AN INTRODUCTION TO THE LEGAL SYSTEM OF SRI LANKA

L.J.M. COORAY

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By the same author

Reception in Ceylon of the English Trust

Essays on the Constitution of Ceylon

Reflections on the Constitution and the Constituent Assembly

Conventions, the Australian Constitution and the Future

N. Selvanatkumaran

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FOREWORD

The intention of the learned author of this book is to give a brief account of the various laws, legal systems and the organisational pattern of the courts of Ceylon today making reference to historical facts and developments, and to treat separately the history as well as the extent and nature of the present application of each of the component traditions (English law, Roman-Dutch law, Muslim law, Kandyan law, *Tesawalamai*) of the legal system of Ceylon.

A study of this nature, which has not hitherto been made in Ceylon, will be interesting and profitable. It should reveal which principles of the laws administered in Ceylon are common to the different systems and traditions, and the extent to which concepts derived from particular sources have been extended or modified by the impact of different concepts or by the need for adaptation dictated by social, economic or political considerations.

At a stage when extensive Law Reform is being contemplated in Ceylon, Dr. Cooray's endeavour to analyse the background of our existing laws and legal system should be of much assistance.

H N G FERNANDO
Chief Justice
The Chief Justice's Chambers
Colombo

February 17, 1972

PREFACE TO THE FIRST EDITION

When the Faculty of Law of the University of Ceylon was situated in Peradeniya, I delivered in the academic year of 1961/62 a series of lectures on the Legal Systems of Ceylon. I lectured again on the same subject in the following academic year. These lectures, along with the mimeographed hand-outs with which they were supplemented, contained the fruits of some original research and considerable labour. I then went abroad and spent four years in Cambridge. When I returned to Ceylon I found that with the considerable expansion of legal education consequent to the awarding of external degrees, my lectures had been made use of in various ways without any acknowledgement to me. Sections of them had been mimeographed and distributed to students and parts of them had been the basis on which others had lectured. I thus decided to rewrite, add to and modify these lectures and compile a book. Chapters I, II, III and V in particular contain I believe a very distinctive presentation and a certain amount of original matter about the Legal System of Ceylon.

It is hoped that the student, the overseas reader and also the local practitioner will find useful information about the laws, organization,sources, concepts and the underlying principles of the legal system of Ceylon. An attempt is made to give a brief account of the various laws, legal systems and the organizational pattern of the courts of Ceylon today making reference to historical facts and developments. In this work the emphasis is on the contemporary legal system. Therefore the history as well as the extent and nature of the present application of each of the component traditions (English law, Roman-Dutch law, Muslim law, Kandyan law, *Tesawalamai*) of the legal system of Ceylon, are treated separately in relation to each tradition. Such an approach has its disadvantages. When one studies the component legal traditions separately one may not obtain an overall view of and the manner of the evolution of the entire legal system. On the other hand a chronological approach which analyses the legal system and its historical development will militate against a clear presentation of the contemporary laws and the different legal traditions which exist in Ceylon today. It is hoped that Chapter I (the Introduction) which attempts to hold together and relate the various

chapters will remedy the disadvantage arising from the absence of the use of the chronological approach. It is also hoped that the Introduction and cross references in footnotes will help to make clear and explain the relationship and interaction between the various competing systems.

Chapters II, III and IV describe the history and present application of the different legal systems of Ceylon. Chapter V deals with the sources of the law of Ceylon. Chapter VI outlines system the of courts. Chapter I is an introductory chapter which attempts to give an overall view of the legal system and to give cohesion to the work. It also outlines the interrelationship and interaction between the diverse legal traditions. The legal system of Ceylon consists of a number of different systems and diverse traditions, and it is important for the student and the overseas reader who is approaching this system for the first time to have some understanding of the interaction between the various systems and the extent of their relative application. Chapter I is intended to help such an understanding.

The student and the overseas reader might find the interaction in Ceylon of the various traditions difficult to understand. For this purpose cross references have been inserted and at times repetition has been resorted to as an aid to understanding. Repetition which may be wearisome has been deliberately resorted to in places, particularly for the sake of the student. As a teacher of legal systems over many years I am particularly familiar with the problems that students have in sorting out and understanding the overlap and interaction between the various systems. Therefore this book has been written with this experience behind me and with the intention and the hope that it will assist the student.

A student approaching for the first time the study of law must endeavour to gather an understanding and view of the entire legal system. The student approaches a subject as consisting of a number of topics. This book contains a number of Chapters. A subject is studied by topics and chapters not because it consists of distinct elements, but because one cannot study all things at the same time. The topics are based on divisions made, not by practitioners and judges, but by law teachers and academic writers. Judges and practitioners are concerned with issues which arise from the facts of a particular case and which will involve legal principles which

have to be extracted from diverse topics and subjects. The professional legal world is forced to view the law as an organic whole. The intelligent and successful is the one who studies "topics" seeing their interrelatedness and their place and relative importance in the entire subject, who sees each subject as a part of a greater entity "law" and who understands the place of law in society.

No one can hope to produce a completely original work. Any writer makes use of the experiences and ideas of others. From many writers named in the footnotes and others unnamed I have learnt much. I must however record what I owe to some who have perceptibly and directly helped me during my study of the legal system of Ceylon. I must start with Mr. R.K.W. Goonesekere who introduced the subject to me in 1958 when I was a first year student of "Legal Systems" at the University of Ceylon. Subsequently when I myself started lecturing on the subject I was stimulated and learnt much from the students whom it was my privilege to teach both at the University and the Law College. I also gathered knowledge from the writings of Professor T. Nadaraja regarding the early history of the courts, and from the works of Dr. H.W. Tambiah, Dr. Ralph Peiris and Dr. M.L.S. Jayasekera about the special systems of law. During the course of the preparation of this particular work many have helped me in various ways. Mr. M.C. Sansoni and Mr. Barry Metzger did me the great service of carefully reading the manuscript and offering many valuable suggestions and criticisms. Messrs Ravindra Tennekoon, Austin Pulle and Saleem Marsoof read certain sections of the manuscript and offered very valuable and penetrating suggestions which prompted me to rewrite certain sections. I must confess that I was considerably stimulated and helped by discussions I had with Messrs Saleem Marsoof and Ravindra Tennekoon in the preparation of the chapters on English law and Roman Dutch law. Dr. M. Sornarajah, Messrs S. Rudiramoorthy, Nimal Dissanaike, Sunil Cooray, Palitha Kohona and J.K. Canagarayar also rendered valuable assistance by giving me certain suggestions and providing me with information regarding certain sections of this work. Mr. Lal Perera and Miss Mangalam Kanapathipillai put in a great deal of work in the preparation of the table of cases and table of statutes. Mr. P. Suntharalingam was responsible for the compilation of the index. Many helped me in checking and correcting the various drafts of the typed

manuscript and proofs. I record with thanks the names of those whohave given me a great deal of assistance in this respect. Messrs Lloyd Basnayake, Kumar Cherubim, A.U. de Almeida, Mahinda Dharmadasa, D.J.P.D. de S. Egodage, Clement Fernando, S. Gunasekera, Ikram Mohamed, Iqbal Mohamed, Mano Rajapakse, Paul Ratnayake, P. Suntharalingam, H.A.J. Soza and D.G. Paliyaguru and Misses Mangalam Kanapathipillai and Manel Ganegoda. The greater part of the work was done by Miss Mangalam Kanapathipillai, Messrs Ikram Mohamed, Lal Perera, Mano Rajapakse and P. Suntharalingam. I must thank Messrs H. Amerasinghe and T.S. Almeida of Lake House Investments Limited who very carefully went through the entire manuscript and pointed out many errors and inconsistencies. I owe much to the members of the library staff of both the University of Ceylon and the Law College where a great part of the reference was done. Mention must also be made of Mrs Ranjit Karunatilake, Mrs Malini Chandrasena, Messrs Haroun Amath and David Mangalasinghe and Miss T. Dole who were responsible for typing the various drafts of the manuscript.

L.J.M. COORAY.

Ceylon Law College.
2nd September, 1971.

PREFACE TO THE SECOND EDITION

An Introduction to the Legal System of Ceylon was first published in 1971. It has been out of print for some time. It has become a rare book, if judged by the price at which it now changes hands.

Mr H. Samaranayake, the Publishing Manager of Lake House Investments Ltd brought to my notice on a number of occasions the fact that there is a big demand for a second edition. Since I left Sri Lanka in 1974 and have been resident abroad, I did not feel that I could undertake the task of bringing out a new edition. Accordingly the task of bringing out the second edition was entrusted to a local academic lawyer. However due to pressures of work he was not able to get very far with the project. Therefore when I came to Sri Lanka in 1980 to spend part of my sabatical leave Mr Samaranayake once again asked me to prepare a second edition. Time was again a constraining factor. Finally we ended up with a compromise. I agreed with the help of lawyers resident in Sri Lanka to revise the manuscript and update it. What I ended up by producing was not a new edition, but rather a revision of the first edition deleting parts which were obsolete and updating sections which required modifications in the light of changed circumstances.

The second edition contains a change of name - a substitution of "Sri Lanka" for "Ceylon". Chapter 6 of the first edition which deals with the System of Courts has been omitted. It is hoped to bring out a separate volume dealing with Courts and Tribunals, in the not too distant future.

I must express my thanks to those who have helped in the preparation of this revision. Mr K. Selvaratnam offered some very valuable comments and provided some extracts which have been included. Professor T. Nadaraja made some comments, drawing on his expert and unrivalled knowledge on the legal system of Sri Lanka. Mr H. Samaranayake of Lake House Investments Ltd. must be regarded as the guiding force without whose encouragement the project would have never begun. Macquarie University and the National Science Council of Sri Lanka made available funds to meet research, typing and other expenses. Mr R.K. Suresh Chandra, Miss Sriyanganie Fernando, Miss Mangalam Kanapathipillai and Miss Fiona Senanayake have given me valuable assistance in the course of revising the manuscript. Mrs Himani Perera

was responsible for typing the changes to the manuscript a task she performed efficiently and expeditiously. Mr I.A.W. Perera carefully and expertly did the final proof reading and provided valuable editorial suggestions. This edition was prepared while I was resident overseas. I trust that the readers will forgive the shortcomings.

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5th January 1987

ABBREVIATIONS USED IN CITATION OF SRI LANKA LAW REPORTS AND JOURNALS

Standard abbreviations are used in this work when citing English and International law reports and journals.

The following are the abbreviations used in the citation of Sri Lanka law reports and journals.

A.C.R.	Appeal Court Reports.
Asir.	Asirwatham's Reports.
Austin	Austin's Reports.
Bala N.	Balasingham's Notes on Cases.
Bala R.	Balasingham's Reports.
Bevan and Mills	Reports compiled by Bevan and Mills.
Browne	Browne's Reports.
C.A.C.	Court of Appeal Cases.
C.L.C.R.	Ceylon Law College Review.
C.L.E. (1956)	Ceylon Legislative Enactments, 1956 Edition.
C.L.J	Ceylon Law Journal.
C.L. Rec.	Ceylon Law Recorder.
C.L. Rep.	Ceylon Law Reports.
C.L. Rev.	Ceylon Law Review.
C.L.W.	Ceylon Law Weekly.
C.W.R.	Ceylon Weekly Reports.
Creasy	Creasy's Reports.
Crowther	Crowther's Reports.
Curr. L.R.	Current Law Reports.
Fernando	Fernando's Reports.
Grenier	Grenier's Reports.
Joseph and Bevan	Joseph and Bevan's Reports.
Koch	Koch's Reports.
Leader	Leader Law Reports.
Leemb.	Leembruggen's Reports.
Leemb. and Asir./L & A.	Reports compiled by Leembruggen and Asirwatham.
Marshall	Marshall's Judgments.
Morgan	Morgan's Digest
Lorenz/Lor.	Lorenz's Reports.
Murray	Murray's Reports.

Nell	Nell's Reports.
N.L.R.	New Law Reports.
Ram.	Ramanathan's Reports.
S.C.C.	Supreme Court Circular.
S.C.D.	Supreme Court Decisions.
S.C.R.	Supreme Court Reports.
Solomon	Solomon's Reports
S.P.	Sessional Paper (Ceylon).
Tambyah/Tamb.	Ceylon Revised Reports. Edited by Isaac Tambyah (1820-43).
Thompson/Thomp.	Thompson's Institutes of the laws of Ceylon.
Times	Times Law Reports.
U.C.R.	University of Ceylon Review.
U.C.L.R.	University of Ceylon Law Review.
Vand.	Vanderstraaten's Reports.
Weerakoon	Weerakoon's Reports.
Wendt	Wendt's Reports.

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INTRODUCTION

1. THE DIFFERENT SYSTEMS OF LAW IN FORCE IN SRI LANKA

An author attempting to write about the legal system must necessarily divide the subject matter he intends to cover and deal with a topic at a time. The student also studies "by topics". But a legal system even though composed of diverse traditions and elements, and of different facets, must also be viewed as an organic whole which cannot be neatly compartmentalized or divided. This chapter is intended to provide an understanding and overall view of the legal system of Sri Lanka, so that when the reader wanders through the succeeding chapters in which different aspects and the component parts of the legal system are analysed, he will not lose his bearings. Every effort has been made to interpret and explain (having in mind the student and the foreign reader) the interaction of, and the relationship between, the diverse systems of law in force in Sri Lanka. This has involved cross references in footnotes, and in places repetition (brief reference to or summaries of) of what has been stated in a different context.

1.a The multiple systems of law

Many different systems of law have affected the development of the law of Sri Lanka. These are Sinhalese law (today more commonly referred to as Kandyan law), Buddhist law, Hindu law, *Tesawalamai* law, Islamic law, Mukkuvar law, Roman-Dutch law and English law. An individual may, in respect of different transactions or legal relations, be governed by different systems of law.

A Tamil living in the Jaffna district of Sri Lanka would inherit property on his father's death according to the law of the *Tesawalamai*;[1] he might be called upon to be a trustee of a Hindu temple in which case principles which originated in the English courts of equity and Hindu religious law would be relevant to determine his powers, rights and duties,[2] he would mortgage his property according to principles derived from the Roman-Dutch law,[3] he has a choice whether to contract a marriage according to the statute law of the land or custom, but his

1. See below, article 19
2. L.J.M. Cooray, *Reception in Ceylon of the English Trust* (1971, Colombo), article 63.a.
3. W. I. Jennings and H.W. Tambiah, *The Dominion of Ceylon* (1952, Stevens, London), p. 214.

capacity to marry would be determined by statute law,[4] if he brought an action for divorce he would to some extent be subject to principles of law originally developed in English,[5] but his claim to the custody of his children would depend on the Roman-Dutch law,[6] and his wife's right to retain the property she had brought into the marriage community and any property she may have acquired subsequently would be governed by the *Tesawalamai*.[7]

Problems have arisen as a consequence of the overlap of the different systems.[8] But the principles determining the extent and confines of each do not often worry the experienced practitioner.

The existence of a multiplicity of laws is the result of historical development and the place occupied by the various systems in the legal system and the interaction between them can best be understood and viewed in a historical perspective. It is proposed, therefore, to provide a brief outline of the development of the various systems of law. The outline commences from 1505, the year of the arrival of the Portuguese. The procedure adopted in this analysis is to state the communal systems of law in existence in 1505, and then to show the effect exercised by the judicial and administrative reforms of successive European colonial powers on the operation of these systems.

1.b. The laws before 1505

The Portuguese, the first European power to exercise dominion over Sri Lanka, arrived in 1505. The two chief sections of the population were the Sinhalese who spoke the Sinhala language and the Tamils whose language was Tamil. The Sinhalese occupied the interior of the country and its southern and western areas and were Buddhists. The Tamils, professing the Hindu religion, occupied the Northern and Eastern areas. A community of Muslim traders[9] had settled on the western seaboard. The Mukkuvars, a fisher caste from the south - western coast in India had settled down mainly in Jaffna, Kalpitiya, Puttalam and Batticaloa. There were also certain numerically negligible communities-

4. The relevant provisions of the Civil Procedure Code, 1889, are based on English law. See Jennings and Tambiah, op. cit., pp. 200-208.
5. Ibid., p. 203.
6. Ibid., p.204.
7. Ibid., pp. 274- 75.
8. See article 14.c.
9. Muslims are those who profess the Islamic religion. The word "Muslim" carries no connotation of race. The Muslims of Sri Lanka are Moors (descendants from Arabian ancestors or Malays). But a person of any race by conversion to Islam, can become a Muslim. See below 18d.

the Chetty and Parsee merchants who had migrated from India and settled in Colombo and the Paravars from South India who lived around the pearl fisheries of Sri Lanka.[10]

(i) **Sinhala law.**[11] The Sinhalese legal system was developed over many centuries. An elaborate system of courts served the entire country. Local and indigenous customs, canonical writings, practices and rites of Buddhism, Hindu laws and customs, Sakyan and Mauryan customs, other Indian customs, and the laws and customs which the original Sinhalese brought with them to Sri Lanka had in varying degrees influenced the laws of the Sinhalese.

(ii) ***Tesawalamai.***[12] The Tamil word *Tesawalamai* means the custom of the land. The *Tesawalamai* was brought to Sri Lanka by the Malabar or Tamil immigrants from India, was modified by another wave of Indians who came from the Coromandel coast, was subsequently influenced by Hindu law and developed in to a peculiar system of law administered in the Northern Kingdom of Sri Lanka at the time of the arrival of the Portuguese.

(iii) **Muslim law.**[13] The Muslims who came to Sri Lanka brought with them a portion of a very great system of jurisprudence known to Muslims the world over. When they settled down in Sri Lanka usually in villages or separate colonies, they preserved their own laws and customs, which the Portuguese and the Dutch recognized and administered as separate systems. But there is no evidence as to whether before 1505 Muslim law was administered by the Sinhalese tribunals as a separate system. The Muslims had no separate kingdom and lived in the Sinhalese areas. It is probable that the Muslim community in Sri Lanka conducted their own private and social affiars according to their laws and customs; but that where a question came before a Sinhala tribunal it might have been determined according to Sinhala law.[14]

(iv) **The laws of the Mukkuvars, the Chetties, the Parsees and the Paravars.**[15] These communities preserved their laws and customs which were recognized by the courts during the Dutch and British

10. See Alexander Johnston's Papers on "Ceylon Native Laws and Customs". (unpublished) as referred to in T. Nadaraja, "The Administration of Justice in Ceylon under the Dutch Government" in 12 J.C.B.R.A.S. (N.S.) 1 at 10.

11. The ancient Sinhalese legal system is analysed in article 15.a.

12. The origin and early history of the *Tesawalamai* is discussed in article 19.a.

13. An account of Muslim law and of its history and development in Ceylon is given in article 18.

14. See Cases cited in article 17. b. in which Sinhala law in the Kandyan areas in the early years of the British period was applied to Muslims and Hindus.

15. See *supra*, n. 9 and as regards Mukkuvar law, see below, article 20.

periods.[16] But the same comments made above regarding the application of Muslim law by the courts prior to the advent of the Dutch would be relevant in this context too.

1.c. The Portuguese influence on the laws of Sri Lanka

The Portuguese did not introduce their own system of law in to Sri Lanka. There is a reference in the *Tesawalamai* Code compiled in Dutch times to the changes made by the Portuguese. But evidence is not available as to the nature of the changes and as to the effect of Portuguese rule on the laws and customs of the other minority communities.

Sinhala law[17] before 1505 was a single system which was administered in the Sinhalese areas. There were, no doubt, local usages in force in particular areas, and slight differences of detail from place to place. The subsequent distinction between the laws and customs of the low country and of the Kandyan areas dates from the period of Portuguese rule. The Portuguese never occupied the Kandyan provinces and in no way influenced the Sinhala law in the Kandyan provinces. But the Sinhala laws and customs in the maritime provinces were not uninfluenced by the Portuguese. At the Malwana Convention of 1597 it is said that the Portuguese agreed to maintain and administer the laws and usages of the Sinhalese in the maritime provinces which came under their sway.[18] But the system was administered mainly by foreigners who were unacquainted with the spirit of the laws and the customs of the people, and had no inclination to study them. Further, Sinhala law in the maritime provinces came under the growing influence of Portuguese customs and in course of time it was natural for the Sinhala laws and customs to change their character.

1.d. The Dutch influence on the laws of Sri Lanka

The Dutch ruled certain parts of Sri Lanka from 1656-1796. They introduced their laws into Sri Lanka, but the extent of the application of Dutch law in Dutch times is not clear.[19] The Dutch laws were applied to the Dutch settlers and their native servants, to the Sinhalese and Tamils living within the forts and also to those who had embraced Christianity. The laws and customs of the Tamils of Jaffna, the Muslims,

16. See T.Nadaraja, "The Administration of Justice in Ceylon under the Dutch Government" in 12 J.C.B.R.A.S. (N.S.) 1, 11 and 55-56.
17. .See further in articles 15 and 16.
18. But see T.B.H.Abeysinghe, "The Myth of the Malwana Convention" in (1964) Ceylon Journal of Historical and Social Studies, Vol.7, No 1, p.67.
19. See further, article 14.a. and 14.b.

the Mukkuvars and the Chetties were applied, and the Dutch law was regarded as a residuary law which was resorted to where the local customary laws were silent or the Dutch considered them unsuitable. But there is uncertainty regarding the extent of the application of Sinhala law in the maritime provinces. It is not clear whether Sinhala law was administered in the same manner (referred to above) as the other customary laws, or whether it was ignored and the Dutch law applied. The Dutch never gained control of the Kandyan Provinces for any length of time and therefore did not in any way influence Sinhala law as it was administered in those areas.

The Dutch established an elaborate system of courts in the areas they ruled.[20]

1.e. The British influence on the laws of Sri Lanka

The coastal and immediately adjacent areas of the Island were surrendered in 1796 by the Dutch to the British under Articles of capitulation. The same territory was subsequently ceded by the Dutch to the Government of the United Kingdom at the Peace of Amiens in 1802. The Kingdom of Kandy in the mountainous central area of Sri Lanka had throughout Portuguese and Dutch rule of the surrounding territory maintained its territorial integrity. But in 1815 the King of Kandy was deposed and the entire island passed under British sovereignty.

The law which applies consequent to the commencement of British power in a particular country depends on the nature and circumstances of the assumption of sovereignty. There are three main types of colonies conquered, ceded and settled. It is generally believed that Britain acquired Sri Lanka as a ceded colony. The Dutch possessions in the maritime provinces of Sri Lanka were conquered by the British in 1796, and were ceded by the Dutch in 1802. The Kingdom of Kandy was conquered in 1815. Conquered and ceded colonies are subject to the same rules. A settled colony is a territory which at the time of annexation was not populated or sparsely populated, and was primarily occupied by persons of British origin, e.g. North America, Canada, Australia and New Zealand.[21] In settled colonies the law of England becomes a part of the colony at the time of annexation. In a conquered or ceded colony the law that was already in force, prior to the cession or conquest, continues in force until changed.

20. See further, article 30.

21. See further, Wade and Phillips, *Constitutional Law* (1965, Longmans, London), p. 418.

In *Campbell* v. *Hall*[22] Lord Mansfield laid down a series of rules which govern the legal status of conquered or ceded colonies.

(i) The conquered or ceded country becomes a dominion of the King in the right of the Crown; and therefore, necessarily subject to the Parliament of the United Kingdom.

(ii) The inhabitants of the colony become British subjects and are said to be under the protection of the British sovereign.

(iii) The Articles of capitulation on which it is surrendered or the Articles of peace by which it is ceded are sacred and inviolable, according to their true intent and meaning. But these articles could be altered either by the Parliament of the United Kingdom, or by the King in the exercise of his prerogative powers of legislation.

(iv) The law equally affects all persons and all property within the limits of the colony, subject to three qualifications that where the law of the place is of a special character, as through association with religion, it does not apply to Europeans.

(v) The laws of a conquered or ceded colony to be in force until they are altered. This principle is subject to three qualifications[23] not stated in *Campbell* v. *Hall*; (1) Local rules that are barbarous or contrary to rules of natural justice, as understood by English law, are void. (2) The inhabitants of the colony are governed by laws applicable generally to colonies, possessions and British subjects. (3) A change of sovereignty implies a change of prerogative.[24] The English prerogative law thus operated "to abrogate any rule of law previously in force under the government of the United Provinces if it was incompatible with the British concept of the exercise of sovereign authority by the Crown".[25] Subject to these exceptions, the laws of a colony continue to be in force until they are amended by the Parliament of the United Kingdom, the Crown or the local legislature.

(vi) The King in Parliament or the King in the exercise of the prerogative powers can legislate for the colony. But the King cannot in the exercise of his prerogative powers legislate contrary to an Act of the United Kingdom Parliament, or seek to limit the authority of Parliament. If he does so, such legislation would be void. But the King in the

22. (1774) 1 Cowper 204.
23. See *Fabrigas* v. *Mostyn* (1775) 20 St. Tr. 162.
24. Jennings and Tambiah, op. cit., pp. 81-82.
25. See *Kodeeswaran* v. *The Attorney-General* (1969)72 N.L.R. 337. P.C.

exercise of his prerogative powers may legislate contrary to the common law of England.

The principle that the laws of the colony continue in force, subject to certain qualifications, until changed by the deliberate act of the new sovereign, was followed by the courts in Sri Lanka[26] and was also given statutory force by the enactment[27] that the laws that prevailed under "the ancient Government of the United Provinces[28] should continue subject to such alterations as have been or shall be by lawful authority ordained". When the Kandyan Kingdom was ceded, the Treaty of Cession[29] guaranteed "to all classes of the people" the continuance of "the laws, institutions and customs in force among them" Consequently the Roman-Dutch law and the customary laws of the Sinhalese, the Tamils and the Muslims continued in force.[30] Sinhala law was administered in the Kandyan Provinces after 1815. The Islamic law was applied as a strict personal law to Muslims. The *Tesawalamai*, a personal law with a peculiar territorial limitation, governed disputes between Tamils, but only Tamils resident in a particular territory (the Jaffna district). The Mukkuvars apparently retained their own customs (Mukkuvar law) which governed succession on intestacy until 1876.[31] The customs of the Chetties appear to have become obsolete.[32] Buddhist law and Hindu law have affected the growth of Sinhala law[33] and Tamil law[34] respectively but are not given effect to by the courts as separate and distinct systems. But these religious laws are given effect to,[35] if observed as customs, or if there is a religious dispute which affects civil rights, or under section 106 of the Trusts Ordinance. The Roman-Dutch law which it was assumed[36] was introduced during the

26. (1873) Gren. Part III 129; *Abeysekara* v. *Jayatilaka* (1932) 33 N.L.R. 51, P.C.
27. The Proclamation of 23rd Sentember 1799.
28. i.e. of the Dutch.
29. s.4.Kandyan Convention, 1815.
30. See below, article 161 Nadaraja in (1952).U.C.R. 31, 32-36; Jennings and Tambiah, op. cit., p. 62.
31. .See below, article 20.
32. ibid.
33. See below, article 15.a.
34. See below, article 19.a.
35 See below, article 26.
36. The word "assumed" is used for two reasons; (i) it was not the classical Roman-Dutch law but the Statutes of Batavia which was generally applied in Sri Lanka during Dutch times (See article 13.a. and 13.b.); (ii) it is not at all clear that Dutch law was applied in all situations to the Sinhalese of the maritime provinces (see article 14).

period of Dutch rule, was applied during the British administration to the European inhabitants, the Sinhalese outside the Kandyan Provinces, and those subject to the special laws where those laws were silent.[37]

The above systems of law were in force at the commencement of British rule. The laws of Sri Lanka were greatly expanded during the British period (1796-1948).[38] The introduction of English law, ideas and concepts of law, of English methods of judicial administration and organization reshaped the legal framework of the land. The structures of judicial administration and organization set up during the British period, were not substantially altered until 1972. However a number of statutory tribunals were set up. The Administration of Justice Law made some changes in the judicial system and further changes were made by us. Likewise the laws have not been altered, but they have been considerably added to. A significant characteristic of legislation dating from 1931 (the date when Sri Lanka received internal self-Government) has been the concern shown by the legislature for the provision of public services, social welfare and the regulation and control of sectors of the economy.

2. THE SOURCES OF THE LAW OF SRI LANKA

The sources of the classical Roman-Dutch law were statute, treatises, opinions of jurists, decisions of the courts and custom.[1] In the modern period the judiciary have regarded the treatises on the Roman-Dutch law, particularly those by Grotius and Voet, as the main source.[2]

In civil law jurisprudence the writings of jurists "...are a more important source of law than judicial decisions. The treatises are authoritative source of the law itself" [3] But the English doctrine of the single binding precedent was judicially incorporated into Sri Lanka and the courts have gradually evolved rules of *stare decisis*.[4] These rules were applied when the Roman-Dutch law was being expounded. Thus an interpretation a court put upon the Roman-Dutch sources became binding within the limits of the doctrine of precedent, and to that extent deprived the classical source of the authority it had possessed.[5]

37. See below, articles 14.c, 17.e 18.d, and 19.b.
38. See articles 5,6, 7, and 22.
1. .See further below, article 12.
2. See below, article 13.
3. T.Nadaraja in (1952) U.C.R. 31, 38-39, See further, articles 23.a. and 24.
4. See below, article 23.
5 See below, article 23.n.

The greater part of the customary laws is contained in codifications undertaken by the legislature.[6] The decisions of the courts interpreting non-statutory areas are an important source of Kandyan law.

The sources of the general law of Sri Lanka are legislation, case law and custom; religion and equity may be regarded as indirect sources.[7]

3. LAW REPORTS, DIGESTS AND TEXT BOOKS

Systematic law reporting commenced in Sri Lanka about 1877, though there had been earlier reports covering some of the years after 1833.[1] In 1877 when an attempt was made to compile from court records, reports of the cases decided after 1796 (the date when British rule commenced) it was found that the court records before 1820 had all perished owing to damp and moths, and those between 1820 and 1833 had been almost entirely destroyed.[2]

The Report of the Judicial Commission of 1936[3] states: "...in some respects the series of the reports now being published fall far short of what law reports should be." Among the deficiencies mentioned are the inadequate headnotes, which often do not contain all the significant points dealt with in the case being reported. The Judicial Commission Report pin-points two deficiencies in the compilation of the index to the law reports.

> The cross referencing in the current law reports is usually insufficient...the indices themselves have frequently been compiled by the simple method of copying out the headnote in the report, whether the headnote does or does not correctly represent the substance of the judgment.[4]

The Judicial Commission Report dealt with the system of reporting in 1936.[5] The nineteenth century reports often did not contain any digest and are even more unreliable.[6] Law reporting in Sri Lanka was in its infancy during that period, and was in the hands of private individuals.

There is no comprehensive Digest of the reported cases. Rajaratnam's

6. See below, articles 17.c, 18.c, and 19.b.
7. See below, Chaper V.
1. Preface, (1820-33) Ram; A.E.Keuneman in (1954) C.L.R. 19-21.
2. ibid.
3. Ceylon Sessional Paper 6 of 1936, para 246.
4. ibid.
5. See Judicial Commission Report, *supra*, n.3.
6. Keuneman in (1954) C.L.C.R. 19-21.

Digest covers the years 1820-1914 and 1914-1936. This *Digest* is not a very good one.[7] It does no more than reproduce the headnotes of decisions and we have noted that the headnotes are not very satisfactory. Cases are collected with no reference to the date that they have been overruled. The classification of subject matter is rather arbitrary and cross references do not remedy this defect.

Writing textbooks on the law of Sri Lanka is not a profitable venture, because of a limited reading public.[8] Therefore until very recently most of the textbooks dealt with "the laws of Ceylon"[9] and as a consequence no subject is treated in much detail. Until very recently, books dealing with a particular subject were not common.

In consequence of the above factors, judgments are sometimes delivered in ignorance of relevant authorities. When one also considers the multiple legal systems in operation, it is not surprising that many branches of the law of Sri Lanka are obscure to practitioners, judges and academics.[10]

4. THE SYSTEM OF COURTS

The ancient Sinhalese possessed an elaborate judicial system.[1] This was in part superseded in the maritime provinces during the Dutch period[2] by the system of courts which the Dutch set up. In the British period,[3] initially the courts set up during the Dutch period were continued with slight modifications. Governor North's Proclamation of 1799 abolished barbarous modes of punishment, insisted that legal proceedings must be in public, abolished the practice of obtaining confession by torture, established a single system of courts, extended the jurisdiction of certain civil courts, gave appellate jurisdiction to a Court of Appeal with right of appeal to the Privy Council in certain areas and provided for the liberty of conscience and the free exercise of religious worship.

After the conquest of the Kandyan provinces in 1815 the existing judicial system was continued in force, with modifications. The Sinhalese judicial officers continued to administer justice. After the 1817-

7. Dias in (1941) C.L.C.R. 8, 11; Judicial Commission Report, *supra*, n.3, paras 246-247.

8. Vetus in (1923) 4 C.L.Rec. lix, lxi.

9. W. Pereira, *Laws of Ceylon*; K. Balasingham, *Laws of Ceylon* (5 Volumes): A.B.C. Soysa, *Laws of Ceylon* (3 Volumes).

10. Nadaraja in (1952) U.C.R. 31, 43.

1. See below, article 15.

2. See below, article 30.

3. See below, article 31.

1818 rebellion the powers of the chiefs were considerably curtailed and judicial authority passed to a Board of Commissioners with Kandyan assessors to guide them. The Board supervised the Government Agents on whom fell the main task of dispensing justice.

The Charter of Justice of 1833 amalgamated the two systems of courts and set up an unified system of courts for the whole of Sri Lanka. The basic organizational pattern has been retained to the present day though changes have been effected.

5. AN OVERVIEW OF THE LAWS OF SRI LANKA

5.a. The laws of Sri Lanka

The laws of Sri Lanka like those of South Africa have been influenced by the two great legal traditions the world has known - the civil and the common law systems. The influence of the common law system which originated in England and spread throughout the English colonies has exercised a much greater influence in Sri Lanka than the Roman tradition.

Roman-Dutch law is the residuary law of Sri Lanka. The Roman-Dutch law in British times came to be applied in all situations in which there was no relevant statute and in case of those subject to the special laws, where those laws were inapplicable or silent. The interaction of the various systems of law could be described thus. A statute is the primary source of law. Statutes could be based on English law or may be enacted in view of local needs and circumstances or be a restatement of customary or religious law. Some statutes incorporated by reference the English law on a particular subject. Where there is no applicable statutory principle, the courts will first look to see whether the parties are governed by one of the exceptional systems of law, and if not, they will apply the Róman-Dutch law. But the Roman-Dutch law has been affected by judicial decisions, which departed from and modified the Roman-Dutch principles, introduced English principles instead or applied and gave effect to local customs and practices.[1]

It is proposed to briefly discuss in this context the extent of the application of Roman-Dutch law and the extent to which the Roman-Dutch law which is the residuary law of Sri Lanka has been modified by English law, judicial decisions and statute. The extent of the application of the exceptional laws derived from custom are discussed

1. The law of tort or delict.

elsewhere.[2]

5.b. **Criminal law, procedure and evidence**

Criminal law and the law of evidence are statutory. The early statutes were copies of Indian enactments which were drafted for use in British India. The Criminal Procedure Code, 1898 which was a copy of the Indian enactment was replaced by the Administration of Justice Law, 1973, which in turn was replaced by the Code of Criminal Procedure Act, 1979. The influence of English Law is apparent and overpowering in the Criminal Procedure Code, 1898 and continues, but to a lesser degree.

The rules of civil procedure which were embodied in the Civil Procedure Code, 1889 were derived from rules of Indian Procedural law, English Rules of Court and the New York Civil Procedure Code. The Civil Procedure Code, 1889 was replaced by the Administration of Justice law, 1975 which in turn was replaced by the Civil Procedure Code (Amendment) Law, 1977 which in effect revived most of the provisions in the Civil Procedure Code, 1889.

5.c. **Constitutional law**

Sri Lanka has had many Constitutions. The period of British colonial rule was characterised by successive Constitutions which over a period saw a gradual evolutionary process culminating in 1948 whereby power and sovereignty vested in the United Kingdom was gradually transferred to the local inhabitants. The Ceylon (Constitution) Order in Council, 1946, which took effect from 4th February, 1948 gave Ceylon (as it was then called) a constitution based on the Westminster model with a Parliament consisting of two chambers and the sovereign of the United Kingdom and an executive consisting of a Prime Minister, a Cabinet and civil servants, acting in the name of a sovereign in whom executive power was legally vested by section 45 of the Ceylon (Constitution) Order in Council, 1946. The conventions of the British Constitution were generally followed. But there was scope for a adaptation of conventions in the light of local events and circumstances.

A Constitutent Assembly was summoned in 1970 to draft and proclaim a new Constitution. The motivating factor behind this exercise was to draft a Constitution which rooted sovereignty in the people of the

2. See State Industrial Corporations Act, 1957. Other acts have set up corporation and institution for specific purposes. See further W. A. S. Weerasooriya, "Public Corporation in Ceylon, Their Constitution, Powers and Legal Position" in 19 Ceylon Historical Journal 50.

country and which repudiated the British connection by it, provided an indegenous legal root and abrogated all references to the British sovereign in the Constitution. The Republican Constitution was proclaimed in 1972 when Sri Lanka became a Republic within the British Commonwealth and repudiated the link with the British sovereign which had endured from 1796.

The Republican Constitution of 1972 established a National State Assembly with very wide powers. This legislative organ was a unicameral one.The Westminster type executive consisting of a Prime Minister and a Cabinet with a President (taking the place of the Governor- General) with nominal powers was retained.

The Constitution of the Democratic Socialist Republic of Sri Lanka was introduced in 1978, replacing the 1972 Constitution. This Constitution is an amalgamation to the Westminster model with the French presidential system. There is an executive President with real power, but also a Prime Minister and a Cabinet. Parliament is the unicameral legislative organ. The English law governing the issue of writs of *certiorari*, prohibition, *mandamus* and *quo warranto* has been incorporated by reference by successive statutory enactments. This incorporation of English law, together with the existence in the colonial and early post-colonial period of a Civil Service modelled on the British pattern, has given rise to the growth of a body of administrative law with a marked English character. English principles of judicial review of administrative action are applied by the courts, e.g. the rules relating to discretionary power, the retention of discretion, the abuse of discretion and the rules of natural justice followed in Sri Lanka are based on English law. Increasing state intervention in many areas of national life through the setting up of public corporations has given rise to a body of law relating to State Corporations which bears a national character.[3]

The principle of individual liberty, so vital in a democracy, is taken from English law. As in England, the writ of *habeas corpus* is a vital safeguard of the liberty of the individual.[3a] In England there is no comprehensive Bill of Rights. The Sri Lankan Constitutions of 1972 and 1978 (to a greater extent) contain provisions which provide the means for assertion of fundamental rights.

3. See State Industrial Corporations Act, 1957. Other acts have set up corporations and institutions for specific purposes. See further W.S. Weerasooria "Public Corporations in Ceylon, their constitution, Powers and Legal Position in 19 Ceylon Historical Journal; 50.

3a. *In Re Bracegirdle* (1937) 39 N.L.R. 193.

5.d. Commercial and Mercantile law

Principles adopted from England, which repealed the Roman-Dutch law, apply in relation to bills of exchange, sale of goods, partnership, companies, insolvency, banks and banking, maritime matters, carriage of goods and insurance.[4]

5.e. The sphere of influence of the Roman-Dutch law

The influence of Roman-Dutch law is discernible in the law relating to succession, persons, property and obligations. But the application of Roman-Dutch law in these areas is restricted by statutes, some of which are based on English principles or judicial decisions or by the operation of special laws.

A brief examination of the branches of private law in force in Sri Lanka today will be undertaken in an effort to demonstrate the extent of the application of Roman-Dutch law, English law and statute law.

5.f. The law of tort or delict

Liablity in the Roman-Dutch law of delict is founded on the Aquilian action and the *actio injuriarum*. The Aquilian action lay where a wrongful act had been committed through negligence or fraud which had resulted in patrimonial loss. The *actio injuriarum* was available where the personal dignity or reputation of an individual had been affected. This action lay for the sentimental loss (as distinct from patrimonial loss) which had been suffered. Apart from the two general actions mentioned above, there were other remedies such as the Pauperian action, the *Aediles edict*, the *actio de pastu*, the *actio de effusis vel dejectis*, and the *actio de suspensis* which were available in particular situations.

The English law of torts knows no basic principle of liability corresponding to the Aquilian action or to the *actio injuriarum*, but attaches liability in specific cases. Under the English law a person could obtain damages if he could establish that an act had been committed which gave rise to a liability falling within one of the specific torts of English law, such as negligence, trespass, false imprisonment, conversion, nuisance, abuse of legal process, defamation, passing off, etc.

In most situations the facts which give rise to liability in tort in English law will also give rise to liability in Roman-Dutch law. But

4. See Bills of Exchange Ordinance, 1927, Sale of Goods Ordinance, 1895, Companies Act, 1982, Insolvency Ordinance, 1853, and the Introduction of the Laws of England Ordinances of 1852 and 1866.

there are torts (nuisance, conversions, the rule in *Rylands* v. *Fletcher*[5]) which impose liability in English law in the absence of fault or negligence. The English tort of nuisance has been incorporated in to the law of Sri Lanka and the rule in *Rylands* v. *Fletcher* and the tort of conversion may also be regarded as part of the law of Sri Lanka, though there are contrary views and judicial *dicta*.[6] According to these torts liability may arise without fault or negligence (strict liability). According to the Roman-Dutch law, fraud or negligence is a prerequisite of liability in the Aquilian action. The Sri Lanka law has adopted the nomenclature of the English specific torts while attempting to retain the principles enshrined in the two basic Roman-Dutch actions. But in certain areas the Roman-Dutch law has been distinctly modified by English principles, such as in the torts relating to malicious abuse of legal process and the defences of fair comment and absolute privilege in the action for defamation. There has been a recent trend in the law of torts (as in other areas) to re-assert and re-define the principles of the Roman-Dutch law.

The Law Reform (Contributory Negligence and Joint Wrong-Doers) Act, 1968, and the Crown Liability in Delict Act,1969- have modified the law governing contributory negligence and Crown liability in delict. Prior to the latter act the question of Crown liability in delict was governed by the English law before the Crown Proceedings Act, 1947. These are the only two statutes in the field of torts law.

5.g. The law of contract

Statute law has superseded the Roman-Dutch law on some matters. Sale of goods, insurance, carriage of goods by sea, corporations, partnerships, agency and bills of exchange are governed by statutes based on English principles or by statutes which have incorporated English law by reference.[7] But substantial areas of contract law are still based on the Roman-Dutch law which has, however, been modified in part by judicial decisions. Contracts for the sale of land are generally governed by Roman-Dutch law. Section 2 of the Prevention of Frauds Ordinance, 1840, specifies the formalities to be observed. Thus a contract relating to or a conveyance *inter vivos* of immovable property must be executed before a notary and two witnesses.

5. (1866) L.R.1 Ex. 265.
6. See below, article 14.e, at pp. 80-98.
7. See above, text to footnote 4.

The law governing capacity to contract if there is no statute will be the Roman-Dutch law or the special law applicable to the parties. If the special laws are silent the Roman-Dutch law applies. The Roman-Dutch law relating to the capacity of minors to enter into contracts applies in Sri Lanka. Many restrictions were placed on the capacity of women to contract in the Roman-Dutch law. Most of these restrictions have been removed by statutes such as the Married Women's Property Ordinance, 1923, and the Matrimonial Rights and Inheritance Ordinance, 1876.[8] The Sex Disqualification Ordinance, 1933, makes women entitled to become Advocates, Proctors, Notaries and Commissioners for Oaths.

The Roman-Dutch concept of *causa* according to which every contract must have a reasonable cause is still prevalent in the modern law. But it may be doubted whether it adds anything to the prerequisites for a valid contract and therefore may be regarded as a compendious form of expression. The English rules governing consideration were held to be alien to and therefore not a part of the general law of Sri Lanka.[9] But consideration is required in contracts governing sale of goods and bills of exchange, in which areas statutes based on the English law have been introduced. English principles relating to privity of contract and part performance are not a part of the law of Sri Lanka.

In certain matters where the Roman-Dutch law was silent and there were no relevant legal principles, the courts have resorted to English law. English principles governing undue influence, rectification of documents and contracts in restraint of trade have been adopted in this manner. The law relating to illegality of contract and fraudulent misrepresentation has been modified by English principles introduced by judicial decisions.

The rules governing the special contracts of sale, hire, donation and suretyship are Roman-Dutch though statutory modifications have been made by statutes such as the Rent Act, 1972, and the Prevention of Frauds Ordinance, 1840.

Some of the principles of the law of contracts have also been modified by legislation such as the Industrial Disputes Act, 1950, the Wages Boards Act, 1941, the Control of Prices Acts, 1950 and 1957, the Rent Act, 1972, the Agrarian Services Act, 1979 and the Consumer

8. See further below article 5.i at pp. 23-24.

9. *Jayawickrema* v. *Amarasuriya* (1918) 20 N.L.R. 289; *Abeysekere* v. *Gunasekere* (1918) 5.C.W.R. 242.

Protection Act, 1979.

5.h. **The Law of Property**

The fundamental principles of the law of property are Roman- Dutch. The extent of the application of Dutch law has been restricted by legislation, judicial decisions and the application of some of the exceptional systems of law, and to a limited extent by local custom. More statutes have been enacted in this branch of law than in other areas of private law. Among the significant statutes which affect the law of property are the Prevention of Frauds Ordinance, 1840, the Partition Law, 1973, the Prescription Ordinance, 1871, the Registration of Documents Ordinance, 1947, the Crown Lands Ordinance, 1947, the Mortgage Act, 1950, the Land Acquisition Act, 1950, the Land Development Ordinance, 1935, the Rent Act, 1972, the Agrarian Services Act,1979, the Sale of Goods Ordinance, 1896, the Land Reform Law, 1975, and the Ceiling on Housing Property Law, 1974. But it is noteworthy that unlike in the other areas discussed in this article, the influence of English law has not been significant. It was perhaps realized that legislation which was drafted had to take account of the basic and fundamental principles of the residuary law which is Roman-Dutch. Thus though there exists a considerable body of statute law, drafted to suit the needs, circumstances and socialist policy of the country, yet as the following analysis shows, the foundation and infrastructure is Roman-Dutch.

The position of the Crown and State. The British sovereign exercised authority over Sri Lanka from 1796 to 1948 and even between 1948 to 1972 (as Head of the Commonwealth). The Constitution of 1978 continued to recognise the vesting of authority in the Governor-General as representative of the Sovereign. But the Constitution of 1972 which established a republic deleted all reference to the Crown and the Sovereign a practice continued under the present Constitution of 1978. Until 1972 law officers were called "Crown Counsel". In and after 1972 they are called "State Counsel". Especially in the early years of British rule there was some uncertainty as to the relative application of English law and Roman-Dutch law in relation to the rights and position of the Crown and the State. Therefore, legislation was passed to regulate such matters. The Crown Lands Ordinance, 1947, and earlier statutes which were repealed by it, modified the Roman-Dutch law in some respects. Other statutes have dealt with areas relating to which the Roman-Dutch law possessed no relevant principles. The Land Acquisition Act, 1950, provides for the acquisition of land by the State,

for the payment of compensation and other related matters. The Roman-Dutch law subject to statutory modifications[10] regulates the rights of the public and of the State as regards the use of the sea, rivers, lakes, the seashore, etc. The Ceylon Constitution Order in Council, 1946, and prerogative rules of English law essential to the exercise of sovereign authority by the State, which could be considered to have replaced the Roman-Dutch law, are also relevant in this context.[11] In *Kodeeswaran* v. *The Attorney General*[12] the Court did not apply the Roman-Dutch law or English law but gave effect to a practice recognized for a long time by the executive and the courts, according to which an action was available in contract against the Crown for the payment of salary at the instance of a Crown servant.

Ownership and kinds of ownership. The English and Roman-Dutch law differs. In England different rules govern the ownership of real and personal property. Real property is subject to interests which are calculated with reference to their duration. In England it is possible to own a leasehold (a tenancy for a fixed period) or a life interest in property. In Roman-Dutch law no difference is made between movable and immovable property as regards kinds of ownership. Ownership may be restricted in its enjoyment by *jura in re aliena*, e.g. a lease, a life interest, an *emphyteusis*, a servitude, mortgage, etc. In the case of a lease, the lessor is the owner, and in the case of a life interest the reversioner or remainderman is regarded as the owner.

The type of dual ownership, where two kinds of ownership (legal and equitable, as in the case of the interests of the beneficiary and trustee) co-exist in the same *res*, is unknown to the Roman-Dutch law. In Sri Lanka the Trusts Ordinance, 1917, has introduced the English trust, recognizing a type of double ownership without reference to the English distinction between the equitable and legal estate.[13] But subject to this statutory exception which operates only within the narrow ground covered by the statute, the basic principles of the Roman-Dutch law have been followed and ownership is determined according to Roman-Dutch principles.

In *Attorney-General* v. *Herat*[14] the Privy Council said:

10. Crown Lands Ordinance, 1947.
11. *Kodeeswaran* v. *The Attorney General* (1969) 72 N.L.R. 337.
12. ibid.
13. See L.J.M.Cooray, *Reception in Ceylon of the English Trust* (1971) ,pp, 187-89.
14. (1960) 62 N.L.R. 145, 147.

> The word "owner" in the Land Redemption Ordinance, in the absence of definition in the Ordinance itself must mean a person possessing the attributes of ownership under the general law at the time the Ordinance was passed subject to such modifications, if any, as may be imposed upon it by the context.

> Lee, (*Introduction to Roman-Dutch Law*, 5th edition, p. 121) in a chapter headed "The Meaning of Ownership" reflecting the view of Van der Linden says:-

> "Dominium or ownership is the relation protected by law in which a man stands to a thing which he may; (a) possess, (b) use and enjoy, (c) alienate. The right to possess implies the right to vindicate, that is , to recover possession from a person who possesses without title to possess derived from the owner".

Their Lordships pointed out that "these three factors are all essential to the idea of ownership but need not all be present in an equal degree at one and the same time." It may also be said that where one or more of these rights are vested in one person, and the remainder in another, the ownership is qualified, and the person who has the residue of the rights however reduced is regarded as owner, and the specific rights however extended are inferior to ownership.

The law of Sri Lanka recognize the *jura in re aliena* (the rights in the property of others) of the Roman-Dutch law and the law governing leases, *emphyteusis,* superficies, co-ownership and mortgage is basically Roman-Dutch. The operation of these rules are modified by statutes, such as the Prevention of Frauds Ordinance, 1840, and the Registration of Documents Ordinance, 1927, which deal with matters pertaining to form. The Mortgage Act, 1950, is concerned primarily with procedure and form and many of the substantive principles of the Roman-Dutch law are still in force. The powers of an executor or administrator to lease property is governed by English law, because the English law of executors and administrators has been incorporated into Sri Lanka. A type of *jus in re aliena* called the planter's share based on local customary rules has also been recognized. The law governinig servitudes is Roman-Dutch, but a few categories of servitudes based on local customs have been recognized.

Acquisition of ownership. The modes of acquiring ownership are derived from the Roman-Dutch law. The Roman-Dutch law which was basically similar to the Roman law provides for the acquisition of ownership by *occupatio, accessio, traditio* and *usucapio*. In the modern law it is also possible to acquire titles (statutory titles) under various statutes.

(i) ***Occupatio.*** The Roman-Dutch law relating to acquisition by *occupatio* of things (such as treasure, birds, animals, things, found in the

river, sea and seashore) which do not have an obvious owner, subject to modification by statute and judicial decisions, is still in force. The Fauna and Flora Protection Ordinance, 1937, the Gaming Ordinance, 1889, have altered the Roman-Dutch law relating to the capture and acquisition of wild animals through *occupatio*. Similarly the Treasure Trove Ordinance, 1887, applies to the acquisition of ownership of treasure.

(ii) ***Accessio***. According to the principle of accession what is fixed to property, enures to the owner of the property. Thus if A builds on B's land, the building belongs to B. But A can claim compensation for improvements effected. The Roman-Dutch distinction between a *mala fide* possessor and a *bona fide* possessor and the classification of improvements as ornamental, useful and necessary are considerations of which a court will have in mind when awarding compensation. The influence of South African decisions is discernible in this area. The courts have developed a new category, the *bona fide* occupier who has been held to be entitled to compensation in circumstances in which under the old Roman-Dutch law compensation was not available.[15] This sphere of the law has been untouched by legislation. The Roman-Dutch law relating to encroachment (when A builds on his own land but his building encroaches on a small part of B's land) is applicable in Sri Lanka.

(iii) ***Traditio***. *Traditio* or delivery considered as a mode of acquisition may be described as a transfer of possession of a corporeal thing under such circumstances that it effects a transfer of ownership. Delivery may be physical or constructive. The basic Roman-Dutch principles are in force and apply to transfer of ownership, subject to the operation of statutory rules (section 2 of the Prevention of Frauds Ordinance, 1840) which govern the form in which the transfer must be executed. The requirement of *traditio* in the modern law is satisfied by the delivery of the deeds which is regarded as constructive delivery. One of the requirements of *traditio* is that it is only an owner of land who can transfer ownership. But the *exceptio rei venditae et traditiae* of the Roman-Dutch law which is available in Sri Lanka, provides that where a purchaser gets possession from a vendor who at the time of the transfer had no title, he could rely on a title subsequently acquired by the vendor. The Paulian action of the Roman-Dutch law is available in the modern law to enable a creditor to set aside a transfer of ownership in fraud

15. *Hassanally* v. *Cassim* (1960) 61 N.L.R. 529.

of creditors made by an owner of property, if at the time of the transfer the liabilities of the owner exceeded his assets. The Paulian action is supplemented by the statutory provisions in section 247 of the Civil Procedure Code, 1977.

(iv) ***Usucapio***. Prescription or *usucapio* in Roman-Dutch law differed from the Roman law in that the former did not require *bona fides* or just title. In Sri Lanka the Roman-Dutch law of prescription has been replaced by the Prescription Ordinance, 1871, which is modelled on an English enactment. But in interpreting the words "adverse possession" in that enactment the judges have resorted to the Roman-Dutch concept of possession *animo ut dominus*.[16] According to this Ordinance as judicially construed, if a person is in undisturbed and uninterrupted possession, *animo ut dominus* (with the intention of being owner), of land for a period of ten years he acquires title to it by prescription.

The Prescription Ordinance does not make any provision regarding movables and it is not clear what law should apply. It may be suggested that since the Prescription Ordinance superseded all previous laws on prescription, and since it does not provide for prescription of movables, movables cannot be prescribed. It could also be argued that the Prescription Ordinance cannot be regarded as superseding the entire Roman-Dutch law, but only so much of the Roman-Dutch law as is contrary to it, and that where it is silent the Roman-Dutch law as the residuary law should apply.

