adopter."[80] It would thus appear that the adopted child in Sri Lanka succeeds to the intestate estate of members of his natural family while acquiring rights of inheritance in respect of the property of the adoptive parents. In a recent case the Supreme Court assumed that a child validly adopted under the Ordinance could succeed as sole heir to the intestate estate of the adoptive father.[80A] The Sri Lanka Ordinance also contains a general provision that parental rights are extinguished permanently. Even though it enacts the provision in the Act of 1926 on the specific rights, duties and liabilities that are transferred by adoption,[81] it may be argued that the adoptive parents became the repositories of all parental rights, and that they acquire the duties and responsibilities owed by a parent to a legitimate child.

The Adoption of Children Ordinance nevertheless imposes some restriction on the rights of succession of adopted children. Though a legitimate child is considered an heir of his parents and qualified to take under a bequest to 'children',[81A] in the absence of an express intention, it cannot be implied that an adoptee is entitled to receive a bequest devolving on a child of the adopter by an instrument created before the adoption. Nor does he enjoy the status of the adopter's child for the purposes of fidei-commissum.[82] He cannot become entitled to any rights of succession by will or on an intestacy on the basis that he is a representa-

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tive in law of the adoptive parent.[83] The adopter is not generally deemed an heir at law of the adopted child, for the purposes of succession.[84]

Even though an adopted child is described as a person "born in lawful wedlock of the adopter", these limitations make it clear that he does not enjoy the status of a legitimate child of the adopter for all purposes. Thus adoption is not effective as a method of legitimation of an illegitimate child.[84A] Such a child even if adopted does not cease to be an illegitimate child in relation to the mother, since he continues to enjoy rights of succession in that capacity. He will not enjoy all the privileges of a legitimate child of the adoptive parent for the purposes of succession, irrespective of whether the adopter is the biological parent or a stranger. The dictum of Denning L. J. in **Re D**[84B] that "the child remains illegitimate but being adopted, ... it suffers none of the disabilities which attach to illegitimacy" though made in interpreting the English Adoption Act of 1950, is equally pertinent in Sri Lanka. The adopted child may be described as enjoying the status of a "quasi legitimate" child.

In England, continuous reforms with regard to the consequences of adoption have resulted in the adopted child acquiring a legal status very close to that of a legitimate child.[85] The disabilities with regard to succession, introduced in the first Act of 1926 have been progressively eliminated. Under this Act the adopter had no rights of succession in the new family, and retained those he had in the natural family. The Adoption Act of 1949 conferred on an adoptee the same status as that of a legitimate child of the adopter for the purpose of devolution of property. He thus acquired rights of intestate succession, and the word "child" in an instrument intervivos or a will created after the adoption was deemed to refer to him.[86] In the modern law the latter interpretation is accepted even in respect of wills and instruments intervivos created prior to the adoption. The recent Childrens Act 1975 in England reflects the policy that an adopted child should have the same rights under wills and other instruments as a legitimate child.[87] In addition, the scope of the provisions with regard to transfer of parental rights have been widened. The Act of 1926 contemplated transfer of particular rights and liabilities such as those concerning

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custody, maintenance and education. The most recent legislation enacts that an adopted child shall be deemed in law as a legitimate child of a married couple who adopt him or in any other case, as a child born to the adopter in lawful wedlock. The adoptee is no longer deemed to be the child of any other person, and adoption prevents the child being illegitimate.[88] The adopted child therefore acquires almost all the rights of a legitimate child of his adoptive parents, but the existence of minimal differences and the failure to accept total assimilation,[89] has perpetuated the concept that he is a quasi legitimate."[89A]

The limitation on the rights of inheritance of an adopted child in Sri Lanka were obviously inspired by the 1926 Act, and they result in the adoptee enjoying a legal status which is not identical in this respect with the status of the adopter's legitimate issue. Though full parental rights and responsibilities appear to be transferred, the somewhat clumsy drafting, leaves room for doubt and controversy. There is no reason why the Sri Lanka law should not indicate clearly that the adoptee becomes a legitimate child of the adopter for all purposes. Adoption in the indigenous laws was familiar as a device for bringing a child into another family. The concept that the adoptee could inherit family property was known to these systems. The Adoption of Children Ordinance though it was more liberal than the Act of 1926, was influenced by the English law, and it is not reasonable to perpetuate principles of adoption law that were abolished in that country in as far back as 1949.

In Western adoption laws, the rationale for the severance of the adoptees ties with the natural family by adoption is based not merely on the need to assimilate the child into the adopter's family, but the desirability of avoiding all contacts which could disrupt the harmony of the new relationship. Adoption laws in some countries encourage placement by agencies rather than private persons when the parties are strangers to each other, so that the identity of the natural parents need not be revealed.[90] In England connections between entries in the Register of adoptions and the Register of births, can only be traced with the permission of the court making an adoption order. It is only recently that a controversial provision has been introduced enabling an adopted

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person over the age of 18 to obtain his birth records. This information is also available to an adoptee under that age who intends to contract a marriage. There is a duty cast upon the Registrar–General and upon adoption authorities and agencies to provide "counselling" services for someone who wishes to obtain this information.[91]

The Adoption of Children Ordinance envisages the severance of parental rights but enacts that the adoptee retains his rights of inheritance in the natural family.[91A] The adopted child is therefore not treated as a person who should have no contact with the natural family. In a small country like Sri Lanka, except in the case of unwanted and destitute children who are adopted through orphanages, when the natural parents have no interest in the child and may not even be known, it will be impossible to prevent contact between the natural parents and the child. In "relative adoption", where the child's relationships with his immediate family invariably flow into his relationship with the wider family, such contact may not necessarily be harmful or disruptive for the adoptive parents and the child. Nevertheless, if the adoptee's legal status is to be successfully assimilated with that of a legitimate child of the adopter, it is important that he should not retain his rights of inheritance in the natural family. Adoption being irrevocable, the adoptee does not need the protection of entrenched rights of intestate succession in his natural family. Besides, even if he can be disinherited by an adopter's will, he can equally become a beneficiary under the will of a member of his natural family. There is thus no rationale for providing that he retains his rights of inheritance in the natural family.

Adoption under the present law does not prevent or enable a marriage which could or could not have been contracted according to the prohibited degrees of consanguinity or affinity.[92] Thus a marriage between an adoptive parent's natural children and adopted children, if not within these prohibited degrees is not prohibited merely because of the adoption. Since the adoptive parents and the adopted child are specifically declared not to be within the prohibited degrees for marriage,[92A] it is clear that marriage between an adopted child and an adoptive parent will be lawful. However the incest barrier is retained in regard to the adoptee's relationship with members of his natural family.

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The incest barrier has often both a social and biological rationale. Since adoption aims at simulating the parent-child relationship, the stability of family relationship may justify a prohibition on marriage between the adopter, the adopted child, and member's of the adopter's family who would come within the prohibited degrees, if the adoptee was the natural child of the adoptive parents. In some countries a marriage between an adopter and the adopted child is prohibited, even though marriage between his legitimate children and the adoptee is permissible if there is no barrier of consanguinity or affinity.[93]

Record of adoptions

Statutory adoptions are recorded in Sri Lanka in the adoption register and its index that is maintained at the office of the Registrar General.[94] Usually this entry does not carry the date of birth of the child. If it is proved in the adoption proceedings that the date of birth has been recorded under the Birth and Deaths Registration Act, the court must direct the Registrar-General to mark the entry with the word "adopted", and include the date of birth in the entry in the adoption register.[95] If the adoption entry does not contain a record of the date of birth of the child, a certified copy of the adoption registration is *prima facie* evidence of the adoption. A certified copy of an adoption registration which contains a record of the date of birth, is *prima facie* evidence of the adoption and the date of birth.[96] Originally there was no provision that prevented the release of entries in the register of births that were marked with the word "adopted". Thus the connection between entries in the register of births and the adoption register could be traced, and this information pertaining to adopted children is as accessible as the usual entries in a register of births. This situation has now been modified by a recent amendment to the Adoption Ordinance. The adoption register and index are no longer open for public inspection and search. There is provision for the-re-registration of the birth of an adopted child by the Registrar–General under the Births and Deaths Registration Act. If there has been re-registration, he cannot furnish information from the adoption register and index, except under an order of the Family Court. If not, the Registrar–General may provide such information, and

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the provisions of the Act regarding the demand and issue of certified copies apply, as if the adoption register and index are books kept by the Registrar-General.[96A]

3. Adoption under the Kandyan Law

The application of the Adoption of Children Ordinance, does not prevent persons subject to Kandyan law, adopting children according to their personal law.[97]

Most text writers on the Kandyan law distinguish between bringing up a child '*in loco parentis*', assuming the guardianship of an orphaned child, and adopting it for the purpose of inheritance. Only the latter practice is described as an adoption under Kandyan law.[98] It has been pointed out earlier[99] that this distinction is untenable because instituting the adoptee-heir was merely one type of Kandyan adoption. A child could be brought into another family because he was an orphan, or unwanted by his parents or to fulfil the need for family support and assistance in old age. Such a child was also an adoptee, a "hadagath daruwa" or "nurtured child," who could make a claim against the nurturing parent's estate even if he had no fixed rights of inheritance like a person brought up in another family for the purpose of obtaining an heir who would perpetuate the family name and property.

We have observed that the Roman law institution of adoption was not confined to *adrogatio* or adoption for succession. However English judges and writers in Sri Lanka, who were familiar with the concept of adoption for succession in Roman law, seem to have thought that adoption in archaic systems, was solely for the purpose of instituting an heir. They were thus unwilling to associate the concept of legal adoption with the relationship that existed in the Customary laws between a nurturing parent and the nurtured child who had not been instituted as heir. Emphasising the absence of "legal rules" regarding the latter relationship, they designated it as an informal extra legal assumption of the parental role, "acting *in loco parentis*," or else legal guardianship that was distinct from adoption.[99A] We have already seen how adoption in English law originated as a device for ensuring the permanent transfer of parental rights, and that the Common law described the assumption of parental responsibilities by foster parents as

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de facto adoptions without legal consequences. It is not surprising that the practice of persons other than natural parents, nurturing a child in Kandyan society was viewed in the same way, and as not constituting legal adoption according to Kandyan law. Had the real nature of the institution of adoption in Roman law been appreciated, it is possible that this view would not have been maintained. For Roman law with its recognition of both *adoptio* and *adrogatio* appears to provide a more appropriate framework than the English law for understanding the concept of adoption in Kandyan society.

The Kandyan law on adoption was consistently interpreted as referring essentially to adoption for the purpose of succession. Since an adoptee who had been instituted heir had fixed rights of inheritance under the Kandyan law, the text writers and the courts agreed that there must be clear proof of adoption for the purpose of succession. While the text writers emphasised that the acknowledgment of the adoptee as heir must be public,[100] the judicial decisions devoted considerable attention to the question whether a formal public declaration of adoption was necessary, or whether there need only be evidence that the adoptee was intended to be the adopter's heir. The question of proving adoption for succession turned out to be more complicated for the very reason that children brought up in the family as "hadagath daruwa" or "nurtured children" were not necessarily accepted as heirs to the adopter's property.

Several early decisions held that vague expressions, made casually, were inadequate to establish adoption for succession.[101] In one case a death-bed declaration that a person who had lived in the household and rendered assistance was an adopted child who should inherit property, was accepted as proof of adoption for succession.[102] On the other hand, some decisions hesitated to recognise an adoption from a declaration to a few people that a person was a "hadagath daruwa"[103] who was "to be given lands."[104] These decisions draw attention to a proposition noted in earlier cases, namely that a "hadagat daruwa" or a nurtured child was not necessarily instituted as the adopter's heir.[105] That concept is also the basis of the decision in the leading case of **Loku Banda** *v* **Dehigama Kumarihamy** [106] where the Supreme Court decided

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that a child who had been brought up in the family and rendered assistance and was described in certain deeds executed by the deceased as "my nephew adopted by me" had not been adopted as an heir. Maartenz J. went on to state that an oral statement made on an occasion that was not formal or public **and** which did not indicate that the deceased intended to make the alleged adoptee **heir**, was not sufficient to prove adoption.[107]

The opinion expressed in **Loku Banda** *v* **Dehigama Kumarihamy** was therefore not different to the views expressed in the earlier cases. However, it was interpreted later, as recognising the need to prove a public formal and open acknowledgment of the adoptee as heir, or in other words, a declaration of adoption for succession.[108] The early cases were also decided on the basis that the intention to institute the adoptee as heir had to be clearly proved, but they have been sometimes criticised on the assumption that they stipulated the need for a formal public declaration of adoption.[109]

In **Tikirikumarihamy** *v* **Niyarapola,**[110] the Supreme Court unanimously rejected the need to prove a formal public declaration of adoption. It emphasised that all that was necessary was a clear expression of intention that a child nurtured in the household (the hadagat daruwa) was also adopted for inheritance. On the facts, the court was prepared to hold that a statement by the deceased to outsiders that she was bringing up the child and intended to give him property was adequate expression of the intention to adopt for succession. The Supreme Court therefore expressed the same view on the law as **Loku Banda** *v* **Dehigama Kumarihamy,** though it arrived at a different conclusion on the facts.[111]

It was the actual decision in **Tikiri Kumarihamy** *v* **Niyarapola,** rather than its analysis of the law, that was to create an important change in the Kandyan law on adoption. On the basis of this case, a person who was nurtured in the family was entitled to claim that he had been adopted and instituted as an heir, by proving that the deceased intended to give him property.[112] However in **Dayangani** *v* **Somawathie,** Basnayake C.J. in a judicial opinion that considered the earlier authorities clarified that even though a public declaration of adoption on a formal occasion was unnecessary, there had to be "an unqualified disclosure of the. . . . intention to adopt the foster child as his (the adoptor's) heir."[113]

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The Kandyan Law Commission which considered and recommended changes in the law on adoption observed that the judicial decisions had recognised that a valid adoption could take place under Kandyan law, when a person had been instituted as heir to the adopter by a formal public declaration or acknowledgment of his adoption for the purpose of succession. In order to prevent perjured testimony and solve the difficulties of proving adoption, they recommended the device of the notarially executed adoption deed.[114] Though the Commissioners considered that adoption could take place under Kandyan law without instituting the adoptee heir,[115] the requirement of an adoption deed seems to have been envisaged as fundamental to adoption for the purpose of succession for it was only in this type of adoption that the adoptee became the adopter's heir.

In traditional Kandyan law, the adopter and the adoptee were required to be of the same caste, but subject to this, there was no limitation with regard to who could adopt or who could be adopted. The adoptee, could even be an adult, and adoption could take place even if the adopter had children of his own.[116] The Kandyan Law Commission in recommending changes in the adoption law, assumed that the principle regarding caste applied.[117] They did not comment on this aspect of the traditional Kandyan law on adoption, even though the caste requirement contradicted the fundamental values of the legal system, even at that time.[117A]

The traditional Kandyan law dealt with the consequences of adoption on the aspect of succession.[118] An adopted child instituted as heir, inherited all the adopter's property if there were no direct descendants, but there is some controversy regarding his rights when there were legitimate issue. An adoptee acquired no rights of succession in respect of relatives of the adoptive parent, and a son retained the right to inherit through his natural family. A daughter however generally lost her right to succeed to the paternal inheritance like a daughter married in diga.

By contrast there were no legal rules regarding the impact of adoption on parental rights. This is hardly surprising in view of the fact that there were no clear legal rules regarding the rights and responsibilities of natural parents. What information there is, indicates that the adopter of a minor child exercised parental

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rights and responsibilities when the child was brought up in the family as a "hadagath daruwa", subject to limitations on those rights introduced in the child's interests.[119] However, adoption in Kandyan law appears to have been revocable, so that the adoptive parent could terminate the relationship while the adoptee could rejoin his family. Rights of inheritance were also acquired in adoption for succession only when the adoptee remained in the adopter's household.[120] These principles and the fact that an adopted daughter lost her rights to inheritance, like a diga married daughter, suggests that adoption involved a severance of the parental rights and responsibilities of the natural parents, and assimilation into the adopter's family, for the duration of the period when the adoptee was a member of the adopter's family.[121]

The Kandyan Law Commission did not consider the impact of adoption on parental rights over a minor adoptee though it dealt extensively with reforms regarding the consequences of adoption on succession. The Commission merely emphasised the need to prove the adoptee's consent to adoption, and recommended a change in the law which would prevent adoption being revoked, describing these measures as necessary for safeguarding the adoptee's interests. It would appear that the Commission assumed that there would be a permanent irrevocable transfer of parental rights, when a minor was adopted.

The Commission recommended far reaching changes regarding the rights of the adopter and adoptee with regard to intestate succession, and these changes were subsequently incorporated in the Kandyan law Ordinance (1938).

Adoption in the Kandyan Law as it applies today

Either a minor or an adult may be adopted,[122] but the relevance of the caste requirement is doubtful. The question whether adopter and adoptee must belong to the same caste was raised but not decided in the comparatively recent case of **Subanchima** *v* **Jamis Appu.**[123] The court based its decision on the narrow ground that differences in caste were not in any case relevant in the area of succession to acquired property. Such a distinction is not supported by the principles of Kandyan law, since only one text writer refers to the requirement of caste differences in the

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context of incapacity to inherit paraveni property.[124] The court should therefore have considered the wider question of the relevance of caste differences in the Kandyan law, as it applies today.

Local customs and laws based on caste differences were not recognized even during the British period of colonial rule. In a case arising in the Provincial court of Calpentyn, cited before the Commission of Eastern Inquiry (1829-1830), the court refused to recognise the caste privileges claimed by the Barber caste of Chilaw against the Washer caste.[125] Besides, in a case reported in 1848, the court decided that a Kandyan marriage between parties belonging to different castes could not be declared void, as being prohibited under traditional Kandyan law, "when all legal disabilities for caste are virtually abrogated and obsolete."[126] It may be argued that a court cannot take cognisance of caste differences in the modern law of Sri Lanka when there is a Constitution and legislation directed against disabilities based on caste.[126A] The requirement that the adopter and adoptee should belong to the same caste may therefore be considered obsolete. However it may be possible to argue that in the modern law, the traditional concept of caste equality means that both adopter and adoptee must be subject to Kandyan law.

The Kandyan Law Ordinance declares that an adoption must be effected by an instrument in writing signed by both the adopter and the adoptee in the presence of the District Judge or Magistrate, a licensed notary and two witnesses[127]. Though the Family court has been granted sole and exclusive jurisdiction in adoption matters, this is qualified by the specific provisions in the Kandyan Law Ordinance, which has conferred a specific jurisdiction on the above courts. The adoptee's consent to the adoption must be expressed in the deed. If he is a minor his consent is not a requirement, for consent may be given and the instrument signed on his behalf by the parents or surviving parent. The Kandyan Law Commission, emphasised the importance of obtaning the adoptee's consent, but no provision has been introduced in the statute to ensure that a minor's consent is in fact obtained. If the parents cannot be found or they are incapable of giving consent,[127A] or the minor is an orphan, there is a procedure enabling a court to appoint any person to give consent and sign the adoption deed. The court

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must be moved to exercise this jurisdiction by a petition presented before it and an appointment can be made "after such inquiry as they consider necessary."[128] Thus while there is, unlike under the Adoption Ordinance, a statutory procedure for obtaining and recording consent, this is not relevant to the case of a minor adoptee. The statutory protections in that Ordinance in regard to obtaining the minor's consent to an adoption, are absent altogether.

The consequences of adoption are described in the Kandyan Law Ordinance only in terms of rights of succession. Adoption affects males and females in the same way, and an adopted child enjoys the same rights of succession on the adopter's death intestate, as he would have if he had been a legitimate child. In this sense, the consequences of adoption are the same whether Kandyans adopt under the Adoption Ordinance of Kandyan law. The adoptee has no rights of succession to any person other than the adopter. Both an adopted son or daughter retain their rights of inheritance in respect of members of their natural family. The adoptee's property devolves on his natural heirs and the adopter does not acquire any right to succeed to the adoptee in the event of his death intestate.[129] As in the General law therefore, adoption may cure the disabilities of illegitimacy, but it does not operate as a method of altering the status of a person as an illegitimate child of his natural parents. Adoptive relationships do not also prevent a marriage which would not otherwise be within the prohibited degrees of consanguinity or affinity.[130]

The Ordinance is silent with regard to the transfer of parental rights. However, by making adoption irrevocable,[131] it confirms the permanency of the relationship between adopter and adoptee. Consequently the mere fact that the adoptee retains his rights of succession in the natural family cannot be interpreted as suggesting that parental rights and liabilities are not transferred permanently to the adoptive parent. The concept of a transfer of parental rights and responsibilities for the duration of the adoption appears to have been inherent in the practice by which an adopted child was brought into the adopter's family as a "**hadagat daruwa**" or nurtured child. The legislative change merely clarifies that parental power is terminated permanently.

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In view of the fact that the traditional Kandyan law recognized a practice of adopting a child out of generosity or for the purpose of obtaining "familial assistance" without instituting him as heir, can it be argued that such adoptions are valid in that law as it applies today? This practice has been consistently distinguished in the judicial decisions from "regular adoption" which is identified as adoption for succession. It may therefore be argued that it merely reflects an informal arrangement which is not a lawful adoption under Kandyan law today. On the other hand, the practice of nurturing a child was not deemed unlawful by the courts which considered the traditional law on adoption. It can thus be described as a type of Kandyan adoption that continues to be legal, but which is not governed by the rules developed by the courts and the legislature in regard to adoption for succession. If this argument is accepted, it would be lawful for Kandyans to bring up a child and care for him, without creating the adoption deed that is required by the Kandyan Law Ordinance, or obtaining a valid adoption order under the Adoption of Children Ordinance. They would also not be under a legal duty to register their custody under Part II of the Adoption of Children Ordinance.[131A]

In the traditional law, these arrangements for nurturing children were inter-family relationships in respect of which the law did not presume to create legal rules. They would probably not have been the source of litigation or disputes. In the modern context however the law does intrude and these relationships must be accommodated within the legal rules on the subject of parent and child. Since the practice of adopting or nurturing a child in Kandyan law did not terminate the parental power permanently, it becomes difficult to recognize it in a context where the General law principles on parent and child apply to Kandyans, and the statutory law on adoption under both the Kandyan law and the Adoption of Children Ordinance contemplates a permanent transfer of parental rights and liabilities. If the parental power subsists, the rights and liabilities of the natural parents continue under the General law, and it may be argued that a Kandyan who nurtures and brings up another's child in his family is merely a *de facto* custodian, with no legal rights or liabilities. Unless he obtains a court order granting him custody, he would come within the category of persons who commits an offence under the Adoption

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of Children Ordinance by not registering as *de facto* custodian of the child. The Kandyan Law Ordinance has also introduced a general provision that takes away the legal significance of rendering family assistance in the area of intestate succession. A claim to inherit the property of an intestate can no longer be made on the basis that assistance and support has been rendered.[131B]

It would thus appear that the only kind of adoption that is lawful under Kandyan law today, is adoption for succession which results in a permanent termination of the parental power, and a transfer of all parental rights and liabilities to the adoptive parent. This method of adoption is not however subject to the controls and limitations that are deemed an essential prerequisite for adoption of minors under the Adoption of Children Ordianance.

Since Kandyans can now dispose of their property by will, adoption of an adult for the purpose of inheritance, has no rationale in the modern law. Adoption of a minor for succession entails the acceptance of parental rights and responsibilities and is in fact no different to the practice of statutory adoption under the Adoption of Children Ordinance, for rights of succession can be conferred in such cases too on the adoptee. There appears to be no valid reason why Kandyans should be permitted to adopt minor children without following the procedure and particularly the safeguards recognised in the Adoption of Children Ordinance. There are many areas in which this statute can be pruned and amended, but subject to such changes, it should be the basis of a uniform law on adoption.

4. De Facto Custody without adoption—Foster care

The parent may be deprived of his or her right to custody under the provisions of the General law, or under the Children and Young Persons Ordinance.[132] Since the court has the power to restrict or eliminate the parent's right of access, the personal aspects of the relationship with the child may also be permanently severed in the latter's interests. In the absence of such an order however, those who are not lawful guardians, adopters or persons exempted from the requirement by Part II of the Adoption of Children Ordinance, must register their custody. Failure to do so is an offence under this statute.

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We have observed that these provisions on registration of *de facto* custody were introduced to prevent cruelty to children who were **not** accepted as members of the family with whom they were placed. While these statutory provisions are not enforced in the absence of an effective administrative machinery,[133] they are a disincentive to the assumption of parental responsibility for children with whom there is no biological tie or a close blood relationship. In order to safeguard children from exploitation by adults with whom they live, the State intrudes on the practice of nurturing children which appears to have a traditional base in our society.

There is some reason for reviewing the existing statutory provisions on registeration of *de facto* custody. We have already observed that they have sometimes inhibited the courts in their role as guardians of the minor's welfare.[134] Besides, recognition of the practice of nurturing, which is sometimes described as foster care without legal adoption, need not, in our law, make the child a focus of conflicting adult interests. In the event of a dispute as to the child's custody between a foster parent and a natural parent who wishes to reassert parental rights, the jurisdiction of the courts as Upper Guardian can always be used to make a decision that is in the child's interests. Fostering may thus be an area which should be permitted to function outside the area of statutory controls. It may be that these controls should be confined to situations where the *de facto* custody of a minor is retained by persons who do not assume parental responsibilities, and do not accept him as a member of their family.

NOTES

1. Buckland, Roman Law, op. cit. p. 121—123, 124—125, 370—371; Isaac, Adopting a Child Today, op. cit. p. 210 refers to the practice of adoption in ancient Egypt and in the Code of Hammurabi.

2. Buckland, op. cit. p. 122—123; W. W. Buckland and A. D. Mc Nair Roman Law and Common Law (1952) p. 42—44.

3. James, Child Law op. cit. p. 45—46; Grotius 1.6.1.; Voet 1.7.7.; Lee Roman Dutch Law op. cit., p. 38; Hahlo and Kahn op. cit. p. 358.

4. Clarke Hall and Morrison, on Children op. cit. (1972 ed.) p. 1017; Termination of Parental Power, Ch. VIII supra.

5. James, op. cit. p. 45—46; Spiro, Parent and Child op. cit. (1959 ed.) p. 54—166.

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6. Margaret Puxon, Family Law (Penguin ed.) p. 198.

7. James, op. cit. p. 47 note 12(a); Olive Stone, Family Law op. cit. p. 229; Isaac op. cit.; c.f. Re D(1958) 3 AER 716.

8. Schacht, An Introduction to Islamic Law op. cit. p. 14 note 1, p. 166; Tyabji op. cit. p. 209.

9. Clarke Hall and Morrison op. cit. 1018, James, op. cit. p. 45, Century of Family Law, op. cit. p. 46.

10. Issac, op. cit. p. 210, and Ch. 2; Bromley Family Law op. cit. (1976 ed.) p. 358; Adoption Act (1958) s. 2(1), 57(1) Re D. per Denning L. J. at p. 718.

11. Buckland and Mc Nair op. cit. p. 44—45; Adoption of Children Act (1926) s. 5, Halsbury's statutes of England, 2nd ed. Vol. 12 p. 962.

12. See Clarke Hall and Morrison, op. cit. p. 1017—1018; Isaac op. cit. p. 210.

13. Niti Nighanduwa op. cit. p. 41; Hayley op. cit. p. 208.

14. Tesawalamai, Part II especially s. 1; See also s. 7.

15. Tesawalamai, op. cit. s.1.

15A. Hayley, op. cit. p. 137.

16. Robert Knox, op. cit. Tissara Prakasakayo ed. (1966) p. 178.

16A. Hayley op. cit. p. 202, 203, 208, 216, 308—312, 487, 488, 491; Perera's Armour op. cit. p. 38; Lokubanda *v* Dehigama Kumarihamy (1904) 10 NLR 100; Wedda *v* Balea (1843) Morgans Digest 347, In Re Unguhamy (1876) Rama Rep. 251; (1845) Austin 52; Tikirikumarihamy *v* Niyarapola (1937) 26 NLR 105; Peries *v* Fernando (1915) 1 CWR 1; c.f. Nitinighanduwa op. cit. p. 41, 44; see also Obeyesekere, Land Tenure op. cit. p. 49.

17. See Hayley op. cit. note 16A; Wedda *v* Balea; J. D. M. Derrett (1956) 14 U.C.R. op. cit. p. 122—123, but c.f. Peries *v* Fernando per de Sampayo J. at p. 2; see further adoption in Kandyan law infra.

18. Tesawalamai, s. 1.

18A. See references in note 16A supra.

19. See the concept of parental power in the Kandyan law and Tesawalamai, Ch. VI supra; see also Hayley op. cit. p. 216.

19A. See note 120 infra.

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19B. See the Nitinighanduwa op. cit. p. 41 where the authors merely state that if a destitute child that had been taken care of .....**and not proclaimed to the world as an adopted child, will have no right of succession**; see also the Kandyan Law Commission Report op. cit. p. 16 where the Commissioners (the majority of whom were Kandyans) agreed that instituting an heir was not the only rationale for a Kandyan adoption. The dictum of de Sampayo Join Peries *v* Fernando supra at p. 2 supports the view that there were two types of adoption in Kandyan law.

20. Report of the subcommittee appointed by the Executive Committee of Home Affairs, Ceylon Law of Adoption, Sessional Paper II of 1935 op. cit. 35.

20A. L. Nell, The Muhammedan Laws of Ceylon (1873), and note 8 supra.

21. Adoption of Children Ord. (1941) s. 16; see also Menikhamy *v* Podimenika (1978) 79 NLR 25.

22. Tambiah, Tamil Culture, op. cit. p. 16, Laws and Customs of the Tamils of Jaffna op. cit. p. 138; The Jaffna, M.R.I. Ord. does not provide for succession in respect ofadoptions, andsince this was an important aspect of adoption under the Tesawalamai, the exclusion supports the theory of obsolosence.

23. See In Re Sithamparapillai (1919) where a testator in his will referred to a devisee as "adopted for the purpose of inheritance", under the Tesawalamai.

24. "Emergence of a Welfare policy 1931—1948", University of Ceylon, History of Ceylon, op. cit. p. 476—488; Debates in the State Council of Ceylon, (1941), Hansard, Vol. 1 Jan—June p. 442; Sessional paper (1935) op. cit. p. 11, 25.

25. See Robert Knox op. cit. note 16; see also Hayley op. cit. p. 202; Perera's Armour op. cit. p. 38.

26. Hayley, op. cit. at p. 137; see also Sawers op. cit. p. 32.

27. See the Debates in the State Council, op. cit. note 24.

28. See Obeyesekere, Land Tenure, op. cit. p. 16.

29. See the authorities cited in note 24 supra; registration of custody was the other device introduced by the statute. See Ch. VI. supra.

30. Sessional paper (1935) op. cit. p. 35.

31. See consequences of adoption infra.

31A. ss. 2(1), 17.

32. See Children and Young Persons Ord. (1939) s. 88, Adoption of Children Ord. s. 30.

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33. The English Adoption statutes clarify that the age of majority is the upper limit for adoption. Adoption of Children Act (1926) s. 1(2); Act of 1958 s. 57(1); Childrens Act (1975) s. 8(1). A more recent statute, the Adoption Act (1976), is a consolidating enactment that repeals Part I (ss. 1—32) of the Childrens Act. It contains a similar provision in s. 12(5) cited in Olive Stone, Family Law op. cit. p. 230.

34. For a similar provision, see English Adoption Act (1958) s. 57(1); see also Children Act (1975) s. 8(5).

35. Adoption of Children (Amendment) Act No. 1 of 1964. s. 2 amending s. 6(6) Adoption of Children Ord.; c.f. Adoption of Children (Amendment) Law No. 6 of 1977 s. 2 and the present law as stated in the Adoption of Children (Amendment) Act. No. 38 of 1979, s. 2 introducing a new s. 3(6) to the principal enactment, and repealing the earlier amended section.

35A. Re C (1937) 3 A.E.R. 783 (mother of an illegitimate child); Adoption of Children Act 1949 s 1(1), Law Reports Statutes (1949) Vol II p. 2175, reflecting this interpretation of the 1926 Act; see also Adoption of Children Ord. proviso to s. 3(1)(b) discussed in the text after note 46 infra.

35B. See Re D per Denning L.J. at p. 717.

35C. See legal consequences of adoption infra.

35D. c.f. English Adoption Act (1949) s. 2 (1)(c) amending the Act of 1926 Since that time it has been clear that in English law an illegitimate may be adopted by either the father or the mother. See Re D per Denning L. J. at p. 717—718 on the advantages of adopting an illegitimate, and the legal consequences of adoption infra; see also Halsbury's Laws of England (3 ed.) Vol. 21 p. 231; Bromley op. cit. (1976 ed.) p. 358. See however infra notes 39, and 40 on the restrictions introduced recently on adoption by one person acting as sole adoptor.

35E. ss. 2(1), 3(2).

36. s. 3(2).

36A. The recommendation of the Stockdale Departmental Committee on the adoption of children in England Cmnd 5107 (Oct. 1972) para 70—78 has been accepted in the Children Act (1975); See Bromley op. cit. (1976 ed.) p. 360.

36B. ss. 3(4), 7(2), Bromley op. cit. (1976 ed.) p. 358—359.

36C. proviso to s. 3(4), s. 7(2).

36D. s. 2 (2). A similar provision is found in the modern English law. Olive Stone, Family Law op. cit. p. 236.

37. See note 76 infra.

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37A. Cases cited in Olive Stone , Family Law op. cit. p. 236 note 53.

37B. See termination of parental power by court order, Ch. VIII supra.

38. Bromley, op. cit. (1976 ed.) p. 359—360; the Adoption Act (1964) of Victoria, s. 10(3) contain a similar provision, Bourke and Fogarty's Maintenance Custody and Adoption Law (1972), p. 276—272.

39. Clarke Hall and Morrison op. cit. (1977 ed·) p. 836; Olive Stone, Family Law op. cit. p. 236 citing, the Adoption Act (1976) s. 15(3).

40. Stockdale Committee report op. cit. para 98—192; Children Act 1975, s. 10, discussed in Clarke Halle and Morison op cit. (1977 ed.) p. 836.

41. See parental power and custody over illegitimate children, Ch. VI supra.

42. See Ch. IV supra.

42A. See legal consequences of adoption infra.

43. Adoption of Children Ord. s. 3(1) (a) and (b) c.f. Adoption Act (1926) s. 2(1).

44. See Buckland and Mc Nair op. cit. p. 44.

45. Adoption of Children Ord. s. 15; G.M.O. Ord. s. 16 K.M.D. Act s. 5(1); c.f. English law, where the Adoption Act (1949) s. 11(1) introduced for the first time the concept that the adopter and the adoptee were within the prohibited degrees of consanguinity. Marriage between an adopter and an adoptee is therefore prohibited in the English law, Halsbury's Laws of England 3rd ed. Vol. 19 p. 782—783, Adoption Act (1958) s. 13(3); now see Children Act (1975) Bromley op. cit. (1976 ed.) p. 377 note 1.

46. Proviso to s. 3(1) b; c.f. provisions in marriage statutes cited in note 45 supra.

46A. See Ch. VII note 208 A supra.

47. s. 2(1) of the Act of 1926 requiring an age difference was repealed by later legislation, but the adopter is required to be of a specified age. The Stockda Committee Report op. cit. para 70-78 suggested 21 as the minium age for an adoptor and this reccommendation was accepted in the Children Act (1975) s. 10 a. 1975 (1). Now see, to the same effect, Adoption Act (1976) ss. 14, 15

48. The age limit was not relevant in English law when the applicant for an adoption order was the mother or father, see Bromley (1976 ed.) op. cit. p. 358. The Children Act (1975), and the Adoption Act (1976), specify the age of 21 in all cases, see note 47 supra.

49. M. K. Masters. Inter Country Adoption, Law and the Commonwealth (1971) p. 561 at 565.

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50. Adoption of Children (Amendment) Act s. 2 amending Adoption of Children Ord. s. 6(3).

50A. See Adoption of Children (Amendment) Act No. 38 of 1979 s. 2 amending s. 3(6) of the principal enactment, and repealing the amended section introduced by the Amending Law No. 6 of 1977.

51. s. 3(5); see also s. 7(2); Menikhamy *v* Podi Menika.

52. s. 4(b).

52A. Clarke Hall and Morrison, op. cit. (197) ed) p. 838, 841. Bromley, op. cit. (1976 ed.) p. 360—364.

52B. A similar provision is found in the Adoption Act (1964) in Victoria, cited in Bourke and Fogarty op. cit. p. 290.

53. s. 4(a).

54. s. 3(3).

55. s. 3(3); this interpretation was accepted in the early English law on adoption, where the word "parent" was construed as not referring to the putative father— Re M (1955) 2 A.E.R. 911 C.A., interpreting the Adoption Act 1950, and following Butler *v* Gregory (1902) 18 T.L.R. 370. The putative father's consent to the illegitimate child's adoption was conceded as being relevant, at a time when the English adoption law made the consent of a person liable to contribute to the child's support, a necessary requirement for adoption, see Re M. per Birkett L.J. at p. 915, and the editor's note on the case, at p. 911; see also Harris *v* Hawkins (1947) 1 A.E.R. 312, interpreting the proviso to s. 2(3) of the Adoption Act (1926), which is identical with the provision in the Sri Lanka Adoption of Children Ordinance. The relevance of the putative father's consent was discussed in this case because he had the custody of the child. See duty of support, Ch. X infra. on the putative father's liability to provide support.

55A. See text at note 55 supra.

55B. See Re M per Birkett L.J. and the editor's note on the case.

56. s. 3(3) s. 17.

56A. s. 3(3).

57. s. 3(3) proviso; The comparable provision in the English Act (1926) i.e. s. 2(3) does not contain a similar sentence.

57A. s. 4(a).

58. s. 3(3) and the proviso; see Re B (1967) 3 A.E.R. 629.

58A. to Harris *v* Hawkins; but see the language of the latter part of the proviso s. 3(3).

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59. Adoption of Children Act (1958) s. 51.(2); J. C. Hall, (1972) 31 C.L.J. op. cit. at p. 259; Re C (1964) 3 A.E.R. 483 (C.A.) at 495; c.f. Re W (1971) 2 A.E.R. 49; the Stockdale Committee report op. cit. para 205—217; Goldstein Freud, Solnit, Beyond the Best Interests of the Child, op. cit. Chs. 2,4; Bromley op. cit. (1976 ed.) p. 362 —363; Olive Stone, Family Law op. cit. p. 230.

59A. The Adoption Act (1964) in Victoria includes such a general provision in addition to other grounds for dispensing with consent. Bourke and Fogarty op. cit. p. 288—289.

60. s. 3(3) proviso though contra Harris *v* Hawkins.

60A. Act of 1926 s. 2(3) proviso; c.f. for the present law, Bromley op. cit. (1976 ed.) p. 360—364.

60B. Voet 25.3.10; S *v* Mac Donald 1963 (2) SALR 431, see duty of support Ch. X infra.

60C. See Clarke Hall and Morrison op. cit. (1972 ed.) p. 1024.

60D. The English Adoption Act (1958) contained a definition of the term "guardian", (s.57) and required the consentof the parent or guardian of the child, (s. 4(a) —see Clarke Hall and Morrison op. cit. (1972 ed.) p. 1024.

60E. Re E (P.) (1969) 1 A.E.R. 323; Olive Stone, Family Law op. cit. p. 231.

61. See notes 36B and 36C supra.

62. ss. 2(1) 13(1).

63. A.J.L. ss. 5(d), 46(1).

63A. Judicature Act ss 24(1) 24(2), Third Schedule, and 29(2) introduced by Judicature (Amendment) Act No. 37 of 1979 s. 4.

63B. See e.g. the facts of Menikhamy *v* Podimenika.

63C. 13(2), Adoption Ordinance giving the Supreme Court the power to make orders in this respect; c.f. also A.J.L. s. 7(a).

64. s. 4(b).

65. s. 13 (4). See also Menikhamy *v* Podimenika, at p. 33.

66. See Bromley op. cit. (1976 ed.) p. 368—369; Olive Stone, Family Law op. cit. p. 232, discussing the Children Act (1975) and the Adoption Act (1976); c.f. Adoption Act (1926) s. 8.

66A. See s. 13(4), and c.f. the facts of Menikhamy *v* Podimenika where the father was the guardian litem; c.f. the Adoption Act (1926) s. 8 which permitted a court to appoint a local authority as guardian ad

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litem, with their consent; see note 50 supra.

67. Issaac op. cit. Ch. I, III, Bromley, op. cit. (1976 ed.) p. 356—357.

68. Clarke Hall and Morrison, op. cit. (1977 ed.) p. 843.

69. Clarke Hall and Morrison, op. cit. (1977 ed.) p. 837 discussing provisions in the Children Act (1975); Olive Stone, Family Law op. cit. p. 231 on the Adoption Act (1976).

70. s. 7(1)(2) following Adoption Act (1926) s. 6; the provisions with regard to consent apply to such an order, and it can only be made in the circumstances in which an adoption order can be granted. See Bromley op. cit. (1976 ed.) p. 372 on interim orders for adoption.

71. Goldstein Freud, Solnit Beyond the Best Interests of the Child, op. cit. p. 22.

71A. A similar provision is found in the Adoption of Children Act (1964) of Victoria, Bourke and Fogarty op. cit. p. 276—277.

72. See ss. 4(a) 3(3) 3(4) and 3(5), and the discussion on the requirement of consent, supra; see also Menikhamy *v* Podimenika.

72A. See Menikhamy *v* Podimenika at p. 34.

72B. s. 4(a),(b),(c), s. 14; Adoption Act (1926) s. 3(c),9; c.f. English law today, prohibiting any unauthorised payment or reward made in consideration of an adoption. Clarke Hall and Morrison, op. cit. (1977) p. 843.

73. s. 5.

74. s. 4(a), s. 6(1)(3); Stockdale Committee report, op. cit. para 184—185; see also Bromley op. cit. (1976 ed.) p. 374.

75. s. 9.

76. s. 2(2); c.f. James, op. cit. p. 64; Adoption Act (1958) s. 26 permitting revocation of an adoption order when an illegitimate who has been adopted by either parent is legitimated by the subsequent marriage of his parents; See on legitimation, Ch. IV supra.

76A. See Menikhamy *v* Podimenika especially at p. 34, and 40. The dissenting opinion of Tittawela J. that the order was voidable for want of the child's consent is contrary to s. 3(5) of the Ordinance.

77. s. 6(3); See also s. 6(1)(2) and proviso to s. 6(5).

77A. s. 4(a); see also s. 6(1).

78. s. 6(1).

79. s. 6(2).

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79A. Act of (1926) s. 5(1); Buckland and McNair op. cit. p. 45.

79B. s. 6(3).

80. c.f. English Act (1926) s. 5(2); Adoption of Children Ord. s. 6(4).

80A. See Menikhamy, *v* PodiMenika.

81. c.f. English Act (1926) s. 5(1), Adoption of Children Ord. s. 6(1), 4(a).

81A. See status of the illegitimate in the General Law, Ch. II supra.

82. s. 6(3) and the proviso; Abeysinghe *v* Baudhasara (1967) 72 NLR 385; c.f. Nadaraja, Fideicommissa op. cit. p. 65, p. 66 note 22 that a condition "si sine liberis" fails if there are adopted children, though the latter cannot take as fideicommissaries under an implied fideicommissum.

83. s. 6(3) proviso.

84. s. 6(5) which also contains an exception regarding immovable property inherited or transferred to the adoptee as a child of the adopter.

84A. This is the view expressed on adoption in English law, both prior to and after the significant reforms introduced with regard to the adoptees' status. See T. E. James, A Century of Family Law, op. cit. p. 47; Bromley, op. cit. (1976 ed.) p. 355, 580—582.

84B. Re D. at p. 718.

85. James, op. cit. p. 51.

86. Adoption Act (1949) ss. 9(1)(2) and s. 9(3); Buckland and McNair op. cit. p. 45.

87. See Bromley op. cit. (1976 ed.) p. 580—852, discussing the changes introduced under the Children Act (1975); Stockdale Committee report op. cit. para 326—327.

88. Children Act (1975) discussed in Bromley op. cit. (1976 ed.) p. 376; the Adoption Act (1976) contains similar provisions, see Olive Stone, Family Law op. cit. p. 239.

89. For the differences (the incest barrier to marriage with members of his natural family, devolution of dignity, title or honour) see Bromley op. cit. (1976 ed.) p. 377, Olive Stone, Family Law op. cit. p. 239, 240.

89A. Bromley op. cit. (1976 ed.) p. 355.

90. See Bromley, op. cit. (1976 ed.) p. 356; Isaac, op. cit. p. 116—117.

91. Bromley, op. cit. (1976 ed.) p. 371—372. Clarke, Hall and Morrison op. cit. (1977) p. 843.

91A. s. 6(4).

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92. Adoption of Children Ord. s. 15; see also G.M.O. Ord. s. 16, K.M.D. Act s. 5(1). Muslim law does not recognise adoption, (see note 20 A supra,) and the normal rules on prohibited degrees will apply.

92A. Adoption of Children Ord. s. 15, reflecting the legal position on the prohibited degrees, for marriage as stated in the marriage statutes and in Muslim law, note 92 supra.

93. For the legal position in England see note 45, supra, Stockdale Committee report, op. cit. para 329—332; for South Africa, see Spiro, op. cit. (1959 ed.) p. 33.

94. s. 10.

95. s. 10 (3) 10(4) as amended by Amendment Law No. 6 of 1977; the adoption form in the schedule to the Adoption of Children Ord.

96. ss. 10(6)(a), 10(6)(b).

96A. See Adoption of Children (Amendment) Law (1977) introducing s. 10(B) into principal enactment; see also new s. 11 introduced by this law; c.f. the English law, note 91 supra; the Adoption Act (1964) of Victoria contains similar restrictions on the release of entries in the register of births, regarding adopted children, Bourke and Fogarty op. cit. p. 329.

97. s. 16; See also the text at note 21, supra, and Menikhamy *v* Podimenika.

98. Hayley, op. cit. as cited in note 16 A supra, and at p. 213, 216; J.D.M. Derrett (1956) 14 U.C.R. op. cit. p. 122—123. See also Perera's Armour op. cit. p. 38.

99. See the discussion in the text at note 18 A supra.

99A. See note 17 supra.

100. Sawers, op. cit. p. 25; Nitinighanduwe, op· cit. (the Sinhala ed.) cited in Dayangani *v* Somawathie (1956) 58 NLR 337 at 343.

101. (1846) Austin 74; In Re Unguhamy.

102. Peries *v* Fernando (1915) especially at p. 2.

103. See the discussion in the text at note 18A supra.

104. Tikiri Kumarihamy *v* Punchi Banda (1901) 2 Br. Rep. 299; Tikiri Banda *v* Loku Banda (1905), 2 Bala Rep. 144.

105. See Re Unguhamy; (1845) Austin 52, though contra (1841) Austin 51, Dunuwille *v* Kumarihamy (1917) 4 C.W.R. 99, where a reference in a deed to a person as a son of the adopter was considered evidence of adoption for succession.

106. (1904) 10 NLR 100.

107. p. 104.

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108. See the head note to the case; the Kandyan Law Commission report op. cit. p. 13; Tikiri Kumarihamy *v* Niyarapola; Hayley, op. cit. p. 208.

109. See Hayley, op. cit. p. 202, p. 208, Tikiri Kumarihamy *v* Niyarapola; c.f. Perera's Armour, op. cit. p. 38.

110. (1937) 26 NLR 105.

111. The court was reluctant to accept the evidentiary value of statements made to members of the household or relatives interested in the adoption, see Hearne J. at p. 108, Maartenz J. at p. 106.

112. Ukku Banda Ambahera *v* Somawathie Kumarihamy (1943) 44 NLR 457. c.f. Kobbekaduwe *v* Seneviratna (1951) 53 NLR 354 at 357, incorrectly interpreting Tikirikumarihamy *v* Niyarapola as requiring a public formal declaration of adoption.

113. (1956) 58 NLR 337 at 345.

114. The report of the Commission op. cit. p. 13.

115. p. 16.

116. Hayley op. cit. p. 202, 203, 298. Perera's Armour op. cit. p. 38; Nitinighanduwe op. cit. p. 41; See also dicta in Lokubanda *v* Dehigama Kumarihamy at p. 102 on the relevance of the caste requirment, (1846) Austin 74, Kandyan Law Commission report op. cit. p. 13.

117. The report op. cit. p. 13.

117A. See at notes 125, 126 infra.

118. Modder op. cit. p. 481, 483; report of the Kandyan Law Commission op. cit. p. 14—16; Hayley op. cit. p. 369, 390, 475—481; Nitinighanduwa op. cit. p. 89.

119. Hayley, op. cit. p. 137; note 19 supra.

120. Kandyan Law Commission report, op. cit. p. 14; Nitinighanduwa, op. cit. p. 90; Hayley op. cit. p. 480.

121. c.f. Hayley, op. cit. p. 331, 336—343; Modder op. cit. p. 411, 451 etc.

122. The Kandyan Law Ord. (1938) Part II, the adoptee being described as "a person" rather than as a minor.

123. (1961) 64 NLR 564.

124. Sawers, op. cit. p. 139, followed in Lapaya *v* Dingiri, (1909) 3 Lead. 3; but see Hayley op. cit. p. 203; Nitinighanduwe op. cit. p. 41.

125. C.O. 416/17 op. cit. F. 46., Case of the Barber Caste of Chilaw *v* Washer Caste of Chilaw.

126. (1848) Austin 235; this case was followed by Garvin A.C.J. in Mohomadu *v* Dingiri Menika (1933) 35 NLR 337.

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126A. See Constitution (1978) Art. 12. The Prevention of Social Disabilities Act No. 21 of 1957 s. 3 contains an exhaustive definition of acts involving caste discrimination for the purpose of imposing penal sanctions, but the Act reflects the general policy of the law, against discrimination based on caste. See generally Suntheralingam *v* Herath (1969) 72 NLR 54.

127. s. 7(1).

127A. Incapacity is defined as an incapacity to act due to unsoundness of mind, illhealth or other incapacity, in s. 7.

128. s. 7(1) and the proviso; Kandyan Law Commission report, op. cit. p.13.

129. s. 8(1)(2)(3).

130. K.M.D. Act s. 5; see also Adoption of Children Ord. s. 15.

131. See s. 8(4).

131A. See the discussion of these provisions, in regard to custody disputes between parents and third parties, Ch. VI supra.

131B. s. 25.

132. See ch. VI supra.

133. This transpired in an interview with officials in the Department of Probation and Child Care.

134. See Abeyawardene *v* Jananayake.

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CHAPTER X

THE RECIPROCAL DUTY OF SUPPORT

1. Family Support in the Indigenous Laws

The reciprocal obligation of parents and children to maintain each other, is an aspect of the Sri Lanka law which has been developed in the context of Western legal values. Nevertheless the indigenous laws recognised the duty of support as a fundamental obligation between the members of a family, even though the concept of a civil action to enforce the duty was unfamiliar to these systems.

An authoritative work on traditional Sinhala law, states that "it is a fundamental principle of the law, that every person born a member of the family retains throughout his or her life the right to maintenance out of the family property in case of absolute need."[1] Even members of the family who had no fixed rights of inheritance in family property could claim maintenance from it in time of need. Thus the diga married daughter could, if she were divorced, illtreated or widowed, return to her parents, live with them, and be supported by them. Though she ceased to have any rights of inheritance in the paraveni (ancestral) property on contracting such a marriage, if she became indigent or destitute, she could claim maintenance from such property in the hands of her brothers who had inherited it. Her right of maintenance was effective as a charge against the property. The heirs were also liable to support an umarried daughter of the deceased, and the widow had a right to be maintained out of the paraveni property if the acquired property left by the deceased was inadequate for the purpose.[2] Besides, the concept of familial support or rendering assistance as a member of the family in time of need, specifically in infancy, old age and infirmity, was valued highly in the traditional society. It had an important impact on the law on donations, and could be the basis for claiming a right to a share in the estate of the deceased in circumstances where there were no fixed rights of inheritance.[3] The legal system appears to have reflected accepted social values, for the English government officials giving evidence before the Commissioners of Eastern Inquiry (1929) refer to the restrictions on bequeathing property, as well as the

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practice by which Kandyans assumed full responsibility for disabled members of the family who were "incapable of procuring a subsistence."[3A]

Some provisions in the Tesawalamai Code indicate the importance attached to the duty of supporting dependant members of the family in time of need. The duty to dower a daughter, the reference to the obligation of sons to utilise the acquired property of ageing parents to maintain them in time of need, and the connection between familial assistance and rights of inheritance [4] suggests that the reciprocal obligation of parents and children to provide for each other was an accepted legal value. The Mohammedan Code which is a collection of the Customary laws recognised among the Muslims of Sri Lanka, contained provisions regarding maintenance of members of the family.[5]

2. Duty of Support in the Roman Dutch Law

The Roman Dutch law which is the source of the principles governing some aspects of the law of parent and child in Sri Lanka, contains developed principles on this subject.[6]

The obligation of support is not a corollary of the parental power as it is understood in the Roman Dutch law. Natural parents who are able to fulfil the obligation, are under a duty to support all children who are not capable of supporting themselves. The duty of both parents extends to the support of major and minor children irrespective of whether they are legitimate or illegitimate,[6A] and is based on the concept of parental dutifulness (*ex officio pietatis*) or on the natural obligation that arises from the blood-tie. It commences at the birth of the child, though under the *nasciturus* rule,[6B] it may arise in respect of an unborn child, who is afterwards born alive. It is enforceable as long as the parent is able to provide support, and the child, irrespective of age, is unable to maintain himself. The duty extends to the provision of food, clothing, accommodation, and an education or professional training. The scale of maintenance varies according to the means of the parents and their standard of living. This obligation arises however only in respect of a child who cannot support himself. Children with income-bearing property, or who

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are earning, are not entitled to claim maintenance from the parents. In the case of an illegitimate, the mother can claim lying in expenses as well as funeral expenses if the child dies,[6C] from the father.