Statutory titles. If a co-owner is dissatisfied with the *status quo* his remedy is to bring a partition action to have the land proportionately divided. The Roman-Dutch law on partition was applied for a short time in the British period. But subsequently there have been successive enactments passed relating to partition. In 1863 the Partition Ordinance was passed and Roman-Dutch principles appeared to have had some slight effect on it. But the major part was based on English law. The Roman-Dutch law would apparently apply in cases where the Ordinance is silent. The Partition Ordinance of 1863 was repealed and replaced by the Partition Act of 1951 which was similar in many respects to the 1863 Ordinance. The Partition Law, 1977, made further minor changes. The successive legislative enactments relating to partition have not succeeded in solving to any great extent the many problems created by fragmentation which has arisen consequent to the local habit of dividing property and handing it down from generation to generation.

16. *Tillekeratne* v. *Bastian* (1918) 21 N.L.R. 12.

The title conferred by a partition decree is the strongest title in the law of Sri Lanka. Certificates of title may be granted by other statutes, but they do not possess the same degree of authority.

Possession. The law governing possession is the Roman-Dutch law. The Roman-Dutch law has affected the development of the law governing possessory remedies. The possessory remedies are available on the basis of Ordinance 22 of 1871 and the Roman-Dutch law. A person who has been in possession of property and has been dispossessed otherwise than by process of law, irrespective of whether he had title or not, can bring a possessory action.

Actions relating to land. Reference has been made above to the Paulian action, the *exceptio rei venditae et traditiae* and to the possessory actions.

The remedy available to an owner whose property is unlawfully occupied by another is the *actio rei vindicatio*, to assert his right to the property, and recover by process of law that which belongs to him. The *actio rei vindicatio* which is a Roman-Dutch action has however not been accepted in its entirety and has been altered by judicial decisions.

Registration. The law of Sri Lanka does not make provision for the acquisition of an indefeasible title to immovable property by registration. It merely provides for the registration of documents relating to immovable property. No positive benefit is acquired by registration but non-registration of a conveyance may result in it being rendered void as against a subsequent registered conveyance from the same source. The registration laws qualify what has been stated above in relation to *traditio* and the *exceptio rei venditae et traditiae*. In the case of movables registration is necessary for the validity of a bill of sale.

Trusts. The trust concept which is foreign to the Roman-Dutch law has been received in Sri Lanka. The Trusts Ordinance, 1917, is a fairly comprehensive statute which makes provision for the creation of trusts arising by operation of law (constructive and resulting), charitable trusts and contains detailed rules governing trustees and beneficiaries and other matters relating to trusts.

Fideicommissa. The law relating to *fideicommissa* was in operation in Sri Lanka till the abolition of *Fideicommissa* and Entails Act, 1972. The law as it existed prior to 1972 was the Roman-Dutch law regarding *fideicommissa.* A *fideicommissum* can be created by will or deed. The

Roman-Dutch law of *fideicommissa* loomed large in the law of Sri Lanka. But prior to abolition it was altered in some respects by statute. The Entail and Settlement Ordinance, 1876, abolished perpetual *fideicommissa* created after the Ordinance came in to operation. The Ordinance set a time limit on the period for which property may be tied up through a *fideicommissum.* The Entail and Settlement Ordinance, 1876, also made provision for sale or exchange of property subject to *fideicommissa.*

One of the most important rules of the Roman-Dutch law of *fideicommissa* was that an expectant right of a *fideicommissary* could not be defeated by an act of a third party or of the *fiduciary.* But in the later law the interest of the *fideicommissary* could be affected by the operation of enactments such as the Partition Act, 1951, the Registration of Documents Ordinance, 1927, and the Prescription Ordinance, 1871.

5.i. The law of persons

Juristic persons. The law governing juristic persons is in general based on English principles. But birth and legitimacy is governed by Roman-Dutch law subject to the operation of statute.

The Crown which was necessarily an English concept has replaced in many respects the *fisc* of Roman law.[17] After 1972, the "State" as a concept replaced the "Crown". The Introduction of the Laws of England Ordinance, 1866, incorporated by reference the English law of corporations. The State Industrial Corporations Act, 1957, and specific statutes have set up public corporations.[18] The incidents of birth are generally governed by Roman-Dutch law. But the determination of and questions of legitimacy are governed by section 112 of the Evidence Ordinance, 1895, and the General Marriages Ordinance, 1907. The consequences of illegitimacy are governed by both the Roman-Dutch law and statute law. The consequences of legitimacy are significant in relation to testate succession and intestate succession. The law governing the maintenance of children and wives is found in the Maintenance Ordinance, 1889, but the liability of a child to support an indigent parent is governed by the Roman-Dutch law.

Marriage. The Marriages (General) Ordinance, 1907, is a comprehensive enactment which provides for most matters which can arise in relation to marriage -the capacity of parties, formalities to be observed in celebrating marriages, the age at which parties can marry and the

17. See above, article 5.h..
18. See W. S. Weerasooriya, op., cit., 5.c, n.3.

circumstances in which a valid marriage could be contracted.

The law of Sri Lanka recognizes the validity of a customary marriage celebrated according to solemn ceremonies. But only in relation to formality. The requirements as to capacity must be satisfied under the general law.[19]

Under the Roman-Dutch law where there has been a breach of promise of marriage one of the remedies is specific performance which enforces an obligation on the parties to get married. Section 19 of the General Marriages Ordinance, 1907, repeals this rule of the Roman-Dutch law. The only remedy available today is an action for damages. But section 20 provides that no action lies for breach of promise of marriage unless it is in writing. Apparently this does not affect delictual claims based on the same facts that give rise to the breach of contract.

Consequences of marriage. The most important legal consequence of marriage in the Roman-Dutch law was the community of property in the absence of an antenuptial contract. When community of property operates in a marriage, the husband and wife jointly become entitled to all property and also to future acquisitions. Further, under the Roman-Dutch law a woman was subject to several disabilities with regard to capacity to contract, to appear in court unassisted, and she was also subject to the marital power of the husband, especially in relation to the administration of their joint property. Roman-Dutch law applied in Sri Lanka in the early days of the British period but two important statutes radically altered the law; The Matrimonial Rights and Inheritance Ordinance, 1877, and the Married Women's Property Ordinance, 1923. The Matrimonial Rights and Inheritance Ordinance abolished the community of property between spouses married after 1877. The Matrimonial Rights and Inheritance Ordinance, 1877, laid down the law relating to the matrimonial rights of married persons with regard to property. These latter provisions were repealed, modified and re-enacted by the Married Women's Property Ordinance, 1923. Section 5 (1) of the Married Women's Property Ordinance, 1923, confers on a woman the capacity to hold and dispose of property as if she were a *feme-sole*. Section 5 (2) confers on a woman capacity to enter into contracts and of rendering herself liable in contract to the extent of her separate property and also provides that a woman can sue and be sued without her husband being joined as a party. But contracts by a wife for necessaries are governed by the Roman-Dutch law. These

19 *Thiagaraja* v. *Kurukal* (1923) 25 N.L.R. 89.

Ordinances do not apply to those who are governed by Kandyan law, *Tesawalamai* or Muslim law.

Matrimonial actions. In Sri Lanka matrimonial actions are of three kinds; for divorce, for separation *a mensa et thoro*, and for nullity of marriage. The law relating to divorce and marriage is governed by provisions of the Civil Procedure Code, 1977, and the General Marriages Ordinance, 1907, which have been largely influenced by English law. The principles on which alimony are granted are stated in the Civil Procedure Code and are based on English statutes. But there are areas in which the Roman-Dutch law still applies. The law governing custody of children after divorce is the Roman-Dutch law influenced by English law. An action for separation *a mensa et thoro* and nullity of marriage is governed by Roman-Dutch law. A separation is granted on any of the grounds available for divorce and on other grounds such as insanity of a partner, gross cruelty and mutual consent.

Parent and child. The law governing parental power is basically Roman-Dutch law except where it has been altered by statute. The duty of support which lies on the father is found in the Maintenance Ordinance, 1889, but the duty of a son to provide for an indigent parent is governed by Roman-Dutch law. Section 27 of the Married Women's Property Ordinance, 1923, deals with the duty of a mother to support her children.

Minority. The Age of Majority Ordinance, 1865 as amended by the Age of Majority (Amendment) Act, No. 17 of 1989, confers majority at 18 years. But a person may attain majority at an earlier age under the exceptional laws. A minor's capacity to enter into contracts is governed by the Roman-Dutch law according to which many restrictions are placed on the ability of a minor to enter into a valid contract. The delictual liability of a minor is also governed by Roman-Dutch law. The procedure to be followed in a suit in which a minor is involved either as plantiff or defendant is contained in the Civil Procedure Code, 1977.

Guardians. The law governing guardianship is the Roman-Dutch law subject to modifications made by the Civil Procedure Code, 1977,in particular, and other enactments. The term "guardian" was applied under the Roman-Dutch law to one appointed to take charge of the person and property of a minor and the term "curator" to one appointed to take charge of the estate of a lunatic or prodigal. Under the Civil Procedure Code, 1977, the term "curator" is applied to one appointed

to take charge of the property of a minor and "guardian" to one appointed to look after the person and maintenance of a minor. But the duties which a curator or guardian are subject to are stated in the Civil Procedure Code, 1977, and when this is silent the Roman-Dutch law applies.

Lunatics and prodigals. The Roman-Dutch law on this subject has in large measure been replaced by statute law. The Courts Ordinance, 1889 and subsequent statutes have conferred jurisdiction on District Courts over lunatics, idiots and persons of unsound mind and for the appointment of guardians and curators. The Mental Diseases Ordinance, 1873, makes provision for the care and custody of lunatics and persons of unsound mind and their estates. But the capacity of a lunatic to enter into a contract is still governed by the Roman-Dutch law. The Roman-Dutch law treated prodigals in the same way as lunatics. There is no statute law on this point and it further appears that Roman- Dutch law does not apply.

5.j. **The law of succession**

Testate succession. The formal manner in which a will can be made is contained in the Prevention of Frauds Ordinance, 1840. The revocation of wills is also dealt with by the same Ordinance. The question of capacity to make a will, to be an attesting witness and to be a beneficiary under a will is governed by the Roman-Dutch law, altered in some respects by statute. The restrictions placed on disposition of property by the Roman- Dutch law are not in force today. Section 2 of the Wills Ordinance, 1844, has been construed to give full freedom to dispose of property by will, and restrictions on freedom of testation such as the *legitima portia* do not apply in our law.

Intestate succession. The general law of intestacy was the Roman-Dutch law. Before the passing of the Matrimonial Rights and Inheritance Ordinance, 1877, there was a controversy as to whether the Roman-Dutch law of North Holland or South Holland was to apply. The law of intestate succession is governed by rules stated in the Matrimonial Rights and Inheritance Ordinance, 1877. If that Ordinance is silent it is enacted therein that the Roman-Dutch law of North Holland should be followed. The Matrimonial Rights and Inheritance Ordinance does not apply to those governed by *Tesawalamai*, Kandyan law and Muslim law.

The offices of executor and administrator are copied from English law and the rules governing executors and administrators are to be

found in the Civil Procedure Code Law, 1977, and have been influenced by English law. But they are given effect to in a Roman-Dutch atmosphere because Roman-Dutch rules generally apply regarding heirs and testate succession.

5.k. The law of remedies

The principle of English law is enshrined in the famous maxim"*ubi jus ibi remedium*". A right is always enforceable by a remedy. The English law remedies for the control of administrative action are generally available in Sri Lanka. But the application for judicial review procedure adopted in England 1977 in accordance with the scheme proposed by the law Commission in 1976 and later incorporated in the Supreme Court Act, 1981, has not been adopted yet in Sri Lanka.

The remedy of specific performance is part of the law of Sri Lanka.[20] The Roman-Dutch remedy of *restitutio in integrum* is available in Sri Lanka.[21]

In the case of a transaction voidable on account of fraud, misrepresentation, duress, undue influence, mistake, *laesio enormis*, incapacity, a person who may repudiate the transaction may reclaim from the party money or property he has transferred or a benefit derived from it, as a condition that he himself restored to the other person what he has received from the transaction. Some of the fundamental rights included in Chapter III of the Constitution of 1978 are taken from principles of English case law. For example, every person is presumed innocent until he is proved guilty [Article 13 (5)]. This is said to be a fundamental right of the citizen. No person is to be arrested except according to procedure established by law. Any person arrested is to be informed of the reason for his arrest [Article 13 (1)]. The right to acquire a trial by competent court (Article 13 (3)). This is one of the elements of due process. Article 13 (4) is reminiscent of Chapter 39 of the *Magna Carta*. "No free man shall be taken or imprisoned or disseized or outlawed or exiled or in any wise destroyed, save by the lawful judgment of his peers and the law of the land". Article 12 (6) enshrines the principle of legality. The English maxim is *nulla poena sine lege*.

5.l. Foreign influences

If the non-European systems based on religion (Jewish law, Hindu

20. *Abdeen* v. *Thaheer* (1958) 59 N.L.R. 385 at, 388-89.
21. C.G. Weeramantry, *The Law of Contracts*, Part 2, chapter 31.

law and Muslim law) are not taken into account, the legal systems of most non-Communist countries in the world today may roughly be said to belong to one of two categories or families. They are known as the common law and the civil law families. The term " the common law" and the term "the civil law" have more than one meaning. What these terms mean in one context is not necessarily the same as what they may mean in another context. Some of these meanings are considered in various parts of the book. In the present context the term " civil law" is used to refer to the system of law based on the revived Roman law and the civil law countries are those countries in which this system operates.[22]

Most of the countries of Europe are civil law countries. However it is also found in countries outside Europe, e.g. in Louisiana in the United States, Quebec in Canada, Egypt, Turkey, Ethiopia and Japan. Countries which belonged to the former British Empire have chosen the common law in preference to the civil law. Other countries which were never part of the former British Empire and which were ruled by countries with civil law systems have preferred to adopt the civil law, which is based on the Roman-Dutch law. The Roman law is more systematic in arrangement than the common law, which includes not only Acts of Parliament but also the decisions of courts. Another important aspect of the Roman law must be noticed. There is a fundamental principle of the Roman law which is expressed in a well know maxim " what pleases the prince has the force of law." In the original Latin, the maxim "*quod principi placuit legis habet vigorem*". The Romans recognised a distinction between public law and private law. Private law was the law dealing with legal relations between individuals, the property of individuals, contracts, commercial law and civil wrongs. Public law was the law relating to the state and its authority and embraced constitutional law and criminal law. This division of the law into public law and private law is a striking feature of the civil law family. The Roman lawyers were mainly concerned with private law. So when the holders of power in a country chose to adopt the Roman civil law, they could do so without thereby affecting its government and politics.

Among the countries that belong to the common law family are England, the United States of America with the exception of the state of Louisiana, Canada with the exception of Quebec, Australia, New Zealand, India and Pakistan.

22. *Supra*

One of the most striking differences between the common law and the civil law is the fact that the former has not come so much under the influence of Roman law as the latter. The common law in the sense in which we are now using the term is the Anglo-American system of law or the English law.

Most civil law countries have codified the law. For instance, there is the French Civil Code of 1804, the German Civil Code of 1896 and the Swiss Civil Code (1881-1907). In contrast to the civil law, the common law has not been codified (a few minor exceptions apart). In the civil law systems the judges are members of a judicial service. At the very outset of his legal career it is necessary for an individual to choose between entering the judicial service or practising as a lawyer. This is not so in common law countries where judges in the higher courts are selected from practising lawyers or though less often, from among academic lawyers.

The legal systems of certain countries, however cannot be said to belong exclusively to either the civil law system or the common law system.

The legal systems of Sri Lanka, South Africa, Scotland, the Phillipines, Zimbabwe and Mauritius are said to be mixed in the sense that features of both the civil law and the common law are to be found in them.

The legal system of Sri Lanka, with which this book is concerned belongs to this category of mixed legal systems because elements of both the civil law and the common law are to be found in it.

The rule in British constitutional law is that in settled colonies British settlers were assumed to have taken English law with them to these colonies. In the case of ceded and conquered colonies, however, the law in force at the time of cession or conquest was to remain unchanged, subject to the power of the sovereign to alter it. In accordance with this rule, Roman-Dutch law continued to be in force in Sri Lanka after the cession of Sri Lanka to the British by the Treaty of Amiens in 1802. The pervasive influence of the Roman-Dutch law is seen right through the legal system of Sri Lanka, though certain rules and principles of that law have been made inapplicable to Sri Lanka by the legislature. However, the English law has left its impact on the law of Sri Lanka, in particular in constitutional and administrative law, in criminal law and in the law of evidence. The influence of English law on the law of Sri Lanka are considered in various parts of this book. For the present

it is enough to note that English law has had a profound impact on the Sri Lankan legal system during nearly a hundred and fifty years of British colonial rule. There is thus good reason to regard the Sri Lankan legal system as a mixed system belonging exclusively neither to the civil law legal family or the common law legal family. There is a further reason for regarding the Sri Lankan legal system as mixed. Besides the Roman-Dutch law and the English law, other systems of law exist in Sri Lanka, notably Muslim law, Kandyan law and *Tesawalamai*.

5.m. The end product is the law of Sri Lanka

The above analysis which discusses the relative historical influence of English law and Roman-Dutch law, perhaps gives a misleading impression. Derived from English, Roman-Dutch and many other sources, the ultimate product is a rule of Sri Lanka law and a body of Sri Lanka law. In the non-statutory areas, what is ultimately important is the case law which Lord Diplock in *Kodeeswaran* v. *Attorney-General* termed the indigenous common law of Sri Lanka.[23]

A brief outline of the content of the laws of Sri Lanka is contained in this article and in articles 17.d, 18.c and 19.c. A selected bibliography about the laws of Sri Lanka is contained in Appendix A and the books cited therein may be referred for further information about the laws of Sri Lanka.[24]

23. See further, article 14.d.

24. See in particular W. I. Jennings and H. W. Tambiah, *The Dominion of Ceylon* (1952, Stevens & Sons, London); B. Metzger, *A. Student's Research Guide to the Laws of Ceylon* (1971, Ceylon Law College, Colombo); B. Metzger, *An Index to Periodical Articles on the Laws of Ceylon* (1971, H.W.Cave & Co. Ltd, Colombo); H. W. Tambiah, *Principles of Ceylon Law* (1971, H. W. Cave & Co. Ltd, Colombo.)

CHAPTER II

THE INFLUENCE OF THE COMMON LAW TRADITION

The influence in Sri Lanka of the English law is not as far- reaching as in some other former British colonies. The introducton of English law into most British colonies (many of which are now no longer colonies) was virtually total- the laws in force in England at a particular date being adopted.[1] In Sri Lanka a different pattern was followed because of the existence of the Roman-Dutch law and systems of communal personal law.The English law relating to certain subjects was selectively incorporated by statute and by judicial activism. These two methods of incorporation are analysed separately.

6. THE RECEPTION OF ENGLISH LAW BY STATUTE

The legislative incorporation of English law has been effected in six ways: (i) a statute passed by the Parliament of the United Kingdom was copied and enacted as law by the local legislature; (ii) the principles underlying the decisions of the English courts were codified and adopted by the local legislature; (iii) the English law on a particular subject was extended by the local legislature to the Island, without further elaboration of the substance of the law in the enabling enactment, or in other words, English law was incorporated by reference; (iv) provision was made for the application of English law where a statute in (i) or (ii) above was silent; (v) the extension before 1948 of Acts of the United Kingdom Parliament to the Island as a consequence of its colonial status; (vi) English law became applicable as a consequence of the assumption of British sovereignty.

(i) **Copy of statute enactment in the United Kingdom.** Examples are the Insolvency Ordinance, 1853, the Joint Stock Companies Ordinance, 1861, the Companies Ordinance, 1938, the Sale of Goods Ordinance, 1896, and the Bills of Exchange Ordinance, 1927.

(ii) **Codification of English case law principles.** Examples are the Penal Code,1883, the Code of Criminal Procedure Act, 1978, the Evidence Ordinance, 1895, and the Trusts Ordinance, 1917. These enactments copied from statutes prepared and enacted in India, reproduced

1. Sir K. Roberts-Wray, *Commonwealth and Colonial Law* (1966, Stevens Ltd., London), pp.529-557, especially 533, 542.

with slight modifications, the principles developed over many centuries by the English courts. These enactments were codifications based on the underlying principles of the English law.

(iii) **Incorporation of English law by reference.** The Introduction of the Laws of England Ordinance, 1852, enacts that the law of England is to be observed in maritime matters and in respect of all contracts and questions relating to bills of exchange, promissory notes and cheques.[2]

The Introduction of the Laws of England Ordinance, 1866, makes similar provision as regards the law of partnership, joint stock companies,[3] corporations, banks and banking, principles and agents, carriers by land, and life and fire insurance. The above enactments, unlike (i) and (ii), contained no statement of the substance of the law, and directly incorporated by reference the laws in force in England. These provisions are subject to the qualification that they do not introduce into Sri Lanka English rules relating to property or succession.[4]

English rules relating to executors and administrators, the issue of the prerogative writs,[5] and the extent of the jurisdiction of the Sri Lanka Court of Admiralty,[6] have by judicial decisions construing legislative provisions been held to have been incorporated by reference into the law of Sri Lanka. The legislative provisions which have been so construed require further analysis.

Section 27 of the Charter of 1833 gave power to District Courts to appoint and control executors and administrators. The draftsman perhaps overlooked the fact that there was no substantive law relating to executors and administrators in the Island, since the Dutch law was very different.[7] This section was construed in *Staples* v. *de Saram*[8] to have introduced the entire English law on the subject. This case was con-

2. Now see Bills of Exchange Ordinance, 1927.
3. Now see Companies Ordinance, 1938.
4. See section 2 proviso, Introduction of the Laws of England Ordinance, 1866.
5. s. 49, Charter of 1833; s. 20,21, Ordinance, 10 of 1843; s.22,24, Administration of Justice, 1868; s. 45,46,49, Courts Ordinance, 1889, Ordinance 4 of 1920; (1873) Grenier Reports, Part III, 122; *Abdul Thassim* v *Edmund Rodrigo* (1947) 48 N.L.R. 121.
6. S. 2, Admiralty Ord.,1891.
7. See *Malliya* v. *Ariyaratne* (1962) 65 N.L.R. 145.
8. (1863-68) Ram. 265, 275-76; *Cassim* v. *Marikar* (1892) I.S.C.R.180.

sistently followed. Eighty years later when it was too late to reverse it, the basis on which it was decided was doubted.[9] In two relatively recent judgments, Basnayake, C.J. has held that it is the English law in force at the time of the Charter of 1833 that was introduced[10] perhaps unaware of some contrary authorities.[11] In *Malliya* v. *Ariyaratna*,[12] Basnayake, C.J. thought that if the English law from time to time in force were to extend to Sri Lanka this would include statutes enacted in Westminster, and would be inconsistent with Independence and with the legislative powers of the then Parliament of Ceylon. This argument, if valid, would affect the construction of other statutes incorporating English law by reference. But since the Parliament could at any stage have terminated the introduction of English law, it is difficult to understand how its sovereignty could have been compromised. Further, these legislative provisions though enacted before Independence appear in the Revised Edition of the Ceylon Legislative Enactments of 1956.[13]

Section 2 (2) of the English Colonial Courts of Admiralty Act, 1890, enacts-

9. *Malliya* v. *Ariyaratne, supra*, n.7. The English law introduced was partially overlaid by chapters 38 and 45 of the Civil Procedure Code, 1889..

10. *Malliya* v. *Ariyaratne, supra*, n.7; *Somasunderam* v. *Wijeratne* (1964) 66 N.L.R.193. see also *Silva* v. *de Mel* (1971) 74 N.L.R. 327,329.

11. Authorities for and against the view of Basnayake C.J. that the English law of executors and administrators as it stood in 1833 was imported into Sri Lanka.

(a) English statutes enacted after 1833 were applied in (1843-55) Ram.48; *Holsinger* v. *Nicholas* (1918) 20 N.L.R. 417 and the following cases seem to (obiter) favour the same view *Weerasiri* v. *Sanchihamy (1892) 2 S.C.R.69; Kulendoeveloe* v. *Kandeperumal* (1905) 9 N.L.R. 350; *Kulanthavelu* v. *Kanderperumal* (1906) 9 N.L.R. 353; *Mohamado Jan* v. *Ussen* (1909) Curr.L.R. 53.

(b) It has been said that English statutes would not apply in Ceylon in *Cantlay* v. *Elkingtom* (1906) 9 N.I .R. 168. See also *de Silva* v. *de Silva* (1938) 40 N.L.R. 228; also see (c) below.

(c) The view of Basnayake C.J. is supported by K. Balasinghm, *Corpus Juris*, Vol. vi, col. 100, citing *Thornton* v. *Velaithen Chetty* (1938) 40 N.L.R. 157,which is not exactly in point, and by Jennings and Tambiah, op.cit at p. 235 citing *de Silva* v.*de Silva, supra*, which seems to have left the issue open.

(d) The issue was discussed and left open in *Thornton.* v. *Velaithen Chetty, supra*; *Usoof Joonoos* v. *Kuddoos* (1939) 40 N.L.R. 481; *de Silva* v. *Silva, supra*.

(e) Busnayake C.J. in coming to his conclusion referred to *Kulendoeveloe* v. *Kandeperumal, supra*, and *Cantlay* v. *Elkingtom, supra*, among the authorities cited above. He referred to many old cases dealing with the early history of the law of executors and administrators, but which had not considered this particular issue.

12. *Supra*.

13. See *Ibralebbe* v. *The Queen* (1963) 65 N.L.R. 433, 438-39.P.C.

> The jurisdiction of a Colonial Court of Admiralty shall...be over like places, persons, matters and things as the Admiralty jurisdiction of the High Court of England, whether existing by virtue of any statute or otherwise.

The jurisdiction of the Ceylon Court of Admiralty is defined in similar terms.[14] It was held that the extension of the Admiralty jurisdiction of the High Court in England by the legislation of 1920 and 1925 did not have a corresponding effect on the Ceylon Court of Admiralty.[15] The Supreme Court followed a judgment of the Privy Council on appeal from Canada[16] where their Lordships held that the word "existing" cannot be interpolated so as to mean

> from time to time existing...A construction of the Statute of 1890 which would have the singular effect of introducing by an automatic process unasked for changes in the jurisdiction or procedure of the courts of self governing dominions...manifestly could not be adopted unless the words of the statute should be found to leave no other alternative.[17]

Section 42 of the Courts and their Powers Ordinance, 1888, enacted-

> The Supreme Court or any judge thereof...shall have full power and authority to inspect and examine the records of any courts and to grant and issue, according to law, mandates in the nature of writs of *mandamus*, *quo warranto*, *certiorari*, *procedendo*, and prohibition against any District Judge, Commissioner, Magistrate, or other person or tribunal.[18]

Since the writs referred to in section 42 were unknown to the general law of Sri Lanka the words "according to law" were construed by interpolating "English" between "according to" and "law".

> ...it cannot be doubted that when this clause bids us issue these writs...it bids us to issue these writs according to English law; and it gives these writs validity according to English law, the only law to which such writs were known.[19]

14. S.2, Ceylon Courts of Admiralty Ord., 1891.
15. *Government of the U.S.A.* v. *The Ship "Valiant Enterprise"* (1961) 63 N.L.R. 337; *Cargo and Tankship Management Corporation* v. *The Ship "Valiant Enterprise"* (1961) 64 N.L.R. 271.
16. *The Yuri Maru* [1927] A.C. 906.
17. ibid., 915.
18. See also s. 22, Charter of Justice, 1833; s. 43, Administration of Justice Ordinance, 11 of 1868; Introduction of the Writ of Quo Warranto Ordinance, 4 of 1920.
19. (1873) Grenier Reports, Part III, 122; *Abdul Thassim* v. *Edmund Rodrigo* (1947) 48 N.L.R.121.

In some early decisions[20] the view was expressed that the words "other person or tribunal" in section 42 must be read *eiusdem generis* with the preceding words and therefore that the writs were available only against courts established for the ordinary administration of justice. In *Abdul Thassim* v. *Edmund Rodrigo*[21] a representative Divisional Bench of the Ceylon Surpreme Court overruled the earlier cases, and held that "...the writs would issue in the circumstances under conditions known to the English law"[22] and therefore held that a writ of *certiorari* might issue against the Controller of Textiles.

The Courts Ordinance was repealed by the Administration of Justice Law, 1973 which recognised the principles relating to the issue of the writs. The provisions regarding the issue of the writs are now incorporated in the Constitution of 1978.

(iv) Incorporation of English law in the event of a *casus omissus* in a local Statute. Section 100 of the Evidence Ordinance, 1895, section 58 (2) of the Sale of Goods Ordinance, 1896, section 6 of the Criminal Procedure Code, 1898, (now repealed) section 2 of the Trusts Ordinance, 1917, and section 98 (2) of the Bills of Exchange Ordinance, 1927, provide for the application of English law on matters relating to evidence, sale of goods, criminal procedure, trusts and bills of exchange respectively, where the above Ordinances are not complete.[23]

In (i) and (ii) the enactment of the Ceylon legislature is the primary source of the law, and English decisions construing the corresponding English statutory provisions are merely persuasive.[24] But in (iii) and (iv) English law applied directly and English decisions are binding.[25]

(v) Extension before 1948 of Acts of the United Kingdom Parliament. Certain Acts of the Parliament of the United Kingdom, relating for example to Copyright, Air Navigation and Appeals to the Privy Council which extended to British colonies in general, became part of the law of the colony during the British period.[26]

20. *Dankoluwa Estates* v. *The Tea Controller* (1941) 42 N.L.R. 197, 206: *The application for a Writ of Prohibition to be directed to the members of a Field General Court Martial* (1915) 18 N.L.R. 334, 339.
21. *Supra* ,n .19.
22. ibid. at 128.
23. s. 2 of the Trusts Ordinance, 1917 is discussed in Cooray, op. cit., articles 12 and 14.
24. Cooray, op. cit., articles 12 and 13.
25. ibid., articles 12 and 14.
26. See further, article 22 at p.151.

The law relating to copyright has now been included in the Code of Intellectual Property Act, 1979 and therefore English Law ceases to be the law in Sri Lanka after 1979. Appeals to the Privy Council were abolished in 1971.

(vi) Application of English law as a consequence of assumption of British sovereignty. As a consequence of the assumption of British sovereignty over Sri Lanka, rules of the English prerogative law essential for the exercise of the sovereign authority of the Crown, became part of the law of Sri Lanka.[27] Some of the consequences of the assumption of British sovereignty in 1796 were; Sri Lanka became one of the possessions of the British Crown; all persons born in the island became British subjects owing allegiance to the Crown; all public officers became servants of the Crown; all government property became the property of the Crown; all Government contracts became contracts with the Crown; and the English rules on these matters became part of the law of Sri Lanka superseding the Roman-Dutch law in the maritime provinces and the Sinhalese law in the Kandyan provinces.

The prerogative powers derived from English law became part of the law through annexation, but since there was considerable doubt on the matter most of the prerogative rights and powers were enshrined in legislation.[28] The grant of independence affected the first two of the above-mentioned consequences. As regards the other consequences these powers and rights continued to be vested in the Crown, but were exercised in fact not by the British government and its representatives in Sri Lanka but by the members of the government of independent Sri Lanka. Section 4 (2) of the Ceylon (Constitution) Order in Council, 1946, Sri Lanka had the effect that the Queen and the Governor-General would act on the advice of the Ceylonese ministers. Section 1(2) of the Ceylon Independence Act, 1947, enacted that after 4th February, 1948 "... His Majesty's Government in the United Kingdom shall have no responsibility for the Government of Ceylon". Thus independence in 1948 did not affect the basic legal position of the Crown but changed the advisors of the Crown in whom actual (as distinct from legal) power is vested.

The Republican Constitution of 1972 severed the connection which Sri Lanka had with the Crown in England.

27. *Campbell* v. *Hall* (1774) 1 Cowp. 204; *Bastian Pulle* v. *David Hughes* (1837) (1833-1842) Morgan's Digest, 117,122.

28. See in particular Crown Lands Ordinance, 1947, Treasure Trove Ordinance, 1887, and Ordinances 12 of 1840 and 14 of 1843.

The first four categories[29] overlap. The Trusts Ordinance, 1917, contains sections which are copies from English Acts and sections which are codification of principles extracted from English case law. The English Partnership Act, 1890, and the English Bills of Exchange Act, 1882,[30] became part of the law of Sri Lanka because of the Introduction of the Laws of England Ordinances of 1852 and 1866, which incorporated English law by reference and therefore fall within both (i) and (ii).

English case law and legislation has also been modified and adapted by statutes such as the Prevention of Frauds Ordinance, 1840, the Wills Ordinance, 1844, the Partition Law, 1977 and the Partition Act, 1947, the Prescription Ordinances of 1834 and 1871, the Land Registration Ordinance, 1897, the Registration of Documents Ordinance, 1927, the Rent Act, 1972, the Workmen's Compensation Act, 1935, and the Industrial Disputes Act, 1950.

7. THE RECEPTION OF ENGLISH LAW THROUGH JUDICIAL ACTIVISM

In *Samed* v. *Segutamby*[1] Jayawardene, A.J. said,

> The Proclamation of 1799[2] established the Roman-Dutch law as it "subsisted under the ancient Government of the United Provinces" as our common law, and the presumption is that every one of those laws, if not repealed by the local legislature, is still in force.

But the law reports of Sri Lanka contain many instances where English principles other than those which had been incorporated by statute, were referred to and formed the basis of judicial decisions.[3] By this *technically* improper use of the judicial technique, English law trespassed on the preserves of the Dutch law. But the amalgam of English and Roman-Dutch law produced by process undoubtedly enriched the legal system.[4]

The causes for this practice were manifold. The Dutch judges refused to serve the British government. The early judges and lawyers were British. It is not difficult to imagine how, unfamiliar with the system they were supposed to be operating , they would tend to think in English

29. See above..
30. But now see Bills of Exchange Ordinance, 1927.
1. (1924) 25 N.L.R. 481, 496.
2. Referred to in article 1.e and 14.e.
3. See cases cited below.
4. See further, article 14.e.

terms, and to introduce English principles. They were unfamiliar with the rules and courses of the Dutch law and probably found that it involved less hardship to refer to principles and case law with which they were familiar. The main sources of the Dutch law were the treatises which were written in Dutch or Latin, and in the nineteenth century good translations were few and not readily available.

Sometimes, especially in the nineteenth century, English principles were judicially adopted for no stated reason as to why they were resorted to, or why the "laws in force"[5] were not applied.[6]

But as the judiciary became conscious of their obligation to administer the "prevailing laws", they attempted to justify their resort to English law in derogation of the laws they were bound to administer. Some of these "excuses" are stated below: (i) The Roman-Dutch law does not provide for the situation which confronts the courts.[7] (ii) The rules peculiar to the conditions of life in Holland are not a part of the law of Sri Lanka.[8] (iii) The Roman-Dutch law is similar to English law.[9] (iv)The Roman- Dutch law should be adapted to suit the circumstances of modern life by reference to English authorities, or that the courts have adapted and acted only upon so much of the Roman-Dutch law as is suited to circumstances in Sri Lanka.[10] Some of the above propositions appear *prima facie* to be reasonable tests to apply. But the above tests often were not carefully and seriously considered and applied, and served merely as an excuse for ignoring one system and resorting to another. Thus sometimes the Roman-Dutch law was ignored, when it did provide for the situation which confronted the courts,[11] when the rules were not peculiar to Holland[12] and when the Dutch law was not

5. See above.

6. (1836) Marshall 585; (1835) Marshall 439; *Nannytamby* v. *Saravanamuttu* (1862) Ram. 197; *Juliahamy* v. *Corea* (1915) 5 Bala. B.5.

7. *De Zilva* v. *Cassim* (1903) 7 N.L.R. 230; *Brodie* v. *A.G.*(1903) 7 N.L.R. 88; *Ramalingam* v. *Mohideen* (1921) 23 N.L.R. 409.

8. *Ramasamy* v. *Tamby* (1875) Ram. 189; (1873) Grenier Part III 129 M; *Northmore* v. *Meyapulle* (1864)Ram. 95.

9. *Boyd* v. *Staples* (1821) Ram.19,21; *Re Ledward* (1872) Ram. 18;(1899) Koch Reps.35; *Wright* v. *Wright* (1903) 9 N.L.R. 31,33-34.

10. *Swaris* v. *Alwis* (1872) Ram.50; *Noordeen* v. *Badoorden* (1941) 42 N.L.R. 393,401; *Wijeykoon* v. *Goonewardena* (1892) 2 C.L.R ep. 59.

11. Cf. *De Zilva* v. *Cassim, supra*, n. 7, with *Mohamadu* v. *Ibrahim* (1909) 13 N.L.C.R.187.

12. See Cayley, J. dissentiate in *Ramasamy* v. *Tamby, supra*, n. 8.

similar to English law.[13] As regards (iv) it is difficult to discern in some of the decisions a genuine adaptation to suit modern circumstances.[14]

But there are other methods of judicial incorporation which are more arbitrary. (v) Thus, it was held that it must be proved that a Roman-Dutch rule relied upon by a litigant, had been applied by the courts during the Dutch period.[15] Since the records were in the Dutch language this was virtually impossible to prove, and there does not seem to be a single case where a Roman-Dutch rule was given effect to when the court adopted this approach. In practice this gave the court an unfettered discretion to reject any Roman- Dutch rule and apply English principles instead. These decisions are directly contrary to the *dicta* quoted above[16] of Jayawardene,A.J. in *Samed* v. *Segutamby*.[17]

Marshall, C.J. pointed out,[18]

> It is also said that...not a single instance has occurred in which this provision[19] has been demanded in any court of justice....but if the right exists, it is not the less because hitherto suitors may not have known of its existence, or may not have thought it expedient to exercise it.

The above method of restricting the Roman-Dutch law is apparently an unjustifiable extension based on a misunderstanding of the Roman-Dutch rule that a Dutch statute enacted after 1656 must be shown to have been introduced into Sri Lanka if it is to form a part of the law of the land.[20] But this rule also lays down that all other Roman-Dutch rules, including pre-1656 statutes and rules laid down in the treatises, are part of the law of Sri Lanka, because it is assumed that the legal consequences of the Dutch assumption of sovereignty over Sri Lanka was that the Dutch laws at the date of conquest (1656) became a part of the law of Sri Lanka.[21] (vi) English law has been applied because

13. See comments on *Boyd* v. *Staples*, n. 9.by Rajanayagam in (1960-61) C.L.R. 68-71.
14. Wikramanayake in (1949) C.L.C.R. 11,12.
15. *Andres* v. *Bastiana* (1862) Ram. 133; *Fernando* v. *Bastian* (1875) Ram. 151; *Korossa Rubber Co* .v. *Silva* (1917) 20 N.L.R. 65, 81.
16. See above at p. 34.
17. *Supra*. *n*.1.
18. Marshall's Judgements 424; *Ramasamy* v. *Tamby*, *supra*, n. 8 at 194-99.
19. Referring to a Roman-Dutch rule.
20. See below, article 13.b. at 56-58.
21. See below, article 13. a and 13.b.at 56-58.

the Roman- Dutch rule was obsolete. Thus Lascelles, C.J. said in *Silva* v. *Balasuriya*:[22]

> When we find that the Dutch law on a matter of frequent occurrence is inconsistent with the well established and reasonable practice of the colony and that it has never been recognised by the Supreme Court, it is a fair inference that the Dutch Law on this matter has either never been introduced into the colony, or, if introduced, that it has been abrogated by disuse.

Such a formulation is unobjectionable. The above is a correct statement of the Roman-Dutch law according to which a law could be abrogated by contrary custom or by contrary and continuous acts of disobedience to the law.[23] But no such test was applied in *Silva* v. *Balasuriya.* The court apparently relied on the fact that the rule had not been referred to in a reported case but did not investigate and establish the existence of continuous and contrary practices. Thus in *Silva* v. *Balasuriya* it could be said that the court merely gave a lame excuse and bypassed the Roman-Dutch law. With such an approach may be contrasted the *dicta* of Marshall, C.J. and Jayawardene, A.J. quoted above. English principles have also been incorporated on the following grounds; (vii) the salutary character of the English rule,[24] (viii) that the parties agreed to be governed by English law,[25] (ix) that the commonsense of English law knows little of the casuistical subtleties which are to be found in the Roman-Dutch authorities,[26] and (x) that where the Dutch jurists disagree the Roman-Dutch law may be disregarded.[27]

In the above ways the court in the nineteenth and early twentieth centuries restricted the application of Roman-Dutch law. But from about 1920 there has been a revived interest in, and application of, the original sources of the Roman-Dutch law. The revival of the Roman-Dutch law and the amalgam of Roman-Dutch and English law created by judicial decisions are discussed in a different context.[28]

22. (1911)14 N.L.R.452, 456; *Marikar* v. *Suppramaniam* (1943) 44 N.L.R. 409.
23. See R.W. Lee, *An Introduction to the Roman-Dutch Law* (1953, Clarendon Press, Oxford), p.9. See below, article 14.e at pp. 77-79.
24. *Silva* v. *Balasuriya*, *supra*, n. 22 at 457.
25. *Pless Pol* v. *de Soysa* (1909)12 N.L.R.45; *Pronchihamy* v. *Davithamy* (1910) 14 N.L.R.35.
26. *Francisco* v. *Costa* (1889) 8 S.C.C.189; *In Re the Application of Silva Poonian* (1826) Ram.80.
27. *Ramasamy* v. *Tamby* (1875) Ram. 184,189.
28. See below, article 14.d and 14.e.

The judicial reception of English law[29] in derogation of the Roman-Dutch law is seen particularly in the law of torts and contracts, though the latter system is still the basic or common law.

The judicial reception of English law was not confined to areas which were governed by the Dutch law, but also affected statute law. We have noted[30] that certain English statutes were copied in Sri Lanka. Decisions construing these English statutes were followed in Sri Lanka, despite not insignificant differences in the wording of the English and the Sri Lanka statutes.[31] The Prevention of Frauds Ordinance, 1840,was overlaid by equitable rules, which were not enacted in the Sri Lanka statute, such as the maxim that a statute cannot be used as an instrument of fraud.[32] Similarly, the rules relating to concealed fraud which were nowhere incorporated in the Prescription Ordinance, 1871, were judicially "added" to the statute.[33]

This eclectic attitude of the judiciary towards the Roman-Dutch law undoubtedly enriched the law of Sri Lanka.[34] But confusion, doubt and conflicting decisions were the by -products of such a process of incorporation according to the whims and fancies of individual judges based neither on principles nor on predetermined and rigorously applied tests.[35] Clarence, J. observed in *Parusella* v. *Tikiri Banda*.[36]

> It is one of the unfortunate results of our present ill-defined system of practice, halting between...(the) traditions of Roman- Dutch law and tacit scarce importations of English rules, that one searches in vain for any certain authoritative principles on the question...

8. ROMAN-DUTCH LAW *V.* ENGLISH LAW?

The Roman-Dutch law[37] is often referred to as the common law of Sri Lanka[38] because it is the residuary law which is resorted to when there is no other relevant legal principle. There was a tendency, as has been noted above, to deviate from Roman-Dutch law during the

29. See above, article 7.
30. See above, article 6.
31. Cooray, op, cit, article 13.
32. ibid., articles 28 and 31.a.
33. *Dodwell* v. *John* (1918) 20 N.L.R. 206. P.C.; *Nagammai Achi* v. *Lakshamanan* (1957) 58 N.L.R. 481.
34. See above, article 3 and below, article 4e.; Nadaraja in (1952) U.C.R. 31, 40-44.
35. ibid. at 43-44.
36. (1886) 8 S.C.C. 49.
37. "Roman-Dutch law" is the title of Chapter III.
38. See below, article 14.d..

British period. But in recent times the judges have arrested this process, and have reasserted the role of the Roman-Dutch law in the legal system, sometimes adopting an attitude disapproving of decisions which have had the effect of incorporating English law. Such an attitude is understandable in South Africa which has ethnic and cultural affinities with Holland. But both English law and Roman-Dutch law are foreign systems in Sri Lanka and the choice between either in a particular situation should be genuinely selective and pragmatic.[39]

9. THE EXTENT OF THE RECEPTION OF ENGLISH LAW

We have noted above some of the subjects governed by English law. English principles have been received to the exclusion of all other laws with respect to the criminal law, mercantile law, and the law of evidence. Criminal and civil procedure are governed by statutes drafted for use in India but influenced by rules of court formulated in England and the New York Civil Procedure Code. The law of persons, property, succession, contracts and torts is fundamentally Roman-Dutch, modified by statutes (most of which are based on English law) and English law incorporated through judicial decisions. The Constitution of 1946 was to a very great extent influenced by British ideas and concepts.[1]

The limits of the application of the communal personal laws and statutes are relatively well defined. By contrast the relative extent of the application of the Roman-Dutch law and English law, though not creating problems in the majority of situations, has given rise to some awkward legal problems.[2]

The distinction between equity and common law is historically of fundamental importance in the English legal system and even today the distinction is by no means irrelevant.[3] The question arises as to what extent the reception of English law in Sri Lanka has involved the incorporation of the distinction between law and equity and the legal and equitable estate into our legal system. Before considering this issue it is necessary to appreciate the significance in English law of the distinction between law and equity.

The distinction between law and equity arose in England as a consequence of the existence of two sets of courts-(i) the Courts of Common

39. See below, artile 14.e.
1. See above.
2. See below, article 14.c.
3. See Glanville Williams, *Learning the Law* (157, Stevens Ltd, London), p.27; see also discussion below.

law, and (ii) the Courts of Chancery or Equity. Principles which were developed by (i) are referred to as "law" or "common law" and the rules developed by (ii) are called "equity". The system of dual courts was abolished in 1873, but the two systems of law developed by these courts remain to some extent distinct at the present day. A rule of equity (i.e. a rule developed by the Courts of Chancery before 1873) has to be read in the light of the whole complex of rules developed by the chancellors, and is subject to the subsidiary rules and maxims[4] of equity. A common law rule has to be interpreted in a common law atmosphere, leaving out of account such equitable rules as apply only to equitable rights. This difference is highlighted in *Fuard* v. *Weerasuriya*[5] and is clearly illustrated by the following example given by Glanville Williams:-[6]

> The distinction between law and equity, as I have tried to explain it, was vividly brought home to me in a case that I listened to in my student days. It was an ejectment action brought by a landlord against his tenant, whom we will call Mr. Isaacson. The latter had what is known as an equitable lease of the premises, that is to say, not a formal lease under seal, but an informal lease valid only in equity. For nearly all practical purposes these equitable leases are just as good as legal leases, and they are habitually relied on. This particular tenant, however, had broken the terms of his equitable lease, for shortly after receiving it he had assigned it to a company by the name of Saxon Ltd., and there was a covenant in the lease not to assign. Mr. Isaacson somewhat disingenuously explained that he did not think this mattered, for the company was his own creation and 'Saxon' he said, was none other than the latter part of his name. But Mr. Isaacson's real defence was that, although he might be liable in damages for having broken his covenant not to assign that was not any reason for his being ejected altogether from the premises. Had the document been a legal lease this defence would have been a good one, for the lease did not contain a proviso for re-entry on breach of covenant. But unfortunately for the tenant it was an equitable lease, and by breaking an important term of it he had soiled his hands and, therefore, lost his lease. Consequently the action succeeded, much, I remember, to my surprise.

In Sri Lanka principles of law and equity have been received by statute as well as by judicial decisions, but the consequences of the distinction between law and equity are irrelevant. What has been incorporated are rules of law, and the fact of the incorporation of a par-

4. See Snell, *Principles of Equity* (1965, Sweet and Maxwell), pp. 24-41.
5. (1954) 56 N.L.R.12 P.C., discussed in L.J.M. Cooray, *Reception in Ceylon of the English Trust* (1971, Colombo), p.193.
6. Williams, op. cit., pp. 27-28.

ticular rule does not have the consequence that the subsidiary rules of common law (if it is a common law rule) and the subsidiary rules of equity (if it is a rule of equity) apply. The incorporated rule is governed by the laws (statutory, Roman-Dutch and customary) in the legal system of Sri Lanka. This may be illustrated by the decisions of *Dodwell* v. *John* [7] and *Fuard* v. *Weerasuriya*, [8] and the fact that the distinction between the legal and equitable estate has not been adopted, even in relation to trusts.[9] In England, equitable actions (e.g. an action for breach of a fiduciary duty) are not affected by the Statute of Limitations which applies only to actions at common law. It was held in *Fuard* v. *Weerasuriya*[10] that an action for the breach of a fiduciary duty would be governed by the Prescription Ordinance (the local counterpart of the Statute of Limitations) because as Mr. L.M.D. de Silva pointed out, "No Court in Ceylon had at any time jurisdiction corresponding to the 'exclusive jurisdiction' of the Court of Chancery in England".[11]

In *Dodwell* v. *John*[12] Viscount Haldane discussed *obiter* the application in Sri Lanka of the English common law action for money had and received. It was argued that a plaintiff in an action for money had and received should (i) be in a position to set up a fiction of a contract and prove a ratification of it, and (ii) cannot complain if the money was properly paid over before licence to do so was revoked. Viscount Haldane pointing out that (i) and (ii) were common law rules said:

> For under principles which have always obtained in Ceylon, law and equity have been administered by the same Courts as aspects of a single system, and it could never have been difficult to treat an action analogous to that for money had and received as maintainable in all cases "where the defendant has received money which *ex aequo et bono* he ought to refund. If, as in Ceylon, there is no necessity to find an actual contract or to impute the fiction of a contract, inasmuch as every Court can treat the question as one not merely of contract, but of a trust fund where necessary, there is no difficulty in extending the remedy to all the cases covered by the words just quoted.. [13]

7. (1918) 20 N.L.R. 206. P.C.
8. (1954) 56 N.L.R. 12 .See also *Gavin* v. *Hadden* (1871)17 E.R. 247.P.C.
9. Cooray, op. cit., pp. 187-84; cf. p. 193.
10. *Supra*, n. 8, Discussed by Cooray, op. cit., p. 193.
11. *Supra*, n. 8 at 20-21.
12. *Supra*, n. 7 at 210-12.
13. ibid. at p. 211.

The reception of English law has not generally affected the basic concepts of the Roman-Dutch law relating to persons, property, succession and obligations.[14] Thus the nature of the trustees' interest in the trust property is determined according to Roman-Dutch rules of ownership.[15] Section 2 of the Prescription Ordinance, 1871, is similar to section 15 of the English Limitation Act, 1833, and relates to the acquisition of title to land by "adverse possession". But English cases interpreting "adverse possession" were not cited by the local courts in the construction of the words "adverse possession" in the local statute.

The courts have noted the different concepts of property law in the two systems, and in interpreting "adverse possession" in the local statute have referred to the Roman-Dutch concept of *ut dominus*.[16] Despite the introduction of the English law of executors and administrators, on an intestacy the property of a deceased vests not in the legal representative but in the intestate heir, according to the Roman concept of the heir as the universal successor.[17]

The English concept of consideration is not a part of the general law of Sri Lanka. An attempt to judicially incorporate English rules relating to consideration was halted in *Jayawickreme* v. *Amarasuriya*,[18] because they are foreign to the Roman-Dutch law. But the concept of consideration has been introduced in special situations by statute and is required in contracts in Sri Lanka which are governed by the Bills of Exchange Ordinance, 1927,[19] and by the Sale of Goods Ordinance, 1896.[20]

10. THE OVERALL INFLUENCE OF ENGLISH LEGAL IDEAS AND CONCEPTS

This chapter is primarily concerned with the influence of English law. But the English contribution to the legal system is not restricted to the field of substantive, adjectival and procedural law and this will be apparent in the succeeding chapters of this book, particularly from the chapters dealing with sources and the system of courts. The or-

14. W. I Jennings and H.W. Tambiah, *The Dominion of Ceylon* (1952, Stevens, London), pp. 183, 199-235.

15. Cooray, op. cit., article 73.

16. *Naguda Marikar* v. *Mohammadu* (1903) 7 N.L.R. 91; *Cadija Umma* v. *Don Manis* (1938) 40 N.L.R. 392.P.C.

17. *Silva* v *Silva* (1907) 10 N.L.R.234.

18. (1918) 20 N.L.R. 289.

19. *Parampalam* v. *Arunachalam* (1927) 29 N.L.R. 289.

20. *A.G* .v. *Abram Saibo Co.* (1915) 18 N.L.R. 417,421-22 .See also s. 66, 93 of the Trusts Ordinance.

ganisational pattern of the courts as well as the practices and traditions of the courts, the bench and the bar have been influenced by English ideas. The terms "advocate" and "proctor" (though the terminology is different) reflected the division between the barrister and the solicitor of the English system. In 1973 the distinction between advocates and proctors was abolished and all lawyers came to be referred to as attorneys-at-law. The doctrine of precedent is another manifestation of the English influence. The basic legal structure (the constitution) was derived from England and the new Constitution, though not to such an extent, still continues to reflect some English principals. Sri Lanka also owes to Britian legal concepts such as the Rule of Law and the independence of the judiciary.

CHAPTER III

ROMAN-DUTCH LAW

11. THE ORIGIN AND EARLY HISTORY OF THE ROMAN-DUTCH LAW

11.a. The phrase "Roman-Dutch law"

The phrase Roman-Dutch law (*Roomsch Hollandts-Recht*) was probably invented by Simon Van Leeuwen who employed it as the sub-title of his work entitled *Paratitla Juris Novissimi* published at Leiden in 1652. Subsequently he issued in 1664 a treatise under the title *The Roman-Dutch law* (*Het Roomsch Hollandts-Recht*).[1] The term Roman-Dutch law emphasizes the fact this system contains a mixture of Roman and Dutch law. How was it that the Dutch law came to be influenced by that of Rome? To answer this question one must refer to the process known as the "reception of Roman law in Europe".

11.b. The reception of Roman law in Europe[2]

As a result primarily of the work of restatement and systematization carried on during the reign of Justinian, the Roman law emerged as a logical, coherent and complete body of law. Despite the decay and fall of the Roman Empire, Roman law did not suffer a similar fate. But for a long time its influence on the continent was not great. Yet it continued as a living law. About the eleventh century interest in the study of Roman law was revived mainly due to the Glossators, the lecturers in the law schools of Europe.

When the institutions and laws of medieval and post-Renaissance societies proved inadequate to meet the increasing complexities of life, the student of Roman law advocated resort to this system which was well equipped to perform the function of filling in the gaps in the legal systems in the different continental countries. Thus the chief reason for the adoption of Roman law is to be found in the growing needs of society and in the inability of local laws and customs to satisfy these needs[3]. The only law taught in the European Universities of that period was the Roman law. Hence the educated judges and officials would

1. See further, R.W .Lee, *Journal of Comparative Legislation*, N.S., xii, p. 548.
2. See further, P.Vinagradoff, *Roman law in Mediaeval Europe* (1929, Clarendon, Oxford.)
3. For a statement of the earlier Roman law, see Sir John Wessels, "Future of Roman-Dutch Law in South Africa" in 37 S.A.L.J. 265, 266-67.

have been familiar only with that system and it is likely that they would have been inclined to resort to it. By about the seventeenth century the Roman law was recognized as the common law of Europe. It was the law in these places subject to the local customs and statutes. In this way Roman law greatly influenced and moulded the developing legal institutions of continental Europe. This process has been called the reception of Roman law in Europe.

In the nineteenth century codes of law were promulgated by Napoleon in many European countries. But the influence of Roman law in these countries was not at an end. For the codes continued to reflect the principles enunciated almost two thousand years previously.