There is some authority in support of the view that as between parents, the primary obligation is imposed on the father of the child.[7] The father's primary obligation to provide maintenance for a legitimate may have been influenced by the fact that a married man was manager of community property.[8] In the Roman Dutch law the duty of maintenance is not a corollary of parental rights, but is based on the blood tie. This is why a putative father who is denied parental rights is under a legal duty to support his children, and maintenance can also be claimed by adult children in need. The fact that the mother's parental rights are subordinate to the father's rights over legitimate minors, cannot therefore provide adequate justification for a distinction between parents as regards their respective duties of support. When the wife's right to separate property is recognised, there is authority in the modern Roman Dutch law as applied in South Africa, to support the proposition that she must contribute to the children's maintenance when she has the means to do so. She is even required to bear the responsibility of maintenance alone, when the father is unable to provide for the children.[9] Either parent incurs sole responsibility for maintenance on the death of the other.[9A]

The duty of support is not cast upon step parents since the rationale for the obligation recognised in the Roman Dutch law, was the existence of a blood tie between the parent and the child.[10] The argument that acceptance of the obligation of support is inherent in the contract of marriage has been rejected in South Africa, even though an obligation to support a step child was treated in Roman Dutch law as one of the consequences of a marriage in community.[10A]

There is some controversy among the textwriters with regard to whether the obligation terminates with the death of the parents.[11] The view that it does not, and that it is a debt that can be enforced against the estate of the deceased parent, has been expressed in a long line of decisions in South Africa which recognised the claims of minor children in this respect.[12] It has been pointed out more recently, that this development was the result of a wrong reading

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of Groenewegen, and the current judicial trend in South Africa is against the extension of this liability.[13] It is therefore unlikely that the liability of the estate will be recognised in respect of needy major children.[14]

If parents are unable to provide maintenance, the responsibility is imposed on grandparents, but only on the maternal grand-parents, in the case of illegitimate children.[15] Reflecting the reluctance to recognise a liability after the death of a person who was under a duty of support, a South African court has decided that a claim cannot be made against the estate of the grandparents.[16]

The duty of support between parents and child is considered reciprocal in Roman Dutch law. Thus children with means are under a legal duty to maintain indigent parents who are unable to maintain themselves.[17] Indigency is a question of fact, and must be clearly proved.[18] The obligation to support parents can even devolve on a minor with means.[19] However since there is a duty of support between husband and wife, it has been decided in South Africa that a married woman must look for support to her husband first, if he has the means to support her. Her right to claim from the child arises only in the event of her being unable to claim from the husband, and thus in need of support.[20]

There is authority in the Roman Dutch law that the duty of support is reciprocal even between the natural father and the illegitimate child.[21] The principle is obviously based on the concept of the blood tie. The natural father of an illegitimate child, has no legal status as a parent. However just as he is under a duty to support the child, the latter is under an obligation to support him.[22]

The Roman Dutch law also buttressed the obligation of support through the law on civil injuries. Thus a person who wrongfully caused bodily harm or death is liable in delict to dependants for the pecuniary loss resulting from the deprivation of support.[22A]

Despite this legal heritage on the subject of support in the Customary laws and in the Roman Dutch law, the Kandyan Law Ordinance, (1938) introduced changes antagonistic to the concept of family maintenance, while the General law in Sri

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Lanka has been developed in the context of the Maintenance Ordinance 19 of 1889, introduced during the British period of colonial rule. This legislation itself was influenced by the attitudes prevalent in the English law on the obligation of maintenance between members of the family. Consequently the statutory obligation of maintenance when it was first introduced and applied, was dramatically out of harmony with the legal values accepted and recognised in the indigenous law, as well as the Roman Dutch law which has provided the foundation for other areas of the Sri Lanka law on parent and child.

3. Duty of Support in the English Law

A child had no legal right to maintenance in the Common law, and the duty of support that is now recognised is a product of legislation over the centuries.[23]

The duty of the parents to provide for their children has been sometimes described[24] as a moral obligation and an unenforceable duty, but it is clear that there was no civil liability for maintaining a child. The father incurred legal liability even in respect of the bare necessaries provided to a legitimate child, only if the latter had been constituted his agent, or if his wife had obtained the necessaries for the child in her capacity as the husband's agent of necessity. An illegitimate child was deemed a *filius nullius* to whom neither parent owed any legal duties. Obligations regarding maintenance and support were introduced into the English law by periodic legislation, commencing with the Poor Law Acts that were first enacted in the sixteenth century. It is the Poor Law Acts which imposed the duty of supporting an illegitimate child on the mother, and also enabled her to obtain maintenance from the putative father. The Poor Relief Act of 1601 imposed a duty on parents' to support children under fourteen in their custody, and made neglect of this obligation an offence.

The duty to maintain legitimate children was expanded in the course of time, while the law with regard to illegitimates was amended and consolidated in the Bastardy Laws (Amendment) Act of 1872, enacted a few years before the Sri Lanka statute on Maintenance. The legislation in England adopted a quasi criminal approach; the object of affiliation or proving the illegitimate's

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relationship to the natural parents in the early years was to enforce the duties of support, so that the child did not become a charge on parish funds. The duty of parents to support their children is described even in the modern English law as a duty owed to the other parent or a third party, rather than as one directly owed to the child. The child has thus no independent right of support.

4. Duty of Support under the Maintenance Ordinance (1889)

The background to the Ordinance

The early legislation on maintenance in the British period of colonial rule in Sri Lanka reveals the impact of English legal values of that time. For instance when the Vagrant's Ordinance of 1841 was enacted, the statute included provisions making it a punishable offence for any person "being able, wholly or in part to maintain his family (to leave) his wife or his child, legitimate or otherwise without maintenance or support, whereby they shall become chargeable to or required to be supported by others."[25] Since the provisions on this aspect were contained in a general Sri Lanka statute making vagrancy a criminal offence, the courts refused to recognise that the Ordinance created a duty of maintenance which could be enforced in an independent action.[26] Nevertheless the statutory offence of failure to maintain reveals the influence of the concept of maintenance liability in the English Poor Laws referred to above, and it is not surprising that the provisions in the Vagrant's Ordinance were used for the purpose of obtaining maintenance for wives and children.[27] The statute permitted the court to order that the fine or penalty for the offence be paid to "any person deserving of reward",[28] and this provided a procedure for payment of maintenance to a wife or child. The concept of a legal action to enforce the duty of support had thus become a familiar feature of the legal system.

The procedure in the Vagrant's Ordinance appears to have been considered the only legal remedy for wives and children denied support, for it is the inadequacies in this procedure that inspired the introduction of a special statute on maintenance. In his report on the Maintenance Ordinance No. 19 of 1889, the Attorney-General pointed out that non maintenance was an offence under the Vagrant's Ordinance, and that criminal prosecutions had to

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be initiated each time a person defaulted in supporting his wife and children. He drew the attention of the administration to the fact that even though the statute gave some relief to the dependants, the court was powerless to order a regular payment of maintenance.[29]

The Attorney-General's report and the proceedings in the Legislative Council, make it very clear that the Maintenance Ordinance was intended as a statute which created a new and effective law on the subject of maintenance of wives and children. Reforms in the law on this subject had been contemplated earlier, and an effort made to introduce a chapter on maintenance in the Criminal Procedure Code, on the lines of Chapter 36 of the Indian Criminal Procedure Act of 1862 which was the model for the Sri Lanka Code. However the chapter on maintenance in the original draft of the Criminal Procedure Code was omitted by the Secretary of State for the colonies, on the argument that amendments to the law on maintenance were out of place in a Code on Criminal Procedure, and should be introduced by a separate enactment.[30] When this special legislation on maintenance was introduced later, the chapter that had been excluded from the Criminal Procedure Code was enacted as the Maintenance Ordinance No. 19 of 1889. This explains the similarity between the Ordinance and the chapter on maintenance of wives and children in the Indian Criminal Procedure Act.

The Maintenance Ordinance also incorporated some of the procedure found in the Bastardy Laws (Amendment) Act of 1872, when it introduced the concept of the single order which could be enforced whenever there was default in the payment of the quantum of maintenance fixed by the court. A summary criminal procedure was accepted as most suitable for the maintenance action to be instituted in the Magistrate's Court, in order to ensure that support would be obtained speedily with a minimum of delay. The special procedural safeguards incorporated in the English statute of 1872 were enacted in the Maintenance Ordinance, as measures that would prevent false and vexatious applications in respect of illegitimate children. The Ordinance introduced certain provisions borrowed from the Criminal Procedure Code, but created a special liability and a procedure for enforcement that was different to the procedure used ordinarily in a Magistrate's Court.[31]

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Judicial interpretation of the statutory liability for maintenance

The use of a procedure that was familiar to criminal prosecutions in the maintenance action was the source of a great deal of confusion on the nature of the liability for support created by the Maintenance Ordinance. The Sri Lanka courts were divided on the issue whether the Ordinance created a civil liability, or whether non-maintenance was an offence to be governed by the provisions of the Criminal Procedure Code, and in particular the rules regarding autrefois acquit. Sometimes judges were prepared to concede that the Ordinance did not deal with a strictly criminal liability, even though the maintenance action was considered as being regulated by the provisions of the Criminal Procedure Code.[32] Nevertheless there was a strong body of opinion that the Criminal Procedure Code was relevant in a maintenance action, because non-maintenance itself was a criminal offence.[33] In the early case of **Rankiri** *v* **Kiri Hatana,**[34] Burnside C. J. confirmed this view in delivering the judgment of the majority of the judges of the Supreme Court. He stated that the Maintenance Ordinance did not enforce a civil liability regarding the provision of support for wives and children. In adopting this interpretation the court followed an earlier decision under the Vagrant's Ordinance.

The background to the Maintenance Ordinance clearly indicates that the interpretation in **Rankiri** *v* **Kiri Hatana** was not correct. Thus Clarence J. in his dissenting judgment placed the liability under the statute in its correct perspective, when he distinguished between the liability created by the Vagrant's Ordinance, and what he described as the civil liability for support under the Maintenance Ordinance. This dissenting judgment in **Rankiri** *v* **Kirihatana** was follwed by Bonser C.J. in the later case of **Subaliya** *v* **Kannangara,**[35] and was also endorsed in a long line of judicial decisions in the Supreme Court.[36] These cases have refused to treat non-maintenance as an offence governed by the procedure and the concept of autrefois acquit set out in the Criminal Procedure Code. The Sri Lanka courts now accept that the Ordinance did not create a criminal liability, but adopted the procedure in the Magistrate's court merely to ensure that the civil liability of support would be enforced speedily and inexpensively.[37]

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Though the rationale for the statutory liability has sometimes been explained in terms of the policy of preventing a person's dependants becoming a charge on the community,[38] that view has been criticised as being out of harmony with the provisions of the Maintenance Ordinance. It has been pointed out that even if the Vagrants Ordinance reflected that approach, the statute on Maintenance "is not concerned with questions of vagrants or vagrancy, and has for its avowed purpose the provision of maintenance for wives and children."[39]

5. The Relevance of the Roman Dutch Law on Liability for Support in the Modern Law of Sri Lanka

In **Rankiri** *v* **Kiri Hatana,** Clarence J. compared the liability of support created by the Maintenance Ordinance with the statutory liability created by the Bastardy Law in England. However, subsequent decisions have referred to the Roman Dutch law as providing the foundation for the duty of support imposed by the Ordinance.[40] In any case, it appears to be well established in our courts that a civil action is not available for the purpose of claiming maintenance, as a legal remedy apart from or parallel with the action under the Maintenance Ordinance. The dictum of Burnside C. J. in **Rankiri** *v* **Kiri Hatana,** that there is no civil liability on a father to maintain his children[41] is certainly borne out by the subsequent cases, even though they rejected his opinion that the Maintenance Ordinance did not enforce a civil liability. Thus in **Perera** *v* **Nonis** and **Justina** *v* **Arman,** Woodrenton J. having agreed that the statute created a civil liability, commented that it had superseded or swept away the common law on the subject.[42] This judicial view was followed in obiter dicta in several other cases,[43] culminating in the the Full Bench decision of **Lamahamy** *v* **Karunaratna.**[44] The obsolence of the civil action for maintenance is emphasized in more recent decisions that deal with the scope of the Maintenance Ordinance.[45] The opinion of Bonser C.J. in the early case of **Subaliya** *v* **Kannangara,** that a civil action for maintenance based on the Roman Dutch law is available as a parallel remedy[46] does not accord with what has been accepted in many cases as the current legal position.

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The view that the Ordinance swept away the Roman Dutch law on maintenance has been supported by reference to the early decision in the case of **Menikhamy** *v* **Loku Appu.**[47] What the case decided was that an action under the statute was the only remedy for non-maintenance, in the absence of any evidence that the deserted wife had a legal right to institute a civil action for maintenance. The correctness of even this view can be queried, since there are reported decisions in which a Kandyan wife's claim to maintenance has been recognised, and dicta supporting the availability of the same right of action to a deserted wife in the Maritime Provinces, prior to the Maintenance Ordinance.[48] In any event **Menikhamy** *v* **Loku Appu** does not support the argument that the Maintenance Ordinance swept away the Roman Dutch law obligations that may have existed before the statute was introduced. It is at best an authority in favour of the view that there was no civil action before the Maintenance Ordinance was passed.

The history of the Maintenance Ordinance indicates that the inspiration for the statute was the English law on support, and the provisions on maintenance in the Indian Criminal Procedure Act. The Ordinance cannot, in this context be treated as legislation that was intended to sweep away the Roman Dutch law principles on the duty of support. There is also nothing in the Ordinance to indicate that it was intended to replace the Roman Dutch law and confine the obligations of support in this country to the duty prescribed by the statute.[49] If the Ordinance was intended to be a complete code on the subject of maintenance, this was only because it was assumed that there were no other legal principles governing the obligation to support dependants.

Was this assumption correct? If it was, clearly the Maintenance Ordinance provides the only source of the legal principles on the subject of maintenance. In **Lamahamy** *v* **Karunaratne,** the majority of judges in a full court agreed that the record of legislation on this subject in the British period of colonial rule suggests that a civil action for maintenance was not available in Sri Lanka. While the historical material on the background to the Ordinance clearly supports this inference, it is not correct to attribute to the legislators of that time, an accurate knowledge of the existing legal position in the country. We have observed that there were

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decisions in which the deserted wife's right to claim maintenance from the husband was recognised. There is also an early case in which the husband's liability to provide accommodation for his children has been conceded.[49A] Besides, it has been pointed out in the Supreme Court that in the absence of clear proof that the Roman Dutch law was not introduced in the country, it is not correct to assume the contrary.[50] Leading cases have queried the validity of adopting an ecclectic attitude so as to exclude fundamental principles of the Roman Dutch law.[51] Since the source of the General law on many aspects of family relations is the Roman Dutch law, the courts are not justified in refusing to apply the principles of that system to an obviously important subject such as family maintenance.[52] Though the argument of desuetude has sometimes been used merely because there is no reported case in which a civil action has been maintained,[52A] our courts have often emphasised that "if a right exists, it is not the less law because hitherto suitors may not have thought it expedient to exercise it."[53]

The judicial view that the Maintenance Ordinance provides a parallel remedy is supported by two decisions of the Supreme Court pronounced before **Lamahamy** *v* **Karunaratna**.[54] It has been endorsed by recent decisions which have drawn upon the principles of the Roman Dutch law to recognise obligations of support in respect of situations which are not covered by the Ordinance.[55] Once it is conceded that the Roman Dutch law of support is a source of the law on maintenance, it becomes more difficult to justify the interpretation of the Ordinance as a compelete code on the aspects of support that it covers. For the argument that it provides the only remedy is based on the assumption that there was no other action based on the Roman Dutch law, at the time the Ordinance was introduced. If some aspects of the Roman Dutch law on maintenance can be resurrected now, even though litigants have not asserted their rights before, it is logical to assume that the civil action for maintenance was part of the law of Sri Lanka, even if it was not used before the introduction of the Ordinance.

Lamahamy *v* **Karunaratna** is treated as a Full Bench decision which is authoritative on the proposition that the Maintenance Ordinance is a complete code on the aspects of support that it covers. The actual decision in the case was based on the avail-

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ability of a claim for maintenance against the estate, in itself a controversial point in the Roman Dutch law. The comments in the case on the application of the Maintenance Ordinance may therefore be considered obiter dicta. It is submitted that it is not too late to follow the parallel remedy view and reverse the long accepted trend in our courts, by placing the liability created by the Maintenance Ordinance in its correct perspective. This statute can still be viewed as creating a parallel source of legal principles on the subject of maintenance, even if litigants have over the years, confined themselves to utilising the remedy that the statute offers. The history of the Ordinance does not endorse the view that it is a complete code on the law governing the obligation of support between parents and children, or even a father and his legitimate or illegitimate issue.

6. The Reciprocal Duty of Support in the General Law

(i) Parental resposibility for support of children

(a) Liability under statutes

The Father's duty of support under the Maintenance Ordinance

If a man has sufficient means, the Maintenance Ordinance imposes a duty upon him to provide for his legitimate or illegitimate minor children who are unable to maintain themselves.[56] He incurs a liability under the statute if he refuses or neglects to maintain these children. The adequacy of the father's means may be established by proof of a source of income. However there are decisions which have held that a man who has earning capacity and wilfully abstains from obtaining an income, incurs a liability under the Ordinance as a person with adequate means[57] to support his children. In determining whether there is a deliberate failure to acquire the means with which to support his dependants, a court is required to consider "whether a man is in health and strength, and able to earn by work suitable to his past and present condition in life, and whether such work is readily obtainable."[58] Thus insanity may be pleaded as a factor that relieves the father from liability,[58A] presumably if he has no source of income or assets. The judicial decisions therefore leave room for a flexible and humane approach to this question in the context of objective factors such as the availability of employment, and subjective issues like a man's aptitude and experience for the work accessible to him.

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The illegitimate child

When English statutes imposed a liability foreign to the Common law, requiring a man to support his illegitimate children, it was inevitable that special care would be taken to incorporate safeguards protecting men from false and vexatious claims. The Maintenance Ordinance of Sri Lanka reflected the policy of the early English law, when it enacted the safeguards in the Bastardy Laws (Amendment) Act of 1872, in respect of applications for the support of illegitimate children.[59] Thus, an application will not be entertained under the Ordinance, in respect of an illegitimate, unless it is made within twelve months of the birth of the child, or unless it is proved that the man alleged to be the father has maintained it within a period of twelve months next after the birth of the child. If the man has gone abroad within this period the application must be made within the twelve months next after his return. In **Seneviratna** *v* **Podimenike** the Supreme Court held that the magistrate had jurisdiction to hear an application presented after the specified period, on proof of special facts not mentioned in the Ordinance. The court justified its decision on the argument that in the absence of specific provisions to cover the situation, it was free to make an order that "will promote the ends of justice" and secure maintenance for an illegitimate child.[59A] However it is doubtful whether the statute gives the courts this discretion.

There is also a further obstacle to an application for maintenance that is made on behalf of an illegitimate. An order cannot be made against the father on the evidence of the mother, unless her testimony is corroborated in some material particulars, by other evidence.[60] The courts are not required to decide the issue of paternity until it is established that the claim was brought within the specified period. However paternity must be decided before the court considers whether there has been a failure to support the child.[61] The Supreme Court has interpreted the provisions in the Maintenance Ordinance as not requiring the corroboration of the mother's evidence that the putative father supported her illegitimate child within the specified period.[62] But corroboration of the mother's evidence on paternity is vital once her application comes to trial,[63] and has been considered from very early times,[64] specially important in establishing paternity. If

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the defendant denies that he is the father of the child, a court cannot make an order against him on the uncorroborated testimony of the mother.

The strict attitude to the requirement of corroboration reflects the view that the Ordinance creates an exceptional liability to support an illegitimate, which must not be imposed on a man, unless he is proved to be the father according to the high standards associated with criminal prosecutions. Thus it has been decided that it is unreliable to base a finding of paternity on the uncorroborated testimony of the mother, however true or impressive her evidence appears to be.[65] Though the Sri Lanka courts have taken this view and emphasised the need to satisfy the statutory requirement of corroboration, they have used their discretion to adopt a more flexible approach, when determining the standard of proof necessary to establish paternity in maintenance actions. The desirability of identifying the father of an illegitimate, and enforcing his essentially civil obligation to provide support has inspired the courts to adopt the civil standard of proof on a balance of probabilities in maintenance actions.[66] Thus when a maintenance action is brought in respect of the child of a married woman against a man who is not her husband, rebuttal of the presumption of legitimacy is deemed to establish the defendant's paternity.[67] Corroboration has been judicially defined as "an independent item of evidence which shows or tends to show. . . . (defendant) was the father of the child."[68] If the evidence of the mother is in itself unreliable, and not accepted, a question of corroboration does not arise.[69]

The mother's own conduct is not regarded as adequate,[70] but circumstantial evidence of a close personal relationship is usually accepted by the courts as corroborative evidence.[71] There has been some controversy whether statements regarding paternity made by the mother to a third person within a few months of conception can be considered evidence that corroborates her testimony. Some early cases were prepared to accept this evidence on the basis that it came within the definition of corroboration in the Evidence Ordinance.[72] But in the Full Bench decision in **Ponnammah** *v* **Seenithamby**[73] that sets out the current legal position[74] the court held that previous statements by the mother

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to third persons could not be accepted if made after sexual relations had ceased. The court emphasised that these statements would qualify to be considered as corroborative evidence, only if they were made at or about the time sexual intimacy was continuing. However there is dicta in **Ponnammah** *v* **Seenithamby,** that a complaint made against the defendant at a formal inquiry, to a competent public authority investigating the fact of intimacy, may be accepted as corroboration even if it was not made at or about the time when sexual relations took place.[75] Besides incidents that take place after sexual relations have ceased have been considered to corroborate the mother's testimony.[76]

Silence and lack of protest by the defendant when an allegation of paternity is made against him in circumstances where he may reasonably be expected to reply, has been considered adequate.[77] Similarly, an offer to marry the woman, even if coupled with a denial of paternity.[78] False statements by the defendant have also been accepted as corroborating the mother's allegation of paternity.[79] Evidence of mere opportunity for intimacy is not regarded as corroboration.[80] Nor is the resemblance of the child to the plantiff.[81] Though past precedents are relevant, in the final analysis it seems that the Ordinance "does not in any way place any limits as to the type or the nature of corroborative evidence."[81]

Where there is evidence that is deemed to corroborate the mother's testimony, the court must decide whether it is sufficient to support the allegation that the defendant is the father of the illegitimate child.[82] If the defendant admits, or it is proved that sexual intercourse had taken place at the time when the child was conceived, it is no defence to prove that there were other men who had intercourse with the mother. Nevertheless blood test evidence may be led as circumstantial evidence to prove that the defendant is not the father of the child.[83] Once the question of paternity is decided on the merits in a maintenance action, it is deemed a final determination for the purpose of liability under the Ordinance.[83A] Even where an applicant withdraws her case on the trial date, or it is dismissed because she does not have evidence to prove paternity, it has been held in several cases that an order dismissing the application operates as a bar to a subsequent application for maintenance.[83B] These cases are in conflict with the

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flexible interpretation adopted in some cases that a fresh application can be presented when there has been no hearing or adjudication on the merits.[83C] In England and some other Common law jurisdictions, "claims in respect of an illegitimate child, constitute an exception to the general rule of res judicata,"[83D] so that a dismissal even after adjudication on the merits does not bar a subsequent application provided there is fresh evidence. The present restrictive attitude adopted by the Sri Lankan courts is hardly justified in view of the fact that the finding on paternity in a maintenance action does not operate as a declaration of non paternity.

The Sri Lanka courts have interpreted the Ordinance as conferring a right of support in favour of the illegitimate child.[84] The application for maintenance can also be made by the mother or any other person, *on behalf of the child.*[85] These circumstances, and the language used in the section requiring corroboration,[86] suggest that the mother's evidence regarding paternity is not essential in an application under the Ordinance. This view is supported by the decision and the dicta in a case where an action was permitted when the Plaintiff was a dumb woman who did not testify.[87] The requirement of corroboration is relevant only if the mother testifies,[88] and the problems it poses for an application in respect of an illegitimate may be avoided where paternity can be established by other evidence.

Inability of the child to support itself

The Maintenance Ordinance imposes a liability in respect of a child who cannot maintain himself.[89] If the child has independent means which are adequate for his maintenance, the father will not be liable in an action for maintenance.[90] The fact that a child is being maintained by the charity of another person or an institution does not relieve the father from liability to provide for it.[91] A claim may also be made on behalf of an infant when its basic nourishment is provided by the mother who breast feeds it.[92] The child's capacity to look to the mother for support is, like his ability to contribute to his own support, relevant to the quantum that can be claimed from the father rather than the creation of the legal duty to provide for the child.[93]

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The Father's neglect or refusal to maintain the child

Maintenance is interpreted flexibly by the Sri Lanka courts. It has been recognised that even an infant's needs go beyond the requirements of basic nourishment, and that maintenance can refer to provision of shelter, clothing, drugs and food,[93A] and education.[93B] In determining whether there has been a neglect or refusal to maintain the child it has been stated that the courts will not assess the manner or the adequacy of maintenance provided by the father, for he is deemed to incur liability only if the plaintiff proves a total denial of support or "such inadequate maintenance as to be in reality no maintenance at all."[94]

This judicial opinion fails to note the distinction between 'neglect' and 'refusal' and does not also accord with the policy of a statute which seeks to enforce the father's legal obligation to adequately provide for his minor children, who are unable to maintain themselves. The duty of support being a continuing liability, the issue of refusal or neglect to maintain the child can be raised in maintenance proceedings from time to time.[95] In the past, it was not affected by the existence of a decree with regard to maintenance in a matrimonial action, unless the father was making adequate payments under that order.[95A] It would also appear that there is no time limit within which an application for past maintenance of a legitimate must be filed, since an order is operative from the date of refusal or neglect.[95B]

An award of maintenance under the statute is not a personal benefit to the mother or a third party who has the custody of the child and presents the application on his behalf, for the legal right to claim maintenance is vested in the child.[96] The father is therefore not entitled to refuse maintenance on the basis that the mother (who is making the application on the child's behalf) is living in adultery. He may be ordered to pay maintenance to her, and he cannot plead her conduct as exempting him from liability for refusal or neglect to maintain the child.[97] These principles indicate that the same approach should be adopted regarding a father who refuses to maintain a child because he does not live with him.[97A] The failure to appreciate this, created problems at a time when the custody jurisdiction of the Sri Lankan courts was quite distinct from the jurisdiction of magistrates in maintenance proceedings.