11.c. The reception of Roman law in the Netherlands.[4]

In the latter part of the sixteenth century a number of hitherto separate states formed a federation called the United Provinces, which roughly corresponds to Holland as it is called today. But in tracing the origin and history of the system known as "Roman-Dutch law" one must go back to a period in history long before the coming into being of this Union, when the area covered by the Holland of today was composed of a number of separate provinces. The laws administered in these various provinces were not uniform. They had no single common source of law and their laws had been influenced by those of their neighbours and their rulers and there were also customs of indigenous origin. Teutonic custom was perhaps the most prominent single source.

The circumstances and date of the reception of Roman law in the provinces is a matter of controversy. It was perhaps a gradual process, which became apparent in about the sixteenth century. The reception of the law became apparent in about the fifteenth and sixteenth centuries. But it must not be assumed that the Roman law was entirely unknown to the people of the area before that. The Code Theodosianus (A.D.438) influenced to a degree, the customary laws that prevailed in the Netherland. Later the Frankish Monarchy and the Church, through the medium of the Canon law, had introduced elements of the Roman law. But prior to the "reception", the influence of Roman law had been slight. The general acceptance of Roman law in the fifteenth and sixteenth centuries, had been preceded by a long period during which

4. J.W. Wessels, *History of the Roman-Dutch Law* (1908, African Book Company, Cape Colony), pp. 13-191. See Sir John Kotze's notes to his translation of Simon Van Leeuwen's *Het Roomsch Hollandsch Recht* (12 ed., Amsterdam, 1780), translation (1921, London), pp. 459-68; R.W.Lee, *An Introduction to the Roman-Dutch Law* (1953, Clarendon Press. Oxford), pp. 1-25; Wessels, op. cit., 37 S.A.L.J. at 265-71.

Roman law had exerted influences at various times on the laws of the Netherlands. The earlier process has been described as the "infiltration of Roman law"

In the fifteenth century the provinces of the Netherlands passed under the rule of the Duke of Burgundy. It was the policy of the Duke to unite their possessions in a single kingdom The House of Burgundy favoured every means calculated to bring about a uniformity in the law. There existed such a diversity of laws and customs in the towns and provinces, each town and province having its own laws, that in order to bring about a union, uniformity in the law seemed indispensable. As the Roman law supplied this want the Duke encouraged its study and practice. It was during the Burgundian period that Roman law gained a firm footing in the United Provinces.

One of the important factors which facilitated the general reception of Roman law was the establishment of the Great Council of Mechlin 1473 which had supreme jurisdiction over the provinces of the Netherlands, then subject to the Duke of Burgundy. The creation of this court may be regarded as the beginning of the legal system known as the Roman-Dutch law. The court made constant reference to Roman law and started the process of assimilating the local customs and statutes and the Roman law into a single system.

The work begun by the Council was continued by the great writers on the Roman-Dutch law, who brought into being a new system called the Roman-Dutch law. The work of Grotius who has been called the Father of Roman-Dutch law is perhaps the most significant. His *Inleiding* constitute a masterpiece of legal literature. With extraordinary skill Grotius has combined into a coherent fabric the various local customs, the statutory enactments of general application and principles of Roman law. Thenceforth the Roman-Dutch law was developed by a series of great writers. According to Lee, "The History of the Roman-Dutch law is the history of the authoratative writers from whom are derived our knowledge of it".[5]

The early Roman-Dutch writers who expounded the Roman law, such as Grotius, Voet and Van Leeuwen were regarded in their lifetime as traitors to the law of their country. In attempting to assess the extent to which the Roman law was received in the Dutch provinces, reference could be made to a statement by Van der Linden:

5. Lee, op. cit., p.6. An account of the writers of the Roman-Dutch law is contained in article 12.b.

> In order to answer the question what is the law in such and such a case we must first inquire whether any law of the land or local ordinance (*plaatselijke keur*),
> having the force of law, or any well established custom, can be found affecting it. The Roman law as a model of wisdom and equity is, in default of such a law, accepted by us through custom in order to supply this want.[6]

The term Roman-Dutch law implies that it is composed of Roman and Dutch law. This is however to ignore the effect of Teutonic customs which were prevalent in the Netherlands and had a significant effect on the development of certain areas of the Roman-Dutch law. Further as the Roman-Dutch law is based upon Roman law, it swept into its system the legal learning accumulated by the great Italian, French and German jurists. The writers on the Roman-Dutch law were aware of and influenced by other European commentators on the Roman law.[7]

Lee[8] refers to the various sources that have contributed to the development of the Roman-Dutch law.

> Derived from two sources, Germanic custom and Roman law, the Roman-Dutch Law may be said to have been anticipated so soon as the former of these incorporated elements derived from the latter. Undoubtedly such a process was at work from early times. Long before the *Corpus Juris* of Justinian had been "received" in Germany, the *Codex Theodosianus* (A.D.438) had left its mark upon the customary laws of the country now comprised within the limits of the kingdoms of Holland and Belgium. Later the Frankish Monarchy, the Church through the medium of its Canon law,[9] the Universities and the courts of law forged fresh links between Rome and Germany. The general reception of the Roman Law in Germany and Holland in the fifteenth and sixteenth centuries completed a process which various ways and through various channels had been at work for upwards of a thousand years.

In the Netherlands Roman -Dutch law was replaced by the Napoleonic Code in 1809 after the French conquest, and this in turn was replaced by a new Code in 1838.[10]

11:d. The reception of the Roman-Dutch law in the Dutch colonies

Roman-Dutch law was carried by the Dutch trading companies to their colonies in the East, the West Indies and the Southern part of Africa. There were three areas in which the influence of Roman -Dutch law was substantial - British Guiana, South Africa and Sri Lanka.

6. Van der Linden, *Handbook* (Juta's Translation), p.2.
7. See further, Sir John Wessels, op. cit,. in 37 S.A.L.J. 265-69.
8. R.W .Lee, op. cit., p.3.
9. For effect of Canon law on Dutch law, see Kotze, *Van Leeuwen*, pp. 468ff.
10. See further, Lee, op. cit., p.6

British Guiana.Roman-Dutch law was introduced into Guiana in the middle of the sixteenth century. Subsequent to the British conquest in the nineteenth century, Roman-Dutch law was retained and continued to be in force. But in 1916 Roman-Dutch law was completely superseded by the introduction of English Law Ordinance.[11]

South Africa. In the Cape which Dutch occupied in 1652 the Roman-Dutch law was applied. The British conquered the Cape in 1806, but in accordance with the British constitutional principles laid down in the case of *Campbell* v. *Hall*[12] that the laws of the conquered territory remain in force, until abrogated, the British continued to apply the Roman-Dutch law. When the States of Transvaal, Natal and Orange Free State were taken over Roman-Dutch law was retained in those States. When the Union of South Africa was formed, the Roman-Dutch law became the common law of the Union. Roman-Dutch law was later extended to the mandated territory of South-West Africa, and to the Prince Edward Islands and Rhodesia.[13]

Sri Lanka. Roman-Dutch law was introduced to Sri Lanka after 1656 when the maritime provinces of Ceylon were conquered by the Dutch. In 1796 the British assumed sovereignty over the Dutch territories, but by the proclamation of 1799 the laws which subsisted under the Dutch government were retained. Today the Roman-Dutch law still exists as the residuary law of the country.[14]

12. THE SOURCES OF THE CLASSICAL ROMAN-DUTCH LAW[15]

12.a. The sources

The sources of the ancient Roman-Dutch law were (i) treatises (ii)statutes, (iii) decisions of the courts, (iv) opinions of jurists and (v) custom.

11. See further, R.W .Lee, op. cit., p.10..
12. [1774] 1 Cowp. 204
13. See further, R.W. Lee, op. cit., pp. 11-14; H.R.Hahlo and E.Kahn, *The Union of South Africa . The Development of its Laws and Constitutions.* (1960, Stevens & Sons Ltd.), pp. 1-50.
14. See further below, articles 12,13 and 14.
15. R.W. Lee, *An Introduction to the Roman-Dutch Law* (1953, Clarendon Press, Oxford), pp. 14-23; C.G.Weeramantry, *Law of Contracts* (1967, Colombo), pp. 36-44; Hahlo and Kahn, op. cit., pp.10-16; Wessels. *History of the Roman-Dutch Law*, pp.191-386.

12.b. Treatises of the jurists

The treatises written by the Dutch jurists between the sixteenth and nineteenth centuries contain authoritative statements of the Roman-Dutch law. It has been stated[16] that the writers were responsible for bringing into being this system. The rules expressed in the treatises are regarded not merely as opinions but as authoritative expressions of the rules of Roman-Dutch law. In the English law the works of jurists do not enjoy similar authority. The arguments set out by jurists in their works may be utilized by counsel, but judges are free to accept or reject them. If they accept the authority of a writer it is because the writer has correctly stated the existing law, which is not regarded as a source of law. But in the case of the Roman-Dutch writers their treatises are accepted as a source of law. They are authentic statements of the law itself and are regarded as authoritative unless proved to be incorrect.[17] In the event of a conflict of opinion among the jurists on the same point the court has a discretion which opinion to follow.

Hugo Grotius (1583-1645). Grotius is regarded as one of the greatest Roman-Dutch jurists and his book *Introduction to the Roman-Dutch Jurisprudence of Holland* (*Inleiding tot de Hollandsche Rechtsgeleertheyd*) is regarded as the beginning of the system of Roman-Dutch law. In this work Grotius treated the jurisprudence of Holland as a living system of law and proceeded to explain it scientifically and methodically. Though he followed the *Institutes of Justinian* to the extent of division of the subject matter (*jus personarum, jus rerum* and *jus obligationum*) he adopted a style and presentation of his own in developing these heads.

No jurist before Grotius had conceived the law of the Netherlands as a single system. Grotius was the first great Dutch lawyer who systematized the confused mass of law which was observed in his day. His labours enabled subsequent legislators and jurists to build on the solid foundations that he had laid.[18]

16. See above, article 11.c.

17. T. Nadaraja, "The Legal Systems of Ceylon" in (1952) U.C.R. 31, 38-39. *Abeyawardene* v. *West* (1957) 58 N.L.R. 313, 320, PC.; Lee, op. cit., p. 14:

18. He is also known as the father of International law. The *De Jure Belli ac Pacis* is a very important contribution because it is the first attempt to set out principles of Internationl law. Wessels, *History of the Roman-Dutch Law*, at p. 273, referring to the work on International law says that it was "as nearly original as any work of men in an advanced state of civilisation can be". But from the point of view of the history of Roman-Dutch law Grotius' work on International law is not very relevant.

The Law of Nature or Natural Law is at the basis of Grotius ideas of law and he was pains to expound this concept.

Arnold Vinnius (1588-1657). He was a Professor of Law at the University of Leiden and was a contemporary of Grotius. He published a *Commentary on the Institutes of Justinian (In IV Libros Institutionum Imperialium Commentarius).* The method adopted by Vinnius was to set out a title from *Justinian's Institutes,* then to append a text or explanatory note and to continue with an exhaustive commentary on the subject matter of the particular section. At the end of the commentary he explains in what way the Roman law had been altered in Holland. But his system differed from that of Grotius who tried to create a single system assimilating the Roman law and the various native systems of laws in the Netherlands.

S. Van Groenewagen van der Made (1613-1652). He practised as an advocate for some time before taking up an administrative post. He wrote three main works in all before he died at the age of 39. His presentation was similar to that of Vinnius in that he took principles of law laid down in the *Corpus Juris* of Justinian and discussed the extent to which they had been adopted and to what extent the Roman law had fallen into disuse.

Simon Van Leeuwen (1626-1682). The term Roman-Duch law was first used by Van Leeuwen in his writings. He attempted to show that the law of the Netherlands was a substantive system of law based upon the Roman law, but by no means the antiquated system of Justinian that prevailed in Europe in the middle ages. His important works were *Paratitula Juris Novissimi,* published in 1652, *Censura Forensis* and *Het Roomsch Hollandsch Recht.* The distinctive feature of Van Leeuwen's work is that he discusses the law that was administered in the various provinces of the Netherlands as well as the law that obtained in France and other neighbouring territories. On the other hand Grotius confined himself almost entirely to the law of Holland. Further Van Leeuwen traces the history of the law, again unlike Grotius, who dealt with the law of his time.

Ulrich Huber (1636-1694). His most important works are the *Praelectiones Juris Civilis* and his treatise on Roman-Dutch law. He was a judge of the Court of Friesland, a province in the United Provinces and his work was intended mainly for the lawyers in that province. But in as much as he did not confine himself to an expression of the law of Friesland, but wrote about the Roman-Dutch law as it applied

in the Netherlands his works have been regarded as one of great value and authority.

Johannes Voet (1647-1713). He was Professor of Law in the University of Leiden for about thirty years. His *magnum opus* was the *Commentarius ad Pandectas* first published in 1698. Voet adopted the Method of Vinnius (and not of Grotius) of taking a title from the Digest and then expounding the law upon the subject matter of the title in a methodical way. He brought in examples from the situations of everyday life, referred to the principles of other legal systems, and the law of nature, in order to make his treatise complete. Voet then gave a thorough and masterly explanation of the Roman-Dutch law of his time. It is important to note that he was writing almost a century after Grotius and that therefore he was dealing with the Roman-Dutch law at a later stage of its development. This is one reason why his book enjoys very great authority even today.

Voet's writings were detailed and he deals with matters which Grotius had ignored. "There is much more in Voet than there is in Grotius, but what there is in Grotius is much more concise and much more methodically arranged".[19]

Cornelis Van Bijnkershoek (1673-1743). He was the most important Dutch jurist of the eighteenth century. He was President of the Supreme Court of Holland, Zeeland and West-Friesland from 1724 up to his death. He was very conscious of the legal profession which felt and failed to live up to the high standards which he set out. He wrote books on the Roman law, Roman-Dutch law and International law. A characteristic feature of his writings was that he was not concerned with specific branches of the law, but confined himself to discussing isolated legal questions, which were not connected to each other, but raised interesting and controversial issues. He was writing as a judge and since he was daily called on to decide practical questions which arose in the courts, his books contained not mere theoretical possibilities but observations on such matters as had actually occurred in practice and were therefore likely to occur again. His views are often of a controversial nature. He regarded law not as an arrested growth, but as a living organism, and believed that it should adopt itself to its surroundings. Therefore sometimes carried away by the spirit of controversy he goes to extremes and seeks to upset what has become the settled practice simply because in his opinion it was built upon a wrong

19. Wessels, *History of the Roman-Dutch Law*, p. 324.

foundation. Because of his disinclination to accept the existing law, Bijnkershoek's works made a great impression on the development of the Roman-Dutch law.

D.G.Van der Kessel (1738-1816). He was a Professor of Law at Leiden. He may be regarded as the last of the really great Dutch exponents of the Roman-Dutch law. His important works are the *Theses Selectae* (a collection of notes on Grotius'Institutes). His *Dictata ad Jus Hodiernum* which in accordance with his wishes was not published during his lifetime.

Joannes Van der Linden (1756-1875). His work *The Institutes of the Law of Holland* is a very valuable contribution to Roman-Dutch law. Van der Linden who was the last writer of the new system which took its place when the Roman-Dutch law crumbled beneath his hands. When Holland was conquered by Napoleon he left his projected supplement to *Voet's Pandects* unfinished and applying his industry in the new field he became to his countrymen the interpreter of the laws of their conquerors.

12.c. Statutes

The paramount legislative authority was the States-General, the federal legislature of the Republic of the United Netherlands. The legislatures of the individual states could also legislate for the particular state. The Council of Seventeen, the directorate of the East India Company had the power to issue regulations, obtaining the sanction of the States-General in important matters.[20] Subject to the above authorities, the Governor General and Council in Batavia in the case of the eastern colonies, and the Governor of a particular colony had legislative power.[21] The Political Ordinance of 1580 (an enactment of the States-General) and the Statutes of Batavia[22] (an enactment of the Council of Batavia), are among the more well-known statutes.[23]

12.d. Judicial decisions

There are many published volumes of the decisions of the Dutch Courts which constitute a subsidiary source of Roman-Dutch law. The Volumes most often referred to are those of Cornelius Neostadius and Johannes A. Sande.[24]

20. T. Nadaraja,"The Administration of Justice in Ceylon under the Dutch Government," in 12 J. C. B. R. A. S. (N.S.) p. 1.
21. Nadaraja, op. cit., p.1 and pp. 8-10.
22. See further , article,13.a and 13.b.
23. See further, Hahlo & Kahn, op. cit., pp. 14-16.
24. See further, Lee, op.cit., p. 19.

But unlike the decisions of the courts in the common law countries judicial decisions in the Netherlands and other places which follow the Roman tradition, have, at the most, persuasive authority and are not binding.

12.e. Juristic opinions

A feature of the Roman-Dutch system of jurisprudence is the existence of numerous volumes of juristic opinions published by practising lawyers. These differ from the treatises in that (i) they contain opinions, not authoritative statements, (ii) deal with isolated questions and are not comprehensive, and (iii) are not commentaries on the Roman law.

12.f. Custom

Custom as everywhere else in the world, was an important source of Dutch law in the formative periods of its legal development. The native laws and usages found in the Netherlands which had been derived from many sources were woven into the fabric of the Roman-Dutch law. But as the Roman-Dutch law developed, the influence of custom dwindled. Nonetheless a custom if proved to exist, and if it had not been abrogated by disuse, would be enforced by the courts. It must be noted that it is through custom that Roman law found its way into the Netherlands.

13. SOURCES OF DUTCH LAW IN SRI LANKA

13.a. Sources of law in the Dutch period

Nadaraja makes the following statement regarding the sources of Roman-Dutch law in the Dutch period.

> Without making a close study of what is still legible in the legal records of the Dutch period no conclusions can be reached regarding the order in which the different kinds of authorities would have been considered by a judge engaged in deciding a case. There is, however, evidence to suggest that such a judge would have inquired first whether any local statutes dealt with the matter in hand. Where local statutes contained no clear provision on the point or were silent, and in the absence of any local custom having the force of law, he would have had recourse to the Statutes of Batavia. If these two were silent, he would then have turned to the law of Holland, excluding such customs and legislation as had reference to the special local circumstances of the mother-country. In practice this meant that he would have relied on the general principles expounded in those "books of authority" which were most commonly used. Finally, where all the above sources failed, the judge would have consulted the Roman Law as interpreted in Holland. In their attitude to earlier judicial decisions it may be presumed that the judges in Ceylon followed the practice that prevailed in Holland; while there was no rule of law binding judges to follow such

> decisions, a line of consistent decisions to the same effect would generally be followed by later judges unless there was some good reason for disregarding the current of authority.[1]

The Statutes of Batavia which are referred to in the above quotation were in fact apparently the source most commonly resorted to in the Dutch period.[2]

The Statutes of Batavia.[3] The "Statutes of Batavia" is the name given to an important collection of legislative enactments which proceeded from the headquarters in Batavia,[4] of the Dutch East India Company which we have seen[5] had the power to legislate for the colonies. In April 1641 the Governor-General in Batavia, Van Diemen, ordered the President of the Court of Justice in Batavia, J. Maetsuycker, to draw up a code of all the *placaats* and orders which had been issued in Batavia up to that date, including so much of the legislation and common law introduced from the United Provinces as was in force in the colonies. The code so drawn up came to be known as the Statutes of Batavia and it has been stated that it was "An attempt to alter and modify the jurisprudence of the United Provinces, so as to reconcile the administration of justice in the colonies to the spirit of the people therein".[6] The Statutes of Batavia were promulgated in July 1642 by the Governor-General of Batavia, Van Diemen, and was approved by the Council of Seventeen and the States-General in 1650. In effect it constituted a code for all the possessions of the East India Company. Since Dutch Statutes before 1656 are presumed to have been incorporated into the law of Sri Lanka, and since this statute was passed before 1656, it was not necessary to show that it was introduced into Sri Lanka.[7] But there is definite evidence that it was accepted and applied by the Dutch government in Sri Lanka.[8] There are three copies of this enactment in the Sri Lanka National Archives.

1. T. Nadaraja, "The Administration of Justice in Ceylon under the Dutch Government" in 12J.C.B.R.A.S. (N.S.) 1,13-14.
2. ibid.
3. See Nadaraja, op.cit,. pp.9-10, 49-51; C.G.Weeramantry, *The Law of Contracts* (1967, Colombo), pp.26-29; H.W.Tambiah" Roman-Dutch Law in Ceylon" in (1951) C.L.S.R. 36; K. Balasingham, *Laws of Ceylon* (1929 Sweet & Maxwell, London), Vol. III, Part II, pp. 148-50; *Daniel Silva* v. *Johanis Appuhamy* (1965) 67 N.L.R.457,464-68.
4. Now called Djakarta.
5. Article 12.c.
6. *Karonchihamy* v. *Angohamy* (1904) 8 N.L.R.1 at 24.
7. See article 13.b at pp. 56-58.
8. See Nadaraja, op. cit., 9-10,49-50.

The Statutes of Batavia further made provision for additions in the future in keeping with legislative alterations which took place in the United Provinces.[9]

In 1761 Governor-General P.A.Van der Parra ordered the compilation of a new collection modifying and altering the 1642 Statutes. This collection was ready in 1764 and is known as the New Statutes of Batavia. Doubts have been raised as to whether it was ever given legal force. Tambiah[10] brings forward a number of reasons to show that the New Statutes were in force in Sri Lanka. Nadaraja says that the New Statutes were strictly not law because they did not receive the approval of the Council of Seventeen in Holland, but states the fact that "...they continued to be observed in the East Indies for nearly a century after their adoption in Batavia and there are several indications that they were observed in Ceylon".[11]

There is some evidence (which is however not conclusive) of the application of the New Statutes in Sri Lanka. (i) Parts of the New Statutes are found in the Government Archives. So it is probable that they may have been used here. (ii) Governor Simons's memoir seem to imply that the New Statutes were applied here. (iii) Two cases decided in Dutch and British times state that the New Statutes were in operation in Sri Lanka. In *Van Cleef's* case[12] it was said that the New Statutes being the latest law of India ought to be applied in Sri Lanka. The New Statutes are also referred to in *Dona Clara* v. *Dona Maria.*[13] But these cases contain only *obiter dicta* to the effect that the New Statutes had been incorporated into Sri Lanka. In *Van Cleef's* case, though the judge made the statement referred to above, he decided that case according to the law set out in the Old Statutes of Batavia, which law was identical to that stated in the New Statutes. In *Dona Clara* v. *Dona Maria* too the law stated in the Old Statutes and New Statutes was similar. (iv) Cleghorn[14] expresses the view that the law applied by the Dutch included the New Statutes of Batavia. (v) In giving evidence before the Cameron Commission in 1833, Sir Richard Ottley

9. *Karonchihamy* v. *Angohamy* (1904) 8. N.L.R. 1,22.
10. *Daniel Silva* v. *Johanis Appuhamy* (1965) 67 N.L.R. 457; H.W. Tambiah, op.cit.
11. Nadaraja, op. cit., pp. 9-10, 49- 50.
12. (1869-1871) Vander Straaten's Reports, Appendix A, p xxviii.
13. (1820-33) Ramanathan Reports 33; (1869-71) Vander Straaten's Reports, Appendix A, p.xxii.
14. H.Cleghorn, "Administration of Justice and of Revenue in the Island of Ceylon under the Dutch Government" in 3 J.C.B.R.A.S. (N.S), P. 129.

states that the New Statutes of Batavia did necessarily form part of the laws of Sri Lanka and that the New Statutes were of the greatest value.

13.b. The sources of Dutch law in modern Sri Lanka

The treatises of the jurists and the cases decided by the Sri Lanka courts interpreting and sometimes modifying the Roman-Dutch principles may be regarded as the most important modern sources. Dutch statutes have a limited application. The decisions of Dutch courts are occasionally cited in our courts. It is proposed to discuss the three significant sources of the modern Roman-Dutch law; (i) the treatises of the jurists, (ii) Sri Lanka case law, and (iii) statute.

(i) **Treatises of the Roman-Dutch jurists.** The most important of the old sources of the Roman-Dutch law existing in Sri Lanka today are the treatises of the writers. Among the jurists who are most frequently cited in the Sri Lanka courts are Voet, Grotius, Van der Linden, Van der Keessel and Van Leeuwen. The Sri Lanka courts have generally preferred the views of Voet.[15] In *Tarrant* v. *Marikar*,[16] the court said that as in South Africa, so also in Sri Lanka, in case of a conflict of authority, the opinion of Voet would usually be followed. But this is not always the rule and there have been occasions on which the courts have preferred the views of other jurists. In *General Ceylon Tea Estates Co. Ltd.* v. *Pulle*,[17] the court gave preference to the views of Grotius Van der Keessel, to those of Voet and Van Leeuwen. In *Fernando* v. *Weerakoon*[18] the courts preferred the views of Groenewegen and Van der Keessel to those of Voet and Van der Linden.[19]

(ii) **Sri Lanka case law.** The decisions of the Sri Lanka courts are an important source of the modern Roman-Dutch law, as it is applied in Sri Lanka today. In the Roman- Dutch law as it was administered in Holland and other countries whose laws are based on the Roman law, the decisions of courts were not a very significant source of law.

Where the text of a treatise is interpreted in a particular judicial decision, that case becomes the dominant source and the interpretation

15. *Saram* v. *Thiruchelvan* (1945) 46 N.L.R. at 146; *Tarrant* v. *Marikar* (1934) 36 N.L.R. 145, 157-58.
16. (1934) 36 N.L.R.145, 157-58.
17. (1906) 9 N.L.R. 98.
18. (1903) 6 N.L.R.212.
19. See also *Mukthar* v. *Ismail* (1962) 64 N.L.R. 293, where Domat was preferred to Voet. A. Wood Renton, "The Roman-Dutch Law in Ceylon under the British Regime" in 49 S.A.L.J.161, 171-73, discusses the attitude of the Sri Lanka courts where the views of Dutch jurists are in conflict.

put on the text, subject to the doctrine of *stare decisis* as it is applied in Sri Lanka, become authoritative.[20]

The judiciary during the British period have not always done justice to the Roman-Dutch law and at times have expounded it erroneously,[21] and because of the operation of the rules of *stare decisis* [22] it has often not been possible to correct these errors.

The Sri Lankan cases also consult South African authorities on issues regarding the interpretation of Roman-Dutch authorities because South Africa is a jurisdiction where the Roman-Dutch law applies. South African cases are persuasive (as distinguished from absolutely binding) precedents.

(iii) **Statute.** Statutes enacted by the Dutch are also a source of the modern Roman-Dutch law of Sri Lanka to a limited extent. Such legislation as we have seen[23] may take various forms and could emanate from the States-General of the United Provinces (the legislatures of the individual provinces were not competent to legislate for the colonies) and from the Governor-General and Council in Batavia which was the Executive Committee of the Dutch East India Company.

There is some difficulty as to the extent to which Dutch legislation applies in Sri Lanka. It seems to have been accepted by our courts, though it has sometimes been overlooked, that Dutch legislation of a general character applied to Sri Lanka if it was passed before 1656 (the date when the Dutch occupied Sri Lanka).[24] But after 1656 it would apply only if it can affirmatively be proved that the statute was applied in Sri Lanka during the Dutch period.[25] In *Karonchihamy* v. *Angohamy*[26] the Supreme Court held that *placaat* of 1674 was not part of the law of Sri Lanka because it had not been proved that it had been introduced to Sri Lanka in Dutch times The burden of proof lies on the person who alleges that the statute has been introduced into Sri Lanka.

20. See further, article 23. h and 23.n.
21. See article 7.
22. See article 23.n.
23. See above, article 12.c.
24. *Karonchihamy* v. *Angohamy* (1904) 8 N.L.R. 1; *Jafferjee* v. *Cyril de Zoysa* (1953) 55 N.L.R. 124; Walter Pereira, *Laws of Ceylon* (1904, Government Printer, Ceylon) *p.2*.
25. *Samed* v. *Segutamby* (1924) 25 N.L.R. 481. See also *Daniel Silva* v. *Johanis Appuhamy* (1965) 67 N.L.R. 457.
26 .(1904) 8 N.L.R. 1

The proposition as stated above is subject to two qualifications. Firstly, Dutch statutes passed before 1656 which were clearly of a local or peculiar nature have not been regarded as part of the Roman-Dutch law that was in force in the Dutch colonies. In *Re Insolvent Estate of Loudon*,[27] the court remarked "when this colony was settled by the Dutch, the general principles and rules of Holland were introduced, but by such introduction it did not follow that special and local laws should also be introduced".[28] In *Herbert* v. *Anderson*[29] it was held that certain *placaats* stating fiscal and revenue laws of Holland were not a part of the Cape Colony. Similarly in Sri Lanka too, such statutes were excluded from the Roman-Dutch law that was applied here. In *Ramasamy* v. *Tamby*[30] it was held that the usury laws of Holland being in their nature merely local enactments and unsuited to the conditions of Sri Lanka, were not introduced by the Dutch, and were not enforced during their occupation.

Secondly, statutes passed after 1656 which had not been introduced to this country might nonetheless apply here, if it can be shown that some statute or part thereof had been incorporated into the common law. This could happen if an important writer on Roman-Dutch law incorporated in his treatise the substance of the laws stated in a statute or part thereof. Then the statute by incorporation became part of the common law, and as such would apply to the colonies.[31] But this rule has no application in respect of principles enunciated in the treatises and therefore it is not necessary to show that principles developed after 1656 must be shown to have been specifically introduced.[32]

Dutch statute law even if it were applicable in Sri Lanka could apparently be abrogated by disuse.[33] As regards statutes passed after 1796 (after the Dutch occupation had ended) the rule of the Roman-Dutch law may not be applicable. In English law a statute cannot be abrogated by disuse. In *Kandar* v. *Sinnachipillai*[34] the view was taken that a provision in the *Tesawalamai* Code was obsolete. The Code was

27. (1829) 1 Menzies 387, 388 (South Africa).
28. W.I.Jennings, *Notes on the Customary Laws of Ceylon* (unpublished), available in Library of University of Sri Lanka.
29. (1839) 2 Menzies 166 (South Africa).
30. (1875) Ramanathan Reports 189.
31. See *Jafferjee* v. *Cyril de Zoysa* (1953) 55 N.L.R. 124. 127; T. Nadaraja, op. cit., (*supra* n.1.) at pp. 48-49.
32. But see article 7 at p. 36.
33. *Seaville* v. *Colley* (1891) 9 S.C.C. 44; *Karonchihamy* v. *Angohamy* (1904) 8 N.L.R. 1.
34. (1934) 36 N.L.R. 362.

prepared in Dutch time but it could be regarded as a part of the post-1796 legislation because it was promulgated by the Governor in 1806 and was included in the Legislative Enactments of Sri Lanka.

The statutes of Batavia whatever their historical claim to authority[35] have not generally been cited and followed as a source of law in Sri Lanka in the British period. The courts have preferred to follow the treatises of the Dutch jurists.

Nadaraja takes the view that the Roman-Dutch law as found in the treatises was only the fourth in order of importance as a source of law[36] in Sri Lanka in the Dutch period, while the Statutes of Batavia was the most important. But in the British period the former became the most important. It thus appears that in the British period a change took place in the nature of the law applied-the treaties replacing the Statutes of Batavia as the primary source.

14. THE APPLICATION OF DUTCH LAW IN SRI LANKA

14.a. The sphere of influence of Dutch law in the Dutch period

The early colonial policy of the Dutch was to apply their laws to both European and local inhabitants alike. But it became apparent that the non-recognition and destruction of local customs created animosity and gave rise to opposition. Therefore, it was felt to be expedient to give effect to the customs of the people. Accordingly the Dutch, while applying their laws in criminal cases, gave affect to local customs in civil cases.[1]

In Sri Lanka the Dutch recognized and administered the laws and customs of the Tamils of Jaffna,[2] of the Muslims[3] and the Mukkuvars,[4] applying their own Dutch laws when the local laws were silent or were not in accordance with their own conceptions of morality and public

35. See above, article 13 a.

36. See qrotation above, article 13 a.

1. See T. Nadaraja, "The Administration of Justice in Ceylon under the Dutch Government" in 12 J.C.B.R..A.S. (N.S.) p. 1,10.

2. See article 19; Nadaraja, op. cit., p. 11 and pp. 53-55.

3. See article 18. c; Nadaraja, op. cit., pp. 11-12 and 56-58.

4. See article 20; Nadaraja, op. cit., pp. 6. 11, 42,55-56.

policy.[5] The Johnston papers[6] indicate that certain numerically negligible communities who had settled in Sri Lanka, the Paravars from South India who lived around the pearl fisheries of Sri Lanka, the Chetties in the Pettah of Colombo and the Parsee merchants of Sri Lanka had preserved their customs, particularly in matters relating to succession and marriage.

The Dutch never ruled the Kandyan provinces and therefore Dutch law had no influence on the Sinhalese laws in those areas. The extent to which the Dutch laws were applied to the Sinhalese of the maritime provinces or conversely the extent to which the Sinhalese laws and customs were in force, is a question which has been the source of much writing and conjecture.[7]

The source of controversy has arisen because in the British period in pursuance of the obligation to give effect to the laws that subsisted under Dutch rule, the Roman-Dutch law was applied to the Sinhalese of the maritime provinces on the assumption that they were subject to this system during the Dutch period. But it has been questioned whether this was a correct assumption.

Jayawardene[8] puts forward a number of reasons to show that the Sinhalese law and not Dutch law was the primary law that was applied to the Sinhalese in the maritime provinces in Dutch times (Dutch law applying only when the Sinhalese laws were silent or unsuitable), and that the application of Dutch law was confined to the Dutch and their servants, the officials of the Dutch East India Company, the residents within the towns, and perhaps to the other local inhabitants who had adopted Christianity.

5. See Nadaraja, op. cit., pp. 10- 11.

6. See Alexander Johnston's Papers on "Ceylon Native Laws and Customs" (unpublished) as referred to in Nadaraja, op. cit., pp.61-62, n. 228, which were written in the early years (1806- 1817) of the British period about 10-15 years after the end of Dutch rule and which could therefore be regarded as evidence of the laws in force in the Dutch period. It is not clear to what extent these laws were recognized and administered by the courts in the Dutch period.

7. See A. St. V. Jayawardene, *The Roman- Dutch Law as it Prevails in Ceylon* (1901, Colombo), 2-11; T.Nadaraja op. cit., 1 at 3, 10-14, 26-28, 45-65; F.A.Hayley, *Laws and Customs of the Sinhalese* (1922, Times of Ceylon, Colombo) pp. 20-37; *Karonchihamy* v. *Angohamy* (1904) 8 N.L.R. 1; *Karonchihamy* v. *Angohamy* (1896) 2 N.L.R 276; H.W.Tambiah, 'The Roman-Dutch law in Ceylon' in (1951) Ceylon Law Students Review 36; W.I.Jennings and H..W Tambiah, *The Dominion of Ceylon* (1952, Stevens Ltd., London) pp. 195-96, *Daniel Silva* v. *Johanis Appu* (1965) 67 N.L.R. 457 at 464-68.

8. Jayawardene, op. cit., pp. 3-11.

(i) Jayawardene[9] having stated that the "nature of the legislation of the Dutch in Ceylon cannot be stated with certainty, owing to the loss of the Dutch record", however, analysing the index to the Dutch legislative enactments which was available, and which indicated what legislation was in force in Sri Lanka, concludes,

> ...the remaining legislative enactments do not seem to have effected any radical change in the laws and customs of the Singhalese or the introduction of the Roman-Dutch Law. The Roman- Dutch Law of succession, inheritance, *fideicommissum*, and contracts does not seem to have been imposed on the Singhalese. The laws of the Singhalese seem to have been left intact.

(ii) Jayawardene[10] argues on the basis of an interpretation of the words of the Charter of 1801, the Proclamation of 10th November, 1802, and Regulation No.9 of 1822, that these enactments "afford unmistakable proof that the Government not only recognised the Sinhalese Laws, but even enforced their application".

(iii) The Dutch recognized the laws and customs of the Muslims, the Tamils and the Mukkuvars. Jayawardene asks:[11] "Then, is not the conclusion that the Singhalese were allowed to live under their own laws irresistible."

(iv) The Dutch were mercenary in their outlook and regarded the colonies as sources of revenue and were not interested in enforcing their laws on such colonies.

> When we come to the question whether, even assuming that the law forbidding such marriages prevailed among the Dutch Burghers, it extended to the native inhabitants subject to the Dutch Government, we are, I think on firm ground. The Dutch East India Company was a trading Company, and it is a well known fact that the Dutch, whether from policy or from indifference, troubled themselves very little about the native inhabitants, except perhaps in the case of the small number of native Christians who were in the service of the government or resided in the forts, and left them more or less contemptuously to themselves. The Dutch, therefore, were not likely to extend to the native population in their integrity the personal laws by which they governed themselves, and least of all their peculiar and strictly Christian views of the marriage relation. Accordingly we find that native customs and usages were recognised, and that even when Roman-Dutch law was in any degree applied, it was applied with such modifications and qualifications as were suitable to the people.[12]

9. op. cit., pp. 4-5.
10. op. cit., p.8, also see p.7.
11. op. cit., p.4.
12. *Karonchihamy* v. *Angohamy* (1904) 8 N.L.R.1, 23-24.

(v) Jayawardene[13] citing the *dicta* and decisions of judges, the opinions of authors of books, British administrative officers and historians writing in the British period, says that they confirm the conclusion that the Sinhalese were allowed to live under their own laws. But a careful and more extensive collection of views from all sources (expressed in the British period) by Nadaraja[14] shows that there is no unanimity in the views expressed and that there are writings which both support and militate against Jayawardene's view.

(vi) There is another argument which supports Jayawardene's view and which was stated by de Sampayo, J. in *Karonchihamy* v. *Angohamy*.[15] A Court called the *Landraad* was set up in the Dutch period to try land cases arising among the Sinhalese. This court was to be composed of Sinhalese officials. "It would be strange if this singular court knew or were able to apply to the intricacies and refinements of the Roman-Dutch law.[16] It is extremely unlikely that if the Roman-Dutch law were in force as regards the Sinhalese that this court would have been composed of Sinhalese officials. The composition of the court seems to indicate that Sinhalese laws and customs were recognized.

(vii) Nadaraja gives[17] some examples of Sinhalese laws and customs which were recognized in Dutch times.

Jayawardene concludes[18] on this note:

> All the facts-the legislative enactments of the British government, the actual application of Singhalese law in our Courts in the early days, the opinions of eminent judges, the exemption of the Mukkuvars, Malabars, and Moors from the operation of the Roman-Dutch law, and the character of the Dutch government-point to the conclusion that the Dutch did not establish their laws amongst the natives of this Island. When they settled here their rights and liabilities were regulated by the Roman-Dutch law; but they did not interfere with the laws and customs of the Singhalese. They introduced the Roman-Dutch law to Ceylon; but it is the English, and not they, who established it amongst the Singhalese, who made it the law of the land the common law of Ceylon.

Nadaraja's conclusion[19] is not very different to Jayawardene's but he points out the difficulty of making a definite statement in the absence of more reliable information.

13. op. cit., 4, 6-9.
14. op. cit., pp, 12-13, 57-64.
15. *Supra.*
16 .de Sampayo j. in *Karonchihamy* v. *Angohamy, supra*, p.27.
17. op. cit., p. 58, n. 218. See also pp. 12 and 58-60.
18. op. cit., p. 11.
19. op. cit., p.12.

Since no code of the customary law of the Sinhalese of the Maritime Provinces appears to have been compiled in Dutch times, it is not easy to say what Sinhalese customs were recognised by the Dutch authorities. The Sinhalese tenures of land and the services incidental to those tenures, as well as the customary rights and obligations of the different castes, were recognised and enforced "in conformity with the prejudices and customs of the inhabitants." It has been suggested that the Dutch "were not likely to extend to the native population in their integrity the personal laws by which they governed themselves, and least of all their peculiar and strictly Christian views of the marriage relation". But a not inconsiderable proportion of the population in the territories occupied by the Dutch was at least nominally Christian[20] and instances are known of Dutch legislation regulating the personal relations of the native inhabitants in accordance with Christian conception. However, in the absence of a written code, it is not possible to state with certainty exactly what matters were recognised by the Dutch authorities as being governed by Sinhalese custom in the Maritime Provinces until a full examination is made of whatever is still legible in those enactments of the Dutch period and the judgments of the Dutch courts (especially those of the *Landraden*) which have survived. Yet a report on the native customary laws made by Puisne Justice Alexander Johnston in 1807 suggests that, in the later stages of Dutch rule at any rate, the customary law of the Sinhalese of the Maritime provinces had been largely superseded by the Roman-Dutch Law.

14.b. The sphere of influence of Dutch law in the modern period.

In the British period, on the one hand the subject matter of Dutch law (or in other words the area of application of Dutch law) was restricted, while on the other hand it was extended with reference to the persons to whom it was applied.

(i) **Restriction of the area of application of Dutch law.** The Dutch law in the fields of procedure, evidence, criminal law, constitutional law and mercantile law has been almost entirely abrogated, and its application has been restricted to certain areas of private law in which it is the residuary law of the land.[21]

The significant factors which have restricted the application of the subject matter of Roman-Dutch law in Sri Lanka could be said to be (a) legislation and (b) the actions and attitude of the judiciary.

(a) **Legislation.** Statute law always supersedes the common law in the event of a conflict. Therefore, whenever a statute is passed on a

20. The material inducements to profess Christianity were many (see Nadaraja, op. cit., p 59, n. 220) and therefore Nadaraja thinks that a great proportion of the Sinhalese and Tamil population nominally professed Christianity.

21. See further, article 5 in which the relative importance of the various systems of law are discussed.

matter on which the Roman-Dutch law applies, then that part of the law is abrogated. In this way some sections of the Roman-Dutch law have been repealed and modified by statutes passed after 1796.

(b) **Actions and attitude of the judiciary.** The administration of the Roman-Dutch law after the British conquest was in the hands of the judges. A system of law is not merely a collection of statutes and judicial or juristic opinion but a tradition of judicial administration which is followed not merely by courts but also by lay administrators. Dutch judges would follow a Dutch system even had they no books to consult. English judges might consult books but their minds would turn almost instinctively to English solutions and the ethos of administration was necessarily different. Jennings and Tambiah say:[22] "The Roman-Dutch law as applied by the British was like an old cadjan roof. As it got older it let in the outside elements and they were mainly English law." The process by which the British judges by referring to English law limited the application of the Roman-Dutch law[23] and the resurgence of the Roman-Dutch law[24] are discussed in a different context.

(ii) **Extension of the application of Dutch law with reference to the persons to whom the law applied.** In the Dutch period the Dutch law was probably applied to the Dutch inhabitants and to the Sinhalese who embraced Christianity and to those who lived within the Dutch forts. As regards the other Sinhalese in the maritime provinces, the Muslims, Tamils, Mukkuvars and Chetties, Dutch law applied only where their laws were silent or considered unsuitable.[25] In the British period Roman-Dutch law, subject to the application of statute, came to be applied to the inhabitants of Sri Lanka (including the Sinhalese of the maritime provinces), and in respect of those subject to Kandyan Law, Muslim law and the *Tesawalamai*, where those laws were silent.

Thus while the Roman-Dutch law was superseded by other laws in relation to its subject matter and thereby restricted it was extended in respect of the persons to whom it applied: (a) It was extended to the Kandyan provinces and was applied to the non-Kandyan residents and to the Kandyans where their laws were silent. (b) In administering the Dutch law in all cases to the Sinhalese in the maritime provinces the British probably extended the application of the Dutch law.

22. W.I. Jennings and H.W.Tambiah, *The Dominion of Ceylon* (1952, Stevens & Sons Ltd) p.198.
23. See article 7.
24. See article 14.e.
25. See above.

(a) **Extension of Roman-Dutch law to the Kandyan provinces.**

Sinhalese law was applied to the Kandyans according to the terms of the Kandyan Convention, 1815, which guaranteed to all classes of the people the safety of their persons and property with their civil rights and immunities, according to the laws and customs established and in force among them. Sinhalese law as it was applied in the Kandyan provinces came to be known as Kandyan law. Roman-Dutch law by the operation of Ordinance of 1852[26] was applied in the event of a *casus omissus*, a procedure which had never been followed in Dutch times. A change was also made in the application of the Kandyan law. At the time of the British conquest Kandyan law was territorial in its application. But subsequently it became a personal law applying only to "Kandyans."[27] This had the effect of extending Roman-Dutch law to persons other than the Kandyan Sinhalese resident in the Kandyan provinces who whatever laws they were subject to prior to 1815 had certainly not been subject to Dutch law.

(b) **The extension of the Roman-Dutch law to the Sinhalese of the maritime provinces.**

The judiciary in the British period applied the Roman-Dutch law in all cases to the Sinhalese of the maritime provinces, under the apparent impression that they had been subject to Roman-Dutch law in Dutch times and in the belief that they were giving effect in terms of the Proclamation of 1799, to the existing systems of law. But it has been questioned whether this was a correct assumption. There are grounds for the view that the judges erred in doing this and that they were responsible for the extension of and the application of the Roman-Dutch law, in derogation of Sinhala law in the maritime provinces.[28]

The question can well be asked how the British judges came to make such a mistake, if a mistake it was. A number of reasons can be put forward which could have together contributed to give a wrong impression to the early British judges.

Sinhalese law unlike the *Tesawalamai* and Muslim law was unwritten and had not been codified. This system had declined considerably in Portuguese times due partly to the unsympathetic way in which it had been administered, and partly to the contact with the customs and laws of the Portuguese.[29] This process was carried further in Dutch times

26. Quoted below, article 17. b .
27. See further below, article 17. b.
28. See further, article 14.a.
29. See article 1.c and 17.a.

when even though Sinhalese law was not superseded in all cases by the Roman-Dutch law, yet the sphere of its influence was reduced.[30] The chaotic administrative set-up which prevailed between 1796 and 1801[31] may have had a further unsettling effect on these customs and usages. There were no law reports until 1830 and court records were not systematically kept and referred to. The early British administrators were contemptuous of Sinhalese customs and abolished certain practices such as polyandry, the mode of eliciting confession and some barbarous methods of punishment and also *rajakariya* (the Sinhalese land tenure system). In the early years they also discouraged caste distinctions. It is not impossible therefore that a judge in the 1830s might in ignorance of Sinhala law in its then existing state, have assumed on a cursory glance at the legal system that Roman-Dutch law was of universal application to the Sinhalese.

It scarcely requires mention that this question is today merely an academic one, as the Roman-Dutch law is undisputedly the law that applies and has been applied for more than a century to the low-country Sinhalese, where there is no relevant statute.

14.c. The overlap of English law and Roman-Dutch law

The co-existence of English law and Roman-Dutch law in the legal system gives rise to interesting issues The basic or fundamental law is the Roman-Dutch law. The English law on certain subjects has been incorporated, and in certain areas has superseded the Roman-Dutch law. In *Jayawickreme* v. *Amarasuriya*,[32] the English law relating to consideration was held to be not part of the general law of Ceylon because the concept is foreign to the Roman-Dutch law. But consideration is required in contracts which are governed by the Bills of Exchange Ordinance, 1927,[33] and the Sale of Goods Ordinance, 1896,[34] which statutes are based on English law. But the English law can only apply within the area in which it was introduced. At the point at which the applicability of English law is terminated the Roman-Dutch law comes back into operation. An example would be[35] a case where a creditor agrees to waive the amount due on a decree entered in an

30. See above, article 14.a.

31. See Jennings and Tambiah , op. cit., pp. 107-109.

32. (1918) 20 N.L.R. 289.

33. *Parampalam* v. *Arunachalam* (1927) 29 N.L.R. 289.

34. *A.G.* v. *Abram Saibo* (1915) 18 N..L.R. 417, 422. See also s.66, 93 of the Trusts Ordinance, 1917.

35. See C.G.Weeramantry, *Law of Contracts* (1967, Colombo) pp. 48-49.

action brought by him on a promissory note.[36] In such a case the question whether there should be consideration for the agreement must be decided according to the Roman-Dutch law, for the debt due on the decree is a new debt quite distinct from and independent of the debt on the promissory note. The promissory note, while it exists, is governed by the English law, but when the decree is entered the note is merged in the decree and loses its identity. The debt due on the decree would thus be a new debt governed by the common or Roman-Dutch law. Likewise, when such an instrument has been discharged by payment it is no longer governed by English law,[37] nor does English law apply to the procedure for the enforcement of such an instrument.[38]

The overlap of English law and Roman-Dutch law may also be illustrated from examples in the law of trusts. The Trusts Ordinance, 1917, is a codification based to a very great extent on the English law of trusts. Where there is no special provision governing trusts in the Ordinance, English law applies under section 2 of the Trusts Ordinance. But where the Ordinance impinges on a branch of law outside trusts, the general law of the land applies.

Section 93 of the Ordinance enacts,

> Where a person acquires property with notice that another person has entered into an existing contract affecting that property, of which specific performance could be enforced, the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract....."

In interpreting "specific performance" and "existing contract," it is the Roman-Dutch law and not English law which is revelant.[39] In determining whether a trust has been created for an illegal purpose, and in what circumstances there will be resulting trust for the purported settler, it is the general law which applies and not English law.[40] The nature of a trustee's interest in the trust property is determined according to Roman-Dutch property principles.[41] The basic formalities regarding the creation and enforcement of trusts are governed by the Trusts Ordinance. But the enforcement of a promise to create a trust is probably governed by the Roman-Dutch law.[42]

36. *Ramalingam* v. *James* (1939) 40 N.L.R. 486.
37. *Gunasekera* v. *Gunasekera* (1941) 24 C.L.W. 35.
38. *Mudalihamy* v. *Punchi Banda* (1912) 15 N.L.R. 350.
39. L.J.M. Cooray, *Reception in Ceylon of the English Trust* (1971, Colombo) pp. 43, 149-50.
40. Cooray, op.cit., pp. 43, 91-99.
41. Cooray, op. cit., pp. 187-89.
42. See Cooray, op. cit., pp. 60-64.

The interaction of English and Roman-Dutch law, and the fact that the courts in more recent times will not extend the judicial incorporation of English law, are illustrated by *Samed* v. *Segutamby.*[43] The Court while assuming that the English rule in *Rylands* v. *Fletcher*[44] had been judicially incorporated into the law of Sri Lanka, however, held that the English law relating to fire brought on to one's land for an agricultural operation had arisen and developed in England independent of the doctrine in *Rylands* v. *Fletcher*, and that the reception of *Rylands* v. *Fletcher* did not mean that this allied principles was part of the law of Sri Lanka. They accordingly resorted to the Roman-Dutch law on the subject.

According to the Roman-Dutch law where there is no fixed place for the performance of a contract, it is the duty of the creditor to seek out the debtor and seek performance. In English law the debtor must seek out the creditor.[45] The cause of action would arise in the former case where the debtor resides and in the latter case where the creditor resides.[46] This distinction is of practical importance where the place where the cause of action accrues is the sole factor which confers jurisdiction on the court in which the action is brought.[47] In a situation where it is not clear whether the English law or the Roman-Dutch law applies a plaintiff is confronted by obvious difficulties when he plans to institute an action. It must be noted that the words "debtor" and "creditor" are used in this context in a wide sense to include all situations where a promise has been made.[48]

In *Sowdoona* v. *Abdul*[49] the English rule was applied in relation to an action arising on a trust. We have noted that in some subjects the law in force in England is incorporated by reference[50] and is a direct source of law in Sri Lanka. The English rule relating to performance would apply in this situation. Though the law of trusts in Sri Lanka is based on English principles, the primary source of the law is the Trusts Ordinance, a statute enacted by the legislature of Sri Lanka. In such circumstances it may be argued that this is a situation where the law

43. (1924) 25 N.L.R. 481; *Subaida* v. *Wadood* (1927) 29 N.L.R. 330 F.B.
44. (1866) L.R.I. Ex. 265.
45. *Haniffa* v. *Ocean Accident Corporation* (1933) 35 N.L.R. 216.
46. ibid.
47. (1934) 13 C.L.Rec. XCVII.
48. ibid..
49. (1955) 57 N.L.R. 75.
50. See above, article 6.

of trust impinges on a subject outside the law of trusts, and therefore the residuary law of the land (i.e. the Roman-Dutch law) applies.[51]

The difficulties which can arise in a particular situation in determining whether English law or Roman-Dutch law applies became apparent in *Lily de Costa* v. *Bank of Ceylon*.[52]

In this case the defendant bank collected a divident warrant for its customer to which the customer had no title at all. The bank was sued by the plaintiff, the true owner of the warrant, for recovery of the amount of the divident warrant on the basis that the English law of conversion applied, and that the defendant had committed the tort of conversion in relation to the divident warrant. The defence of the bank was that it had collected the amount of the warrant in good faith and without negligence and paid it out to its customer before it knew that the plaintiff was the owner of the warrant and that, by the Roman-Dutch law which applied, it was not liable to the plaintiff. The customer in question was a party to a clever fraud relating to the divident warrant for which he was later tried and convicted.

The majority of the court in *Lily de Costa*'s case was of the view that conversion was not a part of the general law of Sri Lanka; but that in relation to (i) negotiable instruments and (ii) the law of banks and banking, the English law of conversion was applicable.

Section 98 (2) of the Bills of Exchange Ordinance read with section 2 of Ordinance 5 of 1852 was held to have the effect that the liability of a negligent collecting banker in Sri Lanka to the true owner of a cheque was governed by the English law of conversion.

Section 98 (2) of the Bills of Exchange Ordinance, 1927, enacts,

> The rules of the Common Law of England, including the law mercnant, save in so far as they are inconsistent with the express provisions of this Ordinance or any other enactment for the time being in force, shall apply to bills of exchange, promissory notes and cheques.

Ordinance 5 of 1852 incorporated by reference the English law relating to bills of exchange, promissory notes and cheques as a part of the law of Sri Lanka. This provision was repealed when the Bills Exchange Ordinance, 1927, which was a Code based on English law, was enacted.

51. See also further examples of interaction between Roman-Dutch law and trusts law, Cooray, op. cit., p. 10.
52.(1969) 72 N.L.R. 457.

The courts also held that section 82(1) of the Bills of Exchange Ordinance, 1927, assumed, and was only explainable on the basis that the English law of conversion applied. Section 82(1) enacts,

> Where a banker in good faith and without negligence receives payment for a customer on a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto,,the banker shall not incur anyliability to the true owner of the cheque by reason only of having received such payment.

It was held that section 82 of this Ordinance affords to a collecting banker a defence against liability and this section was meaningful only on the basis that the legislature assumed the law to be that a collecting banker would be liable for conversion. The majority disapproved the *dictum* of Tambiah, J. in *Daniel Silva* v. *Johanis Appuhamy*[53] that section 82 was superfluous and redundant to the Bills of Exchange Ordinance because conversion was not a part of our general law.

The majority was also of the view that, when a bank collects a cheque for its customer to which he had no title, the question whether the Bank had converted the cheque of the true owner is a matter relating to banks and banking, and that section 3 of the Civil Law Ordinance which incorporated by reference the English law of banks and banking, afforded another basis for the application of English law.

In the *Kodeeswaran*[54] case the court was faced with the problem of determining whether the English or Roman-Dutch law applied in respect of an action by a Crown servant for arrears of pay.

Kodeeswaran sued the Crown upon a contract of service for arrears of pay. The Supreme Court dismissed his action. H.N.G.Fernando, C.J. held that the English law and not the Roman-Dutch law governed the relationship between the Crown and its servants in Sri Lanka, and that under the English law a civil servant has no right to remuneration which can be enforced in a civil court. English law was held to apply because the power to appoint public officers in Sri Lanka was a power derived from, and exercised on behalf of the Crown, and therefore,

> The grant of such powers by the British Sovereign must fairly be presumed to have been an exercise of the Royal Prerogative under the law of England and not to any authority of a Sovereign under Roman-Dutch law....The efficacy or validity of appointments made by the executive in Ceylon was

53. (1965) 67 N.L.R. 457.

54. *Attorney-General* v. *Kodeeswaran* (1967), 70 N.L.R 121. S.C; *Kodeeswaran* v. *Attorney- General* (1969) 72 N.L.R. 337 P.C. See Saleem Marsoof. "The Common Law of Ceylon after *de Costa* v. *Bank of Ceylon* and the *Kodeeswaran* case" in (1971) Colombo Law Review 83.

> therefore referable to the law of England and it follows in my opinion that the nature and legal effect of the relationship constituted by such appointments had also to be determined by reference to English law.[55]

The Privy Council reversed the decision of the Supreme Court and held that an action was available to Kodeeswaran significantly not on the basis that English law or Roman-Dutch law applied. Lord Diplock held there was a practice recognized by judicial decisions that an action lies at the suit of an officer in the civil administration for unpaid salary earned during the period of his appointment.[56]

Weeramantry[57] referring to the overlap of English and Roman-Dutch law says,

> The uncertainty in respect of the law governing such matters arises from the co-existence in one legal situation of factors some of which attract one legal system and some of which attract the other. The answer to problems arising from such conflicts must be found in an assessment of the relative importance in each legal situation of the factors which attract the competing systems, and on a consideration of the severability of such component factors. Where the factors are not severable the dominant factor, must be taken to prevail and to attract its appropriate system of law.

The above analysis seems to give the impression that the Roman-Dutch law and English law are competing systems. Historically this is perhaps not an incorrect picture. But it is slowly being recognized that an indigenous system of law containing an amalgam of Roman-Dutch and English law has been developed by the courts.[58]

14.d. The common law of Sri Lanka

The Roman-Dutch law is often said to be the common law of Sri Lanka. Williams[59] points out that the phrase "common law" may be used in different senses:

> The phrase "the common law" seems at first a little bewildering in use because it is always used to point a contrast, and its precise meaning depends upon the contrast that is being pointed...(1) Originally this meant the law that was not local law, that is the law that was common to the whole of England. This may still be its meaning in a particular context, but it is not the usual meaning. More usually the phrase will siginfy (2) the law that is not the result of legislation, that is, the law created by the customs of the people and decisions of the judges. Within certain narrow limits, popular customs created law, and so (within much wider limits) do the decisions of the courts, which we call precedents. When the phrase

55. *Attorney-General* v. *Kodeeswaran, supra* pp. 128-29.
56. See *dicta of* Lord Diplock quoted below in article 14.d.
57. op. cit., pp. 48-49.
58. See article 14. d. and 14.e.
59. Glanville Williams, *Learning the Law* (1969, Stevens, London) pp.24.

> "the common law" is used in this sense it may include even local law (in the form of local custom), which in meaning (1) is not common law. Again, (3) the phrase may mean the law that is not equity; in other words it may mean the law developed by the old courts of common law as distinct from the system (technically called "equity") developed by the old Court of Chancery. In this sense "the common law" may even include statutory modifications of the common law, though in the previous sense it does not. Finally (4) it may mean the law that is not foreign law, in other words, the law of England, or of other countries (such as America) that have adopted English law. In this sense it is contrasted with (say) Roman law or French law, and in this sense it includes the whole of English law-even local customs, legislation and equity. It will thus be seen that the precise shade of meaning in which this chameleon phrase is used depends upon the particular context, and upon the contrast that is being made. When I said that our law is made up of common law, equity and legislation, I meant it in a mixture of senses (2) and (3), as the context itself showed.

When the term "common law " is used to describe the application of the Roman-Dutch law it appears that none of the meanings of common law referred to above are relevant. In *Sultan* v. *Peiris*[60] Garvin, J. explained the term thus:

> It has thus become the inveterate practice in Ceylon to resort to the Roman-Dutch law in all matters outside the area covered by the other systems of law where it can be applied without conflict with any of its provisions, rules or principles. The Roman-Dutch law thus became the general law of the Island applicable to all its inhabitants in all matters whereupon which their personal laws are silent and in this sense the common law of the land.

It has been said:"... the Roman-Dutch law is ... the common law, applicable to fill in the gaps in a legal system containing a multiplicity of personal laws;"[61] " The Common law of Ceylon is the Roman-Dutch law;"[62] The Roman-Dutch law is applicable all over Ceylon. It is the Common law of the whole Island. There are no localities where it is inapplicable ".[63] Thus the phrase "common law" has been traditionally and frequently used in Sri Lanka to describe the Roman-Dutch law-the residurary law of the land, the law which is common to all persons, the law, which as distinct from the laws which govern special sections of the community (the Muslims, the Tamils of Jaffna and the Kandyans), applies to the entire population (including those subject to these special laws where these special laws and the statute laws are silent).

60. (1933) 35 N.L.R. 58, 81. See also *Weerasekara* v. *Peiris* (1932) 34 N.L.R. 281, 285.
61. Savitri Goonesekere, 'Damage by Animals' in (1971) Colombo Law Review 49.
62. E.B. Wickramanayake "Our Common Law" in (1949) C.L.C.R. 11
63. A. St. V. Jayawardene, *The Roman-Dutch Law as it Prevails in Ceylon* (1901, Examiner Press, Colombo) p.29.

With the traditional definition in Sri Lanka of "common law" quoted above, may be contrasted the approach of Lord Diplock in *Kodeeswaran* v. *The Attorney-General*.[64]

> It is not, however, essential that it should be demonstrable that such a remedy was in fact exercised before the British occupation, for although the Roman-Dutch law as applied in Ceylon under the Government of the United Provinces is the starting point of the "common law" of Ceylon, it is not the finishing point. Like the common law of England the common law of Ceylon has not remained static since 1799. In course of time it has been the subject of progressive development by a *cursus curiae (Samed* v. *Segutambi*) as the Courts of Ceylon have applied its basic principles to the solution of legal problems posed by changing conditions of society in Ceylon. In their Lordship's view if long established judicial authority for a proposition of law not inconsistent with the British constitutional concept of the exercise of sovereign authority by the Crown can be found in the decisions of the Ceylon Courts themselves there is no need to go back to see whether any precedent can be found for it in the Jurisprudence of the Courts of the United Provinces or the doctrine of the Roman-Dutch jurists of the eighteenth century. Still less is it necessary to find a precedent for it in the English Common law.

It seems clear that Lord Diplock gives the term "common law" a different meaning from that which has traditionally been given to it in Sri Lanka. Adopting Lord Diplock's approach it may be said that the common law is composed of the following elements:- (i) The Roman-Dutch law as it subsisted in the Netherlands in 1796 (the date of the British conquest); (ii) The Roman-Dutch law as embodied in the case law of Sri Lanka which would include developments by the courts after 1796 including modifications from the classical Roman-Dutch texts brought about by judicial decisions;[65] (iii) Judicially received principles of English law;[66] (iv) Developments of the law by the counts to meet changing circumstances and modern conditions; (v) Practices of the country which the courts recognize; (vi) Customs recognized by the courts.

The last three elements referred to above cannot be clearly divided and tend to overlap. In the *Kodeeswaran* case Lord Diplock recognized the power of the courts to develop the law to suit changing circumstances and also give effect to a local practice, and did not apply the Roman-Dutch nor the English rule canvassed in argument before it . The courts have frequently recognized local customs. They have also extended

64. (1969) 72 N.L.R. 337, 342.
65. See above, article 7.
66. See above, article 7.

Roman-Dutch principles governing servitudes in the light of local customs and practices relating to paddy cultivation.[67] The planter's share (a local customs) has been recoginzed as a *jus in re aliena* within the framework of the Roman-Dutch law of property.[68]

Fragmentation of land in rural areas into very small holdings is a common feature of the social system. A case is recorded of a jak tree owned in 96 shares,[69] and small plots of land have even more than a hundred co-owners. The Roman-Dutch law was intended for an entirely different social system and shown to be unsuitable. If the law as laid down by the jurists had been followed, inevitable confusion would have resulted. Under the Roman-Dutch law a co-owner could not cultivate without the consent of his co-owners.[70] Had this rule been applied a single co-owner, in dispute with his family (and such disputes are common) could have obstructed cultivation and caused the land to be barren and valueless. Applying the rule that Roman-Dutch law is not considered to be in force, where it is inapplicable to local conditions, the courts have held that any co-owner may have such use and enjoyment of the property as is necessary in the circumstances.[71] These decisions are based on their own authority and not on the Roman-Dutch law.[72] In developing the concept of the *bona fide* occupier the courts have departed from the classical Roman-Dutch law.[73]

A widening of the meaning of the term common law to include the six elements referred to above would combine the traditional use in Sri Lanka of the phrase "common law" in relation to the Roman-Dutch law (the Roman-Dutch law has in Sri Lanka been called the common law because it is the residuary law applying to all sections of the community) with the second meaning of common law given by Williams (the common law is the law created by the customs of the people and the decisions of the judges). Only the first of the six elements referred to above fall within the traditional definition used in Sri Lanka of "common law." It appears that the idea of common law as meaning judge-

67. *Tikiri Appu* v. *Dingirirala* (1934) 36 N.L.R. 267; *Pincha Arachchi* v. *Ibrahim* (1863) Ramanathan; *Chinnappa* v. *Kanakar* (1910) 13 N.L.R. 157.

68. *Saibo* v. *Baba* (1917) 19 N.L.R. 441; *Sinnewappo* v. *Mohamadu* (1860) Ram. 113.

69. W.I.Jennings and H.W.Tambiah, *Dominion of Ceylon* (1952, Stevens, London) p. 212.

70. Voet 10.3.7.

71. *Goonewardene* v. *Goonewardene* (1913) 17 N.L.R. 143; *Goonewardene* v. *Silva* (1914) 17 N.L.R. 287.

72. *Muthaliph* v. *Mansoor* (1937) 39 N.L.R. 316.

73. *Hassanally* v. *Cassim* (1960) 61 N.L.R. 529.

made law, which would come naturally to an English lawyer's mind, influence Lord Diplock's statement referred to above, and his reference in the same case to the "indigenous common law of Ceylon".

By "indigenous" in this context is meant, not a law indigenous to the soil and the people, but a system of law indigenous to the legal system. The common law in this sense will sweep into its fold the diverse traditions and system of law existing in Sri Lanka and will mould them into a composite whole.

The day must surely come when we will cease to ask ourselves whether a rule of law is a rule of Roman-Dutch law or English law or Kandyan law or Muslim law or *Tesawalamai*. It would be sufficient to say that it was a rule of the law of Sri Lanka, found either in statute or in a body of case law recognized and acted upon by the courts (common law). Today we are beginning to approach this position but have not reached it yet. The *Kodeeswaran*[74] approach which points towards the development of a body of Sri Lankan judicial jurisprudence in non-statutory areas, may be regarded as a signpost along the way.

14.e. The renaissance of the Roman-Dutch law

The methods by which especially in the nineteenth and early twentieth centuries the judiciary introduced principles of English law, which had a correspondingly restrictive influence on the Roman-Dutch law have been analysed.[1] There were judges and administrators during this period who were contemptuous of the Roman-Dutch law and advocated its repeal. Jayawardene[2] referring to the period when the Supreme Court was composed of Justices Burnside, Clarence and Dias says:

> These were some of the darkest days in the history of the Roman-Dutch Law. These Judges professed a contempt and dislike for the Roman-Dutch Law which it is hard to account for, considering that it is directly founded on the Civil Law, a Law which has provided modern civilization with its legal systems. Either through an aversion to search for the law, which was not ready to hand like the English law, but buried in the Dutch and Latin works of eminent commentators and institutional writers or through an unwise penchant for the English Law, these three Judges eagerly seized every opportunity, and urged every excuse, however trivial, to declare the Roman-Dutch Law obsolete, contradictory, unrefined, and undiscoverable. The law of Ceylon has suffered considerably in consequence.

74. See *Kodeeswaran* v. *Attorney-General, supra*..

1. See above, article 7.

2. A.St V. Jayawardene, *The Roman-Dutch Law as it Prevails in Ceylon* (1901 Examiner Press, Colombo), p.17.

L.B. Clarence, Senior Puisne Justice of the Supreme Court, expressed the view in 1886: "All remains of the Roman-Dutch law should be cut down and grubbed up root and branch."[3] The reasons for this antipathy appear from this statement, "at this day no one can read the Dutch law books, and Latin ones are practically beyond the capacity of the bulk of legal practitioners"[4] However, there were also judges such as Sir Charles Marshall, Thomas Berwick, Sir Thomas de Sampayo and Sir Anton Bertram who were interested in and showed concern for its continuance. From about the second decade of this century there has been a growing concern to emphasize the importance of the Roman-Dutch law and to re-assert and redefine its principles.

The decision in *Samed* v. *Segutamby* may be regarded as a turning point in the history of the Roman-Dutch law in Sri Lanka. Bertram, C.J. said,[5]

> Are we then to consider our common law as superseded because certain eminent Judges in previous decisions and *dicta* have ignored or repudiated it? On what principle can this be justified? These eminent Judges base their view upon the proposition that the Roman-Dutch Law, pure and simple, does not exist in this country in its entirety, and that "it is not the whole body of Roman-Dutch Law, but only so much of it as may be shown or presumed to have been introduced into Ceylon", that is now applicable here. With the very greatest deference to the high authority of these Judges, I hesitate to apply such propositions to fundamental principles of the common law enunciated by authorities recognized as binding wherever the Roman-Dutch Law prevails. Such principles may no doubt, in course of time, become modified in their local application by judicial decisions, but it would be only by a series of unbroken and express decisions that such a development could take place.

Samed v. *Segutamby* could be said to mark a change of attitude and from about the middle of the first half of this century a gradual change

3. L.B. Clarence, "Administration of Justice in Ceylon" in (1896) 2 L.Q.R. 38, 49.
4. op.cit., at p. 43.
5. *Supra*, p. 487.

in the attitude of the judiciary is discernible and a greater awareness of and respect for the Roman-Dutch law becomes manifest.[6]

The Privy Council itself emphasized the importance of the Roman-Dutch law. Lord Uthwatt in *Perera* v. *Peris* said:[7]

> The gladsome light of Roman jurisprudence once shone on the common law,[8] repayment to the successor of the Roman Law must not take the form of obscuring one of its leading principles.

Weeramantry says:[9]

> However the Roman-Dutch law has long come into its own with a growing appreciation on the part of the Supreme Court of its importance as our common law. There has been, correspondingly, an intensified resistance to the tacit importation of English principles on matters covered by the Roman-Dutch law and an increasing tendency to resort to the works of the commentators.

The period of active incorporation of principles of English law in derogation of the Roman-Dutch law may now be regarded as over. But there are past judicial decisions in which Roman-Dutch principles have been ignored or modified and English principles applied. One cannot turn the clock back and old established principles of law cannot be lightly and easily discarded. Two questions arise in this connection-what tests should be applied in determining what are the departures from the Roman-Dutch law which form an integral part of our system, and for the future, do the courts have no power to depart from the Roman-Dutch law? The old cases which willy nilly departed from the Roman-Dutch law[10] are not relevant to such an analysis. There appear to be two tests applied in the modern law in answering the questions formulated above: (i) One approach is to ask the question whether the

6. *Samed* v. *Segutamby* (1924) 25 N.L.R.481; *Perera* v. *Peiris* (1948) 50 N.L.R 145, 159; *Sudu Banda* v. *Punchirala* (1951) 52 N.L.R. 512; *Chissel* v. *Chapman* (1954) 56 N.L.R. 121, 127; *de Costa* v. *Times of Ceylon* (1959) 62 N.L.R. 265,270; *David* v. *Abdul Cader* (1963) 65 N.L.R. 253; *Daniel Silva* v. *Johanis Appuhamy* (1965) 67 N.L.R. 457; *Lily de Costa* v. *Bank of Ceylon* (1969) 72 N.L.R. 457. Academic writers (see works of T. Nadaraja, A.R.B.Amerasinghe and C.F.Amerasinghe) have emphasised the importance of the Roman-Dutch law. See also A.Wood-Renton, "The Roman-Dutch Law in Ceylon under the British Regime" in 49 S.A.L.J.161. Cf. similar developments in South Africa, H.R.Hahlo and Ellison Khan, *The Union of South Africa, The Development of its Laws and Constitutions* (1960, Stevens, London), pp.1-50. See also C.F.Amerasinghe, "*Rylands* v. *Fletcher* in the Law of Ceylon" in (1962) International and Comparative Law Quarterly 937; L.W. Athulathmudali, "The Law of Defamation in Ceylon" in (1964) I.C.L.Q.1368.

7. (1948) 50 N.L.R. 145, 159.

8. The reference here is to the "common law" of England(not Sri Lanka).

9. C.G.Weeramantry, *Law of Contracts* (1967), pp. 66-67.

10. See above, article 7.

Roman-Dutch law has been abrogated by disuse (the test of desuetude). (ii) The other is that the Roman-Dutch law can be departed from only by a series of express and unbroken decisions.

(i) **Modification of Roman-Dutch principles by reference to the principles of desuetude.** Lee[11] stated the rules of the Roman-Dutch law which would be relevant thus:

> In a system derived from the Roman law repeal may be effected *tacito consensu* as well as *alia postea lege lata*: so that as regards the Cape Province we may state the presumption to be that, except so far as they have been abrogated by legislation or by the growth of a custom inconsistent therewith, or by mere disuse, the laws which obtained under the Dutch Government remain in force to the present day.

Lee cited the judgments in two South African cases. In *Seaville* v. *Colley*,[12] referring to the Roman-Dutch law, de Villiers, C.J. said:

> The presumption is that every one of these laws, if not repealed by the local Legislature, is still in force. This presumption will not, however, prevail in regard to any rule of law which is inconsistent with South African usages. The best proof of such usage is furnished by unoverruled judicial decisions. In the absence of such decisions the Court may take judicial notice of any general custom which is not only well established but reasonable in itself. Any Dutch law which is inconsistent with such well-established and reasonable custom, and has not, although relating to matters of frequent occurrence, been distinctly recognised and acted upon by the Supreme Court, may fairly be held to have been abrogated by disuse.

In *Green* v. *Fitzgerald* [13] Innes, J.A. expressed a similar view.

> I do not think, however, that the doctrine of the Roman-Dutch law can be confined to cases where contrary usage has been established; both in principle and on authority, mere desuetude must in certain circumstances be sufficient, or non-reception.[14]

The above principles apply alike to the statute law and to the common law of Holland.[15]

In Sri Lanka this principle has been cited in many of the old cases[16] but as has been pointed out the courts often did not strictly examine and investigate whether the Roman - Dutch principle was in fact

11. R.W.Lee,*Introduction to Roman-Dutch Law*(1953,Clarendon Press, Oxford), p.9.
12. (1891) 9. S.C. 39 at 44.
13. 1914 A.D.88,111.
14. *Spies* v. *Lombard* 1950 (3) S.A. 469 (A.D.) See also *Rex* v. *Detody* 1926 A .D. 198 at 223; O' *Callaghan N.O.* v. *Chaplin* 1927. A.D. 310; *Tutt* v. *Tutt* 1929 C.P.D. 51, 53.
15. See *Parker* v. *Reed* (1904) 21 S..C. 496; *Machattie* v. *Filmer* (1894) I.O.R. 305; *Natal Bank* v. *Kuranda* 1907 T.H. 155; *Green* v. *Fitzgerald* 1914 A.D. 88.
16. See above ,article 7.

obsolete-but readily assumed disuse and applied English law. The principle of desuetude has been creatively applied in the recent case of *Namasivayam* v. *Heen Banda.*[17] Alles J. analysing South African and Sri Lankan authorities held that the *Pauperian* action according to which the owner of a docile animal acting *contra naturam* and causing injury to persons is liable for the full amount of the damage as compensation, and that the alternative available to the owner of surrendering the offending animal in lieu of paying damages (*noxae deditio*) was available in Sri Lanka sixty years ago. He, however, held that the option of noxal surrender had fallen into desuetude, and was not available today, though the *Pauperian* action was available for the recovery of full damages.

Alles, J. held that noxal surrender had fallen into desuetude, citing South African authorities in support of the proposition that obsolescence or desuetude may be implied from the absence of recognition, judicial or otherwise, in the context of a contradictory, usage or custom. He thought that the absence of reported decisions in the past sixty years was an indication that the law had been abrogated by disuse. But prior to 1907 there had been decisions[18] recognizing the option of noxal surrender.

The judgment of Alles, J. was apparently influenced by the view that in the modern law the equities should favour the plaintiff. The option open to an owner of an animal who had caused damage to surrender the animal (which may be valueless) and thereby avoid payment of damages, was in the modern law an anachronism and a hopelessly inadequate satisfaction for the injury suffered.

Goonesekere[19] says;

> The judgment in this case indicates not just a genuine concern to delete from our legal system, some of the anachronisms of the Roman-Dutch law, but a new role for the judiciary as an agency of Law Reform.

The principle referred to above that mere desuetude or non-reception is sufficient, appears to be contrary to the proposition which our courts have stated that "if a right exists it is not the less law because hitherto suitors may not have thought it expedient to exercise it".[20]

17. (1970) 73 N.L.R. 251, discussed in (1971) Colombo Law Review 49, 66-67. See also *Kandar* v. *Sinnachipillai* (1934) 36 N.L.R. 362..

18. ibid..

19. op. cit. at p. 67.

20. See (1835) Morgan's Digest 61; *Samed* v. *Segutamby* (1924) 25 N.L.R. 481 at 497; *Ambalavanar* v. *Navaratnam* (1955) 56 N.L.R. 422.

These two principles could be reconciled on the basis that even though suitors may not have relied on a principle in a court of law, such a principle may have nonetheless been recognized by customs or practices. A principle may not have been referred to in a decided case, but it may have been acted upon and recognized in the custom and practice of the land. The inference may be drawn from *Nama[illegible]iyam* v. *Heen Banda* that if a rule has not been cited in judicial decisions and it is unsuited to modern conditions, this may be a factor from which desuetude may be presumed.[21]

The question may however arise whether the principle of desuetude would apply to "... fundamental principles... enunciated by authorities recognized as binding wherever the Roman-Dutch Law prevails".

A different approach to that adopted by Alles, J. is to be found in *Lily de Costa* v. *The Bank of Ceylon*.[22]

(ii) **Modification of Roman-Dutch principles by a series of unbroken and express decisions.** In *Samed.* v. *Segutamby* Bertram, C.J. said[23] that it was only by a series of "unbroken and express decisions" that fundamental Roman-Dutch principles could be modified. Jayawardene A.J. said:[24] "Something might be said in support of such a decision" (that is a decision modifying Roman-Dutch principles) "...if it has been consistently followed in practice and adopted by the Courts...."

An example of a very strict approach to the modification of the Roman-Dutch law is the recent decision of *Lily be Costa* v. *The Bank of Ceylon*[25] which contains an analysis of (a) the words of the statutes which have been interpreted as making the Roman-Dutch law the residuary law and (b) the words "series of express and unbroken decisions" referred to in *Samed* v. *Segutamby* and an application of this test to determine whether the English tort of conversion had been incorporated into the general law of Sri Lanka.

(a) **Analysis in *Lily de Costa's* case of words of statutes introducing Roman-Dutch law.** The words of section 2 of, and the Preamble to the Proclamation of 1799 and Ordinance, No.5 of 1835, were closely analysed in *Lily de Coste's* case. Ordinance, No. 5 of 1835, referred

21. See *Samed* v. *Segutamby, supra; Ambalavanar* v. *Navaratnam, supra.*
22. *Supra;* also discussed below.
23. *Supra* at p. 487.
24. ibid at p. 491.
25. *Supra.*

to and repealed certain sections of Governor North's Proclamation of 23rd September,1799. The Proclamation of 1799 and Ordinance, No. 5 of 1835, were included in the 1938 and 1956 editions of the Ceylon Legislative Enactments under the title "Adoption of the Roman-Dutch Law Ordinance". This is a title which has been added by the editor of the Enactments. The original Ordinance, No. 5 of 1835, and the Proclamation of 1799, did not contain such a title and in fact did not refer to the phrase Roman-Dutch law at all.

Section 2 of the Proclamation of 1799 enacts:

> the administration of justice and police in the island shall henceforth and during His Majesty's pleasure be exercised by all courts of judicature, civil and criminal, magistrates and ministerial officers, according to the laws and institutions that subsisted under the ancient government of the United Provinces, subject to such deviations and alternations by any of the respective powers and authorities hereinbefore mentioned, and to such other deviations and alterations as we shall by these presents, or by any future proclamation, and in pursuance of the authorities confided to us, deem it proper and beneficial for the purposes of justice to ordain and publish, or which shall or may hereafter by lawful authority be ordained and published.

Section 2 follows upon a Preamble which reads:

> Where as it is His Majesty's gracious command that for the present and during His Majesty's will and pleasure the temporary administration of justice and police in the settlements of the Island of Ceylon, now in His Majesty's dominion, and in the territories and dependencies thereof, should, as nearly as circumstances will permit, be exercised by us in conformity to the laws and institutions that subsisted under the ancient government of the United Provinces, subject to such deviations in consequences of sudden and unforeseen emergencies, or to such expedients and useful alterations as may render a departure therefore either absolutely necessary and unavoidable or evidently beneficial and desirable.

In *Lily de Costa* v. *Bank of Ceylon* H.N.G.Fernando, C.J. after a careful study of the Proclamation of 1799 and other relevant documents concluded that:[26]

> What is important for present purposes is that the Proclamation of 1799 and the Ordinance of 1835 did not authorise the Courts to alter or deviate from the Roman-Dutch law or to apply in Ceylon principles of English law which conflict with the Roman-Dutch law. From 1835 at least such deviations or alterations could be effected only by Odinance.

Weeramantry, J[27] too thought that in the terms of the Proclamation "the common law of Ceylon was the Roman-Dutch law, subject to such deviations and alterations as the specified authorities might determine

26. *Supra* at. pp.460-62.
27. *Supra*, at pp.510-13.

but that the authorities thus expressly empowered to make deviations did not include the Courts." Hence, "the Roman-Dutch law was thus firmly enthroned as the common law of this country subject to such deviations as might be legislatively ordained". But Weeramantry, J. was of the opinion that this did not mean that the common law cannot be developed "by tacit adoption by the courts over long period of time." It only meant that the courts cannot "effect a deliberate deviation from the Roman-Dutch law". His Lordship said:

> As was observed in *Samed* v. *Segutamby* although fundamental principles of the common law may in course of time become modified by judicial decisions, it would be only by a series of unbroken and express decisions that such a development could take place.

The judgment of H.N.G.Fernando, C.J. has provoked immediate comment.[28]

> It is submitted, with the greatest respect, that it is inconsistent to hold on the one hand that the Proclamation did not authorise the Courts to deviate from the Roman-Dutch law, and on the other to investigate earlier decisions to ascertain whether an unequivocal unbroken line of cases has tacitly introduced the English tort of conversion into our common law. On this aspect of the case, a point may be made that the Proclamation introduced the Roman-Dutch law as a source of our common law. Our common law is not the Roman-Dutch law but the law that has been decided by our Courts, and our Courts do not owe a permanent allegiance to the original Roman-Dutch law.
>
> Having regard to the careful analysis of the Proclamation by their Lordships, it is submitted with respect that there is another view, namely that the terms of the Proclamation "seems to reserve distinct power to courts of judicature; civil and criminal" of making deviations and alterations where expedient, and useful alterations which might render a departure there from either absolutely necessary or evidently beneficial and desirable" per Clarence, J. in *Regina* v. *John Mendis* (1883) 5 S .C.C 186, 190-91.

Section 2 of the Proclamation (quoted above) enacts "....the administration of justice...shall...be exercised by all courts of judicature...subject to such deviations and alterations by any of the respective powers and authorities hereinbefore mentioned". This appears to indicate that the courts do have the power to effect "deviations and alterations" to the Roman-Dutch law.[29]

On a construction of section 2 by itself it is clear that the courts do have a power to effect deviations and alterations. The view of H.N.G. Fernando, C.J. and Weeramantry, J. is based on stressing the words

28. V. Ratnasabapathy, "The Collecting Banker and Conversion of Cheques" in (1970) Journal of Ceylon Law 165, 166-67.

29. See *Karonchihamy* v. *Angohamy* (1904) 8 N.L.R. 1, 27.

of the Preamble and certain words in the Proclamation of 1799 which do not appear in subsequent editions of the Legislative Enactments which words are used to qualify section 2. It is a rule of statutory interpretation that while a Preamble is an aid to a construction of a section in a statute, and is particularly relevant when the words of a section are ambiguous or not clear, the words in a Preamble cannot be used to vary or add to the words of a section when the section itself is clear. This issue was not discussed at all in the *de Costa* case.[30] It may, therefore, be said that since the Preamble cannot be used to qualify section 2, the courts do have a power to modify the laws existing in 1796.

The original Proclamation of 1799 contained, after the words "...beneficial and desirable" in the Preamble, the following words:-

> Subject also to such directions, alterations, and improvements, as shall be directed or approved of by the Court of Directors of the United Company of Merchants of England trading to the East Indies, or the secret Committee thereof, or by the Governor-General in Council of Fort William in Bengal.

The learned judges referred to the above words in the Preamble to the Proclamation of 1799 (which Preamble it has been submitted is not binding) which words had not been included in the reprints of the Proclamation in editions of legislative enactments subsequent to 1835 and on a construction of these deleted words held that the power of deviating from the Roman-Dutch law was conferred only on the authorities specified in the Preamble, and since no reference was made to the courts in the Preamble, the courts had no power to depart from the strict Roman-Dutch law. H.N.G. Fernando, C.J. said.[31]

> This examination of the relevant documents and of the Ordinance of 1835 has shown that Chapter 12 of the Revised Edition of the Legislative Enactments of 1956 is not an accurate reproduction of the provisions of law relating to the application in Ceylon of the Roman-Dutch law; Section 2 of Chapter 12 is incorrect in purporting to permit any deviations or alterations other than those ordained by lawful authority.

The Ordinance of 1835 the purpose of which was said to be "To Repeal, with certain exceptions, divers Proclamations and Regulations which have become no longer requisite", enacts as follows:

> To repeal, with certain exceptions, divers Proclamations and Regulations which have become no longer requisite.

30. See Maxwell, on *Interpretation of Statutes* (1969, Sweet & Maxwell, London), p.7, *Attorney-General* v. *H.R.H. Prince Ernest Augustus of Hanover* (1957) A.C. 436.
31. *de Costa's* case, *supra* at p. 462.

> WHEREAS by reason of the many fundamental alterations in the Administration of Justice within these Settlements effected by His Majesty's Charter, bearing date the 18th day of February 1833, and on other accounts, the provisions contained in many of the Proclamations and Regulations of Government heretofore passed have become obsolete, or are rendered inexpedient, or inapplicable to the present institutions. It is therefore hereby enacted by the Governor of Ceylon, with the advice and consent of the Legislative Council thereof, that the several Proclamations and Regulations of Government following, except in so far as they repeal any former provisions, be and the same are hereby repealed; that is to say, the Proclamation of the 23rd September, 1799, except in so far as the same doth publish and declare that the Administration of Justice and Police within the Settlements then under the British Dominion and known by the designation of the Maritime Provinces should be exercised by all Courts of Judicature, Civil and Criminal, according to the laws and institutions that subsisted under the ancient Government of the United Provinces; which laws and institutions it is hereby declared, still are and shall henceforth continue to be binding and administered through the said Maritime Provinces and their dependencies, subject nevertheless to such deviations and alterations as have been, or shall hereafter be by lawful authority ordained; and except in so far as the same doth abolish the application of torture, and of punishment by the wheel, mutilation, or other barbarous modes, and doth direct sentences to be pronounced in Criminal cases on the evidence given, without requiring the confession of the prisoner; and except also in so far as the same doth allow liberty of conscience and the free exercise of religious worship to all persons quietly and peaceably enjoying the same without offence or scandal to Government.

The Ordinance then proceeds to repeal in sections of other Proclamations and Regulations which are not relevant in this context.

It is seen that the 1835 Ordinance itself repealed certain parts of the 1799 Proclamation without expressly specifying what parts of the Proclamation were not repealed.

The extra words referred to by H.N.G.Fernando, C.J. and Weeramantry, J. were not included in the compilation of Legislative Enactments periodically published between 1841 and 1923.[32] The first compilation after the 1835 Ordinance was in 1841. These compilations had no legislative sanction having been compiled on the instructions of the Secretary of State for the Colonies. Therefore, the deletion of these words, if not warranted by legislative authority, would not render the deleted words invalid. But the deletion of the words by successive official editors of the Legislative Enactments, combined with the fact

32. See (1956) Edition of Legislative Enactments of Ceylon, p. ix, for list of previous editions of the Legislative Enactments of Ceylon.

that the courts were in fact exercising the function of adapting the Roman-Dutch law, could be regarded as a practice of the courts from which the words (even if effective to restrict the power of the courts)[33] could be regarded as obsolete. It is also relevant that the words were apparently omitted in 1835 because the authorities mentioned had no powers in relation to Sri Lanka after 1801, when Sri Lanka became a Crown colony.

The 1938 and 1956 Editions of the Legislative Enactments compiled under statutory authority[34] omitted these words, and whatever the position before 1938 was, it seems clear that the disputed words in the 1799 Proclamation may after 1938 be regarded as being conclusively repealed. The Editor of the Legislative Enactments possessed the power to make changes in the existing statute law.[35]

For the above reasons it is submitted that the view of the two learned judges in the *de Costa* case, that the Proclamation of 1799 did not give the courts the power to develop the Roman-Dutch law, cannot be accepted.

> If, as the whole judgment of his Lordship suggests, our Courts cannot progressively develop the Roman-Dutch law keeping pace with modern requirements, it is an alarming state indeed. It would take back to that stage of legal development when Moncrieff, A.C.J. was in a position to assert "the common law of Ceylon is the Roman- Dutch law as it obtained in the Netherlands about the commencement of the last century."[36]

(b) **Application of the "series of decisions" test in *Lily de Costa*'s case to determine whether the English tort of conversion had been incorporated into the law of Sri Lanka.** In *Lily de Costa*'s case the issue whether the English tort of conversion forms part of the general law[37] of Sri Lanka, was discussed even though it was not necessary for the finding in the case. Counsel for the plaintiff argued that the English tort of conversion had been introduced to the law of Sri Lanka by the decisions of our courts. Two of the members of the Court,

33. It is submitted above that the words were found in the Preamble and were in any event not relevant.

34. Revised Edition of the Legislative Enactments Act, 1956; Revised Edition of the Legislative Enactments Act, 1938.

35. See section 3(1)(a), 3(1)(d), 3(1)(e), 3(1)(f), 3(1)(g), of Act, of 1956, Supra, and section 3(1)(a), 3(1)(d), 3(1)(c), 3(2), 3(5) of Act of 1938, supra. The words in the above-mentioned sub section appear to confer on the Editor the power to delete the words deleted from the 1799 Proclamation.

36. S. Marsoof, "The Common Law of Ceylon after *de Costa v. Bank of Ceylon* and the *Kodeeswaran* case" in (1971) Colombo Law Review 83,92.

37. The court however held that as regards the law governing Bills of Exchange and Banks and Banking, English law was applicable - see above, article 14.c.

H.N.G.Fernando, C.J. and Weeramantry, J. (Sirimane, J, disagreeing) held that it had not become part of our general law because an unbroken and unequivocal line of cases did not exist which had the effect of tacitly introducing the English tort of conversion as part of our common law. Sirimane, J. stated that the law of conversion had been considered to be part of the law from very early times.

A Privy Council decision, *Page* v. *Cowasjee Eduljee*,[38] which in 1866 had applied English principles regarding conversion in an appeal from Sri Lanka was not cited in *de Costa's* case. If this case had been cited in argument in *de Costa's* case, the court would probably have had no option but to recognize the English law of conversion as being part of the general law of Sri Lanka. It may therefore even be argued that the *dicta* of H.N.G. Fernando, C.J. and Weeramantry, J. discussed below are for that reason *per incuriam.*

The "series" test referred to above itself raises problems. The question arises whether a series of Full Bench or Privy Council decisions are required or whether a single Full Bench or Privy Council decision is sufficient and the "series" test applies only to single judges and Divisional Bench decisions, when confronted by decisions of co-ordinate jurisdiction. It may be assumed that the series test applies only in relation to courts of co-ordinate jurisdiction, and that a Divisional Bench would be bound by a more representative Divisional Bench or a Full Bench or a Privy Council decision applying English principles, and the Divisional Bench could not therefore disregard a single Privy Council or Full Bench or a more representative Divisional Bench decision on the ground that there was not a series of decisions adopting English law. An alternate approach would involve a modification of the rules of *stare decisis* followed by our courts. A single judge for example could not without departure from the rules of *stare decisis* refuse to follow a single decision of a Full Bench or even of a Divisional Bench which has modified the Roman-Dutch law on the ground that there was no series of decisions. The rules relating to *stare decisis* which are followed in Sri Lanka are discussed in article 23.i to 23.n.

If there is an attempt in a court of law to modify the Roman-Dutch law or to declare it obsolete, a counsel would naturally raise the argument based on the *de Costa* argument that there is no series of decisions. If this argument is accepted in the future it will be impossible to establish a "series of decisions" because at the first attempt to do so, counsel will raise the argument that there is "no series". This would in effect

38. (1866) 14 L.T. 176, L.R. 1 P.C. 127.

mean that subject to modifications which have already taken place by an existing series of decisions, the courts have power of adaptation in the future, and that we are bound by the Roman-Dutch law of 1796. A system of law must be a living system. The Roman-Dutch law in Voet's day is very different from the Roman-Dutch law hundred years earlier at the time of Grotius. The law had adapted itself during this period in keeping with changing needs and circumstances. The Roman-Dutch law died in Holland in 1809 when it was repealed by a Code. It is illogical to tie ourselves to the law enunciated by the Dutch commentators before 1809, and abdicate the power to mould and adapt the law, which the Dutch commentators would undoubtedly have done, if not for the abolition of Roman-Dutch law in Holland. It is therefore submitted that any approach which seeks to tie the courts of Sri Lanka down to the law of 1796 should be avoided.

In *Samed* v. *Segutamby* the court said that fundamental principles of the Roman-Dutch law could not be altered except by a series of unbroken decisions. It is significant that the effect of the word "fundamental" was not stressed and discussed in the *de Costa* case. What is a fundamental principle? Is it fundamental to the entire Roman-Dutch system of jurisprudence (as distinct from merely the Aquilian action) that there cannot be liability without fault and can it be said that under no circumstances and under no Roman-Dutch action can liability without fault be admitted? Some of the minor Roman-Dutch actions (such as the *Pauperian* action) recognize liability without fault.

Further, it is submitted that if the *de Costa* test is applied strictly it would result in English principles which have been recognized as applicable being rejected because it cannot be shown that there is a long series of unbroken and express decisions.

In deciding that it could not be said that there was a series of express and unbroken decisions introducing the English law of conversion the court laid down two propositions which require careful scrutiny in relation to the principles governing *stare decisis*.[39] The first proposition apperars from the *dicta* of Weeramantry, J. and H.N.G Fernando, C.J. Weeramantry, J. said,[40]

> The mere use in some of them of the expression "conversion" is not conclusive of the deliberate and conscious application therein of the English principles relating to conversion, to the exclusion of Roman-Dutch principles and indeed many of the cases cited may equally well have been

39. See article 23.k. to 23.n.
40. *Supra* at 514.

decided the same way upon the basis of the Roman-Dutch principles relating to wrongful appropriation of property.

H.N.G. Fernando, C.J. said,[41]

> None of the early decisions I have thus far examined has been shown to be one in which the liability of the defendant would not have arisen under the Roman-Dutch law,...

The argument of the two learned judges is that even if a series of cases had applied English principles of tortious liability which were contrary to the Roman-Dutch law, yet if on an analysis of the facts of these decisions, liability would have been available under the Roman-Dutch law, the English rule cannot be regarded as having been adopted into our system. The problems which could arise from this approach may be illustrated by reference to the following hypothetical example. On facts A,B and C, a Sri Lanka case adopts and gives effect to the English law regarding conversion without any discussion of the Roman-Dutch law. According to the approach in the *de Costa* case it can subsequently be argued that on facts, A, B and C, liability in negligence would arise according to Aquilian principles and therefore the case is not an authority for the proposition that English principles regarding conversion are applicable. It is submitted that such an approach ignores the fact that English law regarding conversion was cited and ultimately applied in that case. That case would therefore be authority as *ratio* for the proposition that English law regarding conversion had been applied in that case. Any other approach would be contrary to rules regarding *stare decisis* as followed by our courts.[42] The case is authority as a single precedent for the adoption of the English law and the rejection of the Roman-Dutch law. An analysis of the facts of the case and a consideration of whether liability would have also arisen according to Roman-Dutch law is irrelevant, because that is not how the judges proceeded.

The second proposition which the two learned judges laid down was that the cases cited as authority for the proposition that the English law of conversion had been introduced into our law could not be regarded as authority on that point, because the courts in these cases assumed that conversion was part of our law without having occasion to decide this question. This proposition was influenced by the *dicta* of Jayawardena, A.J. in *Samed* v. *Segutamby*.[43]

41. ibid. at 464.
42. See below, article 23.f.
43. *Supra* at p. 495, quoted by H.N.G .Fernando C.J.in *Lily de Costa* v. *Bank of Ceylon*, *supra*, p. 464.

> The authority of a precedent extends only to rules or principles of law expressly decided or tacitly assumed by the Court itself. In either case there must have beenan application of the judicial mind to the question of law involved, whether the result is explicitly stated or not. Hence when counsel in the argument of a case assume a certain principle advanced by them as correct law, and the Court decides the case upon the assumption thus made by counsel, without discussing the correctness of the assumption the opinion is not aulthoriy as to the legal validity of the principle so taken for granted. The rule is the same as to matters which, without being submitted to the court for determination, are simply treated as settled by the parties on both sides without objection.
>
> At the best, the Ceylon decisions in what are claimed to have been cases of conversion have applied the English principle merely on a presumption that the principle is applicable in Ceylon, and without any deliberately expressed intention to introduce a basis of liability unknown to the Roman-Dutch law of Delict.

The above is apparently a statement of the *sub silentio*[44] rule according to which the *ratio decidendi* of a case does not extend to cover a rule of law, relevant to the facts which are not argued before the court, or where the courts assume the correctness of the rule without adjudicating upon it; Glanville Williams says;[45] ".... a case is not .... a binding authority for a rule that was not raised in it, even though the facts enabled it to be raised". Can it be said that when a court applies English principles instead of the Roman-Dutch law, *a rule of law* has been overlooked? If a court applies an English principle of conversion it must be regarded as an authority for the proposition that the English law of conversion has been applied. No doubt an authority which states that the English law and not the Roman-Dutch law should apply would be a stronger authority - but the authority of a case which applies English law without reference to Roman-Dutch law cannot entirely be discounted.

An important principle of *stare decisis* is at issue here. Should the *sub silentio* principle discussed above and also the doctrine of *per incuriam*[46] apply to situations where the Roman-Dutch law has been ignored or misinterpreted? This raises another question - the relationship between the authority assigned to the writings of the jurists and to judicial precedent by our legal system. It is submitted that the basis on

44. Glanville L. Williams, *Learning the Law* (1954, Stevens & Sons, London), pp. 73-74 See below, article 23. h. at p 165.
45. Williams, op.cit., p. 7.
46. See below, article 23.h. at p. 162.

which the courts have proceeded, and which underlies many judicial decisions, is that where a Roman-Dutch authority is interpreted in a judicial decision, the interpretation put upon it becomes binding in accordance with the rules of *stare decisis*.[47] Is an effort being made to change this approach? In most areas where English law has been incorporated in the past, English law was resorted to without a consideration of the question whether the Roman-Dutch law or English law should apply and therefore if the *per incuriam* and *sub silentio* rules are applied many areas where English law has been recognized as having been judicially incorporated would have to be reconsidered. It is submitted therefore that the *sub silentio* rule should have no relevance in this context and that the *per incuriam* rule should apply only in the situations discussed below.

The proposition laid down in *Lily de Costa*'s case are very far-reaching. Perhaps their implication were not obvious and they were not intended to be so far-reaching. It was not necessary in that case to decide whether the tort of conversion was part of the general law of Sri Lanka. The further question arises whether what was stated was *obiter dicta*. In view of the detailed discussion by H.N.G. Fernando, C.J. and Weeramantry, J. it is difficult to regard the views in their judgments as anything other than *ratio*, though the views expressed on this issue were not necessary for the conclusion. But the judgments of two out of five judges cannot be regarded as laying down the *ratio* for the entire case. Sirimane, J. dissented on this point and held that conversion was a part of our law from early times. Alles, J. in a brief statement which could be regarded as *obiter* stated that conversion was not part of the law of Sri Lanka on the ground that it could not be said that there was a series of decisions introducing English law. Even if the judgment of Alles, J. could be regarded as *ratio* for the proposition that conversion is not part of the law of Sri Lanka, he cannot be regarded as having associated himself with the propositions laid down in the judgments of H.N.G. Fernando, C. J. and Weeramantry, J. and which have been discussed above. Wijayatilake, J. expressed no opinion on the issue whether conversion was part of the general law of Sri Lanka, but stated that a puristic approach to the Roman-Dutch law and of antagonism to English law was outdated.

It is submitted that the adoption and application of the two propositions discussed above will have the effect of turning the clock back

47. See above at p.88.

and creating uncertainty in those areas in which English law has long been considered to have been judicially incorporated. While the early judicial trend went too far in the direction of English law it appears that there is a danger that the modern trend will overreach itself in the opposite direction.

The difference in the approach in the *Namasivayam* and *de Costa* cases which is one manifestation of a differing emphasis towards the Roman-Dutch law found in many judicial decisions, reflects a division which is also found in South Africa. The waning and the waxing of Roman-Dutch law in Sri Lanka is similar to the developments in South Africa. A similar conflict to that manifest in the two Sri Lanka cases discussed above, as witnessed in South Africa, and a comparison of the attitude of a leading authority in South Africa to this conflict would be instructive and helpful. Having referred to the early attitude of excessive reliance on English authorities, and noting a modern trend in favour of the Roman-Dutch law, Hahlo and Khan say:[48]

> In this process one may detect a swing of the pendulum towards a revived interest in the original sources of the Roman-Dutch law. English decisions are cited no less often than before, but their force is persuasive rather than compelling.
>
> During the last decade or two this trend has become accentuated, partly as a result of general political tendencies, and partly as a result of the work done by the growing faculties of law of the several Universities in the Union in exploring and expounding the original Roman-Dutch law.
>
> In South Africa's political climate it was inevitable that a legal system which combines Roman-Dutch law and English law should come under attack both for being too English and for not being, English enough. Adherents of the former school deplore the tendency "unnecessarily to introduce legal doctrines and principles which are foreign to our own system of jurisprudence". They suggest that in cases where Roman-Dutch law does not provide an answer we should turn for assistance to modern Continental codes rather than English law. At the extreme wing of this school are the fanatical purists and fundamentalists who look on every importation from English law as a pollution of the pure stream of our own law, which ought to be filtered out of it at the first opportunity.
>
> Adherents of the second school deplore extensive recourse to the old law as a waste of time....
>
> Faced with these opposing views our courts and, more especially, the Appellate Division, have on the whole succeeded in steering a safe middle course....

48. H.R.Hahlo and E.Khan, *Union of South Africa, the Development of its Laws and Constitutions* (1960. Stevens & Sons, London), pp.43-45.

> ....the Appellate Division has achieved a remarkable degree of success, avoiding, on the one hand, the perpetuation of ancient subtleties merely because they are ancient and, on the other hand, the abandonment of sound principles merely because they are not shared by other codes. This process has still far to go. It is still possible for an apparently sound line of modern cases to be upset by reference to a seventeenth century civilian, and a doctrine which has been thought dead for a hundred years to rear its anachronistic head in the midst of the affairs of today.
>
> But lapses are inevitable in the best regulated legal systems.On the whole, our courts have been successful in taking the best from Roman-Dutch law and the best from English law and fusing the two into a harmonious union. They have been aware that they are building a new legal system.

Though the decisions on a superficial comparison do not appear to differ, yet it is submitted that there is an underlying difference in the attitude towards and assumptions regarding the scope of the Roman-Dutch law in the *Namasivayam* decision and the judgment of H.N.G. Fernando, C.J. and Weeramantry, J. in *Lily de Costa*'s case. It is of course true that Alles, J. was primarily concerned with the disuse of a Roman-Dutch principle, while in *Lily de Costa*'s case the court was considering the disuse of a Roman-Dutch principle of liability and the adoption of a foreign principle based on English law into the legal system. But the rule of disuse adopted by Alles, J. clearly envisages that a Roman-Dutch principle could be abrogated in the absence of judicial decisions by "the growth of a custom inconsistent with it".[49] According to *Lily de Costa*'s case it appears that such an inconsistent growth can only be established by a series of unbroken and express decisions. This amounts to saying that a custom can only be established by a series of unbroken and express judicial decisions. Provided the requirements of custom are present,[50] a custom can be recognized by a single decision.

Sri Lanka has been influenced by South African developments, and South African case law and academic writing has influenced our judges and academics. The basic reason is of course that in both countries Roman-Dutch law is the residuary law. But it is apparent that Sri Lankan academics in particular, and the judiciary, are concerned to a great extent with South African Law, than their counterparts in South Africa are with Sri Lanka law. Sri Lankan authors write about the Roman-Dutch law of Sri Lanka and South Africa, and perhaps even a greater part of their works may be concerned with South African cases. But on the other hand it is only the very important Sri Lanka cases that find their

49. See above at pp.77-79.
50. See article 25.

way into the text (as distinguished from the footnotes) of the South African works. Likewise the Sri Lanka courts pay greater attention to South African cases while their counterparts in South Africa are not very concerned with the Sri Lanka case law.

It appears that the South African aversion to English law has influenced the attitude of local academics and judges. But there are two factors which were not present in Sri Lanka which apparently motivated the South African antagonism to English law. Firstly, the growing climate of hostility and criticism in Britain and the Commonwealth to South Africa's racial policies which culminated in the expulsion of South Africa from the Commonwealth. Secondly, the Roman-Dutch law is rooted in the cultural heritage of the Afrikaaners - a considerable section of the white community - and it is natural that they would wish to turn to a system with which they have historical, cultural and linguistic affinities. Thus, while the South African antagonism to English law has had its impact on the law of Sri Lanka it appears to have been overlooked that the conditions and circumstances of Sri Lanka are very different. In Sri Lanka, Roman-Dutch law and English law are both foreign laws - they have both exercised a profound effect on our laws - and the choice between them in a particular situation where there are conflicting decisions should be pragmatic, genuinely selective and in the ultimate based on policy considerations. Goonesekere[51] expresses such a point of view.

> More recently academic writing and research has renewed an interest in the Roman-Dutch law and judgments from the Supreme Court seem to emphasise the importance of the Roman–Dutch law, sometime adopting a puristic approach unfavourable to influences from the English law.....
>
> If the early trend in our courts which was unsympathetic to the Roman-Dutch law can be criticised, it is submitted that the recent tendency to emphasise the importance of the Roman-Dutch law, is not without its own limitations. Even adopting a conservative view of the role of the judiciary in "law making", it would seem that if Ceylon has a legal heritage derived from many systems it is worthwhile to draw on the vitalising elements of either system, to fashion a jurisprudence suited to the needs of our own society.....
>
> Even if the South African jurisdiction has perhaps from a need to vindicate a movement for a racial and cultural insularity, chosen to be intolerant of extraneous influences, there appears to be little justification for underrating the significance of a long trend in our courts to introduce some of the concepts of the English Law....

51. S.W Goonesekere, "Damage by Animals" in (1971) Colombo Law Review 50-51.

Having quoted the words of Lord Diplock in *Kodeeswaran* v. *Attorney-General*,[52] she says;

> This is a timely warning that there should be some limit to the zeal of purging our law of influences other than the Roman-Dutch law, in areas where due to historic reasons it was considered to apply, for no progressive legal system can disregard the trends of the past, as a corruption of pure principle. If a judicial trend is a vitalising force in our law and introduces a corruption of principle which is suited to the jurisprudence of this country, this should be considered a valuable product of its peculiar legal heritage....
>
> It is possible to adopt a puristic approach and argue that the Roman-Dutch law has been misunderstood, but it is not always clear that such an approach is justified, for sometimes there are indications that principles from one system have been used in the process of applying the latter in order to introduce a coherence or meaning to the decisions that judges have to make in the peculiar circumstances that come up for adjudication before them. In that sense, principles can grow out of the experience of the past, which have peculiar relevance to the particular society in which a legal system operates, and it would appear destructive to tamper with those developments for the purpose of introducing purity into the Roman-Dutch law as it is applied in Ceylon.

Lee, one of the great modern Roman-Dutch authorities has criticised the "bias against English law".[53]

No legal system is static. The Roman-Dutch law is a development from the Dutch law. And the Roman-Dutch commentators never envisaged that the Roman-Dutch law should stand still.

> .....however anxious the Courts may be to maintain the Roman-Dutch law in all its integrity, there must in the ordinary course be a progressive development of the law keeping pace with modern requirements, for it is a self evident truth that a legal system cannot stand still. As pointed out by Lord Tomlin in *Pearl Assurance Company* v. *Union Government*,[54] the Roman-Dutch Law is a virile living system of law, ever seeking, as every such system must, to adapt itself consistently with its inherent basic principles to deal effectively with the increasing complexities of modern organised society.[55]
>
> We are...entitled to develop the legal principles handed down to us in connection with new situations which arise in our civilization. The tests which were taken as determining tests under the Roman law are not always justly applicable as determining tests in the various combinations of fact,

52. (1969) 72 N.L.R. 332 at 342, quoted above, in article 14.d.

53. R.W.Lee in (1923) Yale L.J. 224 at p. 230. See also R.W. Lee in (1924) 41 S.A.L.J. 297.

54. [1934] A.C. 570. 579.

55. S.Marsoof, "The Common Law of Ceylon" in (1971) Colombo Law Review 83,92.

which, from time to time, present themselves in modern life.[56] Much hasbeen said about the necessity to apply the principle of our common law, the Roman-Dutch law - without adulterating it with English law. This view appears to be far too outdated quite contrary to the progress and development of our law.[57]

Tambiah, J. in *Kamalawathie v. de Silva*[58] observes that "Law like race is not a pure-blooded creature" and stresses the inroads made by English law into the legal systems of South Africa and Sri Lanka. The *dicta* of Lord Diplock in *Kodeeswaran* v. *The Attorney- General*[59] who pointed out that the Roman-Dutch law is the starting point of the common law and not the finishing point and that the courts have a responsiblility to develop and change the law, is in conflict with the *Lily de Costa* view that the courts have no power to develop the law.