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The putative father has no parental rights over an illegitimate child. As he has no legal right to the child's custody and cannot claim that he should live with him, it may be argued that he "neglects" to maintain, even when he offers to support the child on condition that he lives with him.[98] The father of a legitimate child by contrast, has a preferential right to custody. Is he liable under the Ordinance when he is willing to provide for him in his own home, but refuses maintenance when the child is wrongfully kept away from him by the mother or a third party? Even if he cannot be said to have 'neglected' to maintain him, nevertheless by making a conditional offer to provide for the child, he has "refused" maintenance within the meaning of the Ordinance, and it may be argued that he is just as liable as if he had neglected to maintain the child. There are many decisions in the Supreme Court that have not observed this distinction between "refusal" and "neglect" to maintain, and have held that the father who refuses maintenance when a child is kept away from him against his wishes, does not incur a liability under the Ordinance. It has been said that "the crucial question is whether the children are in the lawful custody of the mother,"[99] or the person claiming maintenance on their behalf.[100]

We have observed that in the Roman Dutch law the duty of support was a parental obligation which had no connection with the parent's rights over his minor children. The duty to provide support was therefore not a corollary of the legal right to custody. The Maintenance Ordinance was not based on the legal values of the Roman Dutch law. And yet, while creating a liability only in respect of minor children, it was founded on the concept that a man should make financial provision for his dependants, and that they had a right to look to him for support. This is why "refusal" to maintain is treated as a separate basis of liability from "neglect" which connotes fault. By failing to appreciate that liability can arise from both refusal and neglect to maintain, the Magistrate's Courts, which determined applications for support in the past found themselves in a situation where they had to adjudicate on disputed claims to custody,[101] or determine the legal rights of the parties to custody,[102] thus exercising a jurisdiction that was completely outside the scope of the ordinary proceedings in a maintenance action. The fact that these courts applied

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principles on custody which were in conflict with the fundamental provisions on the law on this subject, passed unnoticed in the Supreme Court. There are cases in which this court approved of a decision made by a Magistrate which had been based on the principle that the mother of a legitimate had a *prima facie* right to custody.[103] And yet, the father's preferential right to custody during the subsistence of the marriage is a fundamental principle of the General law on custody. Besides, the father of an illegitimate who is completely excluded from the parental power, and has on right of custody, has been permitted to refuse maintenance for an illegitimate child who lived with the maternal grandmother, on the basis that he had a better right to custody.[104]

Even if the mother or third party who has not obtained legal custody by a court order cannot establish that the father of a legitimate child neglects to maintain him, when he is willing to provide support in his own home, they can, as suggested above, claim that there is refusal of support. Proving neglect or failure to support against the putative father will be easier even when he offers to support the child if he lives with him, since he has no right to custody . In any case, refusal to provide support irrespective of neglect or default, is an adequate basis for liability. The decisions in which the Sri Lanka courts have permitted a wife who has deserted her husband or committed a matrimonial offence to claim maintenance on behalf of a child who lives with her, can be justified on this basis rather than on the principle that the mother has a legal right to custody.[105] As Manickavasagar said in **Shanmugam** *v* **Annamuttu,**[106] under the Maintenance Ordinance " it is the duty of the father to maintain his child and . . . . if he has not the custody of his child, he is bound to pay the allowance ordered under section 2 to the person in whose custody the child is . . . . the allowance ordered is personal to the child." Such an approach that views the right of maintenance as personal to the child and emphasises the father's obligation to provide for him irrespective of where he lives, may have enabled the Magistrate's court to avoid the danger referred to in **Joslin Nona** *v* **Silva,** namely, that of usurping the habeas corpus jurisdiction of the Supreme Court.[107] The father who did not have the physical custody

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of the child could not use the maintenance proceedings to enforce or claim his legal rights in that respect. Under the past procedure in Sri Lanka he should have continued to provide maintenance even if the child lived with someone else. If he was ordered to pay maintenance under the Ordinance, his remedy was to bring an application for a writ of Habeas Corpus seeking the custody of the child; if he succeeded, he could obtain a cancellation of the original order for maintenance.[108]

The Family courts have now been conferred with jurisdiction in custody matters as well as in maintenance proceedings. There are also provisions for transfer of matters from several courts into one Family court, and the consolidation of several proceedings between the same parties or relating to the same matter, into a single proceeding.[108A] The relevance of custodial rights in an action for maintenance may thus be considered by the Family Court determining the dispute on custody and maintenance in one proceeding. But the continued use of habeas corpus proceedings in the Court of Appeal to litigate custody disputes may result in a restriction of the Family court's powers in this respect, and the resurfacing of the problems discussed above. The father will be liable for neglect or refusal to maintain the child despite the existence of an agreement with the mother by which she undertakes not to claim maintenance.[109] Since the right of maintenance is personal to the child, a strict view has been adopted and a compromise of his claim is not considered lawful, even if it was entered into under the auspices of the court.[110] Of course, if adequate payments are being made by the father under an agreement, the father will not be liable. Similarly, the courts will not disapprove of an agreement by which the husband undertakes to invest a reasonable lump sum so that an adequate amount is payable regularly as maintenance for the child.[111] An agreement for extra judicial separation being valid in our law, provisions for the support of children in such an agreement are also valid and enforceable.[112] However if a compromise with the mother, even with court sanction does not ensure fulfilment of the father's continuing obligation of support, the existence of an agreement will not prevent a subsequent action for maintenance.

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The award

On proof of refusal or neglect to maintain, the Ordinance as later amended empowers the Magistrate to order the father to make a monthly allowance for the child, at such rate "as the Magistrate thinks fit, having regard to the income of the defendant and the means and circumstances of the applicant or such child." The reference to Magistrate must now be taken as a reference to the Family court judge hearing the proceedings under the Maintenance Ordinance.[113] The allowance is payable from the date on which the application for maintenance is made available, i.e. the date of refusal or neglect to maintain the child. Previously the maximum that could be claimed as maintenance was Rs. 100/- per month, and the allowance was payable only from the date of the order.[114] Since the award of maintenance is personal to the child, and the judge has now been conferred a wide discretion, he should be free to order the payment of a sum in excess of that claimed on the child's behalf.[115] The allowance is ordered with the aim of enforcing the father's obligation to maintain the child, and is payable for the purpose of providing shelter, the basic needs of the child, and for its education.[116]

There is some controversy with regard to the relevance of the mother's means, in ascertaining the quantum of maintenance payable by the father. Some early cases took the view that the mother's ability to support the child was relevant, since a Magistrate could "take into consideration all the circumstances before him; the means of the respective parties . . . the question of the maintenance (the child) actually requires."[117] However in **Ediriweera** *v* **Dharmapala,** Alles J. held that the ability of the mother to support the child was not relevant, the father's liability being dependent on the adequacy of his means and the inability of the child to maintain himself.[118]

We have observed that the recent amendment introduced into the principal enactment, includes a provision which permits a court to take into account the means of the applicant or the child. Since the child is deemed to be the real applicant in a maintenance action against the father, the expression "applicant" seems to refer to the wife when she claims maintenance from her husband. The

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amendment may therefore be interpreted as enabling the court to take into account the means of a wife in an application against a husband, and the means of the child, when maintenance is claimed from the father. But the very fact that the child's means and circumstances are relevant in assessing the quantum payable by the father, enables the courts to follow the interpretation in the early cases and determine the amount, having regard to the ability of the mother to support the child. The fact that the mother with means has a legal duty to support the child,[119] strengthens the argument that the child's liability to look to her for maintenance is relevant in assessing the quantum that should be paid by the father.

When the Maintenance Ordinance was originally contemplated it was proposed that an order would be valid until the child was 14 years old, subject to the right of the Magistrate to limit its operation to a shorter period, or to extend it until the child was 18.[120] However when the Ordinance was enacted, it provided that the order was to lapse at the age of 14, unless the Magistrate directed in the initial order that maintenance was to be paid until the child became 18.[121] By a later amendment an order was to be valid until the child died or attained the age of 16, but the Magistrate was permitted to order maintenance until the child became eighteen, either by a directive in the original order or one issued subsequently.[122] The purpose of the amendment appears to have been to raise the compulsory age limit for payment of maintenance from 14 to 16, and to enable a subsequent application for support upto the age of 18, when the Magistrate had not made a direction to that effect in the initial order. Clearly the legislature intended to permit claims for maintenance of a child between 16 and 18 at the discretion of the Magistrate. The background to the amendment does not support the view taken in some cases, that as an initial order generally lapses at 16, an application for further maintenance must be made before it expires.[123] Since the Magistrate was empowered to order maintenance initially upto the age of 18, there is merit in the judicial opinion that even a first application may be made between 16 and 18.[124]

The most recent amendment to the principle enactment has changed the law significantly. A maintenance order now remains

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valid until the death of the child, or until he is twenty-one years, which is the statutory age of majority.[125] An order for maintenance can therefore be made any time before the child attains this age.

A maintenance order may be cancelled or altered on proof of a change in the circumstances of the child, or the father. An application in this regard may be made on behalf of the child, or by the father. The quantum payable may be increased under this provision, but the father can also obtain a cancellation of the order or a reduction of the allowance, if he becomes unable to support the child or the latter ceases to require such support.[126] It has been decided in the Supreme Court that a finding on paternity in a nullity action which does not bind the child, will not enable the father to obtain a cancellation of a previous order for maintenance.[127] A child is not represented in a matrimonial action, and it must be conceded that this procedure prevents the District Court and now the Family court making an order on paternity that binds the child.[127A] However the fact that a binding order on the child's status has not been obtained in the matrimonial court, should not prevent the exercise of the flexible jurisdiction conferred on the court to cancel an order on proof of a change in the circumstances of the father or the child. It is singularly anomalous that a man whose marriage has been annulled by a competent court on the ground of *antenuptial stuprum* should be required to continue to pay maintenance for a child that has been proved not to be his in the subsequent matrimonial action. Besides, if a finding on paternity does not bind the child, it can also be argued that the making of an order with regard to his support in a matrimonial action will not enable the cancellation of an earlier order under the Maintenance Ordinance. This would lead to a situation where a maintenance order would continue to be in force, despite the fact that a matrimonial court has made an order regarding the support of the child.

It is submitted that in the past an order pronounced in the District Court provided a basis for obtaining a cancellation of the original order made in the Magistrate's Court. The latter order could not be treated as automatically dissolved when the District Court pronounced its decision in a matrimonial dispute between spouses. It was deemed to have this effect in regard to a previous order for

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maintenance made on behalf of a wife, only because she is a party to a matrimonial action, and ceases to occupy the status of wife when the marriage is dissolved.[127B] By contrast, even when the presumption of legitimacy is rebutted in a matrimonial action, the decision on this issue does not automatically alter the legal status of the child in relation to the husband, since the child himself is not a party to the matrimonial action. As the child's status and his legal relationship to the father is not automatically affected by the order in a matrimonial action, cancellation of a previous maintenance order is relevant and necessary. Since the Family court now has jurisdiction in both maintenance and matrimonial proceedings, an application for cancelling an earlier maintenance order may be made to the court hearing the matrimonial action.

The procedure in a Maintenance action

It has been observed that the Sri Lanka courts refused to treat non-maintenance as an offence governed by the provisions in the Criminal Procedure Code. Consequently the provisions on Criminal Procedure are not applicable to maintenance actions, unless they have been specifically introduced by the Maintenance Ordinance.[128] In the event of a lacuna in the Ordinance, it was suggested at one time that the statutory provisions on Civil Procedure should apply.[129] However, later cases have not favoured the introduction of the principles on Civil Procedure. It has been pointed out that the Maintenance Ordinance is self contained and that it is not proper to refer to another statute in order to elucidate its provisions.[130] The courtsh ave been in favour of interpreting the Ordinance flexibly, so as to give effect to the intention of the legislature to provide a speedy remedy for non-maintenance. Thus, when the Maintenance Ordinance, does not contain a provision on the procedure in the action, a procedure that will meet the justice of the case will be followed. If the father is insane for instance, the court can appoint a guardian as in a civil action, and proceed with the hearing.[130A] An applicant has also been permitted to file a claim for maintenance in any Magistrate's Court.[131] The provisions in the law on Civil Procedure with regard to representation of the minor however have not been applied, and the application is made on his behalf by

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the mother or the third party. Now that the Family Court has jurisdiction in maintenance proceedings, there is a clear basis for applying these provisions.

The procedure for enforcing an order has been improved by later amendments to the principal enactment. The judge continues to be able to enforce the order by imprisonment or fine, and no allowance may be claimed in respect of an order, where imprisonment has been suffered.[131A] The salary of the defendant can now be attached in the hands of his employer. The court can also order that the allowance should be deposited at a Post Office, Bank or D.R.O's Office in favour of the child.[132] Arrears in respect of an order can be recovered without any limit with regard to time or amount,[133] and even if the child has been maintained by someone else in the intervening period.[133A]

When jurisdiction was conferred on the Family Courts, the procedure specified in the Ordinance was clearly made applicable to maintenance proceedings instituted in Family courts.[134]

The Mother's duty of support under the Married Women's Property Ordinance (1923)

A married woman having separate property adequate for the purpose is said to be liable under this statute, to maintain her children in the same way as a widow is liable for their maintenance, without relieving the husband of his legal duty of support.[134A] Her liability under this statute was raised in one reported decision, but was not considered by the court.[134B] The language in which it is couched suggests that it refers only to a duty to support legitimate children.

The comparison with the widow's liability is significant. Under the Roman Dutch law a woman assumes the sole responsibility to support children in need when her husband dies. The Ordinance seems to refer to that concept, when it compares the liability created by the statute with a widow's liability to maintain her children. The fact that this provision is contained in an Ordinance that grants a married woman full powers in respect of her separate property strengthens the argument that in imposing a liability comparable to that of a widow, the statute intended to impose

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a liability parallel to that of the husband. Since the Ordinance declares that this liability does not relieve the husband of his duty of support, we may conclude that a married woman must share the responsibility for maintaining a child who is in need with the husband, and that she must contribute to such support. The liability created by this early Ordinance is in harmony with recent amendments to the law on matrimonial disputes, that permit a court to order a woman to maintain children of the marriage, when it pronounces a decree for divorce or judicial separation.[134C]

(b) Duty of support under the Roman Dutch Law

Despite the dicta to the contrary, it is submitted that the father's liability of support is not restricted to the Maintenance Ordinance, and can also be derived from the Roman Dutch law.[135] The fact that he was under a duty to provide accommodation for his children was recognised in a very old case [136] and it is implicit in later decisions on the husband's liability to provide accommodation for his wife.[137] A civil action for maintenance should be available even to needy major children, despite the absence of reported decisions that have recognised such a claim.[137A] Since a mother who is able to do so, is liable to contribute to the support of children in need during the father's lifetime,[137B] her means will be relevant in determining the quantum payable by the father in a civil action. Nevertheless, according to principles in the law of marriage, a deserted wife or a wife who is the manageress of the common household will be able to pledge the husband's credit for the purchase of necessaries for minor children who live with her, or in the common home.[138]

When the Maintenance Ordinance imposed restrictions on the quantum of maintenance that could be claimed, the civil action for support of minor children would have served a practical purpose. With the expansion of the statutory remedy in recent times, the civil action against the father will afford a useful remedy only to needy major children, and perhaps illegitimate minors for whom maintenance is not claimed within the specified period. The action for support of illegitimates is much wider under the Roman Dutch law.

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Since the Married Women's Property Ordinance creates a liability to share in the support of legitimate children, a civil action for maintenance can be brought against the mother on the basis of her liability under the statute or under the Roman Dutch law. In either case her liability is based upon the fact that she must share the responsibility of providing maintenance, with her husband. An action for the support of an illegitimate however can only be founded on the mother's non statutory liability to support needy major or minor children. Though there is some authority in favour of the view that the father's is the primary obligation, we have observed that in the modern Roman Dutch law the mother shares the responsibility to maintain a child. In that system, it is the mother who is deemed the parent with the legal relationship to the illegitimate child, and it is not anomolus to require her to share in the obligation of support.

When both parents are alive and able to provide maintenance, each is liable merely to contribute to the child's support. Even a minor for whom the father provides an allowance under the Maintenance Ordinance, has a right to claim support from the mother on the basis of the Roman Dutch law, where she neglects or refuses to fulfil her obligation to contribute to his maintenance. The surviving parent becomes solely liable for support on the death of the other parent. Similarly, the parent with means must shoulder the full responsibility if the other is unable to support the child. Parents who are liable to support minor children will be liable to third parties who have supplied them with necessaries.[138A]

The Adoption of Children Ordinance refers to a man who marries a woman with a child as a person liable to contribute to the child's support.[138B] However, a step parent has no obligation under the Roman Dutch law to support a step child,[138C] and it is difficult to consider this duty an inherant consequence of the contract of marriage.[138D]

The right to claim reimbursement

Writers on the Roman Dutch law suggest that parents who are under a duty to support only children in need, cannot claim reimbursement in respect of children who were supported by them

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when they had adequate means for their own maintenance. It has been said that they "will normally have no right of recourse against the child, (because) it must be assumed that they acted out of parental affection and intended donation."[139] There is judicial authority in Sri Lanka that parents can claim reimbursement, and the Supreme Court has been disinclined to accept that they supported the child from their own means out of generosity without intending to claim a refund.[140] These decisions must be interpreted in the context of the Roman Dutch law liability to maintain children, since it is difficult to envisage such a claim in respect of the liability of support created by statutes. They should be reviewed, for they are not in harmony with traditional legal values on the parent-child relationship, and they are not justifiable even by reference to the Roman Dutch law. The legal system has provided a remedy against parental neglect and refusal to maintain children. There is no reason why it should intervene to give the remedy of a legal action to parents who have responded to the accepted value of supporting members of the family. If a minor child has means, it is always possible for the parent to obtain court permission to receive an allowance for maintenance from his estate.[141] Provision of support for a minor child, with independent means, or for an adult, can reasonably be construed as motivated by parental generosity and affection, without the expectation of obtaining reimbursement from the child. Can the same argument be used to prevent an action for reimbursement between parents, in circumstances where one of them has assumed the sole responsibility of maintaining the child?

The Maintenance Ordinance permits a mother who has shouldered the whole responsibility of providing for her children to claim maintenance for them from the time when the father neglected or refused to provide support. Though the money is payable to the minor child, the mother has access to it. Nevertheless a right of reimbursement if recognised will have practical significance in regard to a mother who has borne the full responsibility to maintain a minor illegitimate, in circumstances where she cannot obtain the statutory remedy within the specified time. It may also be useful to a mother who has supported a needy major child, or a man who has provided the sole support for a child. The maxim "*in praeteritum non vivitur*" has been used in South Africa

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to prevent a claim against a husband for past maintenance by a wife who maintained herself with her own means, and this view is supported by an earlier decision in our own courts.[142] A claim for reimbursement by a wife or child who supported themselves from their own means may be refused on the argument that the liability to support arises only in case of need.[143] The same principle cannot be applied when reimbursement is claimed in a situation where there is a clear liability of support imposed on the person from whom recourse is sought. Thus, the South African courts have recognised that a parent who has shouldered more than his share of the duty to support has a right of recourse against the other parent.[144] This view should be followed in Sri Lanka, for the fact that a parent is deemed to have supported a child with means from parental affection without the intention of claiming a refund, does not mean that he or she can be presumed to have waived the right to recover, where either has discharged the obligation of maintenance for the other. The maxim "*in praeteritum non vivitur*" cannot be justifiably used in this context to prevent the parent from claiming reimbursement for support that he or she has already provided for the children.[145]

(c) Maintenance of children after matrimonial proceedings

Special provision was made in the Administration of Justice (Amendment) Law for a matrimonial court to make orders regarding education and maintenance on behalf of minor children, before pronouncing the decree of divorce, separation or nullity. This provision was the same as that contained in the Civil Procedure Code, which now governs matrimonial actions.[145A] Even though it has been decided that a Magistrate's court may not be able to refuse to entertain an application for maintenance pending a matrimonial action,[145B] the proper court in which maintenance pending such an action can be claimed, is the Family court. The liability of the parents whose marriage is the subject of the matrimonial action to support children of the union, may therefore be enforced by this court pending the action. The orders on education are referred to in the Civil Procedure Code as a separate type of order, despite the fact that it is an aspect of either custody or maintenance.[146] The Family Court may also make orders with regard to maintenance and education when pronouncing the decree

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or even afterwards. This jurisdiction with regard to the making of orders for maintenance and education is a continuing one, and is therefore not exhausted by a single exercise of the courts power.[147]

The Administration of Justice (Amendment) Law introduced, in addition, a new provision that permitted a court issuing a decree for divorce or separation to order either the father or the mother to pay permanent alimony for a child. This provision was enacted into the Civil Procedure Code, by an amendment of 1977, which described the financial provision as a "settlement" rather than "permanent alimony".[148] Since the provisions discussed above specifically refer to minor children, this provision must be interpreted as referring to payments on behalf of even a child who is an adult. However since a court has a discretion in making an award, it is likely that an order for a settlement will be made in the case of an adult, only when he or she is, for some adequate reason, financially dependent on the parents. The phrase "permanent alimony" is one that is traditionally used to describe the kind of financial support provided for a spouse after divorce or separation. The use of the same phrase at one time, and the current use of the word "settlement" to describe an award in respect of a child, as well as the form of the payment, (which could be even a monthly allowance)[149] indicates that it is viewed as maintenance for the child.

It is not clear why this additional provision with regard to the maintenance of children was introduced, when there are already provisions that deal with the maintenance of minor children. The new provision is not limited to needy major children who do not come within the scope of the provisions on maintenance orders regarding minors. Previously an order for permanent alimony could be enforced in the manner of an order in a civil decree, or under the provisions for obtaining speedy relief found in the Maintenance Ordinance.[149A] while an award for maintenance and education of minors was made by the matrimonial court in the same manner as an order on custody, and did not attract the provisions of the Maintenance Ordinance.[150] The Civil Procedure Code now clarifies that any order for alimony or maintenance may be enforced either under the Code or the Maintenance Ordinance.[150A] Both types of financial orders

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may thus be enforced like orders made in maintenance proceedings, though orders purely on the education of a minor will not attract those provisions.

The relationship between orders for maintenance made by the matrimonial courts, and orders made by the Magistrate's Courts acting under the Maintenance Ordinance has always been a source of great confusion. We have observed that the issue of paternity which is determined in a maintenance action may be readjudicated in a civil court, and that this could lead to conflicting orders from the District Court and the Magistrate's Court.[151] There was also some difference of opinion in the Sri Lanka courts as to whether the jurisdiction of the Magistrate's Court was taken away, if an order on the maintenance of a child had been made in a matrimonial action.[152] The conflict of opinion on this point was reviewed by a bench of two judges, who adopted the view of Soertsz J. that a paper order for support obtained in a matrimonial action did not bar an application for maintenance. At one time therefore, liability for neglect or refusal to maintain could be the basis of a claim under the Maintenance Ordinance, even after a matrimonial action in which an order on maintenance had been obtained, unless there was evidence that the father was making payments under that decree.[153] The question whether the order for support in the matrimonial action is conclusive with regard to the quantum, or whether a fresh action could be instituted on the basis of the inadequacy of that order has been raised but not decided.[154] There is dicta in support of thc view that if payments under the civil decree are inadequate, an application for maintenance can be made in the Magistrate's Court, so that an enhanced amount may be obtained. It has also been decided that an agreement by the mother in a divorce action, to waive her claim for maintenance, on the father depositing a sum in court for the children, cannot prevent a claim for maintenance under the Ordinance, though the magistrate may take into account the sum deposited in the court, and decree that the maintenance order be executed only after the monthly allowance specified has been recovered over a period of time, from the fund in the District Court.[155]

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We have observed that the Family Court has a continuing jurisdiction to make awards for the maintenance and education of minor children even after a decree for divorce, separation or nullity. In the past, maintenance actions appear to have been instituted in the Magistrate's Court even after a matrimonial action, because the order on support of children obtained in such an action had to be enforced like a civil decree, while maintenance could be claimed in the Magistrate's Court with comparative ease and speed.[155A] It is not difficult to appreciate these decisions expressing the view that refusal or neglect to maintain can be pleaded in the Magistrate's Court after the pronouncement of an order on support in a matrimonial action if the latter remains merely an order on paper. However, it is clear that the inadequacy of the maintenance order decreed by the matrimonial court and the issue of non-maintenance should not have been raised in the Magistrate's Court, and that no maintenance action can be instituted if payments are being made under a civil decree. The inadequacy of the award obtained in the matrimonial court or its failure to make an order should therefore be raised by utilising the provision for review of maintenance orders.[156] This court is enforcing the basic obligation of support recognised in the substantive law, and there is no basis for readjudicating the matter of support in a maintenance action. With jurisdiction in both matrimonial and maintenance matters now being conferred on the Family Court, and provisions for transfer of cases and consolidation,[157] there is no longer any need to pursue maintenance claims after matrimonial proceedings in separate actions for maintenance. Besides any orders on support made by the Family Court in matrimonial actions may be enforced in the speedy manner provided in the Maintenance Ordinance. In the present law, orders made in a matrimonial action regarding maintenance of minors and the issue in general can be reviewed after the decree, and an order for a settlement for children may be reviewed from time to time in the matrimonial court.

Since the exercise of the District Court's jurisdiction regarding the award of permanent alimony was completely discretionary, there was an incentive to obtain maintenance from the Magistrate's Court, when the District Court failed to make an order on maintenance. The judicial decisions of the past suggest that litigants

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went back to the Magistrate's Court not merely because of difficulties in enforcing the civil decree, but due to the fact that the District Court did not exercise its jurisdiction so as to safeguard the minor's right to continued support. Such problems may not surface now because Family Courts are conferred with jurisdiction in both maintenance and matrimonial matters, and there is an incentive to ensure that support for minors is provided when a matrimonial action is concluded.

The law of Sri Lanka does ensure that a matrimonial court issues orders regarding the maintenance of dependant children of spouses who obtain matrimonial relief in the Family Court. It is accepted that there should be only one forum, and one method of enforcement. An order in a matrimonial action, on support, can form an adequate basis for the automatic lapse or cancellation of a previous order obtained under the Maintenance Ordinance. Enhancement of a previous maintenance order pronounced by a court so that it conforms with an order in a matrimonial court[158] is not a procedure that should be permitted.

(d) Liability of the parent's estate for maintenance

There are local decisions that have refused to permit a claim by an illegitimate for maintenance from the estate of his deceased father.[159] Our courts have expressed the view that it is not clear whether the Roman Dutch law recognised the liability, and that even if it did, there is no evidence that it was introduced into the island. It has also been suggested that the Maintenance Ordinance, by creating personal liability for maintenance, superceded any liability imposed by the Roman Dutch law on the estate of a deceased parent, and that recognition of the liability would conflict with the concept of freedom of testation introduced by the Wills Ordinance.[160]

We have observed that it is now accepted that the Roman Dutch law did not permit a claim against the estate of the deceased parent.[161] However, the concept of the legitimate portion in the law of succession ensured that dependants would obtain a certain share of their parent's estate. The British administration saw in this, a source of conflict and uncertainty in the devolution of title to property. They abolished the legitimate portion by the

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Wills Ordinance, and introduced the English law concept of freedom of testation, permitting a testator to dispose of his property without any restriction.[161A] In the present law therefore, an action for maintenance cannot be instituted against the estate of a deceased parent. The parent's duty of support exists only in their lifetime, and they are under no obligation to provide for dependants from their estate after their death. They may put the estate out of the reach of dependants by disposing of all property by a will that even leaves them destitute.[161B]

(ii) Liability of children to support their parents

The reciprocal duty of support has been accepted as a fundamental principle of the Roman Dutch law that is part of the General Law.[162] The duty may be enforced by a civil action, and an order of support obtained, provided there is clear proof of the adequacy of the child's means and the parents' inability to maintain himself. Since married persons have a legal duty to maintain each other it can be argued that the child's duty of support arises only if a parent is unable to claim support from the other parent.[163] It may be possible for a child who has borne a greater share of the responsibility of support than he owes to obtain reimbursement from the parent's spouse or a collateral, though such a claim may not succeed if it is brought by a child who supported a parent with means.[164]

7. Reciprocal Duty of Support in the Customary Laws

(i) Parental responsibility for support of children

Kandyan Law

(a) Non-statutory liability

The traditional Sinhala law may not have known of the device of a legal action to enforce the obligation of providing maintenance for dependants. Nevertheless it is clear from the legal principles with regard to assistance and support of the family, that this obligation occupied an important place in the legal system. The Sinhala law had its own devices for ensuring that support was provided. We have observed that the Kandyan law of succession permitted

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claims by relatives who had maintained the deceased during infancy or old age, even though they were persons who would not normally share in the inheritance. Similarly a diga married daughter who returned home destitute, as well as an unmarried daughter had a right to maintenance from their parents, and could exercise this right by claiming from their estate in the hands of brother's or anyone else.[165] The rationale for these 'fixed' rights of inheritance was the obligation to provide support.