It is submitted that the approach of Lord Diplock in the *Kodeeswaran* case and of Alles, J. in *Namasivayam* v. *Heen Banda* has more to commend it than that of Weeramantry, J. and H.N.G.Fernando, C.J. in *Lily de Costa*'s case. The points analysed above in detail may be summarized thus: (1) The approach of Alles, J. is based on a Roman-Dutch rule regarding disuse. (2) The approach in *Lily de Costa*'s case where it was said that the Roman-Dutch law can be departed from only by a series of express and unbroken decisions it is submitted (i) is contrary to the Roman-Dutch rule of disuse, (ii) may sometimes be contrary to the rules of *stare decisis* and (iii) is based on a restrictive interpretation of the Proclamation of 1799, which as subsequently amended, it is submitted does give the courts power to depart from the Roman-Dutch law; (iv) in any event the series test applies only to *fundamental* provisions of the Roman-Dutch law, and (v) if strictly applied will have the effect of disturbing the areas of the law in which English law has been adopted as being applicable. (3) Lord Diplock in the *Kodeeswaran* case implies,[60] that the courts do possess a greater power to depart from the Roman-Dutch law than was conceded in the *de Costa* case. (4) English law and Roman-Dutch law are both foreign laws and unlike in South Africa, Sri Lanka owes an inherent reason for loyalty to either, and in a particular situation where there are judicial *dicta* or a few cases which have adopted English law and it is argued that the

56. *The Government Agent, Central Province* v. *Letchiman Chetty* (1922) 24 N.L.R. 36,46. It is significant that the modification of a pure Roman-Dutch principle was subsequently dissented from in subsequent decisions, but was later reapplied in *Hassanaly* v. *Cassim* (1960) 61 N.L.R. 529 P.C.

57. Per Wijayatilake, J. in *Lily de Costa* v. *The Bank of Ceylon*, op.cit., p. 547

58. *Kamalawathie* v. *de Silva* (1961) 64 N.L.R. 252.

59. (1969) 72 N.L.R. 337, discussed above in article 14.d..

60. Discussed above in article 14.b.

Roman-Dutch law should be reverted to, the choice between them should be genuinely eclectic and based on consideration of public policy and the needs of the times. (5) A body of law is not static, it cannot stand still. The Roman-Dutch commentators who modified and developed the Roman law recognized this and hence the manner in which the principle of desuetude was laid down to enable the Roman-Dutch law to change and develop in the future. Are we to discard the rule of desuetude and lay down a stricter rule and tie ourselves to the Dutch law of the seventeenth century in a manner which the Dutch commentators themselves would not have envisaged or considered desirable?

The *Kodeeswaran* case clearly recognized that the common law is not only the Roman-Dutch law of 1796 but also the body of law developed by the courts.[61] It has been stressed in a different context[62] that in non-statutory areas of private law, bearing in mind that the legislature has little time to devote to this type of legislation, the judiciary should take the initiative in adapting the old law to suit changing conditions and circumstances.

In areas where there is doubt as to whether Roman-Dutch law or English law applies, the courts should be concerned less with re-establishing ancient Roman-Dutch principles and the pristine glory of the Roman-Dutch law, and concerned more with producing a jurisprudence suited to our times and of doing justice between man and man. Such an approach underlies two recent decisions. In *Moosajee* v. *Carolis Silva*[63] the court turned the clock back and overruled a long series of decisions extending over a period of 80 years and reasserted the authority of a Roman-Dutch principle which had been misinterpreted. It appears that in overruling a long series of cases the court was influenced by the fact that the overruled principle stood in the way of the development of available ground space, and was therefore not suited to modern conditions.[64] Likewise the decision in. *Namasivayam* v. *Heen Banda*[65] where it was held that a Roman-Dutch principle was obsolete, notwithstanding cases which had upheld the principle, was apparently influenced by policy considerations and the equities of the case.

61. ibid.
62. See article 23.o.
63. ibid
64. *Moosajee* v. *Carolis Silva, supra at p. 226.*
65. Discussed above at pp. 77-79.

Despite case law spanning a century it is still not clear whether the rule in *Rylands* v. *Fletcher*[66] and the tort of conversion[67] are part of the law of Sri Lanka. It appears that but for the "puristic" attitude these principles of liability would have been by now incorporated into our system, and that what may some time ago have appeared to be settled issue, has now been reopened.

It is submitted that it is the approach in *Moosajee*'s case (reasserting an old forgotten Roman-Dutch principle valid for our times) and *Namasivayam*'s case (rejecting an anachronistic Roman-Dutch rule once accepted by our courts) which should govern the issue whether the principles of liability in conversion and *Rylands* v. *Fletcher* should apply in Sri Lanka.

Goonesekere[68] takes the view that English principles regarding strict liability should be adopted and says this is particularly necessary.

> ....in the area of liability for civil injuries, where the citizen comes into contact in a personal way with the legal system when he seeks redress at law; it is surely unjust to leave him to the mercy of a legislature already burdened with other pressing problems in his quest for coherence in the law. In the Roman- Dutch law of delict for instance, moral blame worthiness plays a significant part in the principles of liability except in certain narrow areas where the concept of strict liability is recognised. The English law however recognises certain significant areas of strict liability e.g. liability in Nuisance and the Rule in *Rylands* v. *Fletcher*. Due to the demand for adjusting competing interests in the area of compensation for damages done through civil injuries in a developing society, there must inevitably be a shift of emphasis from intentional to negligent wrongdoing and strict liability.
>
> While the Aquilian Action may afford sufficient scope for the development of principles of liablity in negligence, it seems unreasonable to suggest that liability in nuisance or the rule in *Rylands* v. *Fletcher* are not part of our law where there is a trend of decisions accepting those areas of liability as part of our law.[69]

The courts have already found it necessary to incorporate the English principles of strict liability relating to nuisance. It seems to follow that the rule in *Rylands* v. *Fletcher* and the tort of conversion should likewise be incorporated. It may be thought that strict liability is not a desirable policy. This would be a valid reason for not adopting it. In a situation such as this where the Roman-Dutch and English law are competing with each other, and there is judicial authority in favour of and against

66. (1866) L.R. 1. Ex. 265. See C.F. Amerasinghe, "*Rylands* v. *Fletcher* in the law of Ceylon" (1962) I.C.L.Q. 960.

67. See discussion above.

both systems, it is submitted the courts should not adopt a puristic attitude to the Roman-Dutch law, but should make a choice based on policy considerations.

The relationship between the two systems in South Africa is brought out by Hahlo and Kahn.[70]

> Modern South African law is a composite legal system, made up of two ingredients; Roman-Dutch law and English law of the nineteenth century variety. Through the work of the courts these two ingredients have become thoroughly integrated in a new system. Occasionally the English element has been looked upon as a foreign intruder, but by now it is part of the very warp and woof of South African law. To eliminate it would be as impossible as to eliminate Roman law from the fabric of European legal systems or to sort out the waters of the sea into the rivers whence they came. Moreover, it would be entirely wrong to think of Roman-Dutch law and English law as mutually incompatible systems which, like oil and water, will not mix. Their origins are similar, and while it is true that there was a reception of Roman law as a system in Holland, but not in England. English law too, has been strongly influenced by the infiltration of Roman law doctrines. Not surprisingly, therefore, Roman-Dutch law and English law coincide in many instances - if not in their detailed rules, at least in the final results.
>
> Following in the grand tradition of the text writers of the Roman-Dutch era, our great South African judges have built and are continuing to build out of the two components of our law a legal system which is adapted to the conditions of South Africa, eschewing both the archaisms of the old Dutch law and the technicalities of the English law. And it can confidently be expected that as our own body of jurisprudence grows, reference to the old writers will become less and less necessary. It has been rightly said that the law of any country can be found in the last thirty years of its law reports. This stage of certainty has not as yet been reached in South Africa, but the time is undoubtedly approaching when reference to the old writers will be the exception rather than the rule.
>
> South African law today is no longer an importation from Holland or England or any other country, but a sturdy indigenous growth with its roots firmly in the soil of South Africa. It is South African law, "made by South Africans for South Africans". We may as well get used to calling it by its proper name. "I consider" said Classen, J.P. in *R.v.Goseb,*[71] "that the term 'Roman-Dutch Law' is confusing, for in fact the common law of the Union or for that matter of the Cape of Good Hope is not Roman-Dutch law. It is South African common law".

The *Kodeeswaran* case is a pointer which could enable the legal fraternity in Sri Lanka to move away from the old formulation of the Roman-Dutch law as the common law, and to think in terms not of Roman-Dutch or English law and of the antithesis between Roman-

70. Hahlo and Kahn, op. cit., pp. 47, 50- 51.
71. (1956 (2) S.A. 696, 698. (S.W.A.).

Dutch law and English law in our legal system - and to recognize that there is a body of law, in the decisions of our courts, a body of law not English nor Roman-Dutch but which is the creation of our courts and which in Lord Diplock's words in the *Kodeeswaran* case may be called "the indigenous common law" of Sri Lanka.[72]

72. The antithesis between Roman-Dutch law and English law in the legal system is analysed -see article 14.e Academic writers have favoured such an approach -V. Ratnasabapathy, "The Collecting Banker and Conversion of Cheques" in (1970) Journal of Ceylon Law, 165, 167; Savitri Goonesekere, "Damage by Animals" in (1971) Colombo Law Review 49-51; S.Marsoof, "The Common Law of Ceylon" in (1971) Colombo Law Review 83, 88-93.

CHAPTER IV

THE SPECIAL LAWS

15. THE ANCIENT SINHALESE LEGAL SYSTEM

A common characteristic of most ancient judicial systems in all parts of the world is that legal concepts such as law, customs and sanctions are not as precisely formulated as they are in modern systems. There was for example no clear distinction between law and custom. There was a hierarchy of courts but they were not graded as the courts of today are. It was possible to appeal from a judgment of the lowest court (the *gamsabhava*) straight to the king, who occupied the top place in the judicial hierarchy. There were no legal sanctions in the sense that there were no judicial tribunals or specific bodies concerned enforcing the decisions of the courts. The distinction between civil and criminal law (which is difficult to draw even today), was almost non-existent. Further, most of the courts tribunals and judicial officers also performed administrative and executive functions. The separations between judicial and executive functions, essentially a modern concept, was unknown.

15.a.The laws and customs of the Sinhalese

There was no systematized law to guide the administrators of justice. Sinhalese law was unwritten law in the most literal sense. It was contained in no book. It was almost untouched by legislation. It acknowledged no judicial decisions. It consisted essentially of the customs of the realm known to the people, handed down in the form of an oral tradition from generation to generation, the main repositories of which were the chiefs. The law was therefore almost entirely composed of customs and traditions and a few edicts of kings carved on rocks."There are no laws but the will of the King, and whatsoever proceeds out of his mouth is immutable law. Nevertheless they have certain usages and customs that do prevail and are observed as laws; and pleading them in their Courts and before their Governors will go a great way".[1]

There is slight evidence of written law. An inscription of Parakramabahu VI states that the king on occasions proclaimed edicts fit to be carried out in the world. Occasional references are found in the

1. R.Knox, A. *Historical Relation of Ceylon* (1681), (Reprint 1958, Saman Press, Ceylon), p. 161.

histories to decrees of the sovereign. Thus the *Mahavamsa*[2] states that Tissa abolished the practice of inflicting torture which had prevailed up to that period.[3] But Hayley points out that such orders seem to have been forgotten in course of time and were disregarded by subsequent kings. And there is little evidence of written legislation. Knighton says:[4]

> We have certain and distinct intimation in the history of the reign of Dappulla III of his having compiled a distinct code of law which he transmitted to posterity with the greatest care. But this seems to be the only case in which the composition of a code of laws seems to be explicitly referred to, yet the frequent commendation of various persons in the native history for their, just administration of laws on the one hand and the frequent condemnation of those who administer them unjustly on the other hand, leave no manner of doubt but that they were kept constantly in view and generally promulgated.

Pridham takes the opposite view:[5]

> In the absence of more conclusive evidence and reasoning it is clear that it was equally opposed to the sermons of the King and priesthood, the two fountains of the law, to determine by a specific and definitive code, customs which took their tone as much from the pressure of circumstances and the contingencies of the moment as from any prescriptive rights.

Valuable information about the sources of the early Sinhalese customary laws is contained in a recent article by Dr.Jayasekera. Jayasekera says :[6]

> The Sinhalese laws (the survival of which are called today Kandyan law) have their origins in customs introduced, in an elementary state, by the Aryan immigrants that came to Ceylon from the North West and North East of India a few centuries before the Christian era and by other Aryan groups who arrived in Ceylon with the introduction of Buddhism. These mainly ranged in the beginning round the King, the Caste system and the system of land holding in a small agricultural community. These customs began to be developed in their island home thereafter into a system which suited a feudal agricultural society of which the King (*Raja*) was always the head. In the course of its growth for almost twenty-three centuries the Sinhalese legal system gathered material from various quarters. It appears to us that the following sources furnished material in the beginning and subsequently, to the development of the Sinhalese customary laws up to the end of the Sinhalese Kingdom;- (1) Hindu laws

2. XXXVI, 28.
3. F.A.Hayley, *Sinhalese Laws and Customs* (1923), Times of Ceylon), pp-56- 57.
4. W.Knighton, *The History of Ceylon from the Earliest Period to the Present Time* (1840, Longmans.).
5. C.Pridham, *A Historical, Political and Statistical Account of Ceylon and its Dependencies* (2 Volumes) (1849, London, T.W.Boone. Vol.I), p.215.
6. M.L.S.Jayasekera, "The Sources of Sinhalese Customary Law" in (1970) Journal of Ceylon Law 81. Much of what follows is based on Jayasekera's researches.

and customs, (2) Canonical writings, practices and rites of Buddhism, (3) Sakyan and Mauryan customs, (4) *Pera Sirit* (former or immemorial customs), (5) *Kula Sirit* (customs of clans and castes). (6) *Gam Sirit* (customs mainly connected with land holding in villages), (7) South Indian customs.

(1) **Hindu laws and customs.** Jayasekera is of the opinion that as the Sinhalese people had been mainly Hindu in the first two and a half centuries of their existence in Sri Lanka it is quite possible that with their religious beliefs and practices they brought with them some form of Hindu customary laws and institutions as well.

He refers to kingship, caste system, patriliny and *diga* marriage and the concept of *gama* (village) around the *wewa* (tank) as Hindu institutions and customs which the Sinhalese seemed to have brought with them. Hindu law also came in later stages. It is conceivable that some at least of the Hindu laws current at the time reached Sri Lanka during the Gupta period. The Hindu *niti* literature came to Sri Lanka in the Polonnaruwa period when it influenced the criminal law. In the sphere of Buddhist ecclesiastical law certain Hindu customs have come in.[7]

(2) **Canonical writings, practices and rites of Buddhism**. With the advent of Mahinda and the conversion of King Tissa to Buddhism there arose a great ecclesiastical body, the order of monks, the *Sangha*. To control the conduct of this body the Buddha had established rules and regulations which had the effect of positive law. Gradually a set of rules arose which took the form of a code called the *Vinaya* or *Vinaya Pitaka*. The infringements of these rules entailed punishments of varying degree depending on the gravity of the offences. As a result of the pious acts of kings in granting large tracts of land to the Buddhist monasteries to enable them to carry on their work, in course of time a large extent of land became *Viharagam* (temple villages with tenants enjoying allotments in them and performing services according to customary law to the monasteries, in lieu of rent. In course of time perhaps due to Hindu influence rules of succession to temples and temple lands called *sisyanu sisyaparamparawa* and *siwuru paramparawa* began to be developed. As regards the laity there does not seem to exist any rules of law springing from Buddhist tenets governing their personal or proprietary relationships. As a result of Buddhism there sprang up the practice of kings ordering in inscriptions *Maghata*, i.e.non-slaying of wild animals in forests and non-killing of fish in tanks. We thus see the beginnings of game and fauna protection laws in the Sinhalese

7. See below.

kingdom. The rights of sanctuary (*abhaya*), too were conferred on holy places and monasteries. Criminals escaping thereto were immune from arrest. Various privileges and immunities were given to temple lands. Along with Buddhism came certain Buddhist rites and practices, some of which had Hindu origins. The method by which property given to the Buddhist temple is rendered *sanghika* by the ceremony of pouring water on to the hands of the donees, with certain words being spoken, became part of Sri Lanka's Buddhist ecclesiastical law. The erection of *sima* or boundaries on lands granted to temples became an important and necessary feature in grants to temples. The property given in the prescribed manner could not be taken back.

(3) **Sakyan and Mauryan customs.** The Sakyans who came to Sri Lanka before the arrival of Mahinda brought with them some of their customs which became engrafted into the Sinhalese legal system. The independence the married women enjoyed in respect of their personal and proprietary relationships is derived from Sakyan sources. Certain incidents of land tenure and some *gam sirit* seem to have derived also from Mauryan sources. Examples of Mauryan customs relating to land and revenue which have influenced the local customs are the customs relating to the *muttettu* fields of a *gabada-gama*, what is known as *ande* cultivation and the position of officials such as the *gamarala*, *lekama* and *kankanama*.

(4) ***Pera sirit* (former or immemorial customs).** *Pera sirit* may be defined as customs observed by former kings which the later kings followed as a matter of conservative policy. "In ancient days the customs of virtuous men (*sadachara*) handed down in regular succession (*paramparya kramagata*) formed part of the established law of the country, ranking in the same category as religious injunctions and legal enactments. In Sri Lanka too the law of the land was nothing but the established customs of the country".[8] It is possible that the Sinhalese ideas of customs were based on and influenced by these Hindu views. In the Sinhalese system, *sirit* (customs) or *pera sirit* (former or immemorial customs) held the same position as the common law in England. Jayasekera citing original sources infers that a good portion of *pera sirit* would constitute constitutional law. The *pera sirit* in this instance would include therefore (a) observance by the king of the customs and traditions brought over from India by the early immigrants,

8. Walpola Rahula, *History of Buddhism in Ceylon* (1959, Gordon Fraser, Bedford), p. 64.

the caste laws for example, and (b) observance by the king of precepts and practices that arose as a result of Buddhism.

(5) ***Kula sirit*** **(customs of clans and castes).** *Kulasirit or kulachara* are customs of clans or families handed down for generations. Family customs or *kulachara* may be defined as "Usages of a family transmitted successively (from father to son) according to law .... It generally relates to matters affecting the members of a family in their relationship to each other and to the family as a unit. Amongst the members of a family it has an obligatory force and distinguishes the family by its rules from other families. These rules chiefly concern adoption, marriage, descent and devolution of property".[9] Allied to *kula sirit* were the caste laws which each caste had to observe.

(6) ***Gam sirit*** **(customs mainly connected with village land).** The word "*gama*" derived from Sanskrit "*grama*" denoted among the Sinhalese not only village but also land. Hence customs affecting land tenure came to be known as *gam sirit*. *Gam sirit* covered not only the working of land holdings but also the rights to water from the reservoir, and gave rise to the *ande* and *betma* system of cultivation and other '*sirit*' on irrigation. *Gam sirit* also dealt with working of land holdings; rights to water from tanks and allocation of water during periods of scarcity; responsibility for erection of, repairs to, damage to, and maintenance of tanks. Bailey says: [10]

> The successful cultivation of every tract of fields depends upon the combined exertions of all concerned. Almost every act of every cultivator is associated with the interests of the rest and on a close examination of the ancient customs in all their bearings it is impossible not to be struck with their perfect sufficiency for the purpose required, *viz.*, to ensure that all should act in concert and it is difficult to conceive a more just code of laws. They are laws which have been sanctioned by the experience of centuries and are therefore surely worthy of our attention and it is only by studying the effects of the breach of them that we shall be able to form a just estimation of the consequences of permitting them to be infringed.

(7) **South Indian customs.** With the frequent invasions by the Cholas and the Pandyans of South India some Dravidian customs relating to polyandry and the caste system were introduced into Sinhalese society and these became parts of the Sinhalese legal system. During the

9. S. Roy, *Customs and Customary Law in British India* (Tagore Law Lectures, 1908), p.43.

10. Papers upon the Subject of Irrigation with a Sketch of the Native Agricultural Customs and Suggestions with a view to Legislation for the Protection of Cultivators. (*The Speeches and Minutes of Sir H.G. Ward*, 1855-60). As a result of this report Ordinance 9 of 1856, was passed.

Kandyan and Kotte period, the influx of Tamil princes and South Indian Brahmins resulted in the infiltration to some of their customs relating *inter alia* to *dewalagama* tenure and the caste system.

15.b. The Administration of justice

The most striking feature of the ancient Sinhalese kingdom was the elaborate judicial system that prevailed. The king was, to use a modern term to describe his place in the judicial system, the fountain of justice. Subject to appeal the king delegated his judicial functions to various officers of state throughout the country, each of whom had a greater or lesser jurisdiction according to his position. Side by side with the royal or official courts, the affairs of a particular village or district were under the control of its own regional tribunal. The ascending order of merit of the different judicial organs was not rigidly drawn. It was possible to appeal from a decision of the lowest courts to the king. The more important organs which administered justice were the *Gamsabhava, Ratasabhava, Sakki Balanda*, the Courts of the Royal officials (*vidanes, liyanaralas, mohottalas, korales, disavas* and *adigars*).[11]

Gamsabhava. The *gamsabhava* or village tribunal whose origin dates back to the origin of the village itself was composed of the village elders. It is said to have met at an *ambalama* or under a shady tree. It dealt with very minor offences such as small debts, minor quarrels, boundary disputes and thefts. The *gamsabhava* attempted not so much to mete out punishment but to amicably settle disputes on the basis of commonsense and compromise. The procedure was characterised by admonition, compromise and commonsense, unsullied by legal technicalities and rigid rules of procedure. It had a minor punitive jurisdiction to impose fines, but only if the headman was present.

Ratasabhava. This was composed of the delegates of each village in a particular district. It had original jurisdiction in matters relating to caste, marriage and social status. Its proceedings were attended with much ceremony.[12] Hayley[13] further states that it heard appeals from the *gamsabhava* and Tambiah accepts this view.[14] According to Pieris[15]

11.See Ralph Peiris, *Sinhalese Social Organisation*. (1956, Ceylon University Press) pp. 143-66. W.I. Jennings and H.W.Tambiah, *Dominion of Ceylon* (1952, Stevens, London) ,pp. 91-100.

12. See Hayley, op. cit ., p.63.

13. ibid.

14. Jennings and Tambiah, op. cit., p.92.

15. Ralph Pieris, op. cit., p. 150.

it was only the dry zone *ratasabhavas* that had appellate jurisdiction. His view is that in the dry zone areas due to distance from the capital and from the central government officials, the *ratasabhavas* were allowed to function in an appellate capacity.

Sakki Balanda. This inquired into sudden deaths. It was composed of the prominent men of the district. There is very little authority on the precise functions allocated to these courts, except that of Davy, who refers to the procedure adopted in the case of a suicide.[16] The functions of this tribunal has been compared to that of the Coroner's court of today.

The judicial powers of the state officials. The extent of the jurisdiction of the various officials depended on their status. Their jurisdiction ranged from the extensive judicial powers vested in the *adigars* to the highly circumscribed authority of the *vidane*. In the infliction of punishments the officials had to take into account the caste and rank of the wrongdoer. Low caste persons were subject to more severe and degrading punishments. The state officials could be classified thus; (i) *vidanes*, (ii) *liyanaralas*, *undiralas* and *koralas*. (iii) *Mohottalas* and *arachchis*, (iv) chiefs, (v) *disavas* and *adigars*.

Vidanes. The officials with the least judicial power were the *vidanes* who possessed a minor civil and criminal jurisdiction. Their duties were somewhat similar to those of police officers. They could levy small fines and inflict corporal punishment on persons of low caste.

Liyanaralas, undiralas, koralas. They could hear complaints regarding for example petty thefts and other trivial disputes. They had limited power in land disputes and had a limited power of imposing punishment which was however slightly wider than those of the *vidanes*.

***Mohottalas* and *arachchis*.** They had more extensive jurisdiction. These two classes of officials could grant written decrees known as *wattoru* after adjudicating in a land dispute. They had power also to deal with criminal offences. The *mohottalas* of the Seven Korales, Uva and Sabaragamuva which were isolated areas had greater power.

All the above officials could inflict fines ranging from 21/2 pieces of silver in the case of the *vidane* to 100 in the case of the *mohottala.*

Chiefs. The *lekams, ratemahatmayas* and the chief royal officials attached to the King's court and household had civil jurisdiction over all persons subject to their orders. Their civil jurisdiction was limited only by their inability to adjudicate in some land cases.

16. Ralph Pieris, op. cit., p. 151.

***Disavas* and *adigars*.** They had very extensive jurisdiction over all persons within the territory they ruled. The *adigars* were next in line to the king and could take cognizance of all cases, civil and criminal, except those concerned with Royal lands and disputes which arose between members of the Royal Court. The *adigars* and *disavas* were not well versed in the law, being persons drawn from the nobility and they had often to consult their inferior officers.

***Maha Naduwa*.** This was composed of the higher officials and the chiefs, for example, the *adigars* and *disavas*. The origin of this court may be traced to the practice of the king who referred to his chiefs judicial matters submitted to him and which were considered not important enough to merit his personal attention. These officials originally acted in an advisory capacity and reported back to the king, who delivered the verdict. In course of time the *Maha Naduwa* acquired an original jurisdiction as distinct from its earlier function of merely advising the king.

King. The king was the ultimate judicial authority. He had very wide powers which extended over all matters. The king exercised extensive jurisdiction in the following cases; suits arising between any principal servant or chief of his court, or where such a person was a defendant, and those relating to royal lands; suits between priests claiming rights to the incumbency of principal temples; serious crimes namely treason,rebellion and conspiracy against the king or his family and all homicides. The king could also try cases submitted to him by his officials or even where a petitioner approached him individually either directly or through a court official.[17]

15 .c. **Procedure in the courts**

Institution of proceedings. The difficulty confronting a complainant was to bring the person who had wronged before the court or the judicial officials. The complainant would generally seize a valuable of the wrongdoer and when the latter complained of the seizure he would have an oportunity to bring his grievance before the court. If he did not he could hold the article he had seized as a pledge.

Trial. The proceedings were oral and there were no written pleas.There were no lawyers and each party recited his own version of the facts.The complainant stated his case. The defendant answered and

17. See further on the Sinhalese Legal System, W.I.Jennings and H.W. Tambiah, *Dominion of Ceylon* (1952, Stevens, London), pp.91-100: Ralph Pieris, op. cit., pp. 144-66: Hayley, op. cit. ,pp.81-103.

the evidence by those unable to attend was allowed, preferably if the written evidence was confirmed by an oath at the temple.

The decision was arrived at either by means of evidence of witnesses or by the system of oath or by the system of ordeal. A case could be decided on the evidence of witnesses and other concrete evidence available. The parties and relations were not competent witnesses.

The belief the divine basis of law was so strong that on occasions when disputes could not be settled to the satisfaction of the parties by the secular modes of trial, resort was had to the oath the object of which was to secure a divine judgment. The help of the gods was invoked through much ritual and their will was communicated by some subsequent sign or disaster befalling one of the parties. In its simplest and later form each party went to the temple and swore to the truth of his assertion. The guilt of either was established if a misfortune befell one party, for example the death of a relation, the loss of a buffalo or damage to property.[18]

Another method of trial adopted was to resort to what has been termed the ordeal. There were three kinds of ordeal; ordeal by oil, ordeal by hot iron and ordeal by cobra. The ordeal by oil was conducted thus; after many preliminary ceremonies had been observed during which each party continually swore to the truth of his assertion, each would dip his fingers in burning oil. If the finger of them was burnt he could lose his case. If both or neither of the litigants were burnt the case would be compromised or was decided in favour of the defendant. For example, in the case of a land dispute, land would be equally divided.[19]

Decree. The decree of the Court was communicated to the parties orally. Occasionally it was given in writing. But no records of the cases were preserved by the courts. The absence of any fixed fee payable was the chief feature in this stage of the proceedings. All fees and charges in litigation went to the judicial officer and in some cases the fees amounted to little more than bribes.

Appeals. The institution of an appeal was not accompanied by any formalities and there was no specific period within which an appeal should be instituted. Further there was no order of appeal. The party who disagreed with the decision brought the matter before the superior court either in person or through a chief or headman.

18. For details see Hayley , op. cit., pp.85-90.
19. See Hayley, 90-94, Ralph Pieris, op cit., pp.159-163.

Res judicata. In Sinhalese procedure there appears to have been no law to prevent the retrial of a case previously heard and decided.The appointment of a new chief or headman offered an opportunity of obtaining a decision different to that given by his predecessor in office. The ancient Sinhalese law did not know of *res judicata.*

15.d. Sanctions and punishment

Men obey the law for diverse reasons, prehaps the most important, though sometimes the least obvious, is that they have recognized the need for the existence of law. Other reasons are because of fear of divine displeasure if wrong is done, because of the undefined pressure of social custom and usage and finally because of fear of punishment at the instance of the state. Belief in the divine basis of law has been one of the stronger forces which made men obey the law in primitive and undeveloped legal systems.

The Sinhalese system did not possess an organized body with authority to enforce the law and to see that the judgments of the courts were obeyed. The task of enforcement fell on the officer who was the judge. The system of self-help was not uncommon.

There was no clear distinction between a civil and criminal wrong. Thus when a robbery was committed a double penalty covering public and private justice was enforced. Compensation was given to the wronged individual and a fine was exacted by the state.

Penalties imposed were not uniform. A very important consideration was the caste of the wrongdoer. The judicial officers too within bounds possessed certain discretions. The king sometimes exercised his discretionary power to punish, arbitrarily. The lands and property of a murderer were confiscated. A collective fine was imposed on a village if a murderer was not brought to justice. If a person brought a grave accusation which he could not prove, his property was forfeited to the other party. The punishments generally imposed were imprisonment, flogging, mutilation, banishment, degradation, fine and death.[20]

16. THE TERMS "PERSONAL LAW" AND "TERRITORIAL LAW"

Kandyan law, Muslim law and the *Tesawalamai* are three systems of law found in Sri Lanka, which are not of general application but apply to sections of the community. These are sometimes not very accurately referred to as the "personal laws".

20. See Hayley, op.cit., pp. 123-31.

The term "personal law" in this context must be distinguished from a "territorial law". A "territorial law" is one which applies to all persons resident in a particular territory. The application of a personal law does not depend upon where a person resides but applies instead to a section of the population in a given territory on account of certain common factors which they all possess. Thus the application of a personal law may be determined by the community to which persons belong by birth or because of adherence to a religion.

In pursuance of the promise in the Proclamation of 1799 reaffirmed in subsequent enactments, that justice would be administered according to the laws and institutions that subsisted under the ancient Government of the United Provinces, the British government dispensed justice to the Tamils of Jaffna and Batticaloa and the Muslims throughout Sri Lanka in accordance with their own laws and customs. The Kandyan Convention guaranteed to the people their civil rights and immunities according to the institutions and customs in force among them. These sections of the population are today governed by their own laws in so far as they have not been altered, regulated or abrogated by statute. These systems of law are loosely called personal laws. It will be seen that only Muslim law is a personal law in the real sense of the term. Kandyan law (though historically a territorial law) and the *Tesawalamai* cannot today be said to fall exactly within either category. These laws are sometimes referred to as the "customary laws" or "special laws". The use of the phrase "customary law" is open to the objection that the *Tesawalamai* and the Muslim law, and to a lesser extent Kandyan law, have been modified and restated by legislation, and these laws have also been expanded and explained by case law and can therefore no longer be referred to as "customary laws". In *Savundranayagam* v. *Savundranayagam*[21] Wood Renton, C.J.referred to the *Tesawalamai* as " ... an exceptional custom in force in the province of Jaffna..." and "... as the *Tesawalamai* is a custom in derogation of the common law, any person who alleges that it is applicable to him must affirmatively establish the fact". These comments are equally applicable to Muslim law and Kandyan law and to those to whom they apply. Thus it is submitted that these systems could more accurately be termed "exceptional laws" or the "special laws."

The existence of such communal systems of law is by no means peculiar to Sri Lanka.

21. (1917) 20 N.L.R.247, 276.

> According to our modern system of legislation our laws are territorial, i.e. they bind all the individuals within a certain territory. This is a development of later times, and certainly did not prevail during the Merovigian dynasty. Each inhabitant of the Frankish Kingdom was subject to the law of his own nationality. Thus in France the Frank was subject to the *Lex Salica;* the Burgundian to the *Lex Burgundionum;* the Visigoth to the *Lex Antiqua Visigothorum;* whilst the Roman lived under the *Lex Romana*. According to this system the laws were personal and not territorial. Their applicability was determined not by the place where the person lived, but by the nationality to which he belonged. That this system which appears so strange and unreasonable to us, did exist is borne out by a large mass of reliable authority.[22]

17. KANDYAN LAW

17.a. The term " Kandyan Law"

The Sinhalese are one race, a fact which received judicial recognition in *Manikkan* v. *Peter*.[1] Prior to 1505, the manners and social system, the customs and laws of the Sinhalese of the up-country and low-country were in the main identical with slight differences from area to area conditioned by purely local usages.[2] The subsequent distinction between the Kandyan and low-country Sinhalese is the result of historical developments. While the maritime provinces fell under foreign rule in various stages, beginning from 1505, the Kandyan provinces maintained its territorial integrity till 1815. During the Portuguese and Dutch reign the native laws and usages of the Sinhalese of the low-country though not expressly superseded, were considerably affected by contact with European laws, manners, thoughts and religion. But in the Kandyan highlands where the winds of change which were swiftly passing over the coastal areas were hardly felt, the laws and customs of the Sinhalese were preserved in a more inviolate and indigenous form.

The British government while preserving the existing laws of the Kandyans which should properly be called Sinhalese law, administered Roman-Dutch law to all the Sinhalese of the low-country under the assumption that this was the procedure followed in Dutch times.

> No doubt the introduction by the English of Roman-Dutch law, which in the absence of any written Sinhalese code was easily effected, the spread of commerce and Christianity, and the larger association with the Europeans have made a considerable distinction between the legal notions of the low-country Sinhalese of the present day and those of the Kandyans,

22 J.W.Wessels, *History of the Roman-Dutch Law* (1908, African Book Company Ltd) pp. 45-46.

1. (1899) 4 N.L.R. 243.

2. F.A.Hayley, *Laws and Customs of the Sinhalese* (1923, H.W.Cave & Co., Colombo) pp.23-25.

but the idea that such distinction results from any inherent differentiation between the original customs appears to be erroneous.[3]

17.b. **Subjects of Kandyan law**

Sinhalese law as enforced in the Kandyan Kingdom in the eighteenth and nineteenth centuries was a territorial law, recognizing no doubt like other territorial laws customary modifications in various districts for various classes, but by no means confined to the Sinhalese. Today, Kandyan law is not a territorial law and applies only to the Kandyan Sinhalese, consequent to the decision in *Williams* v. *Robertson*.[4] Many reasons can be advanced to prove that the decision in *Williams* v. *Robertson* was based on erroneous reasoning and that even right up to 1850 Kandyan law was territorial in character.

(1) An examination of the early Proclamations clearly shows that between 1815 and 1835 the British applied Kandyan law to all the inhabitants of Kandy and not merely to Kandyans. The Proclamation of 1815 known as the Kandyan Convention draws a distinction between Kandyan inhabitants and persons residing in or resorting to the provinces not being Kandyans, for the purpose of assigning courts. But no distinction as to the substance of the law to be applied was drawn, excepting that the law governing murder was to be that of England and special rules were applied to soldiers. This Proclamation casts no light on the question whether Kandyan law should be regarded as a personal or territorial law. But it appears from the Proclamation of 1816 that the Kandyan law was regarded as a territorial law by the British. This Proclamation announced that the ancient laws of Kandy were to be administered till His Majesty's pleasure should 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 Majesty's European subjects for offences committed therein. It appears from the terms of the Proclamation that Kandyan law was to apply to all persons within the Kandyan provinces until Her Majesty would decide whether any distinction was to be drawn between the natives and Europeans. No such Proclamation signifying Her Majesty's decision was made and therefore it can be argued that the territorial character of Kandyan law remained unaffected.

(ii) In 1851 the judges of the Supreme Court sitting collectively, recommended in answer to a communication from the Governor, that among other amendments to the law, Kandyan law be restricted to

Kandyans, and that as regards persons other than Kandyans the law of the maritime provinces should apply. This recommendation would have been manifestly unnecessary unless at that time Kandyan law applied to all residents in the Kandyan provinces.[5]

(iii) The recommendation of the judges was not accepted and Ordinance, 5 of 1852 was passed to limit but not abolish the application of Kandyan law, the territorial nature of which is assumed in that enactment. The fifth clause of the Ordinance of 1852 enacts;

> Where there is no Kandyan law, or Custom having the force of law, applicable to the decision of any matter or question arising for adjudication within the Kandyan provinces... the court shall in any such case have recourse to the law as to the like matter or question in force in the Maritime Provinces.

The Ordinance sets out certain exceptional cases when Kandyan law does not apply. The sixth clause extends the Roman-Dutch law of *namptissement*[6] to the Kandyan provinces. The seventh clause provides that the criminal law of the maritime provinces applies in the Kandyan provinces. The eighth clause enacts that the inheritance and succession to property of Europeans and Burghers is the law of the maritime provinces and also provides that marriage between parties one of whom is a Burgher or European is valid only if contracted according to the law of the maritime provinces. The ninth clause enacts that the Muslim Code applies to Mohammedans in the Kandyan provinces. The reference in clause five to matters "arising for adjudication within the Kandyan Provinces" should be noted. If the Kandyan law was regarded as a personal law the reference should have been to matters "arising for adjudication between Kandyans". If the Kandyan law had been a personal law at the time of the Ordinance, clauses 7,8, and 9 would be superfluous.

(iv) There are constant references in the Proclamations of 1815, 1816, 1818 and 1852 to the term Kandyan provinces,[7] which seem to emphasize the territorial character of Kandyan law.

(v) The early case law seems to indicate that Kandyan law was territorial in character. In *Mongee* v. *Siyar Paye*[8] decided in 1820 the Kandyan chiefs consulted by the Board of Commissioners said that

5. See *Kershaw* v. *Nicoll* (1860-62) Ramanathan 157 at 164.

6. *Namptissement* is an interlocutory decree allowed by the Roman-Dutch law whereby the plaintiff is provisionally granted conditional relief pending adjudication of an action.

7. See Hayley, op. cit., pp.27-31.

8. Board Minutes, July 7, 1820; Hayley, op. cit., pp. 25 and 35.

under the King's government it had always been customary to decide cases which arose between Hindus according to Kandyan law. In a case decided in 1856[9] it was said that the Kandyan law also applies to Muslims.[10] But in a case decided in 1851[11] the Courts recognized the rights of the Moors to be governed by their own customs. This is contrary to the two former cases.

It is significant that *Mongee* v. *Siyar Paye*[12] was decided after consulting the Kandyan chiefs and further that it was decided in 1820 while the case in Austin which held that Moors were governed by their own customs was decided 30 years later. Therefore the former is more likely to correctly state the law as it was administered in the days of the Kandyan kings.

In *Kershaw* v. *Nicholl* [13] it was held that a European wife of a European domiciled in the Kandyan provinces was governed by Kandyan law, the operation of which was not limited to Kandyan natives. One of the main factors which influenced the judge in this decision was the Ordinance of 1852 discussed above.[14]

In *Williams* v. *Robertson*[15] a full Bench overruling *Kershaw* v. *Nicholl* held that Kandyan law was a personal law. The judgment proceeded on the basis that if Kandyan law was territorial in application persons governed by Kandyan law would have to prove that they had a Kandyan domicile and that it was not possible to conceive of a domicile in a non-sovereign state, and that it was not possible therefore to aquire a Kandyan domicile as distinct from a Sri Lankan domicile. Jennings[16] argues that where there is a separate system of law there is a separate domicile.[17] The reasons underlying this decision are undoubtedly fallacious and contrary to the established practice.But it has been constantly followed and must be regarded as authoritative.

9. (1833-1859) Austin's Report 192.
10. See also E, Modder, *Kandyan Law* (1914, Stevens, London), Introduction, p.xv which refers to Kandyanised Moors. See also (1833-59) Austin 192.
11. (1833-59) Austin 150.
12. *Supra*, n. 8
13. (1860-62) Ramanathan 157.
14. See further W.I.Jennings, *Notes on Legal Systems*, unpublished, available in University of Ceylon Library; *Silva* v. *Carolina Hamy* (1856) 1 Lor. 189: *Mammedoe Lebbe* v. *Aratchy* (1857) 2 Lor. 120; (1855) Austin 203.
15. (1886) 8 S.C.C.36.
16. W.I.Jennings, *Notes on Legal Systems*, p.62.
17. See also Hayley, op. cit., pp. 31-32.

The decision in *Williams* v. *Robertson* was the starting point of a series of decisions in which Kandyan law (really Sinhalese law) was held not to be applicable to low-country Sinhalese settled in the Kandyan provinces even if they were married to Kandyans. In *Wijesinghe* v. *Wijesinghe*[18] it was held that a low-country Sinhalese living in the Kandyan provinces is governed by Roman-Dutch law and does not by reason of his residence in the Kandyan provinces become subject to Kandyan law. In *Narayanee* v. *Muttuswamy*[19] it was held that the immigrant Tamils resident in the Kandyan provinces were not governed by Kandyan law. In *Manikkan* v. *Peter*[20] succession to the property of a Kandyan woman married to a low-country Sinhalese was held to be governed by Kandyan law. A low-country Sinhalese is not a person of a different race or nationality. Therefore Section 2 of the Matrimonial Rights and Inheritance Ordinance, 1876, was held to be not relevant to such a case. Section 2 enacts that when a woman marries a man of a different race or nationality to her own she takes on the race or nationality of her husband, so long as the marriage subsists. This construction of the Ordinance was followed in later cases. In *Kapuruhamy* v. *Appuhamy*[21] the child of a low-country Sinhalese man who had permanently settled in the Kandyan provinces and married a Kandyan woman was held not to be subject to Kandyan law. In *Mudiyanse* v. *Appuhamy*[22] succession to the property of a man resident in the Kandyan provinces, the son of a Kandyan father by a woman of the low-country, was held to be not governed by the Kandyan law. The argument in the case went — such a person is not a Kandyan; it is not necessary to inquire how he may be classified; if he is not a Kandyan, Kandyan law does not apply to him.[23]

The report of a Commission appointed by the Governor[24] referred to the frequency of marriages between Kandyans and non-Kandyans and adopted the unanimous opinion of the witnesses examined to the effect that the *Mudiyanse* case was contrary to the customs of the Kandyans and the generally accepted practice. As a consequence the Kandyan Succession Ordinance, No.23 of 1917, was passed, according to which a person is declared to be subject to Kandyan law if he is the

18. (1891) 9 S.C.C.199.
19. (1894) 3.S.C.R. 125.
20. (1899) 4.N.L.R. 243.
21. (1910) 13 N.L.R. 321.
22. (1913) 16 N.L.R. 117.
23. See also *Punchihamy* v. *Punchihamy* (1915) 18 N.L.R. 294.
24. Sessional Paper, 1 of 1917.

issue of (a) a marriage contracted between a man subject to Kandyan law and domiciled in the Kandyan provinces and a woman not subject to Kandyan law, or (b) a marriage contracted in *binna*[25] between a woman subject to Kandyan law and domiciled in the Kandyan provinces and a man not subject to Kandyan law. It is significant that the term "domicile" which we have noted was held in *Williams* v. *Robertson* to be not relevant in a non-sovereign state, is used in the Ordinance. Thus the law which applies to the issue of inter-marriage between low-country and Kandyan Sinhalese persons is now regulated by the Ordinance and the decisions in some of the cases cited above are purely of historical interest.

Who is a Kandyan for the purpose of the application of Kandyan law?[26] The question as to who is a man or woman who is subject to Kandyan law and domiciled in the Kandyan provinces, is not answered in the Kandyan Succession Ordinance. So we have to ask the question, who is a Kandyan, for the purposes of legal definition. One answer might be "the descendants of the persons living in the Kandyan provinces in 1815" and this would include Tamils and Muslims. Another answer would be to say that a person subject to Kandyan law is one who is a descendant of a Sinhalese subject of the Kandyan king domiciled in the Kandyan provinces before 1815.[27] In tracing descent a person may make use of the Kandyan Succession Ordinance of 1917. But even this does not solve the problem because it is not possible to make such an investigation in each and every case where the question has to be determined.[28] Balasingham[29] says that those families who have long lived rooted to the soil of any provinces where the Kandyan law prevailed and speak the language and follow the customs there prevalent, may be regarded as Kandyans. He goes on to say that in the case of Kandyans who settle outside these provinces their own personal law follows them. But this is merely a presumption and it would not apply where it can be shown that the family has adopted the law of the place of settlement and is hence no longer governed by Kandyan law. Balasingham also goes on to say[30] that the test is how they regard themselves

25. The term *binna* is explained below at pp. 126

26. See further, Hayley, op. cit., pp. 12-36; Modder, op. cit., pp 19-37; Jennings and Tambiah, *The Dominiom of Ceylon* (1952, Stevens, London), pp. 244-48.

27. See Jennings and Tambiah, op. cit., p. 248.

28. See Hayley, op. cit., pp. 35-36 for the logical impossibility of determining who a Kandyan Sinhalese is.

29. K.Balasingham, *Laws of Ceylon* (1929, Sweet and Maxwell, London & H.W. Cave, Colombo) Chapter 15.

30. Balasingham, op. cit., see Chapter 17.

and how they are regarded by others.

What are the Kandyan provinces? In *Robertson's* case the judges expressed the view that there was no precise information as to the exact limits of the Kandyan provinces. The Kandyan Marriage Ordinance of 1870 sets out in its Schedule the areas to which the Ordinance applies. However since this Ordinance was passed, various changes have been made in the boundaries of the different provinces. Hayley says;[31] "Roughly speaking, the Kandyan Kingdom...is contained in the Central, North-Central and North-Western provinces and those of Sabaragamuwa and Uva". The Kandyan Marriage and Divorce Act of 1952 refers to the following provinces; The Central Province, the North-Central Province, the Provinces of Uva and Sabaragamuwa. It leaves out the North-Western Province.

17.c. **The sources of Kandyan law**

The word "source" has a wide and variable legal connotation. In this connection it is sufficient to say that when one refers to a source of law one refers to the place wherein one must look to find the substance of law and rules of law.

The law of the Kandyan provinces was never systematically reduced to writing and up to 1815 there was no code or written work setting out the principles of Kandyan law.[32] In land cases alone written decrees called *sittu*, and if decided by oath *divi sittu*, were delivered to the party who was held to be entitled to the land. These were treasured as title deeds in the family. There were also *sannasas* (royal grants usually written on copper) and talipots (deeds written on palm leaves). These constitute our sole and meagre written evidence of Kandyan law before 1815.

The sources of the ancient Sinhalese law were the usages and customs of the people which were not embodied in writing. Sinhalese law was an oral tradition of which the chiefs and priests were the repositories. But an oral tradition must at any time be an untrustworthy legal guide and this was felt most after 1817 when the chiefs had been stripped of their authority and the administration of law had passed to British civil servants and judges. At the time of the Kandyan Convention, Kandyan law was customary in the strictest sense. It was contained in no book. It was almost untouched by legislation. It acknowledged no judicial decisions. Unlike Muslim law and the *Tesawalamai* which were codified by the Dutch, no code of Kandyan law was ever compiled.

31. Hayley, op. cit., p. 40.

32. See above, article 15 .a.

The sources of ancient Sinhalese law have been discussed.[33] The sources of modern Kandyan law may be said to be: books of authority, decisions of the Board of Commissioners, judicial decisions and statute.

Books of authority on Kandyan law. During the early days of the British regime a few books were written by Englishmen on Kandyan law and these are regarded as sources of Kandyan law. But it must be remembered that they cannot be regarded as sources in a really authoritative sense as for example, a book written by a native person intimately connected with the administration of the law. Sir John D'Oyly was an English civil servant who came to Sri Lanka in 1801 and served the government in various capacities including those of a judge. His main works were *A Sketch of the Constitution of the Kandyan Kingdom* and notes in his diary,[34] compiled between 1810 and 1815. His entire works were not published until 1929, though extracts from them were published in 1831 by the Royal Asiatic Society of Great Britian and in the introduction to the translation of *Nithi Niganduwa*.[35]

Simon Sawers was a servant of the British government in Sri Lanka between 1805 and 1817, and the posts he held included those of a Magistrate and Judicial Commissioner in Kandy. Sawers' *Digest*[36] is an accepted work on Kandyan law. There have been at least two editions, possibly three, of this work. Hayley holds this work in high esteem.[37]

John Armour published in 1842 in the *Ceylon Miscellany* a series of articles on the Grammar of Kandyan Law *(Nithi Niganduwa)*. The later articles were called "Notes on the Kandyan law". No explanation is offerred as to the source of these articles. Hayley[38] thinks that the grammar is a translation of some other work with slight modifications, and the notes are the result of his own labours.

C.J.R. Le Mesurier and T.B.Panabokke published in 1880 what they said was a translation of an earlier Sinhalese work, *Nithi Niganduwa*.[39] in which they give an account of its origin.[40] This Sinhala book is not readily available. They say that a committee of chiefs that assembled under the direction of Sawers had prepared a code of Kandyan law which was arranged as far as possible in a systematic manner by the

33. See above, article 15.a.
34. 1929. Ceylon Government Printer.
35. See below.
36. 1826, published in various editions.
37. See Hayley, op. cit., pp. 14-15.
38. Hayley op. cit., p.15.
39. 1880, Government Printer, Ceylon.
40. See further, Modder, op. cit., Introduction, liv-lviii.

secretary of the committee, a priest of the Malwatte Chapter; that the original copy had been in Armour's possession and passed through various hands and came finally into the hands of Le Mesurier and Panabokke who translated it and published it in 1880.

Modder and Hayley are of opinion that this account of its origin cannot be accepted for many reasons.[41] (i) Though the early portions of Armour's work and *Nithi Niganduwa* are similar, later on there are considerable differences. (ii) The evidence shows that it is the work of a single individual and not of a Committee. (iii) Sawers did assemble the chiefs, but the result of their deliberations were submitted in a memorandum to the Governor. (iv) It does not appear to be the work of a priest. It appears from the subject matter that the author was undoubtedly a lawyer as the organization and scientific classification of the subjects show. The influence of Roman law and Roman-Dutch law is obvious in the mode of presentation adopted. (v) The author was familiar with English as the use of Roman numerals and occasional English words show. (vi) It appears that the author had recourse to the court records of the early British period (1815-20) which were in English and which would have been inaccessible to a priest. Hayley[42] concludes that having compared the handwriting of Armour and that of the writer of *Nithi Niganduwa* the work is that of Armour and the chiefs whom he must have consulted in writing his articles for the *Ceylon Miscellany*.[43]

There are other books on Kandyan law which have not been often cited.[44]

Two recent works which are of value to practitioners and students of the modern law are *Kandyan and Buddhist Ecclesiastical Law* by T.B. Dissanayake and A.B. Colin de Soysa,[45] and *Sinhala Laws and Customs* by H.W.Tambiah.[46] These are the only works which refer to modern cases and statutes.

41. Hayley, op cit., pp. 16-19; Modder, Introduction, Liv-Lviii.

42. Hayley op. cit., p. 18.

44. A.F.C. Solomons, *A. Manual of Kandyan Law* (1898, Times of Ceylon); J.M.Perera, *Armour's Grammar of Kandyan Law*, arranged and digested with a copious Index, Glossary and Appendix (1880 Ceylon Times Company); A.B.C. de Soysa, *Digest of Kandyan Law* (1945, Peramuna Ltd, Maradana, Ceylon); Thomson's *Institutes*, Vol.2 (1866, Trubner and Company, London), pp. 597-693. See also Austin's Reports, which contain cases turning on points of Kandyan Law.

45 .(1963) Dharmasamaya Press.

46. (1968) Lake House Investments Ltd., Colombo.

The treatises of Modder and Hayley contain a wealth of knowledge and information on the life and manners, laws and customs of the Kandyans. But they are not considered so authoritative as the earlier works because they were written in the twentieth century. But from the practical point of view these two works and those by Tambiah and by Dissanayake and Soysa are the most comprehensive. But Modder and Hayley only contain the case law on Kandyan law in the nineteenth century.

The relative merits of the respective works has received some analysis. A decision of a court of law interpreting Kandyan law would always be entitled to paramount consideration. Chief Justice Burnside said; "I cannot regard the *dicta* in Marshall or Armour or even in *Nithi Niganduwa* as sufficient to disturb the solemn decision of a court of law".[47] But where there are no judicial decisions or legislation in point, references are generally made to the text-books. D'Oyly's entire works were not published until a century after he had written them and therefore are not often cited, despite the fact that its antiquity would give it extra authority. Hayley[48] referring to Le Mesurier and Panabokke's book says; "Whatever its origin, its statements coincide with historical evidence and it is an important though neglected source."

The main authorities are the works of Sawers and Armour because in the early days these were the only printed works available in an accessible form. In the event of a conflict between these two, different views have been expressed as to whose opinion should prevail.[49] (i) Sawers' compilation and arrangement is preferable.[50] (ii) But Armour had studied Sinhalese and was more in contact with the people. (iii) Armour's work was later in time and shows the influence of the Roman-Dutch law. (iv) Armour was guided by the judicial records of the sittings of the Board of Commissioners[51] to which he had access. Hayley for reasons (i) and (iii) prefers Sawers. Modder places more reliance on Armour. Judges have expressed a preference for Armour.[52]

47. *Siriya* v. *Kalua* (1889) 9 S.C.C. 45.
48. Hayley op. cit., p. 20.
49. See W.I.Jennings and H.W.Tambiah, *The Dominion of Ceylon* (1952, Stevens, London), pp. 242-43; Modder, op. cit., Lii-Liv; Hayley ,op. cit., pp.15 and 19.
50. Hayley, op. cit., p. 15.
51. See below.
52. *Kershaw* v. *Nicholl, supra; Tittewelle Sangi* v. *Tittewelle Mohotta* (1903) 6 N.L.R. 201.

Decisions of the Board of Commissioners. The decisions of the Board of Commissioners are also regarded as a source of Kandyan law. From the time when the Kandyan provinces were annexed, until 1833, during which time the Kandyan provinces were separately administered, the administration of justice fell upon civil servants who were expected to consult the chiefs. The minutes of the proceedings of the Board setting out the knowledge they gathered from the laws and customs of the people during the years 1816-1833 still exist and contain valuable information on the subject.[53]

Case law. The decisions of the courts setting out on the basis of the above sources the principles of Kandyan law, and interpreting statutes affecting Kandyan law is next to legislation, the most authoritative source. The Sri Lanka courts follow the doctrine of *stare decisis.* [54] Therefore, once a principle of Kandyan law has been authoritatively stated in a judicial decision, it becomes binding according to the rules of *stare decisis.*

Statute law. Statutes which have restated and modified ancient principles are the most important source in the modern law.

17.d. Substance of Kandyan law and the extent of its application today.

Characteristics of Kandyan society.[55] Derrett[56] and Jayasekera[57] are of opinion that Kandyans were obviously a patrilineal society and disagree with Hayley[58] who says that at a remote period the Sinhalese traced their descent through females. Tambiah[59] says that Kandyan society was a bilateral one with an agnatic emphasis.

The customs of the Sinahalese were based on the family system which found expression in two characteristics which mark the whole system of Sinhalese law. The first is the conservation of property in the family. The second is the family socialism of all members of the family, including even those connected to a family by marriage or adoption. The unit was the family and land did not belong to individuals in separate shares. All the members of the family had a right to share in the produce,

53. See Jennings and Tambiah, op. cit., pp. 238-43; Hayley, op. cit., p. 55; Dissanayake and Soysa, op. cit., ch.I.

54. See below, article 23.b. See also above, text at footnote 47.

55. See Modder, op. cit., pp. X-L; J. D. M. Derret in (1963) Vol.xiv, Nos. 3 & 4, University of Ceylon Review, 105-32.

56. Derret op. cit., pp. 124-32.

57. M.L.S.Jayasekera in (1970) Journal of Ceylon Law 84.

58. Hayley op. cit., p. 165.

59. Tambiah op. cit.,pp. 47-79.

the result of their joint labour and all the male members were bound to perform services to the king.

Polygamy and polyandry prevailed from early times and associate marriages where two or more brothers had a common wife was a feature, and the progeny of an associated marriage was the progeny of each and every husband, individually and collectively.

Running through the entire social system was the system of feudal tenure and *rajakariya*.[60]

Slavery and caste were important matters in the social structure and punishments inflicted on wrongdoers depended on caste.

Modification of Kandyan law by legislation.[61] Reference has already been made to Ordinance, 5 of 1852, which introduced the law prevailing in the maritime provinces and also to the Kandyan Succession Ordinance of 1917. The Kandyan Convention of 1815 guaranteed to "all classes of the people the civil rights and immunities according to the laws, institutions and customs established and in force amongst them". It also preserved to high Kandyan officials the rights, privileges and powers of their respective offices. The Proclamation of 1818 restricted the rights and privileges of the chiefs.[62]

A Proclamation of 1820 abolished the Kandyan forms and ceremonies connected with deeds and bequests. The Prevention of Frauds Regulation of 1818 was extended to Kandyans. *Rajakariya* was abolished in 1832.

Polygamy and polyandry were abolished by Ordinance 13 of 1859. The Kandyan law on marriage was to some extent modified and restated by a series of Ordinances such as the Kandyan Marriages Ordinance, 3 of 1870, as amended by Ordinances 9 of 1870, 13 of 1905, 1 of 1919 and 10 of 1922 and the Kandyan Marriages and Removal of Doubts Ordinance 14 of 1909. These Ordinances were repealed and an Act amending and consolidating the Kandyan law on marriage was passed, namely the Kandyan Marriage and Divorce Act 44 of 1952. This enactment consolidates and sets out with modifications the provisions of all the earlier Ordinances. The Act makes detailed provision for the formalities to be observed preparatory to and during the marriage ceremony. The Act became effective from 1st August. 1954, but does not affect the validity of earlier marriages.

60. See Jennings and Tambiah, op. cit., p. 251.

61. See Dissanayake and Soysa, op., cit., pp. 1-8; Modder, op. cit., pp. 52-58. Jennings and Tambiah, op. cit., 243-44, 248-51.

62. See Dissanayake and Soysa, op. cit., pp. 5-6.

Ordinance, 3 of 1870, required registration for the validity of marriages contracted after that date. The Kandyan law relating to marriageable age and as regards the prohibited degrees of marriage have been rendered inoperative and a number of prohibited relationships were set out in the 1952 Act.

Ordinance 5 of 1852, the provisions of which have been discussed in detail,[63] had excluded Europeans, Burghers, and Muslims from the ambit of the Kandyan marriage law. It was held in *Narayanee* v. *Muttuswamy*[64] that Kandyan marriage law did not apply to Tamils. And in *Sophia Hamine* v. *Appuhamy*[65] it was held that it did not apply to low-country Sinhalese resident in the Kandyan provinces.

On the question whether it is imperative that Kandyans must marry under the Kandyan Marriage and Divorce Ordinance or whether they had an option to marry either under the General Marriages Ordinance or the Kandyan Marriage Ordinance, a number of decisions recognized that the Kandyans have an option. This was given legislative sanction in the Kandyan Marriage and Removal of Doubts Ordinance of 1909. As regards property and succession of those who had married under the General Marriages Ordinance, Kandyan law would apply. But if a Kandyan marries under the General Marriages Ordinance he is limited to the grounds of divorce set out in that Ordinance and may not seek divorce under the less stringent provisions of Kandyan law.

The Kandyan law distinguished between two types of marriage, *diga* and *binna*. In the former, which derives from a patriarchal system, the husband conducts his bride to his own house or that of his parents and she becomes, so long as the marriage subsists, a member of his family. The *binna* form of marriage is perhaps older in its origin and derives from a matriarchal system of society in which the husband is brought to the house of the wife or her relations. He takes up his alliance in a subordinate position and can formally be expelled from the family at any time. Whether the marriage was in *binna* or *diga* depends on the intention of the parties. Ordinance, 3 of 1870, provides that an entry in the register of the nature of the marriage as to whether it was *diga* or *binna*, was the best evidence. If it does not appear in the register whether a marriage was originally contracted in *binna* or *diga*, there is a rebuttable presumption in favour of a *diga* marriage. The Kandyan Law (Declaration and Amendment) Ordinance, 39 of 1938, enacted

63. .See above, article 17.b.
64. (1894) 3.S.C.R. 125.
65. (1922) 23 N.L.R. 353.

that a marriage originally contracted in *binna* or *diga* shall continue to be so for all purposes and no change in residence could change the character of the marriage from one to another.

The grounds of divorce in Kandyan law are (i) adultery of the wife; (ii) adultery of the husband coupled with gross cruelty; (iii) complete and continued desertion for seven years; (iv) inability to live happily together (the test being separation from bed and board for one year); (v) mutual-consent. These requirements were set out in Ordinance 3 of 1870, and re-enacted in the Kandyan Marriage and Divorce Act of 1952.

The Kandyan Law Commission was appointed in 1927, but it did not function till 1930. The Commission decided that its work should be directed towards the following ends:-[66] (i) to remove uncertainty in the law as at present understood; (ii) to re-establish those portions of Kandyan law which as a result of judicial interpretation have developed along lines at variance with the spirit of the ancient customs; (iii) to recommend alterations in or additions to the old law where it may appear to be no longer in accordance with modern conditions. As a result of the work of the Commission, the Kandyan Law (Declaration and Amendment) Ordinance, 39 of 1938, was passed which was in turn amended by Ordinance, 25 of 1944. These two Ordinances have settled authoritatively many disputed questions which had arisen regarding Kandyan law which were uncertain under the earlier law.

The Kandyan Marriage and Divorce Act of 1952, is a statute which consolidates with amendments the earlier statute law.

Certain legal enactments which are of general application in the Island also apply to Kandyans. We have already referred to the Prevention of Frauds Ordinance, 1840. The other enactments are the Age of Majority Ordinance, 1865, as amended by Act No. 17 of 1989 which confers majority on a person at 18 and the Wills Ordinance, 1844, which prescribes that a female must be at least 18 and a male at least 20 to make a valid will.

The present-day application of Kandyan law.[67] The extent to which the Kandyan law has been modified is apparent from the discussion above. Kandyan law today has a restricted application and applies in some respects in the law of persons, property and succession. The Kan-

66. See Sessional Paper, 24 of 1935.

67. See Jennings and Tambiah, op. cit., pp. 248-251 and the Kandyan Marriage and Divorce Act. 1952.

dyan law being a customary law was mainly concerned with such matters like slavery, caste, land tenure, law relating to family relations and intestate succession to property.

The law of persons. Slavery and caste were important institutions but after the British annexation, slavery was abolished in 1844 and caste ceased to have any legal significance.

Today marriage and divorce are governed by the Kandyan Marriage and Divorce Act, 1952. This Act prescribes the lawful age of marriage which is 16 for males and 12 for females. It also determines the question of marriages of minors (males below 18 and females below 16) and provides that in such cases the consent of a competent authority is required (a parent or guardian). This Act also states the degree of relationship within which a marriage is prohibited. The Kandyan law adopts a liberal attitude towards divorce. This is evident from the grounds for divorce which are recognized in the Act.[68]

The consequences of marriage are governed by Kandyan law, and under Kandyan law the wife can hold or have separate property and deal with it independently of her husband. In this respect the Kandyan law was more advanced than many other legal systems. However, polygamy and polyandry and other aspects of the Kandyan marriage law have been abolished.[69] Kandyan law distinguishes between two types of marriage, *binna and diga.*[70]

Kandyan law recognized adoption and deal with the succession of adopted children both to the property of their natural parents as well as the property of their adoptive parents. The methods of adoption are dealt with in section 7 and the rights of persons adopted in section 8 of the Kandyan Law (Declaration and Amendment) Ordinance, 39 of 1938. The age of majority however is governed by the Age of Majority Ordinance which is of general application.

The law relating to intestate succession. This is one of the most important aspects of Kandyan law. Intestate succession would depend on the type of property and on the type of marriage contracted. The rules differ according to whether the marriage is in *diga* or in *binna.* The rules of succession are to be found in sections 23 and 24 of the Kandyan Law (Declaration and Amendment) Ordinance of 1938.

The law of property. The forms of property are distinguished according to the method of acquisition. Property is divided into two

68. See above.
69. See above.
70. See above.

categories (i) inherited property or *paraveni* property and (ii) acquired property or *lathimiya.*

Paraveni consists of property acquired by virtue of paternity and which is called *dahimaya,* and property acquired by virtue of maternity and this is known as *vadahimaya.*

Acquired property is known as *lathimiya.* Such property is obtained by way of gift, dowry, purchase or royal grant.

In Kandyan law the theory was that the king was the owner of all lands and every holder of land held such land on the basis of performing certain services to the king or to his immediate overlord. Thus in Kandyan law land granted to a *vihare* or a *devale* by the king is known as *viharagam* or *devalegam.* Similarly, land granted to chiefs in return for certain services was known as *nindagam.* These persons and in stitutions in turn gave out the lands to others for services to be rendered. However, after the British annexation, the Service Tenures Ordinance was passed making it possible to commute services by the payment of a sum of money, if so desired by the tenant.

Donation according to the Kandyan law prior to 1939. It would appear that revocability was the rule and non-revocability was an exception. The view taken by our courts was that as a general rule gifts in Kandyan law were revocable, and before a particular deed is held to be non-revocable, it must be shown that circumstances which constitute non-revocability clearly appear on the face of the deed itself.[71] The Kandyan Law (Declaration and Amendment) Ordinance, 1938, states that a donor may in his lifetime and without the donee's consent revoke any gift except in the following cases:- (i) gifts to temples and priests; (ii) gifts in consideration of marriage; (iii) gifts affecting charitable trusts; (iv) gifts where the right to revoke is renounced.

17.e. Roman-Dutch law applies in the event of a *casus omissus* in the Kandyan laws.

The effect of Section 5 of Ordinance, 5 of 1852,[72] which enacts that the law of the Maritime Provinces will apply in the event of a *casus omissus* in the Kandyan laws, is that where there is no relevant principle of Kandyan law or statute, the law to be resorted to is the Roman Dutch Law.

71. H.W.Tambiah, *Sinhala Laws and Customs* (1968, Lake House Invesuments Ltd. Colombo) p.74.
72. Quoted above at p. 116

18. MUSLIM LAW

18.a. Religion and the state

"In Muslim countries religion and state are indissolubly one and until the very essence of Islam passes away that unity cannot be relaxed."[1] The law of the land is in theory the law of the religion. In Muslim countries, in the formative period of the legal system, canon and civil law were one. Thus it cannot be said in a Muslim country that one person is a great lawyer, another a great theologian and another a great statesman. One man may be all three. Indeed he must have a knowledge of all three, if he is to be great in any one of them.

It is very important in studying Muslim law to distinguish between moral or religious obligations on the one hand and legal obligations on the other. The student of law must distinguish between the concept of *Shariat* and *Fiqh*. *Shariat* means the canon law of Islam and embraces the totality of the Allah's Commandments and subsequent developments of it. It is not law in the modern sense. It is fundamentally a doctrine of duties which contain a guide to ethics. *Fiqh* is also based on the canon law of Islam, but is confined to that part of the canon law which is used to describe the law as a science or a jurisprudence and which a citizen is legally bound to obey. Thus it appears that *Shariat* is a much wider concept.[2]

18.b. The sources of Islamic law

The sources of Muslim law could be said to consist of the Historical sources, the Subsidiary sources, and the Schools of law.

The historical sources. The *Fiqh* or science of Muslim law may be defined as the knowledge of one's rights and obligations derived from the *Quran* or *Sunna* or deduced therefrom or about which the learned have agreed.[3] This definition contains within it the four main sources of Islamic law namely: *Quran*, the *Hadiths*, *Ijma*, and *Qiyas*.

Quran. The *Quran* revealed by the Holy Prophet is the basis of the holy life of the Muslim. The *Quran* does not contain the teaching of the prophet alone but also contains references from the prophets who came before him. It is in its entirety essentially a code of conduct. But it is the main source of Islamic law. It lays down general rules and establishes principles necessary for legislation and formulation of codes appropriate to the state of the people of any period. It must be noted

1. A.A.A. Fyzee, *Outlines of Muhammadan Law* (1964, O.U.P.) p.3.
2. See Fyzee, op cit., pp.22-23.
3. Fyzee, op. cit., pp. 16-30.

that the legal principles laid down in the *Quran* are relatively small. The legal portions must be compared if at all to an act amending the then existing moral customs rather than to a code.

***Hadiths* and *Sunna*.** *Hadiths* consist of, firstly all the words, counsels and oral teachings of the Holy Prophet, and secondly his actions, his works and daily practices, and thirdly his silence on a particular matter which could imply a tacit approval on his part of any individual act committed by his disciples.

Hadiths form the body of what is called the oral law.They are divided by Muslim commentators into two classes (i) the simple sayings or actions of the Holy Prophet based on his own inspired judgment which are called *Hadiths Nabawee*, and (ii) sayings or actions based on divine inspiration which are called *Hadiths Koodsee*. *Hadiths* acquired the force of law after the death of the Holy Prophet. At first they were quoted to decide disputes between disciples and to provide a code of conduct for them. In course of time they became standard judicial determinations applied to all Muslims. The *Imam al Muslim* and the *Imam al Bukhari* are compiled works which contain the *Hadiths*.

The terms *Sunna* and *Hadiths* are often used as synonyms. But Fyzee[4] says that this is inaccurate. The distinction between *Hadiths* in general (i.e. the story of an eye-witness concerning the prophet) and *Sunna* (the practice of the prophet) must be carefully noted. In other words the *Hadiths* constitute the story of a particular occurrence, while *Sunna* is a practice deduced from it, that is the rule of law.

***Ijma* and *Qiyas*.** In the early days when the Muslims were confined to Mecca and Medina the *Quran* and *Hadiths* were sufficient to regulate their affairs. But with the spread of Islam to all parts of the world and with changing conditions and the developments that were taking place, these were found to be inadequate to meet all the circumstances that arose. And this fact gave rise to two other sources of Muslim law namely the *Ijma* and the *Qiyas*.

There is a well-known tradition of the Prophet to the effect "my people will not agree in error." Muslim doctors have formulated a legal doctrine from this which they call *Ijma* or consensus, sometimes referred to as the consensus among the companions of the Prophet. When a number of persons who are learned in the Muslim law and have attained the rank of jurists are agreed on a particular legal question, then their opinion is binding and has the force of law.

4. Fyzee op. cit., pp. 26-28

Qiyas can be defined as the knowledge deduced by way of analogical deduction from the principles laid down in the *Quran* and *Hadiths*. This is an attempt to apply reason and logic based on known religious principles to the problems of a particular time.

Subsidiary sources. The law has been studied, analysed and commented upon for many centuries and most Muslim countries have their own appropriate and authoritative texts. In most Muslim countries the law has been codified and in modern times slight changes have been made in the process of codification to suit modern life and conditions. Another important source of Islamic law in modern times is judicial decisions. Fyzee[5] is of opinion that at least where text writers are clear it is undesirable that the courts should put their own construction on Muslim law, but should merely follow the text writers.

In particular countries the people therein have often retained their peculiar customs in so far as they are not in conflict with the Islamic Civil law. These customs in course of time have become incorporated into the Muslim law of that land. Thus in Sri Lanka there are customs peculiar to the Muslims of Sri Lanka to which our courts have accorded precedence over the general established principles of the Islamic Civil law.[6]

The schools of Muslim law. The followers of Islam are divided in to two main sects; the *Sunnis* and the *Shiahs*. Each of these sects are further divided into a number of schools. The *Sunni* sect is divided into four main schools named after the four great doctors *Haniffa, Malik, Shafi* and *Hanbal*. The four main schools of the *Shiah* sect are the *Ithna, Ashari,* the *Ismailis* and the *Zaydis*. There is a great degree of amity between the four schools of the *Sunni* sect but not between the four schools of the *Shiahs*. The starting points of the basic principles of the two sects are the same and the differences are due to political, economic and cultural reasons.[7] It has been judicially recognized that the Sri Lankan Muslims are *Shaffies*.[8]

18.c. Sources of Muslim law in Sri Lanka

The Islamic civil law is a vast body of jurisprudence, portions of which are applied in Sri Lanka to Muslims as a personal law.

5. Fyzee op.cit., pp.78-80.
6. See below, article 18.c.
7. Fyzee, op. cit., p. 1; see also pp. 31-36.
8. *Mohamedu Cassim* v. *Cassie Lebbe* (1927) 29 N.L.R. 136; *Rabia Umma* v. *Saibu* (1914) 17 N.L.R 338..

The code of Muslim law. This was promulgated in 1806 but it is doubtful whether it was prepared in British times or whether it was a mere translation of a Code compiled by the Dutch. During the Dutch period the Muslims were governed by their own laws and usages. A collection of these laws were published as part of the new Statutes of Batavia. It was called the *Bysondere Wetten aangaande Mooren off Mohametanen en andere Inlandsche Natien* or the special laws relating to Moors or Mohammeddans and other native races.[9] The introduction to this code says that the following civil laws and customs, by which the Mohameddans are guided in respect of disputes arising among them relating to succession, divorce, etc., as collected from Mohammedan rules of law, shall be duly observed.

After the British occupation, the Proclamation of 23rd September, 1799 guaranteed the continuance of the existing laws and usages and the Charter of 1801 expressly provided that Muslims be governed in matters of succession, land, goods and contract by their own laws and usages. On 5th August, 1806, Chief Justice Alexander Johnston submitted to the Governor in Council a code of Muslim Law which the Council resolved should be applied to Muslims. Johnston's memorandum seems to imply that the code was compiled in British times. But according to De Vos[10] the code is nothing but a translation of the *Bysondere Wetten.*

It was contended in a case in Vanderstraaten Reports[11] that Ordinance No. 3 of 1835 which repealed the Charter of 1801 had introduced the Roman-Dutch law as the sole law of the maritime provinces except where altered by statute. Therefore, it had by implication repealed the Muslim law. This argument was rejected on the following grounds. The Mohammedan laws and usages were in force before the acquisition of the colony by the British. Thus they formed part of the laws and institutions of the maritime provinces and they continued by virtue of the rule in *Campbell* v. *Hall* [12] and also by the express provinces in the Proclamation of 1799. It was also pointed out that the law proclaimed to be in force by the 1835 Ordinance, was not the law of Holland but

9. See regarding Dutch influence on Muslim law. T. Nadaraja, "The Administration of Justice in Ceylon under the Dutch Government" in 12 J.C.B.R.A.S. (N.S.) 1,11-12, 56-58. See also F.H.De Vos, *Intestate Succession Among the Moors of Ceylon* (1905, Galle) p. 2.

10. De Vos op.cit.

11. Appendix B xxxi

12. (1774) 1 Cowp. 204.

the laws and institutions that prevailed in Sri Lanka under the Dutch, which included Muslim customary law.

The code in Title 1 dealt with succession, rights of inheritance and other incidents occasioned by death. Title 11 dealt with matrimonial matters. The code has now been superseded by subsequent legislation.

General Principles of Muslim law. The Code has been described in *Rex* v. *Miskin Umma*[13] as a very rough codification of certain portions of a very great system of jurisprudence. There is a presumption that the code is in accordance with the well recognized principles of Muslim law. But where the provisions of the code are clear, effect must be given to them even if they appear to clash with the well established principles of Islamic jurisprudence.[14] But where the provisions of the code are not contrary to the Muslim civil law it is read and interpreted in the light of the general principle of that system of jurisprudence.

But the question arises, where the code is silent and makes no provision on a particular issue, whether reference could be made to general rules of Islamic law. There are two conflicting lines of authority. According to the more authoritative view the Muslim law applicable in Sri Lanka is not the entire civil law but only that portion that was adopted by the Muslims in Sri Lanka. As Schneider, J. observed in *Abdul Rahiman* v. *Ussan Umma*[15] the Muslim law which prevailed in Sri Lanka is so much and no more as has received sanction of custom in Sri Lanka. In the same case Ennis, J. says; "Islamic law applies only so far as it is consistent with the usages of the Mohammedans in Sri Lanka." In an anonymous case[16] it was held that the Mohammedan law of India or other places does not necessarily obtain in Sri Lanka. In *Muttalibu* v. *Hameed*[17] the restriction on the application of the general principles of Islamic law referred to above, were quoted with approval. It was held that *benami* transactions (a principle of contract recognized by Islamic civil law) was not in force in Sri Lanka.

Contrary to *Abdul Rahiman* v. *Ussan Umma*,[18] de Sampayo, J. said in *Narayanen* v. *Saree Umma*[19] that by a long course of judicial practice

13. (1925) 26 N.L.R. 330 at 336.
14. *Bandirala* v. *Mariuma Natchia* (1912) 16 N.L.R. 235.
15. (1916) 19 N.L.R. 175.
16. (1873) Grenier Rept., Part 111, 28.
17. (1950) 52 N.L.R. 97.
18. *Supra*, n.15.
19. (1920) 21 N.L.R. 439.

which cannot be questioned, the original sources of Mohammedan law have always been regarded as authoritative on any point not provided for in the code of 1806. In *Sarifa Umma* v. *Lebbe* [20] it was said that the code did not in any way interfere with the general principles of Muslim law relating to inheritance. But the balance of authority is against the view of de Sampayo, J.

It must be noted that the Muslim law applied in Sri Lanka contains usages and customs peculiar to local Muslims and which do not form a part of the Islamic system of jurisprudence. Examples are the institutions known as *cheedanam* and *kaikooly*.[21] In *Abdul Rahiman* v. *Ussan Umma*[22] the view was taken that ante-nuptial contracts regulating the succession to property after death, although invalid by Mohammedan law, were valid in Sri Lanka, since the practice of the Muslims in Sri Lanka was to follow this practice. Where the code is silent and in cases where no customs can be proved, the Roman-Dutch law will apply.[23]

Statute law. The Muslim Code referred to earlier has been repealed. It was not included in the 1938 copy of the Legislative Enactments of Ceylon. But there are a number of statutes which deal with the branches of law with which the code was concerned. The provisions of the code relating to intestacy, *wakfs*, marriage and divorce were successively repealed by statutes which set out the law on these matters. Two Ordinances were passed in 1929 and 1934, dealing with Muslim Marriage and Divorce. These were replaced by the Muslim Marriage and Divorce Act of 1951, which came into operation in 1954. Another very important piece of legislation was the Muslim Intestate Succession and Wakfs Ordinance of 1931. The Muslim Mosques and Charitable Trusts or Wakfs Act, No. 51 of 1956, redefined and amended the law relating to *wakfs* as stated in Chapter II of the Ordinance of 1931. The Muslim Intestate Succession and Wakfs Ordinance stated that law applicable on intestacy to any Muslim shall be the Muslim law governing the sect to which he belonged. In certain matters it appears to have modified the Muslim law. For example according to Muslim law certain gifts were irrevocable. But the proviso to section 3 makes it clear that all deeds of donation shall be deemed to be revocable unless they are stated to be irrevocable. Further, under the Muslim law of gifts there

20. (1878) 1 S.C.C. 80.
21. See *Zainabu* v. *Usuf* (1936) 38 N.L.R. 37.
22. *Supra*. n. 15.
23. *Narayanen* v. *Saree Umma*, *supra*, n.19; *Weerasekera* v. *Peiris* (1931) 34 N.L.R. 281.

were three essentials. One of them was delivery of possession to the donee. Section 3 makes an important change in that the delivery to the donee should be accepted as evidence of delivery of possession of the property donated.

A question on which conflicting views have been expressed by the Ceylon courts was whether a Muslim could by a deed *inter vivos* make a gift to another, preserving to himself during his lifetime full and unfettered rights to deal with the premises gifted. Such a gift was invalid according to the Muslim law. But the issue was raised whether it could be construed as creating a *fideicommissum* under the Roman-Dutch law. It was held in *Weerasekera* v. *Peiris*[24] that if a Muslim did not intend to make a donation under the Muslim law, but intended to make a gift known to the Roman-Dutch law, the Roman-Dutch law should apply in construing its validity. Section 3 of the Muslim Intestate Succession and Wakfs Ordinance of 1931, gave legislative recognition to the proposition which the Privy Council enunciated in *Weerasekera* v. *Peiris*.

Part II of the Muslim Intestate Succession and Wakfs Ordinance of 1931, provided for the regulation and protection of Wakfs or Muslim charitable trusts. Part II of the Ordinance was found to be unsatisfactory and was therefore repealed and a very comprehensive statute, the Muslim Mosques and Charitable Trusts or Wakfs Act, No. 51 of 1956, now deals with this subject.

The Muslim law relating to marriage and divorce and the consequences of marriage, was until 1951 governed by the Muslim Marriages and Divorce Registration Ordinance of 1937 which repealed a substantive portion of the Muslim Code. The Ordinance was made applicable to all subjects professing Islam. It provided for the appointment of *Quazis* who were given the power to register marriages and divorces. The Ordinance also lays down procedure to be followed in divorce. The view was taken that the Ordinance was not exhaustive and that a Muslim wife can obtain a divorce on grounds not stated in the Ordinance but found in the textbooks, for example on grounds of leprosy.[25] In such an eventuality it is not the *Quazi* but the District Court which has jurisdiction. The Ordinance of 1929 was repealed by the Muslim Marriage and Divorce Act which came into operation in 1951. The Act vested in the *Quazi* exclusive jurisdiction to hear and adjudicate

24. *Supra*, n.23.

25. *Noorul Naleefa* v. *Marikar Hadjiar* (1947) 48 N.L.R. 529.

on applications for divorce on all grounds known to Muslim law. The concurrent jurisdiction of the civil courts was thus abolished.

The Act prohibits the appearance of lawyers in *Quazi* Courts. It makes provision for Muslim marriages and divorces and *Quazis* are given wide powers of adjudicating upon claims between husbands and wives. An appeal lies from the decision of the *Quazi* and then to a Board of *Quazis* and from them finally to the Supreme Court, with the leave of the Supreme Court.

18.d. **Applicability of Muslim law in Sri Lanka**

De Sampayo, J. in *Khan* v. *Maricar*[26] held that Muslim law is applicable to all Muslims, and immigrants from India known as Coast Moors and also to Afghans. The factor which governs the application of Muslim law is not whether a person belongs to a particular race or community but whether or not he professes the Islamic faith. In the Indian case of *Narantakath* v. *Parakkat*[27] it was laid down that the essential doctrine of Islam is that there is one God and that Mohammed is the prophet. This is the indispensable minimum. A belief short of this is not Islam and a belief in excess is for the law courts at least a redundancy. A law court is not concerned with peculiarities in belief whether of orthodoxy or heterodoxy, so long as the minimum belief exists. Muslim law applies to all Muslims, whether they are so by birth or conversion.

Muslim by birth. A person born of Muslim parents is presumed to be a Muslim. Where only one of the parents is a Muslim the presumption would apply, perhaps with less force, if the father was a Muslim. Being presumptions these propositions can always be rebutted by leading contrary evidence.

Muslim by conversion. A person could become subject to Muslim law by conversion and Muslim law is applicable immediately on conversion to Islam. It is a common saying that the thought of man is not triable and since the profession of Islam as the profession of any other religion depends on belief, a *formal* profession *prima facie* is sufficient and a court would not require a person to prove affirmatively that his belief is genuine, unless there is evidence to the contrary. But evidence may always be led to show that the conversion is not genuine–for example, becoming a Muslim for the purpose of marrying a second time while the first wife is alive.[28] If evidence is led to show that the

26. 16.N.L.R. 425.
27. (1922) 45 Madras 986.
28. *Skinner* v. *Orde* (1871) 14 M.L.A. 309.

conversion is not genuine, the burden shifts to the person who allegedly professes it to rebut the evidence. No hard and fast rule can be laid down. Circumcision or observance of Mohammedan ceremonies are relevant facts. Genuine or otherwise conversion is a question of fact for the courts to decide on the evidence before them.[29] A Sri Lankan case in point is *Queen* v. *Obeysekera*,[30] where a man who had become a Muslim and married a second time was convicted of bigamy under the Penal Code. The court did not proceed according to any definite principles and cited no foreign authorities on the question of the applicability of Muslim law. Clarence, J. and Dias, J. emphasized the fact that the man bore a Sinhalese name and had gone through a marriage ceremony (before a Registrar of Marriages) not used by persons professing Islam. Clarence, J.also said that if a man be a Sinhalese the presumption, until the contrary be shown, is that he is not a man professing Islam. No authority was cited for this statement. Clarence, J. concluded: "I find no suggestion throughout the evidence of the defendant having pronounced himself as professing the Mohameddan religion."[31] According to Dias, J. if a Sinhalese man claims that he professes the Islamic faith the onus is on him to prove it.[32] It might appear that this case is contrary to principles set out in Fyzee, but it might be possible to reconcile the decision with the principle stated above by saying that, in the first instance, there was not sufficient evidence of the profession of Islam to raise the presumption.

A similar issue arose in *Reid* v. *A..G*[33] where a man had contracted a marriage according to Muslim rites. He had as a Roman Catholic contracted an earlier marriage and his first wife was still alive. He was charged with the offence of bigamy. He pleaded that he was a convert to Islam and that hence his second marriage was a valid one. The accused and his second wife became converts to Islam on 13th June, 1959, and they registered their marriage on the 16th July; 1959. Basnayake. C.J. said that although the proximity of the date of the second marriage to the date of conversion gave room for the suspicion that the change of faith was with a view to overcome section 18 of the Marriage (General) Registration Ordinance, No. 19 of 1917, such circumstances did not affect the validity of the second marriage. Section

29. See Fyzee, op. cit., pp. 58-62.
30. (1889) 9 S.C.C. 11.
31. ibid., p.12.
32. See also Burnside, C.J.'s dissenting judgment.
33. (1963) 65 N.L.R. 97.

18 of the Marriage (General) Registration Ordinance enacts: "No marriage shall be valid where either of the parties thereto shall have contracted a prior marriage which shall not have been legally dissolved or declared void." Basnayake, C.J. referred to the evidence of the Muslim priest who had testified to the conversion. The inference that may be drawn is that if there is such a conversion the court will not go into the circumstances that led to such conversion.

In *A.G.* v. *Reid*[34] the above decision was affirmed by the Privy Council. Before the Privy Council the inherent right of a person to change his religion or personal law was asserted. Section 64 of the Marriage (General) Registration Ordinance defines marriage as any marriage except marriages contracted under the Kandyan Marriage and Diyorce legislation and marriages contracted between persons professing Islam. Since in *Reid*'s case his second marriage was held to have been a marriage contracted between persons professing Islam, it did not fall within the definition of marriage in section 64 and was therefore not invalid by virtue of section 18 (quoted above).[35] This case may be regarded as deciding that in relation to Sri Lanka, the principles stated by Fyzee (discussed above) and also in *Queen* v. *Obeysekere* must be modified.

In *Katchi Mohamed v. Benedict* [36] the accused was a Muslim married to a Muslim wife according to Muslim rites. Subsequently he became a Catholic and married a Catholic woman while his first marriage was still subsisting. It was held that he was guilty of bigamy because the second marriage came within the definition of marriage in section 64 of the Ordinance and was therefore an invalid marriage under section 18.

The effect of a change of religion after marriage according to Mulla[37] is that "It is an open question whether conversion to Mohammedanism made honestly after marriage with the assent of both spouses and without any intent to commit a fraud on the law has the effect of altering rights incidental to marriage".

34. (1964) 67 N.L.R. 25.
35. See comment on this case by P.R.H.Webb in (1965) 1 C.L.Q. 992.
36. (1961) 63 N.L.R. 505.
37. D.F.Mulla, *Principles of Mahomedan Law* (1922, N.M. Tripathi & Co., Bombay) .p.8.

19. TESAWALAMAI

19. a. The origin and history of the Tesawalamai

The word *Tesawalamai* means the"customs of the land". The origin of the *Tesawalamai* can be traced back to the customs and usages of the Dravidians from the Malabar coast of India. Mayne has shown that these Dravidian usages were not based on Hindu law but that on the other hand many basic principles in Hindu law are based on Dravidian institutions.[1]

The traditional historical accounts speak of two waves of immigrants from India who colonized Jaffna. The first wave of Tamil immigrants came from the Malabar districts. The customs and usages of the Malabars were derived from the *Marumakattayam* law which constitutes the main basis and groundwork of the *Tesawalamai. Marumakattayam* law is one which was administered to the members of a matrilineal system of society. The second wave of colonists were from the Coromondel coast where a patrilineal system prevailed and they brought with them their own customs and usages which modified and altered to some extent the existing legal and social system set up by the Malabar immigrants. Thus in the *Tesawalamai* we find a curious blend of principles governing a patriarchal as well as a matriarchal system of society existing side by side.[2]

The influence of other legal systems on the *Tesawalamai*. It is a well-known phenomenon that customary laws change when they come into contact with foreign systems of law. Hindu law had not influenced the usages and customs which the Malabars brought with them to Sri Lanka from their native land. But Hindu law influenced the development of the *Tesawalamai* after it had been planted in the soil of Jaffna. The consequent establishment of a partriarchal system of society after the advent of the immigrants from the Coromondel coast, was followed by the incorporation of principles of Hindu law. In course of time Hindu law was administered in the event of a *casus omissus*, as it was a mature and well developed system of law.

The influence of Muslim law may be said to be felt in the *Tesawalamai* law of pre-emption. According to the law of pre- emption when property is owned by co-owners and one co-owner wishes to sell the property

1. See J.D.Mayne, *Hindu Law and Usage*, (1938, Madras), p.41; H.W.Tambiah, *Laws and Customs of the Tamils of Jaffna* (1949, Times of Ceylon) pp.5-6.
2. Tambiah, op. cit., pp. 12-13.

he should first offer it to the other co-owners. But Tambiah[3] disagrees and says that the law of pre-emption was brought to Sri Lanka by the Malabar immigrants.

Sinhalese law has in no way influenced the *Tesawalamai*. The Portuguese made changes in the *Tesawalamai*. This is clear from a reference in the *Tesawalamai* Code (compiled in Dutch times) to the many changes made during the time of the Portuguese.

The Dutch altered the *Tesawalamai* in two ways. They changed it by express modification, in that while codifying the *Tesawalamai* they incorporated therein certain changes made on the orders of the Dutch Commander Bloom. The Dutch also applied the Roman-Dutch law in certain cases thereby modifying the *Tesawalamai*. The Commander of Jaffna in his instructions to his successor in 1665 wrote: "The natives are governed according to the customs of the country if they are clear and reasonable, otherwise according to our laws."

The codification of the *Tesawalamai*. The Portuguese when they governed Jaffna applied the *Tesawalamai* as they found it without attempting to codify it. During the time of the Dutch, the Commander of Jaffna, Zwardarcoon, in 1697 stated the necessity for the codification of the *Tesawalamai* because there were no clear principles for the proper administration of justice. Acting on this suggestion, Governor Simons entrusted the task of collecting and codifying to Claas Isaacsz. This work was completed in 1707. The law which was codified was not the original *Tesawalamai* but incorporated the modifications made in Portuguese and Dutch times. The code which was in Dutch was translated into Tamil by Jan Pirus. The translation was next circulated among the Malabar Mudaliyars in order to ascertain whether it set out correctly the customs and usages of the Tamils. The code was in the main approved by the Mudaliyars and the translation was confirmed. Certain minor modifications suggested by the Mudaliyars were rejected. Thereafter it was approved by the Dutch Governor and was applied in civil disputes from 1707 to 1806.[4]

By the proclamation of 23rd September, 1799, the continued operation of the *Tesawalamai* was guaranteed. The position was further clarified by the regulation of 9th December, 1806, which enacted that, "The *Thase Walema* or the Customs of the Malabar Inhabitants of the Province of Jaffna as collected by the order of Governor Simons in 1806 and shall be considered to be in full force". Sir Alexander Johnston, a Chief

3. Tambiah, op. cit.,pp .22-23.
4. See Tambiah, op. cit., pp, .27-30.

Justice in the early British period, had the code translated into English with marginal notes and caused copies to be sent to all courts and judges. From 1806 the English translation has been regarded as authoritative. According to the Regulation of 1806 it was the Dutch Code which was prepared by Isaacsz which was given the force of law. This is important since the English translation contains many errors. In *Sabapathi* v. *Sivaprakasam*[5] it was held that the English translation and not the Dutch original was authoritative. After the publication of the Revised Edition of the Legislative Enactments in 1938 there can be no doubt that the English translation must be treated as law, since this is incorporated in the Enactment.[6]

The influence of English law is noticeable. English principles have influenced legislation such as the Jaffna Matrimonial Rights and Inheritance Ordinance of 1911. Our judges trained in the English system have often referred to English law in solving many problems of the *Tesawalamai*.

The Jaffna Matrimonial Rights and Inheritance Ordinance, No.1 of 1911, applies to the Tamils who are governed by the *Tesawalamai*. It repeals so much of the provisions of the *Tesawalamai* as are inconsistent with it, and it re-enacts with material alterations the whole law relating to Matrimonial Rights and Inheritance. Two other statutes affect the *Tesawalamai* fundamentally; the Jaffna Matrimonial Rights and Inheritance (Amendment) Ordinance, No. 58 of 1947, and the *Tesawalamai* Pre-emption Ordinance of 1947. Other provisions of the *Tesawalamai* have been altered by statutes which apply throughout the country without exception–such as the Prescription Ordinance of 1871, the Partition Ordinance of 1863 and the Partition Act of 1951, the Pawnbrokers Ordinances of 1893 and 1942 and the Frauds Ordinance of 1840.

There are many obsolete provisions in the *Tesawalamai* code. The *Tesawalamai* Commission, 1930, recommended[7] that those sections which were obviously obsolete should be repealed by statute, but due to the opposition to these proposals by the Acting Legal Draftsman at that time[8] no statute repealing the obsolete provisions was passed. The code was included in the 1938 Edition of the Legislative Enactments

5. (1905) 8 N.L.R. 62.
6. Tambiah, op, .cit., pp.35-36.
7. Sessional Paper, 3 of 1930, pp.10-11.
8. For reasons, see Jennings and Tambiah, *Dominion of Ceylon* (1952, Stevens) p.266.

without deletion of the obsolete provisions though the editor was given wide powers to delete obsolete statutory provisions.

In the absence of statutory repeal the question arises whether the judges have the power to declare obsolete a provision of the code (which is a statutory enactment). According to the principles of the Roman-Dutch law, but not according to English law, an obsolete statutory provision can be disregarded by a court of law.[9]

19.b. **Sources of the *Tesawalamai***

The sources of the *Tesawalamai* are to be found in the code collected by Isaacsz and translated into English by Johnston and in the Ordinances affecting it, the decisions of our courts interpreting the *Tesawalamai*, the statute law and the customary laws of the people. Tambiah[10] also refers to the "general principles" of the *Tesawalamai* as being a source of law. The code and subsequent statutory modifications have been discussed above at 19a. The Supreme Court interpreted the *Tesawalamai* Code and statute law on the subject in a number of cases and has built up a body of case law in which is enshrined many principles and concepts of the *Tesawalamai*.

All the customs and usages of the Tamils were not embodied in the code of 1707. Regulation 18 of 1806 states that the customary usages collected by Governor Simons should be in force. It must be noted that it did not state that other customary usages not stated in the *Tesawalamai* Code cannot be proved. A custom which satisfied certain conditions is recognized as an independent source of law in the legal system.[11] As such a custom of the Tamils could be proved before a court of law. Thus in *Vineditaar Wayrewenadan* v. *Vinasi*[12], and in *Welayder Cander* v. *Ramasamy*[13] the Supreme Court sent back the case to the District Court for further evidence to be led as to the existence of customs, and so that the opinion of expert Tamil scholars might be solicited. But in *Theivar* v. *Valliam*[14] this practice was disapproved of since the experts may show partiality towards the party who had asked for their opinion.

9. But see *Nalliah* v. *Ponnamah* (1920) 22 N.L.R. 198: *Kandar* v. *Sinnachipillai* (1934) 36 N.L.R. 362.
10. Tambiah, op. cit., pp. 42-43.
11. See below, article 25.
12. (1852) Muthukisna Reports on the *Thesawalame* 70; Tambiah, op. cit.,p.43.
13. (1838) Muthukisna Reports on the *Thesawalame* 298.
14. (1905) 4 Tambiah Reports 116.

Tambiah[15] also says that the customs contrary to the Code could be upheld. But the validity of this proposition may be doubted for the reasons stated above.

Where there is no provision in the *Tesawalamai* then resort may be had to the general principles of the *Tesawalamai.*[16] But it is not quite clear what is meant by this rather vague term.

The Roman-Dutch law applies in the absence of any provision in the above–mentioned sources, including according to *Chanmugam* v. *Kandiah*[17] the inability to deduce a general principle of the *Tesawalamai.* Hindu law was originally applied in the event of a *casus omissus* and this practice according to Chief Justice Johnston was continued in British times even up to the time of his visit to Jaffna. But our judges in course of time applied the Roman-Dutch law.The Jaffna Matrimonial Rights and Inheritance Ordinance which re-stated and altered the *Tesawalamai* on certain topics, provided that where the Ordinance was silent the Roman-Dutch law of North Holland should apply.

19.c. **The applicability of the *Tesawalamai***

The *Tesawalamai* applies to all persons who come within the description of the Malabar inhabitants of the province of Jaffna. But certain sections of the *Tesawalamai* apply to lands in the Northern Province irrespective of the race or nationality of the owner.[18]These sections are territorial in their application, but are however limited to certain branches of the law of property, viz. to a particular kind of mortgage (*otti*) and servitudes.

Section 3 of the *Tesawalamai* Code enacts that it applies to all questions between Malabar inhabitants of Jaffna or wherein such a person is a defendant. An analysis of this section shows that a person to whom this part applies must be (i) a Malabar (ii) an inhabitant of the province of Jaffna.

(i) **Malabar.** The word "Malabar" has been held to be synonymous with "Tamil". lsaacsz in his preface to the Dutch Code refers to the "Malabar or Tamil lnhabitants". lts application is not confined to those immigrants from the Malabar coast but includes Tamils from wherever they come. In *Chetty* v. *Chetty*[19] it was held that the word "Malabar"

15. Tambiah op. cit., pp. 40-46.
16. *Chanmugam* v. *Kandiah* (1921) 23 N.L.R. 221.
17.ibid.
18. See article 19.d.
19. (1935) 37 N.L.R. 253

means 'Tamil' and that the Vanniya Chetties who could be regarded as a particular caste of the Tamils were governed by the *Tesawalamai.*

The *Tesawalamai* applies not only to Tamil inhabitants of Jaffna in 1806 and their descendants, but to any Tamils who have come or who may come at any time to settle down in Jaffna and who acquire a Jaffna inhabitancy. In *Tharmalingam Chetty* v. *Arunasalam Chettiar*[20] it was held that a person whose father had come from Ramnad in South India long after 1806 was governed by the *Tesawalamai.*

In *Savundranayagam* v. *Savundranayagam*[21] the issue arose whether Savundranayagam was subject to the *Tesawalamai.* His parents were Colombo Chetties, born in Colombo, but they had later settled down in Jaffna. It appears that Savundranayagam was a lawyer who had practised at Trichinipoly in South India where he died. Wood Renton, J. held that he was not subject to the *Tesawalamai.* This decision must be restricted to its facts and regarded as turning on the fact that the Colombo Chetty did not have a Jaffna inhabitancy, and not on the basis that he did not come within the category of Malabar. As Tambiah points out on the authority of Paul Peiris, the Colombo Chetties are Tamils, if they retain the customs, traditions and language of the Tamils. Thus if a particular Colombo Chetty does not mix with the other races so as to lose his identity he should be regarded as a Tamil.[22] If he has a Jaffna inhabitancy he will be governed by the *Tesawalamai.* Whether or not in any particular case a Colombo Chetty is a Tamil is a matter of fact which must be decided by the courts.

(ii) **Inhabitancy.** "The *Tesawalamai* applies to Tamils with a Ceylon domicile and a Jaffna inhabitancy."[23] The term "inhabitancy" has no fixed legal meaning. In *Velupillai* v. *Sivakamipillai*[24] Wood Renton, C.J.thought that the word "inhabitancy" applies to a person who had acquired a permanent residence in the nature of a domicile in Jaffna. Middleton, J. in the same case said:[25] "One who has his permanent home in Jaffna." These definitions which refer to concepts such as home, domicile and residence bring in terms more difficult than in-

20. (1944) 45 N.L.R. 414 at 416-17.
21 .(1917) 20 N.L.R. 274.
22. See Tambiah, op. cit., pp. 56-59. See also *Chetty* v. *Chetty, supra* n.19, discussed above.
23. Soertsz, J. in *Tharmalingam Chetty* v. *Arunasalam Chettiar, supra* n. 20.
24. (1910) 13 N.L.R. 74, 79.
25. ibid, p. 76.

habitant.[26] The meaning attached to the word "inhabitant" in ordinary usage as construed in the light of decided cases might be a better way of approaching the problem.

It is undesirable to lay down any general rule to the circumstances which would suffice to establish the existence of an inhabitancy. Each case must be decided on its own facts. There may be on the one hand residence in Jaffna which would not suffice to make a Tamil an inhabitant of the Province. On the other hand residence elsewhere even for protracted periods (employment outside Jaffna) will not deprive him of that character. The mere fact that a man is of Jaffna Tamil parentage though relevant is not conclusive. In *King* v. *Perumal*[27] it was held that a Hindu Tamil born in India and settled in the Central province is not governed by the *Tesawalamai*. In *Spencer* v. *Rajaratnam*[28] a Jaffna Tamil had left Jaffna when very young and settled down and married a person in Colombo. He was held not to be governed by the *Tesawalamai*. In *Fernando* v. *Proctor*[29] a Mrs P. who was descended from Jaffna Tamil parents and had settled down in Chilaw was held to be not subject to the *Tesawalamai*. In *Somasunderam* v. *Charavanamuthu*[30] a Jaffna Tamil born and educated in Colombo, was living in Colombo for the purpose of practising his profession. He had settled down in Colombo and considered it his home. His parents had a permanent house in Jaffna. He had married in Jaffna but never kept house there. It was held that he was not an inhabitant of Jaffna. The crucial date of inhabitancy of married persons is the date of marriage. In *Velupillai* v. *Sivakamipillai*[31] it was said *obiter* if a person is governed by the *Tesawalamai* at the time of marriage he cannot change his inhabitancy later to the detriment of his wife. For unmarried persons the conclusive date would be the time when the particular dispute arises. According to section 3 of the Jaffna Matrimonial Rights and Inheritance Ordinance the law applicable to the wife at the time of marriage exists till the end of the marriage.

26. For a discussion of the meaning of these terms and their relation to each other, see Tambiah, op. cit., pp. 60-61.
27. (1911) 14 N.L.R. 496.
28. (1913) 16 N.L.R 321.
29. (1909) 12 N.L.R. 309.
30. (1942) 44 N.L.R. 1.
31. (1910) 13 N.L.R 74.

A Tamil who has not got a Sri Lankan domicile cannot by settling in Jaffna acquire a Jaffna inhabitancy.[32]

(iii) **The Province of Jaffna.** During the Dutch period the term "Jaffnapatam" applied only to the Jaffna peninsula and the islands. But as a result of interpretation by our courts the "Province of Jaffna" was extended to a much wider area almost coinciding with the Northern Province of modern times. The *Tesawalamai* has been applied to Tamils of the Mannar District.[33] But it does not apply to the Tamils of Trincomalee or Batticaloa.[34]

Marriage between Tamils subject to the *Tesawalamai* and those not subject to it. Section 2[35] of the Matrimonial Rights and Inheritance Ordinance, 1876 applies when a Tamil marries a non-Tamil. But a marriage between a Tamil subject to the *Tesawalamai* and a Tamil not subject to the *Tesawalamai* is not a marriage between persons of a different race or nationality.[36] Section 3 of the Jaffna Matrimonial Rights and Inheritance Ordinance clarifies the position. According to section 3 (1) whenever a woman to whom the *Tesawalamai* applies marries a man to whom the *Tesawalamai* does not apply, she shall not during the subsistence of the marriage be governed by the *Tesawalamai*. Section 3 (2) provides that whenever a woman to whom the *Tesawalamai* does not apply, marries a man to whom the *Tesawalamai* applies, she shall during the subsistence of the marriage be subject to the *Tesawalamai*.

The extent to which the *Tesawalamai* could be considered to be a personal law. The *Tesawalamai* is not a personal law in the real sense of the term. The application of a personal law depends on the existence of a personal link among a class of persons who are subject to a single system of law. But unlike Muslim law which applies to all who answer to the description of Muslims, Part I of the *Tesawalamai* applies to a class of persons namely Tamils, who are bound together by a personal link, but who must in addition be resident in a particular territory. It is thus a personal law in some respects, with a territorial limitation.

Persons subject to the *Tesawalamai* could change the law by which they are governed by changing their inhabitancy. All persons subject

32. K.Balasingham, *Law of Persons*, Vol. I (1929, Caves, Colombo, and Sweet and Maxwell, London), p. 123.
33. *Marisal v. Savari* (1878) 1 S.C.C.9.
34. *Wellapulla* v. *Siambelem* (1872-76) Ram Rep. 114.
35. Quoted above, article 17 .b. at p. 115.
36. *Fernando* v. *Proctor* (1909) 12 N.L.R. 309.

to Kandyan law however cannot rid themselves of its incidence except by marriage.

> Not being the customs of a race or religion common to all persons of that race or religion in the island, Part I of *Tesawalamai* cannot properly be called a personal law, but an exceptional custom imposed in the province of Jaffna and in force there primarily among the Tamils who can be said to be inhabitants of that province.[37]

Does the *Tesawalamai* apply to property oustide Jaffna? A personal law will apply to the property of a person subject to it wherever it is situated within the limits of his native country. The question whether the *Tesawalamai* applies to property situated outside Jaffna but belonging to persons subject to the *Tesawalamai* was fully considered in[38] *Seelachchy* v. *Visuvanathan*. Bertram, C.J. after citing Voet came to the conclusion that the *Tesawalamai* applies as far as the mutual proprietory rights of husband and wife are concerned. But he did not wish to give any opinion on the question of inheritance. The Jaffna Matrimonial Rights and Inheritance (Amendment) Ordinance, No.57 of 1947, amending section 3 of the Jaffna Matrimonial Rights and Inheritance Ordinance, No. 1 of 1911, clarifies the position. It makes the *Tesawalamai* applicable to all properties of a person subject to it, whether situated in Jaffna or any other part of Sri Lanka.

19.d. The *Tesawalamai* as a territorial law

Certain provisions of the *Tesawalamai* apply to all property situated in the Northern provinces in respect of certain limited aspects of the law of property, viz, *otti* mortgages and *Tesawalamai* servitudes. These sections are territorial in their application.

19.e. The contents of *Tesawalamai*

A system of law by which a people are governed must necessarily be based on the form and structure of the society in which it applies. As in most underdeveloped societies family relations and succession and certain elementary forms of contract are the main subjects governed by the *Tesawalamai*.

The customs regulating family relations deal with slavery, caste, marriage ceremonies and the consequences of marriage. The greater part of the *Tesawalamai* relates to the law of succession and many detailed rules dealing with this subject are enunciated. Testate succession was unknown to the early Tamils.[39] But as a substitute the institute of adop-

37. Tambiah, op. cit., p. 33.
38. (1919) 23 N.L.R 97.
39. See Tambiah, op. cit, pp. 273-82.

tion was resorted to. The law of the *Tesawalamai* relating to marriage and inheritance has been consolidated and amended by Ordinance, No.1 of 1911. The *Tesawalamai* also referred to the law of obligations, not in the way in which the modern law deals with it, but limited to certain types of contracts which were in everyday use such as pawn, letting and hiring of animals and land, purchase and sale, etc. The law of pre-emption in regard to land situated within Jaffna has been amended and consolidated by the Tesawalamai Pre-emption Ordinance, No. 59 of 1947. The *Tesawalamai* distinguishes between various kinds of property. The main kinds are *mudusam* or inherited property, *cheedanam* or dowry (property brought by the wife) and *thediathetam* or property which was acquired for valuable consideration by either of the spouses during the subsistence of their marriage.

20. MUKKUVAR LAW

The Mukkuvar were a fishercaste who migrated form the western coast of India and settled down in Sri Lanka, mainly in Puttalam, Kalpitiya, Jaffna and Batticaloa.[1] The Mukkuvar of Puttalam had abandoned the native customs and usages of their caste long before 1796. The *Mukkuvar* of Jaffna in course of time came to be subject to the *Tesawalamai.* Apparently a compilation of the laws of the *Mukkuvar* of Puttalam was made in Dutch times.[2] The *Mukkuvar* of Batticaloa retained their distinct customs and usages relating to intestate succession and these came to be known as Mukkuvar law.