Principles with regard to maintenance of children are often stated in Kandyan law in relation to marriages that have been dissolved. This is because, as we have observed before, the traditional laws did not generally postulate legal norms for the purpose of regulating family relations, but developed rules when matters were the subject of dispute. When the unit was intact it was assumed that the familial obligation of support would be fulfilled, while rules were postulated in respect of the broken marriage, in order to ensure that members of the unit were provided for. On dissolution of a Kandyan marriage, the duty of support was dependent on custody. If the diga married husband, who had the right to the minor children's custody, committed them to the care of the mother, he was liable to support them until they could maintain themselves. If the mother kept the children, of her own accord, she was bound to support them. However, the binna married husband had no right to custody and was not liable for the support of his children, unless he left the home of his own accord. In that situation he was required to provide them with necessities if they became destitute.[166]

The traditional law did not confine the duties of support to minor children, for a destitute or dependant adult female could claim support. We have observed that parents had a duty to support a destitute diga married female or an unmarried daughter and that this obligation was transferred to collaterals.[167]

During the period when the British were responsible for the administration of justice in the Kandyan provinces, the procedure of a legal action appears to have been used for enforcing duties of maintenance recognised by the traditional Sinhala law.[168] However, in **Menikhamy** *v* **Lokuappu**[169] Bonser C.J. expressed

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the view that a deserted wife's only remedy was to claim support under the Maintenance Ordinance, since the Kandyan law was silent on the question whether a civil action was available to her.

Menikhamy *v* **Lokuappu** has been cited with approval as authority for the proposition that the Maintenance Ordinance has superceded the Roman Dutch law action for maintenance.[170] However, this decision should not be followed, since it fails to appreciate that the Kandyan law was silent with regard to the availability of a civil action, only because this was not a recognised method of enforcing the duties of support in the traditional law. The judicial approach adopted in this case only reveals how the customary legal values and principles could become distorted in the process of being administered by judges familiar with a formal concept of legal rules and legal actions. There is, it is submitted, greater validity in the approach taken in earlier cases, that has been accepted even after **Menikhamy** *v* **Lokuappu.** It was pointed out in these cases that if the claim for maintenance is in harmony with the Kandyan law on the obligation of support, there is no policy against using the device of the civil action for enforcing it.[171]

A civil action for maintenance should therefore be available to Kandyans, and the source of the law on the obligation of support can be the Kandyan law as modified by Roman Dutch law and by statute. The Kandyan Law Ordinance declares that rendering assistance cannot be the basis of a claim to inherit on an intestacy; but this should not prevent the courts in the modern law recognising the underlying duty to support a child who was destitute, or had provided familial assistance.[171A] The Roman Dutch law on support can also be used, unless extension of the latter principles creates a conflict with the established concepts of the Kandyan law.

The obligation of the mother to support her children was thus recognised in the Kandyan law, and a civil action also utilising Roman Dutch law should be available against her in respect of legitimate children, subject to modifications that may have to be introduced because of the nature of Kandyan marriage, and the principles recognised in that law regarding the father's liability

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to support his legitimate children. The principles of the Roman Dutch law can be utilised to permit actions against the parents in respect of both illegitimates and needy major children, unless it is argued that the Kandyan law did not permit claims in respect of illegitimates, and confined the claim of adults to daughters who were unmarried or had returned to the parental home after a marriage in diga. The emphasis placed in the traditional law on the obligation of family support and the liberal attitude to illegitimates, militates against the acceptance of this argument. We have observed that the lack of specific rules on the subject is not always an indication that the legal system intended to prevent such claims.

(b) Liability under statutes

The Mother's liability under the Kandyan Law Ordinance (1938)

In the event of an intestacy, legitimate minor children of a deceased are entitled under the Ordinance to be supported from the income of the acquired property in which the widow obtains a life interest, if there is no paraveni property, or it is inadequate for their maintenance.[172] Though the Ordinance has moved away from the traditional Kandyan law concept of family support.[172A] the right to claim from the mother's life interest is based on the principles of the Kandyan law that we have referred to earlier. We have seen that certain members of the family had a right to claim maintenance from the property in the hand of heirs, when a deceased person owed them an obligation of support. This concept of provision for the family in the event of death accepted in the traditional Kandyan law, and even in a limited way in the Ordinance, is in conflict with the principles of the Roman Dutch law that duties of maintenance are not transmitted to the estate on the death of the parent.

Maintenance from the mother's life interest will be available only in the event of an intestacy. No claim can be made against the estate if the deceased parent disposed of property by will without making adequate provision for dependants, since the principle of freedom of testation has been introduced by the Wills Ordinance which also applies to Kandyans.[173]

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The Father's duty under the Maintenance Ordinance

The Ordinance has always been considered applicable to Kandyans, and a man incurs a statutory liability under it to support his minor children, whether legitimate or illegitimate.[174]

The right to reimbursement

The Kandyan law appears to have recognised the concept of a right to reimbursement from the estate, when an obligation of support had been shouldered where there was no legal duty. Thus persons who had no legal duty but provided "familial assistance" could make claims against the estate.[174A] In this context it may be argued that the principles of the General law can be utilised even in respect of Kandyans. It is submitted that in any event there is no conflict between the principle of the Roman Dutch law that presumes donation in the case of a person who provides support to another when there is no legal duty of maintenance, and the Kandyan law concept [174B] that a diga married daughter who generally had no right of inheritance in paraveni property could claim reimbursement from a deceased parent's estate for providing support. This principle only establishes that she could claim from the heirs, and it does not indicate that she could claim from the parent who had adequate means at the time she provided support.

(c) Maintenance of children after matrimonial proceedings

The statutory provisions applicable to orders for maintenance in matrimonial proceedings instituted according to the General law do not apply to Kandyan marriages.[175] Proceedings for matrimonial relief in respect of these marriages are completely different to the adversarial legal action instituted by persons seeking such relief under the General law. When a District Registrar makes an order granting a dissolution of marriage under the Kandyan law, he has been conferred with the power to make provision in his order that the husband should pay a certain sum of money periodically, or make other provisions for the maintenance of the children.[176] A similar provision in a previous statute on the Kandyan law has been judicially interpreted as a reference to maintenance in respect of children whose paternity the husband admits.[177]

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When the District Registrar makes an order, it is enforced, discharged, varied or revived by the District Court in the same manner as if it were an order of that court in a matrimonial action under the General law.[178] Jurisdiction should now be conferred on the Family Courts, since it is these courts that have acquired the jurisdiction previously conferred on Dictrict Courts in these matters.[178A] The Kandyan marriage statute however clarifies that an action for maintenance cannot be brought in maintenance proceedings if the father is making payment under such an order.[179] If the District Registrar does not make an order on maintenance, there is nothing to prevent an action under the Maintenance Ordinance for refusal or neglect to maintain a child after the dissolution of the parent's marriage.[180]

We have observed that in the General law orders for maintenance after matrimonial proceedings can be enforced in the same manner as orders under the Maintenance Ordinance. Prior to the introduction of the Kandyan Marriage and Divorce Act, an order for maintenance obtained in proceedings for dissolution of a Kandyan marriage could also be enforced by a Magistrate in the exercise of his jurisdiction under the Maintenance Ordinance.[181] The change in procedure introduced by the Act was unwarranted, for applications are sometimes presented in the Magistrate's Court for the enhancement of a previous order in that court, to conform with the order issued in the matrimonial proceedings.[182] This practice enables a lower court to re-examine an order made by a higher court, and permits arguments on the adequacy of the award made in the higher court. Such a procedure would be unnecessary if the order in the Kandyan matrimonial proceedings could be enforced according to the speedy and easier method provided for enforcement of decrees under the Maintenance Ordinance.

Tesawalamai

Persons subject to Tesawalamai are governed by the Maintenance Ordinance,[183] while the Roman Dutch law regarding support may be considered to govern them on the basis of a casus omissus in the Tesawalamai. Since persons subject to Tesawalamai are governed by the General law of marriage, the provisions on maintenance after a matrimonial action in that law apply with

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equal force to them. However, there are specific statutory principles that apply with regard to duties of support between parents and legitimate children governed by Tesawalamai.

Thus, under the Jaffna Matrimonial Rights and Inheritance Ordinance (1911) a married woman with separate property is under a duty to maintain her legitimate children, and the statutory obligation is drafted in the same terms as the liability of a married woman under the Married Women's Property Ordinance that governs women subject to the General law.[184] The statute also gives a surviving spouse the right to possess and enjoy the income of property belonging to the deceased spouse that devolves on children, during the period of their minority, subject to the duty to maintain them until they attain majority.[185] This obligation is similar to that conferred on the Kandyan widow who obtains a life interest in her husband's acquired property, and it would seem to apply only in the event of an intestacy. The parent has the right to dispose of his property without restrictions by making a valid will, and a claim for maintenance cannot be made against the estate.

Muslim Law

We have observed that the Mohammedan Code of 1806 contained specific provisions on the father's duty of maintenance. These provisions reflect the importance attached in Islamic law to the father's duty to support legitimate children, who are unable to maintain themselves.

In Islamic law, maintenance is referred to as *nafaqa* and refers to the provision of food, clothing and shelter. A father with means is legally bound to provide support for sons until they attain puberty (the age of majority) and for daughters until they are married, if they do not have independent means. This duty to provide for legitimate children is not terminated by the fact that they are in their mother's custody. There is an obligation to maintain a divorced or widowed daughter who is destitute, though a son above the age of puberty (an adult in Islamic law) may claim maintenance only if he is disabled.:[186] The father of an illegitimate however has no obligation to maintain it.[187] In Islamic law,

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the mother's liability to support her legitimate children only surfaces if the father is indigent and unable to fulfil his duty of support. In these circumstances, the same limitations that pertain to the father's duty of support apply in determining the scope of the mother's obligation. A Hanafi mother is liable to maintain even an illegitimate child.[187A] Since the Mohammedan Code no longer applies to Sri Lanka Muslims, it is necessary to ascertain whether and to what extent these principles of Islamic law are relevant on the topic of a Muslim parent's duty to support children.

In the early years of administration of justice during the British period of colonial rule, there were no separate courts to administer the indigenous law of the Muslim community. Consequently, the ordinary courts had jurisdiction to apply Muslim law.[188] Since the Maintenance Ordinance was a statute of general application which provided a comparatively speedy method of recovering maintenance, Muslims followed the inclination of the community to sometimes utilise the General law of the land. Actions for maintenance involving Muslim parties were thus entertained in the Magistrate's Courts.:[189] The obligation of support imposed upon a man by the Maintenance Ordinance rather than the Mohammedan Code appears to have been accepted as the source of the law of maintenance. Thus when the Mohammedan Code was repealed by the Muslim Marriage and Divorce Registration Ordinance (1929) the practice of invoking the liability for support under the Maintenance Ordinance continued.

The fact that the Ordinance of 1929 created special courts with jurisdiction in certain matters involving Muslims did not initially have an impact on the law of support. The Quazi courts were given power to inquire into disputes with regard to maintenance among Muslims, and they could make orders against the father for payment of maintenance. The view that the Maintenance Ordinance became inapplicable to Muslims when the Ordinance of 1929 was introduced has been expressed,[190] but the practice in the Quazi courts indicates the contrary. The source of maintenance liability was deemed to be the statutory duty imposed by the Maintenance Ordinance, for this statute was applied in the Quazi courts, in respect of claims for maintenance by Muslim wives and legitimate children.[191] Though Islamic law did not

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recognise the putative father's duty to maintain illegitimate children, applications for maintenance have been entertained by the Quazi courts in respect of children deemed illegitimate in Muslim law, despite the marriage of their parents,[192] as well as illegitimate children of unmarried Muslims.[193] This liberal approach is in harmony with that reflected in the Mohammedan Code, once deemed to express the customs of the Muslim community in Sri Lanka. We have observed that the Code permitted concubinage, and support of concubines.[193A]

The duty of support created by the Maintenance Ordinance thus continued to be recognised in the Quazi courts, though they were deemed to be special courts adjudicating upon matters involving Muslim family law. When Muslims brought their actions for support in these courts, the Quazis decided to apply the Maintenance Ordinance on the ground that it was "not unreasonable to infer that (the legislature) intended (when it conferred jurisdiction on the Quazi courts in maintenance applications) that such claim should be governed by the provisions of the Maintenance Ordinance."[194] The Quazi courts were therefore required to apply the provisions of the Maintenance Ordinance to maintenance disputes in their courts.[195] Claims even in respect of illegitimates were entertained and corroboration of the mother's evidence was required in the same manner as under the Maintenance Ordinance.[196]

At the time that the Quazi courts were conferred with jurisdiction to adjudicate on application for maintenance, it is reasonable to infer that the legislature intended them to apply the principles of Islamic law. Thus, the jurisdiction of the Magistrate's Courts under the Maintenance Ordinance was concurrent, and the statutory remedy parallel to any relief available under the Muslim law.[197] This was why the Supreme Court decided that if an application was made under the Maintenance Ordinance it could not be re-adjudicated in the Quazi court.[198]

When significant reforms in the Muslim law were introduced by the Muslim Marriage and Divorce Act (1951) the jurisdiction of Quazi courts in respect of claims for maintenance on behalf of legitimate and illegitimate children was declared to be

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exclusive.[199] The purpose of the charge was clearly to oust the jurisdiction of the Magistrate's court in respect of actions for maintenance.[200]

The fact that the statute referred to maintenance of legitimate and illegitimate children in a context where Islamic law did not generally recognise a liability to support illegitimates, clearly suggests that the Muslim law in Sri Lanka was considered by this time to incorporate the obligation to support illegitimates. originally derived from the Maintenance Ordinance. The new Act contained some important general provisions on the law to be applied in the Quazi courts. Islamic law was now deemed to apply to marriage and divorce and other matters connected with these topics. Thus in all matters relating to Muslim marriage and divorce, the status, mutual rights and obligations of the parties were to be determined according to the Islamic law of the sect to which they belonged. Yet these provisions do not seem to have been envisaged as introducing the Islamic law principles regarding non-liability to support illegitimate children, in a situation where the Muslim personal law in Sri Lanka recognised such a liability.[201]

Many years after the Act was introduced, the exercise of the Quazi Courts jurisdiction in an application for maintenance on behalf of the illegitimate child of unmarried Muslim parents was challenged in an appeal in the Supreme Court. In rejecting the argument that the Quazi Courts had exclusive jurisdiction in respect of this application, or one in which a non-Muslim woman claimed maintenance for an illegitimate from a Muslim man, T. S. Fernando J. delivered a judgment in the case of **Jiffry** *v* **Nona Binthan,**[202] that was to have far reaching implication for the law on maintenance among Muslims.

In **Jiffry** *v* **Nona Binthan** T. S. Fernando J. held that the general provisions in the Muslim Marriage and Divorce Act, on the application of Muslim law, clearly indicated that claims regarding the maintenance of an illegitimate child of unmarried parents could not be heard and decided in the Quazi Courts. In his Lordship's view, such claims were outside the scope of an act, which made Islamic law applicable to marriage and divorce and

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connected matters. He concluded that the reference in the Act to the Quazi courts jurisdiction in claims for maintenance on behalf of illegitimate children must be interpreted as encompassing claims for maintenance of children *deemed illegitimate* in Islamic law *despite the marriage of their parents.* Fernando J's opinion appears to have been influenced by his impression that the Act could not have intended the Quazi Courts to have exclusive jurisdiction in respect of an application for maintenance on behalf of an illegitimate child when the putative father was a Muslim and the mother a non-Muslim. This opinion in **Jiffry** *v* **Nona Binthan** was followed in several other cases, enabling Magistrates Courts to entertain applications for support of illegitimates under the Maintenance Ordinance, even when the parents were unmarried Muslims.[203]

It may be argued however that this judicial view was not supported by the provisions in the Muslim Marriage and Divorce Act. If these provisions are examined, it is abundantly clear that the statute contemplated claims for maintenance of Muslim illegitimates being presented in the Quazi Courts. It is equally clear that the Act could not have meant to refer to an exclusive category of illegitimates whose parents had purported to contract a marriage, for in Islamic law, they too, like the illegitimate issue of unmarried parents were generally not entitled to obtain support and maintenance.[204] The latter proposition is in itself an indication that the reference to maintenance uf illegitimates in the Muslim Marriage and Divorce Act must have contemplated maintenance for such children being generally claimed according to some source other than the principles of Islamic law. Besides, the validity of a Muslim marriage is determined under the Muslim Marriage and Divorce Act according to the law of a person's sect.[205] The status of illegitimacy arises because of the absence of a valid marriage. It is surely artificial to exclude the claims of illegitimate issue of unmarried parents from the scope of the Act on the basis that there is no "connection" with marriage, while including those of illegitimates whose parents are not validly married.

It must also be pointed out that the practice in the Quazi Courts and the history of maintenance actions in this country does not support the view taken in **Jiffry** *v* **Nona Binthan** and the cases that followed it. There is ample evidence from the Muslim

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Marriage and Divorce Law Reports, that even after the Muslim marriage Act was introduced, the Quazi courts continued the practice of many years and entertained applications for maintenance in respect of the illegitimate children of unmarried Muslim parents.[206]

The Quazi courts acted on the assumption that the new act meant to entrust them with exclusive jurisdiction over the applications for maintenance that they had always entertained and decided according to the Maintenance Ordinance. The only difference that the new Act made to them was that they became less scrupulous about following the procedure outlined for support actions initiated under the Maintenance Ordinance. Where they had been very particular about applying the provisions in that Ordinance, in maintenance cases heard in their courts, they began to adopt a casual attitude to them. The Quazi courts no longer felt bound to follow the procedure in the Maintenance Ordinance, and considered themselves free to determine applications for maintenance without reference to the restrictive procedure in in that statute. For instance after the Muslim Marriage and Divorce Act was introduced, the requirement of corroboration in maintenance applications on behalf of illegitimates was considered relevant merely by way of analogy or guidance and not as an essential condition for the success of the claim in the Quazi Courts.[207] The view that it is unnecessary to adhere strictly to the provision of the maintenance Ordinance has been endorsed in the Supreme Court, and is supported by provisions in the Muslim marriages Act on the implementation of orders for maintenance, and on the obligation of support.[208] Nevertheless the same concept of res-judicata that has been applied in the Magistrate's courts to prevent re-adjudication of an application for maintenance on behalf of an illegitimate has been considered appropriate for application for maintenance in the Quazi Courts. The dismissal of a previous application after inquiry because of insufficient evidence of paternity operates as a bar to a second application for maintenance.[209]

The practice in the Quazi Courts notwithstanding, **Jiffry** *v* **Nona Binthan** created a precedent for avoiding the jurisdiction of the Quazi Courts, and bringing an action against a Muslim man for

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maintenance of an illegitimate child, in the Magistrate's Court. Amending legislation was later enacted to alter this situation, and it re-emphasised the exclusive jurisdiction of the Quazi Courts in maintenance eases involving Muslim parties. This amendment reflected the policy that the Quazi Courts should not exercise jurisdiction when the mother of an illegitimate was not a Muslim. Yet it confirmed the Quazi Court's exclusive jurisdiction in regard to claims for maintenance of illegitimate children when both parents were unmarried and Muslims. The Quazi Courts jurisdition was described by the amendment, as "including the power to entertain claims for maintenance by or on behalf of legitimate children, and, notwithstanding anything in section 2 of the principal enactment (which introduced the Islamic law of marriage and divorce) to the centrary, in respect of illegitimate children whose both parents were Muslims."[210] The amending legislation thus excluded the jurisdiction of the Magistrate's Court and confirmed the Quazi Courts exclusive jurisdiction in all claims for maintenance of legitimate and illegitimate children, when both parents were Muslims, whether married or unmarried.[210A] Thus an unmarried male Muslim may be sued for maintenance in the ordinary courts only when the mother is a non-Muslim.

The statutory amendment did not however clarify the source of the substantive law on maintenance, when applications for support came up before the Quazi Courts. Thus it did nothing to resolve the confusion as to the source of a Muslim male's legal liability to support illegitimate children. In **Pallitamby** *v* **Saviriathumma**[211] a case heard on appeal in the Supreme Court, after the amendment, it was argued that under the law of the sect to which a male Muslim belonged, he had no obligation to support his illegitimate children. This, despite an amendment which specifically gave Quazi courts the power to order maintenance for the illegitimate children of unmarried Muslim parents! Sirimanne J. however rejected the argument, holding that the amendment merely conferred exclusive jurisdiction in maintenance applications upon the Quazi courts without rejecting the statutory duty of support imposed on Muslims by the Maintenance Ordinance.

This judgment reflects correctly the developments that we have observed in regard to applications for the maintenance of Muslim children in this country, and thus gives coherence to the pro-

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visions in the Muslim Marriage and Divorce Act. Sirimanne J. nevertheless used the analogy of developments in India in arriving at his decision. This analogy was not in fact appropriate to the subject of maintenance applications involving Sri Lanka Muslims. Muslims in India are governed by the provisions in the Indian Criminal Procedure Code which contains the applicable provisions on maintenance, because the statute creates a liability **outside** their personal law.[212] By contrast, in Sri Lanka, the duties of maintenance created by the Maintenance Ordinance have been absorbed **with** the Muslim personal law, and thus deemed an inherent aspect of the law on maintenance that is applied **in the Quazi** Courts. The Maintenance Ordinance itself creates a liability that can be enforced only in the Magistrates courts. The provisions in the statute, which are analogous to those in the Indian Criminal Procedure Code, are inapplicable when the parents and the child are Muslims, for the applications for maintenance must be presented exclusively in a Quazi Court. Since, by a long, established practice in the Quazi Courts, endorsed by legislation, the original duty of support derived from the Maintenance Ordinance has been absorbed into the personal law of the Muslims in Sri Lanka, the duty of support may be considered wider than that recognised in Islamic law. It may therefore be argued that a Muslim father's obligation to support legitimate and illegitimate children must be expanded by reference to this wider liability, and that it extends till they arrive at the age of twenty one—the age at which the duty of support under the Maintenance Ordinance terminates.

The approach in **Pallitamby** *v* **Saviriathumma** which gives coherence to the provisions in the Muslim Marriage and Divorce Act on the subject of maintenance of Muslim children is not however supported by the most recent judicial decision in the Supreme Court, and recent decisions in the Quazi Courts. A recent appeal to the Supreme Court, from the Quazi Courts indicates that decisions on the issue of parental liability for supporting children are being made exclusively accordingly to the principles of Islamic law. In **Ummul Marzoona** *v* **Samad,**[213] the Supreme Court, which failed to refer to Sirimanne J's opinion in Pallitamby's case, held that the Quazi Courts must only apply Islamic law in making orders for the maintenance of legitimate children. The court

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cited **Jiffry** *v* **Nona Bintham** in support of the proposition that the Maintenance Ordinance, the General law statute, was inapplicable as a source of law since the Muslim Marriage and Divorce Act made Islamic law applicable in regard to the incidents of a legal marriage.

The implications of this view for maintenance among Muslims is very far reaching. If the decision in **Ummul Marzoona** *v* **Samad** is restrictively construed it may be considered a judicial authority pertaining only to maintenance of legitimate children, thus leaving untouched the significance of **Pallitamby's** case on the duty to support illegitimates. On the other hand, **Ummul Marzoona's** case may be viewed as confirming that Islamic law is the exclusive source of a Muslim's duty of support, when maintenance is claimed for children, in the Quazi Court. If this is the accepted legal position, it may be successfully argued that in Islamic law only a Hanaff mother owes an obligation to support illegitimate children. Despite the fact that the Muslim Marriage and Divorce Act has conferred jurisdiction on the Quazi Courts to order maintenance for illegitimate children, these children will then be invariably denied support under the substantive principle of Islamic law. Besides, a father's obligation to support even a legitimate son in Islamic law can be interpreted as extending only upto the time when he attains puberty (the age of fifteen)—this upper limit being also relevant when the duty of support is transferred to the mother, because of the father's indigence. The resulting vulnerability of the legitimate Muslim child, from the point of view of his legal right to support, can be avoided only by the somewhat strained argument that being unable to maintain himself, he may claim support in the capacity of a "disabled" adult son. This argument prevailed in **Ummul Marzoona** *v* **Samad**. The Court decided that though a Muslim father was not liable to maintain a legitimate son after he attains the age of fifteen, the child, being a schoolboy and unable to obtain employment to support himself, suffered from a "disability" which attracted the Islamic law duty to support an adult legitimate son in "necessitous circumstances."[213A]

The current practice of referring exclusively to the Islamic law of support can be avoided if the interpretation in **Pallitamby** *v* **Saveriathuma** is accepted. The Muslim law in Sri Lanka will then be deemed to reflect the General law obligation of a man to

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support all his legitimate or illegitimate children during minority—before they arrive at the uniform age of majority, which is twenty one.[213B] The Islamic law will still be relevant, as in determining the mother's liability, but subject to the modifications created by an expansion of the father's liability to maintain his children. In any case, even if the Islamic law is applied in the Quazi Courts to determine a father's liability to maintain his legitimate children, there is no justification whatsoever for treating the age of puberty (fifteen) as the time when the duty to support a legitimate son terminates. We have already observed that the general statutory age of majority which applies to Muslims is twenty one.

The confusing trends in the Muslim law in Sri Lanka on support of children only focus further attention on the need to define with greater clarity the areas in which Islamic law applies as the exclusive source of the law applicable to Sri Lanka Muslims.

Reimbursement

The Muslim Marriage and Divorce Act contains specific provisions with regard to reimbursement. A Muslim father may claim reimbursement of sums paid for the use and support of the child between the date of the claim and the date of the order. This is because the Quazi is empowered to order maintenance from the date of the claim.[213C] There appears to be no room for the extension of the General law, on this aspect.

Maintenance of children after matrimonial proceedings

A Quazi Court has jurisdiction to award maintenance in respect of children of divorced parents. It can also award maintenance regarding children of irregular marriages who are deemed legitimate, since it has exclusive jurisdiction in applications for nullity.[214] In this area too the same uncertainities as to the source of the applicable law remain. The law on the obligation of parental support will vary depending on whether or not the obligations accepted in Islamic law are deemed to be expanded by reference to the statutory obligation of a father's liability to maintain children under the Maintenance Ordinance.