There is some evidence that the application of *Mukkuvar* law to the Tamils of Batticaloa was continued in accordance with the terms of the Proclamation of 1799.[3] It appears that the Mukkuvar law is no longer applicable. The Matrimonial Rights and Inheritance Ordinance of 1876 which was stated to apply all over Sri Lanka and regulated the law of intestate succession, exempted from its operation only Kandyan law, *Tesawalamai* and Muslim law. Subject to these exceptions it was enacted that the Ordinance applied generally to all persons in Sri Lanka. It was argued in *Kandepody* v. *Pulleyan*[4] that Mukkuvar principles regarding succession were inapplicable in Sri Lanka in view of the Ordinance of 1876. The judges found it unnecessary to adjudicate

1. See further T. Nadaraja, "The Administration of Justice in Ceylon under the Dutch Government" in 12 J.C.B.R.A.S. (N.S) pp. 6 and 42.
2. See Nadaraja, op. cit., C.G.Weeramantry, *The Law of Contracts* (1967, Colombo), p.35.
3. See above, article 16.
4. (1909) 1 Current Law Reports 81 at 83-84.

upon this point but it does seem that the Mukkuvar law has been abrogated by this statute. There are also *dicta* which indicate that Mukkuvar law is obsolete.[5]

5. *Sethirapillai* v. *Nagamuttu* (1916) 2.C.W.R. 309; *Vyramuttu* v. *Mootatamby* (1921) 23 N.L.R 1. Jennings and Tambiah, *Dominion of Ceylon* (1952.Stevens, London,) p.279. For a statement of the principles of Mukkuvar Law, see C. Brito, *The Rules of Succession among the Mukkuvars of Ceylon* (1876. H.D. Gabriel, Colombo).

CHAPTER V

THE SOURCES OF LAW

21. THE TERM "SOURCES"

The term "sources" has been defined and redefined by successive generations of writers on jurisprudence.[1] In its broadest sense it can be extended to anything which accounts for the existence of a legal rule from the causal point of view or to any place in which the law is stated. The former would include rules of morality, religion, ideas of justice and historical factors which have influenced the development of law, and the latter refers to textbooks wherein writers have attempted to set out legal principles.

But in this context and in a technical or strictly legal sense a "source of law" could be said to be the quarter (source) from which a rule derives its validity as a rule of law. The sources of law in this sense are not identical in all legal systems. The recognized sources of law in modern legal systems are legislation, custom and judicial precedent. The opinions of writers and equity are more important in some legal traditions. Religion is not regarded as a source of law by most modern writers. But it was a significant source in the past and its influence cannot be entirely discounted even today.

The sources of law in Sri Lanka are unique in that they have been influenced by the two great legal traditions–the common law system based on the English law and the civil law system from which the Roman-Dutch law is derived, and also contain elements from the legal systems of the East–Muslim law, Hindu law, Sinhalese law and *Tesawalamai*.[2]

The weight attached to the different sources of law may vary from country to country. Legislation today is the most important source of law. Some centuries ago it would have been custom. The opinions of writers are a significant source of law in Europe and those countries where the civil law system prevails, but is not so important in England and other common law countries. The weight attached to the decisions of courts varies considerably even in the United Kingdom and the United States though both are what may be termed common law jurisdictions where the doctrine of judicial precedent operates.

1. See further on Sources of Law, R. W. M. Dias, *Jurisprudence* (1964, Butterworths, London), pp.21-28.

2. See Acts of the Imperial Parliament Applicable to Ceylon (1914, The Government Printer, Colombo).

22. LEGISLATION

Historically, legislation is a source of law which appears relatively late in the development of society. In modern times, it is by far the most important source of law. The statutes which are law in Sri Lanka may be classified as follows:- (i) legislation of the United Kingdom Parliament; (ii) prerogative instruments; (iii) statutory instruments; (iv) legislation enacted by local legislatures (v) delegated legislation. The terms statute and legislation are sometimes used synonymously to include (i) to (v). But legislation may be used in a narrower and more technical sense to include (i), (iv) and (v) above and may be defined in this sense as "the enactment of the legislature". The legislature is the branch of government which, subject to constitutional limitations, has the function and power to make law. Legislation emanating from the supreme legislative authority takes precedence over all other forms of law, and subject to constitutional safeguards, can repeal any existing law. When there is a conflict between such legislation and any other type of law, legislation takes precedence.

(i) **Acts of the United Kingdom Parliament.** Acts of the United Kingdom Parliament which were extended to the former colony of Ceylon consist of two types: (a) imperial acts of the Parliament which extend to all colonies, and (b) acts specially enacted for Ceylon. The only act enacted specially for Ceylon was the Ceylon Independence Act of 1947. With this exception all United Kingdom legislation falls within the former category and consists of legislation which was applied to Ceylon in common with other British colonies and possessions between 1796 and 1947. An example of such an act is the Colonial Laws Validity Act of 1865.[1] This Act does not, however, apply after 1948. Other examples are the Air Navigation Acts of 1920 and 1947, the Copyright Act of 1911, and the Extradition Acts of 1870 and 1873[2] (Now repealed).

After Independence, legislation of the United Kingdom Parliament has not been extended to Sri Lanka. The Ceylon Independence Act provided that certain Acts which were extended to Ceylon when Ceylon was a colony would not after 4th February, 1948, extend to Ceylon. However such United Kingdom legislation which was not repealed by

1. See, W.I. Jennings and H.W. Tambiah, *The Dominion of Ceylon, The Development of its Laws and Constitution* (1952, Stevens Ltd, London) p. 57. See further Wade and Phillips, *Constitutional Law* (1965, Longmans, London) pp.435-37.
2. See *Acts of the Imperial Parliament Applicable to Ceylon* (1914, The Government Printer, Colombo).

the constitutional documents continue to be in force. But the Parliament of Ceylon had the power after 4th February, 1948 to repeal all legislation of the United Kingdom Parliament extending to Ceylon, except perhaps the Ceylon Independence Act.[3] Thus the Air Navigation Act and the Copyright Act have been repealed by the Parliament of Sri Lanka.

Section 1 of the Ceylon Independence Act enacted that after 4th February, 1948, no Act of the United Kingdom shall extend to Ceylon, unless it is enacted at the request and with the consent of Ceylon.[4]

(ii) **Prerogative instruments issued by the Sovereign of the United Kingdom.** During the colonial period, Ceylon being a ceded colony, the Crown had the power of legislation by means of prerogative instruments. Examples of prerogative instruments are the Orders in Council which contained the various colonial constitutions. Charters under the Great Seal, Letters Patent under the Great Seal, Instructions under the Royal Sign and Manual, Letters Patent and Royal Instructions are issued to Governors and Governors-General. The power to legislate by Order in Council, was removed by section 4 of the Ceylon (Independence) Order in Council, 1947.

An interesting issue arose in *Ibralebbe* v. *The Queen*.[5] The Judicial Committee of the Privy Council after hearing an appeal delivers an order in which unlike other courts it does not decide the dispute, but merely advises the sovereign on how the case should be decided. An Order in Council is issued by the Privy Council incorporating the "advice" of the Judicial Committee. The "advice" by convention is always followed. It was argued in *Ibralebbe*'s case that since the sovereign's power of issuing Orders in Council was taken away by the Independence Order in Council, an Order in Council embodying the decision of the Judicial Committee was invalid. The Privy Council in *Ibralebbe*'s case held that the Order in Council which forms the instrument by which the decision of an appeal to the Privy Council is subsequently implemented is essentially a judicial act. This is different from an Order in Council having legislative effect or with an Order in Council that is part of the administration of government, except in the widest general sense that each within its category derives its ultimate force from some form of sovereign authority and thus can be said to make law.

3. See L.J.M., Cooray, *Essays on the Constitution of Ceylon* (1970), article 8.c, L.J.M. Cooray, *Reflection on the Constitution of Ceylon* (Hansa Publishers, 1971), article 8.c.
4. See further, Cooray op. cit., articles 8.c. and 19.
5. (1963) 65 N.L.R. 433.

(iii) **Statutory instruments.** An Act of the Parliament of the United Kingdom may confer on the Privy Council the power to make subordinate legislation within the terms of the act or to extend the application of the act to any colony. Subordinate legislation made under the provisions of such an act is referred to as a "statutory instrument". Thus the Medical Act of 1886 enables persons who acquire medical qualifications in British possessions to be registered on what is now called the Commonwealth Register. An Order in Council of 27.12.1887 applied this Act to Ceylon. Some Acts passed by the Parliament of the United Kingdom do not specifically extend to colonies, but provide that the Crown could apply the act to any particular colony by Order in Council. This type of legislation is not relevant in Ceylon after 1948, but statutory instruments which were extended to Ceylon during the colonial period are still on the statute book.

(iv) **Local legislation.** Local legislation is of three types; (1) Regulations and Proclamations issued by the Governors between 1801 and 1833. Between 1801 and 1833 the Governor had the power to legislate for the colony; (2) Ordinances which were passed by the colonial legislatures of Ceylon between 1833 and 1947; (3) Acts which have been passed by the Parliament after 1948.

(v) **Delegated legislation.** Delegated legislation issued from some body other than the supreme legislative authority, which body derives its authority from the supreme legislative authority, and which is therefore always subject to interference and control by the supreme authority.

The delegation of law-making power by the supreme legislative authority to other persons or bodies is a characteristic feature of the modern state. Delegated legislation takes various forms and assumes a variety of names. The primary classification stated below is derived from the person or body which has the delegated power.

(a) Ministers and government officials are empowered to issue departmental or ministerial regulations, rules, orders, etc. These are now extremely numerous and far greater in bulk than Acts of Parliament. (b) Local authorities are vested with authority to enact by-laws. (c) Rules Committees are given power to make rules, e.g., the Rules Committee which makes rules for procedure in court (See Article 136 of the 1978 Constitution).

Legislation falling within the first four categories (i) to (iv) above, is printed on the orders of the Government. A collection of all the legislative enactments which are of current application are published

from time to time. The most recent edition was in 1980 containing legislation enacted up to 31 st December, 1980. This compilation contains the statutes falling within categories (i) to (iv) above. A suppliment to the 1980 edition containing Acts enacted between 1st January, 1981, and 31st December, 1984, was issued in 1985. More recent legislation not included in the 1980 edition nor the 1985 suppliment can be obtained from the Government Printer who prints every Act.

Delegated legislation (v) above, is generally published in the Government Gazette. There is a collection (1956) in six volumes of such legislation entitled "Subsidiary Legislation of General Application".

It is thus seen that the modes of legislation have been varied due to the many legislative organs which operated during our colonial history. The sovereign of the United Kingdom, the Parliament of the United Kingdom, the Privy Council, the Governors of Ceylon, the various colonial legislatures of Ceylon, the Parliament of Ceylon (1948-1972), the National State Assembly of Sri Lanka (1972-1978) and the Parliament of Sri Lanka (from 1978 to date) have all made laws for the country, which have been styled Regulations, Proclamations, Charters, Letters Patent, Orders in Council, Ordinances, Acts and Laws.

The greater part of the statute law of Sri Lanka is contained in Ordinances and Acts and in delegated legislative instruments. Most of the prerogative instruments dealt with constitutional matters.

The Roman-Dutch law which obtained in the Island had its own statutes which are commonly referred to as *placaats*. As regards the application of the Roman-Dutch *placaats*, those passed before 1656 form part of the law of the Island and those after 1656 must be shown to have been specially promulgated.[6] The Roman-Dutch statutes are not included in the Legislative Enactments.

The laws passed by the supreme legislative authority, which today is Parliament, subject to constitutional safeguards, will repeal all existing legal rules which are in conflict with any of its provisions, whether found in prior statutes, delegated legislation, custom, religion, case law or the Roman-Dutch law. It must be noticed that such repeal could be partial–abrogating particular branches of law and leaving other sections untouched, or it could be complete.

The issue whether a statute could become obsolete or be modified by custom is discussed in article 25.[7]

6. See above, article 13.b.
7. See at pp. 192 - 93

23. JUDICIAL PRECEDENT

23.a. The term "Precedent"

Precedent may be defined as a previous instance or case which is or may be taken as an example or rule for subsequent cases or by which some similar act or circumstance may be supported or justified. All systems of law follow precedent in this sense chiefly for convenience but also on rational grounds. But the actual manner and degree of the observance of precedent varies in different legal systems. In the countries which have been influenced by the English law, authority is enjoyed by judicial precedents. The doctrine of judicial precedent requires that different cases must be decided in the same way if the material facts are the same. This means that courts are bound by principles set forth in earlier decisions. The characteristic feature of this system is the single binding precedent. A single decision of a superior court is binding on a subsequent court. This is also referred to as the doctrine of *stare decisis* (Keep to what has been decided). Greater weight is attached to the opinions of text writers in the civil law countries[1] and no single case will be regarded as decisive, though a series of judicial decisions on a particular point can acquire strong persuasive authority.

Sri Lanka has adopted the English doctrine of *stare decisis*. Yet the opinions of the writers on the Roman-Dutch law have been referred to by our courts, and cases are decided on their authority. Thus it can be said that Sri Lanka has been influenced both by the common law doctrine of judicial precedent (to a greater degree) as well as the civil law doctrine of textual precedent.

The doctrine of *stare decisis* has exerted a profound effect on the manner in which the laws of the land were fashioned and developed by the judiciary in the nineteenth and twentieth centuries. It could be regarded as one of the most significant aspects of the British contribution to the legal system of Sri Lanka.

23.b. The doctrine of *stare decisis*

A decision of a judge has two aspects. It will decide the instant dispute between the litigants. In the second place the judge will give his reasons for his decision. He will in doing so make a statement of the legal rules which he has applied and this will involve (to a greater or lesser degree depending on the facts of the case) an exposition of the relevant law and perhaps a laying down of general principles. These

1. See below, article 24.

rules and principles may be treated as authoritative statements of the law by later judges as "precedents" to follow.

Subject to qualifications to be stated below it is proposed to accept as a preliminary formulation of the doctrine of *stare decisis* the following definition of Cross: "Every Court is bound to follow any reported case decided by a court above it and some appellate courts are bound by their own decisions".[2] Superior courts are not bound by the decisions of the lower courts, but the decision of any court is entitled to some measure of respect.

For any doctrine of binding precedent to apply in a legal system two conditions are necessary. Firstly, a hierarchy of courts. A decision is generally binding only on a bench of lesser authority and therefore it is necessary that a nicely graded hierarchy of authority is established. Secondly, there must be a system of Law Reporting. Reports need not be official. The New Law Reports now called Sri Lanka Law Reports is an official compilation beginning in 1896, but a number of private reports have also been published.

In England, when authenticated by a barrister, a report of a decision may be cited as an authority. The authorized reports should be cited in preference to others and, when there is a difference between a report of the same case in the authorized reports and in some other series, it is assumed that the former report has been revised by the judge concerned and represents his authoritative opinion. The standing of the various sets of reports differ and from time to time judges have commented on the quality, or lack of it, of a particular set of reports.[3]

23.c. **What part of a case is binding?**

The extract from Cross quoted (see above 23.b.) above does not indicate that it is only some aspects of a previous case, viz the *ratio decidendi*, which is binding on a subsequent subordinate court. The formulation of a precise test to enable a court to determine the *ratio decidendi* of a case has eluded both judges and text writers.

(i) **Defining *ratio decidendi*.** A theory propounded by Goodhart[4] has been widely discussed by academic writers but has not been consistently followed by the courts. According to Goodhart[5] the *ratio* of a case is

2. R. Cross, *Precedent in English Law* (1961, Clarendon, Oxford).

3. See Halsbury, *Laws of England*, 3rd. Ed., Vol. 22, p. 805.

4. A.L. Goodhard, "Determining the *Ratio Decidendi* of a Case" in *Essays in Jurisprudence and the Common law* (1931, Cambridge University Press) p.1.

5. Goodhart, op. cit.

found by taking account of the facts treated by the judge as material and his decision based on them. Suppose that in a certain case facts A, B and C exist; and suppose that the court finds that facts B and C are material and fact A immaterial, and then reaches conclusion X (e.g. judgment for the plaintiff or judgment for the defendant), there the doctrine or precedent enables one to say that in a future case in which facts B and C exist, or in which facts A,B and C exist, the conclusion must be X. If in a future case facts A,B,C and D exist, and fact D is held to be material, the first case will not be a direct authority, though it may be of value as an analogy.

Goodhart's definition begs the question what facts are legally material. Certain facts (names, place, time) are obviously immaterial. Goodhart thinks that all facts not obviously immaterial and referred to by the judge as material are material.

Two major criticisms may be made of Goodhart's theory. Firstly, the difficulty of ascertaining the material facts (Goodhart's suggestion is not very helpful). Williams[6] shows that the facts in a case can be abstracted at different levels depending on whether one wishes for a wide or narrow *ratio*. Secondly, Goodhart assumes that the court deciding a particular case decides once and for all what the material facts are. The task of extracting and applying the *ratio* of a case will fall on a judge in a subsequent case, and the later judge, not the earlier one, will ultimately determine what facts are material. Thus it is not improbable that a later court might adopt a different *ratio* to the one which the judge who decided the earlier case could have extracted if expressly required to do so.[7]

Halsbury[8] defines *ratio decidendi* as follows:-

> The enunciation of the reason or principle on which a question before a court has been decided is alone binding as a precedent. This underlying principle is often termed the *ratio decidendi*, that is to say, the general reasons given for the decision or the general grounds on which it is based, detached or abstracted from the specific peculiarities of the particular case which gives rise to the decision. The concrete decision alone is binding between the parties to it, but it is the abstract *ratio decidendi*, ascertained on a consideration of the judgment in relating to the subject matter of the decision, which alone has the force of law and which, when it is clear what it was, is binding; but, if it is not clear, it is not part of a tribunal's duty to spell out with difficulty a *ratio decidendi* in order to be bound by it, and it is always dangerous to take one or two observations out of a long

6. Glanville Williams, *Learning the Law* (1957, Steven, London) pp. 66- 75.
7. See below, article 23.d. sub-head (i).
8. Halsbury, *Laws of England*, 3rd Ed., Vol, 22.pp, 796-97.

judgment and treat them as if they gave the *ratio decidendi* of the case. If more reasons than one are given by a tribunal for its judgment, all are taken as forming the *ratio decidendi.*

Lord Halsbury in *Quinn* v. *Leathem*[9] stated that the *ratio* is the proposition of law based on the material facts of a case as objectively determined. The materiality of the facts is an objective one and is not a matter for the judge.[10] Stone[11] defines *ratio* as "The general proposition of which the particular decision is an application and which is required or necessary to explain that particular decision". Lord Campbell in *A.G.* v. *Dean and Canons of Windsor*[12] refers to it as the "rule propounded and acted upon in giving judgement".[13]

The difficulty of ascertaining the *ratio* is heightened when there is more than one judgment. When a number of judges give different reasons but agree in the result further problems too complex to be stated here are raised.[14]

(ii) **Extracting the *ratio decidendi* in a particular case.** Even if a satisfactory definition can be arrived at, further problems would arise in applying the formula to each particular case that comes before the court. Williams[15] does not attempt to define *ratio decidendi* but takes a particular case and shows how the *ratio* may be determined or extracted from it.

Cross[16] comes to the conclusion that it is impossible to devise a formula for defining *ratio decidendi*. "All that can be done is to supply a description of it ". Thus he describes (not defines) it as any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion.

23.d. *Obiter dicta*

Obiter dicta are not binding on any subsequent court. The phrase *obiter dicta* in its primary sense is, according to Williams,[17] "a mere saying by the way, a chance remark, a statement not relevant to the

9. (1901) A.C.495.
10. See Cross, op cit., pp. 59-61.
11. J.Stone, *The Province and Function of Law* (1950, Maitland Publications Pte Ltd., Sydney) p. 187.
12. (1860) 8. H.L.C. 392.
13. For other judicial statements, see Cross, op. cit., pp. 79-80.
14. See C. K. Allen, *Law in the Making* (1961, Oxford University Press London) pp.276- 78.
15. Glanville Williams, op. cit., pp. 67-75.
16. Cross, op.cit., pp. 75-77.
17. Glanville Williams, op. cit., pp. 76-77.

central issue between the parties, e.g. a rule of law stated merely by way of explanation, analogy or illustration or a suggested rule upon which the decision is not finally rested".

But *obiter dicta* has been more widely used to describe any proposition of law in a judgment which does not form part of the *ratio*. In latter sense it would include the following:- (i) When a court cuts down the expressed *ratio* of an earlier case by treating as material to the later one some fact present in it which the earlier court regarded as immaterial, then the rule of law in the earlier decision which is excluded by the later court would also be *obiter* and the later court's interpretation of the first court's judgment would be the authoritative interpretation. (ii) A subsequent court may hold that a statement of law is not the *ratio* by alleging that it was too wide and unnecessary for the decision. (iii) A ruling of a judge based on hypothetical facts, e.g. " If the facts were different my decision would have been otherwise".[18] (iv) When two reasons are given for a decision both form part of the *ratio*.[19] But not when one of the reasons is stated in a merely hypothetical way, e.g. "If it were necessary to decide the further point I would hold....".

Though *dicta* are not binding varying degrees of weight will be attached to them according to the reputation of the judge, the eminence of the court, and whether or not it is a deliberate expression of opinion on a point argued before the court.[20]

23.e. **Distinguishing**

If the court considers that a precedent cited before it is really different in nature it will "distinguish" it. Thus if the facts in two cases differ, and the earlier case is based on the facts in it, the earlier case is not binding on the court trying the later case. Here the court accepts the expressed *ratio* of the earlier case but states that it does not apply to the instant case because of a material difference of fact.[21] Williams calls this non-restrictive distinguishing.

Sometimes the Court adopts a process of restrictive distinguishing by cutting down the expressed *ratio* of the earlier case.[22]

One of the defects of *stare decisis* is that subsequent courts may be absolutely bound by an erroneous and manifestly unjust rule of law. In these circumstances sometimes judges under the pretext of distin-

18. ibid.
19. *Jacobs* v. *L.C.C.* (1950) A.C. 361 at 369.
20. See Allen, op.cit., p. 248.
21. Glanville Williams, op cit., pp. 72-75.
22. See above, article 23.d, sub-heads (i) and (ii).

guishing in effect disregard and circumvent such inconvenient decisions.[23]

The distinguishing of precedent is also a useful method of overcoming the irksome effect of a binding precedent which is no longer in accordance with current legal ideals.[24] The House of Lords in the *Fibrosa* case[25] both ignored and distinguished the *French Maritime*[26] case. *The French Maritime* case "was conjured out of the way"-even though it was a House of Lords decision. According to Friedman,[27] the *distinguishing* of a precedent is "a favourite judicial device of developing the law, though it has the grave disadvantages of uncertainty and haphazardness". It takes three main forms; (a) the distinction of facts; (b) the relegation of objectionable judicial opinions to the position of *obiter dicta*; (c) the reliance on one or the other judgment, when the authority of a precedent rests on a concurrence of judgments which arrive at the same result for different reasons. But distinguishing creates confusion because it gives rise to a conflict which is not admitted. The "irksome effects" of *stare decisis* referred to above can also be overcome by reference to the *incuria* doctrine.[28] The latter is a more desirable method, because here the conflict is admitted.

23.f. *Obiter dicta* and *ratio decidendi*

One final remark remains to be made on the relation between *obiter dicta* and *ratio decidendi*. A rigid line of demarcation between them becomes necessary in practice only when the court considers the decision unfortunate or where there is an apparent conflict of binding decisions.

23.g. Overruling

A superior court may overrule an erroneous decision of a court of inferior jurisdiction. Where a precedent is overruled it is definitely and formally deprived of all authority, but only as regards the point on which it was overruled. It becomes null and void like a repealed statute and a new principle is authoritatively substituted for the old. Overruling amounts to a declaration that the supposed rule never was law. Hence any action taken by parties relying on and on the strength of a rule laid down in a judicial decision, may ultimately be held to be governed

23. See Glanville, Williams, op. cit., pp. 74-75; E.F.N. Gratiaen, "Tangle of Precedent in Ceylon" in *Obiter Dicta* (1953, Times of Ceylon Ltd.) pp. 67-68.

24. See W. Friedman, *Legal Theory* (1967, Stevens, London) pp. 467-70. Friedman cites Glanville Williams in 6 Mod. L.R. 48 on the *Fibrosa* case (1943) A.C. 52.

25. *Supra*, n.24.

26. (1921) 2 A.C. 494.

27. Friedman, op.cit., p. 470.

28. See below at pp. 163 - 66

by the law established in a decision which overrules the case they relied on. In this sense the effect of overruling is retrospective except for decisions which are *res judicata*.[29]

Circumstances in which a court will overrule. A court of superior jurisdiction will not overrule any erroneous decision. The precedent while it stood unreversed may have been counted on in numerous situations as definitely establishing the law. Valuable and important transactions may have been entered into in reliance on it. A decision which can easily be overruled without hesitation while yet new, if consistently acted upon may after a number of years acquire increased authority[30] Overruling in such circumstances is even more difficult where proprietary, as contrasted to personal rights are affected.[31] But a long unchallenged decision will be overruled if plainly wrong, and especially if the subsequent course of judicial decisions has disclosed weakness in the reasoning on which it was based, and if practical injustice has been the consequence of perpetuating it.[32]

The United States Supreme Court and the Indian Courts have in some cases adhered to the practice or ordering that their judgments in which they have overruled earlier decisions should operate only *prospectively*. Retrospective effect is not given to some judgments where to do so would cause injustice or great administrative difficulties.

In criminal matters, however, where the interests of justice and the liberty of the subject require it, previous decisions are not adhered to with the same rigidity as in civil cases.[33]

Instances of express overruling have been discussed above. A case can also be impliedly overruled.[34]

From overruling which is an act of superior jurisdiction must be distinguished a "refusal to follow a case" which is an act of a court of co-ordinate jurisdiction. When an earlier precedent is not followed the two decisions stand side by side, conflicting with each other. The legal antimony thus provided must be solved by a higher court. On the other

29. See Cross, op cit., pp. 121-22; *Salmond on Jurisprudence* by P.J. Fitzgerald (1966, Sweet & Maxwell), pp. 158-74.

30. (1871) Vand, 271 at 276.

31. See *Salmond on Jurisprudence*, by G.L.Williams, (1956, Sweet & Maxwell, London), p. 219, *Bandahamy* v. *Senanayake* (1960) 62 N.L.R. 313.

32. See *Bandahamy* v. *Senanayake* (1960) 62 N.L.R. 313; Gratiaen , op. cit., p. 65; *Salmond* (G.L.William's edition), op. cit., pp. 217-22; *Hassanally* v. *Cassim* (1960) 61 N.L.R. 529.

33. *Bandahamy* v. *Senanayaka Supra*, n. 32.

34. See below, article 23.h., sub-head (i); Cross, op. cit., pp. 122-88.

hand when one says that a case has been "reversed" reference is made to a particular case which has gone up to an appellate court and decision in the same case has been varied or set aside in appeal.

23.h. **Circumstances destroying the binding force of Precedent**

The statement of Cross[35] adopted as a working definition requires qualification because it does not refer to the existence of important exceptions to the rules of *stare decisis*. Five of those are set out below. It must be noted that the applicability in the law of Sri Lanka of some of these exceptions has not yet been expressly or fully considered.

(i) **Abrogated decisions.** A decision ceases to be binding if a statute or statutory rule inconsistent with it is enacted, or if it is reversed or expressly overruled by a higher court. A superior court can specifically name a decision of a lower court as being inconsistent with it and *expressly* overrule it. But it may be that a court may give a judgment which is clearly inconsistent with an earlier case without referring to it by name. In these circumstances a third court faced with two conflicting decisions from courts of different authority, may hold that one has been impliedly overruled by the other. A court is not bound by a case which is inconsistent with another of greater authority.[36]

(ii) **The *incuria* rule.** In English law, up to fairly recently a decision would be regarded as being *per incuriam* and not binding in the following circumstances: (i) if rendered in ignorance of a statute, but not if it has merely misconstrued a statute,[37] (ii) if rendered in ignorance or forgetfulness of a case of authority, binding on the Court concerned.[38] Further it was required that the omitted authority should go to the root of the *ratio* of the case decided *per incuriam*. Thus cases could be correctly decided and binding though decided carelessly or in ignorance of material data.

But in recent times the trend has been to widen the scope of the application of the *per incuriam* rule to case law so as to enable the law to keep abreast of changing social and economic considerations.[39]

In *Rabot* v. *de Silva*[40] Wendt, J. said: "A court is bound...unless the decision is founded on a manifest mistake or oversight, or is inconsistent

35. See above, article 23.b.
36. *Rabot* v. *de Silva* (1907) 10 N.L.R. 140.
37. *Young* v. *Bristol Aeroplane Co Ltd.*, (1944) K.B. 718.
38. Per Evershed, M.R. in *Morelle* v. *Wakeling* (1955) 2 Q.B. 379: see also Allen, op.cit., pp. 240-43.
39. See further, Cross, op. cit., pp. 122-25.
40. (1907) 10 N.L.R. 144.

with some previous decision which is of equal or greater authority" (the term *per incuriam* is not specifically used). Basnayake, C. J. observed in *Bandahamy* v. *Senanayake*: "However representative a Bench may be its decision is not regarded as binding if there has been a mistake in the decision or relevant decision or statutes have not been considered".[41]

In *Moosajee* v. *Carolis Silva*[42] Tambiah, J. and H.N.G. Fernando, C.J. following English cases explained the *per incuriam* rule. Tambiah,J. relied on the *dictum* of Denning, L. J. in *Ostime* v. *Australian Provident Socielty*.[43]

> The doctrine of precedent does not compel your Lordships to follow the wrong path until you fall over the edge of the cliff. As soon as you find that you are going in the wrong direction, you must at least be permitted to strike off in the right direction, even if you are not allowed to retrace your steps.

Tambiah, J., having quoted the above *dictum*, went on to say:

> The English principle of *stare decisis* has been adopted by us. As this *dictum* of Lord Denning shows, in the United Kingdom a liberal view is now being taken. In Ceylon, it would be sufficient to state that we should be content to follow English principles on this matter which have been set out by the House of Lords in *Scruttons Ltd* .v. *Midland Silicones Ltd*. (1962) 1 All.E.R. 12. One of the principles enunciated in this case is that if a *ratio decidendi* is obscure, the decision has no binding effect. The *ratio decidendi* of *Neate* v. *de Abrew* is obscure and we are not bound to follow it.[44]

H.N.G. Fernando, C.J. was of the same view and referred to the *dicta* in *Rabot* v. *de Silva*[45] that if a decision was founded on a manifest mistake or oversight it need not be followed, and to *Scruttons Ltd* v. *Midland Silicones Ltd*[46] where Lord Reid said:

> I would certainly not lightly disregard or depart from any *ratio decidendi* of this House. But there are at least three classes of cases where I think we are entitled to question or limit it. First where it is obscure, secondly, where the decision itself is out of line with other authorities or established principles, and thirdly, where it is much wider than was necessary for the decision so that it becomes a question of how far it is proper to distinguish the earlier decision. The first two of these grounds appear to me to apply to the present case.

41. *Bandahamy* v. *Senanayake*, *supra*, n. 32 cf . *Mudalihamy* v. *Ran Menika* (1927) 8.C.L Rec. 202.
42. (1967) 70 N.L.R. 217.
43. (1959) 2 All E.R. 245.
44. *supra*, n. 42, at p. 229.
45. (1907) 10 N.L.R. 140.
46. (1962) 1 All E.R. 12.

The court in *Moosajee* v. *Silva* consisted of five judges, but judgments were delivered only by H.N.G. Fernando, C.J. and Tambiah, J. Abeysundere, Silva and Samarawickreme, JJ. seem to have associated themselves with the judgment of H.N.G. Fernando, C.J.

A former Chief Justice of Sri Lanka has criticized the decision in *Moosajee*'s case taking the view that the existing rules relating to *stare decisis* must be rigidly adhered to.[47] But for some time past the courts in the United States and in more recent times the courts in the Commonwealth countries seem to be moving towards a more flexible doctrine of *stare decisis*, in order that judges may be less rigidly "bound by their own mistakes... or bound by their past decisions even though they have become out of date".[48] The wide *per incuriam* rule adopted in *Moosajee* v. *Silva* is an attempt to mitigate the somewhat rigid operation of the doctrine of judicial precedent in Sri Lanka. It remains to be seen whether the approach in *Moosajee* v. *Silva* will be followed in Sri Lanka.

It is submitted that the *per incuriam* rule should be applied to correct corruptions of principle and wrong decisions which are manifestly unjust or which are not in line with modern trends and conditions. If a corruption of principle or a wrong decision has had the effect of modernizing the law or is a more reasonable or just rule than the technically legitimate rule, the *per incuriam* doctrine should not be invoked. The *per incuriam* rule it is submitted should not be applied to decisions which have modified the Roman-Dutch law except in the above circumstances.[49]

Roman-Dutch law is the residuary law of Sri Lanka and therefore from very early times the Sri Lanka courts referred to the opinions stated in the treatises written by Roman-Dutch authorities, which were the most important source of the classical Roman-Dutch law. It did happen particularly in the nineteenth century that due to the absence of translations of these works which were written in Dutch and Latin, that cases were decided in ignorance of relevant authorities. The question arises whether the *per incuriam* rule could be extended to apply where the authoritative opinion of a Roman-Dutch writer has not been cited in a case. This question has never been judicially discussed. But the

47. See M.C. Sansoni, "Collective Court Redefined and the *Per Incuriam* Rule" in (1969) Colombo Law Review 123-33.

48. Sir Alfred Denning, "The Need for a New Equity", 5 Current Legal Problems 1 at 10.

49. See above, article 14.e. at pp. 89.95-96.

adoption during the British period of the rules of *stare decisis* have resulted in effect, that when a Roman-Dutch rule was stated in a judicial decision, that construction has become binding on future courts in accordance with the rules of *stare decisis* and the *per incuriam* rule has no application. When a Roman-Dutch authority is ignored the error could be corrected only by a court which is not bound according to the rules of *stare decisis* by the decision of the earlier court which ignored the authority.[50] The *per incuriam* rule was applied in *Moosajee* v. *Silva* in respect of *misinterpreted* Roman-Dutch rule.

(iii) **Precedents *sub silentio*.** If in deciding a case, a court does not perceive a particular rule of law and without argument or consideration assumes its correctness and decides the case on another point of law which it pronounces upon, the case is not an authority on the former rule which it is said has been allowed to pass *sub silentio*.[51] But the mere fact that the former rule was badly argued or inadequately considered and fallaciously reasoned is not a ground for impugning its authority.

(iv) **Affirmation or reversal on a different ground.** A case might be decided by the Supreme Court on ground A and then goes to the Privy Council which decided it on ground B. Whether the decision on ground A is binding on a lower Court is a moot point.[52]

(v) **Effect of changing social and economic considerations on a binding precedent.** An Indian judge has expressed the view that in developing countries the courts should have the power to disregard the authority of past binding precedents which are not in accordance with changed political, economic and social ideas.[53] A suggested example is that the courts should not follow judgments rendered by British judges during the colonial period which were intended to further the ends of colonial policy. After the 1857 mutiny the British policy was to recognize certain aspects of the caste system so as not to antagonize the native population and thus lend stability to the British Raj. This

50. See further, article 14.e.

51. Salmond, op. cit., pp. 211-15; *Gerard* v. *Worth of Paris Ltd.* (1956) All E.R. 905; *Samed* v. *Segulamby* (1924) 25 N.L.R 481, 495; *Dias* v. *Perera* (1883) Wendt 365; *de Costa* v. *Bank of Ceylon* (1969) 72 N.L.R. 457, 464; see further article 14.e. at pp. 91-92

52. Compare Supreme Court decision in *Lairis Appu* v. *Tennakoon Kumarihamy* (1958) 61 N.L.R. 97 with decision of Privy Council on appeal in *Lairis Appu* v. *Tennakoon* (1962) 64 N.L.R.97.

53. See P.B.Gajendragadgar, *Secularism, Its Implication on Law and Life in India*, G.S.Sharma (ed.) pp. 6 ff.

attitude is reflected in many judicial decisions. But the new approach suggested by the former Chief Justice of India, P.B. Gajendragadgar, is manifested in the more recent Indian decisions overruling earlier cases in which it was held that in determining whether an insult constituted grave and sudden provocation which would serve as a defence to a charge of murder, the fact that one of the parties was of a high caste and the other of a low caste was a relevant factor.[54]

23.i. Preliminary assessment of the problems involved in analysing the operation of *stare decisis* in Sri Lanka

It has been stated that a superior court may overrule a decision of an inferior court and that the latter is bound by a decision of the former. But the question as to what is an inferior and what is a superior court is not without its difficulties. The answer is obvious if one juxtaposes the Supreme Court and the District Court or the Supreme Court and the Court of Appeal. The Supreme Court is single entity. But it is possible to constitute benches of the Supreme Court of varying degrees of authority. Thus a bench could be constituted of a number of judges ranging from 3 to 10. A definition which speaks in terms of inferior and superior courts requires special interpretation in view of the set-up of the local system of courts. The determination of the respective authority, in relation to each other, of benches of the Supreme Court of varying strengths is another problem which requires consideration. It was also stated that some appellate courts are bound by their own decisions. The powers possessed by and the restrictions imposed on benches of co-ordinate jurisdiction in relation to each other is not uniform. In such cases the following questions arise: have they the power to overrule each other's decisions? If they cannot, are they bound by each other's decisions or can they refuse to follow them?

What are the rules of *stare decisis* which apply in the courts of Sri Lanka today? The hierarchical structure today consists of the Supreme Court as the highest appellate tribunal. The court immediately below it is the Court of Appeal and the other Courts are the High Courts, District Courts, Magistrates' Courts and Primary Courts. This system was introduced in 1978 and has been in operation only for a short period. The rules relating to *stare decisis* was evolved over a period of time as a consequence of the development of judicial attitudes and practices. It is still too early to determine what are the exact rules of *stare decisis* which apply in Sri Lanka under the new Courts structure.

54. See *Rahman*, A.J.R. 1930. Lah. 344; *Abdullah* (1932) Lah, 369; *Kanhaiylal* A.I.R. 1952, Bhopal 121.

Therefore it is considered worthwhile and relevant to retain in the present edition the account given about the rules which applied under the court organisation which prevailed prior to 1978. Some of these decisions would continue to be relevant in the future. However the relevance of the decisions of the past must be gauged on a comparison of the present structure with the past, and where analogies are present drawing on the rules of the past. Where differences exist obviously the rules of the past will not be relevant. Therefore it is proposed to enumerate the rules which prevailed under the past courts structure and then consider to what extent such are relevant under the present system.

The rules stated below were brought into existence when the hierarchy consisted of the Privy Council at the apex, a Supreme Court, District Court, Magistrates' Courts, Courts of Requests and the Rural Courts. Appeals to the Privy Council were abolished by the Court of Appeal Act of 1971 when the Court of Appeal replaced the Privy Council. The Courts of Requests were abolished in 1974. This structure was altered by the Administration of Justice Law, 1973 which established a system consisting of the Supreme Court, High Courts, District Courts and Magistrates' Courts. The Administration of Justice Law was repealed in 1978.

In the hierachical structure today, the Supreme Court is the highest appellate tribunal. The Court of Appeal, High Courts, District Courts and Magistrates' Courts are the other Courts in the present structure.

Having raised the basic problems to be faced in studying the detailed working of *stare decisis* in the law of Sri Lanka it is now proposed to examine the working of the doctrine in the various grades of the judicial hierarchy. The case of *Bandahamy* v. *Senanayake*[55] a decision of a bench of seven judges, could be regarded as settling a number of disputed points of importance which up to the time of that decision had given rise to a most unsatisfactory state of uncertainty. It must however at the outset be stated that the rules set out below are very tentative and represent the author's interpretation. The courts have not always authoritatively set out the applicable rules which therefore have sometimes to be deduced from the practice as distinct from the pronouncements of the courts. In the analysis to follow, though reliance is placed on judicial pronouncements in *Jane Nona* v. *Leo*,[56] *Bandahamy* v.

55. *Supra*, n. 32.

56 (1923) 25 N.L.R. 241 (a decision of 4 judges at a time when 4 judges could constitute a Full Bench, according to test stated below, see below, at p 171

Senanayake,[57] and *Moosajee* v. *Caroliş Silva*[58] it must be noted that the latter two cases are not abosolutely binding decisions and can be overruled by more authoritative courts, and *Jane Nona*'s case is a Full Bench decision.

23.j. **Courts of First Instance prior to 1978**

All Courts of First Instance (District Courts, Magistrate's Courts, Courts of Request, Rural Courts) were bound by decisions of the Supreme Court or of the Court of Criminal Appeal. Decisions of these courts were not reported and therefore the question whether the Court of Request, for example was bound by a decision of the District Court did not arise. There are *dicta* in *Attorney - General* v. *Kodeswaran*[59] which seem to imply that decisions of District Courts could be binding on lower courts.

23.k. **The Supreme Court prior to 1974**

A bench of the Supreme Court could be constituted of a number of judges ranging from one to eleven. The powers possessed by and the restriction imposed on a single judge, two judges, a Collective Court or Full Bench and a Divisional Bench of the Supreme Court were as follows:

(i) **A single judge.** A single judge exercised appellate criminal jurisdiction, original civil jurisdiction in certain matters (e.g. granting of writs) and appellate civil jurisdiction. A single judge also exercised original criminal jurisdiction (Assize).

The *cursus curiae* in relation to a single judge was formulated thus: a judge of the Supreme Court sitting alone was bound by the decision of any bench of the Supreme Court constituted of two judges or more, who had also the power to overrule any decision of such single judge.[60]

A single judge could not overrule a decision of another single judge.[61]

The fact that he could not overrule such a decision did not neccessarily mean that he was bound by the decision of another single judge. The *cursus curiae* on the Supreme Court, it is submitted, was that he can refuse to follow it.[62] Gratiaen[63] inclined to the view that a single judge, in the interest of certainty of the law, could be bound by a decision

57. *Supra*, n. 32 (a decision of 7 judges).
58. *Supra* n .42 (a decision of 5 judges).
59. (1967) 70 N.L.R. 121, 139.
60. *Bandahamy* v. *Senanayake*, *supra*, n.32.
61. *Jane Nona* v. *Leo* (1923) 25 N.L.R. 241.
62. See *Letchchimipillai* v. *Sivakoluntu* (1923) 25 N.L.R. 225.
63. Gratiaen op. cit., p. 70.

of another judge sitting alone. He also suggested that a single judge if *unable to agree with a decision of fellow judge should exercise the powers given to him by section 38 or 48 of the Courts* Ordinance, 1889, to reserve the matter for a fuller bench of the Supreme Court.[64]

Sections 38, 48 and 51 of the Courts Ordinance of 1889 as amended by the Courts (Amendment) Act, No.52 of 1949, were frequently referred to in this analysis and may with advantage be quoted in this context. Section 51 provided,

> .... it shall be lawful for the Chief Justice to make an order in writing in respect of any case brought up before the Supreme Court by way of appeal, review or revision, that it shall be heard by and before all the judges of such Court, or by and beforeany five or more of such Judges named in the order, but so that the Chief Justice shall always be one of such five or more judges.

Section 38 provided *inter alia*, that,

> All appeal in civil cases from judgments, and orders of the several District Courts of the Island shall be heard before two at least of the judges of the said Court.... In the event of any difference of opinion between such two judges the decision of the said Court shall be suspended until three judges shall be present, and the decision of such two judges when unanimous, or of the majority of such three judges, in case of any difference of opinion, shall in all cases be deemed and taken to be the judgment of the Supreme Court.

The concluding paragraph of section 38 as amended would read,

> Nothing in this section contained shall preclude any judge of the Supreme Court sitting alone in appealing from reserving any appeal for the decision of more than one judge of that Court.

Section 48 as amended provided that,

> Where any question shall arise for adjudication in any case coming before a single judge of the Supreme Court which shall appear to such judge to be a question of doubt or difficulty it shall be lawful for such judge to reserve such question for the decision of more than one judge of that Court.

The Amending Act, No. 52 of 1949, introduced a new section 48A which read as follows:

> Any appeal or question which is under section 38 or under section 48, reserved for the decision of more than one judge of the Supreme Court, shall be decided by a Bench, constituted in accordance with an order made by the Chief Justice in that behalf of two or more judges of that Court.
>
> (The Courts Ordinance was repealed by the Administration of Justice Law of 1973).

64. *Rajapakse* v. *Fernando* (1951) 52 N.L.R. 361 (section 38); *de Mel* v. *de Silva* (1949) 51 N.L.R. 105 (section 48).

(ii) **A bench of two judges.** A bench of two judges could be constituted to hear an appeal from a single judge acting under section 37 of the Courts Ordinance or to hear appeals from a District Court in civil or criminal cases or where a single judge acting under section 38 proviso or 48 of the Courts Ordinance referred a decision on a point of law for a larger bench.

The *cursus curiae* of such a court was stated thus: a bench of two judges was bound by any bench of three or more judges.[65] A bench of two judges could not overrule a decision of two judges.[66] A bench of two judges it is submitted could refuse to follow a decision of another bench of two judges.[67]

Section 38 provided that where two judges disagreed the case could be referred to a fuller bench of judges. But there was no section which gave a bench of two judges when they were not in disagreement but were faced by a point of difficulty or conflicting decisions, the power to reserve a decision for a larger bench of the Supreme Court. This was a problem which did not confront a single judge.[68] In the above situation the two judges could invite the Chief Justice to exercise his powers under section 51.[69]

(iii) **A Collective Court or Full Bench in a civil case.** The term Full Bench in a *civil appeal*[70] was a bench consisting of all the judges of the Supreme Court at the time. Thus a Full Bench of the Supreme Court in 1863 would consist of 3; of 4 in 1901; of 7 in 1925; of 9 in 1962 and of 11 in 1971. Up to 1901 the Supreme Court consisted of three judges who could if sitting together constitute a Full Bench. Since 1901 the number of Judges had been progressively increased. The New Law Reports have sometimes erroneously styled as a Full Bench, cases heard after 1901 which were constituted by three judges.

65. *Suppammal* v. *Thevar* (1950) 52 N.L.R. 265 at 267.

66. *Jane Nona* v. *Leo, supra*, n. 61.

67. *Jane Nona* v. *Leo, supra* n. 61; H.N.G.Fernando J, in *Bandahamy* v. *Senanayake, contra* Basnayake, J. in same case. See following cases where two judges have refused to follow decisions of two judges; *Saurmma* v. *Mohamadu Lebbe* (1943) 44 N.L.R. 397; *Senaratna* v. *Jane Nona* (1913) 16 N.L.R. 389; *Beebee Ammal* v. *Ibrahim Saibo* (1938) 40 N.L.R. 396.

68. See above.

69. This is the view of Gratiaen, op. cit., p. 72. See also *Pablis Appuhamy* v. *Dias* (1948) 49 N.L.R. 236; *Sellappah* v. *Sinnadurai* (1951) 53 N.L.R. 133-34.

70. The constitution of a full Bench in a criminal case is discussed below.

The effect of the decision in *Bandahamy* v. *Senanayake* (divided 5 to 1) is that the term "Collective Court" is synonymous with Full Bench. The dissenting opinion expressed by Sinnatamby, J. in *Bandahamy*'s case, which corresponds to that of Gratiaen[71] and is implicit in the decision in *Perera* v. *Munaweera*[72] that a bench of five or more judges constituted under section 51 of the Courts Ordinance carried the same authority as a Full Bench, could be disregarded.

In *Moosajee* v. *Silva*[73] H.N.G. Fernando, C.J. held that prior to 1901 three judges did not constitute a Collective Court unless the three judges assembled to hear an appeal which had been specially reserved for the consideration of the Collective Court either by one judge or by the Chief Justice in exercise of his statutory or inherent powers. H.N.G. Fernando, C.J. also held that before 1901 a Collective Court was not constituted (i) where three judges sat purely casually because there was no other demand on the time of one of them, or (ii) where three judges sat in pursuance of a statutory provision, but only for the reason that the judges could not previously agree as to the decision of an appeal. H.N.G. Fernando, C.J. therefore held that a bench of five judges of the Supreme Court had the power to overrule a decision of three judges in 1883 (at a time when three judges constituted the Supreme Court) in *Neate* v. *de Abrew*[74] because it was not a Full Bench within the test he formulated.[75]

Tambiah, J. in *Moosajee*'s case while agreeing with the above test nonetheless held that applying the test to the facts in *Neate* v. *de Abrew* it should be regarded as a Full Bench decision.

The *cursus curiae* affecting such a court was as follows: the decision of the Collective Court was binding on any bench which was not another Collective Court, even on a bench which was numerically superior to the Collective Court owing to an increase in the number of judges for the time being constituting the court.[76] Thus a Divisional bench of seven judges (when eleven judges were necessary to constitute a Full Bench) would have been bound, subject to the test in *Moosajee*'s case, by a decision of three judges made before 1901 (when the Supreme Court

71. Gratiaen, op cit., pp. 73-74.
72. (1955) 56 N.L.R. 433, 438.
73. (1967) 70 N.L.R. 217 AT 227.
74. (1883) Wendt's Reports 188, 5 S.C.C. 126.
75. See also *Perera* v. *Ranatunga* (1964) 66 N.L.R.337 at 338. See criticism of this test by Sansoni, op. cit.
76. *Bandahamy* v. *Senanayake*, *supra*. n.32.

consisted of three judges) and which could therefore be said to be a Collective Court.

A Collective Court could overrule the decision of any bench of judges except that of another Collective Court.

The decision of a Collective Court was absolutely binding on another Collective Court notwithstanding any numerical difference. Thus a Collective Court of nine judges was bound by a Collective Court of three judges.[77] It follows that a Collective Court had no power to overrule the decision of another Collective Court.

It could however be argued that a Collective Court could be regarded as a body of the whole court speaking authoritatively for the time being, and although its decision was binding on all other courts, it should not have a binding effect on future Collective Courts. In *Gallie* v. *Lee and another*[78] the binding nature of decisions of the English Court of Appeal was considered. Salmon, L.J. referred to a pronouncement of the whole court as being necessary to alter an existing practice.

Where there was a conflict between the decisions of two Collective Courts, in practice, a Court had the discretion as to which one to follow.[79]

(iv) **Divisional Bench.** A divisional Bench was defined as a bench which was not a Full Bench but which consisted of more than the minimum necessary to constitute that particular bench. Thus a Divisional Bench consisted of two or any greater number of judges, but which number was less than the number required at any particular time to constitute a Full Bench of the Supreme Court.[80]

A Divisional Bench could be constituted: where the Chief Justice acting under section 51 created a bench which was not a Full Bench; when a single judge acting under section 38 or 48 reserved a case or a point of law for the consideration of a larger bench; when two judges disagreed and by section 38 the matter was reserved for a bench of three judges.

The *cursus curiae* in relation to a bench of two judges was discussed. It now remains to discuss the *cursus curiae* on a Divisional Bench consisting of three or more judges, which was as follows: it could

77. *Bandahamy* v. *Senanayake*,*supra*, n.32; *Perera* v. *Perera* (1903) 7 N.L.R. 173; *Kanagaratna* v. *Banda* (1923) 25 N.L.R. 129,136.

78. (1969) 1 All E.R. 1062.

79. *Perera* v. *Amarasooriya* (1909) 12 N.L.R. 87 at 88.

80. The number of judges required to constitute a Full Bench was 3 until 1901, and was gradually increased since that date- see further above, p. 171.

overrule a decision of any Court containing a fewer number of judges.[81] Three judges could overrule two judges notwithstanding Gratiaen[82] who assumed that the *cursus curiae* of our courts was the same as the English Court of Appeal. A decision of a Divisional Bench was binding on all courts containing a fewer number of judges, but not on a Full Bench.

The numerical superiority of a Divisional Bench was ascertained by reference to the number of judges constituting it irrespective of whether they were unanimous or divided. This point which was the subject of controversy for a long time was settled by the majority judgment (divided 5 to 1) in *Bandahamy* v. *Senanayake*. This court held that five judges divided three to two had the power to overrule an unanimous decision of three judges. On this reasoning a bench of seven judges divided 4:3 had the power to overrule an unanimous decision of five judges.

A Divisional Bench could not overrule and was absolutely bound by a bench consisting of a similar number of judges. In *Rabot* v. *de Silva*,[83] it was held that three judges were bound by a decision of three judges.[84] This rule apparently applied to Divisional Benches of three judges or more, but did not apply to a Divisional Bench of two judges which as we have seen[85] could have refused to follow another decision of two judges.

23.1. **Court of Criminal Appeal Prior to 1974**

Three judges constituted the minimum required for the composition of the Court of Criminal Appeal. It was bound by its own decisions. In *K.D.J. Perera* v. *The King*[86] a bench of five judges of the Court of Criminal Appeal held that where it was constituted by a number of judges which was more than the minimum, a Full Court could be constituted provided the judges assembled for the purpose of reviewing or reconsidering a previous decision of the Court. Thus, unlike in the case of the Supreme Court, a Full Bench of the Court of Criminal Appeal consisted not of all eleven judges, but any number more than three. "A Full Court of the C.C.A. was not bound by a previous decision of the Court delivered by a Bench that could not be regarded as a Full

81. *Bandahamy* v. *Senanayake*, *supra*, n. 32; *Akilandanayaki* v. *Sothinagaratnam* (1952) 53 N.L.R. 385.
82. Gratiaen. op. cit. at p. 73.
83. (1907) 10 N.L.R. 140.
84. *De Silva* v. *Town Council, Dodanduwa* (1970) 72 N.L.R. 265.
85. See above.
86. (1951) 53 N.L.R. 193.

Bench and had power to disapprove, dissent from or overrule such a previous decision".[87]

23.m. **Foreign decisions**

South African judicial decisions interpreting the Roman-Dutch law, and English cases in areas in which our law is similar to English law, are often cited in the Sri Lanka courts. But all South African decisions and most English cases are only of persuasive authority. They are not binding authorities. As to the authority of English cases where English law applies Jennings and Tambiah[88] point out that strictly speaking a court in Sri Lanka cannot be absolutely bound by a decision of the House of Lords or the Court of Appeal, since an English court is not a Court of Appeal for Sri Lanka and further, though our law is similar to English law, it is seldom identical.

The view of Jennings and Tambiah may be subject to two qualifications, the validity of which qualifications must be critically examined; (i) an appeal court in a colony is bound by a decision of the House of Lords in a jurisdiction where English law applies.[89] (ii) In interpreting a local statute based on an English statute the local courts are bound to follow the construction put upon it by an English Court of Appeal.[90]

The former rule (i.e.(i) above) would be relevant in situations where English law had been incorporated by reference.[91] It is submitted that logically the latter rule (i.e.(ii)above) should be limited to situations where the section is an identical copy, and that where the sections are similar English decisions should be no more than persuasive. However, the above rule has often been applied where the sections are not identical.[92] English cases construing the English Act on which a Ceylon enactment was based, have been followed in Ceylon with no reference to *Trimble* v. *Hill*[93] where the language of the latter did not justify it.[94] This practice of giving undue weight to English authorities was

87. Per Nagalingam, S.P.J.in *K.D.J.Perera* v. *The King, supra*,, n. 72 AT 206; T.S. Fernando in 1970 (July) Journal of Ceylon Law , pp. 41- 42.

88. *W.I.Jennings* and H.W.Tambiah, *The Dominion of Ceylon* (1952, Stevens, London) p. 188.

89. *Robins* v. *National Trust* Co. Ltd. (1927) A.C. 115.

90. *Trimble* v. *Hill* (1879) 5 App.Cas.342

.91. See above, article 6 at pp.

92. See e.g. *Letchchimipillai* v. *Sivakoluntu* (1923) 25 N.L.R. 225, *Cooray* v. *The Queen* (1954) 54 N.L.R. 409,P.C.

93. *Supra*, n, 90.

94. See e.g. *Parantale* v. *Punchy* (1868) Ram. 325; *Ibrahim Neina* v. *Kosumina* (1911) 15 N. L. R. 46.

prevalent in all colonies.[95] Further, where the sections are not similar, English decisions have even been followed in preference to, and without any consideration of contrary local decisions.[96]

Trimble v. *Hill* refers to "colonial courts" and therefore Roberts-Wray[97] argues that the rule would not be relevant after a colony became independent. Ceylon became independent in 1948. The cases are conflicting. In *Pesona* v. *Babonchy Baas*,[98] the Ceylon Supreme Court thought that the attitude to this rule had changed since its formulation in 1879 and it did not extend to a Dominion. In *Nadarajan Chettiar* v. *Tennekoon*[99] the Judicial Committee followed the rule without commenting on Ceylon's independent states, but suggested *obiter* "that there may be in any particular case local conditions which make it inappropriate". In *A.G.* v. *Hale*[1] the Supreme Court assumed that *Nadarajan*'s case had laid down that the rule was no longer applicable to Ceylon. In *Cooray* v. *The Queen*[2] it was argued that this rule did not apply because (i) Ceylon was no longer a colony, (ii) the words of the English and local statutes were not identical, and (iii) the local conditions justified departure from English authorities. Lord Porter brushed these objections aside. While admitting that the rule as originally formulated was limited to colonies he said "...English courts should themselves conform to the same rule..." in following a decision of the Court of Appeal and "...therefore in the case of the courts of a member of the British Commonwealth of Nations a similar course should be followed".[3] It is submitted that all three arguments were valid and that Lord Porter not being familiar with the legal system of Sri Lanka and the local conditions did not appreciate the third argument.

Roberts–Wray[4] does not think that the rule applies to Dominions. It is doubtful whether Lord Porter's approach will find favour in any Dominion.[5] The view in *Nadarajan*'s case is to be preferred and the

95. See Sir Kenneth Roberts- Wray, *Commonwealth and Colonial Law* (1966) Stevens & Sons, London) pp. 563-79.
96. *Dias* v. *Perera* (1883) Wendt 365; *de Silva* v. *Ponnasamy* (1909) 1 Curr. L.R.226; *Muttu Carpen Chetty* v. *Samaratunga* 6 C.L.Rec. 43; *de Silva* v. *de Silva* (1938) 40 N.L.R. 228, 231-32.
97. Roberts-Wray op.cit., pp. 566-70.
98 .(1948) 49 N.L.R. 449, 452-53.
99. *Supra*, n. 91 at 496.
1. (1951) 53 N.L.R. 289, 298.
2. (1954) 54 N.L.R. 409, 412-15
3. *Cooray* v. *The Queen*, *supra*, n. 92. at 415.
4. Roberts-Wray op. cit., pp. 566-70.
5. ibid.

Sri Lankan courts will most probably follow the "convenient" interpretation of the case in *A.G.* v. *Hale.*

The Privy Council as the highest Appellate Court upto 1971 had the power to overrule or absolutely bind any Court in the Island. The Privy Council did not regard itself as being strictly bound by its own decisions.[6]

Whether the decision of the Privy Council was binding only on the courts of the dominion or the colony from which the appeal was taken was not clear. In *Ranasinghe* v. *Sirimanna*[7] the Supreme Court considered that a Privy Council decision in appeal from India had impliedly overruled the Supreme Court decision in *Jane Nona* v. *Leo.*[8] But in *Pesona* v. *Babonchi Baas*[9] a different view was expressed.

Prior to 1971 did the local courts follow the decision of the House of Lords in preference to the Privy Council? It was argued before the Supreme Court in *Kadawatha Co-operative Societies Union Ltd* v. *Ratnavale*[10] that the Privy Council decision in *Nakkuda Ali* v. *Jayaratne*[11] had been impliedly overruled by the House of Lords in *Ridge* v. *Baldwin.*[12] The court did not necessary to decide the issue. It appears at first sight that the Ceylon courts were bound by the Privy Council rather than by the House of Lords. This would be so in construing the sections of a local Act, even if it were similar to or identical with a statute in force in England. In such a situation the sections of the Sri Lanka Statute (e.g. the Penal Code, 2 of 1883, the Sale of Goods Ordinance, 11 of 1896) are the primary source of law and the decisions of English courts construing the corresponding English law are not binding.[13]

But in the case of the issue of the prerogative writs section 42 of the Courts Ordinance, 1 of 1889, which was construed to have introduced English law, did not enact substantive principles, but made provision for the application of the principles in force in England.[14] It should be

6. *N. Kambule* v. *The King* (1950) A.C. 379 at 397; See Gratiaen, op. cit.pp 75-76.
7. (1946) 47 N.L.R. 112.
8. (1923) 25 N.L.R. 241 (five judges)
9. (1948) 49 N.L.R. 442.
10. (1963) 66 N.L.R. 220 at 228- 229.
11. (1951) 51 N.L.R. 457.
12. (1964) A.C. 40.
13. See F.Soertsz, in (1949) University of Ceylon Review 4. But consider effect of *Trimble* v. *Hill, supra,* n. 90 discussed above.
14. See L.J.M.Cooray, in (1969) I.C.L.Q. 757-58.

emphasized that it is the English principles relating to the issue of the prerogative writs that have been introduced to Sri Lanka, and therefore English law applies directly. In such a situation according to the rule in *Robins* v. *National Trust Co. Ltd*[14a] (which has been referred to above), a decision of the House of Lords would be binding.

In *Weerasinghe* v. *Samarasinghe*[14b] H.N.G. Fernando, C.J. held that since the English common law applied regarding the issue of the writs the Supreme Court would be bound by a decision of the Privy Council on appeal from Nigeria *declaring what the English common law was*. On this reasoning a Court in Sri Lanka would be bound by a decision of the House of Lords declaring what the English common law was. If there is a conflict between a decision of the House of Lords and the Privy Council *in a branch of law where English law applies directly*, it may be that the Supreme Court would have a choice as to which decision to follow.

The rule in *Trimble* v. *Hill* and the rule in *Robins* v. *National Trust Co.Ltd* were laid down by judges in colonial times and it is questionable whether they should be applied after independence in an entirely different time and context. It is submitted that English precedents should in all circumstances be regarded as not binding and of not more than persuasive authority.

The Sri Lanka law may be different from, though similar to and based on English principles (as where a local statute such as the Evidence Ordinance, 1895, or the Trust Ordinance, 1917, have codified principles developed by the English courts). Though it is apparent that in such a situation English cases can be of no more than persuasive authority, in the colonial period English cases have been treated as authoritative and followed.[15]

The courts of Sri Lanka also refer to decisions from other countries which have an English (such as Australia, United States) or Roman (such as Scotland) heritage.

23.n. *Stare decisis* in the post 1978 era

The Constitution of the Democratic Socialist Republic of Sri Lanka, 1978, made substantial changes in the system of courts in Sri Lanka which prevailed from 1974 to 1978 under the Administration of Justice Law, 1973. The 1978 Constitution has established two Appellate Courts,

14a. See at p.175.

14b. (1966) 69 N.L.R. 262.

15. See L.J.M.Cooray, *Reception in Ceylon of the English Trust* (1971) pp. 37-43.

the Court of Appeal[16] and the Supreme Court.[17] The Supreme Court is the final superior Appellate court.

The Court of Appeal consists of the President of the Court of Appeal and not less than six and not more than eleven other judges. The Supreme Court consists of the Chief Justice and not less than six and not more than ten other judges.

(i) **Court of Appeal**

. The Court of Appeal exercises its ordinary jurisdiction as follows; by at least three judges of the court in respect of judgments and orders of the High Court; by at least two judges of the court in respect of judgments and orders of all other Courts of first instance, tribunals and other institutions; by not less than two judges in respect of the issue of Writs and Injunctions; by the President or any judge or the Court nominated by the President or one or more judges nominated by the President in respect of election petitions regarding Parliamentary elections.[18]

Its decisions would bind all Courts of First Instance. The *cursus curiae* regarding a Bench of 1 judge, 2 judges and 3 judges (as the case may be) would be the same as laid down in *Bandahamy* v. *Senanayake*.[18a]

The Court corresponding to the Court of Criminal Appeal is the Court of Appeal when constituted of 3 judges in respect of judgments and orders of the High Court. The present Court of Appeal would be bound by the previous Supreme Court decisions, but would not be bound by its own decisions as was the case previously except where there is a decision by a numerically superior bench of the Court of Appeal. It is doubtful whether the decision of the Bench of 5 judges of the Court of Criminal Appeal in *K.D.J. Perera* v. *The King*[19] to the effect that where it was constituted by a number of judges which was more than the minimum, a Full Court would be constituted provided the judges assembled for the purpose of reviewing or reconsidering a previous decision of the courts, would apply in the present system of courts as there is on provision to constitute such a Bench.

16. See Article 105, 137 of the Constitution of Sri Lanka, 1978.
17. See Article 105, 118 of the Constitution of Sri Lanka, 1978.
18. See Article 146,of the Constitution of Sri Lanka, 1978.
18a. See article 23k (i) and (ii).
19. See at p. 175

(ii) Supreme Court

The Supreme Court exercises its jurisdiction ordinarily by not less than three judges of the Court[19a] and under Article 132 (3) of the Constitution (1978) by a Bench comprising five or more judges of the Court. The decisions of the Supreme Court are binding on the Court of Appeal and all Courts of First Instance.

Questions arise regarding the effect of Privy Council decisions (prior to 1971), Court of Appeal decisions (from 1971 to 1974), and the decisions of the Supreme Court which was in existence from 1974 to 1978. Wanasundere, J. in *Walker Sons & Co Ltd* v. *Gunatilleke*[19b] suggests that these questions could be resolved by rules made by the Supreme Court under Article 136 (k) of the Constitution. However, it is doubtful whether Article 136 (k) authorizes the Supreme Court to undertake such a task. The power given under that provision is to formulate rules regarding the binding effect of the decisions of the Supreme Court, that is to say, of its own decisions. The provision presupposes the binding effect of the decisions of the present Supreme Court and empowers that Court to make rules in that regard. Presumably the rules are meant to work out the *cursus curiae* of the present Supreme Court and deal with situations such as those arising from conflicting judgments and regarding the weight to be given to judgment of numerically superior or specially constituted benches.

On the other hand such questions may be resolved on the basis of the general principles set out by the majority in *Walker Sons & Co. Ltd.* v. *Gunatilleke*, according to which the decisions of previous courts which in their time served as the highest courts in the land would, as part of the unwritten law, continue to bind "subordinate" courts including the present Court of Appeal. Applying this principle, it is possible to conclude that the decisions of the Privy Council, the previous Court of Appeal and the Supreme Court which functioned from 1974 to 1978, would bind all the present Courts other than the Supreme Court. These decisions, being unwritten law, can only be overridden by the present "highest court" which is the Supreme Court or by legislation.

The 1978 Constitution in Article 169 (3) provides that the judgments and the Orders of the Supreme Court established under the Administration of Justice Law, 1973, shall have the same force and effect as if they had been delivered or made by the Court of Appeal. Therefore

19a. Article 132 (2) of the Constitution of Sri Lanka, 1978.
19b. SC 365/76 decided in 1980 (unreported).

the decisions of the Supreme Court (during 1974 to 1978) would be binding on the present Court of Appeal on the basis of numerical superiority (The Supreme Court during 1974 to 1978 exercised its ordinary jurisdiction by two judges in respect of matters relating to judgments and orders of Magistrate's Courts and Tribunals, and by three judges in respect of matters relating to judgments and orders of District Courts and High Courts). In *Walker Sons & Co. Ltd.* v *Gunatilleke*[20] the Supreme Court while endorsing the rules laid down in *Bandahamy* v. *Senanayake*[20a] regarding the *cursus curiae* of the several courts, held that the decisions of the Supreme Court (during 1974 to 1978) are binding on the present Court of Appeal, as the Supreme Court during that period was the court enjoying the highest authority.

The decisions of the Supreme Court (during 1974 to 1978) are not binding on the present Supreme Court. In *De Silva* v. *Associated Newspapers of Ceylon Ltd.*[21] the Supreme Court held that it was not bound by the decision of a Bench of five judges in *National Union of Workers* v. *Scottish Ceylon Tea Co. Ltd.*[22] The Bench in *De Silva*'s case comprised of 3 judges.

The question as regards what constitutes a Full Bench or a Collective Court remains the same. The Constitution of 1978 provides for the appointment of 11 judges to the Supreme Court but only 9 have been appointed so far. The situation has not yet arisen to constitute a Full Bench of the new Supreme Court. However, *cursus curiae* regarding Full Bench remains the same.[23] However, the Full Bench and Divisional Bench decisions of the pre-1974 Supreme Court are unlikely to pose a problem to the present Supreme Court. There was no doubt that those decisions at the time were reviewable by the Privy Council, which was the country's highest court. Similarly, the present Supreme Court could review those decisions as it occupies a position equal to that occupied by the Privy Council in the hierarchy.

23.o. Roman-Dutch authorities and the doctrine of *stare decisis*

In the Roman-Dutch law, the writings of the jurists constitute authoritative statements of the law.[24] However in the modern legal system of Sri Lanka the authority enjoyed by the classical Roman-Dutch

20. S.C. 365/76 - decided in 1980 (unreported).
20a. *Supra* n. 32.
21. S.C. 30/79- decided in 1980 (unreported).
22. 78 N.L.R. 133.
23. See, Article 23 (k) (ii).
24. See above, article 12.b and 23.a.

writers has been limited by the doctrine of *stare decisis*. The basis on which the courts have proceeded, and which underlies many judicial decisions, is that where a Roman-Dutch authority is interpreted in a judicial decision, the interpretation put upon it becomes binding in accordance with the rules of *stare decisis*.

The application of the *sub silentio* and *per incuriam* rules in the event of a misinterpretation or avoidance of a Roman-Dutch rule is discussed in a different context.[25]

23.p. **Do judges make law?**

It is traditionally said that the function of the courts is to interpret law and not to make law. But it is increasingly being recognized that judges have made and do make law. Judges make law in a very limited sense in interpreting statutes. But in a wider sense in England specially up to the nineteenth century, the law was almost entirely developed and created by the judges. In Sri Lanka in the nineteenth and early twentieth centuries, judges arrogated to themselves a limited law-making function and introduced some principles of English law into our legal system.[26] The judiciary have played a significant role in shaping the modern amalgam[27] of Roman-Dutch law and English law which characterizes certain branches of the law of Sri lanka.[28]

The historic law-making function of the judges in Britain is brought out in the following statement that the common law consists of:-

> the laws and customs of the realm which have received judicial recognition in the reasons given from early times by the judges, for their decisions in particular cases coming before them. In the reports of these cases governing the particular set of facts before the court are to be found authoritative expositions of the law.[29]

But in modern times, as Parliament has become more concerned with law-making, the British judiciary have abandoned their historic law-making role and have been content to abdicate the law-making function to Parliament.[30] In the United States by comparison there has been a greater degree of judicial activism in modern times.[31]

25. See above, article 14.e and 23. h.
26. See also article 7.
27. See also article 14.
28. See also article 5.
29. Wade and Phillips, *Constitutional Law* (1965, Longmans, London) pp. 8-9.
30. See L.L.Jaffe, *English and American Judges as Law Makers* (1969, Oxford University Press, London), Chapter I entitled; "Is the great Judge Obsolete?"
31. ibid., pp. 59-84.

Case law (common law proper) has been a very significant source of constitutional law in England.[32] In England there is no single written document in which the basic and fundamental constitutional principles are collected. This is because of the important role played by the judiciary and the operation of conventions. Some of the fundamental doctrines of English constitutional law originate from judicial decisions.

Even in the case of countries with written constitutions, a constitution could be subjected to a greater degree of expansion by judicial decisions, than other types of statutes. An example of a constitution which has been considerably expanded by judicial law-making is that of the United States. In Sri Lanka judicial law making in relation to the Constitution has been confined to the assertion of the principles of the separation between the judiciary on the one hand and the executive and the legislature on the other.[33]

Is judicial law-making desirable in the modern state? There are historical arguments against judicial activism. It is possible to point to American and British decisions invalidating or retarding the impact of social welfare legislation.[34] The judiciary have at times not moved with changing circumstances or moved too slowly. Judges have restrictively interpreted economic and social legislation. Roosevelt was in trouble with courts over his New Deal, and the courts did "its best to scuttle the New Deal".[35] Between about 1900 and 1940 the United States Supreme Court conceived it to be its sacred duty to protect the existing economic order from regulation by the legislature.[36] The English courts (the House of Lords in particular) have sought to restrict Trade Union rights and have manifested an antagonistic attitude towards Trade Unions.[37] The attitude of the British courts to early industrial legislation was very hostile. The Workmen's Compensation Act of 1906 was completely mauled by a judiciary antagonistic to the principles enshrined in it, and the entire Act had to be repealed and re-enacted.[38]

32. Wade and Phillips, op. cit., pp. 8-10.
33. See L.J.M. Cooray, *Essays on the Constitution of Ceylon* (1970), Chapter VI, especially at pp. 195-200; L.J.M. Cooray, *Reflections on the Constitution and the Constituent Assembly* (1971, Hansa Publishers, Colombo) pp. 92-102.
34. L.L.Jaffe, op. cit., 85-88.
35 A.H. Kelly & W. Harbison, *The American Constitution, its Origin and Development* (1963, W.W. Norton & Co, Inc., New York), pp. 732 ff.
36. ibid.
37. K.W. Wedderburn, *The Worker and the Law* (1966, Mc Gibbon & Kee, London).
38. See R.M.Jackson, *Machinery of Justice in English*.

But in this interpretation of economic and socialist legislation British and American judges were manifesting their integrity and independence. They were doing what they conceived was in the best economic interests of the nation. They believed that the policy behind such legislation was economically inadvisable. The independence of the judiciary can result in the judiciary setting itself up against the declared will of the legislature and the people.

The judges in England and the United States have maintained a high standard of integrity which is not for a moment questioned. But judges are men. The organization of the legal profession is such that they are drawn by and large from a particular class - a class which, for example, is more likely to be conversant with the views of, and more favourably inclined towards an employer rather than an employee in an industrial dispute. The values and principles which they believe in may, to a great extent, be conditioned by their environment. The independence of the judiciary can mean an independence from the needs, aspirations and demands of the people, particularly of the economically under-privileged. In Britain and the United States an independent judiciary manifested its independence of the definite will of the legislature, and narrowly interpreted economic and socialist legislation.

An American judge, Justice Stone, said:"While the unconstitutional exercise of power by the executive and legislative branches is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint".[39] Public opinion, political pressure and the votes of the electorate are further restraints on the legislature and the executive.

The supreme power of law-making must reside with the legislature which is the representative of the people and which by the very nature of its position must be in touch with the needs and aspirations of the people. Therefore there is much to be said to support the view that judges should seek to give effect to the will and intention of the legislature and should not arrogate to themselves the freedom to restrict and expand legislation.

Three areas of judicial activism may be indicated. Firstly, in the areas where the law is largely statutory, the judiciary could seek to fill the gaps and extend the statutes within the intention and scope of the legislature and thus help to more fully give effect to the policies which the legislature is seeking to implement.

39. *United States* v. *Butler* (1936) 297 U.S. 1,78-79.

Secondly, judicial activism would be welcome in those areas where the legislature has not the time nor the inclination to legislate. In a modern democracy the time of the legislature is generally consumed by the regulation of national economic policy, the provision of educational, social and welfare services, defence and internal security. Matters of private law (civil procedure, the law of persons, property, succession, contracts and torts) and even areas of state concern such as criminal law and criminal procedure tend to suffer neglect in such an atmosphere. Even when the need for law reform is forcefully brought to the attention of the legislature, a meaningful response may not be forthcoming because the legislature, having a politically motivated legslative programme to implement, cannot find the time. Thus in areas where the legislature shows no inclination to effect necessary changes the judiciary could adopt a more positive role to develop the law, overruling decisions which are wrong or not in keeping with notions of justice and equity, changing conditions or the circumstances of modern life. In this way the courts can be of assistance to the legislature by alleviating some of the pressures on it.

Thirdly, in those areas not controlled by statute but which are common law areas, there is legitimate scope for judicial law-making.

Judicial activism especially in the second and third areas outlined above would require that the rigidity of the rules governing *stare decisis*[40] be relaxed and modified.

23.q. **Conclusions**

The question may be raised whether Sri Lanka has benefited from adopting the *stare decisis* rule rather than the civilian approach to case law. But the difference is by no means as significant as is commonly claimed. In all countries inferior courts follow the decisions of superior courts, if only because no judge likes being upset on appeal. And the judges of a Continental supreme court, being imbued with the responsibilities of their high office, and only too aware of the duty of the highest court to maintain legal certainty, will not depart from a previous judgment of the court, unless it is clearly wrong, even though they are not in strict law bound to follow it.

Judicial decisions as a source of law have their disadvantages. Their existence is necessarily fortuitous, dependent on the chance bringing of disputes before the court. There may be difficulty in separating *ratio decidendi* from *obiter dictum* or even in discovering the *ratio decidendi*.

40. See. below, article 23q.

And if there is a bad precedent, the court may have no option but to eliminate it by "distinguishing" it.

But there is the great advantage that, whereas lagislation is sometimes hasty and rigid, case law represents the accumulated wisdom of generations of judges dealing with situations created by life itself; an attribute occasionally recognized when Parliament employs a general expression, leaving it to the courts to work out its ramifications.

Any legal system needs a doctrine of judicial precedent. But the crucial question is whether it is a rigid or a flexible doctrine. The rules of *stare decisis* can be rigid as in England or relatively flexible as in the United States. When the rules of *stare decisis* are rigid, judges who are more concerned with the need to spell out legal rules which serve the ends of justice as against following unjust rules in earlier cases in order to promote certainty in the law, seek to avoid manifestly wrong or unjust and unfair decisions by distinguishing them, even when they cannot legitimately be distinguished according to legal principle. English judges have developed this practice to a fine art and in Sri Lanka too inconvenient cases which cannot in accordance with principle be distinguished, are nonetheless distinguished. The practice of distinguishing creates uncertainty in the minds of all affected by law (and the worst type of uncertainty because there is a conflict of authority which is not admitted), which militates against the certainty which the doctrine of *stare decisis* is said to give rise to. Those who argue that relaxation of the rules of *stare decisis* will create uncertainty, forget the uncertainty and confusion which is created by the practice of distinguishing inconvenient decisions.

The doctrine of *stare decisis*, among the institutions which Sri Lanka has taken over from English law is one of the most important and has exerted a powerful influence on the legal system of Sri Lanka. The adoption of the rule probably followed from the English law training of many of the early judges and the needs of the time for certainty in a welter of often obscure and inaccessible authorities. The Roman-Dutch law approach to judicial decisions has been forgotten. In the Roman-Dutch law, while the-

> tribunals did not recognize the principle that prior decisions have the force of law, they nevertheless assigned to them what an English-speaking lawyer of the present day would call persuasive authority; that is they attached great weight to prior decisions in subsequent analogous cases.... Roman-Dutch jurisprudence, while it recognizes the value of certainty in judicial sentences, and inculcates the precept that previous decisions should not be lightly departed from, also teaches the principle that a

previous decision, which has been shown to be erroneous, ought not to be followed..[1]

It is submitted, that instead of distinguishing decisions which cannot really be distinguished, the courts of Sri Lanka should adopt more flexible rules of *stare decisis* which would permit courts to "refuse to follow" or "overrule" inconvenient decisions.

It is not desirable that the most authoritative court in a country be bound by its own decisions. The House of Lords has in a dramatic fashion recognized this. The Lord Chancellor, Lord Gardiner, on July 26th, 1966 announced in the House of Lords that in future the House of Lords would not regard itself as absolutely bound by its own decisions.[2]

The Appellate Division of South Africa is not bound by its own decisions and may depart from them if satisfied it is wrong.[3] In Sri Lanka by contrast a Full Bench is bound by its own decisions, and the rule operates in a particularly rigid manner so that a decision of three judges before 1901 in effect is absolutely binding on the Supreme Court today because all the judges of the Supreme Court do not generally assemble to hear a case. That the Supreme Court is not unmindful of this problem is shown by the approach in *Moosajee* v. *Silva* where the definition of a Full Bench before 1901 was redefined and the doctrine of *per incuriam* enunciated.[4] However it may be argued that the present Supreme Court, occupying a position of superiority equivalent to that enjoyed by the Privy Council, could nevertheless review such Full Court decisions.

It is significant that the statement made by Lord Gardiner,[5] that the House of Lords will no longer hold to the rule that it cannot reverse an earlier decision, was extra judicial. Similarly it would be open to the Chief Justice of Sri Lanka to make a similar pronouncement on behalf of all the judges of the Supreme Court and change the long-standing rule that a Full Bench of the Supreme Court is bound by its own decisions.

There are two possible methods by which the relative rigidity of the operation of the rules of *stare decisis* in Sri Lanka can be relaxed. If

1. (Mr. Justice) J.G.Kotze, "Judicial Precedent" in (1917) 34 S.A.L.J. 280 at pp.285-287.
2. See 276 H.L.Deb. 677.
3. See H.R.Hahlo and Kahn, *The Union of South Africa, The Development of its Laws and Constitution* (1960, Stevens & Sons Ltd, London) p.30.
4. See above at pp. 161 - 66 and 172
5. Lord, Gardiner, op.cit.

a Full Bench is not bound by its own decisions and more frequent resort is made to the *per incuriam* rule the Sri Lankan rules of *stare decisis* would contain a desirable balance between flexibility and certainty.

> It is a lesser evil for a court to override its own legal opinion, clearly shown to be wrong, than indefinitely to perpetuate its error.[6]

This is the attitude which should pervade the whole approach to precedent.

24. OPINIONS OF WRITERS

The opinions of writers are a very important source of the Roman law and the systems of law derived from it. We have seen that the opinions of the writers on the Roman-Dutch law are considered to be authoritative.[1] But in English law the opinions of writers are not very significant. The extent to which a legal textbook may be regarded as a source of law in the common law countries is confined to the extent to which it accurately reproduces the law of the land. In English law though certain ancient books of authority are given some respect, the opinions of writers cannot be regarded as a *source* of law.

Sri Lanka and South Africa enjoy a unique position, as they have inherited both the common law doctrine of judicial precedent and Roman law tradition of textual precedent.

In the countries which have been influenced by English legal ideas, in constitutional law, the opinions of the text writers are given more prominence than in other subjects. A number of reasons may be put forward to account for this. (i) The British Constitution is developed by case law and conventions basically unwritten. (ii) A significant part of constitutional law is embodied in conventions, which do not come before the courts. (iii) Many of the subjects covered by constitutional law do not raise the problems which result in litigation.

In Sri Lanka, in relation to Kandyan law, particularly in the nineteenth century, books on Kandyan law enjoyed a certain degree of authority. Kandyan law, unlike the *Tesawalamai* and Muslim law, was not codified, and therefore the works of the early writers on the subject enjoyed some degree of authority until they were supplanted by case law and in some areas by legislation.[2]

6. Per Innes, C.J. in *Habib Motan* v. *Transvaal Government*, 1904 T.S. 404 at 513. See further *R.* v. *Faithfull and Gray*, 1907 T.S. at 1080-1081; *R.* v. *Sibiya*, 1955 (4) S.A. 247 at 262; and G.A.Mulligan in (1952) 69 S.A.L.J. 25.

1. See further above articles 12b. and 23a.

2. See further acticle 17.c.

25. CUSTOM

Every community has certain practices which a large body of its members have been in the habit of following over a long period. But not necessarily all customs are recognized by the courts of that community. To take an obvious example the wearing of black at funerals is a practice which is observed. But it will not be recognized by a court of law. But there are other customs which are recognized. But often it is not until an issue is actually taken to the courts that it is possible to say whether it is a legal custom or not.

In early societies, law, custom and religious practices were indistinguishable. It is, therefore, not possible to distinguish between legal customs and other customs in a primitive society. In primitive societies customary rules regulated the life of man and were considered legal because they were obligatory rules of conduct, the sanctions attached to which were ostracism, banishment and death. The practice of self-help was the manner in which an aggrieved person could generally obtain redress, because there were no judicial officers from whom a person who suffered could seek redress.

But with the establishment of judicial officers and the law courts which enforced customary rules and legal rules, and the creation of other law-making agencies such as legislation and case law, custom became less important.

In all societies we see the operation of custom. But legal custom can be distinguished from social custom by the fact that in the former sanctions are more certain in their operation. Voet[1] defines custom as: " It is unwritten right brought in gradually by the usage of those who practice it and having the strength of law". Although the importance of custom as a source of law is not confined to primitive societies its importance in modern societies has decreased due to the preponderance of other agencies of law development, such as legislation and judicial precedent. Various theories have been put forward regarding the nature and origin of custom. The Roman lawyers who were introduced quite early to legislation and codification did not develop a theory of custom. But the *Corpus Juris* of Justinian clearly indicates that custom was regarded as being of practical importance. The *Digest* recognized that custom supplements a written law wherever the latter is silent. While the XII Tables of the Roman law was a codification of pre-existing customary laws, Roman-Dutch law was formed by the amalgam of

1. *Commentary on the Pandects*, 1.3.27.

Roman law with Germanic customs. The *Tesawalamai* and Kandyan law were also in origin customary laws. Even the Muslim law originated in large part from the customs of the Arab tribes. A great deal of law in any legal system is derived from custom. Therefore, it represents the material from which the stuff of law is drawn. Legislation itself is often the official recognition of methods of conduct socially accepted and followed over a long period of time. Similarly judicial decisions embody a great deal of what was originally customary law as in the case of the common law of England.

It is necessary to distinguish between general customs and local customs. Local custom or usage consists of rules observed in a particular trade or in a certain locality. Thus if parties enter into a contract relating to trade, any local usages pertaining to that trade would be read into the contract if they are generally recognized by the people of that area. In Sri Lanka local customs relating to fishing are recognized.[2] The application of Kandyan law, Muslim law and the *Tesawalamai* may be regarded as examples of local custom. General custom is not regarded as a custom since it applies to all persons and would form the basis of the common law of the country. The courts of law today require as a prerequisite of validity that it must satisfy certain tests before they will take cognizance of a local custom. Today local custom differs from other customs prevalent in society in that it will be recognized and enfored by the courts.

In English law[3] custom must satisfy the following tests before it is legally recognized and enforced: (1) Immemorial antiquity. (ii) Continuous enjoyment. (iii) Observance as of right (*nec clam, nec vi, nec precario*, i.e. openly, peaceably and as of right). (iv) Certainty. (v) Reasonableness. (vi) The custom must not be contrary to a fundamental provision of the common law or any statutory provision. But a custom may acquire validity as an exception to the common law or statute. The customary laws of Sri Lanka apply on this basis and may be regarded as exceptions to the statute and common law of the land. (vii) The custom must be not incompatible with other customs in the same locality.

The Roman-Dutch law draws no distinction between general and local custom. The tests to be applied were stated in *Van Breda* v. *Jacobs*[4] as follows: (a) Custom to be valid must be ancient and long established. (b) It must have been uniformly used or observed, i.e. the

2. See cases discussed below.
3. C.K.Allen, *Law in the Making* (1961, Oxford University Press) pp. 126-43.
4. 1921 A.D. 330 at 334-36.

evidence must not vary in regard to the relative circumstances of the act in regard to time, thing or place. In other words the custom must be proved to be certain. (c) The custom must be reasonable.

(a) Corresponds to (i) and (ii), (b) is similar to (ii) and (iv). (c) is the same as (v). (iii) is found in a less positive form in (b). (vi) and (vii) are not found in the Roman-Dutch law.

Gratiaen, J. in *Maduppulli* v. *Patrick*[5] citing *Van Breda* v. *Jacobs* stated that the requirements of a valid custom in Roman-Dutch law do not differ substantially from English law.

In Sri Lanka custom is accepted by the courts according to the following rules which seem to combine Roman-Dutch law and English law;

(i) **The custom must be ancient.**[6] The custom is ancient if it can be taken to be beyond the memory of living man.[7]

(ii) **It must be reasonable.**[8] In English law, Allen[9] says that the true rule seems to be not that the custom will be admitted if reasonable, but that it will be admitted unless it is unreasonable. This is a relevant distinction which affects the burden of proof. Thus in English law a party who seeks to establish the requirements of a custom need not affirmatively prove reasonableness in the first instance, until the party who denies the custom has proved it to be unreasonable. The Sri Lanka courts have not directly adopted this principle though it seems to underlie some of the cases.

A custom which seeks to deny (not merely to regulate) persons their common law right of fishing in the open sea is not reasonable.[10] A custom which is against advancing civilization was held to be not reasonable in *Louis* v. *Veyadu*.[11] A custom is not reasonable which excludes all types of fishing except with a particular type of net which requires a number of persons to handle it and which is very costly. It was also stated that a custom such as the one claimed would preclude improved methods of fishing and was not reasonable.[12] In *Kitnen Kan-*

5. (1952) 54 N.L.R. 365.
6. Voet. 1.3.29.
7. *Chinnappa* v. *Kanakar* (1910) 13 N.L.R. 157.
8. Voet 1.3.28.
9. C.K.Allen ,*Law in the Making*, pp. 136-38.
10. *Fernando* v. *Fernando* (1920) 22 N.L.R. 260 at 260; *Maduppulli* v. *Patrick* (1952) 54 N.L.R. 365.
11. (1872-76) Ramanathan 11.
12. *Baba Appu* v. *Aberan* (1905) 8 N.L.R. 160.

gany v. *Young*[13] it was held that a custom that the head *kangany* on leaving an estate should receive from the proprietor of the estate the amount of the debts to the head *kangany* from the *sub-kangany* was not reasonable. In *Ernest* v. *Ahamadu Lebbe*[14] it was held that a person could not claim a custom to expose goods over a drain because such a custom would be unreasonable.[15]

(iii) **The custom must be certain.**[16]

(iv) **The custom must be observed as right.** This English law requirement is not found in the Roman-Dutch law but was recognized in *Vallipuram* v. *Santhanam.*[17]

(v) **Conformity of custom with statute and common law.** In English law custom cannot repeal statute law nor vary a fundamental provision of the common law. In *Sinnathangam* v. *Meeramohaideen,*[18] following English cases it was held that a local custom could not prevail over the plain words of a statute. It was also stated that the only basis on which a custom which conflicted with a statute could be supported, was it could be affirmatively proved that the legislature did not intend to interfere with the customs of any particular place. The Roman-Dutch law appears to be that a prior law, even a statute, could be abrogated either by a later custom being established or by continuous acts of disobedience not disapproved of, but not by mere disuse. But in the South African case of *Seaville* v. *Colley,*[19] it was held that both on principle and on authority mere disuse may in certain circumstances be sufficient to abrogate a statute. But it was recognized that this rule should be applied only in respect of Dutch statutes and *placaats* introduced from Holland to South Africa. In *Kandar* v. *Sinnachipillai* [20] McDonald, C.J. said *obiter* "under Roman-Dutch law the courts had the power to delare a statute obsolete where there was a contrary usage". But no distinction was drawn in *Kander*'s case between Roman-Dutch *placaats* and legislation enacted by the Sri Lanka legislature. The Roman-Dutch law rule could be said to be confined to statutes of Roman-

13. (1911) 14 N.L.R. 435.
14. (1919) 21 N.L.R. 248.
15. See also 3 Lorensz 161; *Madupplli* v. *Patrick, supra*, n.5.
16. *Fernando* v. *Fernando* (1920) 22 N.L.R. 279; Voet 1.2.32-35.
17. (1915) 1 C.W.R. 96.
18. (1958) 60 N.L.R. 394, 396.
19. (1891) 9 S.C. 39 discussed in article 14.e. at p.-91 - 93
20. (1934) 36 N.L.R. 362.

Dutch origin. This is the position which has been adopted in South Africa.[21]

As regards the Roman-Dutch common law of Sri Lanka the rules of the Roman-Dutch law should apply, and there is no reason why we should adopt the English law requirement that custom must not conflict with fundamental provisions of the common law. Jennings and Tambiah[22] cite *Fernando* v. *Fernando*[23] as authority for the proposition that the English law in this point has been incorporated into our law. But it is submitted that this case does not support this proposition.

26. RELIGION

26.a. Religion as a source of law in primitive societies

In all primitive communities law, custom and religion are almost interchangeable. According to Maine[1] writing in the nineteenth century, the early forms of law which were embodied in customary rules could not be distinguished from the tenets of religion or morality. Maine writing about early society drew attention to the divine influence underlying and supplementing every relationship of life and every source and institution. Thus it could very broadly be stated that formalised law originated from religion and custom. It is not only in primitive societies but also in comparatively modern times that religion has influenced law. Religion has been a factor in the development of custom and the drafting of legislation.[2]

26.b. Religion as a source of law in Europe

In the Middle Ages, throughout Europe the canon law was administered as a separate system in the ecclesiastical courts which were quite distinct from the ordinary civil courts. Even after the ecclesiastical courts became subject to the secular courts the canon law continued to influence the legal systems of Europe. The prohibited degrees of marriage and divorce in English law can be traced to the cannon law. But writers do not regard religion as a direct source of law in modern times, but as merely having entered the law at an earlier stage of its development.[3]

21. See R.W.Lee, *Introduction to Roman-Dutch Law* (1953, Oxford, Clarendon Press) p. 9.
22. Jennings and Tambiah, *Dominion of Ceylon* (1952, Stevens, London) p. 191.
23. (1920) 22 N.L.R. 260.
1. Sir Henry Maine, *Ancient Law* (1907, John Murray, London) Ch.1.
2. See Buddhist Temporalities Ordinance, 1931.
3. R.W.M.Dias, *Jurisprudence* (1964, Butterworth & Co. Ltd.) pp. 21-27.

26.c. Religion as source of law in the East

Religion has greatly influenced and continues to be a direct source of law in the legal systems of eastern nations. Hindu law and Muslim law have shaped the laws of many eastern countries. Even after many years of foreign rule and under the impact of modern law-making agencies like legislation, the sphere of the application of religious law though diminished still continues.

26.d. Religion as a source of law in Sri Lanka

Hinduism, Buddhism and Islam have influenced the legal development of Sri Lanka and legal rules based on these world religions are administered by the courts. The courts of Sri Lanka following English and Indian decisions have laid down the now well established principle with reference to the application of Muslim law, Hindu law and Buddhist law, that the courts will interfere in a dispute involving religious issues only where civil or property rights are involved, and will not interfere in purely religious matters involving points of doctrine or ceremonial.[4] Section 106 of the Trusts Ordinance, 1917, enacts that the courts may apply religious laws and customs in the management and administration of religious trusts, places of worship or religious establishments.

Buddhism as a source of law. Hayley[5] states, "...One of the most striking features of the Sinhalese legal customs is their independence of religious observances". But although the influence of Buddhism on the secular law may be negligible yet the *Vinaya* law of the Buddhist *Sangha* is of importance because it regulates many matters affecting civil and property rights, e.g. succession when a high priest vacates his office; the nature of property which a high priest can possess; the qualifications for ordination; when the Buddhist *Maha Sangha*, an ecclesiastical tribunal, commits an irregularity or gives a finding which affects civil rights the ordinary courts have jurisdiction[6]. The *Vinaya* rules must be proved as custom if they are to be applied by the courts. The Buddhist Temporalities Ordinance, 1931, regulates many matters relating to the administration of temples.

4. *Pitche Tamby* v. *Cassim Marikar* (1914) 18 N.L.R. 111; *Suppramani Ayer* v. *Changarapillai* (1896) 2 N.L.R. 30; *Gooneratne Nayake Thero* v. *Punchi Banda Korala* (1926) 28 N.L.R. 145; *Kurrukal* v. *Kurrukal* (1923) 26 N.L.R. 33; *Attadassi Unnanse* v. *Rewata Unnanse* (1928) 29 N.L.R. 361.

5. F.A.Hayley, *Sinhalese Laws and Customs* (1923, H.W.Cave & Co., Colombo) p.156.

6 *Attadassi Unnanse* v. *Rewata Unnanse* (1928) 29 N.L.R. 361; *Terunnanse* v. *Terunnanse* (1929) 31 N.L.R. 161; *Sumangala Unnanse* v. *Dhammarakkita* (1908) 11 N.L.R. 360.

Hindu law as source in Sri Lanka. In the Dutch and early British period Hindu law was applied when the *Tesawalamai* was silent. But during the British period Roman-Dutch law came to be applied.[7] Hindu law still applies in relation to succession to Hindu temples and to trusteeship matters relating to Hindu temples. But the courts do not interfere unless civil rights are involved.[8] Section 106(3) of the Trusts Ordinance, 1917, provides for the application of religious law in relation to religious trusts for temples and churches. Hindu law has been applied by reference to section 106(3).[9]

Muslim law as a source of law in Sri Lanka. Principles of Muslim law have been enshrined in legislation and are recognized by the courts. This subject has already been considered.[10] According to the principle stated above that courts will interfere in religious disputes only where civil and property rights are affected, the courts have interfered: where an ecclesiastical court has not given a fair trial,[11] where a duly appointed *Lebbe* sought to recover the dues of his office,[12] where the congregation of a mosque desired to appoint a Chartered Accountant.[13] But where a priest of a mosque sought to recover damages from a priest of another mosque because the latter had claimed an exclusive right to perform a ceremony, the courts refused a remedy.[14] In *Aysa Oemma* v. *Sago Lebbe*[15] the court held that a refusal by a priest to attend a burial and perform ceremonies was a dispute of a religious nature not cognizable by the courts.

Buddhism, Hinduism and Islam have not materially influenced the general law of the land, merely applying in certain cases to those professing a particular religion.

The influence exercised by religion on the laws of Sri Lanka. The above analysis demonstrates that religion enters the legal system of Sri Lanka in four ways: (i) Religion has influenced the drafting of legislation affecting Buddhist temporalities and Muslim mosques, charitable trusts and family affairs. (ii) Where property or civil rights are involved the

7. See above, article 19.b.
8. *Kurrukal* v. *Kurrukal* (1923) 26 N.L.R. 23 *Nessammah* v. *Sinnatamby* (1933) 36 N.L.R. 75.
9. *Thamotheram* v. *Sellappah* (1932) 34 N.L.R. 300.
10. See article 18.c. above dealing with the sources of Muslim law in Sri Lanka.
11. *Nuku Lebbe* v. *Thambi* (1913) 16. N.L.R. 94.
12. *Assena Lebbe* v. *Omer Lebbe* (1909) 2 Current L.R. 22.
13. *Abdul Gaffoor* v. *Ahamadu Lebbe* (1931) 33 N.L.R. 97.
14. (1839) Marshal Judgements, 656.
15. (1863-68) Ram.Reps. 240

courts will adjudicate on religious disputes. (iii) The courts may under section 106 of the Trusts Ordinance, 1917, apply religious law and custom in the management and administration of religious trusts, places of worship or religious establishments. Sections 101 and 102 of the Trusts Ordinance also make possible the application of religious law. (iv) Religious law may be given effect to if proved as custom. In none of the above categories is religion the direct source of law. The direct source in (i) is statute, in (ii) it is a rule of case law derived from the English common law, in (iii) it is sections 101, 102 and 106 of the Trusts Ordinance, 1917 (a statute) and in (iv) it is custom. But in (ii), (iii) and (iv) but not in (i), the legal source provides that the rules and practices of a religious community be investigated and applied by the courts.

27 . EQUITY

27.a. The concept of equity in general

The concept of equity is universal. It defies definition. It could broadly be said that there are three manifestations of equity: (i) Equity may be seen as the just and reasonable interpretation of the law. (ii) Principles of law are general by nature and it is possible that the application of law to an individual case might result in hardship and injustice. In such cases equity seeks to temper the hardness and rigour of formulated law. (iii) Equity may also be used to fill in the gaps in a legal system.[1]

Equity is distinct from all other sources of law in that it is not possible to set out in a concrete form the rules of equity. It is an abstract concept or principle behind the law influencing it where the operation of strict legal rules would lead to injustice. Equitable considerations exercise a powerful influence on the development of a legal system especially in its formative periods. But as laws become more certain and rules are more precisely formulated, there is in fact less room for equity to influence its development.[2] Thus in the modern law, equity in this sense cannot be regarded as a direct source of law especially in the common law countries. There is more scope for the operation of equity in the civil law countries. The Swiss Civil Code, 1907 makes provision for the application of a form of equity where the code is silent.

1. See further R.W.M.Dias and O. Hughes, *Jurisprudence* (Butterworth & Co. Ltd., London) pp. 150-69.

2. Though it is arguable that as laws become more formal, there is correspondingly greater need for the operation of Equity.

27.b. **English equity**

From the concept of equity which is universal and essentially abstract, must be distinguished the peculiar creation of the English courts of chancery known as English equity. Originating in the universal concept of equity and seeking to modify the law in instances in which the decisions of the common law courts resulted in injustice the equity of the English chancery courts became in the course of time a stratified system of law with its own legal rules. The equity of the English chancery courts must be distinguished from the concept of equity in general discussed above.[3]

27.c. **Roman Equity**

In the Roman law, the introduction of equitable principles in modification of the old and formal *ius civile* was largely the work of the praetors. Papinian says "praetorian law is that which was introduced by the praetors to aid, supplement and amend the civil law, with a view to our public advantage".[4] Equity in the form of such concepts as *aequitas, aequum et bonum, benignitas, bonafides, humanitas, ratio naturalis* and *utilitas,* greatly influenced the Roman law in several spheres, e.g. in the recognition of good faith as against mere outward form in contracts, in the desire to give effect to the true intentions of parties to legal transactions, especially in the interpretation of wills, in the discouragement of the strict interpretation of the letter of the law when used as an excuse for malicious abuse of rights, and in the prohibition of unjust enrichment of one person at the expense of another.[5]

27.d. **Equity in the law of Sri Lanka**

The modern law Sri Lanka has been greatly influenced by Roman and English jurisprudence. Equity finds a place in both English and Roman law systems as in all rational systems of law.

Jennings and Tambiah say[6]-

> English equity is of course a system of law formerly administered by the courts of chancery and imported into Ceylon law. As such it is not a separate source of law, but a separate branch of law, the source being the decisions of the courts of chancery and the corresponding decisions of the Supreme Court of Ceylon as modified by local legislation. Roman equity on the other hand gives the courts the right to modify the law in order to do justice between the parties. The Roman-Dutch jurists felt themselves

3. See Glanville Williams, *Learning the Law* (1969, Stevens Ltd, London), pp. 24-30.
4. D.1.1.7.
5 J.A.Jolowicz, *Lectures on Jurisprudence* (1963, Athlone Press, London), pp. 262-65.
6. W.I.Jennings and H.W.Tambiah, *The Dominion of Ceylon* (1952, Stevens, London) p. 192.

> at liberty to modify the law laid down in the institutes and the Pandects in order to make it confirm with natural justice.

The idea that English equity is a body of substantive law and that Roman-Dutch equity is closer to the universal concept of equity is not correct. Both systems were in their early stages of development quite flexible, but subsequently lost this flexibility. The influence of the universal concept referred to above is present in both systems, e.g. undue influence and constructive fraud in English equity, and unjust enrichment in Roman-Dutch law. Roman-Dutch equity and English equity though originating from the universal concept of equity in their final stage do not correspond to it.[7] It appears that in the law of Sri Lanka a distinction has not been drawn when using the term "equity" between English equity, Roman equity, and the universal concept of equity.

Equity and statute law. The Charter of Justice of 1801, while decreeing that the existing law continued in force, gave the Supreme Court subject to certain limitations, the equitable jurisdiction of the English Court of Chancery.[8] English equity is a gloss on the English common law, and is meaningless except in the context of the common law. But the Charter of 1801 made provision for the continuance of the existing law (Roman-Dutch law and the customary laws) and gave the Supreme Court the equitable jurisdiction of the English Court of Chancery.

In *Mathes Pulle* v. *Rodrigo*[9] it was said that the provisions regarding equitable jurisdiction in the Charter results in a judge being-

> called upon to administer a system of equitable jurisdiction in analogy to the forms and proceedings of the Courts of Chancery in England and to apply that system to a collection of laws totally different from that over which the jurisdiction of the courts of Chancery was exercised.

When the Charter of 1801 was repealed by the Charter of 1833 which contained no provision regarding equity, Sir Charles Marshall who was partly responsible for the Charter, explained as follows:-[10]

> The absence of a specific equitable jurisdiction is due to the existence of Roman-Dutch equity. Cases could be decided as in the civil law, according to the rules of equity blended with those of strict law.

7. See above.
8. See A.E.Keuneman, *Notes on the Law of Trusts* (1947, Times of Ceylon) pp. 1-7; L.J.M.Cooray, *Reception in Ceylon of the English Trust* (1971, Colombo, Ceylon) pp. 19-21.
9. (1820-33) Ram, Reps. 119.
10. (1833) Marshall's Judgments 261.

It is not clear what type of equity Marshall was referring to. It appears that Marshall was not distinguishing between the concept of equity in general, Roman equity and English equity and seemed to have all three concepts in mind.

English equitable principles have been introduced into Sri Lanka through statutes which are applicable today. The Trusts Ordinance, 1917, is a codification of the English law of trusts, which is a product of English equity. But the source of the law of trusts in Sri Lanka is not English equity but the Trusts Ordinance, 1917, a statute enacted by the legislature of Sri Lanka. This statement requires qualification to the extent that section 2 of the Trusts Ordinance requires reference to principles of equity where there is no specific provision in the Ordinance itself. Section 2 of the Introduction of the Law of England Ordinance, 1866, enacts that the English law of partnership is a part of the law of Sri Lanka. The law of partnership in England was developed by the courts of equity, and was subsequently codified in England by the Partnership Act, 1890. Some of the sections in the Civil Procedure Code, relating to the administration of a deceased's estate are based on English equitable principles.

Words such as "equity" and "equitable" may be used in a statute to vest a discretionary power in the courts. The words "just and equitable" are used in the Industrial Disputes Act, "equitable considerations" in the Waste Lands Ordinance, "equities" in section 340 of the Civil Procedure Code, 1977, "equity and good conscience" in Ordinance, 10 of 1843.[11] In these statutes the words used are not construed in the light of the body of English equity, but the judges are expected to construe the terms in a liberal sense bearing in mind the concept of equity in general.[12]

11.(1845) Nel , Police Court Cases 119, 129, 155-56. Compare the use of the phrase "Justice, equity and good conscience" in statutes in former British Colonies. See J.D.M. Derret in J.N.D.Anderson edited *Changing Law in Developing Countries* (1963,George Allen and Unwin)pp. 114-53.

12. From the above must be distinguished the use of equitable in section 111 (4) of the Trusts Ordinance, 1917;see further, Cooray, op.cit.,pp. 201-202.

Equity and judge made law. It is often said in our decisions that our courts are courts of equity and law.[13]

But no statute apart from the Charter of 1801 which was repealed in 1833,[14] has given our courts an equitable jurisdiction. In some of the above cases, our courts have applied English principles of equity. English equitable principles have been introduced into Sri Lanka not only by statute, but also by judicial action. English principles relating to rectification of documents drawn up under a mistake, equitable relief against forfeiture in a lease, the tort of passing off, undue influence in contracts and specific performance of contracts have been judicially incorporated into the law of Sri Lanka.[15]

Most of the cases where reference was made to equity or the equitable jurisdiction of the courts were those where the courts applied principles of English equity. But there are some decisions[16] where it is possible to see an application of the general concepts of equity. Most of these cases are nineteenth century decisions.

28. THE SYSTEMS OF LAW AND THE SOURCES OF LAW

This analysis of the sources of law in Sri Lanka would not be complete without reference to the Roman-Ducth law which is a significant source of the law of persons, succession, property, contracts and torts.[1] But the Roman-Dutch law is more than a source of law - it is a system of law which has its own sources - the writings of the jurists, Roman-Dutch

13. *Garvin* v. *Hadden* (1871) 17 E.R. 247 P.C.; *Dodwell & Co* v *John* (1918) 20 N.L.R. 206 P.C: *Lindsay* v. *Oriental Banking Corporation* (1860) Ramanathan 37; Lorenz 263 P.C: (1873) Volume iii Grenier Reports 43; VIII Moors P.C. Cases (N.S. p.90,P.C.: *Punchi Hamine* v. *Ukku Menika* (1926) 28 N.L.R. 97; *Muttiah Chetty* v. *de Silva* (1897) 3 N.L.R. 59; *Muttaya Chetty* v. *Vanderstraaten* (1863-68) Ram.Reps. 325; *Lewis* v. *Adrian* (1871) Vanderstraaten 271(1863) Creasy's Report 47; *Antho Pulle* v. *Christoffel Pulle* (1889) 1 N.L.R. 120; *Fernando* v. *Soysa* (1896)2 N.L.R. 40; *Kapadiya* v. *Mohamed* (1918) 20 N.L.R. 314.

14. See L.J.M. Cooray, op. cit., pp. 19-21

15. See also above article 9 where the distinction between law and equity is analyzed.

16. *Janso Hamine* v. *Weeratunge* (1915) 1 C.W.R. 44; *Kumaravaloe* v. *Mohideen* (1882) Wendt Reports 297; *Zahan* v. *Fernando* (1931) 11 C.L.Rec. 200; *Sansoni* v. *Foenander* (1872) Ramanathan 32; *Perera* v. *Morris Smedley* (1843-55) Ramanathan 92; *Daluwatte* v. *Senanayake* (1965) 67 N.L.R. 524; *Fernando* v. *Manzoni* (1860) Ramanathan 34; (1837) Morgan 155; (1836) Austin Reports 35; (1845) Nel 90; (1853) Austin 160; *Wickramesinghe* v. *Seneviratne* (1936) 38 N.L.R. 223.

1. See article 5

placaats and custom.[2] Case law is a significant modern source of the Roman-Dutch law.[3]

English law by comparison has entered the law of Sri Lanka through legislation and case law[4] – the general sources discussed above.

The *Tesawalamai*, Kandyan law, and Muslim law may be regarded as exceptional laws which apply in derogation of the general laws of the land, the primary sources of which today are legislation and case law.[5] At an earlier period of their development they were customary laws.

It may be said that the following are the authoritative sources of law in Sri Lanka: (i) legislation of the Parliament of Sri Lanka, the National State Assembly of Sri Lanka, the Parliament of Ceylon, the colonial legislatures and legislation of the United Kingdom Parliament extended to the then colony during the British period and still in force; (ii) rules made under authority of legislation under (i) which have the force of such legislation; (iii) the authoritative sections of the Roman-Dutch law; (iv) cases decided by the superior courts; and (v) customs having the force of law by virtue of their long standing. In addition, certain subsidiary sources of law may be pointed to which do not necessarily bind a court, but which are of persuasive authority. The decisions of foreign courts where the laws are similar to or contain some resemblance to those of Sri Lanka, and the opinions of leading legal writers, may also be regarded as subsidiary sources. Religion and equity also occupy a subordinate position as legal sources. The greater part of the law of Sri Lanka is statute law. The special laws which had their origin in custom, are today enshrined in statutes which attempt to bring together and rationalize the customary rules or modify them to meet changed circumstances in modern society. But in the case of Kandyan law there are non-statutory areas in which the original customary law has been interpreted by and enshrined in judicial decisions.

2. See articles 12 and 13
3. See article 13.b.
4. See articles 6 and 7.
5. See further, Chapter IV.

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