(ii) Liability of children to support their parents

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Kandyan Law

In the traditional law, children who were assured rights of inheritance were under a duty to support their parents, and could not claim reimbursement from them for fulfilling the obligation. There is authority that a diga married daughter who could not generally inherit paraveni property could claim against the estate of parents for supporting them.[215] In the modern law because of provision in the Kandyan Law Ordinance, a claim cannot be made against the estate on the basis of rendering support.[215A] This only means that the duty of supporting parents is no longer related to rights of succession, and there is an adequate basis in Kandyan law for recognising the civil action available in the General law to enforce the legal duty imposed on children to support parents in need. Since the duty of support can be construed as not being confined to children who have rights of intestate succession, even a diga married daughter should be deemed under a legal obligation to support indigent parents even when she has no rights of inheritance in the father's paraveni property.[215B]

Tesawalamai

The duty to support indigent parents may be considered as one that is placed on persons subject to Tesawalamai in the same way that they are governed by other aspects of the General law on support.

Muslim Law

There is authority that sons and daughters with means are under an obligation to provide for the maintenance of their indigent parents.[215C] This principle of Islamic law may be introduced as part of the law of parent and child, even if it is not deemed a matter on which the Islamic law of the sect applies by virtue of the Muslim Marriage and Divorce Act. In any case the Quazi Courts cannot claim to have exclusive jurisdiction,[216] so that a civil action can be brought based upon the obligation in the Muslim law, or the General law by an extension that is not in conflict with Muslim law.

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8. Inheritance Rights and the Duty of Support

We have observed how, in the indigenous laws of Sri Lanka, inheritance rights were a method of securing support. The Islamic law concept that only one third of the estate could be disposed of by will, achieved the same purpose. In the modern law, since a person may distribute his property by will without restrictions, inheritance rights are effective to provide support, only in the event of an intestacy.[216A] The rights of intestate succession of parents are sometimes combined with the duty to provide support for minor children in Kandyan law and Tesawalamai even today. But inheritance rights discriminate between sons and daughters, male and female parents, and legitimate and illegitimate children.

The disabilities imposed on the inheritance rights of illegitimate children have been discussed earlier.[216B] Legitimate children and a surviving spouse inherit the estate of a deceased person in equal shares, under the General law, while parents are excluded as heirs to their children's estate, if there are descendants. Even if there are no descendants, they inherit only half share, as a half share devolves on the surviving spouse. In the Kandyan law, legitimate sons and daughters inherit their parent's property in equal shares, though a diga married daughter cannot succeed to the father's ancestral property. Parents however receive only a life interest in their children's property, in the absence of a surviving spouse or descendants, when there are collaterals of the deceased child. Minor legitimate children in need are entitled to be supported from the mother's life interest in the father's acquired property. Provision of "assistance in time of need" cannot provide a basis for claiming a right of inheritance in the modern law. However if the father has no acquired property or it is inadequate, the mother may claim maintenance from the father's paraveni property. It is not clear whether there is also a duty of maintenance.

The rules of inheritance in Muslim law vary according to the sect to which a person belongs. In Shafi and Hanafi law which applies to many Sri Lankan Muslims, sons and daughters receive fixed portions, as 'Koranic' or 'agnatic' heirs, the daughters receiving less than sons, when they inherit as 'agnatic' heirs. Parents receive a fixed portion as Koranic heirs ,but by the application of rules regarding agnatic

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heirs, the mother may receive less than the father. In Tesawalamai children share in their parent's property equally, but they receive only half their acquired property (*thediattetam*). As in the General law parents inherit a deceased child's estate, only in the absence of descendants and subject to the surviving spouse's rights in the acquired property. Besides, when they inherit, father and mother receive the whole property derived by the deceased child from themselves, and share the balance equally. A surviving parent has a right to possess and enjoy income derived from property that devolves on minor children from the deceased parent. This right is subject to the obligation to maintain them.

9. Reform of the Law on Support of Children

The subject of maintenance of children deserves special attention since it is a more frequent source of litigation and is of greater practical importance than many other areas in the law on parent and child. In a society where family relationships are still close, the concept of litigation to enforce the right to maintenance may seem out of harmony with familiar values. However the existence of legal rules must be justified by the need to underline values, and to provide relief in circumstances where there is a breakdown or a malfunctioning of relationships within the family. A scheme of family maintenance which ensures that members of the family fulfil their obligations of support is particularly important in a developing country, where the State cannot afford to provide financial assistance for needy citizens.

We have observed that the theory of the Maintenance Ordinance being a complete code on the subject of parental support for children does not represent an accurate picture of the current law. The Ordinance reflects the quasi criminal approach to the subject of maintenance, that was familiar to English law. It covers a very narrow area, and to treat it as a complete code is to settle for a grossly inadequate law on maintenance, in a country where both the indigenous law and the received Roman Dutch law emphasised the importance of the parent's duty to support their children. However when the Roman Dutch law and the Customary laws are deemed to exist side by side with the Maintenance Ordinance, there is room for a duplication of relief, which is unnecessary and can also be a source of confusion and

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uncertainity. It is submitted that the present state of the law warrants the introduction of uniform legislation on the parental duty of support that will govern all persons other than Muslims, whose claims are at present determined by the special Customary quazi courts. Even if the subject of the reciprocal duty of children to support indigent parents can continue to be enforced by a civil action based upon the existing law, it is important to enact legislation that will clarify the principles on maintenance of children. It is proposed in the following pages to highlight some of the areas for reform, and aspects of maintenance that legislation on the subject should deal with.

Liability of parents for the support of legitimate children.

The quasi criminal approach reflected in the Maintenance Ordinance is an anachronism in a country where the civil obligation of support was considered a legal consequence of the blood tie between the parent and the child. The Ordinance only imposes a duty of maintenance upon the father, and has been the source of a great deal of confusion on the mother's obligation to support her children. The Married Women's Property Ordinance and the Jaffna Matrimonial Rights and Inheritance Ordinance impose a liability on a married woman to provide support for her legitimate children, that has almost passed unnoticed. The Maintenance Ordinance requires the father to provide support for only minor children, despite the fact that some unmarried daughters and disabled major children may not be in a position to maintain themselves.

The provisions in the two statutes referred to above that describe the married woman's duty of support should be repealed. In place of these provisions, uniform principles should be introduced in a single statute on maintenance that will deal with the parental obligation to provide support for minors and needy major children. In the Kandyan law, unmarried females and destitute married daughters could expect to be maintained by their parents and even collaterals, while the Roman Dutch law recognised a duty in respect of all needy major children. These legal values should form the foundation of any legislation on this subject.

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The fact that the mother occupies a subordinate role to the father, in respect of her parental rights over minor children or *vice versa* in the case of a binna marriage under Kandyan law, may not be an adequate rationale for imposing a primary obligation of support upon the person with the superior parental rights. The duty of support we have observed is not a corollary of parental rights. However the court deciding the maintenance action should determine who is to have the legal custody of the minor, for the order for payment of maintenance must necessarily be made against the non custodian parent. There has been considerable confusion in the present law because the Magistrate's court had no jurisdiction to decide a dispute regarding custody. The court awarding maintenance should, like in other countries exercise jurisdiction on the issue of custody. If the court that has power to order maintenance, has also the jurisdiction to decide conflicting claims in this regard, the custody dispute can be settled in one forum and an order for maintenance obtained against the non-custodian parent.[217] The recent creation of Family Courts with jurisdiction in both custody and maintenance matters provides one judicial forum for determining these issues, and is a development in the right direction.

The Maintenance Ordinance imposes a liability on the father with adequate means, when he refuses or neglects to maintain his legitimate and illegitimate minor children. This is too restrictive and there should be a positive duty on both parents with adequate means to support minor and needy major children who are unable to support themselves.

The illegitimate child

The Maintenance Ordinance discriminates between legitimate and illegitimate minors, even though under the Roman Dutch law, the obligation of support in respect of all children was identical. This latter feature of the Roman Dutch law, and the humane philosophy that it reflects should be accepted in any legislation on the subject of support. The basic policy of the law should be to enforce the obligations of the putative father and the mother. Thus a quasi criminal attitude to the question of proving paternity should be rejected, and identification of the father should be seen as a necessary preliminary to enforcing his civil obligation of

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support. The restrictive approach to the claim of the illegitimate child should have no place in legislation on this subject. A requirement of confirmation of the mother's evidence can be retained to avoid risk of perjury, but the law should clarify that paternity may be proved even without the evidence of the mother. There should also be no time limit with regard to the application. These provisions in the Ordinance restricting the right to claim maintenance on behalf of an illegitimate are based on archaic statutory provisions in England [217A] that have been altered in the course of the years. In that country the evidence of the mother is no longer essential to prove paternity, and the provisions on the time limit have been amended. The validity of retaining them even in a modified form has been queried. [218]

The principle of res judicata has been applied in our courts to prevent readjudication of the question of paternity once it has been decided on the merits. This interpretation can only be justified if there is provision to obtain a declaratory order on the status of the putative father and the child in the maintenance proceedings that will operate as a judgment in rem. Since the declaratory action is not unfamiliar to the legal system of this country, provision should be made for combining it with an application for maintenance.[219]

In the present law there is no provision for the mother to claim expenses incidental to the illegitimate child's birth or the expenses incurred when the child dies, even though such a claim was possible under the Roman Dutch law and can form a legitimate aspect of a claim against the putative father.[220]

Child of the family

We have observed that the Adoption of Children Ordinance equates the obligation of support created between adoptive parents and adopted children with the duties created in this regard between parents and their legitimate children. We have also seen that the law of Sri Lanka envisages the possiblity of a child being jointly adopted by both spouses or by one of them, with the consent of the other. In the latter situation, should the other spouse who has not given the adoptee access to the common home be called upon to shoulder the obligation of support? Similarly where

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the child of one of the spouses is accepted as a member of the couple's family unit, either without adoption or after an adoption by one spouse, should the duty of providing support be imposed on the spouse who has no biological relationship to the child?

The Adoption of Children Ordinance refers to a man who has married a woman with a child as a person liable to contribute to its support.[220A] Nevertheless the Sri Lanka law on maintenance recognises only the relationship between the biological parent and the child for the purpose of imposing an obligation of support. In some countries a spouse is deemed to assume a *prima facie* liability to support a child of the other spouse.[220B] However, the mere fact of marriage to a man or woman with children may not necessarily indicate acceptance of an obligation to support them,[221] though a child who is not born of the union, may be accepted upon marriage, as a child who belongs to the family unit of the spouses. English law describes children to whom duties of support are owed as "children of the family"—a term encompassing not merely legitimate and adopted children but a child of one person accepted by the other as a member of the family.[222] A statute on maintenance in Sri Lanka should provide for the present lacuna in the law in this respect, by recognising obligations of support between children brought up as members of the common family, and the spouse who has no biological tie to them, even if he or she has not adopted them legally.

Reimbursement

The statute on maintenance should permit applications for past maintenance so as to enable reimbursement to be claimed by a parent who has shouldered more than his own share of the obligation to maintain a child.[222A] Such an express provision on reimbursement is preferable to the present section in the Maintenance Ordinance which enables the order to be made from the date when the action became available. If reimbursement is permitted, an applicant should be entitled to only claim for current maintenance.

Representation of a minor applicant, and the procedure in Maintenance actions

The procedure in a maintenance action should be identified as that relevant to civil proceedings, while retaining the provisions

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in the present law which ensure speedy hearing of applications and enforcement of the order. This change appears to have been achieved when the Family court was conferred with jurisdiction under the Maintenance Ordinance.[222B]

The Maintenance Ordinance envisages the minor as the person with the legal right to sue for maintenance, but it does not consider him a party to the action. Nor does it ensure that the allowance paid is utilised for him. If a minor applicant is made a party who is represented in the proceedings, the present complications regarding whether the finding on paternity binds him will not arise. There will also be a procedure for ensuring that an award is used for the minor's benefit.[223] In England and some states of the U.S. the collection and disbursement of support is at times channelled through the court or office affiliated to the court.[223A]

Maintenance pending or subsequent to matrimonial proceedings

The present law is most complicated in this area. When matrimonial proceedings under the General law are pending, the law should clarify that the ordinary action for maintenance should not be available. The matrimonial court should be required to assume jurisdiction regarding the support of children of the family pending the action, and after its final determination. The present law regarding matrimonial proceedings which enable the making of two different types of orders in respect of children should be amended so as to permit one order for their maintenance which can be enforced by utilising the speedy procedure in a maintenance action. The present distinction between minor and major children that is reflected in the Civil Procedure Code should be abolished, and the law should clarify that orders for maintenance can be made in respect of minors, unmarried and dependant or disabled major children, all of whom may be affected by the dissolution of the marriage.

Since matrimonial proceedings for persons governed by the Kandyan law are quite different, the District Registrar before whom the parties appear is not competent to make an award when there is a dispute between the spouses regarding the paternity of a child. He should however be required to ensure that provision is made for children in respect of whom there is no such dispute,

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subject to the usual procedure by which the courts of law have a supervisory jurisdiction regarding such orders. The jurisdiction now exercised by the District Court under the Kandyan Marriage Act should be conferred on the Family Court which has replaced the District Court as the matrimonial court. If paternity is disputed, the ordinary action under the Maintenance Ordinance can be utilised pending or after a Kandyan divorce. The present provisions in the Kandyan Marriage and Divorce Act should be amended to permit the previous practice by which the District Registrar's Orders on maintenance could be enforced by the speedy procedure available under the Maintenance Ordinance.

Family provision in the event of the death of a parent

In the present law, the surviving parent is expected to shoulder the whole responsibility of support alone, for a parent is entitled to dispose of all his property by will leaving nothing for his dependants. The English law concept of freedom of testation was introduced by the Wills Ordinance that abolished the principle of *legitimate portion* derived from Roman law, by which dependants were assured a certain portion of the parent's estate. The scheme of family provision inherent in the indigenous laws on succession were also rendered ineffective by the Ordinance. We have observed that in Kandyan law, provision of support could be the basis of claims against the estate, and that in this law, and to some extent even in the Tesawalamai, children were entitled to obtain maintenance from the property in the hands of the surviving parent, particularly if their own portions were inadequate for their support. Since persons governed by these laws too can dispose of their property by will without restrictions, the protection of family provision is available only when they die intestate. In the present law a testator can leave his dependants destitute and they will have no claim against his estate.

In the course of time, it was recognised in England that the principle of "freedom of testation" could lead to irresponsibility on the part of testators. The concept was therefore qualified by introducing a statute on family provision in 1938. Thus disappointed legitimate children could petition in court for an order that reasonable provision should be made for them from the estate of a parent who had disposed of his property by will.[224]

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The concept of family provision was expanded later. In 1952 it was extended to intestacies because it was recognised that the law of intestate succession which ensured a division of the estate among heirs may not necessarily ensure that dependant children received adequate provision for their maintenance. The more recent Inheritance (Provision for Family and Dependants) Act 1975 has introduced comprehensive provisions widening the category of dependants who can claim family provision. A child of the family or an illegitimate child who is a dependant may obtain an order from court for reasonable provision from the estate of the deceased parent. There must be proof that the will or the principles on the devolution of the intestate estate leave the dependant without adequate maintenance. The court has the jurisdiction to consider the financial resources and the needs of the person claiming reasonable provision from the estate, and other relevant matters such as his conduct to the deceased.[225]

This concept of family provision should be introduced into the General law of Sri Lanka. However the question of leaving the quantum to be determined by the court may also be reviewed, and a case made out for reintroducing the principle of a fixed share in favour of dependants, comparable to the legitimate portion that is still recognised in some modern legal system.[226] There is also good reason to expand the principles presently applicable in the Kandyan law and Tesawalamai to enable claims for provision from the parent's estate in respect of illegitimates and all children of the family. The Kandyan law and as well as the Tesawalamai as modified by statue, now provide for a limited type of family provision only in the event of intestacy. The concept should be applied even when the parent has left a will. The law should restrict the parent's right to dispose of all his property by will, when such freedom of testation can entail his leaving dependant children destitute or without adequate maintenance.

The delictual remedy for deprivation of support

We have observed that in the Roman Dutch law, a person who wrongfully caused bodily harm or death is liable to pay damages in delict to a parent or child to whom the injured or deceased person owed a duty of support. The delictual liability for wrongfully causing death has been recognised by courts in Sri Lanka.[227]

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They have permitted an action by a dependant child,[227A], and even a parent,[228] to whom a duty of support was owed. This type of remedy should continue to be recognised in the law of Sri Lanka, as it strengthens the law on provision of support for dependants.

The action of dependants, in countries with a heritage of English tort law has been the product of Fatal Accidents legislation enacted over a period of time. This is because the Common law did not recognise such an action.[229] Since the Sri Lanka law on civil injuries is derived from the Roman Dutch law, legislation on this subject is unnecessary if the courts apply and develop the received legal principles. If mere bodily harm has been caused, dependants should also have a right of action, provided the injured person himself has not been awarded a sum as damages, to meet his obligations of support.[230]

Muslim Law

The Quazi courts have jurisdiction in respect of claims for maintenance by Muslims, and as long as this policy remains unchanged, Muslims cannot be governed by the principles of a uniform law. Several amendments to the existing law however can be introduced to clarify the legal principles applicable.

Islamic law imposes duties of support on both parents of a legitimate child. Nevertheless recent judicial decisions have cast some doubt as to the age at which the obligation terminates. The provisions in the Muslim Marriage and Divorce Act should therefore clarify that maintenance can be claimed from the father or the mother under Muslim law until the child reaches the uniform age of majority accepted in this country. In order to avoid the confusion that has arisen in the present law, the Act should clarify that the Muslim law as applied in this country recognises the father's duty to support his minor illegitimate children. A legislative provision will serve to enshrine the clear trend that has been observed in the Quazi courts, even if it does not accord with the traditional Islamic law attitude to the status of illegitimacy. The Act should also be amended so as to permit a claim against the mother of the illegitimate child, for Hanafi law recognises that she has a duty to provide maintenance.

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We have observed that Islamic law considers the illegitimate a *filius nullius*. Since the Muslims in Sri Lanka appear to have accepted the General law value that the putative father must support his illegitimate child, there is good reason to introduce reform that will ensure support for an illegitimate from the mother who has the means to maintain it, in all cases where the putative father is unable to shoulder his burden.

Muslims are governed by the Wills Ordinance, and to that ex-tent, there is no reason why a uniform law on family provision should not apply to them.

NOTES.

1. Hayley op. cit. p. 388.

2. Modder, op. cit. p. 468. Hayley op. cit. p. 355—358, 388, 497, 498.

3. Hayley, op. cit. p. 308—312, 487—491; Obeysekere, Land Tenure, op. cit. p. 49, V. Samaraweera, The Judicial Administration of the Kandyan Provinces, op. cit. 150.

3A. C.O. 416/19, op. cit. p. 299, 304.

4. Tesawalamai, s. 1, 3, 8, and 9.

5. ss. 91—93, 96—100 (Maintenance of wives and dependant children) ss. 101 (support for concubines).

6. Voet 25.3.4—6; Grotius 1.9.9, 3.35.8; Spiro Parent and Child op. cit. (1959 ed.) p. 10—11, p. 258, 260, 266—267, and see also p. 262 note 99; Gliksman *v* Talekinsky 1955 (4) S.A.L.R. 468; In Re Knoop 1893 10 S.C. 198; S. *v* Richter 1964 (1) S.A.L.R. 841; Oosthuizen *v* Stanley 1938 A.D. 322 at 328.

6A. For a recent case that emphasises the aspect that illegitimacy of the child makes no difference to the parent's liability, see Tate *v* Jurado 1976(4) SALR 238.

6B. See Legitimacy Ch. II supra.

6C. Voet 48.5.6.; Spies Exors *v* Beyers, (1908) T.S. 473; M'Guni *v* M'Twali 1923 T.P.D. 368 cited in Hahlo and Kahn op. cit. p. 354 supports the proposition that the action may be brought before the child is born.

7. M. Nathan, Common Law of South Africa Vol. 1. (1904 ed.) p. 106 ff. (1913 ed.) p. 116; Hahlo and Kahn op. cit. p. 373. Voet 25.3.6.; Van Leeuwen Commentaries on the Roman Dutch Law 1.13.7; see also S *v* Pitsi, 1964 (4) S.A.L.R. 583.

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8. Spiro op. cit. p. 260.

9. Sprio op. cit. p. 260; Hahlo and Kahn op. cit. p. 373; Motan and Another *v* Joosub 1930 A.D. 61 at 66; Bank *v* Suissman 1968(2) S.A.L.R. 15 at p. 17; Christie *v* Est. Christie 1956 (3) S.A.L.R. 659 at 661; Glazer *v* Glazer 1963 (4) S.A.L.R. 694; c.f. Van Leeuwen Censura Forensis 1.1.10.3

9A. Lee Roman Dutch Law, op. cit. p. 41, n.3; Hahlo and Kahn op. cit. p. 373.

10. Voet 25.3.10; S *v* Mac Donald, 1963 (2) S.A.L.R. 431.

10A. S *v* Mac Donald at p. 432; Hahlo and Kahn, op. cit. 349.

11. Voet op. cit. 23.2.82, 25.3.18; Spiro op. cit. p. 257., where the authorities are discussed.

12. See Glazer *v* Glazer for a discussion of these authorities. See also Bernard *v* Miller 1963 (4) S.A.L.R. 426, Bank *v* Suissman; B. Beinart (1958) Acta Juridica 92—111; Spiro op. cit. p. 257.

13. See Glazer *v* Glazer , Bernard *v* Miller.

14. See H. R. Hahlo (1959) S.A.L.J. 234.

15. Motan *v* Joosub.

16. Bernard *v* Miller, though contra Lloyd *v* Menzies 1956 (2) S.A.L.R.97.

17. Voet 25. 3.8.; Lee, Roman Dutch Law, op. cit. p.41, Peterson *v* South British Insurance Co. Ltd. 1964(2) S.A.L.R. 236

18. Van Vuuren and Another *v* Sam 1972 (1) S.A.L.R. 100.

19. In Re Knoop; Oosthuizen *v* Stanley; Anthony *v* Cape Town Municipality 1967 (4) S.A.L.R. 445 (A.D.); C. Laurie (1938) 55 S.A.L.J. 286.

20. Smit *v* Smit 1946 W.L.D. 360, followed in Manuel v. African Guarantee and Indemnity Co. Ltd. 1967 (2) S.A.L.R. 417.

21. Voet 25.3.8., and the authorities cited in Spiro op. cit. p. 269 note 79.

22. See Spiro op. cit. p. 269, that the principle will not apply in the modern law of South Africa, since the law does not recognise the relationship between the natural father and the illegitimate.

22A. McKerron Law of Delict op. cit. p. 139, note 2, and p. 146 note 56A cites the authorities. In the modern law of South Africa the courts may not recognise a claim, by dependants for bodily harm when the injured person himself has a right to recover damages which would include an amount for the support of dependants, see de Vaal *v* Messing 1938 T.P.D. 34.

23. See generally James, Child Law op. cit. p. 95, 106, Bromley op. cit. (1976 ed.) p. 582, p. 592—593, (1966) p. 392. Olive Stone, Family Law op. cit. p. 13—15, 76—77.

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24. See Olive Stone, Family Law, op. cit. p. 14., 202, 221, 222.

25. Vagrant's Ordinance No. 4 of 1841, s. 3(2).

26. Justinahamy *v* De Silva (1884) 6 S.C.C. 136; See also Podihamy *v* Gooneratna (1883) 5 S.C.C. 231, especially at p. 232.

27. Lawarinahami *v* Pedro Appu (1884) 6 S.C.C. 75; Meddumahami *v* Kaluappu (1880) 3 S.C.C. 132; Madalena Fernando *v* Juan Fernando (1884) 6 S.C.C. 76 F.B.

28. Vagrant's Ord. s. 21.

29. Enclosure 3 dated 3 Jan. 1890, Despatch 16 From Governor Gordon C.O. 54/586.

30. Report of the Attorney General, note 29 supra; Address of Governor Gordon, proceedings of the Legislative Council 29.10.1889 p. 5, Papers laid before the Legislative Council of Ceylon, sessions 1889, Colombo (1899).

31. Report of the Attorney General, note 29 supra; address of Governor Grodon, note 30, supra. See also Maintenance Ord. (1889) s. 15.

32. See Saboor Umma *v* Coos Canny (1909) 12 NLR 97 at 98.

33. Fernando *v* Cassim (1908) 11 NLR 329; Herft *v* Herft (1928) 29 NLR 324.

34. (1891) 1 C.L Rep. 86.

35. (1899) 4 NLR 121; see also, Eina *v* Eraneris (1900) 4 NLR 4 per Bonser C.J. Obiter.

36. Ana Perera *v* Emeliano Nonis and Justina *v* Arman (1908) 12 NLR 263; Letchimanpillai *v* Kandiah (1928) 30 NLR 280; Jane Nona *v* Van Twest (1929); Isabella *v* Pedru Pillai (1902) 6 NLR 85; Bebi *v* Tidiyas Appu (1914) 18 NLR 81; Eliza *v* Jokino (1917) 20 NLR 157; Menika *v* Banda (1923) 25 NLR 70; Saraswathi *v* Kandiah (1948) 50 NLR 22; Baby Nona *v* Kahingala (1964) 66 NLR 361 p. 365; Carlina Nona *v* Silva (1948) 49 NLR 163; Selliah *v* Sinnamma (1947) 48 NLR 261 at 262; Velenis *v* Emmie (1952) 55 NLR 95 at 96, and more recently, Weeraratna *v* Perera (1977) 79 NLR 445 especially at p. 447, and 452.

37. See Bonser C.J. in cases cited in note 35 supra.

38. See Eina *v* Eraneris, per Bonser C. J. Ranasinghe *v* Pieris (1901) 13 NLR 21, Silva *v* Senaratna (1931) 33 NLR 90.

39. Sivaswamy *v* Rasiah (1943) 44 NLR 241 D.B. at p. 245.

40. See Bonser C.J. in Subaliya *v* Kannangara and Eina *v* Eraneris. See also Perera *v* Nonis and Justina *v* Armon; Saraswathy *v* Kandiah; Weeraratna *v* Perera, per Vythialingam J at p. 452.

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41. Rankiri *v* Kirihatana at p. 86.

42. (1908) at p. 267.

43. See Basnayaka C.J. in Saraswathy *v* Kandiah and Namasivayam Saraswathy (1949) 50 NLR 333; Letchimanpillai *v* Kandiah.

44. (1921) 22 NLR 289 (F.B.) per Ennis and Shaw J.J.

45. Ambalavanar *v* Navaratnam (1955) 56 NLR 422, at p. 424; Ediriweera *v* Dharmapala (1965) 69 NLR 45; Tenne *v* Ekanayaka (1962), 63 NLR 544 at 546; Perumal *v* Karumegam (1969), Weeraratna *v* Perera per Vythialingam J at 452.

46. (1899) at p. 123; for a similar view see Parupathipillai *v* Arumugam (1944) 46 NLR 35 at 36.

47. 1898 1 Bala Rep. 161; See Woodrenton J. in Perera *v* Nonis and Justina *v* Arman; see also Lamahamy *v* Karunaratna.

48. Ukko *v* Tambya 1863 Rama Rep. p. 70; D.C. 64 Ratnapura (1834) Morgan's Dig. 22; Yadalgoda *v* Herat (1879) 2 S.C.C. 33. See also R.K.W. Goonesekere (1960) 18 U.C.R. 177 at p. 191.

49. This view is expressed in the dissenting judgment of Schneider J. in Lamahamy *v* Karunaratna (at p. 293) and Perera A.J. in Ranasinghe *v* Pieris (at p. 24).

49A. D.C. 64 Ratnapura (1834) Morgan's Dig. 22.

50. See Perera *v* Nonis and Justina *v* Arman, per Woodrenton J. at p. 267.

51. Samed *v* Segutamby (1924) 25 NLR 481 at 497, Ambalavanar *v* Navaratnam.

52. See Lamahamy *v* Karunaratna per Schneider J. dissentiate.

52A. Namasivayam *v* Heen Banda (1970) NLR 251 per Alles J at p. 259 following a dictum in the South African case of Seaville *v* Colley (1880) 9 S.C. 39 at 44; c.f. Silva *v* Balasuriya (1911) 14 NLR 452 where Lascelles C.J. expressed the same view as in Seaville *v* Colley, at p. 456.

53. 1835 Morgan's Dig .61; Samed *v* Segutamby at 497; Ambalavanar *v* Navaratnam.

54. See Ranasinghe *v* Pieris at p. 23,24—25; In re Estate Illangakoon (1911).

55. See Ambalavanar *v* Navaratnam (child's duty to support a parent) Canekaratna *v* Canekaratna (1968) 71 NLR 522, Alwis *v* Kulatunga (1970) 73 NLR 337 (husband's duty to provide the wife with accommodation).

56. Maintenance Ord. s. 2, 7 as amended by the Maintenance (Amendment) Act (1972).

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57. Sivapakiam *v* Sivapakiam (1934) 36 NLR 295, Ramaswamy *v* Subramaniam (1948) 50 NLR 84.

58. Sivapakiam *v* Sivapakiam at p. 297; Weeraratna *v* Perera, per Vythialingam J at p. 450; c.f. Rasamany *v* Subramaniam (1948) 50 NLR 84 per Basnayaka C.J. at 861.

58A. See Weeraratna *v* Perera per Vythialingam J.

59. s. 6; the Attorney General's report on the Maintenance Ordinance note 29 supra, Governor Gordon's address, note 30 supra.

59A. (1969) 73 NLR 91 especially at p. 92.

60. s. 6

61. Somawathie *v* Fernando (1953) 55 NLR 381, though contra Perera *v* Fernando (1911) 15 NLR 309.

62. Perera *v* Fernando; Kusalihamy *v* Dionis Appu (1912) 15 NLR 325; Navaratnam *v* Uppin Mudalali (1943) 44 NLR 310; Somesunderam *v* Periyanayagam (1951) 54 NLR 43.

63. See Perera *v* Fernando.

64. See Angohamy *v* Babasingho (1910) 4 Weer 60; Parupathi *v* Chelliah (1916) 3 C.W.R. 87.

65. Karupiah Kangany *v* Ramaswamy Kangany (1950) 52 NLR 262 at 263 per Swan J; Dharmadasa *v* Gunawati (1957) 59 NLR 501 at 504.

66. Selliah *v* Sinnammah, Velenis *v* Emmie, Letchiman Pillai *v* Kandiah, Eina *v* Eraneris, Carlina Nona *v* Silva, Piyasena *v* Kamalawathie (1973) 77 NLR 406; Vidane *v* Ukku Menika (1944) 48 NLR 256 has been overruled.

67. See Kanapathipillai *v* Parpathy (1956) P.C.

68. Wimalaratna *v* Milina (1973) 77 NLR 332 per G.P.A. Silva S.P.J. at 333; see also Angohamy *v* Babasingho, Punchiappuhamy *v* Wimalawathie (1952) 55 NLR 11 at 12; Tennekoon *v* Tennekoon (?) 78 NLR 13; Dona Carolina *v* Jayakody (1931) 33 NLR 165.

69. Turin *v* Liyanora (1951) 53 NLR 310; Wimalaratna *v* Milina; Fernando *v* Abeysekera (1972) 78 NLR 119.

70. See Dona Carolina *v* Jayakody.

71. Bandara Menika *v* Dingiri Banda (1926) 27 NLR 282, Tennekoon *v* Tennekoon at p. 18; Navaratnam *v* Uppin Mudalali; Carlina Nona *v* Silva; Alice Nona *v* Aron Singho (1937) 10 C.L.W. 37.

72. Angohamy *v* Kirinelis Appu (1911) 15 NLR 232, following the Evidence Ord. s. 157; see also Gimara *v* Bastian (1915) 1 C.W.R. 208, Avale Umma *v* Adamlevvaipodi (1915), 1 C.W.R. 169, Meenachipillai *v* Sanmukam (1916) 3 C.W.R. 366.

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73. (1921) 22 NLR 395.

74. See Somasena *v* Kusumawathi (1958) 60 NLR 355 at p. 357, Dona Carlina *v* Jayakody, Dharmadasa *v* Gunawati, Edwin *v* Rosalin (1950) 19 Times 177; Tennekoon *v* Tennekon p. 20; the dictum of G. P. A. Silva J. in Wimalaratna *v* Milina p. 334 is in conflict with these authorities.

75. See p. 399, followed in Sinnatangam *v* de Silva (1926) 28 NLR 212; c.f. Parupathi *v* Chelliah.

76. Gunaratna *v* Babie (1948) 50 NLR 23, Tennekoon *v* Tennekoon, though contra Dona Caralina *v* Jayakody.

77. Meenachipillai *v* Sanmukam; Nanduwa *v* Nandawathie (1953) 55 NLR 189.

78. Angohamy *v* Kirinelis Appu; See also Hinnihamine *v* Don Alfred (1938)

79. Dharmadasa *v* Gunawathi; Warawita *v* Jane Nona (1954) 58 NLR 11; Tennekoon *v* Tennekoon; Indrawathi Kumarihamy *v* Purijjala (1970) 74 NLR 430.

80. Justinahamy *v* Gunasekera (1925) 27 NLR 481; Warawita *v* Jane Nona.

81. Saram Appuhamy *v* Ranni (1946); c.f. Angohamy *v* Kirinelis.

81A. See Tennekoon *v* Tennekoon at p. 20 per Malcolm Perera J.

82. Maintenance Ord. s. 7, Wijeratna *v* Kusumawathie (1948) 49 NLR 354; Puchiappuhamy *v* Wimalawatnie; Warawita *v* Jane Nona.

83. See the discussion on admisson of serological evidence in Chapter III supra.

83A. Subaliya *v* Kannangara; Janehamy *v* Darlis Zoysa (1909) 12 NLR 70; Jainamboo *v* Izardeen (1938) 10 C.L.W. 138.

83B. Seethy *v* Mudalihamy (1937) 40 NLR 39; Punchi *v* Tikiri Banda (1951) 54 NLR 210.

83C. Perera *v* Nonis and Justina *v* Arman; Beebi *v* Mohmood (1921) 23 NLR 123; Jeerishamy *v* Davith Singho (1921) 23 NLR 466.

83D. Bourke and Fogarty's Maintenance Custody and Adoption Law op. cit., p. 23, Robinson *v* Williams (1964) 3 A.E.R. 12.

84. See Eina *v* Eraneris; Luciya *v* Ukku Kira (1907) 10 NLR 225; Shanmugam *v* Annamuthu (1964) 69 NLR 63 at 64; Baby Nona *v* Kahingala. The right of maintenance conferred by the Indian Criminal Procedure Code is also interpreted as the child's right ,see R. Ratanlal and D. K. Thakore Tne Criminal Procedure Code (1943) p. 249, 432; c.f. English law, where maintenance for an illegitimate is still viewed as the mother's right, sec Olive Stone, Family Law op. cit., p. 14, 221, 222.

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85. Podina *v* Sada (1900); Beebi *v* Mahmood.

86. See Maintenance Ord. s. 6.

87. See Karupiah Kangany *v* Ramaswamy Kangany; see also Pemawathi *v* Dharmapala (1975) S.C. 507/74

88. Maintenance Ord. s. 6. In England, this is the legal position after the Affiliation Proceedings (Amendment) Act (1972), see Olive Stone Family Law op. cit. p. 222.

89. s. 2.

90. Sivaswamy *v* Rasiah (1943) per Soertsz S.P.J. obiter at p. 243.

91. Gunasekera *v* Ahamath (1931) 33 NLR 241; Perera *v* Perera (1972) 77 NLR 143.

92. Luciya *v* Ukku Kira, overruling Sethuwa *v* Janis (1896)2 NLR 103.

93. See Luciya *v* Ukku Kira at p. 226; c.f. Sethuwa *v* Janis. See also quantum of maintenance, discussed under "the award", infra.

93A. Luciya *v* Ukku Kira overruling Sethuwa *v* Janis

93B. Rodrigo *v* Rodrigo (1931) 33 NLR 383; Thanganayagam *v* Chelliah (1941) 42 NLR 379 at p. 381.

94. See Annapillai *v* Saravanamuttu (1938) per de Kretser J. at p. 7, in a decision that is hard to justify on the merits or the law; see infra at custody and maintenance proceedings, and cases in note 84 supra.

95. Subaliya *v* Kannangara; Sethuwa *v* Janis; Gunahamy *v* Arnolis (1895) 3 NLR 128.

95A. See on maintenance of children after matrimonial proceedings in the General law infra.

95B. Maintenance Ord. s. 2; c.f. note 59 supra.

96. See cases cited in note 84 supra; In Annapillai *v* Saravanamuttu de Kretser J. failed to appreciate the importance of this aspect of the statute.

97. Shanmugam *v* Annamuthu; de Silva *v* Fernando (1930) 32 NLR 71.

97A. See the contrary analysis in Annapillai *v* Saravanamuttu, per de Kretser J.

98. Though contra, Meenachi *v* Supramaniam Chetty (1898); see also recognition of an illegitimate child, Ch. IV supra.

99. See Roslin Nona *v* Abeyweera (1938) 40 NLR 197 at 198.

100. Roslin Nona *v* Abeyweera; Velupillai *v* Sanmugam (1928) 30 NLR 50 at 54; Thanganayagam *v* Chelliah; de Silva *v* Fernando; Dingiri Menika *v* Mudianse (1906) 3 Bala Rep. 253; Annapillai *v* Saravanamuthu; Perera *v* Perera (1903) 7 NLR 166; Fernando *v* Fernando (1937) 9 C.L.W. 97.

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101. Annapillai *v* Saravanamuttu.

102. See cases cited in note 100 supra.

103. Perera *v* Perera, (1903), Velupillai *v* Sanmugam.

104. Meenachipillai *v* Supramaniam Chetty, especially at p. 182.

105. Velupillai *v* Sanmugam; Roslin Nona *v* Abeyweera; de Silva *v* Fernando, Perera *v* Perera (1903).

106. (1964) at p. 64.

107. (1924) 26 NLR 287 at 288.

108. See on cancellation of maintenance orders, infra.

108A. See Judicature Act s. 24(1) 24(2), Third Schedule s. 28 (1)(2) s. 25

109. Nakamuttu *v* Kantan (1908) 1 S.C.D. (Weerakoon Rep.) 48 ; Janehamy *v* Darlis Zoysa; Simon Appu *v* Somawathie (1953), 56 NLR 277 at p. 277, 288; Baby Nona *v* Kahingala, per Basnayaka C.J. obiter at p. 368.

110. Parupathipillai *v* Arumugam, where the earlier authorities are discussed.

111. Nakamuttu *v* Kantan; Hinnihamy *v* Gunawardene (1921) 3 CLRec. 161; Jinadasa *v* Dingiri Amma (1965) 67 NLR 568.

112. Frugtneit *v* Frugneit (1941) 42 NLR 547.

113. s. 2 as amended by the Act of 1972; Judicature Act s. 24(1) 24(2) and Third Schedule.

114. Maintenance Ord. as amended by Ordinance No. 13 of 1925, s. 2; c.f. s. 2 as amended by the Act of 1972. Does this mean that there is no prescriptive period for the maintenance action?.

115. c.f. Dhanapala *v* Baby (1968) 77 NLR 95 to the contrary.

116. Luciya *v* Ukku Kira; Rodrigo *v* Rodrigo; Thanganayagam *v* Chelliah at p. 381; education would include professional training; c.f. the position under the Roman Dutch law, discussed at the beginning of this chapter, and also the restrictive interpretation of the concept of maintenance in Annapillai *v* Saravanamuttu note 94 supra.

117. See Luciya *v* Ukku Kira per Woodrenton J. at p. 226; see also Sethuwa *v* Janis.

118. See Ediriweera *v* Dharmapala; c.f. Sivasamy *v* Rasiah.

119. See the mother's duty of support under statute and non-statutory provisions, General law, supra.

120. Sessional Paper XXXVII (1889).

121. s. 8; Este *v* Silva (1895) 1 NLR 22.

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122. s. 7 and the proviso to it, as amended by Ordinance No. 13 of 1925; see also Thanganayagam *v* Chelliah.

123. Hinniappuhamy *v* Wilisindahamy (1952) 54 NLR 373 citing Dona Rosaline *v* Goonesekere (1926) 13 C.L.W. 17, which was however decided according to the law prior to the amendment enabling a subsequent directive, ordering maintenance to be paid up to the age of 18; see also Nadaraja *v* Nadaraja (1966) 71 NLR 16.

124. See Thanganayagam *v* Chelliah per Soertsz J. though contra Alles J. in Nadajah *v* Nadaraja; see also R.K.W.G. (1970) J. Cey. L. Vol. 1, No. 1, 5—7.

125. s. 7 as amended by the Act of 1972.

126. s. 10 as amended by the Act of 1972; c.f. de Silva *v* Fernando at p. 72 for the view that a cancellation order cannot be made to have retrospective effect.

127. Perumal *v* Karumegam.

127A. See the discussion on judicial declaration of paternity, Ch. V supra.

127B. Meniki *v* Siyathuwa (1940) 42 NLR 53; Mihirigamage *v* Bulathsinghala (1962) per Weerasooriya S.P.J. obiter at p. 136, though contra Fernando *v* Fernando (1958) 59 NLR 522 per Sinnathamby J. at p. 524.

128. See cases cited in note 36 supra, and Weeraratna *v* Perera per Vythialingam J. at 451.

129. Jane Nona *v* Van Twest.

130. Saraswathy *v* Kandiah; Tenne *v* Ekanayaka; Baby Nona *v* Kahingala; Weeraratna *v* Perera at 452; c.f. Seneviratna *v* Podi Menike per Wijethileke J. at 92; for an early case that takes this view, see Perera *v* Nonis and Justina *v* Arman.

130A. Weeraratna *v* Perera; c.f. Seneviratna *v* Podimenika, cited with approval in Weeraratna *v* Perera.

131. Rajasinghe *v* Bandara (1973) 77 NLR 175; Tenne *v* Ekanayaka.

131A. Katherina *v* Davith (1917) 19 NLR 500.

132. Maintenance Ord. s. 8, ss. 8 A and 8 B introduced by the Act of 1972, which replaced s. 8 of the principal enactment.

133. Velupillai *v* Sanmugam following de Silva *v* Fernando (1930).

133A. Gunasekera *v* Ahamath, Perera *v* Perera (1972).

134. s. 29 (2) Judicature Act, as amended by Act No. 37 of 1979.

134A. M.W.P. Ord. s. 27.

134B. Roslin Nona *v* Abeyweera.

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134C. A.J. (Am.) L. s. 629, repealed and re-enacted in the Civil Procedure Code s. 615, as amended by Law No. 20 of 1977 s. 100.

135. See the cases discussed under the relevance of the Roman Dutch law on liability for support supra; see also Ranasinghe *v* Pieris at p. 25.

136. D.C. 64 Ratnapura (1934) Morgan's Dig. 22.

137. Canekeratna *v* Canekeratna, Alwis *v* Kulatunga.

137A. See Ambalavanar *v* Navaratnam, c.f. Thanganayagam *v* Chelliah per Soertsz J. at p. 380, where the principles of the Roman Dutch law are discussed; see also Ranasinghe *v* Pieris at p. 25.

137B. See the Roman Dutch law of maintenance supra; see also in re Estate Illangakoon.

138. Hahlo, Law of Husband and Wife op. cit. (1969 ed.) p. 110; Sivapakiam *v* Nawamani Ammal (1935) 37 NLR 386; Voet 23.2.46; c.f. Lalchand *v* Saravanamuttu (1934) 30 NLR 273; Gunerishamy *v* Nona Baba (1921) 23 NLR 253.

138A. Hahlo and Kahn op. cit. p. 374; Lee Roman Dutch Law, op. cit. p. 41.

138B. s. 3(3) proviso, discussed under consent to adoption, Ch. IX supra.

138C. See note 10 supra.

138D. S *v* Mac Donald, note 10A supra; see also the discussion on "child of the family" infra.

139. Hahlo and Kahn op. cit., p. 374; see also Spiro op. cit. p. 363.

140. In re Estate Illangakoon; see also de Silva *v* Wijenaike (1912) where the executors of the mother's estate were permitted to claim credit for the sums spent by the mother from the minor's property, without obtaining court permission. The English law too recognises the principle of reimbursement. See Olive Stone, Family Law, op. cit. p. 99.

141. In re Estate Illangakoon; de Silva *v* Wijenaike suggests that obtaining court permission is not essential. But see parental power over administration of a minor's property Ch. VII supra.

142. Ranasinghe *v* Pieris at p. 25; Voet 2.15.14. Oberholzer *v* Oberholzer 1947 (3) S.A.L.R. 294.

143. Woodhead *v* Woodhead 1955 (3) S.A.L.R. 138 per Beadle J. obiter at 139—140.

144. Farrel *v* Hankey 1921 T.P.D. 590; Woodhead *v* Woodhead, and more recently, Tate *v* Jurado.

145. Woodhead *v* Woodhead at p. 140.

145A. See A.J. (Am.) L.S. 630(2), now see Civil Procedure Code ss. 619 and 621.

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145B. See Rayappen *v* Monicamma (1969) 73 NLR 428 (maintenance for wife pending a divorce action).

146. c.f. A.J. (Am.) L. s. 630(2), reflecting a general approach, in this law [see e.g. s. 614(5)(9)] ; see text after note 6B supra and at note 116 supra; see also Jeeris Appuhamy *v* Kodituwakku (1947) interpreting the provisions in the Civil Procedure Code (see ss. 619 and 621), and Judicature Act s. 24(2) and Third Schedule.

147. Civil Procedure Code s. 620, 622, Aryanayagam *v* Thangamma (1939) 41 NLR 169 at 171. A similar provision, was found in the A.J. (Am.) L. s. 630(2).

148. c.f. s. 629 and now see Civil Procedure Code s. 615 introduced by amendment 20 of 1977.

149. c.f. A.J. (Am.) L. s. 629(1) and now see Civil Procedure Code s. 615(1).

149A. s. 628(4).

150. See award of custody after matrimonial litigation Ch. VI supra; c.f. Fernando *v* Fernando (1969) 72 NLR 549.

150A. See s. 624 A introduced in 1977.

151. Perumal *v* Karumegam discussed also under cancellation of maintenance orders, supra.

152. Aryanayagam *v* Thangamma (the Magistrate has no jurisdiction); contra Pieris *v* Pieris (1940) 45 NLR 18 per Soertsz J.

153. Fernando *v* Amarasena (1943) 45 NLR 25, following Soertsz J. in Peiris *v* Pieris supra; see also Silva *v* Karunawathie (1954).

154. Pieris *v* Pieris.

155. Silva *v* Karunawathie especially Nagalingm A.C.J. at p. 94.

155A. See Aryanayagam *v* Thangamma at p. 171; see Civil Procedure Code s. 619—622, and note the absence in the old code of a provision similar to the present s. 624 A introduced by Law No. 20 of 1977 s. 102.

156. See A.J. (Am.) L. s. 629(1) and (2), 630(2); now see Civil Procedure Code ss. 615(2) and 620, 622.

157. Judicature Act s. 24(1) 24(2) Third Schedule and s. 28.

158. c.f. Abeyasekera *v* Bisso Menika (1961) 64 NLR 260, and the text at note 182 infra.

159. Dingito *v* Appuhamy (1916) 3 C.W.R. 64; Lamahamy *v* Karunaratna.

160. See Lamahamy *v* Karunaratna.

161. See Glazer *v* Glazer, and notes 12, 13, and 14 supra.

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161A. Sir Harding Giffard's evidence to the Commissioners of Eastern Inquiry C.O. 416/14 op. cit. p. 26—27 refers to the legitimate portion as "injurious to the country and productive of perpetual litigation." Also C.O. 54/216 op. cit. 113. despatch by Governor to Sec. of State recommending the Wills Ord, and Wills Ord. s. 2. See also disabilities of illegitimate children in the Roman Dutch law, Ch. II supra.

161B. See the dictum of Bonser C.J. in Karonchihamy *v* Angohamy (1896) cited in Ch. II at note 35 B supra.

162. Ambalavanar *v* Navaratna especially at p. 424.

163. The South African cases have adopted this view in the cases cited in note 20 supra. In Ambalavanar *v* Navaratnam a joint claim was brought by indigent parents.

164. See the right to claim reimbursement supra.

165. Hayley op. cit. p. 358, p. 486, 489, 497; see also on family support in the indigenous laws supra, Modder op. cit. p. 468, (1836) Morgan's Dig. 96.

166. Hayley op. cit. p. 288—289.

167. See note 165 supra, and note 171A infra.

168. Ukko *v* Tambya; D.C. 64 Ratnapura (1834) Morgan's Dig. 22; Yadalgoda *v* Herath.

169. (1898) supra.

170. See Tenne *v* Ekanayaka per Basnayaka C.J. obiter at p. 546.

171. See Ukko *v* Tambya, Yadalgoda *v* Herath, followed in Menika *v* Dissanayaka (1903) 7 NLR 8; c.f. also the distortion in customary law that occurred because of the colonial attitude to administration of Justice, Ch. I supra, note 33.

171A. See Kandyan Law Ord. s. 25 abolishing the right to inherit from the deceased, on the basis of having rendered familial assistance. But it may be argued that support may be claimed by a daughter who lived in the 'mulgedera' or family home, from the heirs, see note 165 and c.f. Rana *v* Kiribindu (1978) 79(2) NLR 73.

172. Kandyan Law Ord. (1938) s. 11.

172A. See Kandyan Law Ord. s. 25.

173. Wills Ord., s. 2.

174. Menikhamy *v* Lokuappu; Menika *v* Naide (1916) 19 NLR 351; Pinchi Amma *v* Mudiyanse (1920); Sanchi *v* Allisa (1926); Abeyasekera *v* Bisso Menika (1961); Tenne *v* Ekanayaka.

174A. See liability of children to support their parents in Kandyan law infra, and the section on family support in the indigenous laws, at the beginning of this chapter.

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174B. See Hayley op. cit. p. 489.

175. A.J. (Am.) L. s. 631. Now see, Civil Procedure Code s. 627.

176. K.M.D. Act s. 33(7) (iii).

177. Sanchi *v* Allisa, per Jayawardene A.J. at p. 201.

178. K.M.D. Act s. 35(1).

178A. See Judicature Act s. 24(1) proviso, 24(2) and Third Schedule which exclude the Family Courts Jurisdictioin, and indicate that the District Court has jurisdiction.

179. See Pinchi Amma *v* Mudiyanse at p. 478 and the discussion on maintenance of children after matrimonial proceedings supra at notes 176—178

180. Pinchi Amma *v* Mudiyanse, Sanchi *v* Allisa supra; c.f. Menika *v* Naide

181. See Abeysekere *v* Abeysekere (1957) 60 NLR 66 at 67; Abeyasekere *v* Bisso Menika.

182. See Abeysekere *v* Bisso Menika

183. Annapillai *v* Saravanamuttu.

184. Jaffna M.R.I. Ord. s. 13; c.f. M.W.P. Ord. s. 27.

185. Jaffna M.R.I. Ord. ss. 37, 38. The father's duty in this respect now coincides with the duty of a man to support his legitimate children under the Maintenance Ord. c.f. Annapillai *v* Sarvanamuttu at p. 7.

186. Fyzee, op. cit. (1964 ed.) p. 205, (1974 ed.) p. 214; Mulla op. cit. p.346; Schacht, An Introduction to Islamic Law op. cit. p. 168.

187. Fyzee op. cit. (1964 ed.) p. 206; Mulla op. cit. p. 347.

187A. See Mulla op. cit. 346, Fyzee op. cit. (1964 ed.) 214—215.

188. K. *v* Miskin Umma (1925) at 336.

189. Amina Umma *v* Nuhu Lebbe (1926); Ajax Umma *v* Hamidu (1929); Abdul Rahiman Lebbe *v* Pathumma Natchiyar (1918); Beebi *v* Mahmood; Ponnammah *v* Seenithamby; Ummu Hani *v* Abdul Hamid (1940) 2 M.M.D.L.R. 111 at 114 (B.Q); see also Menikhamy *v* Lokuappu.

190. Ibrahim Saibo *v* SithyMarliya (1952) 3 M.M.D.L.R. 141 considering Ord. No. 27 of 1929.

191. Asfardeen *v* Zubaida Umma (1937) 2 M.M.D.L.R. 28; Koya Hameed *v* Marikkar (1937) 2 M.M.D.L.R. 47; Mohomad *v* Khairiah (1941) 2 M.M.D.L.R. 124; Abdul Majeed *v* Sithy Hafeela (1946), 3 M.M.D.L.R. 57.

192. Sulaiman Lebbe *v* Pathumma (1945) 3 M.M.D.L.R. 33, 34; Ibrahim Saibo *v* Sithy Marliya.

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193. Marikkar *v* Marikkar (1937) 2 M.M.D.L.R. 26; Ismail *v* Umma (1938) 2 M.M.D.L.R. 57; Ummu Hani *v* Abdul Hamid; Meera Saibo *v* Kulantiumma (1951) 3 M.M.D.L.R. 137; Sirahadeen *v* Abdeen (1938) M.M.D.L.R. 75; Saidu *v* Marikkar (1941) 2 M.M.D.L.R. 141.

193A. See note 5 supra, and Ch. I note 21A supra.

194. Ummu Hani *v* Abdul Hamid (B.Q.) at p. 112.

195. Sulaiman Lebbe *v* Pathumma at p. 35; Marikkar *v* Marikkar (1937) 2 M.M.D.L.R. 26.

196. Ismail *v* Umma; Sirahadeen *v* Abdeen.

197. Sooriyaumma *v* Sathukeen (1937) 2 M.M.D.L.R. 31; Marikkar *v* Cassim (1941) 2 M.M.D.L.R. 144; Mohomad *v* Khairiah.

198. Jainamboo *v* Izardeen (1938).

199. M.M.D. Act s. 47(1)(c), s. 48.

200. Jiffry *v* Nona Binthan (1960) at 256; the dictum to the contrary in Abdul Gaffoor *v* Cuttilan (1956) 61 NLR 89 suggesting that the Magistrate's court has concurrent jurisdiction, has been made per incuriam.

201. ss. 2, 98(1); see also s. 98(2) which uses the phrase "Muslim law" in a context where the reference is obviously to Islamic law.

202. (1960) especially at p. 256—257.

203. Ismail *v* Latiff (1962) especially at p. 173—175; Moosa Lebbe *v* Assia Umma (1962) 63 C.L.W. 106; Pitchai *v* Feena Umma (1965) 70 C.L.W. 56.

204. Fyzee op. cit. (1964 ed.) p. 107. 184; Tyabji op. cit. p. 43.

205. s. 16.

206. Mohideen *v* Asiya Mariam (1958) 4 M.M.D.L.R. 141; Mohomadutamby *v* Pathumma (1955) 4 M.M.D.L.R. 78. See also Ismail *v* Muthumarliya (1963) 65 NLR 431, Aliyarlebbe *v* Pathumma (1961) 63 NLR 571, endorsing the practice.

207. Mohideen *v* Asiya Mariam; Mohomadutamby *v* Pathumma.

208. Aliyarlebbe *v* Pathumma per T. S. Fernando J. at p. 572; see also M.M.D. Act ss. 35 and 36.

209. Aliyarlebbe *v* Pathumma following Jainamboo *v* Izardeen; c.f. Beebi *v* Mahmood.

210. s. 47(1)(c) and 47 (1)(cc) introduced by amending Act No. 1 of 1965.

210A. s. 47(1)(cc), s.48.

211. (1969) 73 NLR 572.

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212. Fyzee op. cit. (1964 ed.) p. 206; Tyabji op. cit. p. 257, Ratanlal and Thakore, The Criminal Procedure Code (1964 ed.) p. 440; c.f. Pallitamby *v* Saviriathumma at p. 573.

213. (1977) 79 NLR 209.

213A. Ummul Marzoona *v* Samad, followed in Burhan *v* Ismail (1978—1979) 2 Sri L. R. 218.

213B. See Termination of Minority supra.

213C. MMD Act ss. 35(2), 36.

214. ss. 47(1)(c), 47(1)(i), 48; Fyzee op. cit. (1964 ed.) p. 108.

215. Hayley op. cit. p. 489.

215A. Kandyan Law Ord. s. 25.

215B. On the diga married daughter's rights of inheritance, see Hayley op. cit. 331, 336—343, 384. The Kandyan law Ord. did not change the law regarding her exclusion from the father's paraveni property.

215C. Schacht op. cit. p. 168; Fyzee op. cit. (1974 ed.) p. 215; Mulla, op. cit. p. 348.

216. s. 47(1) s. 48.

216A. See for General law, M R I Ord. ss 22 - 25, and Kandyan law Ord. ss. 11, 16, 18, 25, for Kandyan law. See also for Tesawalamai, J M R I Ord. ss 20 - 24 37, 38. For Muslim law, see M. T. Akbar, Mohommeddan law of Intestate Succession in Ceylon, (1919) 1 C. L Rec. 19 - 22, Fyzee op. cit. (1964 ed.) 385, 391, 402-403, 414 - 419.

216B. See Chapter 11 supra.

217. c.f. Procedure in English law under the Guardianship of Minors Act (1971), Bevan, Law Relating to Children, op. cit. p. 456.

217A. See note 59 supra.

218. Affiliation Proceedings Act (1957) as amended by Affiliation Proceedings (Amendment) Act 1972, discussed in Bevan op. cit. p. 490—492.

219. See the discussion on the declaratory action in Ch. V supra.

220. See note 6C supra; such payments can be claimed from the putative father in affiliation proceedings under English law, Bevan , op. cit. p.491.

220A. Lasok, Polish Family Law op. cit. p. 201 refers to such a principle. But even in Polish law the liability in respect of such a child is not absolute, and the court has a discretion regarding these applications.

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221. See S *v* Mac Donald at 432; Hodgkins *v* Hodgkins (1965) 3 AEK 164 C.A. Bowlas *v* Bowlas (1965) 3 AER 40, C.A., H *v* H. (1966), 1 AER 356; c.f. Snow *v* Snow (1971), 3 AER 833 C.A.

222. Bromley op. cit. (1976) p. 323—325 p. 585.

222A. A comparable provision is found in Art. 140 of the Polish Family and Guardianship Code, Lasok, op. cit. p. 283.

222B. See Judicature Act s. 24(1) 24(2) Third Schedule, and s. 29(2).

223. See A.J. (Am.) L. s. 611(7) (8) on representation of a minor in civil proceedings; c.f. note 132 supra for the procedure under the Maintenance Ordinance. See also Olive Stone, Family Law, op. cit., p. 14—15, criticising the English law for its continued refusal to consider the child as the applicant for support. The position is different in some other European countries, Kraus, Illegitimacy, Law, and Social Policy, op. cit. p. 200.

223A. Foote Levy and Sander op. cit. p. 936; Olive Stone, Family Law op. cit, p. 222; c.f. provisions in the Maintenance Ordinance, note 132 supra.

224. The Inheritance (Family Provision) Act (1938) discussed in Bromley op. cit. (1976 ed.) p. 622—623.

225. Bromley op. cit. (1976 ed.) at p. 623; Bevan op. cit. at p. 497; J.C. Hall (1968) C.L.J. 217, 219.

226. e.g. T. B. Smith, Scotland, op. cit. p. 390.

227. Carolis *v* Don Bastian (1879) 2 S.C.C. 184, Agidahamy *v* Fonseka (1942) 43 NLR 453, Meinona *v* Uparis (1958) 60 NLR 116. The General law of Delict applies to persons governed by the customary laws. See Appuhamy *v* Kirihamy (1895), Sudu Banda *v* Punchirala (1951), Cassim *v* Beebi (1900) 4 NLR 316.

227A. Meinona *v* Uparis.

228. Agidahami *v* Fonseka; see generally, Van Vuuren and Another *v* Sam 1972(1) SALR 100, Mckerron Law of Delict op. cit. p. 139.

229. Winfield and Jolowicz on Tort (1975 ed.) p. 501—503.

230. See note 22A supra.

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CHAPTER XI

IN CONCLUSION

In the Indian sub-continent, and in African countries that were part of the British Empire, indigenous Customary law has always been an important source of the law on family relations. This survey of the Sri Lanka law on parent and child reveals how for centuries, what may be deemed a substantial area of the law on family relations has been governed and based on principles derived from the West. We have observed that this development has not been, as in some former colonies, the result of western oriented legal reforms introduced in the period after political independence.[1] It is rather, the product of Sri Lanka's colonial legal heritage. The period of colonial rule saw an entrenchment of Western legal values, in the content of the law. For that very reason too, the British colonial policy of recognising and thus perpetuating in the legal system, the differences in the laws governing distinct communities in the island, did not operate as a significant obstacle to the development of uniform legal principles and concepts. The scope of the Customary laws was narrowed, and their content modified because of the influence and the intrusions of the Western-oriented and Roman Dutch law based General law.

The Customary laws known as Kandyan law and Tesawalamai operate as laws that are personal to narrow categories of people. They thus apply as personal laws in derogation of the General law. Nevertheless we have observed that the General law has made its inroads, thus reducing the significance of pluralism in the sources and content of the law on parent and child that governs the majority of Sri Lanka's citizens. The fact that the General law and these personal Customary laws were administered and still continue to be applied in a unitary system of courts, has assisted assimilation. We have observed that these Customary laws were not applied in distinct Customary courts with separate jurisdiction. The courts of Sri Lanka in the colonial as well as the post-independence period, thus found it relatively easy to develop uniform principles in the process of supplementing gaps in the Customary law with principles and concepts derived from the General law. We have observed how legislation was also used,

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more accidentally than consciously, to promote uniformity. Besides the Sri Lanka courts too played an important role in developing a substratum of common principles, and in the end result, persons subject to Kandyan law and Tesawalamai are often governed by the General law on the subject of parent and child.

By contrast, the significance of the Muslim law as a source of the law on family relations has increased in importance due to developments in both the colonial and post-independence period. The legal justification for applying a distinct law to Muslims, was as in the case of the other groups, the legal recognition of their Customary laws. To that extent the Muslim law in Sri Lanka must be viewed as a Customary law that applies as a personal law in derogation of the General law. Nevertheless we have observed that the early tussle in the courts between the inclination to confine Muslim law to its Customary base, and the tendency to accord it the status of Islamic religious law, was resolved by legislation that favoured the latter view. We have observed how statutes established separate Quazi courts that apply the personal law of the Muslims. Legislation also recognised the status of Islamic law as a source of the legal principles that govern certain transactions in respect of which Muslim law applies. Since this legislation has continued to leave undemarcated the limits of the application of Islamic law in the area of family relations, the ordinary courts are still required to cope with the problem of deciding whether to resort to the General law or the Islamic law. This problem has not been made easier by the exclusive jurisdiction conferred, in regard to certain matters, upon the Quazi courts.

The developments in the early law of Sri Lanka on legitimacy, support, adoption, and wills,[2] reveal that principles and concepts which are alien to Islamic law and religious beliefs, apply to Sri Lanka Muslims. Yet in a more recent era, the acceptance of the Islamic law of a person's sect as the source of the law governing Muslims in regard to certain matters, has made for a shift of emphasis. The courts, and the legislature too in at least one instance, have shown an inclination to find solutions to problems in the law of parent and child from an Islamic law point of view.[3] While this can result, as we have seen, in greater coherence in the Muslim law on parent and child, it must inevitably result in a deeper entrenchment of differences between the law applicable

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to Muslims and the law on parent and child that governs other citizens in the country. Recent developments in Muslim law make it increasingly difficult for the courts to apply principles derived from the General law on parent and child, while providing a greater rationale for utilising the Islamic law. The Sri Lanka experience also indicates that it is the recognition of the status of Islamic law, that has made it difficult to introduce reforms based on uniform legal values in the area of parent and child.[4]

The continuing differences between the law of parent and child that governs Muslims and other persons may be justified on the basis that the legal system has now recognised the status of Islamic law, as a religious law applicable in the area of family relations. It is not so clear whether the same sacrosanct attitude should be adopted to Kandyan law and Tesawalamai. We have observed that after the introduction of the Kandyan Marriage and Divorce Act, the category of persons to whom the Kandyan law applies has been narrowed further. Tesawalamai also applies to a limited class of persons. It has become so encrusted with Roman Dutch law concepts and legal values as to have little relevance as the indigenous law of the Tamil people in the Northern Province. There is an important need to review the fundamental question whether there is any necessity to perpetuate the distinctions that exist between the General law, the Kandyan law and Tesawalamai, in the area of family law generally,and more specifically in regard to the subject of parent and child.

The differences between these systems in regard to the law governing parent and child, and the possibilily of developing uniform principles have been explored in the earlier chapters of this book. It is only intended here, to pose the question whether uniformity in this area of law is not a realistic and worthwhile goal for the reformer to pursue. The constitution guarantees equality before the law, and other fundamental rights, and postulates common guidelines for state policy.[4A] The decision in **Attorney-General** *v* **Reid**[5] though perhaps arrived at by a foreign judicial body that misunderstood the attitude of Sri Lanka Muslims to the right to practice polygamy, nonetheles reveals how a whole scale of accepted legal values can be brought to ridicule by the recognition of completely diverse legal values, in regard to the same relationship, within one legal system. The recent judicial developments in regard to the Muslim parent's obligation to support children, highlights

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the same problem.[5A] Viewing this issue from the point of view of the legal rights of citizens, one may well ask why some parents and children should enjoy rights and privileges, or be subject to duties and disabilities that are not enjoyed or imposed upon others. Should a legal system not postulate uniform legal values in regard to such an important family relationship like that of parent and child ? Western writers on family law in developing countries are very often advocates of the need to recognise Customary and traditional systems. Rejection of pluralism and diversity in family law in favour of one law is sometimes seen as an over radical and unrealistic effort at modernisation.[6] And yet is it possible to say that Sri Lankans are so deeply attached to their Customary laws that they guide their family relations according to them, and will reject the concept of a reformer's uniform law ?

In the colonial period the rationale for the recognition of plural systems was that subject people, must in the interests of political stability be permitted to preserve their customs and traditions inviolate against the conqueror. Even in this respect we have observed that the British were not especially wary of interfering with Kandyan law.[6A] In any case, the narrowing down of the scope and application of the Kandyan law and Tesawalamai in the modern law of Sri Lanka indicates that the Customary laws do not have the same significance for people today. Tesawalamai law on adoption has long been obsolete, and persons governed by this system are required to utilise the General law. Kandyans may adopt under their law, but also use the General law. It is not uncommon for non-Christian Kandyans to contract marriages under the General law. And despite all the protections in regard to family provision, they and their fellow citizens governed by Tesawalamai do not hesitate to utilise the facility to dispose of property by will. In this context, it would seem that the concept of a uniform law on parent and child in respect of non-Muslims, is not, at least in Sri Lanka, an unrealistic goal. Besides any purely emotive regrets that some Kandyans and persons governed by Tesawalamai may feel at the displacement of their Customary law will probably be assuaged by the recognition of certain Customary law concepts in a proposed uniform law.[7]

The General law on parent and child in Sri Lanka has been fertilised by concepts and principles drawn from both Roman

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Dutch law and English law. Just as many centuries of contact with foreigners has produced a culture and civilization in Sri Lanka that has absorbed diverse influences, the foreign legal heritage has produced a General law that is uniquely Sri Lankan. For that reason alone, it should not, though inspired by seventeenth and eighteenth century Dutch jurists and their English successors, be viewed as a system that has ceased to have relevance for an independent nation. It can thus provide the foundation for a uniform law. One of the significant limitations of the General law is that, though applied in the same courts as the Customary law, it has not been influenced by principles and concepts familiar to those systems. We have discussed in previous Chapters, the manner in which aspects of Roman Dutch law and English law that have influenced the law of parent and child may be replaced with concepts and legal values derived from the Customary laws. If legislative trends and even a bold judicial attitude show a willingness to replace the antiquated aspects of the received Roman-Dutch and English law, while at the same time appreciating the creative and useful features in the Customary legal heritage, it may be possible to develop a General law that overrides the limitations of the existing systems. In the process a uniformly applicable set of laws will govern the relationship of parent and child, and replace the existing areas of pluralism and diversity.

We have observed in earlier Chapters that many Western as well as Asian and African countries have in more recent times resorted to codification of the laws governing family relations, and in particular, those dealing with parent and child.[8] These codes help to reduce confusion and contradictions in the law, and can be drafted to reflect the fundamental values that the legal system accepts in regard to the law of parent and child. The process of codification also gives an opportunity for law makers to draw upon the legal thinking on this subject in other systems. It has been suggested in earlier Chapters that the comparative approach to legal problems can be a fruitful exercise, helping to surface principles and concepts that can be usefully borrowed and adapted.

Codification is also an important device for removing or at least reducing diversity in legal systems with a multiplicity of personal laws. It has already been pointed out that there may no longer be any justification for continuing to recognise the Kandyan law and

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Tesawalamai as distinct sources of law. However even if these systems are retained, it is still possible to follow the pattern of the past by recognising the "choice concept." A uniform law on parent and child can thus be introduced that may be utilised by all citizens as an alternative to their own personal laws. This will require absorbing some of the areas at present governed by distinct statutes. Inevitably some aspects of the code will also have to be drafted in the awareness that the law will apply to parents who have not contracted their marriages under the General law. The drafting of a uniform code will therefore be clearly a more complex task if the non-Muslim Customary laws are to be retained in Sri Lanka. However the very introduction of such a code may pave the way for ultimate uniformity in the area of family relations, and the law on parent and child. We have observed how legislation originally envisaged as General law statutes eventually came to be accepted as the norm for determining the legal transactions of all citizens in regard to the matters dealt with.

Codification also encourages law reformers to focus on the appropriate forums and procedures in litigation that involve intrinsically common elements. One of the striking features of the Sri Lanka law, prior to the recent creation of the Family Courts, was the availability of several different types of procedures and courts to decide related matters involving parents and children. Inevitably there was duplication of legal processes and difficulty in developing a consistent approach in important areas of the substantive law that affected both groups. We have observed these limitations especially in discussing the law on custody, curatorship and the support obligation. Family Courts were introduced for the first time in 1978 in Sri Lanka prior to, and without contemplating, codification of the substantive law on parent and child. These Courts have been conferred with sole and exclusive jurisdiction in a wide range of matters that affect children and parents, with powers of transfer and consolidation which enable one court to decide several related matters in regard to the same parties.

We have observed the anomalies that have arisen due to the lack of corresponding changes in both substantive law and civil procedure which harmonize with the new jurisdiction conferred on

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the Family Courts. There has thus been a premature attempt to introduce a rationalisation of forums and procedures without the essential framework of a comprehensive and meaningful package of reforms to change the often antiquated substantive law. Besides, the concept of judicial proceedings in the family Courts has been retained, with a marginal effort to change the formal accusatory approach in court proceedings through the concept of a preliminary procedure of conciliation by family counsellors. These counsellers in any event, can play a very insignificant role in the Family Courts, as presently constituted; the emphasis is on accusatory adversary court proceedings with legal representation of parties by lawyers. Even this minimal effort to introduce the concept of counselling by non-legal personnel prior to judicial proceedings has run into problems due to lack of trained counsellors, and Family Court judges who understand their special role in determining family disputes, that come before these courts. Parties in Sri Lanka usually take the final step of litigation after efforts at conciliation by the wider family and intimate friends have failed. It was perhaps inevitable that neither litigants nor lawyers understood or valued the concept of conciliation efforts by officially appointed 'family counsellors'. Though the Judicature Act made reference of a dispute to a family counsellor, and the conciliation procedure an essential preliminary step to judicial hearing—subsequent amendment postponed the application of that procedure, for a time when family counsellors were "attached" to family courts.[84] This appears to be a recognition of the pragmatic problems of implementation, recruitment of personnel, as well as the superfluousness of the conciliation procedure from the litigant's point of view. The concept of Family Courts has, as we have observed introduced some beneficial change in avoiding the duplication of procedures and courts that was a feature of Sri Lankan law. Yet the contradictions and ambiguities in the law invariably continue, and neither the current court procedure and practice nor the substantive law reflect or encourage the adoption of a consistent approach to legal problems in the area of family relations.

Some of the problems caused by conflicts between the General law and the other systems of personal law that apply in Sri Lanka today have been discussed in Chapter I. Legislation is clearly

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necessary to resolve the confusion created by conflicts and uncertainity in the provisions in important statutes referred to in this Chapter, that pertain to the application of the General law, Kandyan law, and Tesawalamai. The subject of unilateral conversion or apostacy from Islam and its impact on the change of personal law is also discussed in this Chapter, and is an important area for legislative reform. It is suggested that any future reforms in regard to questions involving inter-personal conflict of laws should focus an the concept of uniformity, and the need to avoid plurality of laws in the area of family relations. The utilisation of the General law by persons in an important relationship like marriage for example, should be treated as an opting out of their personal law. For instance a Kandyan or a Muslim who marries under the General law should not be permitted to claim the application of their personal laws. Again if the focus is on applying the General law as the system governing family relations, the concept of applying one system of law to the individuals who belong to the family unit can be followed, in a departure from the traditional and somewhat controversial conflict of laws rule that a married woman and her children follow her husband's personal law. The problems entailing a conflict of personal laws cannot afford to be ignored, if the present pluralism in the law on family relations continues to be maintained in the modern law.

The most important features in the law of parent and child that have been discussed in this book are legitimacy, support, parental rights, and the artificial creation of this relationship through adoption. The existing law and the suggestions for its reform have been discussed in the separate Chapters that deal with these aspects. It is proposed only to reiterate the main themes that have been expanded in them.

The concept of legitimacy does pose certain fundamental issues in regard to the status accorded in the legal system to lawful marriage. Nevertheless the present work suggests that the focus in the modern Sri Lanka law on this subject should be upon the need to relieve an illegitimate of the blight of his inferior legal status. We have observed that the illegitimate is after all the legitimate child of an illegitimate union. We have also seen how the Christian ethic in regard to monogamous marriage that greatly influenced the legal values on legitimacy in Western Europe has ceased to have

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its original impact on the law governing illegitimates. The laws in these countries have been revised and modified in favour of illegitimate children, despite the fact that the parent-child relationship has been created outside marriage. The indigenous law in Sri Lanka traditionally adopted a more humane attitude to illegitimates, and it is certainly time that the legal values and principles in this regard were reviewed.

The provision of maintenance and support may be sometimes regarded as a necessary corollary of parental and filial rights. It may be argued that a parent has the right to the custody of his minor child, and a duty to support and maintain him. The child's rights in the latter respect create an obligation upon him to provide for parents in need. However the law on support in Sri Lanka favours a different policy—namely that the obligation of support is placed upon certain individuals irrespective of legal rights. Thus parental rights are disassociated from duties of support, and the reciprocal obligation of maintenance between parents and children becomes a method by which the State is relieved of shouldering that burden. The important features in this area of the law on parent and child, and the need for reforms have been explored in the Chapter dealing with the duty of support.

Parental rights over minor children have been progressively eroded in the West, whereas the Sri Lanka law in this area emphasises this aspect, as well as the preferential legal status of the father of the legitimate child. The law of adoption too has undergone constant review and reform in the English law that was the inspiration for the Sri Lanka statute on this subject. The Chapters relating to these aspects examine the existing law, discuss some of the changes that have been introduced in other legal systems, and evaluates whether the rethinking in these areas should guide future reforms in Sri Lanka.

It has been suggested that changes in the law of adoption must be undertaken with a realistic assessment of the availability of the supporting services necessary to ensure the success of reforms along the lines accepted in the modern English law. The concept of according identical parental status to married men and women, as part of the campaign for equal rights for women and State protection of minor children, feature significantly in the reforms

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introduced in Western countries. The constitution now reflects commitment to achieving equal rights for women, and directs the state to promote the interests of children and youth. International commitments in this regard have been accepted.[8B] The concept of parental rights over minor children, and the preferential status accorded to the father in this respect may have some relevance to traditional Sri Lankan values in regard to family relationships, when the family unit functions well. Since acknowledgement of rights may also operate as an incentive for parents to shoulder responsibilities, it has been suggested that a developing country like Sri Lanka may have cause to view their recognition as a meaningful aspect of its legal heritage. It has been noted that the concept of the child's welfare is not alien to the Sri Lanka law because of the recognition given in the legal system to the State as Upper Guardian of minors. The view presented here is that future reforms should seek to retain the existing balance between the concept of parental rights and state concern with safeguarding the interests and welfare of minor children. It has been suggested that when the family unit is disrupted by separation, divorce or death of a parent, or in some other way, the priorities change, so that the law is justified in moving away from its commitment to parental rights and the preferential legal position of the father.

Because of the exposure to foreign systems of family law through centuries, the law reformer in Sri Lanka is not confronted with the problem of uprooting deeply entrenched Customary law values, that may conflict with any new laws. In any event though Western writers[9] on family law view replacement of Customary law with family law codes that have a Western legal bias as an over radical effort at modernising traditional societies, law reformers in developing countries often reject a timerous or conservative approach. Mr. M. C. Chagla a former Indian Minister reflected this confidence when he said, "in the context of a developing country.....the law (should give) the lead to society, and (place) before society, ideals and values to which persons should conform".[10] It would seem however that the more valid objection to "modernisation", is that it has become a slogan for introducing Western legal values on the basis that they are the ideals that the law in third world countries should postulate. It is important that we should appreciate that the rationale for law

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reform in Sri Lanka is not the need to duplicate borrowed legal values, in the name of "modernisation" or "progress". In introducing law reforms we should adopt a critical approach to comparative trends in other legal systems, absorbing only those features that have a validity and usefulness in changing the direction of our law.

Through years of colonial exploitation, third world societies sometimes find it difficult to appreciate that western legal models do not neccessarily have a universal validity. We resent the inference that what is good for the West is not good enough for us, without appreciating that we should rather ask ourselves whether what is good for them is good enough for us! Slogans such as "equality for women" and "the rights of children" have sometimes been pursued so ruthlessly in the West, as to reject entirely the concept of family obligations, and distort the very structure of personal relationships between spouses, parents, and children. A consciousness of the disruption and malfunctioning in family relationships that the West has seen in recent times, should also make us aware of the need to evaluate trends in their law that reflect these disturbing changes. For the uncritical acceptance of these trends, and their duplication in the formal legal system may have even a limited impact in weakening support for legal and social values that we do not really wish to reject. It is therefore important for us in Sri Lanka to utilise Western concepts, whether in regard to the legal position of women and children, or in any other respect, only in such a way that they make for creative and socially relevant changes in our law.

If we do not adopt an eclectic attitude in this context, we will only be following the same pattern of law reform as in the colonial era. At that time, we absorbed Western legal values because these were postulated as the best. In the process we have observed how many worthwhile values in the indigenous laws were rejected or discarded. When these very values came to be reflected in the liberal family law reforms in Western countries in recent years we find ourselves carrying a burden of legal principles and concepts that are antiquated by the self same Western standards. It is surely unreasonable that we should repeat this experience in the post independence era of our history. We should instead adopt a critical and eclectic

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attitude to current trends in the law of parent and child in other systems while also drawing strength and inspiration from the creative developments that have taken place in our own legal system. The sentiments expressed by the late Mr. S. W. R. D. Bandaranaike at the ceremonial opening of the first session of Sri Lanka's independent parliament in 1948, reflect thoughts that have a special relevence to the subject of law reform. "It is true" he said, "that no people can live on memories alone; it is equally true that history often provides a source both of strength and inspiration to guide them in the future. It is only against the background of the past, that the present and the future can be viewed in their correct perspective".[11] It is such an approach, that views with both confidence and objectivity the legal heritage of the past, that can inspire creative and meaningful changes in the Sri Lanka law on parent and child.

NOTES

1. See the works cited in Chapter I note 1 supra; Gunther Dietz Sontheimer in Some Aspects of Indian Law Today, Brit. Inst. of Comp. and Intern. Law (1964) 32; M. Friedman Chinese Family Law in Singapore, Family Law in Asia and Africa op. cit. 52; O. Kahn Freund, "Law Reform in Kenya" (1969) op. cit.

2. See Chapter II supra especially at note 94 and Chapters IX, and X.

3. See especially Chapter X.

4. See especially the discussion of parental rights in regard to a minor's marriage, ChapterVII supra; see also the report of the Commission on Marriage and Divorce op. cit.

4A. Constitution (1978) Ch.III Art. 12, and Ch. VI.

5. (1964)

5A. See the recent cases on Maintenance and Muslims discussed in Chapter X supra.

6. See the works cited in note 1 supra; J. D. M. Derrett, Religion Law and the State in India op. cit. 361, A Critique of Modern Hindu Law op. cit. 30—31.

6A. See especially Chapters I and II.

7. See the views expressed by the late D. B. Ellepola and P. B. Ranaraja, the Kandyan members of the Marriage and Divorce Commission (1959) as reflected in the report.

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8. See Derrett A Critique of Modern Hindu Law op. cit. and also J. N. D. Anderson ed. Changing Law in Developing Countries and Family Law in Asia and Africa op. cit; Kahn Freund op. cit., D. Lasok Family Law op. cit., Olive M. Stone, Family Law op. cit. P. M. Bromley Family Law (1976 ed.) op. cit.

8A. See Judicature Act s. 26(1) 26(4) and Amendment Act No. 37 of 1979 s. 3 which introduced a new subsection 26(5).

8B. Constitution (1978) Arts. 12 27 (13); Universal Declaration of Human Rights, The world Plan of Action for the International Womens' Year (1975), The Declaration of the Rights of the child and International Covenant on Economic Social and Cultural Rights.

9. See the works cited in notes 1 and 6 supra.

10. M. C. Chagla in "Some Aspects of Indian Law Today" op. cit.1.

11. as cited in K. M. de Silva, Introduction, Sri Lanka : A Survey op. cit. xi.

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